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Commonality and the Constitution: A Framework for Federal and State Court Class Actions

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Commonality and the Constitution: A Framework for Federal and State Court Class Actions

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In Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court concluded that the allegations of pay discrimination in a case brought by over one million female employees lacked sufficient commonality to warrant class certification under Federal Rule of Civil Procedure 23(a). Though the case was expressly decided under the Federal Rules, some well-known employer groups have begun to advance the argument that* Wal-Mart *was decided on constitutional grounds. These advocates maintain that the Supreme Court's decision creates a commonality standard for all class-action plaintiffs—regardless of whether those litigants bring their claims in federal or state court. This Article explores the possible constitutional implications of the* Wal-Mart *decision. This Article explains the potential due process concerns of commonality in class-action claims and critiques the argument that* Wal-Mart *creates a constitutional floor for all systemic litigation.*

This Article further fills a void in the scholarship by establishing a framework for analyzing whether class-action claims satisfy commonality under the Constitution. This Article develops a normatively fair definition of commonality, identifying five core guideposts that should be considered when determining whether a class-action claim complies with due process guarantees. This Article explains the implications of adopting the proposed guideposts, and situates the suggested framework within the context of the existing academic literature. Wal-Mart *signals a sea change for how commonality will be analyzed in all class-action cases. This Article helps define what commonality means under the Constitution, and the guideposts identified here will help streamline all future complex litigation.*

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"Chaos isn't a pit. Chaos is a ladder." – Lord Petyr Baelish[1]

INTRODUCTION

There can be little doubt that the Supreme Court's controversial decision in *Wal-Mart Stores, Inc. v. Dukes*[2] created widespread chaos on the standard for commonality in class-action litigation.[3] Though this existing chaos has created substantial difficulty for the lower courts when analyzing systemic claims, there is the potential for this confusion to help shape a new constitutional dimension for complex litigation. This Article helps identify the due process guarantees of commonality for all class-action claims.

In *Wal-Mart*, the Supreme Court refused to certify a proposed class of over one million female employees of the company.[4] The Court concluded that the allegations of pay discrimination in the case lacked sufficient commonality to warrant certification under Federal Rule of Civil Procedure 23(a).[5] The case was expressly decided under the Federal Rules, but some have read the decision as one that creates a constitutional floor for all systemic claims.[6] Thus, *Wal-Mart* can be read as creating a commonality standard for all class-action plaintiffs—regardless of whether those litigants bring their claims in federal or state court.[7]

This Article explains the possible constitutional implications of the *Wal-Mart* decision, describes the possible due process concerns of commonality in class-action claims, and critiques the argument that *Wal-Mart* creates a constitutional floor for all systemic litigation. This Article further fills a void in the scholarship by establishing a framework for analyzing whether a class-action claim satisfies commonality under the Constitution.[8]

Rule 23 provides the basic federal guidelines for complex litigation. The rule has, since its inception, had a constitutional dimension.[9] Though the rule is procedural in

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1. *Game of Thrones: The Climb* (HBO television broadcast May 5, 2013).
2. 131 S. Ct. 2541 (2011).
3. *See infra* Parts I, II (discussing *Wal-Mart* decision and explaining possible constitutional dimension of the case).
4. *See infra* Parts I, II.
5. *See infra* Parts I, II.
6. *See infra* Parts II, III (setting forth *Wal-Mart* constitutional argument).
7. *See infra* Parts II, III.
8. *See infra* Part IV (developing unified standard for commonality).
9. *See, e.g.*, Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217 (1975) [hereinafter *The Importance of Being Adequate*] (discussing due process safeguards of Rule 23).

nature, it was created to address various substantive due process concerns for *both* plaintiffs and defendants.[10] Rule 23(a) mandates sufficient numerosity, commonality, typicality, and adequacy of representation before a complex action will be certified.[11] *Wal-Mart* was decided on commonality grounds, and the case signals a dramatic shift in how this requirement will be defined. However, *Wal-Mart* fails to address any constitutional issues related to this commonality requirement. Nonetheless, this connection has already been made by many advocates in the legal community.[12]

This argument is compelling, as *Wal-Mart* follows a trend of Supreme Court cases that invoke the Due Process Clause to protect a defendant's rights in litigation involving complex actions or high-dollar claims.[13] *Wal-Mart* was not the first time that the Court raised concerns about the potential for a class-action case to unfairly prejudice the defendant; indeed, the cases discussed below have moved the needle toward the defendant on constitutional issues related to the Due Process Clause in systemic cases. This movement is particularly clear in the Court's high-profile decision involving punitive damage ratios—*Exxon Shipping Co. v. Baker*.[14]

The *Exxon* decision illustrates how ill-defined complex claims can limit the defendant's right to notice and an opportunity to be heard.[15] In *Exxon* it was clear that the Court was concerned with the due process implications and unreasonable harm that would result from requiring a company to defend against certain types of cases.[16] Similarly, in class-action litigation where there is insufficient commonality between claims, the company would inherently be harmed by the action. This harm takes on a constitutional dimension when defendants are stripped of the procedural protection the notice requirement affords. A vague and amorphous systemic claim brought by tens of thousands of individuals (or more) can rob defendants of their due process guarantees.

Similarly, in *Philip Morris USA v. Williams*, the Court held that the Due Process Clause of the Constitution does not permit the introduction of evidence of nonparty harm for purposes of punishing the defendant.[17] The similarities between *Wal-Mart* and *Philip Morris* are striking. Both cases raise the potential for defendants to have to respond to third-party harm for which there is inadequate evidence at the time of the litigation.[18] Both cases raise due process concerns for the defendant who may be unable to adequately respond to the amorphous allegations in the case. And both cases involve the question of providing relief for individuals who are not properly parties to the litigation.[19] *Philip Morris* therefore demonstrates the potential constitutional implications of the *Wal-Mart* decision. Though these implications

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10. *See* Hansberry v. Lee, 311 U.S. 32 (1940); *id.*

11. *See* FED. R. CIV. P. 23(a).

12. *See infra* Part II (addressing argument that *Wal-Mart* creates a constitutional floor).

13. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Philip Morris USA v. Williams, 549 U.S. 346 (2007).

14. 554 U.S. 471 (2008).

15. *See infra* Part II (describing the Supreme Court's *Exxon* decision).

16. *See Exxon*, 554 U.S. 471.

17. *Philip Morris*, 549 U.S. at 355.

18. *See infra* Part II (discussing similarities between the Supreme Court decisions).

19. *See infra* Part II.

were not expressly articulated by the *Wal-Mart* Court, they permeate the Court's reasoning. The substantive due process issues raised by *Exxon* and *Philip Morris* thus pervade possible commonality concerns as well.[20]

Well-known employer groups, such as the U.S. Chamber of Commerce and the Equal Employment Advisory Council, have begun to advance the argument that *Wal-Mart* was decided on constitutional grounds.[21] There can be little doubt that class-action claims have a constitutional component that provides defendants with certain due process guarantees. The *Wal-Mart* decision, however, does not define what these guarantees should be. Rather, the case was expressly decided under Federal Rule of Civil Procedure 23(a)—a rule that the Court relied on repeatedly throughout its decision.[22] Nowhere in the Court's decision can any discussion of the due process limits of commonality be found.[23] Thus, no serious argument can be made that the Court intended to establish a constitutional boundary for commonality in the case.

Though *Wal-Mart* did not create a constitutional standard for commonality, such a standard must still exist. There must, thus, be some normative standard for what commonality means from a constitutional perspective. Where a systemic claim lacks sufficient commonality, the due process guarantees are breached. Carefully navigating *Wal-Mart*, *Exxon*, *Philip Morris*, and other Supreme Court case law, this Article proposes five core guideposts that can be used to define commonality in all systemic litigation.[24] The framework set forth here is not intended to be exhaustive. These guideposts are meant primarily to spark a discussion on the topic and to begin a dialogue as to what constitutional protections defendants have when defending a class-action claim that lacks a common core of issues or facts.

The guideposts for defining commonality under the Constitution set forth here have the potential to help streamline class-action litigation, allow the courts to identify poor complex claims, and encourage settlement among all parties. These potential benefits strongly suggest that the time is now for adopting a general standard for commonality under the Constitution, particularly as more and more cases are beginning to turn on this issue.

Part I of this Article explains the contours of the *Wal-Mart* decision, emphasizing the Court's view of commonality under the Federal Rules. Part II discusses the argument that *Wal-Mart* creates a constitutional floor for commonality in all class-action litigation. Part III critiques this argument and explains why the *Wal-Mart* decision should be limited to federal court claims brought under Rule 23. Part IV develops a normatively fair definition of commonality, identifying five core guideposts that should be considered when determining whether a class-action claim satisfies the Due Process Clause. Finally, Part V explains the implications of adopting the proposed guideposts and situates the proposed framework within the context of the existing academic literature.

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20. *See infra* Part II (describing due process concerns raised by Supreme Court decisions).

21. *See generally infra* Part II.

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

23. *See id.*

24. *See infra* Part IV (establishing a new framework for analyzing commonality under the Constitution).

I. THE *WAL-MART* DECISION

The Supreme Court's decision in *Wal-Mart v. Dukes*[25] is well-traveled ground. Though still a recent decision, scholars and the lower courts have analyzed the case closely and have widely applied its reasoning.[26] This Article does not seek to revisit or challenge the analysis of others on this topic. Rather, it builds on the existing body of scholarship by identifying a critical area of the decision that has yet to be fully identified: the Due Process Clause of the Constitution. To put this analysis in context, it is helpful to review the Court's decision in the case. Because much has already been written in this area, only a brief summary of the decision is set forth below.

In *Wal-Mart*, the Supreme Court addressed a class action sex discrimination suit brought under Title VII of the Civil Rights Act of 1964 against "the Nation's largest private employer."[27] The massive systemic lawsuit was brought on behalf of 1.5 million current female workers (or former employees) of the store alleging discriminatory pay and promotion practices.[28] The plaintiffs in this case alleged that the discrimination that they suffered was "common to *all* Wal-Mart's female employees."[29] The action alleged that a "strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers."[30] The systemic action thus sought to "mak[e] every woman at the company the victim of one common discriminatory practice."[31] The lawsuit sought injunctive and declaratory relief as well as punitive relief and backpay.[32]

The district court approved the proposed class and certified it under Federal Rule of Civil Procedure 23.[33] The massive class comprised all female workers that had been employed by the store since December 26, 1998.[34] The Ninth Circuit largely

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25. 131 S. Ct. 2541.

26. *See, e.g.*, Scott v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 2871 (2014); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (2012); Bolden v. Walsh Constr. Co., 688 F.3d 893 (7th Cir. 2012); Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 DUKE J. CONST. L. & PUB. POL'Y (SPECIAL ISSUE) 73 (2011); Brian R. Martinotti, *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 LOY. U. CHI. L.J. 561, 564–65 (2012); Angela D. Morrison, Duke-*ing Out Pattern or Practice After* Wal-Mart*: The EEOC as Fist*, 63 AM. U. L. REV. 87 (2013); Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 148–54 (2011); Joshua A. Rosenthal, Comment, *The Case Against Constitutionalized Commonality Standards for Collective Civil Litigation*, 32 YALE L. & POL'Y REV. 309 (2013).

27. 131 S. Ct. at 2547.

28. *Id.*

29. *Id.* at 2548 (emphasis in original).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 2549.

