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Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change

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REACTIONS TO *WAL-MART V. DUKES*: LITIGATION STRATEGY AND LEGAL CHANGE

*Andrew J. Trask**

INTRODUCTION

In 1967, a warrantholder in a small company called Walnut Grove filed a class action against W.R. Grace & Co.[1] He alleged that when W.R. Grace & Co. bought Walnut Grove, it improperly characterized the transaction as a "liquidation" rather than a merger, depriving him of the chance to buy stock in the company.[2] The lawsuit is notable for several reasons, including that it was one of the first class actions filed under the "new" Rule 23 after it was amended in 1966, and it was one of the first class actions to allege violations of the Securities Exchange Act.

But the case is remarkable for another reason: during the course of briefing, W.R. Grace argued that the trial court lacked jurisdiction over the case because the warrantholder's individual claims were not worth enough to meet the amount in controversy requirement for federal diversity jurisdiction.[3] The plaintiff, on the other hand, argued that, because the case was a class action, he could simply aggregate the total value of the claims he sought to represent in order to reach the amount in controversy.[4] The court ruled against the plaintiff, noting that several other class action plaintiffs had unconvincingly advanced the same argument.[5]

To understand what is truly remarkable about this argument, we must skip ahead thirty-odd years to another set of cases addressing the question of when federal courts have jurisdiction over class actions. This time, however, the *defendants* argued for aggregating the claims to meet the amount in controversy requirement, and the *plaintiffs* ar-

* Counsel, McGuireWoods LLP; coauthor of *The Class Action Playbook*. *See* BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK (2d. ed. 2012). Many thanks to the editors of the *DePaul Law Review* for inviting me to their Symposium, and to the participants for very helpful feedback. Thanks also to Kathleen Lawton-Trask and Alexandra Trask for their support and contributions.

1. *See* Pomierski v. W.R. Grace & Co., 282 F. Supp. 385 (N.D. Ill. 1967).
2. *See id.* at 385, 388–89.
3. *Id.* at 390.
4. *Id.*
5. *Id.* at 390–91.

gued against jurisdiction.[6] The primary change in the intervening years was that state courts had proved more amenable to certifying class actions than federal courts. As a result, the tactics had changed: plaintiffs typically filed cases in state court, defendants removed them to federal court, and then plaintiffs moved for remand. Ten years later, Congress passed the Class Action Fairness Act (CAFA), which states that courts must look at aggregated claims, and the jurisdictional fight moved on to whether a named plaintiff could file a case in state court and seek no more than the $5 million amount in controversy in order to keep the case there.[7]

What do these decades-old jurisdictional battles have to do with the Supreme Court's recent opinion in *Wal-Mart Stores, Inc. v. Dukes*? More than you might think. The title of this Symposium is *Class Action Rollback?* and, in addition to being a lawyerly pun on one of Wal-Mart's marketing slogans, it carries with it an assumption that there is an optimal level of class actions—a preferred doctrine—and deviations from that level are a "rollback" to a dark age when mighty corporations roamed the earth preying on small consumers and employees.

Even federal courts cannot decide whether *Dukes* has wrought a significant change in class action law. Numerous trial courts have treated the case as simply clarifying the law. One trial court in the northern district of Illinois announced that "it hardly needs stating that neither *Dukes* nor *Jamie S.* 'changed' the law on class certification. Class certification is still governed by the [Federal Rule of Civil Procedure 23], and the requirements of that rule have not changed substantively . . . ."[8] The eastern district of Oklahoma agrees: "XTO also contends that the Supreme Court's decision in *Wal-Mart* has implemented a material shift in the class certification analysis requiring the denial of certification in this case. The Court disagrees."[9] The southern district of New York also agrees, at least in part.[10]

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6. *See, e.g.*, Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1355–60 (11th Cir. 1996).

7. In March of 2013, the Supreme Court determined that this tactic was not a valid method of avoiding federal jurisdiction under CAFA. Standard Fire Ins. Co. v. Knowles, No. 11-1450, 2013 U.S. LEXIS 2370, at *9 (Mar. 13, 2013) (reversing remand because "Knowles lacked the authority to concede the amount-in-controversy issue for the absent class members").

8. Corey H. v. Chi. Bd. of Educ., No. 92 C3409, 2012 U.S. Dist. LEXIS 100316, at *17–18 (N.D. Ill. July 19, 2012). "*Jamie S.*" refers to a Seventh Circuit opinion discussing commonality. *See* Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481 (7th Cir. 2012).

9. Chieftain Royalty Co. v. XTO Energy, Inc., No. CIV-11-29-FHS, 2012 U.S. Dist. LEXIS 51593, at *17 (E.D. Okla. Apr. 12, 2012).

10. Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 169 (S.D.N.Y. 2011) ("*Dukes* makes no new law that impacts in any way this Court's certification of the Rule 23(b)(3) 'damages class.'").

Taking the contrary position, the Fifth Circuit is equally emphatic that *Dukes* "has heightened the standards for establishing commonality under Rule 23(a)(2)."[11] It is joined by the central district of California: "[N]otwithstanding the Supreme Court's protestation to the contrary, it is somewhat difficult to understand *Dukes* as doing something other than melding the commonality requirement with the predominance requirement of Rule 23(b)(3) . . . ."[12] The confusion is understandable, and it centers around how people view the law—either as something slowly "discovered" by analysis, or as part of a progression.

While historical arguments about the development of class actions are common, they are also largely wrong. The law is not on a single trajectory from less "justice" to more, or from more protection of certain interests to less. In the United States, where the law is largely judge-made common law supplemented by statute, the law is a product of judicial opinions, which are themselves the product of a constant struggle between lawyers representing opposing parties. There is no "natural" position for a given side. Instead, there are only positions that provide an advantage in a given case. However, some parties, or some lawyers, are more forward-thinking: they may adopt positions that lose in a given case, but set up larger, more systemic changes in the law that will prove more advantageous.

Viewed as part of this larger strategic struggle, the *Dukes* opinion is neither a triumph for defendants (although it improves their circumstances in the short-term), nor an insurmountable defeat for plaintiffs. Further, despite the many academics and lawyers who have written otherwise, it does not represent the "demise" of the class action.[13] Instead, *Dukes* is simply a strategic reset, adjusting a doctrinal drift that occurred over the course of many years. When viewed in the context of class actions' history and a year's worth of reactions to the case, it is clear that *Dukes* has not wreaked the massive disruptions to class action practice that many scholars warned about. To be sure, *Dukes* has certainly had an effect, even a significant one, on class action practice. But it has not heralded the demise of the class action, nor has it pro-

11. M.D. v. Perry, 675 F.3d 832, 839–40 (5th Cir. 2012).

12. Cambridge Lane, LLC v. J-M Mfg. Co., No. CV 10-6638-GW(VBKx), 2012 U.S. Dist. LEXIS 43533, at *5 n.2 (C.D. Cal. Mar. 15, 2012) (citation omitted).

13. *See, e.g.*, George Rutherglen, Wal-Mart, AT&T Mobility, *and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 25 (2012), www.virginialawreview.org/inbrief/2012/04/14/Rutherglen.pdf; Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005); Benjamin Sachs-Michaels, Note, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665, 668–70 (2011).

vided a renaissance for defendants. Instead, it has afforded defendants the opportunity to defeat the kinds of class actions most likely to result in either costly appeals or blackmail-style settlements.

II. Two Models of Class Actions

It is possible to divide the vast majority of commentary about class actions (and even many of the judicial rulings on them) into two schools of thought. The crudest labels for these schools would be "pro-plaintiff" and "pro-defendant," but those labels do not communicate many of the underlying assumptions that these sides hold. It would be more accurate (and more fair to each side) to talk about "progressive" and "reform" arguments.

Under the "progressive" model, scholars assume that a continual evolution of legal substance and procedure towards a common goal exists. The most rhetorical way of thinking about it would be from "less justice" to "more justice," but in class action terms that translates to a progression from more restrictions on the use of class actions to fewer.

