

August 2012

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Recommended Citation

Hecker, Catherine R. (2012) "Wal-Mart Stores, Inc. v. Dukes: Taming “Too Big to Fail” Classes in the Battle Against Blackmail Actions and Frivolous Litigation," *Liberty University Law Review*: Vol. 7: Iss. 1, Article 4.
Available at: http://digitalcommons.liberty.edu/lu_law_review/vol7/iss1/4

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NOTE

WAL-MART STORES, INC. V. DUKES: TAMING “TOO BIG TO FAIL”[†] CLASSES IN THE BATTLE AGAINST BLACKMAIL ACTIONS AND FRIVOLOUS LITIGATION

Catherine R. Hecker^{††}

I. INTRODUCTION

Imagine you run a chain of grocery stores in a large Southern state. You have approximately 3,000 store locations in this state, and the state has fifty counties. Each store employs an average of more than 400 employees. One store employee in a mid-sized store complains of discrimination against her by one of the managers and files a lawsuit against you and your statewide grocery chain. In thirty-six different counties, at least one employee alleges that she has experienced discrimination at the hands of her local store management. While the allegations of discrimination occur on a case-by-case basis, many of these allegations are legitimate and are supported by expert testimony and anecdotal reports. You are an equal opportunity employer with a stated anti-discrimination employment policy. All fifty counties, including the fourteen counties with no allegations of discrimination, have banded together to bring suit against you as the employer. Do the employees in the fourteen counties with no allegations of discrimination have the right to sue you? Should thousands of employees in a county have the right to sue you if only one person in that county has alleged discrimination?

[†] The author decided to use the term coined from government bailouts of various corporations and financial institutions under the reasoning that, should these massive institutions fail, the whole of society would suffer. The author analogizes this term, and undoubtedly stretches this term, to certain class actions that become so large and foreboding that, regardless of the merits of the plaintiffs' claims, defendants' best option is to just pay them off rather than to endure lengthy and costly litigation. For an interesting article on the “bigness” of class actions, see Alexandra D. Lahav, *The Curse of Bigness and the Optimal Size of Class Actions*, 63 VAND. L. REV. EN BANC 117, 118 (2010).

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Alone, each employee has limited resources to pursue a lawsuit against your corporation—they are weak, you are strong, and the litigation will likely drain them and produce minimal results. Many times in cases like this, individual instances of discrimination go unchecked because of the sheer cost of asserting one's rights in court. Once banded together, however, these employees from the fifty counties pose a formidable courtroom threat of billions of dollars in damages to your business, regardless of whether the employees' claims actually have merit. In a lawsuit like this, you may never know if the claims of discrimination are legitimate because you will certainly be forced to settle before trial. What is the just outcome in a scenario like this?

This Note focuses on the seminal United States Supreme Court case articulating support for a heightened standard of Rule 23(a)(2) class action commonality: *Wal-Mart Stores, Inc. v. Dukes* (“*Wal-Mart v. Dukes*”).¹ In Part II, this Note examines the history of class action litigation and the background and holding of *Wal-Mart v. Dukes*.² In Part III, this Note analyzes what benefits and detriments *Wal-Mart v. Dukes* may have for future class action litigation within the categories of class action suits most commonly brought.³ Lastly, in Part IV, this Note reflects on the standard for Rule 23(a)(2) commonality and individualized monetary damages as stated in *Wal-Mart v. Dukes* and considers whether these standards will have a substantial effect on categories of future class action litigation.

II. BACKGROUND

A. Class Action Litigation

The class action lawsuit permits large groups of individuals to become a single litigative entity and seek a collective legal remedy. One or more class representatives litigate these individuals' interests, and all members are bound by the results of the litigation.⁴ While class actions are heavily criticized for inequities, such as “sweetheart settlements” and “blackmail

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

2. The focus of this Note is not to probe the merits of the case any further than what is appropriate at the stage of class action certification, but instead to delve into the why and how of the legal standard for commonality articulated in *Wal-Mart v. Dukes*.

3. The five categories of class actions this Note seeks to examine in light of *Wal-Mart v. Dukes* are Title VII, mass tort, securities, antitrust, and labor class actions.

4. See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION I (1987).

settlements,⁵ they also provide legal recourse for claimants with small monetary claims or limited financial resources because the class action pools the resources of other claimants with similar injuries.⁶ In these instances, to recognize individual litigants as a single litigative entity is to grant them a greater form of power than the individuals possessed alone.⁷ Since the beginning of American class action litigation, courts have struggled to fairly allocate the bargaining power between the classes and the parties opposing them.

B. History of Modern Class Action Litigation

Modern American class action litigation can be traced back to the nineteenth century, particularly to Justice Joseph Story's opinions and treatises on group litigation.⁸ At that time, the class action vehicle was used sparingly and was suitable only for equity actions where litigants shared a common interest in having the court issue an injunction.⁹ Not until 1937 did the United States Supreme Court officially set out the procedural guidelines for federal class representation established in the original Rule 23.¹⁰ It was the original Rule 23 that first permitted litigants to recover damages in a class action.¹¹ Many terms in the original Rule 23 proved to be obscure and uncertain—Rule 23 did not squarely address any notice requirements to non-parties and did not clearly assert the extent to which judgments were binding.¹² Then, in 1966, the Supreme Court approved the revision of the Federal Rules of Civil Procedure, which resulted in a major

5. David Rosenberg, *The Regulatory Advantage of Class Action*, in REGULATION THROUGH LITIGATION 29799 (W. Kip Viscusi ed., 2002) (defining “sweetheart settlements” as settlements in which class counsel compromises the class members’ interests in settling a meritorious claim for far less than it is worth, and “blackmail settlements” as settlements in which the class counsel threatens costly class action litigation, forcing the defendant to settle the claim for far more than it is actually worth).

6. YEAZELL, *supra* note 4, at 10–11; see also MARGARET C. JASPER, YOUR RIGHTS IN A CLASS ACTION SUIT 2–3 (2005) (providing a hypothetical scenario of a claimant monetary situation that exemplifies why class action suits aggregate many claims).

7. YEAZELL, *supra* note 4, at 10–11.

8. *Id.* at 220–21.

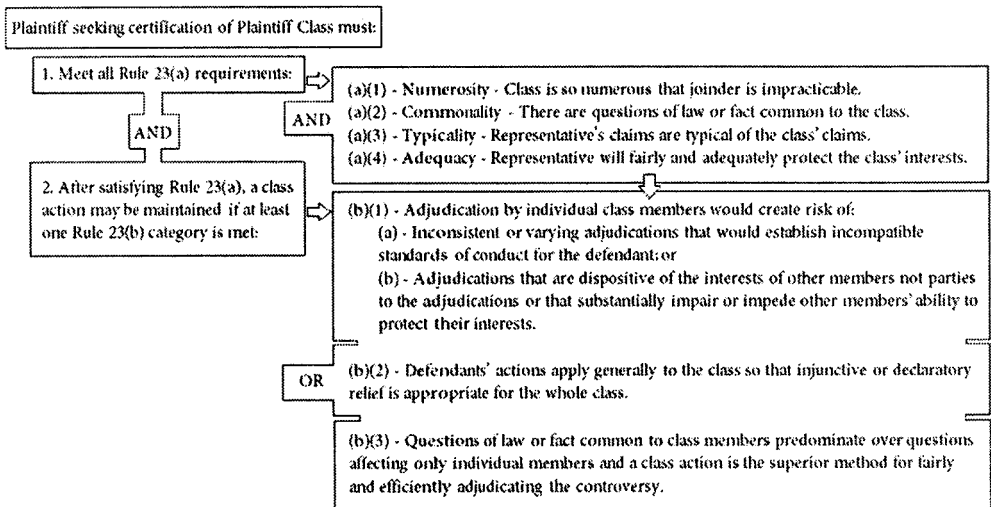
9. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1751, at 12 (3d ed. 2005).

10. See FED. R. CIV. P. 23 advisory committee’s note, 1937 Adoption, subdiv. (a).

11. *Id.*

12. See FED. R. CIV. P. 23(b)(2) advisory committee’s note, 1966 Amendment; 39 F.R.D. 69, 99 (1966).

overhaul of Rule 23 requirements¹³—the “true,” “hybrid,” and “spurious” class distinctions that the courts read into original Rule 23 were eliminated and replaced with new categories for litigation.¹⁴ Specifically, to achieve class certification, the revised Rule 23 mandates two requirements: all four of the Rule 23(a) requirements and at least one of the Rule 23(b) class categories must be met by the plaintiff class seeking certification.¹⁵ The Rule 23(a) and (b) requirements are laid out in the following chart:¹⁶



First, for a class to achieve certification in federal court, it must clear the hurdles of Rule 23(a): numerosity,¹⁷ commonality,¹⁸ typicality,¹⁹ and adequacy.²⁰ If any one of the Rule 23(a) hurdles is not cleared, class

13. FED. R. CIV. P. 23(b)(2) advisory committee's note, 1966 Amendment.

14. *Id.*; see also 7A WRIGHT ET AL., *supra* note 9, §§ 1752–53.

15. FED. R. CIV. P. 23(a) & (b).

16. The chart is the author's own creation and is a flowchart of how to approach Federal Rule 23(a) and (b) for class action certification. See FED. R. CIV. P. 23(a) & (b).

17. FED. R. CIV. P. 23(a)(1) (requiring that “the class is so numerous that joinder of all members is impracticable”).

18. FED. R. CIV. P. 23(a)(2) (requiring that “there are questions of law or fact common to the class”).

19. FED. R. CIV. P. 23(a)(3) (requiring that “the claims or defenses of the representative parties are typical of the claims or defenses of the class”).

20. FED. R. CIV. P. 23(a)(4) (requiring that “the representative parties will fairly and adequately protect the interests of the class”).

certification will be denied automatically.²¹ This Note focuses on the commonality requirement of Rule 23(a) because Rule 23(a) commonality was the “crux” of *Wal-Mart v. Dukes*.²² A class meets Rule 23(a)(2)’s standard for commonality when “there are questions of law or fact common to the class.”²³ In the employment discrimination class action case *General Telephone Co. of the Southwest v. Falcon*,²⁴ the Supreme Court held that a rigorous analysis must be conducted to ensure that the Rule 23 requirements are met.²⁵ Post-*Falcon*, the circuits have varied on the Rule 23(a)(2) commonality requirement—some circuits have liberally construed commonality to be sufficient so long as the proposed class contains some common question of law or fact,²⁶ while other circuits have adopted a more difficult standard for what is sufficient as a common question of law or fact.²⁷ The varying Rule 23(a)(2) standards throughout the circuits added

21. FED. R. CIV. P. 23(b) (stating that a class action categorized under Rule 23(b) cannot be maintained if all portions of Rule 23(a) are not satisfied).

22. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011).

23. FED. R. CIV. P. 23(a)(2).

24. 457 U.S. 147 (1982).

25. *Id.* at 160–61 (“[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”).

