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DUKES V. WAL-MART: CAN 1.5 MILLION WOMEN SAVE EMPLOYMENT DISCRIMINATION CLASS ACTIONS?

ROBERT FISHER[*]

I. INTRODUCTION

In June of 2004, a federal district court certified the largest class action employment lawsuit in history against Wal-Mart.[1] The suit alleged a pattern and practice of gender discrimination by the largest retailer in the world,[2] affecting a potential class of more than 1.5 million female employees. It specifically alleged that "Wal-Mart discriminates against its female employees by advancing male employees more quickly than female employees, by denying female employees equal job assignments, promotions, training and compensation, and by retaliating against those who oppose its unlawful practices."[3] Not only has this suit garnered significant media attention, but it has also inspired the filings of a number of subsequent class action lawsuits against Wal-Mart.[4]

Certification also comes at a time of vibrant public discourse on class actions in general.[5] In contrast to this very public debate, the Supreme Court has rarely had much to say on issues regarding class actions. Even in the rare instance where the Court has given some limited direction, it has consistently focused on issues outside the scope of employment law.[6] The cultural and legal significance surrounding the Wal-Mart suit makes it the ideal candidate for Supreme Court review. The Supreme Court should take this opportunity to resolve the long-

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[*] Benjamin N. Cardozo School of Law, J.D., June 2006; Oxford University, M.Sc., 2001; Johns Hopkins University, B.A., 2000. I wish to thank my family for their help and support in developing this note. In particular, I wish to dedicate this note to my mother. Additionally, I would like to thank Professor Melissa Hart of the University of Colorado for lending her expertise to this effort. Finally, I want to thank the editorial staff of the *Cardozo Journal of Law & Gender* for all their hard work.

[1] Dukes v. Wal-Mart, 222 F.R.D. 137 (N.D. Cal. 2004).

[2] "Wal-Mart employs uniform employment and personnel policies throughout the United States." Plaintiffs' Third Amended Complaint at ¶ 1, *Dukes*, 222 F.R.D. 137 (No. C-01-2252 MJJ) [hereinafter Complaint]. It is also alleged that "all stores regularly report payroll, labor and other employment data" and that "there are uniform policies for employees, uniform 'orientation' procedures, uniform salary, assignment, pay, training, and promotion policies." *Id.*

[3] *Id.* at ¶ 21.

[4] *See* Steven Greenhouse, *Lawsuits and Change at Wal-Mart*, N.Y.TIMES, Nov. 19, 2004, at A25.

[5] *See* Stephen Labaton, *Senate Approves Measure to Curb Big Class Actions*, N.Y. TIMES, Feb. 11, 2005, at A1.

[6] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 519 (1997); Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (per curiam).

standing circuit split regarding class certification in employment discrimination class actions and to remedy one of the largest instances of gender discrimination on record. In addition to the message that will be sent to the lawyers as well as the public at large, the outcome of this suit will be devastating for either of the parties involved.

For the past three years, the circuit courts have been clearly divided over the certification issues in employment discrimination class actions following the Civil Rights Act of 1991.[7] At the center of the debate is the Fifth Circuit's misinterpretation of Rule 23 of the Federal Rules of Civil Procedure.[8] This has resulted in the creation of a per se rule that essentially bars certification of suits involving claims for compensatory and/or punitive damages. Other circuits, while addressing the concerns expressed by the Fifth Circuit, have favored an ad hoc approach to certification.[9] The Supreme Court should resolve the split by following the better-reasoned approach of the Second and Ninth Circuits. The ad hoc approach will allow for certification in those very instances where Congress has intended to empower victims of discrimination. In the absence of intervention by the Court, victims of employment discrimination, depending upon the judicial district in which they are situated, will continue to find themselves without a proper means of legal redress.