Many of the advocates of this model are open about their belief that class actions should be easy to certify.[14] These advocates usually have a number of justifications for increasing the role of the class action. They tend to believe that, left unchecked, corporations will take advantage of individuals in undetectable ways.[15] Further, they believe that the threat of class actions—whether meritorious or not—will deter corporate misconduct.[16]

In contrast to the progressive model, the reform model argues that class actions tend to invite abuse. In particular, supporters of this model express two concerns. First, they worry that the aggregation of claims leads to fees that encourage plaintiffs' lawyers to act badly: at best, they create a deadweight loss by collecting large fees that would otherwise go to deserving class members;[17] at worst, they lead to the

14. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013); Rutherglen, *supra* note 13, at 29 ("That is the dismaying lesson of *Wal-Mart*. It might not foretell the death of class actions, which the Supreme Court has continued to endorse in other respects, but it does diminish the frequency of class actions." (footnote omitted)).

15. *See, e.g.*, Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 317–18 (2010).

16. *See, e.g.*, Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010) (arguing that awarding plaintiffs' attorneys fees equal to 100% of the plaintiffs' judgment will enhance deterrence); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105–07 (2006) (noting that deterrence is the primary goal of class actions).

17. *See, e.g.*, Jeffrey Hammond & James E. West, *Class Action Extraction?*, 116 PUB. CHOICE 91, 97 (2003).

filing of meritless claims for the sole purpose of extorting large-fee settlements.[18] Second, they worry that the rush to aggregate claims often leads courts to cut corners in ways that compromise the rights of either absent class members or defendants.[19] These commentators rarely if ever advocate the abolition of the class action; instead they argue that the device should be limited so that it does more good than harm.

So both the progressive and the reform models of class action litigation advance normative arguments. Much legal scholarship relies on "normative" arguments—that a given doctrine should be decided in a given way. These arguments make sense if one assumes that a point exists at which legal rules become set in stone. However, that does not happen in the long-term. Even if one could identify a single rule that would always apply in a given situation, human beings, and especially lawyers, are hard-wired to push back on rules.[20] Hence, a "settled" rule in litigation simply does not exist. Rules are always subject to appeal, distinction, and collateral attack. This is particularly true in the realm of class actions, which involve particularly high stakes. Moreover, many of these "normative" arguments tend to be useless for both the judges who write opinions and the lawyers who try to persuade them.

III. THE *DUKES* CASE

To give a brief background on *Dukes*, seven named plaintiffs—all women—brought a nationwide class action alleging that various members of Wal-Mart's management discriminated against them in pay and promotion decisions.[21] The plaintiffs argued that, despite Wal-Mart's official policy prohibiting sex discrimination, its practice of allowing its managers wide discretion in pay and promotion decisions resulted in a disproportionate number of promotions and raises for men.[22] While one might think (and Wal-Mart argued) that "excessive discretion" sounds like the opposite of a common issue, the plaintiffs

18. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (discussing concerns about "blackmail settlements").

19. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 619–23 (2010).

20. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 117 (2010) ("Lawyers know that no matter how clear a rule appears to be, there will be some exploitable ambiguity, some room for manipulation.").

21. For a fuller account of the *Dukes* opinion and the procedural maneuvering leading up to it, see Andrew J. Trask, Wal-Mart v. Dukes*: Class Actions and Legal Strategy*, 2011 CATO SUP. CT. REV. 319, 328–29.

22. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 141 (N.D. Cal. 2004).

responded that the class was united by a common corporate culture that featured pervasive gender discrimination.[23]

The District Court for the Northern District of California certified a class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices."[24]

Both the plaintiffs and Wal-Mart appealed the ruling—Wal-Mart appealed the certification of the class as error while the plaintiffs challenged the lower court's limitation of backpay to only current employees.[25] A three-judge panel affirmed the certification,[26] as did an *en banc* panel on rehearing.[27] Neither opinion was unanimous.[28]

The Supreme Court granted certiorari to review two questions: (1) when plaintiffs can seek Rule 23(b)(2) certification for a class that seeks money damages and (2) *sua sponte*, "[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."[29] In an opinion authored by Justice Antonin Scalia, the Court unanimously held that plaintiffs could not use Rule 23(b)(2) as an alternative means of certifying a difficult monetary damages class.[30] It also held (in a portion supported by a five-justice majority) that a finding of commonality requires a court to identify questions "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[31]

IV. THE REACTION TO *DUKES*

Leaving aside scholarly reaction, the conduct of both litigants and courts since the Supreme Court decided *Dukes* indicates that the opinion hardly led to a "rollback" of class actions. Class action plaintiffs have not slowed their pace of filings. In fact, a third-party survey commissioned by a class action defense firm found that in 2012, "corporate legal departments expect to handle slightly more [class ac-

23. *Id.* at 145.

24. *Id.* at 141–42.

25. *See* Trask, *supra* note 21, at 336.

26. Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214, 1215 (9th Cir. 2007).

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

28. *See Dukes*, 474 F.3d at 1244 (Kleinfeld, J., dissenting); *Dukes*, 603 F.3d at 628 (Ikuta, J., dissenting); *id.* at 652 (Kozinski, C.J., dissenting).

29. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2011).

30. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558–59 (2011).

31. *Id.* at 2551.

tions]—on average, 5.4 matters per company, up from 4.4 in 2011."[32] That survey also found that labor and employment lawsuits remain one of the three most prevalent forms of class action that corporations face.[33] Similarly, a survey of workplace-related class actions by another defense firm found that, "[b]y the numbers, [Fair Labor Standards Act] and [Employment Retirement Income Security Act] litigation filings stayed constant over the past year, *while employment discrimination cases increased.*"[34] That report also predicted, based on increased numbers of charges filed with the Equal Employment Opportunity Commission (EEOC), "a significant jump in the coming year" for employment class actions.[35] These surveys were published by defense firms hoping to demonstrate their expertise in order to attract future clients; as a result, they have no incentive to overstate filings. If the *Dukes* opinion really represented a "rollback" of class actions, let alone their imminent demise, one would not expect an *increase* in filings.

Additionally, the *Dukes* plaintiffs have not given up in the face of the Supreme Court's opinion. Instead, they have done as the decision suggested by scaling down their efforts. Rather than arguing for a nationwide class, they launched a campaign of single-state class actions asserting the same claims against Wal-Mart.[36]

The reaction of the courts is equally important in determining whether *Dukes* represents some kind of rollback. Here, too, the results are more nuanced than either the progressive or reform models

32. THE 2012 CARLTON FIELDS CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COST AND MANAGING RISK IN CLASS ACTION LITIGATION 4 (2012). One could argue that defense expectations are not the same as actual filings. However, given the tightness of legal budgeting, there is no reason to assume that these departments would significantly inflate their expectations.

33. *Id.* at 7. One explanation for the prevalence of labor/employment class actions is the development of class actions under the Fair Labor Standards Act (FLSA). *See* 29 U.S.C. §§ 203–19 (2006). Unlike Title VII class actions, which often delve into complicated questions of hiring and promotion qualifications, FLSA class actions deal with simpler questions of whether certain wage policies comply with the FLSA. *See, e.g.*, Ross v. RBS Citizens, N.A., 667 F.3d 900, 909 (7th Cir. 2012); Bouaphakeo v. Tyson Foods, Inc., No. 5 07-cv-4009-JAJ, 2011 U.S. Dist. LEXIS 95814, at *10–11 (N.D. Iowa Aug. 25, 2011).

34. SEYFARTH SHAW LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 3 (2012) (emphasis added). "By the close of the year, ERISA lawsuits totaled 8,414 (down slightly as compared to 9,038 in 2010), FLSA lawsuits totaled 6,779 (up slightly as compared to 6,761 in 2010), and employment discrimination filings totaled 14,771 lawsuits (an increase from 14,559 in 2010)." *Id.*

35. *Id.*

36. *See* Ariane de Vogue, *'We're Back': Walmart Plaintiffs File Amended Sex Discrimination Complaint*, ABC NEWS (Oct. 27, 2011, 4:16 PM), http://abcnews.go.com/blogs/politics/2011/10/were-back-walmart-plaintiffs-file-amended-sex-discrimination-complaint.

would have us believe. Many courts have followed *Dukes*.[37] This result makes sense because the Supreme Court is supposed to provide direction on difficult issues. However, several lower courts have also begun to distinguish the opinion in various ways in order to facilitate the certification of various class actions.[38]

Courts that may be so inclined, however, cannot simply ignore the opinion. The Ninth Circuit, for example, which enjoys a reputation as pro-certification,[39] recently vacated the certification of a class action that, pre-*Dukes*, it would most likely have affirmed. In *Ellis v. Costco Wholesale Corp.*,[40] the defendant appealed the certification of a Title VII class action on behalf of "all women employed by Costco in the United States denied promotion to [AGM] and/or [GM] positions."[41] The *Ellis* class bore several striking similarities to the original *Dukes* class. On a purely superficial level, it was a Title VII suit brought against a major American discount retailer that alleged disparate impact on women. Significantly, from a legal standpoint, it sought a combination of injunctive relief and money damages, and the plaintiffs offered expert declarations that "female employees [were] promoted at a slower rate and [were] underrepresented at the AGM and GM levels relative to their male peers," and that "Costco [had] a pervasive culture of gender stereotyping and paternalism."[42]

Despite the Ninth Circuit's "amenability" to class certification, the ruling in *Dukes* prevented it from taking the same course it did in its original *Dukes* opinions. Instead, "[g]iven this new precedent altering existing case law," it remanded the case to the lower court with instructions to probe more deeply into several factual questions surrounding commonality, and to find that several former employees were inadequate class representatives to pursue prospective injunctive relief.[43]

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37. Shephard's indicates that, as of September 1, 2012, 180 courts have "followed" the case.