26. See *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (stating that the commonality requirement is applied “permissively”); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009) (stating that the commonality requirement is a “low hurdle”); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (stating that the commonality requirement is a “low bar”); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (holding that the test for commonality is “not demanding”); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (stating that commonality is “easily met”); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) (holding that the “threshold of ‘commonality’ is not high”); *Pichler v. UNITE*, 228 F.R.D. 230, 249 (E.D. Pa. 2005) (holding that the “commonality threshold is relatively low”); *Int’l Molders’ & Allied Workers’ Local 164 v. Nelson*, 102 F.R.D. 457, 463 (N.D. Cal. 1983) (stating that the Ninth Circuit’s standard for Rule(a)(2) commonality is a relaxed standard).

27. See *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 176 (3d Cir. 2009) (holding that this rigorous analysis may include a preliminary inquiry into the merits); *Trevizo v. Adams*, 455 F.3d 1155, 1163 (10th Cir. 2006) (holding a rigorous analysis standard for commonality and that the trial court did not abuse discretion in finding lack of commonality); see also *Garcia v. Johanns*, 444 F.3d 625, 632–33 (D.C. Cir. 2006); *Reeb v. Ohio Dep’t of Rehab. & Corr.*, 435 F.3d 639, 640 (6th Cir. 2006); *Cooper v. Southern Co.*, 390 F.3d 695, 712 (11th Cir. 2004), *overruled on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999).

another facet of risk to the class action process; *Wal-Mart v. Dukes* sought to clarify this commonality ambiguity.²⁸

Rule 23(a) requirements are necessary but not sufficient conditions for a class action.²⁹ In addition to fulfilling Rule 23(a), classes seeking certification must fall into one of the Rule 23(b) categories.³⁰ Generally, Rule 23(b)(1) stipulates that if there are inconsistent or varying adjudications, or if *res judicata* against non-parties would result from individual litigation, then a Rule 23(b)(1) class certification is appropriate.³¹ Rule 23(b)(2) applies to situations in which the defendant has treated the members of the class in an unlawful way so as to warrant an injunction or declaratory relief as a remedy.³² In Rule 23(b)(2) class litigation, money damages may be awarded in addition to an injunction or declaratory relief so long as the money damages are incidental.³³ Last of all, Rule 23(b)(3) functions like a “catch-all” category for all other types of class action litigation.³⁴ Rule 23(b)(3) requires (1) that the questions of law or fact common to class members must predominate over any questions affecting only individual members, and (2) that the class action is superior to other methods available to fairly and efficiently adjudicate the controversy.³⁵

While the main focus of this Note is Rule 23(a) and (b), when considering the dynamics of class action lawsuits, it is beneficial to consider Rule 23(f) and the reasons for its adoption in 1998. Rule 23(f) states that the “court of appeals may permit an appeal from an order granting . . . class-action certification under this rule.”³⁶ Because of the number of participants and the potential for large settlements, class action lawsuits are costly,

28. *Dukes*, 131 S. Ct. at 2550–51.

29. FED. R. CIV. P. 23(b)(2) advisory committee’s note, 1966 Amendment, subdiv. (a); 39 F.R.D. 69, 100 (1966).

30. See FED. R. CIV. P. 23(a) & (b).

31. See FED. R. CIV. P. 23(b)(1)(A), (B).

32. See FED. R. CIV. P. 23(b)(2).

33. *Dukes*, 131 S. Ct. at 2544 (stating that claims for money damages could be certified as part of a (b)(2) class as long as those claims did not predominate over the requests for declaratory and injunctive relief). *Wal-Mart v. Dukes* also stipulates that the monetary damages may not be individualized. *Id.* at 2557. This will be discussed at greater length in Part II.C.1.b.

34. Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 816 (2004) (“Because 23(b)(3) is a kind of ‘catch-all’ for more ambiguous class claims, the Rule imposes a number of additional procedural hurdles on the 23(b)(3) class.”).

35. FED. R. CIV. P. 23(b)(3).

36. FED. R. CIV. P. 23(f).

burdensome, and risky for both plaintiffs and defendants.³⁷ Prior to the addition of Rule 23(f), if a class achieved certification in the district court, then many defendants were especially eager to settle.³⁸ Similarly, if a plaintiff class was denied certification, it was forced to seek appellate review “by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation.”³⁹ Class certification is a powerful event for plaintiffs, and in many cases it is a means to settlement; consequently, the Advisory Committee and Supreme Court deemed Rule 23(f) necessary to prevent the inequities that stem from a non-appealable decision of class certification.⁴⁰ To quote one class action scholar, “express authorization for appeals of class certification determinations . . . stands as recognition that certification is no mere preliminary, procedural ruling.”⁴¹

C. *The History of Wal-Mart v. Dukes*

Wal-Mart Stores, Inc. (“Wal-Mart”) is the largest private employer in America and is comprised of 3,400 stores that employ more than one million people.⁴² Pay and promotions at Wal-Mart are delegated to the local managers and exercised in a subjective manner within certain pre-set ranges.⁴³ Wal-Mart does have certain objective criteria for promotion opportunities, but once objective factors are met, promotions are left to the local managers’s subjective discretion.⁴⁴ The crux of the plaintiffs’s class action claim is Wal-Mart’s corporate practice of deferring employment decisions to local managers.⁴⁵

37. See Rosenberg, *supra* note 5, at 297.

38. FED. R. CIV. P. 23(f) advisory committee’s note, 1998 Amendments, subdiv. (f). The Advisory Committee Notes state that granting certification may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. *Id.*

39. *Id.* (positing that wrongful denial of a class certification and consequent litigation merely to access the courts of appeals is a harsh burden for an individual claimant to bear).

40. *Id.*

41. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 98–99 (2009).

42. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546 (2011).

43. *Id.* at 2547.

44. *Id.*

45. *Id.* at 2548.

The plaintiff class seeking certification consists of approximately 1.5 million women; the class is represented by former and current Wal-Mart employees Betty Dukes, Christine Kwapnoski, and Edith Arana.⁴⁶ Betty Dukes has been an employee of Wal-Mart since 1994 and claimed that she was paid less than male employees with less seniority performing the same job and that she was unjustly disciplined by local managers for making complaints against them, while male employees were not disciplined.⁴⁷ Christine Kwapnoski has been an employee of Wal-Mart since 1986⁴⁸ and claimed that she experienced male managers who screamed at female employees, but not male employees, and that she was told to “doll up” by her manager.⁴⁹ Edith Arana worked at Wal-Mart from 1995 to 2001 and claimed that she pursued promotion opportunities at Wal-Mart, but was denied equal opportunity, and was eventually fired because of her sex.⁵⁰

In *Wal-Mart v. Dukes*, the plaintiff class brought an employment discrimination action alleging that company-wide policies of discrimination resulted in a disparity in compensation and promotions between male and female employees.⁵¹ The plaintiffs alleged that this policy of wide-latitude deference had an unlawful impact on female employees and resulted in disproportionate favor for men.⁵² They supported these assertions with three forms of evidence: statistical evidence of disparities in pay and promotion; anecdotal reports of discrimination from 120 female employees; and expert testimony from sociologist Dr. William Bielby.⁵³ Through aggregated statistical findings, the plaintiffs made such assertions as, “Women fill 70 percent of the hourly jobs in the retailer’s stores but make up only 33 percent of management employees,”⁵⁴ and “the salary gap widens over time even for men and women hired into the same jobs at the same time.”⁵⁵ The 120 female Wal-Mart employees’ reports of discrimination bring to light various claims of female employees being denied promotion

46. *Id.* at 2547–48.

47. *Id.*

48. LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS’ RIGHTS AT WAL-MART* 90 (2004).

49. *Dukes*, 131 S. Ct. at 2548.

50. *Id.*

51. *Id.* at 2541.

52. *Id.* at 2548.

53. *Id.* at 2549.

54. *Id.* at 2563 (Ginsburg, J., dissenting) (internal quotation marks omitted).

55. *Id.*

opportunities, being paid less than their male counterparts, and being humiliated at the hands of some of Wal-Mart's local managers.⁵⁶ Through expert testimony, the plaintiff class alleged that Wal-Mart has a strong and uniform "corporate culture" that permits a bias against women to permeate the decision-making of local managers. Under this rationale, *all* female Wal-Mart employees in the nation have been subjected to this discrimination and therefore sought class certification for the period December 1998 until present.⁵⁷

At the trial level, the district court found that the plaintiff class demonstrated the existence of significant legal and factual issues common to the entire class concerning Wal-Mart's alleged company-wide discriminatory policies⁵⁸ and that the monetary relief sought was incidental to the injunctive relief sought.⁵⁹ On appeal, the Ninth Circuit affirmed the district court holding, concluding that the respondents' evidence was sufficient to raise the common question of "whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies . . . that may have worked to unlawfully discriminate . . ." ⁶⁰ Nevertheless, the Ninth Circuit remanded the issue of the respondents' backpay claims to the district court for an analysis of predominance of monetary damages under Rule 23(b)(2).⁶¹ Wal-Mart appealed to the Supreme Court, and the Supreme Court granted certiorari on December 6,

56. *Id.* at 2563–64 (Ginsburg, J., dissenting); FEATHERSTONE, *supra* note 48, at 2, 42, 136.

57. *Dukes*, 131 S. Ct. at 2549.

58. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd*, *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), *aff'd in part on reh'g en banc*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

59. *Dukes*, 222 F.R.D. at 141. The plaintiff class in *Wal-Mart v. Dukes* sought "class-wide injunctive and declaratory relief, lost pay, and punitive damages." *Id.* at 141. They also did not seek compensatory damages on behalf of the class. *Id.* The Ninth Circuit Court of Appeals held that punitive damages should not be included in a Rule 23(b)(2) class without further analysis by the district court. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 622 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011). On appeal to the Supreme Court, the Court dealt with the issue of injunctive and declaratory relief, punitive damages, and backpay and noted that the plaintiff class did not seek compensatory damages. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011).

60. *Dukes*, 603 F.3d at 612.

61. *Id.* at 621 ("On remand, the district court must determine whether certification under Rule 23(b)(2) of the punitive damages claims would cause monetary relief to predominate.")

2010.⁶² The parties argued the case before the Supreme Court on March 29, 2011, and the Supreme Court handed down its decision on June 20, 2011.⁶³

1. Majority Opinion in *Wal-Mart v. Dukes*

In *Wal-Mart v. Dukes*, Justice Antonin Scalia, writing for the majority, stated that the plaintiff class failed certification on the basis of Rule 23(a)(2) commonality⁶⁴ and violated Rule 23(b)(2) by asserting individualized claims for backpay.⁶⁵ All nine of the Supreme Court justices agreed that claims for individualized relief preclude a Rule 23(b)(2) class from certification; such individualized relief may only be certified under Rule 23(b)(3).⁶⁶ The contention between the justices centered around the analysis of Rule 23(a)(2) commonality.

a. Rule 23(a)(2) commonality

The standard for Rule 23(a)(2) commonality, as stated in *Wal-Mart v. Dukes*, is not merely “the raising of common ‘questions’ . . . but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.”⁶⁷ In determining the issue of commonality, Justice Scalia relied heavily upon the Supreme Court’s decisions in *General Telephone Co. of the Southwest v. Falcon*,⁶⁸ *Watson v. Fort Worth Bank and Trust*,⁶⁹ and *International Brotherhood of Teamsters v.*

62. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010).