34. *Id.*

affirmed the certification of the proposed class.[35] The Supreme Court granted review and began its decision on the issue by noting that "[t]he crux of this case is commonality."[36]

The Court noted that the Federal Rules of Civil Procedure require—prior to certification—that the cause of action present "'questions of law or fact *common* to the class.'"[37] Before addressing the facts of the case, the Court attempted to set forth some parameters for the definition of commonality.[38] The Court explained that the commonality requirement mandates that class members show that they "'have suffered the same injury.'"[39] The Court noted that this goes beyond having suffered a similar "violation of the same provision of law."[40] Indeed, plaintiffs must show some "common contention" such as "the assertion of discriminatory bias on the part of the same supervisor."[41]

The Court further noted that the plaintiffs must do more than present a common problem—they must further demonstrate that the issue presented "is capable of classwide resolution."[42] This requires that the class members are able to show "that determination of [the] truth or falsity [of the question] will resolve an issue that is central to the validity of each one of the claims in one stroke."[43] This showing of commonality can require a demonstration of the merits of the plaintiff's claim.[44] This is because "proof of commonality necessarily overlaps" with the merits of the case.[45] In an often-cited part of the decision, the Court noted that for commonality to be satisfied, there must be "some glue holding the alleged reasons" for the decisions together, and there must be the ability to "produce a common answer to the crucial question" in the case.[46]

In the matter before it, the Court noted that to show commonality the plaintiff would have to demonstrate "significant proof that Wal-Mart operated under a general policy of discrimination."[47] The Court found that this type of evidence was "entirely absent" in this case.[48] The Court concluded that Wal-Mart's corporate policy of "allowing discretion" to its supervisors to oversee employment issues was "worlds away" from demonstrating a pattern or practice of discrimination.[49] The plaintiffs failed to assert any "common mode of . . . discretion that pervades the entire company."[50] Emphasizing the company's "size and geographical scope," the Court

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35. *Id.*
36. *Id.* at 2550.
37. *Id.* at 2550–51 (emphasis added) (quoting FED. R. CIV. P. 23(a)(2)).
38. *Id.* at 2551.
39. *Id.* (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U. S. 147, 157 (1982)).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 2551–52.
45. *Id.* at 2552.
46. *Id.* (emphasis omitted).
47. *Id.* at 2553 (internal quotation marks omitted).
48. *Id.*
49. *Id.* at 2554 (emphasis omitted).
50. *Id.* at 2554–55.

found it "quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[51] The anecdotal and statistical evidence that the plaintiffs attempted to assert "falls well short" of demonstrating any common policy of discrimination.[52]

At the end of the day, the Court was unable to find sufficient commonality to permit the class action to proceed. This conclusion was heavily based on the pure size and scope of the class. The Court found that "[o]ther than the bare existence of delegated discretion, respondents have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together."[53] The Court concluded its discussion of the lack of commonality in the purported class by quoting the dissenting opinion of the court of appeals, which noted that the class members

> held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.[54]

The Court thus concluded that there was simply insufficient commonality in the case to permit a systemic claim to proceed. In rejecting the plaintiff's claim, the Court's definition of commonality would help redefine class actions under Rule 23.[55]

II. *WAL-MART* AS A CONSTITUTIONAL FLOOR

The Supreme Court's *Wal-Mart* decision was expressly decided on the basis of Federal Rule of Civil Procedure 23.[56] The decision undoubtedly helps define what commonality means under the Federal Rules. However, there is nothing in the case that specifically states that the decision was intended to apply any more broadly than this.[57] Nonetheless, the tenor of the decision itself could be logically extended beyond the confines of the procedural provisions it discusses. Indeed, it is entirely plausible to read the decision as one that creates a constitutional floor for all systemic claims. In this way, *Wal-Mart* can be read as imposing a rigid definition of commonality on all class-action plaintiffs—regardless of whether those litigants bring their claims in federal or state court.

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51. *Id.* at 2555.

52. *Id.*

53. *Id.* at 2555–56.

54. *Id.* at 2557 (alteration in original) (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, C.J. dissenting)).

55. The Court also extensively addressed the plaintiff's claims for backpay under the Federal Rules. The Court examined the question of "whether claims for monetary relief may be certified under" Rule 23(b)(2). *Id.* The Court concluded that such claims cannot be certified, "at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief." *Id.*

56. *Wal-Mart*, 131 S. Ct. 2541.

57. *Id.*

The defense bar has already latched on to this possible interpretation of *Wal-Mart*. Some defendants have even raised this possible defense to class-action claims brought in state court.[58] Unfortunately, this argument has not yet been adequately explored by the litigants. This is likely because the theory is still in its infancy, and it implicates complex rules of constitutional interpretation.

This Part sets forth the possible constitutional implications of *Wal-Mart*.[59] This Article explains how the Supreme Court's decision can be read as limiting those systemic claims that are also brought in state court. This Article thus explores whether *Wal-Mart's* definition of commonality can be extended beyond the Federal Rules.

A. Rule 23 and the Constitution

The Federal Rules of Civil Procedure were designed to make federal litigation more straightforward and predictable.[60] Federal Rule of Civil Procedure 23 accomplishes these goals in the context of complex litigation.[61] The rule helps streamline systemic claims and helps bring some procedural guidelines to class-action litigation. It thus allows the parties some level of predictability in complex litigation, though the rule has obviously been applied in various ways by different jurisdictions.[62]

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58. *See* Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391 (Ct. App. 2012), *vacated*, 325 P.3d 916 (Cal. 2014); Lubin v. Wackenhut Corp., No. 4545, 2012 BL 198161 (L.A. Cnty. Sup. Ct. Aug. 1, 2012), *appeal docketed*, No. B244383 (Cal. Ct. App. Oct. 9, 2012); Jacobsen v. Allstate Ins. Co., 310 P.3d 452 (Mont. 2013), *cert. denied*, 134 S. Ct. 2135 (2014); Braun v. Wal-Mart Stores, Inc., 106 A.3d 656 (Pa. 2014), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015) (No. 14-1123). *See generally* Rosenthal, *supra* note 26, at 316 (discussing issue of constitutionalizing commonality).

59. *Cf.* Rosenthal, *supra* note 26 (arguing against adoption of a constitutional commonality standard). Although the Rosenthal student comment briefly touched on some of these issues, this Article is the first to fully engage this debate and to fully address the important constitutional implications of the *Wal-Mart* decision.

60. *See, e.g.*, Pierce v. Pierce, 5 F.R.D. 125, 125 (D.D.C 1946) ("Among the purposes and objectives of the Federal Rules of Civil Procedure are the elimination of the element of surprise and the narrowing of the issues for the trial."); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 274 (1989) ("The goals of simplicity and non-technical approaches to procedure resemble the idea of the 'liberal ethos.' The Advisory Committee's attempt to circumscribe the number of steps in a lawsuit and the provision for open-ended discovery exemplify these objectives.").

61. *See* FED. R. CIV. P. 23; *see also* Ryan Patrick Phair, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 837–40 (2000) (discussing role of Rule 23 in class-action litigation).

62. *See* Stephen R. Bough & Andrea G. Bough, *Conflict of Laws and Multi-State Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)*, 68 UMKC L. REV. 1 (1999) (discussing different state law approaches to application of Rule 23).

Though often criticized,[63] Rule 23 brings tremendous efficiency to systemic litigation.[64] Class-action claims often save enormous judicial resources.[65] Rather than bogging the courts down with hundreds or thousands of individual claims, this federal rule allows the courts to more efficiently address litigation involving common claims with a single action.[66] Class actions have substantive benefits not only for the courts, but for the parties as well. Defendants will only be subjected to a single lawsuit that can more easily be defended against, and plaintiffs need not repeatedly pursue relief through various actions.[67] And, where class-action litigation is certified by a federal court, settlement may often result, which will completely dispose of the litigation.[68] Rule 23 therefore saves time and money for everyone involved.[69]

The purpose and intent of Rule 23 are not entirely clear, though there are obvious benefits of the rule, which are noted above, for both the courts and parties. The Supreme Court has identified several factors that led to the development of this rule,

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63. *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000) ("[C]lass actions are without doubt the most controversial subject in the civil process today."). *Cf.* Tobias, *supra* note 60, at 277 (noting that "[t]he Federal Rules generally worked well and enjoyed a cordial reception for the first twenty-five years after their adoption").

64. *See, e.g.*, FED. R. CIV. P. 23(b)(3) (permitting class action where "the court finds that . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"); Tobias, *supra* note 60, at 274 (discussing history and goals of Federal Rules of Civil Procedure).

65. *See* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155 (1982) (discussing systemic litigation in class-action case before the Court); Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 356–57 (2013) ("The procedural purpose of the class action is judicial economy. The theory is that, if the interests of the active and absent plaintiffs are aligned closely enough, then simply resolving the interests of the active plaintiffs can save time, effort, and expense, thus also resolving the issues of the absent plaintiffs. The close alignment of the interests of the active and absent plaintiffs also ensures due process and fairness." (footnote omitted)).

66. *See* FED. R. CIV. P. 23.

67. *See* Sanders, *supra* note 65, at 356–57 (discussing potential benefits of class-action claims); Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 568 (2013) ("[T]he class action is a device by which one person (or a group of people) acts as the representative(s) of a larger group (or class) with similar claims. . . . [I]n modern American law, the result achieved by the class representative(s) is binding on the members of the class as long as the representation is adequate; class members lose the ability to prosecute or defend the claims in their own right.").

68. *See* Hay & Rosenberg, *supra* note 63, at 1377 ("Class actions, like ordinary lawsuits between individuals, settle most of the time. Yet unlike ordinary actions, the class action frequently involves thousands or even millions of claims, often worth billions of dollars. With so much at stake, critics have argued that the class action settlement process will inevitably lend itself to corruption and abuse.").

69. *See* Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 567 (2004) ("The class device holds out the promise of resolving issues 'common' to all plaintiffs in a single trial, preventing wasteful and repetitive litigation of similar issues, and the possibility of inconsistent results. And collective adjudication allows plaintiffs to pool resources against better-financed defendants."); Sanders, *supra* note 65, at 356–57 (discussing potential advantages of Rule 23).

including protecting defendants from inconsistent judgments, protecting the interests of absent class members, providing a convenient and economical means of addressing systemic litigation, and spreading costs across the class.[70] While many have seen the development of this rule as primarily for the benefit of plaintiffs in class-action litigation,[71] the rule was also clearly intended to help protect the interests of defendants as well.[72]

There can thus be no denying the many benefits of this federal rule for both plaintiffs and defendants, even in the face of some of the critics. Unlike the other Federal Rules of Civil Procedure, Rule 23 has—since its inception—also had a constitutional dimension.[73] Rule 23 provides the basic federal guidelines for complex litigation. Though the rule is procedural in nature, it protects both plaintiffs and defendants from running afoul of deeply embedded substantive due process concerns.[74]

In particular, Rule 23 assures that basic principles are adhered to when filing a systemic claim. Volumes have been written on the intricacies of this Federal Rule of Civil Procedure.[75] The Supreme Court, academics, and others have all weighed in on

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70. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402–03 (1980).

71. *See In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1128 n.33 (7th Cir. 1979) (noting that class actions are primarily a device to vindicate the rights of the individual class members); *In re* WorldCom, Inc. Sec. Litig., 219 F.R.D. 267, 280 (S.D.N.Y. 2003) (noting that, together, the typicality and commonality requirements of Rule 23 help to ensure that maintenance of a class action is economical, and the rule further assures that the interests of class members will be fairly and adequately protected in their absence); Clark v. S. Cent. Bell Tel. Co., 419 F. Supp. 697, 701 (W.D. La. 1976) (noting that in determining whether to grant class action certification the district court has a "stringent duty" to protect interests of absent class members).