38. Indeed, as of September 1, 2012, the Shephard's database on LEXIS/NEXIS listed 105 decisions that distinguished *Dukes*.

39. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1612 (2008) (noting that the Ninth Circuit is "relatively liberal on class certification"); Genevieve G. York-Erwin, Note, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1805 n.54 (2009) (noting that the Ninth Circuit is "amenable to certification").

40. *See* Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011).

41. *Id.* at 977 (alteration in original). "AGM" and "GM" referred to the titles of "Assistant General Manager" and "General Manager."

42. *Id.* In one departure from *Dukes*, the lower court ruled on the admissibility of several of the experts and struck part of their reports. *Id.* at 978.

43. *Id.* at 974, 988.

However, most class actions do not have so many similarities to *Dukes*. As a result, courts have additional opportunities to distinguish cases when they believe certification is appropriate for a given class. Looking at the various ways in which courts have distinguished *Dukes* provides two insights into this strategic game. First, it offers a window into how "adventuresome" both plaintiffs and defendants are in extending legal precedent. Indeed, in this case, it is more likely that the defendants will be adventurous, seeking to extend the precedent, while the plaintiffs attempt to hold it to a stricter construction. Second, in certain cases, it can also show how a court, determined to certify a class, might maneuver around adverse precedent.

So how have courts actually distinguished *Dukes*? What follows is not an exhaustive list, but a brief categorization of the various ways in which courts have found the opinion inapplicable to the lawsuits before them. As one might expect, some of these reasons may prove more convincing than others.

In some cases, courts have simply noted that *Dukes* is not applicable to the kind of litigation or procedural posture at issue. A large number of the opinions distinguishing *Dukes* are Fair Labor Standards Act (FLSA) collective actions, which follow different procedural rules than class actions.[44] Similarly, some courts have refused to apply *Dukes* to substantive motions that have nothing to do with certifying a class, such as a motion to dismiss.[45] Some courts have also refused to

44. *See, e.g.*, Troy v. Kehe Food Distribs., Inc., 276 F.R.D. 642, 651 (W.D. Wash. 2011) ("Kehe argues that the principles set forth in *Wal-Mart Stores, Inc. v. Dukes* preclude going forward with this case as a collective action. The court is not convinced." (citations omitted)); Karlo v. Pittsburgh Glass Works, LLC, No. 10-1283, 2012 U.S. Dist. LEXIS 101092, at *7 n.2 (W.D. Pa. July 20, 2012) (noting that *Dukes* does not apply to FLSA collective actions); Moore v. Publicis Groupe SA, No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 92675, at *37 (S.D.N.Y. June 29, 2012) ("[M]ost federal courts in New York have held that *Dukes* does not heighten the standard in section 216(b) cases . . . ."); Romero v. Fla. Light & Power Co., No. 6:09-cv-1401-Orl-36GJK, 2012 U.S. Dist. LEXIS 76146, at *15 (M.D. Fla. June 1, 2012) ("*Dukes* cannot fairly be interpreted to foreclose the use of representative testimony in FLSA collective actions."); Lagasse v. Flextronics Am. LLC, No. 11-445ML, 2012 U.S. Dist. LEXIS 86343, at *10 (D.R.I. June 1, 2012) ("[*Dukes*] is not directly applicable to FLSA collective actions."); Butler v. DirectSAT USA, LLC, No. DKC 10-2747, 2012 U.S. Dist. LEXIS 50119, at *18 n.9 (D. Md. Apr. 10, 2012) (same); Chapman v. Hy-Vee, Inc., No. 10-CV-6128-W-HFS, 2012 U.S. Dist. LEXIS 43829, at *9 (W.D. Mo. Mar. 29, 2012) (same); Richardson v. Wells Fargo Bank, N.A., No. 4:11-cv-738, 2012 U.S. Dist. LEXIS 12911, at *9 n.8 (S.D. Tex. Feb. 2, 2012) (same); Pippins v. KPMG LLP, No. 11 Civ. 377, 2012 U.S. Dist. LEXIS 949, at *19–20 (S.D.N.Y. Jan. 3, 2012) (same); Rindfleisch v. Gentiva Health Servs., No. 1:10-cv-3288-SCJ, 2011 U.S. Dist. LEXIS 154667, at *12 (N.D. Ga. Dec. 29, 2011) (same); Sliger v. Prospect Mortg., LLC, No. CIV. S-11-465-LKK/EFB, 2011 U.S. Dist. LEXIS 94648, at *7–8 n.25 (E.D. Cal. Aug. 24, 2011) (same).

45. *See* Winfield v. Citibank, N.A., 842 F. Supp. 2d 560, 575 (S.D.N.Y. 2012) (deferring a decision on whether *Dukes* applied to a standing argument until after determination of class certification); Schulken v. Wash. Mut. Bank, No. 09-CV-2708-LHK, 2011 U.S. Dist. LEXIS 117280, at *16 n.2 (N.D. Cal. Oct. 11, 2011) (denying a motion to dismiss in part because *Dukes*

apply *Dukes* to motions to strike class allegations.[46] The existence of these opinions indicates a certain level of adventurousness by defendants, who clearly sought to extend what they viewed as a favorable ruling into other areas of aggregate litigation.

Many courts distinguish *Dukes* on the ground that the proposed classes before them could still meet its (arguably heightened) commonality requirement. In some cases, this is because of some identifiable common policy that applied uniformly to the class members, in contrast to the discretion Wal-Mart managers exercised in promotion decisions.[47] A significant minority of decisions that distinguish *Dukes*

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does not apply to a mootness analysis); Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(WCF), 2011 U.S. Dist. LEXIS 73200, at *17–18 n.4 (S.D.N.Y. July 7, 2011) ("This authority may be relevant to the substance of the plaintiff's pattern or practice claim and her ability to obtain certification of a class under Rule 23, but it is not pertinent to her ability or right to bring a pattern or practice claim to the court.").

46. *See* Barghout v. Bayer Healthcare Pharm., No. 11-cv-1576(DMC)(JAD), 2012 U.S. Dist. LEXIS 46197, at *29 (D.N.J. Mar. 30, 2012) (noting that *Dukes* does not apply to a motion to strike class allegations); Woodall v. DSI Rental, Inc., No. 11-2590, 2012 U.S. Dist. LEXIS 42826, at *25 (W.D. Tenn. Mar. 27, 2012) (refusing to apply *Dukes* to a motion to strike class allegations because "[t]he standards for class certification and motions to dismiss implicate different questions of law and fact"); Covillo v. Specialtys Cafe, No. C-11-594, 2011 U.S. Dist. LEXIS 147489, at *16 (N.D. Cal. Dec. 22, 2011) (same).