This Note consists of four parts. Part I will provide an overview of the basic mechanisms underlying employment discrimination class-action lawsuits. Particular attention will be given to class certification under Rule 23 of the Federal Rules of Civil Procedure. Part II will examine the recent trend by the courts to cut back on the flexibility of class certification. This note will argue how and why these various decisions are flawed. Part III will focus on alternative approaches to dealing with certification problems that have arisen since the passage of the Civil Rights Act of 1991. Part IV, the major thrust of this note, will review the plaintiffs' several strategic choices in *Dukes v. Wal-Mart* that make the case ideal for Supreme Court review.

II. BACKGROUND AND HISTORY OF EMPLOYMENT DISCRIMINATION AND CLASS ACTION CERTIFICATION

Employment discrimination lawsuits originated with the passage of the Civil Rights Act of 1964 ("Act").[10] Title VII of the Act explicitly prohibits discrimination in employment on the basis of race, color, sex, religion or national origin.[11] The broad-sweeping protections of the Act have been read to apply "not

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[7] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); Robinson v. Metro-North Commuter R.R., 267 F.3d 147 (2d Cir. 2001); Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003).

[8] *See Allison*, 151 F.3d at 411.

[9] *See Robinson*, 267 F.3d at 147; *Molski*, 318 F.3d. at 937.

[10] 42 U.S.C. § 2000 (1994).

[11] 42 U.S.C. § 2000e-2(a) (1994). The prohibition extends to all aspects of employment:

> It shall be unlawful employment practice for an employer (1) to fail or refuse to hire or to

only [to] overt discrimination but also [to] practices that are fair in form, but discriminatory in operation."[12] The Act also establishes a liberal enforcement regime that permits suits by individuals as well as attorneys general and the Equal Employment Opportunity Commission.[13] Within two years of the passage of the Civil Rights Act, Congress amended the Federal Rules of Civil Procedure.[14] The creation of the modern Rule 23 governing certification of class actions in federal court enabled plaintiffs to bring employment discrimination cases as class actions. "Indeed, since the late 1960s, private class action suits have been perhaps the most important means for challenging and eliminating systemic employment discrimination[.]"[15] It is important to understand how each piece of legislation operates in order to understand the combined effect of both.

To qualify for relief under the Civil Rights Act, plaintiffs must prove either a disparate impact or disparate treatment theory of discrimination.[16] Disparate treatment, often more difficult to prove, is based on a showing of intentional discrimination by the employer.[17] Disparate impact, on the other hand, allows plaintiffs to show that an employer's facially neutral policies have had a discriminatory effect on a protected class.[18] A derivative theory known as a "pattern and practice" suit provides the basis for employment discrimination cases brought as a class action.[19] This is a two-phase sequential procedure, involving first a liability phase, and if shown, a second remedial phase.[20] Liability is "established by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure" and was not an isolated occurrence that might be considered accidental and/or sporadic in nature.[21] This is proven through a combination of anecdotal[22] and statistical evidence.[23] "If an employer fails to

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> discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

12 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

13 42 U.S.C. § 2000.

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

15 Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 816 (2004).

16 *Id.* at 815.

17 *Id.*

18 Also, it must follow that the employer cannot justify these policies as being necessary under the ordinary course of business. *See Griggs*, 401 U.S. at 429-31.

19 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 329 (1977).

20 *Id.*

21 *Id.* at 336.

22 *See* Hart, *supra* note 15, at 336-37. This testimony is often given by named class representatives. *Id.*

23 *See id.* These statistics are based on the class as a whole. "Statistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. Mayor of Philadelphia v. Educ. Equal. League, 415 U.S. 605, 620 (1974).

rebut the inference that arises from the [plaintiff's] prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy."[24] The subsequent remedial stage of proceedings involves a separate inquiry to determine the scope of individual relief.[25]

Class certification under Rule 23 consists of a two-part inquiry.[26] The requirements of Rule 23(a) function as the initial gate keeper to the sub-sections of Rule 23(b), which allow for certification according to varying degrees of scrutiny, depending on the nature of the claims and the damages sought.[27] Rule 23(a) requires plaintiffs to show *numerosity*—that the number of class members is so large as to make traditional joinder of claims impractical; *commonality*—that claimants share common questions of law or fact; *typicality*—that the claims made by the named plaintiffs are typical of the class as a whole; and *adequacy*—that the named plaintiffs and their attorneys are adequate representatives of the class.[28]