72. *See* Jan Michelsen, Note, *A Class Act: Forces of Increased Awareness, Expanded Remedies, and Procedural Strategy Converge to Combat Hostile Workplace Environments*, 27 IND. L. REV. 607, 631 (1994) ("The typicality requirement is intended to protect plaintiffs and defendants from being represented by a person whose stake in the action is dissimilar to theirs, to insure that they will not be involved in unwarranted or unnecessary adjudication, and to promote the judicial economy that is the central concept of class actions."); Sarah Somers, *7.2 Rule 23 Class Certification Requirements*, FED. PRAC. MANUAL FOR LEGAL AID ATT'YS (2014), http://federalpracticemanual.org/node/42 [perma.cc/UJ7R-SDVD] (noting that a Rule 23(b)(1)(A) action is "intended to protect the defendants from inconsistent adjudications imposing incompatible obligations that might result from independent actions brought by individual plaintiffs"); *see also* Alsup v. Montgomery Ward & Co., 57 F.R.D. 89, 91 (N.D. Cal. 1972) ("[I]t is undisputed that subdivision (b)(1)(A) was drafted to protect a defendant where different parties were attempting to impose different standards of conduct upon him . . . .").

73. *See, e.g.*, *The Importance of Being Adequate*, *supra* note 9, at 1217 (discussing due process safeguards of Rule 23).

74. *See generally id.*; Hansberry v. Lee, 311 U.S. 32 (1940).

75. *See, e.g.*, Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008) (discussing developments in class-action law); David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587 (2013) (providing history of class-action litigation under the Federal Rules); *see also* Hines, *supra* note 69 (addressing class-action litigation under the Federal Rules and the role of issue class certification); Megan E. Barriger, Comment, *Due Process Limitations on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitation in* Wal-Mart Stores, Inc.

how to interpret this rule.[76] This Article does not seek to revisit this oft-explored area. Nonetheless, a brief summary of the rule can help give context to the constitutional questions addressed here.

To proceed in a systemic federal class-action claim, the action must be large enough and involve similar allegations, and the parties must be fairly represented.[77] The rule specifically requires that complex litigation brought in federal court satisfy the following four elements:

> 1. the class is so numerous that joinder of all members is impracticable;
> 2. there are questions of law or fact common to the class;
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> 4. the representative parties will fairly and adequately protect the interests of the class.[78]

Thus, Rule 23(a) mandates sufficient numerosity, commonality, typicality, and adequacy of representation before a complex action will be certified.[79] In addition to satisfying these requirements, a plaintiff must further meet one of the three different elements of Rule 23(b).[80] A Rule 23(b)(1) class action proceeds where there is a risk of "inconsistent or varying adjudications with respect to individual class members" or adjudications that "would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their . . . interests."[81]

An action is typically brought under Rule 23(b)(2) where injunctive or declaratory relief is the primary remedy being sought in the case.[82] The rule provides that "the party opposing the class has acted or refused to act on grounds that apply generally to the class," such that this type of nonmonetary relief "is appropriate respecting the class as a whole."[83] Finally, systemic litigation brought under Rule 23(b)(3) occurs where "questions of law or fact common to class members predominate over any questions affecting only individual members."[84] This provision is used where "a class

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v. Dukes, 15 U. PA. J. CONST. L. 619, 620 (2012) (addressing impact of recent Supreme Court class-action litigation on complex litigation field).

76. *See generally* John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002–2007*, 8 CLASS ACTION LITIG. REP. (SPECIAL ISSUE) 787 (2007) (discussing class action developments under the case law); Barriger, *supra* note 75 (addressing impact of *Wal-Mart* decision on class-action litigation).

77. FED. R. CIV. P. 23.

78. *Id.* 23(a)(1)–(4).

79. *Id.*

80. *Id.* 23(b); *see also* Barriger, *supra* note 75, at 622–23 (discussing role of Rule 23(b) in class-action litigation).

81. FED. R. CIV. P. 23(b)(1); *see also* Barriger, *supra* note 75, at 623 (discussing requirements of class-action rules); Daniel Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member*, 82 FORDHAM L. REV. 2359, 2367 (2014) (same).

82. *See* Barriger, *supra* note 75, at 623 ("Rule 23(b)(2) . . . requires that the relief sought be primarily injunctive and be applicable to the class as a whole.").

83. FED. R. CIV. P. 23(b)(2).

84. *Id.* 23(b)(3).

action is superior to other available methods for fairly and efficiently adjudicating the controversy."[85]

There are numerous differences between the various provisions of Rule 23(b).[86] Most notably, claims brought pursuant to Rule 23(b)(1) and 23(b)(2) are allowed to proceed as mandatory class actions, while claims brought under Rule 23(b)(3) may be brought as "opt-out class actions."[87] Rule 23(b)(1) and 23(b)(2) are often invoked together, and many class actions involve both of these provisions.[88] By contrast, cases brought under Rule 23(b)(3) are frequently the most difficult for courts to manage as they often involve claims seeking substantial monetary relief.[89] These cases are considered to be the most "conventional" type of systemic claims, where the whole case is certified as a single action by the court,[90] which does not consider "whether there are issues in the case that cannot be resolved collectively."[91]

The provisions of Federal Rules of Civil Procedure 23(a) and 23(b) have been notoriously difficult for the courts to apply.[92] This complexity stems not only from the intricacy of the terms provided by the rule, but also from the constitutional dimension of this provision. Rule 23 differs from many of the other procedural provisions in that it was designed to protect due process rights.[93]

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85. *Id.*; *see* Luks, *supra* note 81, at 2367–68 (discussing various provisions of Rule 23); *see also* Barriger, *supra* note 75, at 624–25 (same).

86. *See generally* Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121 (2015) (discussing different provisions of Rule 23 and their role in class-action litigation); Barriger, *supra* note 75, at 624–25 (same).

87. Jenna G. Farleigh, Note, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1594–95 (2011) (discussing opt-out classes); *see also* Barriger, *supra* note 75, at 624–25 (same).

88. *See* Farleigh, *supra* note 87, at 1594 (discussing different requirements of Federal Rule of Civil Procedure 23); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (discussing provisions of Rule 23 in a class-action case).

89. *See* Farleigh, *supra* note 87, at 1594–95 (discussing claims brought under Rule 23(b)(3)).

90. *See* Seiner, *supra* note 86, at 132 (citing Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 264).

91. Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 Utah L. Rev. 249, 264.

92. *See generally* Bruce H. Nielson, Note, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 To Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988) (discussing different court approaches to application of Rule 23).

93. *See* Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (discussing implication of due process rights in Rule 23); Steven T.O. Cottreau, Note, *The Due Process Right To Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480 (1998) (discussing notice and opt out requirements in Rule 23(b)(3) class actions as affording individual class members due process rights); Stephen E. Morrissey, Note, *State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation*, 95 COLUM. L. REV. 1765, 1772–82 (1995) (discussing historical development of Rule 23 to include procedural safeguards to protect due process rights). *See generally The Importance of Being Adequate*, *supra* note 9 (discussing procedural safeguards that afford due process to absent

The constitutional implications of the rule have been explored by numerous Supreme Court decisions. In perhaps the earliest and best-known case on this issue, the Court addressed the due process implications of class-action litigation in *Hansberry v. Lee*.[94] In *Hansberry*, the Court held that due process entitles individuals to have their interests adequately represented in court.[95] These interests may be more difficult to preserve with systemic litigation, where some individuals may be bound by a decision to which they were not formal parties.[96] The conflicting principles of having one's day in court and encouraging complex litigation that can save enormous judicial resources can create difficulty for the presiding judge.[97] Nonetheless, in *Hansberry* the Supreme Court concluded that this type of complex litigation can still satisfy the due process requirements. In an eloquently written decision, the Court reasoned that:

> [T]here is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. . . . [T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.[98]

According to the Court, then, the key in class-action litigation is that it must provide sufficient procedure so as to "insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue."[99] Where complex litigation satisfies these standards, it satisfies the Constitution.[100]

The Court has thus closely guarded the rights of those that are not formal parties to the litigation. As a general rule, individuals will not be bound to a decision where they are not directly implicated in the suit.[101] Class actions are an exception to this general rule. But, as seen in *Hansberry v. Lee*, adequate protections must exist to allow for this exception.[102] In *Martin v. Wilks*,[103] the Court further expanded upon the protections that must be afforded to nonparties in a systemic claim. The Court acknowledged that there is "an exception to the general rule when, in certain limited

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class members in the amended Rule 23).

94. 311 U.S. 32 (1940).

95. *See id.*

96. *See id.*

97. *See id.*; Rosenthal, *supra* note 26, at 312 ("At the core of the constitutionalized commonality claim is an imagined form of the defendant's 'day in court' ideal.").

98. *Hansberry*, 311 U.S. at 42 (italics in original).

99. *Id.* at 43.

100. *See id.*

101. *See generally* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 193 (1992) ("In the American judicial system, individuals are rarely precluded from litigating a claim or issue simply because someone else has already litigated the same matter.").

102. *See Hansberry*, 311 U.S. 32.

103. 490 U.S. 755 (1989).

circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party . . . [or] where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants."[104]

Similarly, in *Ortiz v. Fibreboard Corp.*,[105] the Court again addressed the tension between the desire to streamline mass litigation and concerns over due process rights of individuals. The Court emphasized that this tension "is only magnified if applied to damages claims gathered in a mandatory class."[106] In this regard, class-action cases require notice and an opportunity to be heard as well as an opportunity to "'participate in the litigation.'"[107] As *Ortiz* demonstrates, the Court has—over the decades—repeatedly put safeguards in place to ensure that Rule 23 complies with due process principles.

Much has also been written over the years in the academic literature on the question of whether and how Rule 23 complies with the Constitution. In an early and well-known article on the subject, the *University of Pennsylvania Law Review* detailed the procedural safeguards necessary for the class-action rules to adhere to due process.[108] The authors addressed the "interaction of the notice and adequate representation requirements" of the rule and explained the various requirements the Constitution imposes on systemic claims.[109] The article explains the potential concern over the "nature and requirements of due process for . . . class action[s]."[110] In particular, the article advocates for some guarantees that the parties are properly assured of their "day in court."[111] "Accepting anything less would violate the rule; interpreting the rule to require less would violate the Constitution."[112]

Similarly, in a much more recent analysis, one commentator looked at the due process limitations of monetary relief in systemic litigation post *Wal-Mart*.[113] The author noted the "growing circuit split on . . . whether claims for monetary relief are ever consistent with certification under Rule 23(b)(2)."[114] The article discusses how *Wal-Mart* avoided this question, but "raised serious doubt that there were any forms of incidental monetary relief that could be certified . . . without violating the Due Process Clause."[115] The constitutional dimensions of Rule 23 and the Due Process Clause have thus pervaded the academic literature for decades since the inception of the federal rule. Indeed, Wright and Miller specifically set forth what they perceive as the due process requirements for class-action claims, outlining the differing academic and judicial opinions on this question.[116] The well-known treatise traces

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104. *Id.* at 762 n.2 (citation omitted).
105. 527 U.S. 815 (1999).
106. *Id.* at 846.
107. *Id.* at 848 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).
108. *The Importance of Being Adequate*, *supra* note 9.
109. *Id.* at 1218.
110. *Id.* at 1224.
111. *Id.* at 1261
112. *Id.*
113. Barriger, *supra* note 75.
114. *Id.* at 620.
115. *Id.*
116. 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL

the "proposition that the notice called for by [the class-action rules] involves due-process considerations and is essential to give binding effect to a class-action judgment."[117]

Thus, class-action litigation has long raised numerous constitutional issues over the years, and there can be little doubt that Rule 23 has been associated with various due process concerns since its inception. These concerns have been raised by the Supreme Court and in the academic literature.[118] The goal of this Article is not to outline all of those different due process issues—which have spanned all aspects of class-action litigation over the last few decades—but rather to highlight the constitutional dimension of what is otherwise a fairly straightforward procedural rule.