47. *See* Gray v. Steve Wall & Assocs. LLC, 444 Fed. App'x 698, 701 (4th Cir. 2011) ("It is this uniform distribution practice which distinguishes *Wal-Mart.*"); Williams v. Wells Fargo Bank, N.A., 280 F.R.D. 665, 672 (S.D. Fla. 2012) ("Here, the ultimate question of liability is whether the force-placed insurance premiums charged to homeowners were unlawfully inflated and excessive."); Connor B. v. Patrick, 278 F.R.D. 30, 34 (D. Mass. 2011) ("Unlike the plaintiffs in *Wal-Mart*, who did not allege any specific, overarching policy of discrimination, Plaintiffs have alleged specific and overarching systemic deficiencies within DCF that place children at risk of harm."); Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 172 (S.D.N.Y. 2011); Logory v. Cnty. of Susquehanna, 277 F.R.D. 135, 143 (M.D. Pa. 2011) ("Unlike *Dukes*, where commonality was destroyed where there was no 'common mode of exercising discretion that pervade[d] the entire company,' here there is a solid policy that applied directly to all potential class members." (alteration in original)); *In re* U.S. Foodservice Inc. Pricing Litig., Nos. 3:06-cv-1657(CFD), 3:07-md-1894(CFD), 3:08-cv-4(CFD), 3:08-cv-5(CFD), 2011 U.S. Dist. LEXIS 138238, at *26 n.16 (D. Conn. Nov. 29, 2011) ("Unlike the plaintiffs in *Wal-Mart Stores*, plaintiffs here are all affected by the same practice of the defendant, namely its use of the VASPs to calculate the cost component of the cost-plus markup price."); Churchill v. Cigna Corp., No. 10-6911, 2011 U.S. Dist. LEXIS 90716, at *12 (E.D. Pa. Aug. 12, 2011) ("*Dukes* is inapposite. . . . Cigna indisputably has a national policy of denying coverage for ABA to treat ASD."); Stinson v. City of New York, No. 10 Civ. 4228, 2012 U.S. Dist. LEXIS 100634, at *7 (S.D.N.Y. July 19, 2012); *Chen-Oster*, 2012 U.S. Dist. LEXIS 99270, at *6–7 ("What was missing in *Dukes*, but is present here, are 'specific employment practice[s]' (the 360-degree review, for example) that 'tie all of [Plaintiffs'] claims together.'" (alteration in original)); Spurlock v. Fox, No. 3:09-cv-756, 2012 U.S. Dist. LEXIS 59123, at *12–13 (M.D. Tenn. Apr. 27, 2012) ("Whereas [*Dukes*] involved the exercise of discretion in each of the allegedly unlawful employment decisions, this case involves allegations of the same conduct toward all the class members . . . ."); Chieftain Royalty Co. v. XTO Energy, Inc., No. CIV-11-29-FHS, 2012 U.S. Dist. LEXIS 51593, at *18 (E.D. Okla. Apr. 12, 2012) ("The discretion afforded Wal-Mart supervisors with respect to employment decisions stands in stark contrast to a uniform policy employed by an oil and gas exploration company for the payment of royalties.").

on the basis of a common policy are FLSA class actions, which distinguish *Dukes* on the ground that, unlike the decentralized decision making behind Wal-Mart's hiring and promotion practices, there were individual wage policies that affected all employees uniformly.[48] In other cases, they have identified some other common features that they held would yield common answers for all class members, such as a common right of way that implicates all class members' properties,[49] an alleged common defect,[50] or (under certain circumstances) a common misrepresentation.[51]

In fact, the *Dukes* opinion has already spurred innovation in the treatment of common issues. Rule 23(c)(4) authorizes courts to cer-

48. *See* Ross v. RBS Citizens, N.A., 667 F.3d 900, 909 (7th Cir. 2012) ("[B]oth classes maintain a common claim that Charter One broadly enforced an unlawful policy denying employees earned-overtime compensation. This unofficial policy is the common answer that potentially drives the resolution of this litigation."); Espinoza v. 953 Assocs. LLC, 280 F.R.D. 113, 130 (S.D.N.Y. 2011) ("The facts and circumstances of *Wal-Mart* are very different from the instant action. Here, Plaintiffs allege that Defendants failed to pay minimum wages and overtime compensation as a result of certain policies and practices."); Eddings v. Health Net, Inc., No. CV 10-1744-JST(RZx), 2011 U.S. Dist. LEXIS 115989, at *2–3 (C.D. Cal. July 27, 2012) ("Because Defendant subjected each of the purported class members to the same timekeeping and rounding policies and, moreover, the legality of those policies represents a common contention that is central to the class members' rounding claims, Plaintiff's rounding claim satisfies *Dukes* and is proper for classwide resolution."); Bouaphakeo v. Tyson Foods, Inc., No. 5:07-cv-4009-JAJ, 2011 U.S. Dist. LEXIS 95814, at *11 (N.D. Iowa Aug. 25, 2011) ("[U]nlike *Dukes*, the instant case involves a company wide compensation policy that is applied uniformly throughout defendant's entire Storm Lake facility."); Ugas v. H&R Block Enters., LLC, No. CV 09-6510-CAS(SHx), 2011 U.S. Dist. LEXIS 86769, at *30 (C.D. Cal. Aug. 4, 2011) ("Unlike in *Wal-Mart*, here plaintiffs have shown that there was 'a common mode of exercising discretion that pervades the entire company,' at least with respect to the Pomona district.").

49. Geneva Rock Prods., Inc. v. United States, 100 Fed. Cl. 778, 786 (2011) ("Unlike *Wal-Mart*, commonality or justiciability is not really at issue. The complaint alleges a single NITU covering a 3.23-mile railroad right-of-way, which arguably effected a taking for all individuals with underlying or abutting property.").

50. Cambridge Lane, LLC v. J-M Mfg. Co., No. CV 10-6638-GW(VBKx), 2012 U.S. Dist. LEXIS 43533, at *7–8 (C.D. Cal. Mar. 15, 2012) (noting that *Dukes* was inapplicable because of a common question involving allegedly defective pipe). While the court discusses this in part as a labeling issue, the plaintiffs' theory is that the pipe was "defective" because it was not fit for the intended purpose. Specifically, they alleged that the pipe "could no longer meet the applicable tensile strength requirements."

51. *In re* Ferrero Litig., 278 F.R.D. 552, 558 (S.D. Cal. 2011) ("In this case, the claims made on behalf of the proposed class are based on a common advertising campaign . . . ."); Public Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co., 277 F.R.D. 97, 106 (S.D.N.Y. 2011) ("The common questions presented by this case—essentially, whether the Offering Documents were false or misleading in one or more respects—are clearly susceptible to common answers."); Johnson v. Gen. Mills, Inc., 276 F.R.D. 519, 521 (C.D. Cal. 2011) ("Here there is a unitary message, which Mr. Johnson claims is fraudulent, that *Wal-Mart* lacked . . . ."); Brinker v. Chi. Title Ins. Co., No. 8:10-cv-1199-T-27AEP, 2012 U.S. Dist. LEXIS 44486, at *3 (M.D. Fla. Mar. 30, 2012) ("This action is quite the opposite. The proposed class members are parties to identical closing protection letters issued by Defendants.").

tify "issues classes" under certain circumstances.[52] The Rule had long lain unapplied. However, in the wake of *Dukes*, the Seventh Circuit, in an opinion authored by Judge Richard Posner, used it to address common issues raised in a Title VII disparate impact case. The opinion, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, reversed the denial of certification under Rule 23(b)(2) of a class of African-American brokers who claimed disparate impact discrimination in pay and promotion.[53] The brokers had specifically challenged two policies at Merrill Lynch: "teaming," which allowed brokers to self-select into teams, and "account distribution," in which brokers would compete for a departing broker's accounts.[54] While Judge Posner agreed that, under *Dukes*, the court could not certify simultaneous claims for an injunction and backpay under Rule 23(b)(2), he instructed the lower court to certify a Rule 23(b)(2) class only on the issue of disparate impact discrimination pursuant to Rule 23(c)(4).[55] While no courts have yet followed *McReynolds* in certifying an issues-only class, Judge Posner's opinion now provides a blueprint to anyone who may wish to follow that course.[56]

Some courts have distinguished *Dukes* when certifying a class seeking monetary relief under Rule 23(b)(2). In some cases, they have held that the relief sought, while not strictly injunctive, was not precluded by the holding in *Dukes*.[57] In others, they have allowed more innovative structures, such as certifying the class under Rule 23(b)(2), but also certifying a subclass seeking monetary relief under Rule 23(b)(3).[58]

In addition, several courts have refused to follow Justice Scalia's dictum, which stated that a full *Daubert* inquiry is likely necessary at

52. FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").

53. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012).

54. *Id.* at 488–89.

55. *Id.* at 490–91.

56. It is unlikely that plaintiffs will choose this strategy as a primary goal. Declaratory relief is notoriously hard to value, and a plaintiffs' attorney would likely need a relatively large inventory of potential plaintiffs to shop the declaration of law around on its own. At that point, it may be more cost effective to simply pursue the individual lawsuits, using the weight of verdicts as a tool to negotiate a settlement later in the process.