After plaintiffs have satisfied these requirements, it becomes a question for the court as to whether certification is proper under 23(b). Rule 23(b)(1) is the least common basis for certification. It is only deemed appropriate where "prosecution of individual suits would create the risk of inconsistent or conflicting resolution."[29] This applies in cases where there is a limited fund for recovery, thus meriting class treatment to ensure a fairer distribution of funds. Subsection (b)(2) provides for certification where the defendant has acted or failed to act on grounds applicable to the class as a whole, such that injunctive or declaratory relief is appropriate.[30] Certification under subsection (b)(3) functions as a catch-all where common questions predominate over individual questions, and maintenance of the suit as a class is superior to other possible methods of adjudication.[31]

Employment discrimination classes have traditionally been certified under Rule 23(b)(2) because they often seek to enjoin employers from further discriminatory conduct.[32] In fact (b)(2) was specifically intended for civil rights actions, including employment discrimination.[33] Class certification under 23(b)(2) is preferable to 23(b)(3) as it does not require that plaintiffs to engage in the costly process of having to give notice and opportunity to each potential class member to exercise their right to "opt out."[34] The Supreme Court has held that in claims

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[24] *Teamsters*, 431 U.S. at 361.

[25] Because the 1964 Act only allowed for recovery of equitable remedies, such as front pay and back pay, and because there was no right to a jury in these cases, both the liability and remedial phases were carried out in the same court.

[26] *See* FED R. CIV. P. 23(a), (b).

[27] *Id.*

[28] FED. R. CIV. P. 23(a) (emphasis added).

[29] Hart, *supra* note 15, at 816 (paraphrasing FED. R. CIV. P. 23(b)(1)).

[30] FED. R. CIV. P. 23(b)(2).

[31] FED. R. CIV. P. 23(b)(3).

[32] Hart, *supra* note 15, at 816. The U.S. Supreme Court has said that "civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions. *Amchem*, 521 U.S. at 614.

[33] *See* FED. R. CIV. P. 23(b)(2) advisory committee's note.

[34] *See* FED. R. CIV. P. 23(C)(2)(B).

where substantial monetary damages are sought, it is essential that potential class members be given the opportunity to maintain individual actions.[35] However, where plaintiff's primary focus is injunctive or declaratory relief, the Federal Rules assume that the class' interests are closely aligned with those of the individuals:[36]

> Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process.[37]

The strength of this presumption is that (b)(2) certification actually compels the class members to participate, which makes class certification mandatory.[38]

The added requirements of predomination and superiority under (b)(3) certification pose significant hurdles for the plaintiffs and make a court's inquiry into certification substantially more complex. A review of the policy differences underling certification pursuant to the two subsections is necessary to understand the constraints that each imposes for the class. Whereas the lesser requirements under (b)(2) are meant to apply to a specific type of suit, (b)(3) certification functions as a catch-all provision that allows for certification only where plaintiffs can meet the additional hurdles of predominance and superiority.[39] It is clear from the language of the rule that class actions should be the norm for claims alleging group harm and seeking injunctive or declaratory relief.[40] Likewise, 23(b)(1) also is meant to apply in specific, although rare, circumstances involving limited funds.[41] In this sense, (b)(3) is essentially an afterthought created to cover any additional suits where plaintiffs are able to make the case for certification on their own, without the aid of preconceived categories. The subjective nature of these additional hurdles can make certification in employment discrimination cases extremely difficult.

Early on, plaintiffs recognized that Title VII remedies to employment discrimination could be most effectively addressed on a class basis.[42] Throughout the mid-1960s and 70s, courts demonstrated a certain flexibility in its application of

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35 *Ortiz*, 527 U.S. at 846-47.

36 *See* FED. R. CIV. P. 23(b)(2).

37 *Robinson*, 267 F.3d at 165.