63. *Dukes*, 131 S. Ct. at 2541.

64. *Id.* at 2556–57.

65. *Id.* at 2559. The plaintiff class’s claims for backpay violated the Rule 23(b)(2) standard because the backpay was not incidental to the injunctive or declaratory relief sought. *Id.* at 2557; see also FED. R. CIV. P. 23(b)(2) advisory committee’s note, 1966 Amendment, subdiv. (b)(2); 39 F.R.D. 69, 102 (1966).

66. *Dukes*, 131 S. Ct. at 2558.

67. *Id.* at 2551 (quoting Nagareda, *supra* note 41, at 132). A plaintiff class’s claims must depend upon a common contention. . . . That common contention, moreover, must be of such a nature that it is 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.

Id.

68. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

69. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

United States.⁷⁰ He also relied upon the law review article, *Class Certification in the Age of Aggregate Proof*.⁷¹

(1) *General Telephone Co. of the Southwest v. Falcon*

In *Falcon*, a Mexican-American employee brought a Title VII suit against his employer, alleging discrimination in hiring and promoting; the district court certified a class of Mexican-American employees and applicants without conducting an evidentiary hearing.⁷² On appeal to the Supreme Court, the majority reversed the district court and denied class certification.⁷³ Speaking in the interest of the government concerning employment discrimination litigation,⁷⁴ the Attorney General maintained that “[t]he commonality requirement focuses on similarity of proof.”⁷⁵ The Supreme Court agreed and stated that, for Rule 23(a)(2) commonality, the plaintiff class must demonstrate that the class members have “suffered the same injury.”⁷⁶ The Court observed that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.”⁷⁷ In *Falcon*, the Court held that the class was “across-the-board,” and that such classes do not promote judicial economy.⁷⁸ “Across-the-board” class actions occur when the representative plaintiff seeks certification of a class inclusive of all individuals within a certain category *merely because* they fall within that category and the representative has a claim of discrimination.⁷⁹ When an “across-the-board” class action is asserted, the court may adopt one of two ways to bridge the conceptual gap between mere allegations and a meritorious Title VII action.

70. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

71. Nagareda, *supra* note 41.

72. *Falcon*, 457 U.S. at 149, 152.

73. *Id.* at 161.

74. Brief for United States as Amicus Curiae at 1, *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982) (No. 81-574).

75. *Id.* at 16 (asserting further that commonality analysis “requires an ad hoc determination of whether the asserted claims, and the proof to be offered in support of them, are sufficiently similar to warrant consideration in a class action.”).

76. *Falcon*, 457 U.S. at 148.

77. *Id.* at 160 (stating that certification is proper if a rigorous analysis of the Rule 23(a) prerequisites is conducted).

78. *Id.* at 159; *see also id.* at 163 (Burger, J. concurring) (stating that “across-the-board” class actions promote “multiplication of claims and endless litigation.”).

79. *Id.* at 148 (majority opinion) (holding that racial discrimination is, in a sense, class discrimination but not for the purpose of class certification).

The first is by bringing forth “[s]ignificant proof that an employer operated under a general policy of discrimination.”⁸⁰ The second is by proving that the employer “used a biased testing procedure to evaluate both applicants for employment and incumbent employees.”⁸¹ In *Wal-Mart v. Dukes*, the majority adopted both of these tests from *Falcon* and stated that, because neither test was met, the plaintiff class failed.⁸²

(2) *International Brotherhood of Teamsters v. United States*

In *Teamsters*, the United States initiated Title VII litigation against a nationwide company and a union, representing many of the company’s employees, alleging that the company had engaged in a pattern or practice of discriminating against minority members.⁸³ The Supreme Court upheld the class certification and stated that “the Government sustained its burden of proving that the company engaged in a systemwide pattern or practice of employment discrimination.”⁸⁴ The government proved that the employer engaged in system-wide discrimination by bringing forth both statistical evidence and individual testimony that described over forty specific instances of discrimination.⁸⁵ These forty accounts represented that, of all minority employees within the company, approximately one out of every eight alleged instances of discrimination.⁸⁶ The majority in *Wal-Mart v. Dukes* adopted the rationale in *Teamsters*.⁸⁷ Much like the employees in *Teamsters*, the plaintiff class in *Wal-Mart v. Dukes* produced both statistical evidence and anecdotal employee reports of discrimination.⁸⁸ The key difference between the classes in these cases is that the ratio of employee reports to members of the proposed class in *Wal-Mart v. Dukes* was one report for every 12,500 class members and, thus, these reports were not evenly spread throughout Wal-Mart’s regions.⁸⁹ Because of this disparity, the majority held that the plaintiff class had not demonstrated that Wal-

80. *Id.* at 159 n.15 (cited by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011)).

81. *Id.* (cited by *Dukes*, 131 S. Ct. at 2553).

82. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553–54 (2011).

83. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 324 (1977).

84. *Id.* at 325.

85. *Id.* at 338.

86. *Dukes*, 131 S. Ct. at 2556.

87. *Id.*

88. *Id.* at 2555–56.

89. *Id.* at 2556.

Mart operated under a policy of discrimination in a manner sufficient to trigger a certifiable class of over one million women.⁹⁰

(3) *Watson v. Fort Worth Bank & Trust*

In *Watson*, a former employee filed a Title VII suit against a bank, alleging class-wide racial discrimination.⁹¹ The district court initially certified the plaintiff class consisting of “blacks who applied to or were employed” after October 1979; however, the court later decertified the class because the class was not based upon a common question of law or fact uniting them.⁹² The Supreme Court granted certiorari, not for the issue of class certification, but to address employment discrimination claims when hiring or promotion systems involve “discretionary” or “subjective” criteria.⁹³ The Court held that “an employer’s policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.”⁹⁴ Nevertheless, the Court also held that “subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.”⁹⁵

For a plaintiff class to establish a disparate impact claim, it must identify the specific employment practice that it is challenging.⁹⁶ The majority in *Wal-Mart v. Dukes* used the holding in *Watson* to make three conclusions. First, the plaintiff class did not properly identify a specific employment practice other than Wal-Mart’s system of allowing local managers to make decisions regarding pay and promotions.⁹⁷ Second, this system of delegating authority to local managers does not of itself raise an inference of

90. *Id.*

91. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 977 (1988).

92. *Id.* at 983.

93. *Id.* at 999.

94. *Id.* at 990.

95. *Id.* at 990–91 (specifying that an appropriate case for disparate impact analysis is when “an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination . . .”). Disparate impact claims, in the Title VII context, are claims brought against an employer for the employer’s “practices that are fair in form, but discriminatory in operation.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

96. *Watson*, 487 U.S. at 994. The Supreme Court specifically held that in cases involving subjective decision making criteria and standardized criteria, which is exactly the scenario in *Wal-Mart v. Dukes*, the burden is upon the plaintiff to isolate and identify the specific employment practice to be challenged. *Id.*

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

discriminatory conduct.⁹⁸ Third, because this system is localized and discretionary, it does not constitute the type of uniform employment practice that is necessary to establish Rule 23(a)(2) commonality.⁹⁹

(4) Class Certification in the Age of Aggregate Proof

In establishing the standard for Rule 23(a)(2) commonality, Justice Scalia used the law review article, *Class Certification in the Age of Aggregate Proof*, to develop the “common answers” doctrine that is now the standard for Rule 23(a)(2) commonality.¹⁰⁰ In that article, Professor Richard Nagareda addressed Rule 23(b)(3)’s requirement that “the questions of law or fact common to class members predominate over any questions affecting only individual members.”¹⁰¹ In Part I of the article,¹⁰² Professor Nagareda discussed how dissimilarities are of critical importance for class certification under Rule 23.¹⁰³ In footnote 197 of the article, he expressly noted that Part I.C was written specifically in the context of Rule 23(b)(2) and 23(b)(3).¹⁰⁴ In fact, Professor Nagareda did not reference Rule 23(a)(2) in the entire article or in any footnotes.¹⁰⁵ For this reason, the dissent argued that the

98. *Id.* at 2555.

99. *Id.* at 2554. Justice Scalia recognizes that discretionary systems can lead to discrimination under the disparate impact approach, but also asserts that just because a Title VII claim can exist “does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common.” *Id.*

100. *Id.* at 2551 (“[C]lass certification . . . is not the raising of common ‘questions’ . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”) (quoting Nagareda, *supra* note 41, at 132) (emphasis added).

101. FED. R. CIV. P. 23(b)(3).

102. Part I is from where the majority in *Dukes* derived its rationale for the new “common answers” doctrine. *Dukes*, 131 S. Ct. at 2551; *see also* Nagareda, *supra* note 41, at 97.

103. Nagareda, *supra* note 41, at 150.

104. *Id.* at 150 n.197; *see also id.* at 109–133.

105. *See, e.g., id.* at 97. The entire paragraph from which Scalia derived this new “common answers” doctrine was written with Rule 23(b)(3) in mind.

The formulation of Rule 23 in terms of *predominant common “questions”* and generally applicable misconduct obscures the crucial line between dissimilarity and similarity within the class. The existence of common “questions” does not form the crux of the class certification inquiry, at least not literally, or else the first-generation case law would have been correct to regard the bare allegations of the class complaint as dispositive on the certification question. Any competently crafted class complaint literally raises common “questions.” What

majority's use of this article wrongly imposed a standard for Rule 23(a)(2) commonality that was based upon an analysis of Rule 23(b)(3) and, as a result, Rule 23(a)(2) commonality emerged as a much greater hurdle than it was ever designed to be.¹⁰⁶ Although these dissenters are correct concerning the context and misapplication of *Class Certification in the Age of Aggregate Proof*, Professor Nagareda has promoted this standard for Rule 23(a)(2) commonality elsewhere in his writings.¹⁰⁷ Thus, while the Supreme Court's use of the "common answers" doctrine is confusing, it is an accurate reflection of Professor Nagareda's views on class certification.¹⁰⁸

b. Rule 23(b)(2) classes and individualized relief

Rule 23(b)(2) states that certification is appropriate "if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."¹⁰⁹ In *Wal-Mart v. Dukes*, all nine justices¹¹⁰ held that the backpay and punitive damages sought by the plaintiff class were inappropriate for certification under a Rule 23(b)(2) class.¹¹¹ The Court held that "[p]ermitting the combination of individualized and classwide relief in a (b)(2) class is . . . inconsistent with the structure of Rule 23(b)"¹¹² and that in "a class action predominantly for money damages . . . absence of notice and opt-out violates due process."¹¹³ Prior to *Wal-Mart v. Dukes*, the Supreme Court

matters to class certification, however, is not the raising of common "questions"—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. at 131–32 (first emphasis added).