57. Donovan v. Philip Morris USA, Inc., No. 06-12234-DJC, 2012 U.S. Dist. LEXIS 37974, at *27 (D. Mass. Mar. 21, 2012) (noting that *Dukes* did not preclude medical monitoring as equitable relief); Gilmer v. Alameda-Contra Costa Transit Dist., No. C 08-5186, 2011 U.S. Dist. LEXIS 126845, at *21 (N.D. Cal. Nov. 2, 2011) ("*Dukes* does not stand for the proposition that an employer is entitled to an individualized determination of an employee's claim for back pay in all instances in which a claim is brought as a collective or class action." (citation omitted)).

58. *See* Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 428 (6th Cir. 2012).

the class certification stage. Most notably, the Eighth Circuit has held that a "tailored" *Daubert* inquiry might suffice instead of a full inquiry.[59] Similarly, at least one court has distinguished another of Justice Scalia's dicta, which discouraged the use of aggregative statistics in class litigation as "Trial by Formula."[60]

Other courts have focused on some more esoteric aspects of the *Dukes* opinion. Several courts have distinguished *Dukes* based on the sheer size of the class.[61] Additional courts have focused on *Dukes*'s discussion of specifics about the class action against Wal-Mart, such as the employer's state of mind.[62]

These various distinctions tell us several things. First, they show that defendants became emboldened by *Dukes*: they took what they viewed as a favorable holding and tried to apply it to similar, but not identical, procedural devices, such as the FLSA collective action. Defendants also tried to stop some class actions at early stages, either by moving to dismiss cases on standing grounds, or moving to strike class

59. *In re* Zurn Plumbing Prods. Liab. Litig., 644 F.3d 604, 612 (8th Cir. 2011); *see also* Behrend v. Comcast Corp., 655 F.3d 182, 204 n.13 (3d Cir. 2011). In February 2013, the Supreme Court granted certiorari in *Behrend* to determine the level of scrutiny expert opinions should receive at class certification. *See* Comcast Corp. v. Behrend, No. 11-864, 2012 WL 113090 (U.S. June 25, 2012). The Court determined that the expert testimony question was not properly before it because Comcast had not objected to the admission of the expert report below. Comcast Corp. v. Behrend, No. 11-864, 2013 U.S. LEXIS 2544, *10 n.4 (U.S. Mar. 27, 2013).

60. *See In re* TFT-LCD Antitrust Litig., MDL No. 1827, 2012 U.S. Dist. LEXIS 9449, at *47 (N.D. Cal. Jan. 26, 2012) (noting that the "Trial by Formula" prohibition does not apply to antitrust damages).

61. Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(JCF), 2012 U.S. Dist. LEXIS 99270, at *8–9 (S.D.N.Y. July 17, 2012) ("*Dukes* is distinguishable in another way. Time after time the Supreme Court circled back to the issue of scale. . . . Not so [for] Plaintiffs in this case. Plaintiffs do not number in the millions . . . ."); Cronas v. Willis Grp. Holdings, Ltd., No. 06 Civ. 15295(RMB), 2011 U.S. Dist. LEXIS 122736, at *9 (S.D.N.Y. Oct. 18, 2011) ("Very much unlike *Wal-Mart*, where the class had 1.5 million members and 3,400 store locations were involved, the Cronas class of 317 officer-level women were all employed at a single location . . . ." (citation omitted)); Delagarza v. Tesoro Ref'g & Mktg. Co., No. C-09-5803, 2011 U.S. Dist. LEXIS 101127, at *26 (N.D. Cal. Sept. 8, 2011) ("The instant case stands in contrast to the putative class in *Dukes*. Here, the purported class members all work at the same facility.").

62. Gray v. Golden Gate Nat'l Rec. Area, 279 F.R.D. 501, 518 (N.D. Cal. 2011) ("Since Rehabilitation Act claims do not require proof of the intent behind the alleged barriers, . . . the Title VII analysis in [*Dukes*] is not closely on point."); Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 171–72 (S.D.N.Y. 2011); Geneva Rock Prods., Inc. v. United States, 100 Fed. Cl. 778, 786 (2011) ("Unlike *Wal-Mart*, commonality or justiciability is not really at issue. The complaint alleges a single NITU covering a 3.23-mile railroad right-of-way, which arguably effected a taking for all individuals with underlying or abutting property."); Madanat v. First Data Corp., No. CV 11-364(LDW)(ETB), 2012 U.S. Dist. LEXIS 99390, at *15 (E.D.N.Y. May 3, 2012) ("This case is distinguishable from *Dukes* because individual inquiries probing defendants' motivations are both unnecessary and irrelevant."); Driver v. Appleillinois, LLC, No. 06 C 6149, 2012 U.S. Dist. LEXIS 27659, at *6–7 (N.D. Ill. Mar. 2, 2012) ("Unlike a Title VII claim, the answer to that question does not involve probing into the motive or intent on the part of any defendant.").

allegations. In general, these proposed expansions of the scope of the *Dukes* opinion did not meet with success.[63] Second, the distinctions show that plaintiffs have made (and courts have accepted) numerous arguments to distinguish the Supreme Court's rulings in *Dukes*. The most successful arguments, those that will likely shape future class action complaints, have focused on explicit common policies as the "glue" that binds the class together. Finally, these reactions show that courts still exhibit a range of attitudes toward class actions, ranging from adopting *Dukes* uncritically to contradicting seemingly clear statements in the opinion.

After reviewing the reactions to *Dukes*, it is clear that, while the decision has had a definite effect on the certification strategy of various parties, it has not led to the demise of the class action, or even a reduction in employment class actions. Instead, it has led plaintiffs to frame their allegations in terms of a single policy or practice that applies to the entire class. In fact, this framing is not new; many successful plaintiffs framed their arguments in support of certification in this way even before the *Dukes* opinion.[64]

V. PRE-*DUKES* DOCTRINAL DRIFT IN COMMONALITY AND INJUNCTIVE RELIEF

Historically, there have been a limited number of turning points in the forty-six years of modern class action practice. There are three primary sources of large-scale changes to class action practice: (1) the amendments to Rule 23; (2) statutory enactments; and (3) Supreme Court rulings. Amendments to Federal Rules of Civil Procedure are proposed by the Judicial Conference of the United States, which meets annually to consider recommendations "to promote uniformity of management procedures and the expeditious conduct of court business."[65] In other words, to amend Rule 23, one must convince enough judges of the necessity of the amendment that their representatives will reach a working consensus at one of the Judicial Conferences.

63. This is not to say that such tactics could *never* succeed. *See* Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 948 (6th Cir. 2011) (affirming the striking of class allegations and citing *Dukes* in support of the proposition that "[w]here and when featured providers offered discounts is a prototypical factual issue that will vary from place to place and from region to region").

64. *See, e.g.*, Gintis v. Bouchard Transp. Co., 596 F.3d 64, 67 (1st Cir. 2010) (affirming certification of an environmental class action because a defendant's uniform opposition to the admissibility of its own records created a dispositive common issue); Daffin v. Ford Motor Co., 458 F.3d 549, 553 (6th Cir. 2006) ("The question that forms the basis for Ford's argument is one of contract interpretation: whether Ford's express warranty promises to cover the alleged defect in the throttle body assembly even if no sticking occurs during the warranty period. This is an issue that can be decided on the merits so as to bind both Ford and the class.").

65. 28 U.S.C. § 331 (2006).

Consequently, as one might imagine, there have been a limited number of amendments to Rule 23. Table 1 summarizes these amendments.

TABLE 1: AMENDMENTS TO RULE 23

YEAR	AMENDMENT
1966	Introduces Rule 23(b)(3) opt-out classes; "modern" era of class actions begins.
1987	Makes technical amendments to Rule 23.
1998	Adds Rule 23(f), allowing for interlocutory appeal of certification decisions.
2003	Codifies practice as evolved.
2007	Simplifies text.
2009	General change to timing in rules: 10 days becomes 14 days.