38 The concern is that plaintiffs who have a slightly greater interest may prefer to bring separate suits and thus detract from the ability of the class as a whole to bring about significant injunctive or declaratory relief. *See Ortiz*, 527 U.S. at 846-47.

39 Hart, *supra* note 15, at 816.

40 FED. R. CIV. P. 23(b)(2). The text allows certification of an "injunctive relief" class where the defendant "has acted . . . on grounds generally applicable to the class," and the plaintiffs seek final injunctive or equitable relief that the court can impose "with respect to the class as a whole." *Id.*

41 FED. R. CIV. P. 23(b)(1).

42 Scotty Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act*, 23 U. ARK. LITTLE ROCK L. REV. 925, 928 (2001).

Rule 23(a) by permitting a number of "across the board" class action lawsuits.[43] These suits involved class members seeking to represent a wide spectrum of plaintiffs, who held a variety of relationships with the employer defendants.[44] This practice allowed for certification of classes made up of both current employees seeking promotions and rejected job applicants.[45] The willingness by a majority of the courts to approve across the board certification was likely a reflection of the political climate of the day. These decisions occurred in the wake of the civil rights movement and showed willingness by the judiciary to fully embrace the policies and themes advanced during this period. Over time, however, the courts' zeal for these policies soon subsided amongst fears of employers being overly burdened by a growing number of Title VII suits.[46]

III. CUTTING BACK

Beginning with *East Texas Motor Freight System, Inc. v. Rodriguez*,[47] the Court began to cut back on the flexibility of certification in "across the board" class actions. The case involved a suit brought by Mexican-American truck drivers on behalf of "all Negroes and Mexican-Americans who had been denied equal employment opportunities with the company[.]"[48] The suit arose when the named plaintiffs applied for, and were subsequently denied promotions after working at the company for several years.[49] In overruling the appellate decision to certify the class, the Court held that "the named plaintiffs were not proper class representatives under *Fed. Rule Civ. Proc. 23 (a)*."[50] While the Court recognized that discrimination lawsuits are often by their very nature class suits, involving class-wide wrongs, they emphasized the importance of a strict adherence to the requirements of Rule 23(a).[51] The specific concern involved in this case was that the named plaintiffs were not adequate class representatives as they could not have

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[43] *See, e.g.*, Johnson v. Ga. Highway Express, 417 F.2d 1122 (5th Cir. 1969); Gibson v. Local 40, Int'l Longshoreman's & Warehouseman's Union, 543 F.2d 1259, 1263-64 (9th Cir. 1976); Crockett v. Green, 534 F.2d 715, 717-18 (7th Cir. 1976); Barnett v. W.T. Grant Co., 518 F.2d 543, 547 (4th Cir. 1975).

[44] *See, e.g., Johnson*, 417 F.2d 1122; *Gibson*, 543 F.2d at 1263-64; *Crockett*, 534 F.2d at 717-18; *Barnett*, 518 F.2d at 547.

[45] *See, e.g., Johnson*, 417 F.2d 1122; *Gibson*, 543 F.2d at 1263-64; *Crockett*, 534 F.2d at 717-18; *Barnett*, 518 F.2d at 547.

[46] In 1976 alone, there were 1,174 class action employment discrimination cases filed in the federal district court system. *See* Richard T. Seymour, *Trends in Fair Employment Litigation*, Remarks at the Midwinter Meeting of the Committee on Equal Employment Opportunity, ABA Section on Labor and Employment (Mar. 25, 1998).

[47] E. Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977). "The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *Id.* at 405-06.

[48] *Id.* at 399.

[49] *Id.*

[50] *Id.* at 403 (emphasis added).