106. *Dukes*, 131 S. Ct. at 2562, 2565 (Ginsburg, J., dissenting).

107. Specifically, the law review article, *Common Answers for Class Certification*, clearly articulates the standard Justice Scalia adopts in *Wal-Mart v. Dukes*, but in the proper Rule 23(a)(2) context. See Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 154 (2010).

108. Compare *id.*, with *Dukes*, 131 S. Ct. at 2551.

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

110. See *Dukes*, 131 S. Ct. at 2561 (Ginsburg, J., dissenting).

111. *Id.* at 2557–58 (majority opinion) ("[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3).").

112. *Id.* at 2558.

113. *Id.* at 2559.

“expressed serious doubt about whether claims for monetary relief may be certified under [Rule 23(b)(2)].”¹¹⁴ Now, claims for monetary relief cannot be certified under Rule 23(b)(2). In reaching this conclusion on individualized relief, the Court relied on *Class Certification in the Age of Aggregate Proof*¹¹⁵ by Professor Nagareda and the Advisory Committee’s Notes for Rule 23 of the Federal Rules of Civil Procedure.¹¹⁶

(1) Class Certification in the Age of Aggregate Proof

The Supreme Court used Professor Nagareda’s *Class Certification in the Age of Aggregate Proof* to derive the doctrine of “common answers” and to analyze the merits of individualized damages.¹¹⁷ The Court specifically quoted Professor Nagareda concerning the nature of Rule 23(b)(2) classes; “The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’”¹¹⁸ Because of the nature of Rule 23(b)(2) classes, a claim for an injunction or a declaratory judgment is only appropriate if it provides the same relief to each member of the class.¹¹⁹ Similarly, monetary damages in Rule 23(b)(2) classes are inappropriate if they are *not* the same across the class but are determined for each member on an individual basis.¹²⁰

(2) Advisory Committee’s Note for Rule 23

The Advisory Committee’s Note for Rule 23, adopted in 1966, states that Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.”¹²¹ Notably, in the cases cited by the Advisory Committee’s Note as examples of Rule 23(b)(2)

114. *Id.* at 2557 (referring to the Court’s opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam)).

115. *Id.* (citing Nagareda, *supra* note 41, at 132).

116. *Id.* at 2558 (citing 39 F.R.D. 69, 102 (1966)); *see also* FED. R. CIV. P. 23(b)(2) advisory committee’s note, 1966 Amendment, subdiv. (b)(2) (containing the same language as 39 F.R.D. 69, 102 (1966)).

117. *Dukes*, 131 S. Ct. at 2557.

118. *Id.* (quoting Nagareda, *supra* note 41, at 132).

119. *Id.*

120. *Id.*

121. FED. R. CIV. P. 23(b)(2) advisory committee’s note, 1966 Amendment, subdiv. (b)(2); *see also* 39 F.R.D. 69, 102 (1966) (containing the same language found in the Advisory Committee’s Notes).

class actions, none of the plaintiffs sought individualized damages.¹²² Justice Scalia relied on the Advisory Committee's Note to probe into the history and original purpose of Rule 23(b)(2) classes.¹²³ The plaintiffs in *Wal-Mart v. Dukes* also relied on the Advisory Committee's Note, arguing that their claims for backpay were appropriate under Rule 23(b)(2) because their claims for injunctive and declaratory relief predominated over their claims for backpay.¹²⁴ Nevertheless, in light of the procedural protections built into Rule 23(b)(3) and practical considerations, Justice Scalia rejected the plaintiff class' claims.¹²⁵ He pointed out that the notice and opt-out requirements for Rule 23(b)(2) classes are far lower than Rule 23(b)(3) classes, and there is no proof that class adjudication for money damages in a Rule 23(b)(2) class is superior to individual adjudications.¹²⁶ Moreover, he stated that "[t]he predominance test would . . . require the District Court to reevaluate the roster of class members continually."¹²⁷

c. The majority's conclusion in *Wal-Mart v. Dukes*

In *Wal-Mart v. Dukes*, the plaintiff class could not satisfy the "common answers" test through *Falcon's* rationale.¹²⁸ Thus, the plaintiff class failed to achieve Rule 23(a)(2) commonality within the context of its Title VII claim.¹²⁹ In reaching this conclusion, Justice Scalia eviscerated the plaintiff class's three forms of evidence.¹³⁰ Concerning the plaintiff class's statistical evidence, he stated that "merely proving that the discretionary system has produced a . . . sexual disparity is *not enough*" to prove a specific

122. *Dukes*, 131 S. Ct. at 2558 (citing 39 F.R.D. 69, 102 (1966)). Classic examples of early Rule 23(b)(2) classes are desegregation cases. See FED. R. CIV. P. 23(b)(2) advisory committee's note, 1966 Amendment, subdiv. (b)(2); 39 F.R.D. 69, 102 (1966) (citing nine class action cases dealing with segregation issues: "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."); see also 35 F.R.D. 317, 338 (1964).

123. *Dukes*, 131 S. Ct. at 2557–58.

124. *Id.* at 2559 (relying upon a negative reading of the Advisory Committee's Notes to support their claim for money damages).

125. *Id.*

126. *Id.* In fact, Justice Scalia posits that allowing individualized monetary damages in Rule 23(b)(2) classes will adversely affect individuals in the plaintiff class. *Id.*

127. *Id.*

128. *Id.* at 2553.

129. *Id.* at 2556–57.

130. *Id.* at 2549, 2553–57.

discriminatory employment practice as required by the Court.¹³¹ Next, Justice Scalia disregarded the employee reports because, even if every employee report were true, it would “not demonstrate that the entire company ‘operate[s] under a general policy of discrimination.’”¹³² Finally, Justice Scalia discredited the expert sociological testimony, stating that it is “unbelievable that all managers would exercise their discretion in a common way without some common direction.”¹³³ The plaintiff class’s evidentiary statistics, employee reports, and expert testimony were not sufficient in the eyes of the Supreme Court to establish “questions of law or fact common to the class.”¹³⁴

Furthermore, the plaintiff class erred in seeking punitive and backpay damages under Rule 23(b)(2).¹³⁵ Under prior Supreme Court jurisprudence and the overall purpose of Rule 23(b) categories, Rule 23(b)(2) should not be used to certify a class of 1.5 million women with claims of individualized monetary relief.¹³⁶ As Justice Scalia demonstrated, such a certification would violate due process because of the lower requirements of mandatory classes.¹³⁷ Because Rule 23(b)(3) has much higher notice and opt-out requirements, in addition to the predominance and superiority requirements, such individualized claims belong in Rule 23(b)(3).¹³⁸ While monetary damages are still available in Rule 23(b)(2) classes as long as the damages are incidental to the injunctive or declaratory relief, individualized damages are never permissible in Rule 23(b)(2) classes.¹³⁹ Justice Scalia rejected the plaintiff class’s predominance argument, stating that predominance does not cure the due process issues of insufficient notice

131. *Id.* at 2555; *see also* *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 241 (2005) (holding that it is not enough for a plaintiff to simply allege that there is a disparate impact, or point to a generalized policy; rather, the plaintiff has the burden to isolate and identify the specific employment practices responsible).

132. *Id.* at 2556.

133. *Id.* at 2555 (holding that just because a practice of delegation of authority is uniform does not mean that all local managers’ decisions will be uniform as well). Justice Scalia also pointed out that Dr. William Bielby could not calculate whether 95 percent or half a percent of the employment decisions at Wal-Mart were made based on the alleged stereotypes. *Id.* at 2554.

134. FED. R. CIV. P. 23(a)(2).

135. *Dukes*, 131 S. Ct. at 2557.

136. *Id.* at 2558.

137. *Id.* at 2559.

138. *Id.* at 2558.

139. *Id.* at 2560.

and opt-out rights and that courts should not have to continuously reevaluate the class roster to ensure predominance exists at all times.¹⁴⁰ Justice Scalia also rejected the plaintiff class's argument that backpay is "equitable in nature" by looking to the language of Rule 23(b)(2).¹⁴¹ Just because the rule states that injunctive or declaratory relief is available does not mean that all forms of equitable relief are up for grabs in a Rule 23(b)(2) class.¹⁴²

2. Dissenting Opinion in *Wal-Mart v. Dukes*

Justice Ginsburg filed an opinion concurring in part and dissenting in part.¹⁴³ She asserted that while the class was properly denied on Rule 23(b)(2) grounds, the standard for commonality that the majority adopted mirrors the Rule 23(b)(3) predominance standard.¹⁴⁴ Justice Ginsburg presupposed that Rule 23(a)(2) commonality is "easily satisfied,"¹⁴⁵ basing this assertion upon the language of the standard itself.¹⁴⁶ The dissent sided with the district court on the issue of commonality, finding that the district court's certification of the class of all female Wal-Mart employees employed any time after December 26, 1998, was permissible.¹⁴⁷ Furthermore, the dissent cited *Califano v. Yamasaki*, wherein the Court had noted that "most issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court."¹⁴⁸ Justice Ginsburg rebutted the main

140. *Id.* at 2559.

141. *Id.* at 2560.

142. *Id.*

143. *Id.* at 2561–62 (Ginsburg, J., dissenting). Justice Ginsburg agreed with the majority's determination that the class failed for Rule 23(b)(2) but disagreed with regard to their Rule 23(a)(2) standard. *Id.*

144. *Id.* (alleging that, by holding that the plaintiff class cannot cross the Rule 23(a)(2) threshold, the majority disqualifies the class at the starting gate).

145. *Id.* at 2565 (citing 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.23(2) (3d ed. 2011)).

146. *Id.* at 2562 (defining "question of law or fact common to the class" from Rule 23(a)(2) as a "dispute, either of fact or law, the resolution of which will advance the determination of the class members' claims"). *Id.*

147. *Id.*

148. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). It is true that "certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court," as stated by the Supreme Court in 1979. *Id.* Rule 23(f), adopted in 1998, also states that matters of class certification may be appealed; thus, the district court's discretion truly is limited to the first instance. FED. R. CIV. P. 23(f).

sources that the majority referenced in adopting the “common answers” standard.¹⁴⁹ She also distinguished the majority’s use of *Falcon* by noting that the plaintiff class in *Falcon* sought class certification based on one claim of discrimination by a Mexican-American employee.¹⁵⁰ In contrast, Justice Ginsburg asserted that the employment practices under fire did touch and concern all 1.5 million potential class members.¹⁵¹ Rebutting the majority’s use of *Falcon*, the dissent quoted from *Watson v. Fort Worth Bank & Trust*, an employment discrimination case decided six years after *Falcon*; the dissent stated that, under *Watson*, a “system of delegated discretion . . . is a practice actionable under Title VII when it produces discriminatory outcomes.”¹⁵² The dissent further criticized the majority’s use of Professor Nagareda’s *Class Certification in the Age of Aggregate Proof*¹⁵³ by accurately noting that the context in which Nagareda speaks of this “common answers” doctrine is Rule 23(b)(3) and not Rule 23(a)(2).¹⁵⁴

An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Id. advisory committee’s note, 1998 Amendment, subdiv. (f).