Just like many of the other constitutional concerns raised by Rule 23, commonality presents its own set of problems. Where a systemic claim lacks commonality, defendants are potentially deprived of their due process rights. Though much of the due process concerns of Rule 23 are targeted at the plaintiffs' rights to their day in court, these constitutional issues cut both ways. Indeed, defendants are guaranteed the same type of process as others under the Constitution. Where defendants are subjected to massive complex claims with little in common, due process is also implicated. Such litigation has the potential to run afoul of due process guarantees by punishing defendants "without first providing . . . 'an opportunity to present every available defense.'"[119]

Commonality is thus one more fertile ground for due process concerns under Rule 23—albeit from the defendant's, rather than the plaintiff's, perspective. Though the potential constitutional concerns raised by commonality have gone largely unexplored in the courts and academic literature, *Wal-Mart* signals a major change on this issue. This change has been in the works in recent years and is highlighted by the Supreme Court's desire to protect defendants from unpredictable harm that is the result of unfair litigation.

As detailed in the section below, *Wal-Mart* follows a trend of Supreme Court cases that invoke the Due Process Clause to protect a defendant's rights. *Wal-Mart* is not the first time that the Court has raised concerns about the potential for complex litigation to unfairly prejudice the rights of the defendant. Indeed, recent case law has moved the constitutional dimension of the Due Process Clause more toward the defendant's favor. This movement has been particularly clear in the Court's high-profile decisions involving punitive damage ratios and third-party harm.[120]

PRACTICE AND PROCEDURE § 1786 (3d ed. 2005).

117. *Id.*; *see also* Debra J. Gross, Comment, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 EMORY L.J. 611 (1991) (discussing class-action cases under the Federal Rules).

118. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940); *The Importance of Being Adequate*, *supra* note 9 (discussing due process safeguards of Rule 23).

119. Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

120. *See* Rosenthal, *supra* note 26, at 309 ("It is no secret that the current Supreme Court is hostile to class actions and other forms of group litigation.").

B. Due Process, Ratios, and Third-Party Harm

The Supreme Court's jurisprudence on due process and the Constitution is quite expansive and extends historically to the early days of the Court itself. The Court has issued countless decisions interpreting this area of its jurisprudence. This Article does not attempt to provide a historical review of this well-traveled issue. Indeed, numerous other academics have explored this fertile ground over the years. Instead, this Article seeks to identify where the Supreme Court is heading specifically with regard to due process and systemic claims. Two of the more recent decisions of the Court are worth highlighting in this regard.

1. *Philip Morris* and Third-Party Harm

First, in *Philip Morris USA v. Williams*,[121] the Court examined the appropriateness of a punitive damage award in a case involving the death of a cigarette smoker.[122] The jury determined that the cigarette company had misled the plaintiff into believing that smoking was safe, and awarded his estate $821,000 in compensatory damages combined with $79.5 million in punitive damages.[123] The punitive portion of the award was subsequently reduced by the trial court, but then reinstated on appeal.[124] The award was then affirmed in full by the Oregon Supreme Court.[125]

The U.S. Supreme Court granted review, and addressed the question of whether the trial court had permitted an improper jury instruction on the question of punitive damages.[126] The Court looked at whether the jury had inappropriately given the plaintiff an award that represented "injury to other persons not before the court."[127] Specifically, the Court considered whether it was appropriate for the plaintiff's counsel to advise the jury to consider how many other individuals like the decedent there had been "'in the last 40 years in the State of Oregon.'"[128] "'In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed].'"[129]

In addressing this question, the Court concluded that the Due Process Clause of the Fourteenth Amendment does not permit the states to punish defendants for injury caused to nonparties.[130] This is because, the Court reasoned, this type of punishment does not allow a company to "defend against the charge, by showing . . . that the

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121. 549 U.S. 346 (2007).
122. *Id.* at 349.
123. *Id.* at 349–50.
124. *Id.* at 350.
125. *Id.* at 352.
126. *Id.* at 350, 352.
127. *Id.* at 350.
128. *Id.* (quoting Joint Appendix at 197a, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 07-1216), 2006 WL 2147483, at *197a).
129. *Id.* (alterations in original) (quoting Joint Appendix at 199a, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 07-1216), 2006 WL 2147483, at *199a).
130. *Id.* at 353.

other victim was not entitled to damages."[131] Moreover, punishing a defendant for third-party harm "would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims."[132] Thus, the Court clearly held that a plaintiff cannot punish the defendant by invoking third-party harm.[133] The Court did, however, leave the door open to using evidence of nonparty harm for a different purpose—demonstrating reprehensibility in the case.[134] As the Court found, "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible."[135]

After *Philip Morris*, then, it is clear that the Due Process Clause of the Fourteenth Amendment does not permit the introduction of evidence of nonparty harm for purposes of punishment.[136] According to the Supreme Court, a company will not have the opportunity to properly defend against this type of evidence, which could result in a substantial punitive award.[137] Third-party harm—particularly in this case—is an amorphous concept. It is far too speculative to require a company to defend against this type of nebulous evidence. Such evidence can only be used for purposes of demonstrating reprehensibility.[138]

Many of the same concerns raised by the *Philip Morris* decision transcend class-action litigation and the *Wal-Mart* case. In particular, ill-defined systemic claims can force defendants to respond to allegations of wrongdoing by thousands of potential class members for whom there is no common bond. Where a class-action case lacks sufficient commonality, defendants are left scrambling to defend against a myriad of different allegations. As the *Wal-Mart* decision reflects, this can even involve a case with over one million different litigants, all with differing interests and claims. These types of actions sometimes carry a "standardless dimension,"[139] and the defendant can be left to determine: "[h]ow many such victims are there? How seriously were they injured? Under what circumstances did injury occur?"[140] Where a proposed class action lacks sufficient commonality, then, defendants can be put in the same *Philip Morris*-type position of defending a case where many of the litigants are not properly before the court. Quite simply, this result runs afoul of the Due Process Clause as interpreted by the Court in *Philip Morris*.

Commonality, then, is a much deeper concept than simply that which is set forth in the Federal Rules. A lack of commonality in a systemic lawsuit puts the defendant in an untenable position and can strip it of its rights to notice and the opportunity to be heard. As in *Philip Morris*, where a defendant is forced to address a class-action lawsuit that has no common thread holding it together, that defendant is essentially

131. *Id.* at 353–54.
132. *Id.* at 354.
133. *Id.* at 355.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 353.
138. *Id.* at 355.
139. *Id.* at 354.
140. *Id.*

being required to defend against undefined third-party harm. Indeed, at the early stages of the class action, hundreds or thousands of the claims may not have been clearly identified, and the potential harm involved is often imprecise at best.

Just as the Supreme Court in *Philip Morris* had due process concerns about third-party harm, similar concerns pervade the *Wal-Mart* decision specifically and class actions more generally. The Court's decision in *Wal-Mart* raises many of these due process concerns. The Court's reasoning is in many ways directly linked to the defendant's inability to properly respond to a massive, amorphous lawsuit. The Court highlighted the mammoth size of the litigation throughout its decision, emphasizing the difficulty a defendant could have responding to such allegations. The Court repeatedly noted the enormity of "Wal-Mart's size and geographical scope,"[141] recognizing that the claims against the defendant involved thousands of stores, across all fifty states, with a variety of different supervisors.[142] The Court was obviously concerned with the employer's ability to respond to what it coined as "one of the most expansive class actions ever."[143]

This is not to say that all large class-action claims fail to provide due process to the defendant. However, a lack of commonality in a systemic case can undermine a company's ability to properly defend itself. Systemic claims may also force defendants to settle a case to avoid the possibility of bankrupting the company.[144]

At the end of the day, the similarity between *Wal-Mart* and *Philip Morris* is striking. Both cases raise the potential for defendants to have to respond to third-party harm for which there is inadequate evidence at the time of the lawsuit. Both cases raise due process concerns for the defendant, who may be unable to adequately respond to the vague and varied allegations in the case. And both cases involve the question of providing relief for individuals who are not properly parties to the litigation. *Philip Morris* thus demonstrates the potential constitutional implications of the *Wal-Mart* decision. Though these implications were not expressly enunciated by the *Wal-Mart* Court, they permeate the Court's reasoning.

2. *Exxon Shipping Co.* and Punitive Damages Ratios

Just like the *Philip Morris* decision, *Exxon Shipping Co. v. Baker* raises constitutional issues that are directly analogous to the *Wal-Mart* decision. In *Exxon*, the Court addressed the appropriate ratio of punitive damage awards with respect to compensatory damages.[145] The case involved the infamous *Exxon Valdez* supertanker that spilled gallons of oil into Prince William Sound creating untold environmental and physical damage to the area.[146] The captain of the ship, Joseph Hazelwood, was a recovering alcoholic and had consumed "at least five double vodkas" the evening of

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141. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555 (2011).

142. *Id.* at 2557.

143. *Id.* at 2547.

144. *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir.) (discussing potential of a large class action to "force[]" a business "to settle" to avoid risking "one's company on a single jury verdict"), *cert. denied*, 133 S. Ct. 338 (2012).

145. Exxon Shipping Co. v. Baker, 554 U.S. 471, 512–15 (2008).

146. *Id.* at 476.

the disaster.[147] Exxon spent billions of dollars cleaning up after this unprecedented spill, and also pleaded guilty to numerous federal laws—including the Clean Water Act and Migratory Bird Treaty Act.[148] The company paid millions of dollars in fines and also settled civil actions brought against it for over $1 billion.[149] In the remaining litigation against Exxon, commercial fishermen, native Alaskans, and landowners brought suit in a class-action claim asking for hundreds of millions of dollars in relief.[150]

Exxon conceded liability in the case, and the trial was centered on the question of damages.[151] A jury ultimately awarded compensatory damages in the case in the amount of $287 million.[152] In a separate phase of the trial, the jury also returned a $5 billion punitive award against Exxon.[153] On appeal, the Ninth Circuit cut the award in half, remitting it to $2.5 billion.[154] The Supreme Court granted review to consider whether the punitive damage award was excessive.[155]

The Supreme Court looked at the question of punitive damages specifically in the context of the Clean Water Act and maritime case law.[156] The Court surveyed the law in this area and concluded that a 1:1 ratio of punitive damages to actual harm was appropriate in this case.[157] The Court reasoned that this was a "fair upper limit in . . . maritime cases," and vacated the judgment with instructions to the lower court to adjust the punitive damage award accordingly.[158] The Court addressed the constitutional implications that would flow from permitting a greater award, noting that the ratio that it approved likely represented "the constitutional outer limit."[159] Anything greater would be excessive and would violate the limits of due process.[160]

In its decision, the Court also referenced its prior jurisprudence regarding punitive damages and the Due Process Clause of the Fourteenth Amendment.[161] In *BMW of North America, Inc. v. Gore*, the Court provided general guidelines for the lower courts to follow to assure that a punitive damage award complied with due process principles.[162] Similarly, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[163] the Court expanded on the application of these guideposts and concluded that anything greater than a single-digit punitive to actual damage ratio may represent an excessive award.[164] "When compensatory damages are substantial,

147. *Id.* at 477.
148. *Id.* at 479.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 480.
153. *Id.* at 481.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 514.
158. *Id.* at 513–15.
159. *Id.* at 515 n.28.
160. *Id.* at 515.
161. *Exxon*, 554 U.S. 471.
162. 517 U.S. 559, 580–583 (1996).
163. 538 U.S. 408 (2003).
164. *Id.* at 425 (stating that "few awards exceeding a single-digit ratio between punitive

then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[165]