[51] "We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs . . . [b]ut careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." *Id.* at 405.

suffered injury according to the allegations set forth. Much of opinion rested on the district court's findings that plaintiffs were in fact not qualified to be promoted to the specific positions sought.[52] While the holding in this case represents a shift in the Court's approach to certification, it is important to take note of the extent of deference given to the findings by the trial court.[53]

In *General Telephone Company of the Southwest v. Falcon*, the Court directly attacked the practice of "across the board" certification.[54] The named plaintiffs alleged discrimination of the company's promotion practices and sought certification of a broad class, including those affected by the hiring practices.[55] The Court attacked the tenuous character of the named plaintiffs' claims, which alleged that the defendant's discriminatory promotion practices represented a broader policy and practice encompassing hiring practices as well.[56] Specifically, the Court opined that it is improper to presume that the discrimination alleged by the named plaintiffs is typical of other claims by employees and applicants.[57] Title VII class actions filed post-*Falcon* have been widely limited in their scope to fit within the few minor exceptions to the Court's restrictive holding.[58]

As a result of the Court's tightening grip on the requirements for class certification in employment discrimination cases, the number of cases commenced in the federal district court system dropped significantly.[59] Beginning in 1977 with *Rodriguez*, the number of cases filed dropped from 1,174 in 1976 to 739 in 1978.[60] By 1980 the number of cases filed dropped by more than two-thirds to 326.[61] After the most recent blow delivered by the Supreme Court in *Falcon*, the number of cases filed fell to just 32 in 1991.[62]

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52 The Court noted that because

> [t]he District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers . . . they could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury.

Rodriguez, 431 U.S. at 403.

53 As will be discussed later, some circuit courts have moved away from a strict level of reliance and have turned toward a rule-like approach of certification that is uniformly applied by the lower courts.

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

55 *Id.*

56 *Id.* at 158.

57 *Id.* at 159.

> If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivable could justify a class of both applicant 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. at 159 n.15.

59 *See* Seymour, *supra* note 46, at 3.

60 *Id.*

61 *Id.*

62 *Id.*

The passage of the Civil Rights Act of 1991 gave a much-needed lifeline to employment discrimination suits by overruling a number of preceding Supreme Court cases.[63] The Act also expanded the remedial provisions of Title VII to include compensatory and punitive damages in cases of intentional discrimination. Additionally, it created an entitlement to a jury trial in instances where the above damages are sought.[64] Through Title VII's enactment, it became clear that Congress intended to show a renewed interest in the protection of employment rights, specifically evidenced through the Act's deliberate overruling of a long line of limiting precedents.[65] The newly-expanded remedial scheme created greater incentives so as to encourage citizens to be more active in the enforcement of Title VII protections.[66] Despite Congress's intentions to expand "the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination,"[67] a handful of subsequent court decisions have created greater barriers to relief than had previously existed.

It was not until seven years after its passage that a United States Appellate Court reviewed the 1991 Act against the backdrop of Rule 23.[68] The Fifth Circuit in *Allison v. Citgo* took a harsh reading of Rule 23(b)(2), establishing a bright line rule that has been applied to essentially disallow class certification of employment discrimination lawsuits seeking any of the expanded remedies pursuant to the 1991 Act.[69] Most significantly, the court drew attention to what it perceived as a direct conflict between the Federal Rules of Civil Procedure and the Civil Rights Act of 1991.[70] The court held that Title VII suits may not be certified under Rule 23(b)(2) where monetary relief predominates, unless it is incidental to requested injunctive or declaratory relief.[71]

Allison involved alleged discriminatory practices against African-American employees and job applicants.[72] Some 130 named plaintiffs and an estimated class of more than 1000 alleged discrimination with respect to general hiring, promotion,

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[63] Cases included Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (reducing employer's burden of proving business necessity); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (limiting severely the reach of the Civil Rights Act of 1966, 42 U.S.C. § 1981); Martin v. Wilks, 490 U.S. 755 (1989) (allowing white males who failed to intervene to challenge affirmative action decree to bring later action challenging promotions made under the decree); Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989) (ruling that challenge of seniority system must be brought by female plaintiffs when the system was adopted).

[64] 42 U.S.C. § 1981 a(a)(1) (2000) (finding by Congress that "additional remedies under Federal law are needed to deter . . . intentional discrimination in the workplace"). These additional remedies were not, however, added to suits based on a theory of disparate impact.