149. *Dukes*, 131 S. Ct. at 2565 n.7 (Ginsburg, J., dissenting) (distinguishing the facts of *Falcon* from those in present case regarding 23(a)(2) commonality); *id.* at 2566 (clarifying that the “dissimilarities” argument derived from Professor Nagareda’s article was developed in the context of Rule 23(b)(3) and not intended to apply as a Rule 23(a)(2) argument).

150. *Id.* at 2565 n.7 (“[T]he only commonality [wa]s that respondent is a Mexican-American and he seeks to represent a class of Mexican-Americans.” (internal quotation marks omitted)).

151. *Id.* Justice Ginsburg asserted that the delegation of pay and promotion authority to subjective local managers is a uniform employment practice across all Wal-Mart stores, affecting all female Wal-Mart employees and resulting in gender discrimination. *See id.* at 2563–65.

152. *See id.* at 2567; *see also* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 982, 991 (1988) (noting that discriminatory results of an employer’s “discretionary employment practices” can give rise to Title VII claims if the employer “had not developed precise and formal criteria for evaluating candidates” and had “relied instead on the subjective judgment of supervisors”).

153. Nagareda, *supra*, note 41, at 97.

154. *See supra* Part II.C.1.a (discussing Nagareda’s stance on the common answers doctrine used for Rule 23(a)(2) commonality).

Justice Ginsburg provided various reasons why the majority misapplied the Rule 23(a)(2) standard and expressed concern for future litigation relating to this heightened standard.¹⁵⁵ Some of those reasons are that Wal-Mart's pay and promotion practices resulting in discrimination were uniform throughout their stores;¹⁵⁶ Wal-Mart operates under a strong "corporate culture" that influences local managers's decision-making;¹⁵⁷ the plaintiff class's anecdotal report suggests Wal-Mart as a whole imposes gender bias sufficient to satisfy *Teamsters*;¹⁵⁸ and pay and promotional disparities can only be explained by gender discrimination.¹⁵⁹

III. POTENTIAL ISSUES FROM *WAL-MART V. DUKES*

There is no doubt that the Supreme Court's holding in *Wal-Mart v. Dukes* had and will continue to have an impact on federal class actions.¹⁶⁰ From the holding and rationale of *Wal-Mart v. Dukes*, one can glean at least four main principles:

- (1) Rule 23(a)(2) commonality is not satisfied by the raising of common questions but by common answers.¹⁶¹
- (2) Statistical proof alone is not enough to prove that there are common answers across a proposed class.¹⁶²

155. *Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting) (warning that an imposed Rule 23(b)(3) standard for Rule 23(a)(2) commonality may preclude certain Rule 23(b)(1) and (b)(2) category classes from being certified). The Third Circuit raised this concern fifteen years prior to *Wal-Mart v. Dukes* by stating that establishing a threshold mirroring Rule 23(b)(3) for Rule 23(a)(2) commonality may have repercussions for Rule 23(b)(1) and (b)(2) class actions not requiring predominance of common questions. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3rd Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

156. *Dukes*, 131 S. Ct. at 2562–63. *Contra* sources cited *supra* note 132.

157. *Dukes*, 131 S. Ct. at 2563. *Contra* sources cited *supra* note 133.

158. *Dukes*, 131 S. Ct. at 2563–64 & n.4. *Contra supra* p. 60 and note 90.

159. *Dukes*, 131 S. Ct. at 2564. *Contra id.* at 2555 ("Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis.").

160. From its handing down in June 2011 until the end of the year, *Wal-Mart v. Dukes* was cited 260 times by the lower courts. See SEYFARTH SHAW LLP, LABOR & EMPL'T DEP'T, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORTS 1 (Gerald L. Maatman, Jr. ed. 2012).

161. *Dukes*, 131 S. Ct. at 2551–52.

162. *Id.* at 2555.

- (3) The *Falcon* requirement of “rigorous analysis” dictates that the facts affirmatively prove compliance with Rule 23(a)(1)–(4).¹⁶³
- (4) Claims for *individualized* damages, including individualized injunctive, declaratory, and monetary relief, are not appropriate for Rule 23(b)(2) classes.¹⁶⁴

Consequently, two issues arising from the holding in *Wal-Mart v. Dukes* that this Note seeks to clarify are:

- (1) Does the heightened standard of requiring the raising of common answers, not common questions, quash legitimate class action suits?
- (2) How does the ban on individualized relief in Rule 23(b)(2) classes affect the claim that the “common answers” doctrine will preclude potentially meritorious class actions?

A. *The Common Answers Doctrine*

The focus of this Note is on the issue raised by the new commonality standard of Rule 23(a)(2): does the “common answers” doctrine adopted by the Supreme Court rein in “blackmail settlements,” or does it merely quash class actions that cannot produce “common answers” in the pretrial stage? This issue is one of fairness and continues to plague class action litigation. One of the main reasons we have the different categories of classes under Rule 23(b) is because the drafters of the Federal Rules of Civil Procedure sought to balance interests in class litigation and place the appropriate measures based upon class characteristics, class member notification required, and relief sought.¹⁶⁵ The heightened standard of Rule 23(a)(2) commonality has the potential to affect all future class actions because Rule 23(a)(2) commonality is a requirement for all class action certification.¹⁶⁶ In her dissent, Justice Ginsburg states that “because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court’s . . . position is far reaching”¹⁶⁷ and that the “common answers”

163. *Id.* at 2551.

164. *Id.* at 2557.

165. See Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. ANN. SURV. AM. L. 681, 686 (2010).

166. See FED. R. CIV. P. 23(a).

167. *Dukes*, 131 S. Ct. at 2566 (Ginsburg, J. dissenting).

doctrine will potentially bar Rule 23(b)(1) or (b)(2) classes.¹⁶⁸ This Note analyzes whether the “common answers” doctrine will have the effect of precluding only “too big to fail” class actions or whether Justice Ginsburg is correct that the “common answers” doctrine hinders meritorious Rule 23(b)(1) and (b)(2) classes. This Note contends that the “common answers” doctrine will only hinder “too big to fail” classes and not Rule 23(b)(1) and (b)(2) classes that are otherwise meritorious.

B. *The Ban on Individualized Relief*

Some scholars have posited that additional procedural rules or stricter interpretation of the existing rules is a viable method to rein in potential “blackmail settlements.”¹⁶⁹ Under the ban on individualized relief, as articulated in *Wal-Mart v. Dukes*, plaintiff classes that previously were fearless in bringing individualized monetary claims under Rule 23(b)(2) are now required to seek certification under Rule 23(b)(3).¹⁷⁰ While many commentators,¹⁷¹ and a few Supreme Court Justices,¹⁷² are incensed over the heightened standard of Rule 23(a)(2) commonality as articulated in *Wal-Mart v. Dukes*, the most substantial change to federal class action litigation is found in the ban on individualized monetary damages in Rule 23(b)(2)

168. *Id.* Justice Ginsburg refers to the “common answers” doctrine as the “dissimilarities” analysis. *Id.*

169. Aaron B. Lauchheimer, Note, *A Classless Act[:] The Ninth Circuit’s Erroneous Class Certification in Dukes v. Wal-Mart, Inc.*, 71 BROOK. L. REV. 519, 533 & 549–50 (2005) (stating that the addition of Rule 23(f) and a strict interpretation of the Rule 23(a) commonality requirement are two ways to prevent inequitable class actions).

170. Consequently, these former Rule 23(b)(2) classes must fulfill the higher standards imposed upon Rule 23(b)(3) classes.

171. Harvey Mars, *A Bad Decision*, LOCAL 802 NEWS (October 2011), http://www.local802afm.org/publication_entry.cfm?xEntry=4340460; Andrew Longstreth, *Wal-Mart v. Dukes shakes up employment class actions*, REUTERS (Jan. 9, 2012, 7:19 PM), <http://www.reuters.com/article/2012/01/10/us-walmart-study-idUSTRE80901320120110> (stating that *Wal-Mart v. Dukes* was so pivotal that from now on “[t]here’s B.D., Before Dukes, and A.D., After Dukes”). *Contra* Scott Hanfling, *Wal-Mart Decision Unlikely to Affect Most Class Action Cases*, KFP LAW (June 27, 2011), http://www.kfpsidebar.com/article_20110627.html (“[A] review of the Court’s rationale in this case [regarding Rule 23(a)(2) commonality] reveals that the decision should only affect those purported classes where the circumstances affecting the class members are only *remotely related* to one another.” (emphasis added)).

172. *Dukes*, 131 S. Ct. at 2561–62. Specifically, Justices Ginsburg, Breyer, Sotomayor, and Kagan disapprove of the Supreme Court’s adoption of the “common answers” doctrine. *Id.*

classes.¹⁷³ This Note analyzes the interplay between the “common answers” doctrine and the ban on individualized monetary relief, and how these rules will affect future class action litigation.

C. Rule 23(b) Classes Revisited

Before delving into the analysis of these issues, a review of the categories of class actions is appropriate. Rule 23(b)(1)–(3) states that

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.¹⁷⁴

The requirements of at least one Rule 23(b) category must be satisfied before a class can be certified in federal court.

173. See *infra* Part III.C–D.

174. FED. R. CIV. P. 23(b)(1)–(3). The factors laid out in Rule 23(b)(3) (“matters pertinent to . . . findings”) have been omitted. See *id.*

1. Rule 23(b)(1) Classes

Rule 23(b)(1) classes are classes designed to deal with a particularized issue where individual adjudications will likely establish incompatible standards of conduct or where individual adjudications would preclude non-parties or impair a non-party's ability to protect its interest.¹⁷⁵ "Rule 23(b)(1) typically does not apply in employment discrimination class actions."¹⁷⁶ In general, Rule 23(b)(1) classes are rare¹⁷⁷ and by their nature are inherently capable of class-wide resolution.¹⁷⁸ Thus, the heightened Rule 23(a)(2) commonality standard as stated in *Wal-Mart v. Dukes* will not affect Rule 23(b)(1) classes.¹⁷⁹ Additionally, the ban on individualized

175. FED. R. CIV. P. 23(b)(1). By their nature, Rule 23(b)(1) classes do not have many issues of Rule 23(a)(2) commonality because the injury at issue is particularized.

176. Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 B.Y.U. L. REV. 305, 310 (2001).