In *Exxon*, then, as well as in the line of Supreme Court decisions before it, the Supreme Court articulated the due process standards associated with subjecting defendants to unprecedented harm. *Exxon* holds that a 1:1 ratio of punitive to actual damages likely represents the constitutional limits in maritime cases, and further notes that anything greater than a 10:1 ratio in any case will likely push the boundaries of due process.[166] In simple terms, a defendant should not expect to be subjected to more than ten times the harm that it creates, and exposing a company to greater damages would violate the Constitution. In *Exxon*, *Gore*, and *State Farm*, the Supreme Court encountered factual scenarios where large companies were exposed in the first instance to startling punitive awards meant to punish, compensate, and deter future conduct. While the Court noted that punitive damages do still play a vital role in American jurisprudence, the amount of these awards is nonetheless constrained by the Constitution.[167] The Court created general guidelines to advise the lower courts on the appropriate limits in this regard.[168]

In *Exxon*, it was clear that the Court was concerned with the due process implications of subjecting a company to defend against the imposition of unreasonable harm in a case.[169] Similarly, in class-action litigation where there is insufficient commonality between claims, the company would inherently be harmed by being required to defend against the action. Where a party is required to defend against circumstances and persons not properly before the court, due process is directly implicated. When a defendant does not have clear knowledge of the claims against it—and the plaintiffs are ill-defined and there is no common nucleus of facts—the company is unfairly and unjustly harmed. This harm takes on a constitutional dimension when defendants are stripped of their fair notice. A vague and amorphous systemic claim brought by tens of thousands of individuals can thus rob defendants of their due process guarantees. A defendant facing this type of litigation will often have little choice other than to informally resolve the dispute.[170]

Just as in *Exxon*, then, class-action claims carry a constitutional dimension that threatens to subject the defendant to unfair harm. *Exxon* and the line of cases before it represent the Supreme Court's desire to put limits on the damages to which a defendant can be subjected. Where a punitive damage award is disproportionate, it violates due process guarantees. Class-action cases present the same concerns. Where a claim lacks commonality, defendants will be unable to properly dispute the allegations. Systemic litigation with no common bond forces a defendant to battle

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and compensatory damages, to a significant degree, will satisfy due process").

165. *Id.* at 425. The Court further provided that "[s]ingle-digit multipliers are more likely to comport with due process." *Id*.

166. *See Exxon*, 554 U.S. 471 at 514–15.

167. *See id.*

168. *See id.* at 501; *id.* at 514–515 ("[A] single-digit maximum is appropriate in all but the most exceptional of cases . . . ." (citing *State Farm*, 538 U.S. at 425)).

169. *See id.* at 490–91.

170. *See* Hay & Rosenberg, *supra* note 63, at 1377 ("Class actions . . . settle most of the time.").

with tens of thousands of plaintiffs (or more) in the courts with varying facts and claims. This type of litigation can push the boundaries of due process as well.

In *Exxon*, the Supreme Court recognized in class-action litigation that punitive damages are appropriate under the right set of circumstances.[171] However, the Court warned that excessive damages do not comply with the Constitution.[172] Similarly, class-action litigation also has a role in American jurisprudence when done appropriately and in compliance with Federal Rule of Civil Procedure 23. Where systemic litigation does not comply with the Federal Rules and lacks sufficient commonality, the outer limits of the Constitution are breached. *Wal-Mart* represents the best example of how class-action litigation can run afoul of the Due Process Clause. The defendant in that case could not properly defend the enormous litigation brought against it where the litigation had no common thread.[173]

The *Exxon* decision, just like *Philip Morris*, illustrates how ill-defined massive claims can limit the defendant's right to notice and an opportunity to be heard. The substantive due process concerns raised by these recent Supreme Court decisions thus pervade systemic litigation as well.

III. CRITIQUING THE *WAL-MART* CONSTITUTIONAL ARGUMENT

From *Exxon* and *Philip Morris*, then, a constitutional argument begins to emerge from the *Wal-Mart* decision. This argument provides that where a class-action case lacks sufficient commonality, the defendant is deprived of due process under the Constitution. From a practical standpoint, this means that *Wal-Mart*'s interpretation of the commonality standard would apply not only to cases brought in the federal courts, but to systemic state causes of action as well. This argument has two major components, which are derived from the principles enunciated in the Supreme Court's recent due process decisions discussed above.

The *Wal-Mart* constitutional argument specifies that to satisfy due process, a systemic claim must (a) provide proper notice to the defendant and (b) not subject the defendant to unreasonable or unexpected harm. The argument further maintains that *Wal-Mart* creates a constitutional floor. The Supreme Court's decision defined commonality,[174] and any systemic claims that fail to satisfy that definition cannot meet the due process guarantees. This constitutional argument thus maintains that *Wal-Mart*'s definition of commonality extends beyond the Federal Rules of Civil Procedure, and applies to all state class-action claims as well.

The *Wal-Mart* constitutional argument is premised on two primary aspects of the *Exxon* and *Philip Morris* decisions discussed above. These two principles—as applied specifically to class-action claims—are addressed in more detail below.

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171. *See Exxon*, 554 U.S. 471.
172. *See id.* at 501.
173. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
174. *See id.* at 2552.

A. Third-Party Harm

Where a class-action claim lacks sufficient commonality, the defendants are forced to respond to third-party harm in the case. This requires the litigants to defend against parties who are not properly before the court. Without any "glue holding the alleged reasons" for the claims together, a claim lacking in commonality makes class-action plaintiffs unable to "produce a common answer to [any] crucial question" in the case.[175] Rather, the questions involved would be unique to each case, and the analysis would proceed on a much more individualized basis.

Where there is insufficient commonality in a case, then, the due process principles discussed in *Philip Morris* are violated. Without commonality, the case takes on a "standardless dimension," that is almost impossible for the parties to defend against.[176] *Philip Morris* calls into question the ability of plaintiffs to use third-party harm in the case.[177] Where claims lack any common thread, defendants are essentially required to show why certain plaintiffs—who are not properly before the court—are not entitled to relief. Defending against this type of third-party harm runs afoul of the Constitution, as recently defined by the Court.

B. Lack of Notice

Where there is a lack of commonality in the case, the defendant will not have clear knowledge of the claims against it. Where the systemic litigation is ill defined, the parties can be left to defend against amorphous claims. *Exxon* presents the best example of this constitutional principle.[178] Where defendants are subjected to catastrophic damages with no direct correlation to the harm caused, the notice component of the Due Process Clause is violated.

The Court's decision in *Exxon* clearly holds that punitive relief in a case must be proportional to the harm caused.[179] A defendant must have some notice—and reasonable expectation—that its unlawful actions will result in a specified level of damages. Where the relief in a case far exceeds these reasonable expectations, due process is violated. Quite simply, a defendant has the right to notice as to the amount of damages it may incur.

Systemic claims lacking in commonality violate this notice requirement. Where a complex cause of action has no common thread, the defendant will not have proper notice of the claim and parties before it. The litigants in this type of case cannot be expected to defend against a nebulous claim involving tens of thousands of litigants. The principles of *Exxon*, thus, pervade class-action law, and the defendant must have proper notice of the contours of the systemic claim that is being brought against it.

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175. *Id.* (emphasis omitted).
176. Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007).
177. *See Philip Morris*, 549 U.S. at 355.
178. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).
179. *See Exxon*, 554 U.S. at 502.

C. The Constitutional Dimension

The notice requirements and prohibition against third-party harm thus form the basis of the due process requirements for class-action claims. Some defendants have already begun to argue that the Supreme Court's decision in *Wal-Mart* contains a constitutional dimension as well.[180] These defendants have thus attempted to argue that the commonality standard created by the Supreme Court in *Wal-Mart* also creates due process guarantees for defendants.[181] In essence, this argument maintains that the *Wal-Mart* definition of commonality creates a constitutional floor for class-action claims.

This *Wal-Mart* constitutional argument is already percolating in the courts, and "[d]efendants have already begun to raise the constitutionalized commonality argument in a wide range" of litigation.[182] The argument has been raised in numerous cases,[183] but has yet to form the basis for any high-profile decisions.[184] This constitutional argument has caught the attention of not only the defense bar, but major employer groups as well. Both the U.S. Chamber of Commerce and the Equal Employment Advisory Council have filed amicus briefs in cases arguing that the commonality standard adopted by the Supreme Court should apply to all state law claims.[185] These groups have thus argued that the commonality standard established by the Supreme Court creates due process guarantees for *all* class-action claims, not just those brought in federal court.

In *Lubin v. Wackenhut Corp.*, the Los Angeles County Superior Court addressed whether a wage/hour claim brought by nonexempt security officers should be certified.[186] In its amicus brief, filed in the California Court of Appeals, the U.S. Chamber of Commerce argued that even though "the *Wal-Mart* court centered its decision on the Rules Enabling Act, such class action procedural 'protections [are] grounded in due process.'"[187] Similarly, in *Jacobsen v. Allstate Insurance Co.*, the

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180. *See, e.g.*, Strawn v. Farmers Ins. Co. of Or., 258 P.3d 1199 (Or. 2011) (discussing class action standards in state law cause of action), *cert. denied*, 132 S. Ct. 1142 (2012); Samuel-Bassett v. Kia Motors Am., Inc., 34 A.3d 1, 11 (Pa. 2011) (same), *cert. denied*, 133 S. Ct. 51 (2012); John H. Beisner & Robert S. Peck, *Emerging Civil Justice Issues*, 9 J.L. ECON. & POL'Y 325, 337 (2013) (citing cases where the Supreme Court has denied certiorari on the question of whether the *Wal-Mart* standard applies to state causes of action).

181. *See* Beisner & Peck, *supra* note 180, at 337–39.

182. Rosenthal, *supra* note 26, at 314.

183. *See* Rosenthal, *supra* note 26, at 310.

184. *See, e.g.*, Beisner & Peck, *supra* note 180, at 337 ("The Court had seen a series of cert petitions over the past year that had asked the [C]ourt to try to impose their view as expressed in *Walmart* on the states as a matter of due process.").

185. *See* Lubin v. Wackenhut Corp., No. B244383 (Cal. Ct. App. appeal docketed Oct. 9, 2012) (amicus brief by Chamber of Commerce); Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391 (Ct. App. 2012) (amicus brief by Chamber of Commerce), *vacated*, 325 P.3d 916 (Cal. 2014); Jacobsen v. Allstate Ins. Co., 310 P.3d 452 (Mont. 2013) (amicus brief by Equal Employment Advisory Council), *cert. denied*, 134 S. Ct. 2135 (2014). *See generally* Rosenthal, *supra* note 26, at 316 (discussing issue of constitutionalizing commonality).

186. Lubin v. Wackenhut Corp., No. 4545, 2012 BL 198161 (L.A. Cnty. Sup. Ct. Aug. 1, 2012), *appeal docketed*, No. B244383, at *1 (Cal. Ct. App. Oct. 9, 2012).

187. Amici Curiae Brief of Chamber of Commerce of the United States of America et al.

Montana Supreme Court addressed whether a class claim could be certified on the basis of an insurance carrier's claim adjustment guidelines that allegedly discriminated against unrepresented parties.[188] The Equal Employment Advisory Council filed an amicus brief in a petition for certiorari before the U.S. Supreme Court.[189] That petition maintained that the requirements of Rule 23 and the *Wal-Mart* decision "are intended to comport with federal constitutional principles of due process designed . . . to 'effectively limit the class claims to those fairly encompassed by the named plaintiff's claims.'"[190]

The issue was also recently raised—somewhat ironically—in another case involving the same employer, *Braun v. Wal-Mart Stores, Inc.*, in Pennsylvania state court.[191] In that case, the Pennsylvania Supreme Court approved a $151 million award in a class-action wage dispute involving almost 200,000 employees.[192] Wal-Mart sought certiorari in the case asking that the holding of the *Dukes* decision (and due process principles) be applied to this state court action.[193] The U.S. Chamber of Commerce similarly filed an amicus brief asking the Court to consider the issue as well.[194]

D. Why the Wal-Mart *"Constitutional Argument" Fails*

Though it has yet to form the basis of a major court opinion, the *Wal-Mart* constitutional argument is compelling. As discussed above, Rule 23 has had a constitutional dimension since its inception, and there can be no doubt that all defendants are entitled to certain due process guarantees. And the rule itself was put in place, at least in part, to protect the interests of defendants.[195] Nonetheless, the *Wal-Mart* constitutional argument fails for several important reasons. While it is true that all parties are entitled to notice and an opportunity to be heard, the Supreme Court's decision in the case fails to address the constitutional limits of the commonality requirement. The Court did not intend for the case to create a

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in Support of Defendant and Respondent, Lubin v. Wackenhut Corp., No. B244383 (Cal. Ct. App. Feb. 18, 2014), 2014 WL 691034, at *38 (alteration in original) (citation omitted) (quoting Taylor v. Sturgell, 553 U.S. 880, 901 (2008)).