[65] *Id.*

[66] The House Report for the 1991 Act provides that compensatory and punitive damages were included to "encourage citizens to act as private attorneys general." H.R. REP. NO. 102-40(I), at 65 (1991).

[67] 42 U.S.C. § 1981 note (2000) (Purpose of 1991 Amendment).

[68] *See Allison*, 151 F.3d 402.

[69] *Id.*

[70] *Id.* at 407.

[71] *Id.* at 415. Incidental damages were defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Id.*

[72] *Id.* at 407.

compensation, and training policies, "under disparate impact and systemic disparate treatment theories of discrimination."[73] Plaintiffs sought both "equitable" remedies[74] as well as compensatory and punitive damages. They also demanded a jury trial on their claims.[75]

At the core of the Fifth Circuit's opinion is the requirement that issues common to the claims for injunctive or declaratory relief must predominate over those involving monetary damages.[76] A great deal of controversy has arisen over the court's adoption of this requirement based on the advisory committee's notes to Rule 23. The notes add a significant requirement for certification under Rule 23(b)(2).[77] The necessity for these strict requirements arises from the court's belief that "[t]he underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—'begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.'"[78] The idea is that the predomination requirement exists so as to keep the focus of litigation on general questions of law and fact. The necessity for this rule seems to suggest that a district court's exercise of its discretion would be somehow inadequate. In other words, the Fifth Circuit seems to ignore the fact that a district court judge may be perfectly capable of exercising its broad discretion to allow the class to go forward under Rule 23.

The majority in *Allison* based their opinion on a misreading of Rule 23. The court argues that the predomination requirement under (b)(2) serves two basic purposes: "[F]irst, it protects the legitimate interests of potential class members who might wish to pursue their monetary claims individually; and, second, it preserves the legal system's interest in judicial economy."[79] Here, the court's reasoning is particularly susceptible to criticism as it fails to cite or discuss its rationale in much detail. The court's primary concern for individual class members who want to pursue their own claims does not support the need for a per se predomination test for (b)(2) certification.[80] Such concerns are better addressed in the context of the need for notice and opportunity to opt out of an impending class action, both of which a judge may require at its discretion, apart from its

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[73] *Id.*

[74] Equitable remedies traditionally available under Title VII are "back pay, front pay, pre-judgment interest, and attorneys' fees." *Id.*

[75] *Id.*

[76] *Id.* at 411.

[77] Class certification under (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." FED. R. CIV. P. 23 advisory committee's notes. *But see* Harvey S. Bartlett III, *Determining Whether a Title VII Plaintiff Class's "Aim is True": The Legacy of* Allison v. Citgo Petroleum Corp. *for Employment Discrimination Class Certification Under Rule 23(b)(2)*, 74 TUL. L. REV. 2163, 2174 (2000) (noting that the creation of the new standard is precisely what the Supreme Court warned against in *Amchem*).

[78] *Allison*, 151 F.3d at 413 (quoting Eubanks v. Billington, 110 F.3d 87, 95 (D.C. Cir. 1997)).

[79] *Id.* at 415.

[80] *See* Hart, *supra* note 15, at 842.

certification under any subsection of Rule 23(b).[81] This will more directly address the Fifth Circuit's concern and allow individual plaintiffs to withdraw from the impending class to pursue their own claims.[82]

The assertion that the underlying premise of (b)(2) certification begins to break down when class members seek to recover back pay or other forms of monetary relief does not withstand analysis.[83] Common injuries suffered by victims of employment discrimination do not suddenly become less so merely because the specific consequences of the discriminatory policy vary for individual employees.[84] For example, a company's practice of discriminating against female employees will manifest itself in a range of harms necessitating different monetary rewards for plaintiffs; however, the policy and practice can and in fact should be addressed first. Moreover, it is appropriate to invoke punitive damages in these cases where an employer has engaged in a pattern or practice of willful discrimination.