177. Rule 23(b)(1) classes are "relatively rare and . . . typically invoked to resolve competing claims to a particular piece of property or an identifiable set of proceeds such that a declaration of one person's rights necessarily resolves the rights of all other members in the class." See Christopher Chorba et al., *Year-End Update on Class Actions: Explosive Growth in Class Actions Continues Despite Mounting Obstacles to Certification*, GIBSON DUNN (Feb. 10, 2009), <http://www.gibsondunn.com/publications/pages/Year-EndUpdateOnClassActions.aspx>; see also 7.2 Rule 23 Class Certification Requirements, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS, <http://federalpracticemanual.org/node/42> (last visited Feb. 2, 2013) (stating that "[c]lass certification under Rule 23(b)(2) is far more common than (b)(1) classes . . .").

178. See Perry & Brass, *supra* note 165, at 686 ("Subdivision (b)(1) captured a defined subset of cases, such as those involving riparian landowners, security holders, or claimants to a limited fund, that inherently required class-wide resolution."). Rule 23(a)(2) commonality is almost a given in Rule 23(b)(1) classes. Rule 23(b)(1)(A) states that a class is appropriate if "prosecuting separate actions . . . would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." FED. R. CIV. P. 23(b)(1)(A). Commonality is likely present in a class where everyone's claims are so similar that they are likely to individually bring the same claim against the same party. Rule 23(b)(1)(B) states that a class is appropriate if "prosecuting separate actions . . . would create a risk of . . . adjudications with respect to individual class members that . . . would be dispositive of the interests of the other members not parties to the individual adjudications . . ." FED. R. CIV. P. 23(b)(1)(B). Commonality is likely present in a class where claims are so similar that they may be potentially precluded under *res judicata*. See also WRIGHT ET AL., *supra* note 10, § 1763 ("[U]nder Rule 23(b)(1) when a court determines that inconsistent adjudications might result if individual actions had to be brought, or that the interests of other class members would be affected by separate actions, in effect it is holding that there is a substantial overlap in the questions of law or fact presented by the representative action.").

179. The wording of Rule 23(b)(1) is such that by its nature Rule 23(b)(1) classes will satisfy the "common answers" doctrine as articulated in *Wal-Mart v. Dukes*. See FED. R. CIV.

damages in Rule 23(b)(2) classes will not apply to Rule 23(b)(1) classes because Rule 23(b)(1) classes are outside of the holding of *Wal-Mart v. Dukes*.¹⁸⁰

2. Rule 23(b)(2) Classes

Rule 23(b)(2) classes, like Rule 23(b)(1) classes, are mandatory classes, meaning that there is no opt-out requirement.¹⁸¹ Rule 23(b)(2) classes are often called “injunctive” classes because their focus is upon injunctive and declaratory relief and not monetary relief.¹⁸² Originally, monetary relief was not sought under Rule 23(b)(2),¹⁸³ but now monetary relief is available under Rule 23(b)(2) so long as it is incidental to the injunctive or declaratory relief sought.¹⁸⁴ This change in perspective on monetary damages has created problems in Rule 23(b)(2) class actions.

When the term “blackmail” is used in reference to class actions, the term is most likely being used in reference to a large Rule 23(b)(2) class seeking

P. 23(b)(1). If every claimant’s claim is so similar that there is a threat that individual claimants will bring the same action against the same party, class adjudication is likely to produce “common answers apt to drive resolution of litigation.” Nagareda, *supra* note 41, at 132. Similarly, if a potential claimant needs to be included in an action because her claim is so similar that she may be precluded under *res judicata*, “common answers apt to drive resolution of litigation” abound. *Id.*

180. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

181. Rima N. Daniels, *Monetary Damages in Mandatory Classes: When Should Opt-Out Rights Be Allowed?*, 57 ALA. L. REV. 499, 503–04 (2005) (“The two so-called mandatory classes are 23(b)(1) and (b)(2), while the only class where opt-out rights are automatic is 23(b)(3).” (footnotes omitted)). Because there is no opt-out requirement in Rule 23(b)(1) and (b)(2) classes, there are due process implications. *Dukes*, 131 S. Ct. at 2558–59 (noting that the Federal Rules provide “no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action.”); *see also* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (noting that certification of a mandatory class including money damages potentially compromises the due process rights of individual claimants).

182. *See* FED. R. CIV. P. 23(b)(2) advisory committee’s note, 1966 Amendment, subdiv. (b)(2); 39 F.R.D. 69, 102 (1966).

183. *See* Perry & Brass, *supra* note 165, at 696.

184. *See* *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Lemon v. Int’l Union of Operating Eng’rs*, 216 F.3d 577, 580–81 (7th Cir. 2000); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998). One court has held that so long as monetary damages are not the plaintiff class’s “primary purpose,” they are permissible. *See* *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

money damages not incidental to injunctive or declaratory relief.¹⁸⁵ In large part, “blackmail settlements” emerged because Rule 23(b)(2) was never satisfactorily equipped with protective measures to provide for monetary relief.¹⁸⁶

3. Rule 23(b)(3) Classes

Rule 23(b)(3) classes are the catch-all class and are proper for classes primarily seeking money damages.¹⁸⁷ Rule 23(b)(3) requires that “questions of law or fact common to class members *predominate* over any questions affecting only individual members.”¹⁸⁸ One key feature of the Rule 23(b)(3) predominance requirement is that predominance of commonality in Rule 23(b)(3) is a much higher standard than Rule 23(a)(2) commonality.¹⁸⁹ Rule 23(b)(3) also requires that a class action be “*superior* to other available methods for the fair and efficient adjudication of the controversy.”¹⁹⁰ Rule 23(b)(3) is the catch-all class, the class with the most potential for judicial expansion. That is why the drafters of Rule 23 placed stricter notice and opt-out requirements upon Rule 23(b)(3), in addition to the predominance and superiority requirements.¹⁹¹ Because of these heightened standards, many class action attorneys try to avoid Rule 23(b)(3) classes and seek certification under Rule 23(b)(1) or (b)(2).

185. “Blackmail” settlements traditionally occur in employment discrimination class actions. Piar, *supra* note 176, at 314 (“[H]igh damages limits under the 1991 [Title VII] Act have paved the way for ‘blackmail’ class actions.”). For a list of lucrative employment discrimination settlements, see sources cited *infra* note 205.

186. See Perry & Brass, *supra* note 165, at 694–701 (discussing the history and intended use of the Rule 23(b)(2) class).

187. See FED. R. CIV. P. 23(b)(3) advisory committee’s note, 1966 Amendment, subdiv. (b)(3); 39 F.R.D. 69, 102–03 (1966); see also Hart, *supra* note 35, at 816.

188. FED. R. CIV. P. 23(b)(3) (emphasis added). This is the predominance requirement.

189. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997). The Supreme Court held that “Rule 23(a)(2)’s ‘commonality’ requirement is subsumed under . . . the more stringent Rule 23(b)(3) requirement that questions common to the class ‘predominate over’ other questions.” *Id.* (reasoning that because the class sought to be certified under Rule 23(b)(3), the court, as a matter of efficiency, need only review whether common questions predominate because this analysis would address the Rule 23(a)(2) question as well).

190. *Id.* at 593 (emphasis added). This is the superiority requirement.

191. See Hart, *supra* note 35, at 816 (“Because 23(b)(3) is a kind of ‘catch-all’ for more ambiguous class claims, the Rule imposes a number of additional procedural hurdles on the 23(b)(3) class.”). Rule 23(b)(3) class actions are “a growing point in the law” and are “flexible.” See Perry & Brass, *supra* note 166, at 687.

4. Conclusion on the Three Rule 23(b) Classes

The heightened standard for Rule 23(a)(2) commonality under *Wal-Mart v. Dukes* has potential to hinder classes seeking certification under Rule 23(b)(1) and (2) but will not hinder classes seeking certification under Rule 23(b)(3). As a matter of practicality, however, the heightened commonality standard from *Wal-Mart v. Dukes* will only affect Rule 23(b)(2) classes; this is because Rule 23(b)(1) classes are rare¹⁹² and by their nature are inherently capable of class-wide resolution.¹⁹³

The ban on individualized relief, as articulated in *Wal-Mart v. Dukes*, will only affect Rule 23(b)(2) classes. First, this is because the Court expressly so narrowed its holding.¹⁹⁴ Second, Rule 23(b)(1) classes under the *Ortiz v. Fibreboard Corp.*¹⁹⁵ mandatory-class framework are construed more narrowly because of Rule 23(b)(1) mandatory-class status¹⁹⁶ and because Rule 23(b)(3) classes are *specifically* for money damages.¹⁹⁷

192. Chorba et al., *supra* note 177 (“Class certification under Rule 23(b)(2) is far more common than (b)(1) classes.”).

193. See Perry & Brass, *supra* note 165, at 686 (“Subdivision (b)(1) captured a defined subset of cases, such as those involving riparian landowners, security holders, or claimants to a limited fund, that inherently required class-wide resolution.”).

194. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (“Respondents’ claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2).”). Justice Scalia speaks only in Rule 23(b)(2) terms when articulating his ban on individualized relief. *Id.*

195. *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999).

196. The Supreme Court in *Ortiz* recognizes that Rule 23(b)(1) classes are mandatory classes in that the potential plaintiffs must become of part of the class or risk being precluded. *Id.* at 833.

‘[T]he prosecution of separate actions . . . would create a risk’ of ‘adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.’

Id. (quoting FED. R. CIV. P. 23(b)(1)(B)).

[M]andatory class actions aggregating damages claims implicate the due process ‘principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process’

Id. at 846 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

197. *Dukes*, 131 S. Ct. at 2558 (“[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3).”). There is “at least a substantial possibility” that “actions seeking

D. *The Classes Most Likely to Be Affected by Wal-Mart v. Dukes*

At face value, the types of class actions most likely to be affected by the holding in *Wal-Mart v. Dukes* are those classes seeking certification under Rule 23(b)(1) and (b)(2).¹⁹⁸ According to research performed after the adoption of the Class Action Fairness Act of 2005, the bulk of all federal class actions are filed for labor, securities, torts, consumer fraud, and civil rights claims.¹⁹⁹ Thus, this Note analyzes Title VII, mass tort, securities, antitrust, and labor class actions within the scope of the “common answers” doctrine and the ban on individualized relief as articulated in *Wal-Mart v. Dukes*.

1. Title VII Class Actions

Title VII class actions are class actions by employees against their employers, alleging discrimination in violation of Title VII of the 1964 Civil Rights Act.²⁰⁰ Historically, plaintiff classes in Title VII actions sought certification under Rule 23(b)(2).²⁰¹ The Civil Rights Act of 1991 expanded appropriate remedies to include compensatory and punitive damages to victims of intentional discrimination and also invoked the right to a jury trial.²⁰² Certain Title VII class actions brought by the U.S. Equal Employment Opportunity Commission (“EEOC”) are not governed by Rule

monetary damages . . . can be certified only under Rule 23(b)(3) . . . and not under Rules 23(b)(1) and (b)(2), which do not.” *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

198. See *Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting) (“Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court’s ‘dissimilarities’ position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class . . .”).