188. *Jacobsen*, 310 P.3d 452.

189. Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner, Allstate Ins. Co. v. Jacobsen, 134 S. Ct. 2135 (2014) (No. 13-916), 2014 WL 847539.

190. *Id.* at 7 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011)).

191. 106 A.3d 656 (Pa. 2014), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015).

192. *Id.* at 667.

193. Petition for Writ of Certiorari, Wal-Mart Stores, Inc. v. Braun, No. 14-1123 (U.S. Mar. 13, 2015); Jane M. Von Bergen, *Wal-Mart Wants U.S. Supreme Court to Overturn Pa's. Wage Case*, PHILLY.COM, Mar. 25, 2015, http://articles.philly.com/2015-03-25/business/60443715_1_pennsylvania-supreme-court-former-employee-jury [perma.cc/7F25-SBX9].

194. Brief of the Chamber of Commerce of the United States of America & Business Roundtable as Amici Curiae in Support of Petitioners, Wal-Mart Stores, Inc. v. Braun, No. 14-1123 (U.S. Apr. 16, 2015).

195. *See* Michelsen, *supra* note 72 (discussing the purpose of Rule 23); Somers, *supra* note 72 (same).

constitutional benchmark for commonality. Nowhere in the Court's decision does it purport to create a standard in this regard. Indeed, the Court's decision on commonality never expressly uses the terms "notice" or "due process."[196]

Indeed, the Court is simply addressing the facts before it in one particular case. And of note, the facts of that case are extraordinarily unusual. Indeed, as addressed by the Court, the *Wal-Mart* facts present "one of the most expansive class actions ever."[197] The Court set out not to define commonality on a constitutional level, but to determine whether commonality was satisfied under the facts of one extreme situation. The Court repeatedly emphasized the enormous size and geographic scope of the decision.[198] This emphasis clearly shows that the Court was concerned not with the constitutional dimension of the case, but with the specific (and unusual) facts before it.

For example, the Court noted that the company "operates approximately 3,400 stores and employs more than one million people."[199] The Court also stated that there is no common policy or practice at the company "that ties all . . . 1.5 million claims together."[200] And the Court noted that the claims involved thousands of locations and a "'variety of regional policies that all differed.'"[201] To say that the *Wal-Mart* case presents an uncommon set of facts would be an understatement. The case is colossal in both scope and scale, and the Court both recognized this fact and premised its decision on the unusual situation before it.

Thus, the Court was concerned with the potential harm that a massive, amorphous lawsuit could cause to defendants. Indeed, such a lawsuit can bring the company to its knees and potentially force bankruptcy in certain situations. This is the type of case that the Court was addressing as evidenced by the reasoning of its decision. The Court emphasized the uniqueness of this particular factual scenario, and did not expressly attempt to create a constitutional threshold for commonality. The decision undoubtedly fails to *expressly* create a due process standard. And to read the decision as *implicitly* creating one would be improper. Developing a constitutional standard for due process was simply not the issue before the Court.

In addition, the case is unique because there is a complete lack of commonality under the facts of the claim.[202] The plaintiffs in the case—at least in the view of the

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

197. *Id.* at 2547. *See generally* Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law (See, e.g., the Lack of Judicial Restraint in* Wal-Mart, Twombly, *and* Ricci*)*, 48 WAKE FOREST L. REV. 989, 1008–09 (2013) (discussing the "atypical" facts of the *Wal-Mart* case).

198. *See, e.g.*, *Wal-Mart*, 131 S. Ct. 2541 at 2555, 2556 n.9, 2557.

199. *Id.* at 2547.

200. *Id.* at 2555–56.

201. *Id.* at 2557 (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (2010) (Kozinski, C.J. dissenting)).

202. It is worth noting that the majority and dissent strongly disagreed on the quality of the plaintiff's evidence of commonality. This Article does not critique the majority's conclusion that the evidence offered was "worlds away" from satisfying the commonality standard. *Id.* at 2554. Instead, as it must, this Article accepts the Court's view on the apparent lack of evidence on this question and embraces the Court's decision that the plaintiffs were not even close to satisfying the commonality test. Because the plaintiff's evidence was so deficient in this regard, it only serves to underscore the fact that this case is a poor choice to serve as a "benchmark" for the constitutional question of commonality under Rule 23.

majority—failed to demonstrate a "general policy of discrimination."[203] The "social framework" and statistical evidence offered by the plaintiffs was expressly disregarded by the Court.[204] And, the "corporate policy" of "allowing discretion by local supervisors over employment matters" fails to provide any inference that the company was discriminating on a nationwide basis.[205] In sum, the majority concluded that the plaintiffs in *Wal-Mart* were "worlds away" from establishing commonality.[206]

The facts of *Wal-Mart*, then, present an extreme case where the Court believed that the commonality standard was not even closely met. In the Court's view, the plaintiffs in the case were largely dissimilar and failed to come anywhere near the Rule 23(a)(2) threshold.[207] Given the complete lack of any common thread in the case, the decision offers a wholly undesirable vehicle for establishing the commonality standards on a constitutional level. A benchmark for constitutional due process in complex litigation does exist. That benchmark, however, is simply not created by the *Wal-Mart* decision, which only gives us an example of one case where the facts have "'little in common'" other than the plaintiffs' "'sex and [the] lawsuit'" in question.[208] Certainly, *Wal-Mart* provides some insight into "what is not" commonality, but it does very little to help shed any light on what type of notice and other due process requirements are actually necessary for class-action claims. The case does not tell us what the minimum standards of the Constitution are for commonality, and we are left to speculate on this question.

Moreover, it is worth highlighting that the Court only resolved the dispute in *Wal-Mart* with respect to Federal Rule of Civil Procedure 23(a)(2). The case cannot—and should not—be read as applying beyond this procedural rule. In its decision, the Court repeatedly discussed and defined Rule 23(a)(2) and evaluated whether the plaintiffs had satisfied this standard. The Court expressly set forth the entire text of the rule in the case,[209] and it specifically mentioned the rule over a dozen times over the course of its decision.[210] In the case, the Court noted that the "[r]ule's . . . requirements . . . effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'"[211] The Court further stated that "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule"[212]; and the Court provided that "[t]he crux of this case is commonality [under] the rule."[213]

It is clear from the decision—which repeatedly addresses the contours of Rule 23(a)—that the Court is not intending to go beyond this rule in its decision. The Court

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203. *Id.* at 2553.
204. *Id.* at 2553–54 (internal quotation marks omitted).
205. *Id.* at 2554 (emphasis omitted).
206. *Id.*
207. *Id.* at 2553.
208. *Id.* at 2557 (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (2010) (Kozinski, C.J. dissenting)).
209. *Id.* at 2548.
210. *See Wal-Mart*, 131 S. Ct. 2541.
211. *Id.* at 2550 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 156 (1982)).
212. *Id.* at 2551.
213. *Id.* at 2550.

does not purport to interpret commonality under the Constitution, but rather defines the term specifically with regard to Rule 23(a). The Court's interpretation of commonality, then, while critical to cases brought in the federal courts, is not binding on claims brought in state court. Nor was it intended to be.

In sum, there can be little doubt that class actions have a constitutional component that provides defendants with certain due process guarantees. The *Wal-Mart* decision, however, does not define what these guarantees should be. Rather, the case is expressly decided under Federal Rule of Civil Procedure 23(a)—a rule which the Court relies on repeatedly throughout the decision. Additionally, nowhere in the Court's decision can any discussion of the due process limits of commonality be found.[214] No serious argument can be made that the Court intended to establish a constitutional boundary for commonality without expressly providing that this was what it was intending to do. The Court has never been shy when developing the law, and it would be bizarre—to say the least—for the Court to create a new standard for due process without expressly saying that this was its intent. Finally, as noted above, the facts of the *Wal-Mart* decision are extreme. The case involves over one million putative plaintiffs as well as the largest private employer in the country.[215] The Court repeatedly emphasizes throughout its decision the unique nature of the case before it.[216] Given the unusual circumstances of the case, the facts of the decision *cannot* be construed as creating a new standard for due process. It is true that the case does present one extreme factual scenario that fails to satisfy the commonality test, but it is difficult to read anything beyond this into the case.

At the end of the day, it is clear that a due process standard for commonality exists. It is equally as clear that the Court has not yet defined what this standard is, and *Wal-Mart* only provided some general guidance on what commonality means under a single set of facts. Any argument that *Wal-Mart* did more—that it actually created a constitutional standard for commonality in class-action claims—must fail. *Wal-Mart* was only intended to apply to federal claims brought under Rule 23, and the decision cannot be extended to the state courts.

This obviously leaves the question as to what commonality actually means under the Due Process Clause. If class actions do have a constitutional component to them—as this Article argues—how is commonality defined under the broader due process test? This Article provides below a framework for commonality under the Constitution. While it is impossible to provide a clear definition for the standard without additional Supreme Court guidance, some general guidelines can be set forth to help shape the meaning of commonality under the Due Process Clause.

IV. DEVELOPING A NORMATIVELY FAIR DEFINITION OF COMMONALITY

Though *Wal-Mart* did not create a constitutional standard for commonality, such a standard must still exist. Amorphous systemic claims lacking a common nucleus of facts clearly run afoul of due process. There must thus be some general normative standard for what commonality means from a constitutional perspective. As

214. *See Wal-Mart*, 131 S. Ct. 2541.
215. *Id.* at 2547.
216. *See Wal-Mart*, 131 S. Ct. 2541.

discussed above, defendants are entitled to notice and an opportunity to be heard. Where a systemic claim lacks sufficient commonality, these due process guarantees are breached.

The question thus arises as to what a normatively fair definition of commonality truly is. If *Wal-Mart* does not define commonality under the Constitution, what are the due process confines of Rule 23? This Article will briefly address some of the guideposts for developing a normatively fair definition of commonality. The standard set forth below is not intended to be all-encompassing. Rather, these guidelines are meant to spark a discussion on this issue and to begin a dialogue as to what constitutional protections defendants have when defending a class-action claim that lacks a common core of issues or facts.

The guidelines below are intended to apply to both state court and federal court claims. The constitutional protections afforded defendants are not restricted by the Federal Rules of Civil Procedure. Due process transcends this rule and guarantees certain core elements to litigants of a systemic claim. Keeping in mind the elements discussed in *Philip Morris* and *Exxon*, this Article draws upon these decisions—and others—to develop a five-part test for all class-action litigation. This test helps evaluate whether commonality is satisfied by a particular systemic claim. Though the standard articulated here would not necessarily be applicable to every possible class-action case, these guideposts could be used to analyze the vast majority of systemic claims. These guideposts are meant to be malleable and may be adjusted to help fit specific class-action litigation.

In sum, to satisfy the Due Process Clause of the Constitution with regard to commonality, all complex litigation must:

1. present a uniform company policy or problem that is
2. effectuated by management level employees, and
3. creates common harm; and
4. the case must include mutual questions shared by all plaintiffs
5. that are capable of resolution across the entire class.