The court's logic is flawed in its characterization of back pay as "incidental" damages fitting within the (b)(2) model.[85] The majority fails to explain how a determination of back pay differs from other sorts of "individualized" damages.[86] If courts are willing to allow back pay awards in class action suits certified under Rule 23(b)(2), there is no logical reason why a per se line should be drawn at this point to disallow all other forms of monetary relief that may require some individual determinations. Perhaps most problematic about the implementation of a per se requirement of predomination under (b)(2) is that, when taken in the aggregate, the court's concerns appear analogous to the requirement of superiority under (b)(3).[87] Through the aggregation of due process and efficiency concerns, the Fifth Circuit effectively asks whether a class action is indeed the best way to proceed. The due process concern is that "a class seeking substantial monetary remedies will likely consist of members with divergent interests[,]" thus necessitating that notice and opportunity to opt out of an impending suit be given to potential plaintiffs to pursue individual claims.[88] In doing so, the court has created

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[81] Note (c)(2) as amended in 2003 makes explicit the district court's discretion with respect to certification under (b)(1) and (b)(2). FED. R. CIV. P. 23(c)(2). *See also Molski*, 318 F.3d at 952. This discretion helps to quell previous due process concerns that may have arisen, especially those arising from certification under 23(b)(2).

[82] Additionally, there is evidence to suggest that after losing the certification battle in employment discrimination class actions, plaintiffs rarely go on to pursue individual claims. *See* W. Lyle Stamps, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. PUB. L. 411, 445 (2003).

[83] Hart, *supra* note 15, at 827.

[84] *Id.*

[85] *Allison*, 151 F.3d at 415; *see* Hart, *supra* note 15, at 824.

[86] Here, the court is unable to erase forty years of precedents that have established back pay as equitable relief, which is explicitly allowed as part of (b)(2) certification. *Allison*, 151 F.3d at 415; *see* Hart, *supra* note 15, at 824.

[87] "The predomination requirement of Rule 23(b)(2) serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions." *Allison*, 151 F.3d at 414-15.

[88] *Id.* at 413.

a more difficult, if not impossible, test that exists as a significant barrier to certification of employment discrimination claims.

Certification under (b)(2) explicitly omits a superiority analysis and it is thus inappropriate for the court in *Allison* to manufacture this test. The requirements for certification under (b)(2) are less strict so as to allow injunctive claims to proceed with greater ease. It therefore appears counter to the plain text and structure of Rule 23 to require class plaintiffs to prove superiority in order to be certified under (b)(2). In fact, "[t]he majority's decision rests on a conception of Rule 23(b)(2) that is irreconcilable with the basic purposes of Rule 23[.]"[89] The challenge for the courts, however, is to find some way of incorporating the concerns of the advisory committee while avoiding each subsection of the rule from becoming indistinguishable.

By muddling the various requirements of (b)(2) and (b)(3), the Fifth Circuit effectively creates a one-two punch for all Title VII suits—first by requiring that all injunctive claims involving damages be certified under (b)(3); and second, by applying the predominance and superiority requirements to disqualify these suits from class certification altogether.[90] In *Allison*, after finding the class improper for certification under Rule 23(b)(2) merely because the plaintiffs sought both compensatory and punitive damages, the court disqualified the class under (b)(3) because in the court's view, "substantial" damages available under the 1991 Act require particularized inquiry of the circumstances of each class member.[91]

The *Allison* test approaches the predomination requirement through a narrow lens. The inquiry focuses directly on the procedures necessary for relief to be granted, interpreting "predomination" as the "determination of compensatory damages for each individual [involving] the most frequent, common or numerous relief in the sense of total time necessary to adjudicate the claims."[92] The effect of this flawed approach creates a scenario where individualized claims for monetary damages will always appear more numerous as compared to a single claim for class injunctive and/or declaratory relief.[93] In this sense, the inquiry is like a pair of weighted dice—always set up to yield results in favor of one party, and in this case, the employer defendant is the favored party. Without taking into account the commencement of the suit and any particular injunctive or declaratory interests that might have preceded the remedial stage, the district court will be hard-pressed to

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89 *Id.* at 426 (Dennis, J. dissenting).

90 *Id.* at 419.