Some of these amendments—like those in 1987 and 2007—have had little effect on class action practice. Others, like the 1966 amendments, the 1998 introduction of Rule 23(f), and several of the changes in 2003, have had immediate and far-reaching impacts. For example, Rule 23(f) has led to the development of a larger body of federal class action opinions. Similarly, the more stringent requirements for orders certifying classes that were introduced in 2003 have led gradually to caselaw that guides a court in conducting its "rigorous analysis."[66]

The second source of major change in class action law is statutory enactment. The two most significant statutes affecting class actions that Congress has passed are the Private Securities Litigation Reform Act in 1995[67] and the Class Action Fairness Act in 2005.[68] While these are the two most influential statutes, various parties often attempt to influence class action practice: the most recent proposal for statutory change came from Senator Al Franken, who offered a bill that would specifically reverse several of the holdings in *Dukes*.[69] Changing class action law through legislation, however, tends to be a long and unpredictable process.

Finally, changes in class action practice have come from the U.S. Supreme Court. Once again, however, there are a limited number of opinions that significantly affect class action practice. This makes

66. *See, e.g.*, Wachtel v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 185 (3d Cir. 2006); Ross v. RBS Citizens, N.A., 667 F.3d 900, 905 (7th Cir. 2012).

67. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 109-67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 77z-1 (2006)).

68. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d) (2006)).

69. *See* The Equal Opportunity Employment Restoration Act of 2012, S. 3317, 112th Cong. § (2)(b) (2012) ("The purpose of this Act is to restore employees' ability to challenge, as a group, discriminatory employment practices, including subjective employment practices.").

sense: before Rule 23(f) was enacted, the Court would only have granted certiorari for disputes arising from final judgments; after Rule 23(f), an appellant must convince an appellate court to essentially "grant cert"[70]—a rare occurrence at best—and then possibly repeat the process with the Supreme Court.

TABLE 2: SIGNIFICANT SUPREME COURT RULINGS

YEAR	CASE	PRIMARY HOLDING
1974	*Eisen v. Carlisle & Jacquelin*[71]	Notice must be sent to all class members who can be identified through reasonable effort, with cost borne by Plaintiffs. Court cannot base certification decision on opinion of merits.
1982	*Gen. Tel. Co. of the Sw. v. Falcon*[72]	Class representative must be member of class.
1988	*Basic Inc. v. Levinson*[73]	Plaintiffs may invoke presumption of reliance for securities cases involving efficient capital markets.
1997	*Amchem Prods., Inc. v. Windsor*[74]	Clarifies standards for typicality and predominance; clarifies role of Rule 23 analysis in settlement approval.
1999	*Ortiz v. Fibreboard Corp.*[75]	Clarifies standard for Rule 23(b)(1) limited fund classes.
2011	*Wal-Mart Stores, Inc. v. Dukes*[76]	Common questions require common answers and Rule 23(b)(2) not available for significant monetary relief.
2011	*AT&T Mobility LLC v. Concepcion*[77]	Holds arbitration clauses not *per se* unconscionable in class actions, even if classwide arbitration not possible.
2011	*Smith v. Bayer Corp.*[78]	Denial of certification carries no collateral estoppel effect.
2011	*Erica P. John Fund, Inc. v. Halliburton Co.*[79]	Plaintiff does not need to prove loss causation at the class certification stage.

However, the lack of major turning points does not mean that the law does not change over time. It just changes incrementally through the application of years of opinions within a given jurisdiction.[80] This

70. FED. R. CIV. P. 23(f) advisory committee's note ("The court of appeals is given unfettered discretion to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."); *see also* Barry Sullivan and Amy Kobelsku Trueblood, *Rule 23(f): A Note on Law & Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008).

71. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

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

73. *See* Basic Inc. v. Levinson, 485 U.S. 224 (1988).

74. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

75. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

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

77. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

78. *See* Smith v. Bayer Corp., 131 S. Ct. 2368 (2011).

79. *See* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011).

80. For a description of one mechanism for this incremental change, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).

description of legal change—as incremental over time and dependent to some extent on previous rulings—is familiar to many legal scholars. Yet it does not fully explain how changes in the law occur. And this is where both progressive and reform arguments often go awry: each of them tends to assume a single, preferred direction to legal change (sometimes called a "normative" direction), from which any deviation may prove disastrous. But that is not how litigation actually works in a common law system. To be sure, judicial opinions rely on precedent, and judges cannot escape their preconceptions, political or otherwise.[81] Both of these forces can create inertia in a given direction: a judge surrounded by a given set of precedent will likely absorb the underlying logic of those cases, and will likely rule similarly, perpetuating a "direction" to the law.

So what would account for legal change, then? Another input to the process exists: the litigants themselves. Commentators tend to consider legal education to be effective at inculcating certain values in lawyers, among them a respect for the rule of law. But many ignore the truth found in conventional wisdom about lawyers, namely that for a litigator a rule is often just something to be argued around.[82] And, throughout its history, the class action has attracted particularly "adventuresome" lawyers.[83] As a result, despite apparently clear doctrines surrounding commonality and the availability of injunctive relief that existed in 1966, lawyers continued to make arguments to expand the meaning of a "common issue" to attach certain kinds of "equitable" monetary relief to the injunctions allowed under Rule 23(b)(2). Viewed in this context, the *Dukes* ruling was not so much a rollback but rather a course correction, reining in doctrines that had drifted too far from their original justifications.

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81. RICHARD A. POSNER, HOW JUDGES THINK 68–73 (2008); *see also* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5, 17 (2007) (noting that judges tend to be intuitive decision makers).

82. *See, e.g.*, AMBROSE BIERCE, THE DEVIL'S DICTIONARY 187 (1911) ("LAWYER, *n.* One skilled in circumvention of the law."). For a more nuanced discussion, see WENDEL, *supra* note 20, at 117 ("Lawyers know that no matter how clear a rule appears to be, there will be some exploitable ambiguity, some room for manipulation.").

83. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617–18 ("In the decades since the 1966 revision of Rule 23, class action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one.").

VI. COMMON QUESTIONS HAVE ALWAYS REQUIRED COMMON ANSWERS

The *Dukes* formulation of commonality quotes the late Professor Richard Nagareda.[84] Professor Nagareda, for all his undeniable insight, did not conjure this "common answers" standard from thin air.[85] Instead, the "common answers" standard reflected years of research into how courts handled class actions, as well as delving into how courts treated the issue of common questions and common answers.[86]

In fact, courts have always required class actions to provide common answers. This standard arose as a practical matter, not only through the predominance requirement of Rule 23(b)(3), but also through the application of a "cohesiveness" requirement under Rule 23(b)(2).[87] The notion of common answers also arose in discussions of Rule 23(a)'s "typicality" requirement.[88] The reason these courts required class actions to provide "common answers" is not out of a systemic conspiracy to favor business interests over consumers; rather, in those rare instances when a class action proceeds to trial, resolving common issues is vital to keeping the trial on track and applying the verdict to absent class members.[89]

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84. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 101 (2009)).

85. *Cf.* Klonoff, *supra* note 14, at 50 ("Instead of looking at the traditional methods of interpreting Rule 23(a)(2), the majority relied heavily on a law review article by Professor Nagareda."). Professor Klonoff implies that the Court relied on Professor Nagareda instead of cases interpreting commonality. However, Professor Nagareda's article contains extensive analysis of various cases that interpret the commonality and predominance requirements. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 115–25 nn.62–95 (2009).

86. *See, e.g.*, Nagareda, *supra* note 85, at 115–25 nn.62–95.

87. *See* Shook v. Bd. of Cnty. Comm'rs, 543 F.3d 597, 604 (10th Cir. 2008) ("Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries, the absence of which can preclude certification."); *see also* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998) ("[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group . . . .").

88. *See* Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998) ("The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class."); *see also* Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 340 (4th Cir. 1998) (same). *Sprague v. General Motors Corp.* also contains a discussion of commonality that presages Professor Nagareda's work and the eventual reasoning in *Dukes*: "It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation." *Sprague*, 133 F.3d at 397. *Sprague*'s influence was felt primarily in rulings on typicality, however.

89. *See, e.g.*, Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1334–35 (11th Cir. 2010) (explaining that individualized inquiries into liability would have to be reopened for each class

Before the 1966 amendments to Rule 23, courts grappled with the same arguments about common questions and answers that they do today. For example, in *Baim & Blank, Inc. v. Warren-Connelly Co.*,[90] a trial court for the southern district of New York refused to allow an antitrust case to proceed as a class action, reasoning that there was no common question because different rights were at stake, different defendants were involved in the litigation, and the plaintiff sought different relief from each defendant.[91] Similarly, in *Zachman v. Erwin*, a trial court for the southern district of Texas faced a number of motions to dismiss in a securities class action.[92] The court held that the "action should be dismissed as a class action" because the plaintiffs could not adequately define the class.[93] However, the court's critique of the class definition sounds remarkably like the modern critique of the commonality requirement:

> Who is this amorphous group [the plaintiffs] claim to represent? All persons whom they claim defendants have "done wrong" in selling any of the securities involved? Though there may appear to be a common question of law or fact involved, such a question must be defined with clarity so that plaintiffs may be seen to "constitute a class" if they are going to maintain a class action under Rule 23(a)(3).[94]

In other words, a highly abstract common question would not be enough to justify class treatment.