199. See Emery G. Lee & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, FEDERAL JUDICIAL CENTER (Apr. 2008), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf); Kenneth Jost, *Will the Supreme Court Approve the Wal-Mart Case?*, CLASS ACTION LAWSUITS, <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2011051300> (last visited Feb. 3, 2013).

200. See 42 U.S.C. § 2000e-2 (2006).

201. This is because the original Title VII provided only for remedies in equity; when Title VII was amended in 1991, however, it added the right to sue for emotional distress and punitive damage awards. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); see also Brian Van Vleck, *2(b) or Not 2(b)?: Dukes v. Wal-Mart Closes the Gap Between Class Certification Under Rule 23(b)(2) and (b)(3)*, CALIFORNIA LABOR AND EMPLOYMENT DEFENSE BLOG (June 24, 2011), <http://www.vtzwlawblog.com/2011/06/articles/class-actions/2b-or-not-2b-dukes-v-walmart-closes-the-gap-between-class-certification-under-rule-23b2-and-b3/>.

202. Piar, *supra* note 176, at 305.

23.²⁰³ These EEOC “pattern” or “practice” lawsuits are governed by Title VII and are required to follow the *Teamsters* framework.²⁰⁴ EEOC actions are not affected by the commonality standard as articulated in *Wal-Mart v. Dukes*, but other Title VII plaintiff classes, like the class spearheaded by Betty Dukes, are.

Title VII class actions are a great method of legal recourse for those with legitimate claims of discrimination, but they have also proven to be a quick ticket to settlement windfalls against major corporations.²⁰⁵ Title VII class actions generally seek certification under Rule 23(b)(2) and can be difficult in the certification stage because the alleged employer discrimination injury is more subjective and difficult to quantify on a class-wide basis than financial injury (e.g., antitrust violations) or physical injury (e.g., a plane crash).²⁰⁶ Like many class actions, once certification is achieved, the defendants have more motivation to settle the case.²⁰⁷ When dealing with a large-scale subjective harm, a defendant is very likely to settle to avoid the costly litigation pursuant to class certification, even if the plaintiffs’ claims are less meritorious.²⁰⁸

Wal-Mart v. Dukes states two means of approaching Rule 23(a)(2) commonality in Title VII cases. The first is the “common answers” doctrine that applies to all class actions.²⁰⁹ The second standard for Rule 23(a)(2) commonality, supplementing only Title VII class actions, is that claimants must present “significant proof” of any alleged “general policy of

203. SEYFARTH SHAW LLP, *supra* note 160, at 34.

204. *Id.*

205. See PRACTISING LAW INSTITUTE, DEFENSE OF FEDERAL CLASS ACTIONS 369, 371 (Oct. 2001) (stating three examples of gender discrimination class action settlements: Lucky Stores, \$107.25 million; Home Depot, \$87.5 million; Publix, \$81.5 million); Aiello v. Novartis Pharm. Corp., 746 F. Supp. 2d 89, 92 n.1 (D.D.C. 2010).

206. Phillips v. Hunter Trails Cmty. Ass’n, 685 F.2d 184, 190 (7th Cir. 1982) (“Injuries [for mental and emotional distress] are by their nature difficult to prove.”); Hobson v. George Humphreys, Inc., 563 F. Supp. 344, 353 (W.D. Tenn. 1982) (“[I]t is difficult to measure emotional and mental distress in monetary terms.”).

207. Chorba et al., *supra* note 178 (stating that 89% of certified class actions settle).

208. *Id.*; AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011) (recognizing that even a small chance of a devastating loss pressures defendants into settling questionable claims).

209. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (“[C]lass certification . . . is not the raising of common ‘questions’ . . . but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”).

discrimination,” and show that the policy discriminates on a class-wide basis.²¹⁰ This second standard for commonality provides clarity on how to achieve Rule 23(a)(2) commonality in Title VII cases and appears to be the Supreme Court’s way of “giving teeth” to the Rule 23 class action requirements in Title VII cases.²¹¹

When applied to Title VII class actions, the “common answers” doctrine for Rule 23(a)(2) commonality will not hinder Title VII actions, regardless of whether they seek to be certified under Rule 23(b)(2) or (b)(3). First, the “common answers” doctrine does not hinder (b)(2) Title VII classes because the requirements of commonality within a Title VII class are clearly laid out in *Falcon*.²¹² If a class meets either of the standards set forth in *Falcon*, then it fulfills Rule 23(a)(2)—the class will present a common answer apt to drive the resolution of the litigation. Second, if the Title VII action primarily seeks individualized relief, the class will need to seek certification under Rule 23(b)(3). Therefore, the “common answers” doctrine does not hinder Title VII class certification under (b)(3) because the standard of *commonality predominance* in (b)(3) classes is higher than even the “common answers” doctrine.

2. Mass Tort Class Actions

A mass tort is any tort that occurs on a large scale so that there are many potential litigants.²¹³ Rule 23(b)(2) applies to matters “involving injunctive or declaratory relief, and will seldom, if ever, apply to a mass disaster case.”²¹⁴ The result of a mass tort is mass injury—consequently, monetary compensation is the primary objective of mass tort litigation.²¹⁵ Because

210. *Id.* at 2553. “[S]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” *Id.*

211. John R. Wester et al. *Commonality in Class Actions After Wal-Mart v. Dukes*, 33 CLASS ACTION REP. 1 (2012). “A prominent treatise had previously found that commonality is ‘easily satisfied.’” *Id.* at n.7 (citing 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 23.23(2) (3d ed. 2011)).

212. See *supra* Part II.C.1.a.(1).

213. A mass tort is defined as “[a] civil wrong that injures many people.” BLACK’S LAW DICTIONARY 1626 (9th ed. 2009). Some of the most popular mass tort lawsuits concern asbestos/mesothelioma, whose advertisements animate television.

214. 27 AM. JUR. *Trials* 485 (1980).

215. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1355 (1995).

money is the primary objective of mass tort claims, generally these claims should be certified under Rule 23(b)(3). Raising the commonality standard, as done in *Wal-Mart v. Dukes*, does not hinder a class seeking to be certified under Rule 23(b)(3) because the Rule 23(a)(2) commonality requirement is subsumed under the requirement that common questions predominate.

3. Securities Class Actions

Simply defined, a security is an investment contract.²¹⁶ Securities fraud is governed by Section 10(b) of the Securities Exchange Act of 1934 and occurs when any manipulative or deceptive device is implemented during the purchase or sale of any security.²¹⁷ Securities class actions are certified under Federal Rule of Civil Procedure 23(a) and (b).²¹⁸ As one scholar put it, “Securities class actions proceed with the objective of permitting those separated wrongfully from their wealth to get some of it back.”²¹⁹ Because money is the emphasis of securities actions, such actions are generally certified as a Rule 23(b)(3) class.²²⁰ Being brought under Rule 23(b)(3), the “common answers” doctrine of *Wal-Mart v. Dukes* does not significantly hinder potential securities class actions, and the Rule 23(a)(2) standard for commonality does not pose a threat of non-certification. The ban on individualized monetary damages for Rule 23(b)(2) classes will not affect securities actions because they are certified under Rule 23(b)(3) and not (b)(2).²²¹

216. See *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 297 (1946).

217. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007).

218. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2183 (2011); *In re DVI, Inc. Securities Litig.*, 639 F.3d 623, 629 (3d Cir. 2011); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 363 (4th Cir. 2004).

219. James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 497 (1997).

220. Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 REV. LITIG. 405, 407 (2003) (stating that a survey on class actions in four federal districts found that a “(b)(3) class was certified in 94% to 100% of the securities cases . . .” (internal quotation marks omitted)).

221. Robert H. Bell & Thomas G. Haskins, Jr., *The Effects of Wal-Mart v. Dukes on Class Certification*, AM. BAR ASS’N (January 31, 2012), <http://apps.americanbar.org/litigation/committees/securities/email/winter2012/winter2012-wal-mart-dukes-initial-effects-securities-fraud-class-certification.html> (stating that the ban on individualized monetary damages “is less readily applicable to securities-fraud class actions, which seek monetary relief and certification under Rule 23(b)(3).”).

4. Antitrust Class Actions

Antitrust law is the law governing business competition and monopolies.²²² Antitrust litigation derives its power from the Sherman Antitrust Act²²³ and the Clayton Antitrust Act.²²⁴ The Clayton Act was enacted to supplement the Sherman Act²²⁵ and expand the jurisdictional options for obtaining relief to those injured by antitrust violations.²²⁶ Antitrust violations are ripe for class action because, in many cases, price fixing affects large numbers of people and, while individual damages are minor, collective damages are severe.²²⁷

In antitrust litigation, defendants are jointly and severally liable for all damages caused by anticompetitive conduct.²²⁸ Therefore, once a class is certified, the defendants generally choose to settle rather than risk having massive damages awarded to the plaintiff class.²²⁹ Because antitrust class actions are brought on behalf of consumers who have been economically damaged, antitrust class actions are almost never certified through Rule

222. See *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); see also *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659 (1975).

223. 15 U.S.C. §§ 1–7 (2006). Section one of the Sherman Act states, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *Id.* § 1.

224. *Id.* §§ 12–27; 29 U.S.C. §§ 52–53 (2006). Fifteen U.S.C. § 15 states that

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.

15 U.S.C. § 15 (2006).

225. See *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957); *Allen Bradley Co. v. Int’l Bhd. of Elec. Workers*, 325 U.S. 797, 803 (1945); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 355 (1922).

226. See *United States v. Nat’l City Lines*, 334 U.S. 573, 579 (1948).

227. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161, 166 (1974) (recognizing that the plaintiffs’ individual claims were \$70 and that a class action of thousands of people collectively is the only way their claims would be worth litigating).

228. See, e.g., *William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co., Inc.*, 668 F.2d 1014, 1053 (9th Cir. 1981) (holding that Plaintiff, Inglis, “was not required to name all of the alleged conspirators inasmuch as antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy”).

229. Stanley D. Davis & Kathy Perkins Brooks, *The Employment Class Action: Recent Developments and Ideas for Discussion*, 2 SEDONA CONF. J. 109, 111 (2001).

23(b)(1) or (b)(2).²³⁰ Because antitrust class actions seek individualized monetary damages and are certified under Rule 23(b)(3), the “common answers” doctrine is not a significant hurdle. The Rule 23(a)(2) commonality inquiry is subsumed under the Rule 23(b)(3) predominance requirement.²³¹ Additionally, in the 2008 case *In re Hydrogen Peroxide*, the Third Circuit held that, in order to achieve certification under Rule 23(b)(3), the plaintiff class must “demonstrate that the [injury] element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than [the] individual,”²³² and that mere “[p]roof of conspiracy is not proof of common injury.”²³³ The Rule 23(b)(3) standard of predominance of a common question is more than sufficient to fulfill the “common answers” doctrine of the Court in *Wal-Mart v. Dukes*. Because antitrust class action lawsuits reside in the realm of Rule 23(b)(3), the effect of *Wal-Mart v. Dukes* is limited: the heightened standard of commonality will not preclude any suits that would otherwise pass muster, and the ban on individualized monetary damages will not affect antitrust classes because such classes are not certified under Rule 23(b)(2).