This five-part framework creates a floor for all class-action claims. A systemic action that satisfies each of these elements will inherently provide sufficient due process to defendants on the question of commonality. Taken together, these elements provide adequate notice to defendants of the claims against them with a sufficient opportunity to be heard. These elements further acknowledge the reality that Rule 23 was designed to protect *both* the interests of plaintiffs and defendants.[217] These elements draw upon the *Wal-Mart* decision as well as other federal court litigation. However, *Wal-Mart* only serves to help define the edges of commonality—as discussed above—and it does not provide a test for determining whether due process is satisfied.

It can be useful to break down each one of these elements to describe the necessity of its inclusion in the framework.

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217. *See supra* notes 71–72 and accompanying text.

A. A Uniform Company Policy or Problem

At its core, any systemic claim must present a uniform company policy or problem. Without commonality as to a particular policy or problem, the issues become far too individualized and cannot be properly defended against on a class-wide basis. Where there is no common policy at play, defendants will not have proper notice of the systemic claim before them. Defendants cannot be expected to litigate these types of claims with no common thread, and requiring them to do so would run afoul of the Due Process Clause.

The *Wal-Mart* decision does provide some guidance on this issue. In *Wal-Mart*, the Court concluded that there was no evidence that the company "operated under a general policy of discrimination."[218] Rather, the only common policy at issue in the case was the more individualized level of discretion that the company gave to management at each particular store.[219] Without more evidence of a common policy holding the case together, the Court concluded that there was no commonality among the claims.[220] This requirement of a general policy that cuts across the class can be found not only in Supreme Court case law, but in all class-action claims.[221] The requirement is thus a basic component of all systemic litigation.[222] Without a common policy in the case, defendants simply have no proper notice of the claim before them.

This is not to say that varied claims cannot be brought against a company. Rather, these claims must be brought on an *individualized* basis where they can properly be defended against. When such suits are filed individually, defendants will have clear knowledge of the facts and allegations in each case. It is only where these suits are brought on a systemic level that due process issues arise. A common policy or problem in the case is thus a critical element and guidepost for satisfying due process when attempting to define commonality under the Constitution.

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218. *Wal-Mart*, 131 S. Ct. at 2553 (internal quotation marks omitted).

219. *See id.* at 2553–55.

220. *Id.*

221. *See, e.g.*, Scott v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013) (finding insufficient evidence of general policy of discrimination), *cert. denied*, 134 S. Ct. 2871 (2014); Rodriguez v. Nat'l City Bank, 726 F.3d 372, 383–84 (3d Cir. 2013) (finding insufficient evidence of a general policy that demonstrated a common harm); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) (finding a common policy with regard to broker commissions that was sufficient to satisfy the commonality question), *cert. denied*, 133 S. Ct. 338 (2012); Bolden v. Walsh Constr. Co., 688 F.3d 893 (7th Cir. 2012) (denying certification based on lack of corporate-wide policy of discrimination); Chicago Teachers Union, Local 1 v. Bd. of Educ. of Chicago, 301 F.R.D. 300 (N.D. Ill. 2014) (finding insufficient evidence of general policy to satisfy the commonality question), *rev'd and remanded*, 797 F.3d 426 (7th Cir. 2015); Burton v. District of Columbia, 277 F.R.D. 224 (D.D.C. 2011) (finding policy in question was vague and conclusory).

222. *See* cases cited *supra* note 221.

B. Policy Effectuated by Management-Level Employees

As a practical matter, any corporation-wide policy that creates a cause of action for a group of plaintiffs will be adopted at the supervisory levels of the company. To be actionable, then, the defendant itself must have implemented the practice in question. Policies and practices need not be formal in nature.[223] Indeed, they can even be subjective.[224] The critical element here is that the top levels of management must either have implemented the practice or looked the other way while the unlawful policy was carried out at the company.

Where a defendant does not put a policy in place at a corporate level, it will be difficult—if not impossible—to show commonality in the case. Again, this will directly implicate due process concerns. Where a company is forced to defend a policy that was not put in place by its management level employees, that policy will be scattered and varied. Requiring a defendant to litigate this type of amorphous action would force it to defend against unforeseen third-party harm. As discussed in the *Philip Morris* decision, such a requirement would violate due process principles.[225] Similarly, where a challenged policy is not adopted by those cloaked with authority at the company, the defendant will not have proper notice of the unlawful actions that have taken place.

The case law illustrates the necessity of this requirement. In *Wal-Mart*, for example, the Court rejected the plaintiffs' claims because there was no class-wide corporate policy implemented by upper management.[226] Rather, individual managers were responsible for developing their own pay and promotion policies at a local level.[227] Without some uniform policy adopted by the corporation, there was a complete lack of commonality related to the claims of the putative class.[228] Many other cases also demonstrate the need for some type of management level imprint on the policy in question to sustain a systemic claim.[229] As can be seen from these

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223. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 999 (1988) ("We granted certiorari to determine whether the court below properly held disparate impact analysis inapplicable to a subjective or discretionary promotion system, and we now hold that such analysis may be applied.")

224. *See* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982) ("Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class . . . if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.").

225. Philip Morris USA v. Williams, 549 U.S. 346, 353–54 (2007).

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

227. *Id.* at 2547.

228. *Id.* at 2553–54.

229. *See* Scott v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013) (questioning district court's failure to certify class where decision making was made by high-level corporate decision makers with authority over a broad segment of the company), *cert. denied*, 134 S. Ct. 2871 (2014); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir.) (permitting certification in case where alleged discriminatory policy was developed by company management), *cert. denied*, 133 S. Ct. 338 (2012); Bolden v. Walsh Constr. Co., 688 F.3d 893 (7th Cir. 2012) (rejecting certification of systemic discrimination claim where discriminatory acts occurred on a local level, rather than through corporation-wide policy); Healey v. Int'l Bhd. of Elec. Workers, Local Union No. 134, 296 F.R.D. 587, 592 (N.D. Ill.

cases—irrespective of the constitutional implications involved—a systemic claim will not be approved where the company has not endorsed a common policy that is in question.[230]

As the Supreme Court's case law makes clear, the Constitution requires notice and an opportunity to be heard for defendants in systemic litigation. Without a unified policy—whether formal or informal—that has been adopted by company management, there can be no proper class-action claim against the defendant. Once again, this does not mean that individual litigation cannot proceed. But defendants cannot be forced to litigate these types of claims on a class-wide basis. The Constitution guarantees more.

C. Common Harm

Commonality under the Due Process Clause further requires common harm in the case. Where the harm is varied, the case becomes far too nebulous to defend against. As discussed above, due process principles require sufficient notice under the Constitution. *Philip Morris* and *Exxon* provided excellent examples of how the potential damages in a class-action case can run afoul of this constitutional requirement. *Philip Morris* held that third-party harm could not be introduced in certain circumstances without violating due process guarantees.[231] *Exxon* similarly concluded that permitting an excessive ratio of punitive damages to actual harm violated the Constitution.[232] General principles of due process further require that the harm caused in a systemic case is common to all plaintiffs and that the damages run across the entire class.

As *Wal-Mart* recognized, common harm means much more than simply making similar allegations of wrongdoing under the same statute.[233] Rather, there must be a "common contention" of harm that pervades the entire class.[234] Though the plaintiffs in *Wal-Mart* failed to meet this burden, the Court noted that such a showing could have been made through "the assertion of discriminatory bias on the part of the same supervisor."[235] Common harm thus provides the "glue holding" the case together, and it is essential for any systemic claim.[236] *Wal-Mart* is not an outlier in imposing

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2013) (finding commonality test satisfied where evidence showed that uniform policy existed that did not require the Court to "delve into how it was used or applied to individual workers"); Youngblood v. Family Dollar Stores, Inc., No. 09 Civ. 3176(RMB), 2011 WL 4597555, at *4 (S.D.N.Y. Oct. 4, 2011) ("Unlike the claims in *Wal-Mart*, Plaintiffs' NYLL claims 'do not require an examination of the subjective intent behind millions of individual employment decisions; rather, the crux of this case is whether the company-wide policies, as implemented, violated Plaintiffs' statutory rights.'" (quoting Creely v. HCR ManorCare, Inc., No. 3:09 CV 2879, 2011 WL 3794142, at *1 (N.D. Ohio July 1, 2011))).

230. *See* cases cited *supra* note 229.

231. Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007).

232. Exxon Shipping Co. v. Baker, 554 U.S. 471, 515 (2008).

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

234. *Id.*

235. *Id.*

236. *Id.* at 2552.

this requirement. Indeed, the case law has uniformly held that some type of common harm is necessary for a class action to proceed.[237]

Generalized allegations of common harm are simply not enough to meet the due process principles in class-action cases. Defendants are entitled to far more notice as to the alleged harm that has occurred—and this harm must present a common theme in the case. Where the harm becomes too individualized, defendants cannot be expected to litigate the case on a systemic basis. Rather, such litigation should occur on an individual level.

D. Mutual Questions Shared by All Plaintiffs

At the core of any class-action litigation is a common question that is presented in the case. Commonality demands that all class-action litigation contain a basic underlying issue that is shared across the putative class. When the facts and issues in the case are boiled down to their basic principles, there must be at least one fundamental question in the case that touches every plaintiff. Due process requires this type of mutuality, as defendants should have proper notice of a common question that will be addressed in the case. Thus, there must be a common inquiry in the litigation to satisfy constitutional standards.

The common question requirement is a fundamental principle of due process law. There cannot be proper notice to the defendant where that litigant is unaware of the underlying issue in the case. Where there are multiple, varied issues at stake, individualized litigation is far more appropriate than a systemic claim. Beyond due process concerns, the case law has consistently defined class-action litigation as being necessitated by a common theme. Thus, the courts have routinely concluded that systemic claims must share a mutual question.[238]

The case law therefore uniformly requires that the plaintiffs present a common question in the case.[239] Defendants are entitled to knowledge of this question when

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237. *See, e.g.*, Rodriguez v. Nat'l City Bank, 726 F.3d 372, 383–84 (3d Cir. 2013) (rejecting class certification where plaintiffs failed to demonstrate a common harm); M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012) (rejecting class certification in a case where the harm was too varied and general across the putative class); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) (reversing denial of class certification where similar harm alleged by plaintiffs), *cert. denied*, 133 S. Ct. 338 (2012); Spread Enters., Inc. v. First Data Merch. Servs. Corp., 298 F.R.D. 54, 72–74 (E.D.N.Y. 2014) (rejecting class certification because the plaintiffs failed to prove common injury); Abby v. Paige, 282 F.R.D. 576, 578–79 (S.D. Fla. 2012) (rejecting class certification where plaintiffs emphasized common violations by defendant but failed to show commonality of harm to proposed class members).

238. *See, e.g.*, *Wal-Mart*, 131 S. Ct. at 2551 (requiring class-action plaintiffs to show a common problem in the case); *Rodriguez*, 726 F.3d at 386 (holding that plaintiffs did not have a common question because they failed to meet "their burden of demonstrating that the 'defendant's conduct was common as to all of the class members'" (quoting Sullivan v. DB Invs., Inc., 667 F.3d 273, 299 (3d Cir. 2011))); *Stukenberg*, 675 F.3d at 841–42 (requiring common questions of law and fact for class-action certification); *McReynolds*, 672 F.3d 482 at 492 (concluding that alleged discriminatory policy spanned all company sites creating a common question for all plaintiffs).

239. *See* cases cited *supra* note 238.

addressing the litigation. This requirement is fundamental to systemic claims and goes to the heart of the due process guarantees of the Constitution.