VII. COURTS HAVE STRUGGLED OVER WHETHER TO APPLY RULE 23(b)(2) TO MONETARY RELIEF

The *Dukes* Court also carefully reviewed the use of Rule 23(b)(2) in certification. The central debate over when a class action may properly mix monetary and injunctive relief was long-standing. Indeed, Rule 23(b)(2) certification has never been as straightforward as some commentators seem to believe.[95] In addition to having to meet the

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member because a federal court hearing damages-phase arguments regarding the tobacco class action could only give estoppel effect to issues actually heard by a jury).

90. Baim & Blank, Inc. v. Warren Connelly Co., 19 F.R.D. 108 (S.D.N.Y. 1956).

91. *Id.* at 111.

92. Zachman v. Erwin, 186 F. Supp. 681 (S.D. Tex. 1959).

93. *Id.* at 688. Before the 1966 amendments took effect, there was no separate provision for certification of a class.

94. *Id.* at 688–89. Before 1966, Rule 23(a)(3) allowed for "spurious" class actions—essentially opt-in class actions for monetary damages or other individualized relief.

95. *See* Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How* Allison v. Citgo*'s Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELY J. EMP. & LAB. L. 405, 413 (2005) (arguing that the advisory committee anticipated the certification of some Rule 23(b)(2) class actions that included monetary relief); Neil K. Gehlawat, *Monetary Damages and the (b)(2) Class Action: A Closer Look at* Wal-Mart v.

four requirements of Rule 23(a), proponents of a Rule 23(b)(2) class action have long had to demonstrate that the proposed class was sufficiently cohesive to justify certification.[96]

In fact, historically it was quite clear that (1) Rule 23(b)(2) was reserved for cases of indivisible injunctive relief and (2) because of that indivisible nature, the class would have to be *at least* as cohesive as an opt-out class under Rule 23(b)(3). The advisory committee's notes to the 1966 amendments to Rule 23(b)(2) clearly emphasize indivisible injunctive relief: "Illustrative are various actions in the [civil rights] field where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration.*"[97] It would be hard to award individualized equitable relief—such as the backpay the *Dukes* plaintiffs sought—to class members one could not identify.

Ironically, the original decision to seek certification of injunctive-relief classes was itself a strategic decision. For example, if blacks who were excluded from segregated facilities sued only on their own behalf, they ran the risk of the facilities granting the individual plaintiffs access as an exception to the general policy of segregation.[98] As the advisory committee observed, the civil rights injunctions on which Rule 23(b)(2) was based did not concern themselves with any kind of individualized relief. To the contrary, they specifically sought relief on behalf of a class in which one could not identify the class members.

To take one example, *Potts v. Flax*[99] involved a pair of parents who challenged the system of compulsory racial segregation in the Fort Worth, Texas school system.[100] The school board argued that the case

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Dukes, 90 TEX. L. REV. 1535, 1552 (2012) ("[B]ackpay fits the remedial focus of (b)(2) class actions . . . .").

96. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248 (3d Cir. 1975) ("By its very nature, a (b)(2) class must be cohesive as to those claims tried in the class action.").

97. FED. R. CIV. P. 23(b) advisory committee's note (emphasis added).

98. *The Class Action Device in Antisegregation Cases*, Comment, 20 U. CHI. L. REV. 577, 578 (1953) ("One reason that the class action appears to be an advantageous method of securing relief for the group is that a favorable decree will in its terms apply to all members. A decree rendered in an action brought by an individual on grounds that he is being discriminated against will require the defendant to desist from such practices only where the individual is concerned. The position of the group will improve only if compliance with the decree by the defendant incidentally inures to the benefit of all members. But a decree rendered in a class action will benefit directly the group as a unit." (footnote omitted)).

This debate persists in Rule 23(b)(3) class actions for monetary relief. In the 2012–2013 Term, the Supreme Court will hear argument in *Genesis HealthCare Corp. v. Symczyk*, a FLSA collective action in which the defendant tried to moot the case by offering the named plaintiff the specific monetary relief he sought. Symczyk v. Genesis HealthCare Corp., 656 F.3d 189 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 26 (2012).

99. Potts v. Flax, 313 F.2d 284 (5th Cir. 1963).

100. Flax v. Potts, 204 F. Supp. 458, 460 (N.D. Tex. 1962).

should not be treated as a class action because it was possible to give the individual plaintiffs the relief they requested without dismantling the entire segregated school system.[101] The school board also pointed out that neither of the plaintiffs had specifically stated that they wished to bring the case as a class action.[102] The trial court was unimpressed, noting that, by 1962,

> the fundamental issue and the type of relief required to be granted in such cases have become so well defined that, when the cases are properly pleaded, they can be treated as class actions from the allegations in the complaint and the evidence as a whole satisfactory to the court establishing the requirements usually made in actions representative in form, without any direct statement by the plaintiffs that they are acting for the class.[103]

In other words, so long as the case was designated as a class action in the pleadings, the parties did not have to specifically provide additional evidence that classwide treatment was warranted.[104]

On appeal, the Fifth Circuit observed that, despite the testimony of the litigants, the relief they sought would necessarily require an injunction that would affect *all* residents of the school district, not just their own children.

> Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the system-wide policy of racial segregation. It sought obliteration of that policy of system-wide racial discrimination. In various ways this was sought through suitable declaratory orders and injunctions against any rule, regulation, custom or practice having any such consequences.[105]

It therefore affirmed the class treatment of the case. In other words, because the lawsuit was really aimed at the systemic problem of segregation, the relief the individual plaintiffs sought was indistinguishable from classwide relief.

The court also took a moment to commend the district court on its "detailed and able opinion," which "greatly simplifie[d] [its] treatment of the case."[106] This praise for a detailed lower court opinion carries

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101. *Potts*, 313 F.2d at 288.

102. *See Flax*, 204 F. Supp. at 463.

103. *Id.*

104. Because this was before the enactment of the "modern" Rule 23, there was no specific procedure for certifying a lawsuit as a class action.

105. *Potts*, 313 F.2d at 288–89 (footnote omitted).

106. *Id.* at 286 n.1. The lower court was able to write such a detailed opinion, in part, because it was considering the defendant's motion for a new trial, and could rely on the record from the previous trial. *See Flax*, 204 F. Supp. at 462. However, it also explicitly recognized that a detailed opinion would facilitate appellate review, and it clearly anticipated that the losing party

with it the seeds of what would later become the 2003 amendment's requirement for a clear order defining the class, claims, and defenses to be tried, as well as the *Dukes* majority's order to delve into the merits of a case when necessary. So, if Rule 23(b)(2) was clearly and historically meant to be applied in cases seeking indivisible injunctive relief, how did the dispute in *Dukes* come about?

In *Jefferson v. Ingersoll International, Inc.*,[107] Judge Easterbrook's opinion provided an abbreviated history of how plaintiffs came to seek money damages under Rule 23(b)(2) in Title VII class actions:

> For many years Rule 23(b)(2) was the normal basis of certification in Title VII pattern-or-practice cases. When this tradition took hold, however, Title VII allowed only equitable relief and therefore nicely fit the language of Rule 23(b)(2). True enough, class members could receive money, because back pay is a form of equitable relief, but this relief was treated as incidental to the injunction—and, because it was deemed equitable, neither side had a right to jury trial, so that handling the suit as a consolidated proceeding in equity did not threaten anyone's rights.
>
> After the Civil Rights Act of 1991, however, prevailing plaintiffs in a Title VII suit are entitled not only to equitable relief but also to compensatory and punitive damages. Either side may demand a jury trial if the plaintiff seeks damages. Because the representative plaintiffs seek both compensatory and punitive damages, Ingersoll contended that any class should be certified under Rule 23(b)(3) rather than Rule 23(b)(2). If the action proceeds under Rule 23(b)(3), then each member of the class must receive notice and an opportunity to opt out and litigate (or not) on his own behalf. If it proceeds under Rule 23(b)(2), by contrast, then no notice will be given, and no one will be allowed to opt out. Because of this difference, Rule 23(b)(2) gives the class representatives and their lawyers a much freer hand than does Rule 23(b)(3). Although class members who want control of their own litigation are vitally concerned about the choice, so too are defendants—for the final resolution of a suit that proceeds to judgment (or settlement) under Rule 23(b)(2) may be collaterally attacked by class members who contend that they should have been notified and allowed to proceed independently.[108]

From a brief review of the caselaw, it appears plaintiffs began to argue that, because the historical purpose of a Rule 23(b)(2) class action was to enforce civil rights, classes seeking monetary relief in civil

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would appeal. *Id.* ("The findings were intentionally prepared to give the appellate court the benefit of the inferences and conclusions drawn from the evidence by the judge who had all the advantages that went with the opportunity to see the witnesses and hear the evidence firsthand.").

107. Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 896 (7th Cir. 1999).

108. *Id.* (citations omitted).

rights cases could be certified under Rule 23(b)(2). In the development of Title VII, this appears to have been a historical accident. Soon after the 1966 amendments created Rule 23(b)(2), Title VII plaintiffs began seeking backpay as part of the relief to which they were entitled.[109] The first few courts to address this question did so in the context of Title VII rather than Rule 23(b)(2). Later, the Fifth Circuit explicitly held that backpay was not incompatible with certification under Rule 23(b)(2).[110]

A parallel line of cases, however, held to the text of Rule 23(b)(2). For example, in 1974, the eastern district of Pennsylvania was confronted with a civil rights class action in which the plaintiffs sought certification under both Rule 23(b)(2) and 23(b)(3).[111] The plaintiffs, individuals who had been arrested in Philadelphia and alleged they were illegally detained until their arraignment, argued that they primarily sought an injunction to cease Philadelphia's alleged policy of illegal detainment, but they also asked for damages that they said were "incidental" to their primary relief.[112]

The court decided to certify only the claims for injunctive relief. It reasoned that

> the issues involved in determining whether the plaintiff class is entitled to injunctive or declaratory relief are simply not the same issues involved in determining whether individual members of the class may be entitled to damages. There could be many reasons for denying injunctive or declaratory relief which ought not to have the effect of precluding particular class members from obtaining damages.[113]

The court also pointed out that, because the issues were different, it could apply different protections. For example, the court did not have to worry whether the class was strictly ascertainable if the only relief was an injunction.[114] Nor would it have to engage in the time-con-

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109. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) (allowing backpay as a remedy in a Title VII class action). Neither the district nor appellate court in the *Bowe v. Colgate-Palmolive Co.* litigation addressed the requirements of Rule 23 in making their decisions. *See* Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967); *Bowe*, 416 F.2d 711.

110. Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 256–58 (5th Cir. 1974).

111. *See* Rice v. City of Philadelphia, 66 F.R.D. 17, 19–20 (E.D. Pa. 1974).

112. *Id.*

113. *Id.* at 20.

114. *Id.* at 19 (noting that because the injunction did not require notice or an opt-out provision, "the precise definition of the class [was] relatively unimportant"). Most courts consider ascertainability an "implicit" requirement of Rule 23. *See* BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK § 2.1.2 (2d ed. 2012).

suming task of establishing that each class member's rights had been violated, as it would if it awarded damages.[115]

By the 1990s, the question of when injunctive relief was appropriate for Rule 23(b)(2) certification had become a recurring one, not just for Title VII cases but for environmental and products liability cases as well. Plaintiffs had learned that focusing on specific injuries—like nicotine addiction from tainted cigarettes—required individualized inquiries into causation, which made the certification of a class difficult.[116] Thus, in an effort to facilitate certifying classes, plaintiffs began to shy away from alleging specific injuries, focusing instead on "future injuries."[117] Doing so allowed them to request injunctive relief (to stop the future injury) while simultaneously seeking compensation for the exposure to increased risk. However, by the turn of the millennium, this too had become a risky strategy. Federal appellate courts proved suspicious of class actions that requested monetary relief while seeking certification under Rule 23(b)(2).[118] Nonetheless, plaintiffs continued to advance the argument, convincing a number of district courts to grant certification under Rule 23(b)(2),[119] and persuading the Second Circuit to adopt an "ad hoc" approach to reviewing 23(b)(2) certification.[120]

Thus, by the time *Dukes* was making its way through the appellate court system, the question of whether a court could certify a class for monetary damages under Rule 23(b)(2) had been fully vetted a number of times, and the results began to depend more on the individual predilections of the court hearing the case than any coherent line of cases.

The *Dukes* opinion is not the only modern announcement of the principle that Rule 23(b)(2) certification should only be available for indivisible injunctive relief. The American Law Institute, which has

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115. *Rice*, 66 F.R.D. at 20 ("In the present case, not only would the calculation of the amount of damages depend upon the individual facts of each claimant's case, but virtually all of the issues would have to be litigated individually in order to determine whether a particular alleged class member was entitled to any damages at all.").

116. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996) (reversing certification of a class action alleging that cigarettes caused nicotine addiction because it was "permeated with individual issues, such as proximate causation").

117. *See, e.g.*, Gates v. Rohm & Haas Co., 655 F.3d 255, 262–63 (3d Cir. 2011) (discussing the jurisprudence of "medical monitoring" relief for future medical injuries).

118. *See, e.g.*, Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998); *In re* St. Jude Med., Inc., 425 F.3d 1116, 1120 (8th Cir. 2005); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1196 (9th Cir. 2001).

119. *See, e.g.*, Agan v. Katzman & Korr, P.A., 222 F.R.D. 692, 701 (S.D. Fla. 2004); Orlowski v. Dominick's Finer Foods, Inc., 172 F.R.D. 370, 375 (N.D. Ill. 1997).

120. Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001).

published a number of influential Restatements of various areas of the common law, recently published its *Principles of the Law of Aggregate Litigation*. The treatise specifically discusses the importance of the "divisibility" of relief in class actions seeking injunctions.[121] Further, it specifically warns against improperly characterizing relief as "indivisible" in order to enable certification of an otherwise problematic class.[122]

VIII. CONCLUSION

Throughout this Article, I have argued that both the progressive and reform schools of class action commentary have allowed their "normative" goals to blind them to important facts about the development of class action doctrine and the importance of day-to-day litigation strategy to its development. What I propose is a more strategic model of interpreting class action doctrine. This model recognizes that class actions can be a useful tool for mass compensation in some cases and can also, under the right circumstances, deter corporate or governmental misbehavior. However, class actions are also prone to abuse. Therefore, during their existence, especially since the 1966 amendments to the Federal Rules of Civil Procedure, courts have tried to balance the benefits of class actions against the potential for their abuse.

Which is the more prevalent problem? Should we be more worried about the masses who go uncompensated or the plaintiffs' attorneys who enrich themselves by settling meritless but large-scale cases? The answer is "it depends." And what it depends on is the balance of doctrine and tactics at any given time.

One of the lessons from the strategic model is that arguments over certification do not go away. Instead, they come back in new, modified forms. There are, however, a limited number of debates over the aggregation of claims in class actions. Moreover, changing circumstances can lend old arguments new life. As a result, any evolution of class action law is a product of two forces: (1) trial and error on the part of the courts as they adapt to the changing circumstances of both fact and law and (2) the changing arguments of plaintiffs and defend-

121. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04 cmt. a ("Litigation seeking prohibitory injunctive or declaratory relief against a generally applicable policy or practice is already aggregate litigation in practice, because the relief that would be given to an individual claimant is the same as the relief that would be given to an aggregation of such claimants.").

122. *Id.* at cmt. b ("The court also should remain alert to the possibility that a given remedy might be mischaracterized as indivisible in an attempt to facilitate aggregation, even though the remedy, in practical operation, will function as a divisible one.").

ants as they, in turn, adapt to court holdings that become part of the legal terrain.

Finally, as we are well aware from our own exposure to them, lawyers attempt to argue around even clear rules when they can. As a result, *no* optimal equilibrium for class action litigation exists. Instead, there are only temporary equlibria, until the next lawyer comes along to advance either a new argument or a new application of the old rules that will favor her side. Seen in this light, the *Dukes* opinion is not so much a rollback as a correction in a constantly shifting game, in which both plaintiff and defense lawyers are arguing for new applications of class action rules.