230. See David R. Garcia & Leo Caseria, *Wal-Mart v. Dukes: Implications for Antitrust Class Actions*, SHEPPARDMULLIN (July 11, 2011), <http://www.natlawreview.com/article/wal-mart-v-dukes-implications-antitrust-class-actions>; see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163–64 (1974) (stating that Rule 23(b)(1) and (b)(2) class certification was inapplicable for the antitrust class action before the Court); PRACTISING LAW INSTITUTE, CLASS ACTION LITIGATION: PROSECUTION & DEFENSE STRATEGIES 149, 177 (July 2004) (“The great majority of antitrust class actions are certified as 23(b)(3) actions.”); Sheldon R. Shapiro, Annotation, *Propriety, Under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, As Amended in 1966, of Class Action for Violation of Federal Antitrust Laws*, 6 A.L.R. FED. 19 (1971) (stating that “few antitrust class actions have involved Rule 23(b)(1) or Rule 23(b)(2)”).

231. See Steven Bizarand & Allison Khaskelis, *Wal-Mart v. Dukes: A Non-Event for Antitrust Defendants*, 26 ANTITRUST 1 (Fall 2006), available at <http://www.bipc.com/files/Publication/b7a13572-6801-4fa0-87bf-7db52174e56f/Preview/PublicationAttachment/62eead50-331a-4733-9f657e0e877b51a2/Fall11-BizarC.pdf> (stating that in most antitrust class cases, the “action” arises under Rule 23(b)(3)); see also Ellen Meriwether, *The “Hazards” of Dukes: Antitrust Class Action Plaintiffs Need Not Fear the Supreme Court’s Decision*, 26 ANTITRUST 18 (Fall 2011) (“[Rule 23(a)(2)] commonality is often conceded in antitrust actions, and the war is waged on the issue of whether the predominance requirement of Rule 23(b)(3) has been satisfied.”).

232. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008).

233. *Id.* (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005)).

5. Labor Class Actions

Labor class actions are the largest category of class actions.²³⁴ Outside of Title VII actions, almost all labor class actions are brought under ERISA, FLSA, and ADEA violations.²³⁵ ERISA stands for the Employee Retirement Income Security Act and is a federal law that sets minimum standards for pension plans in private industry.²³⁶ FLSA stands for the Fair Labor Standards Act and is a federal law that sets minimum standards for wages and labor conditions that employers must observe.²³⁷ While claims under ERISA must conform to the Rule 23(a) and (b) requirements to be certified,²³⁸ FLSA multiple-plaintiff actions, on the other hand, are referred to as collective actions²³⁹ and are not certified under Rule 23.²⁴⁰ Thus, the holding of *Wal-Mart v. Dukes* does not affect labor collective actions under the FLSA.²⁴¹ ADEA actions are actions brought under the Age Discrimination in Employment Act.²⁴² Similar to FLSA actions, multiple-plaintiff age discrimination claims under the ADEA are not governed by Rule 23.²⁴³

The holding of *Wal-Mart v. Dukes* has the potential to affect ERISA claims because these claims are often certified under Rule 23(b)(1),

234. Lee & Willging, *supra* note 200.

235. Chorba et al., *supra* note 177 (stating that most labor class actions are brought under ERISA and FLSA).

236. See 29 U.S.C. § 1001 (2006).

237. See 29 U.S.C. §§ 202, 206 (2006).

238. *In re Syncor ERISA Litig.*, 227 F.R.D. 338, 341–42 (C.D. Cal. 2005).

239. *Alvarez v. City of Chi.*, 605 F.3d 445, 448 (7th Cir. 2010); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008); *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 304 (3d Cir. 2003).

240. See Brian Herrington, *Fair Labor Standards Act Collective Action vs. Rule 23 Class Action*, BARRETT L. GROUP, P.A. (January 15, 2010), <http://www.bherringtonlaw.com/2010/01/fair-labor-standards-act-collective-action-vs-rule-23-class-action/>.

241. The governing law in *Wal-Mart v. Dukes* is Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011).

242. 29 U.S.C. § 623 (2008) (“It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual’s age.”).

243. See SEYFARTH SHAW LLP, *supra* note 160, at 87; see also *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 379 (3d Cir. 2007) (“The ADEA incorporates the collective action provisions of the Fair Labor Standards Act.”).

23(b)(2), and 23(b)(3).²⁴⁴ There are two things to note, however, regarding future ERISA class actions under *Wal-Mart v. Dukes*. First, under the Court's holding, ERISA classes seeking certification under Rule 23(b)(2) will likely fail if individualized money damages are a focus of the litigation;²⁴⁵ Rule 23(b)(2) classes seeking individualized damages are now required to seek certification under Rule 23(b)(3).²⁴⁶ By pushing such money-seeking claims into the Rule 23(b)(3) category, the heightened standard for Rule 23(a)(2) commonality is not a threat because it is subsumed under the requirement of commonality predominance. Second, any Rule 23(b)(1) or (b)(3) ERISA actions will not be affected by the ban on individualized monetary damages in (b)(2) classes because (b)(1) and (b)(3) classes are not affected by the Court's holdings in *Wal-Mart v. Dukes*. Lastly, the "common answers" doctrine will not likely have an adverse impact on Rule 23(b)(1) ERISA class actions. This is so because Rule 23(b)(1) classes are mandatory classes and because the individuals' claims are so similar that they must form a single class or otherwise forfeit their claims because of *res judicata*.²⁴⁷

IV. CONCLUSION

The "common answers" doctrine will not hinder meritorious Rule 23(b)(1) and (b)(2) classes. Because of the limitations *Ortiz* places on Rule 23(b)(1) classes²⁴⁸ and the limitations *Wal-Mart v. Dukes* places on

244. See *Piazza v. EBSCO Indus., Inc.*, 273 F.3d 1341, 1352 (11th Cir. 2001) (noting that claims brought under ERISA section 502(a)(2) are usually certified under Rule 23(b)(1) or (2)).

245. In settlements of ERISA class actions, the terms typically include monetary payments and additional injunctive orders barring fiduciaries and third parties from certain actions. SEYFARTH SHAW LLP, *supra* note 161, at 13.

246. See *Dukes*, 131 S. Ct. at 2557 (holding that individualized relief, including monetary relief, is no longer appropriate within a Rule 23(b)(2) class); SEYFARTH SHAW LLP, *supra* note 160, at 6.

247. WRIGHT ET AL., *supra* note 10, § 1763 ("[U]nder Rule 23(b)(1) when a court determines that inconsistent adjudications might result if individual actions had to be brought, or that the interests of other class members would be affected by separate actions, in effect it is holding that there is a substantial overlap in the questions of law or of fact presented by the representative action.").

248. See *Perry & Brass*, *supra* note 165, at 692 (discussing how *Ortiz v. Fibreboard Corp.* poses limitations on Rule 23(b)(1) classes because it is a mandatory provision and as such it "must be carefully applied to ensure that the procedural class action device does not transgress the rights of either the defendant or the absent class members").

individualized relief within Rule 23(b)(2) classes,²⁴⁹ the effect is that Rule 23(b)(1) and (b)(2) classes will not experience difficulty fulfilling the “common answers” doctrine.

Furthermore, classes seeking certification under Rule 23(b)(1) will not be adversely affected by the “common answers” doctrine adopted by the Court in *Wal-Mart v. Dukes* because Rule 23(b)(1) classes by their nature pose common questions with common answers apt to resolve the litigation.²⁵⁰ Additionally, any class seeking certification under Rule 23(b)(3) will not be adversely affected by the “common answers” doctrine adopted by the Court in *Wal-Mart v. Dukes*.²⁵¹ For categories of class actions like securities, antitrust, and products liability that seek money damages, Rule 23(a)(2) poses the smallest commonality problem.²⁵² Any class primarily seeking money damages need not fear Rule 23(a)(2) commonality because Rule 23(b)(3) predominance will most likely be the deal-breaker.²⁵³

The “common answers” doctrine has the greatest potential to affect employment class litigation. Since large employment class actions have the potential to bankrupt employers, many employers settle once a class is certified, regardless of the merits of the case. Employment class actions brought by classes sometimes seem to adopt a “the more the merrier” approach to class litigation. This approach makes the classes greatly formidable—almost “too big to fail.” Employment classes are almost always certified under Rule 23(b)(2) because Rule 23(b)(2) classes are particularly well-suited for constantly shifting populations.²⁵⁴ Good examples of classes with shifting populations are prisons, student bodies, and workforces. Rule 23(b)(2) classes are well-suited for shifting populations because Rule

249. *Dukes*, 131 S. Ct. at 2557.

250. See Chorba et al., *supra* note 177; see also *supra* pp. 72–73 and text accompanying note 177 (analyzing Rule 23(b)(1)).

251. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997). The Supreme Court held that “Rule 23(a)(2)’s ‘commonality’ requirement is subsumed under . . . the more stringent Rule 23(b)(3) requirement that questions common to the class ‘predominate over’ other questions.” *Id.* (reasoning that because the class sought to be certified under Rule 23(b)(3), the court, as a matter of efficiency, need only review whether common questions predominate because this analysis would address the Rule 23(a)(2) question as well).

252. Rule 23(b)(3) is the more stringent commonality standard that these class actions will be required to prove.

253. See *supra* Part III.C.3.

254. WILLIAM W. SCHWARZER ET AL., *RUTTER GROUP, CAL. PRAC. GUIDE FED. CIV. PRO. BEFORE TRIAL* ch. 10-C, § 10:405.1 (2012).

23(b)(2) relief is limited to injunctive or declaratory relief.²⁵⁵ Money damages are not suitable claims for these shifting populations because the determination of damages owed on an individual basis to a shifting population is very difficult to calculate and would likely breed claims of fraud and due process violations.

The Supreme Court was justified in narrowing the scope of Rule 23(a)(2) commonality because the only type of classes that struggle with commonality are the same type of classes notorious for “blackmail” settlements—Rule 23(b)(2) classes. Similarly, the Supreme Court was justified in shifting individualized monetary damages from Rule 23(b)(2) classes to Rule 23(b)(3) classes, where due process can be better accorded. While the dissent was justified in its concern over preclusion of meritorious Rule 23(b)(1) and (b)(2) classes through the “common answers” doctrine, such concerns are unlikely to come to fruition because of how the ban on individualized relief interfaces with the characteristics of Rule 23(b) classes. Taken at face value, *Wal-Mart v. Dukes* appears to be a watershed case that completely revamps Rule 23 and remands sex discrimination litigation back to the dark ages. When analyzed, however, what is revealed is a precedent that successfully tames “too big to fail” classes aimed at blackmailing defendants with deep pockets, but, at the same time, does not prevent meritorious classes from having their bite at the apple.

255. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3rd Cir. 1998) (noting that Rule 23 (b)(2) classes were “designed . . . for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.”).