E. The Question Is Capable of Resolution Across the Entire Class

As discussed above, common questions form the core of any systemic litigation. Plaintiffs, however, must do more than simply articulate a mutual issue in the case. Class members must further demonstrate that the question presented is capable of a determination that will resolve the claims of all plaintiffs. This is a critical—but often forgotten—aspect of systemic litigation. While it may be possible to develop a uniform question in the case, it can be much more difficult to demonstrate that the answer to this question will resolve the complex litigation before the court. Due process principles are again directly implicated here. A defendant cannot be expected to defend against class-action litigation that is impossible to resolve through common answers to the questions presented in the case.

Wal-Mart presents perhaps the best example of this principle. In that case, the Court emphasized that the plaintiffs must demonstrate that the issue presented "is capable of classwide resolution."[240] This requires that class members are able to show "that determination of [the] truth or falsity [of the question] will resolve an issue that is central to the validity of each one of the claims in one stroke."[241] This showing often requires a demonstration of the merits of the plaintiffs' claim.[242] This is because "proof of commonality necessarily overlaps" with the merits of the case.[243]

Other cases have followed the same approach as *Wal-Mart*, requiring that definitive answers to the problem be provided in the case.[244] While this principle has not always been clearly articulated by the courts, the case law has tended to require a showing of common answers in the litigation prior to certification of the class.[245] Commonality thus requires that any mutual questions presented in a systemic case are capable of class-wide resolution. This requirement rounds out the due process guarantees of commonality. By providing a sufficient answer to the question presented, class members will ensure that the defendant has had proper notice of a claim against it and will have had the opportunity to be heard.

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240. *Wal-Mart*, 131 S. Ct. at 2551.

241. *Id.*

242. *Id.* at 2551–52.

243. *Id.* at 2552.

244. *See, e.g.*, Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 962 (9th Cir. 2013) (concluding that "plaintiffs' claims will yield a common answer that is 'apt to drive the resolution of the litigation'" (quoting FED. R. CIV. P. 23(a)(2))); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 853 (6th Cir. 2013) (finding the district court correctly identified "two primary questions that will produce in one stroke answers that are central to the validity of the plaintiffs' legal claims"); M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 841 (5th Cir. 2012) (requiring class members to explain how a resolution would have the capacity to "'generate common answers apt to drive the resolution of the litigation'" (emphasis omitted) (quoting *Wal-Mart*, 131 S. Ct. at 2551)); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) (permitting certification where common issue related to discrimination could be resolved across class), *cert. denied*, 133 S. Ct. 338 (2012).

245. *See* cases cited *supra* note 244.

V. IMPLICATIONS OF PROPOSED COMMONALITY GUIDEPOSTS

The Supreme Court has clearly articulated one standard for commonality in its *Wal-Mart* decision. As discussed above, this standard relates purely to Federal Rule of Civil Procedure 23 and does not define what commonality means under the Constitution. This Article does not attempt to provide that definition, but it does propose five critical guideposts that the courts should follow when determining whether a class-action claim affords the defendant with sufficient due process guarantees.

The guideposts discussed here require that the plaintiff provide a uniform company policy or problem that is effectuated by management-level employees and creates common harm.[246] Additionally, the case must include mutual questions shared by all plaintiffs that are capable of resolution across the entire class.[247] Admittedly, these guidelines do not provide cut-and-dried rules that will quickly resolve the commonality question in all class-action litigation. Instead, the test set forth here provides a more general framework that the courts can work within to analyze the potential constitutional implications of a given systemic claim. As class-action claims continue to permeate through the courts, a clearer body of case law will emerge that will help define the more specific parameters of the guidelines set forth here.

This Article thus seeks to provide some basic structure to commonality under the Constitution, rather than to provide clear answers to the issue. It also attempts to spark a discussion on the commonality question that is repeatedly arising in the lower courts.[248] There can be little doubt that there is a constitutional dimension to commonality in systemic claims,[249] and the challenge will be to help clarify the parameters of these due process protections. Thus, while the tremendous variance across class-action litigation may make the standard articulated here inapplicable to certain claims, the test is still meant to be used in the vast majority of systemic cases.[250] Moreover, the guidelines set forth here—by their very nature—are meant to be malleable and altered to help analyze more unique systemic actions.

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246. *See supra* Part IV (discussing constitutional guideposts for commonality).

247. *See supra* Part IV.

248. *See* Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391 (Ct. App. 2012), *vacated*, 325 P.3d 916 (Cal. 2014); Lubin v. Wackenhut, No. 4545, 2012 BL 198161 (L.A. Cnty. Sup. Ct. Aug. 1, 2012), *appeal docketed*, No. B244383 (Cal. Ct. App. Oct. 9, 2012); Jacobsen v. Allstate Ins. Co., 310 P.3d 452 (Mont. 2013), *cert. denied*, 134 S. Ct. 2135 (2014); Braun v. Wal-Mart Stores, Inc., 106 A.3d 656 (Pa. 2014), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015) (No. 14-1123). *See generally* Rosenthal, Note, *supra* note 26, at 316 (discussing issue of constitutionalizing commonality).

249. *But see* Rosenthal, *supra* note 26, at 318 ("Since the due process argument for constitutionalized commonality fails on doctrinal, structural, and originalist grounds, one would hope that the Court would reject the claim.").

250. The guidelines developed here would be particularly appropriate in the employment context and in cases presenting systemic claims in the corporate or workplace environment. While the guidelines offered here might need to be modified to fit some systemic claims of mass tort or negligence, the same basic principles could be applied to those situations. Again, it is important to keep in mind that the guideposts offered here are exactly that—guidelines that are meant to provide only general guidance to the courts and litigants. Specific variations

Following the guidelines set forth here will help the lower courts and litigants to appreciate the path that the Supreme Court has blazed for defendants in this area. From *Exxon*, *Philip Morris*, and the other Supreme Court decisions discussed above, it is clear that the Court is concerned with the potential for defendants to be blindsided by complex actions or high-dollar claims.[251] *Phillip Morris* protects against unreasonable third-party harm to defendants, while *Exxon* guarantees that disproportionate damage ratios will not be allowed in these cases.[252] Both cases thus protect the due process rights of defendants where some type of massive litigation is being pursued.

The next logical step in this area would be for the courts to develop a constitutional standard for commonality. The Supreme Court has already advanced a meaning for this term under the Federal Rules of Civil Procedure.[253] The Court has similarly expressed its concerns about protecting the rights of defendants when it comes to commonality and federal class-action claims. The Court would likely adopt a constitutional standard for commonality if it were to grant certiorari in such a case.[254] While the issue has come up numerous times in state court cases post–*Wal-Mart*, it has yet to form the basis for a major decision.[255] This will likely change as the constitutional principle of commonality continues to be advanced by well-known employer groups such as the U.S. Chamber of Commerce and the Equal Employment Advisory Council.[256]

Defining commonality under the Constitution, then, will prove to be one of the key battlegrounds for systemic litigation in the coming years before the issue finally makes its way up to the Supreme Court. While we now know, after *Wal-Mart*, what commonality means in federal court under one specific rule, there will continue to be significant disagreement as to what that standard means on a state level.

The five guidelines set forth here help provide a basic framework for the inevitable battle that will be fought on these issues. The proposed guidelines addressed above help frame the due process issue as related to systemic claims. The courts will have the role of more fully defining the general parameters set forth here. And as each case will be uniquely fact specific, the case law should quickly develop, generating numerous decisions in this area that will help give context to the question of commonality under the Constitution.

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to (and iterations of) these guidelines may need to be applied to certain complex litigation that is not contemplated by this Article.

251. *See supra* Part II (discussing Supreme Court's movement toward a defense-based approach for class-action claims).

252. *See supra* Part II (discussing recent Supreme Court decisions).

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

254. *Cf.* Rosenthal, *supra* note 26, at 318 ("When the Court considers it, the 'day in court' ideal and corresponding Confrontation Clause principles will likely tempt the Court into adopting constitutionalized commonality.").

255. *See* Lubin v. Wackenhut, No. 4545, 2012 BL 198161 (L.A. Cnty. Sup. Ct. Aug. 1, 2012), *appeal docketed*, No. B244383 (Cal. Ct. App. Oct. 9, 2012); Jacobsen v. Allstate Ins. Co., 310 P.3d 452 (Mont. 2013), *cert. denied*, 134 S. Ct. 2135 (2014); Braun v. Wal-Mart Stores, Inc., 106 A.3d 656 (Pa. 2014), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015) (No. 14-1123).

256. *See* cases cited *supra* note 255.

At the end of the day, the law on the question of commonality and the Constitution is at a nascent stage. The issue is critical but has simply been unexplored by the courts and other academics. Developing rudimentary boundaries on the question is quite straightforward: A group of claims lacking any similarity to one another would clearly fail the commonality test, and the defendant would have a constitutional right to be free from litigating this type of systemic claim. At the other end of the spectrum, claims that arose at the same company through a policy created by top management, which creates direct harm to all workers, would be an excellent candidate for systemic litigation. This type of claim checks all of the boxes and provides the defendant with sufficient notice in the case and an opportunity to defend itself.

The difficulty, of course, is that few cases land at one of these two extremes.[257] The remaining systemic litigation cases likely fall somewhere in the middle. Trying to grapple with whether these cases will satisfy the defendant's due process guarantees will continue to be a challenge for the lower courts.

This Article has established general guideposts that can be used when courts face the daunting challenge of defining commonality. The guidelines were written to be flexible and are intended to be used in cases involving a wide array of factual and legal scenarios. Nonetheless, if a plaintiff is able to satisfy all five requirements set forth here, it will serve as an excellent indication that the class should be certified and that the defendant has received its constitutional guarantees on the question.

The guideposts are intended to be workable and to permit the litigants to compare their facts with the elements set forth in this Article. As this type of conscientious consideration of the facts will take place in advance of the litigation, these guideposts will also help to save judicial resources. Where a plaintiff finds that his claim falls well short of the principles set forth here, it is much more likely that the claim will not be filed at all. This, in and of itself, will save the courts and litigants thousands of hours of litigation time and tens of thousands of dollars in attorneys' fees and court costs.

Finally, as the guideposts provide a basic structure for analyzing one's class-action claim with respect to commonality, they will also enhance the likelihood of settlement. Studies have shown that where there is more certainty in the law, outcomes can be predicted with more confidence and cases are more likely to result in settlement.[258] This benefits both sides through reduced litigation costs and also assists the judiciary as the caseload on its docket will begin to lighten.

In sum, the guideposts for defining commonality under the Constitution set forth here have the potential to help streamline class-action litigation, allow plaintiffs to recognize poor complex action claims in advance of suit, and encourage settlement among all parties. These potential benefits strongly suggest that the time is now for

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257. One exception to this, however, is the *Wal-Mart* decision itself, which presented a poor case for commonality. This is one reason why the *Wal-Mart* decision cannot be read as creating a constitutional standard for commonality under the Due Process Clause. The highly unusual facts of that case make it hard to read anything past the Court's specific decision in that single case.

258. *See* Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 662 ("The more certain the law—the less the variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes.").

adopting a general standard for commonality under the Constitution, particularly as more and more cases are beginning to turn on this issue. The guidelines set forth here should be broadly applied as they would not be limited simply to federal court litigation, but would extend to state systemic claims as well. The ultimate goal of this paper is to provide a general framework for commonality under the Constitution and to begin a meaningful dialogue with others as to their view on what core elements should be included in the guidelines.

CONCLUSION

Though *Wal-Mart* was expressly decided under the Federal Rules, the defense bar has already begun to argue that the case was decided on constitutional grounds. This Article critiques the *Wal-Mart* constitutional argument and explains why it must fail. Nonetheless, the Due Process Clause undoubtedly guarantees that there must be sufficient commonality in all class-action litigation. This Article helps to define what commonality means under the Constitution, developing a five-part framework for analyzing all systemic claims. The guideposts identified here will help streamline all future complex litigation and will hopefully spark a dialogue in the academic community on this topic.