91 "The predominance of individual-specific issues relating to the plaintiffs' claims for compensatory and punitive damages in turn detracts from the superiority of the class action device in resolving these claims." *Id.* The court went on to state that "[t]he relatively substantial value of these claims (for the statutory maximum of $300,000 per plaintiff) and the availability of attorney's fees eliminate financial barriers that might make individual lawsuits unlikely or infeasible." *Id.* at 420. By focusing on the maximum amount of recovery possible per plaintiff, the court seems to suggest that the mere existence of the statutory limit may defeat certification.

92 Stamps, *supra* note 82, at 429.

93 *Id.*

find predominance for class claims where compensatory and punitive damages have been plead.

The court is also quick to dispose of arguments in favor of partial certification under Rule 23(c)(4).[94] This would entail certification of the first stage of the pattern or practice claim as a means of narrowing the issues, and thus making (b)(3) certification appropriate for the remainder of the inquiry. The majority seems convinced that certification at the first stage would not significantly increase the likelihood of later certification at the second stage of pattern and practice claims, including those for compensatory and punitive damages.[95] Furthermore, there is a concern that partial certification may be used to circumvent (b)(3) requirements, which would involve the plaintiffs using 23(c)(4) to manufacture the predominance requirement.[96]

The rule in *Allison* does in fact provide substantive protections of due process as well as the right to a jury trial. However, as applied, the protective wall established by the Fifth Circuit harms more than protects the rights provided to plaintiffs under the Civil Rights Act of 1991.[97]

IV. ALTERNATIVES TO THE *ALLISON* APPROACH

One of the more creative approaches to address predominance concerns in the larger context of judicial economy involves the subdivision of claims under Rule 23(c)(4). While the Fifth Circuit has been quick to dispose of this method, other courts have found this approach to be a useful mechanism for balancing the broader interests in the rule.[98] Despite the adoption of the incidental damages approach set out in *Allison* by a handful of circuit courts,[99] the Second and Ninth Circuits have supported an ad hoc approach to certification.[100] The Ninth Circuit, in *Robinson v. Metro North*, held that instead of mechanically applying the harsh rule of *Allison*, a district court must consider the evidence for class certification in a hearing, and assess whether (b)(2) certification is appropriate in light of all of the facts and circumstances of the case.[101]

The class in *Robinson* was made up of past and present Metro North employees who alleged discrimination on behalf of all African American employees for a period of over ten years.[102] The estimated class size in this case was 1,300 people.[103] Plaintiffs asserted both pattern-or-practice disparate

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94 *See Allison*, 151 F.3d at 421-22.

95 *Id.*

96 *Id.* at 422; *see also* Castano v. American Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996).

97 Stamps, *supra* note 82, at 436.

98 *See, e.g., Robinson*, 267 F.3d 147; *Molski*, 318 F.3d 937.

99 *See* Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228 (11th Cir. 2000); Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894 (7th Cir. 1999).

100 *See Robinson*, 267 F.3d 147; *Molski*, 318 F.3d. 937.

101 *See Robinson*, 267 F.3d at 164.

102 *Id.* at 155.

103 *Id.*

treatment and disparate impact claims while seeking to recover both equitable and compensatory damages.[104] The court expressed a strong interest in addressing the due process concerns detailed in the advisory committee's notes but maintained that broad discretion remains with the district court. Before allowing (b)(2) certification, the court stressed that at a minimum, the district court should ensure the following: "[E]ven in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and the injunctive or declaratory relief would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits."[105] In contrast to *Allison*, the inquiry in *Robinson* balances the issue of predomination between the plaintiff's initial motives and interests in bringing the lawsuit against the extent to which injunctive or declaratory relief sought would be reasonably necessary and appropriate as a final remedy.[106]

Throughout the opinion, the court's due process concerns relating to adequacy of notice and opportunity to opt out remain close in the background. The theory underlying (b)(2) certification involves a presumption of cohesion and unity between absent class members that is thought to generally safeguard the interests of absent members.[107] However, the Second Circuit suggests that "where non-incidental monetary relief, such as compensatory damages, are involved, due process may require the enhanced procedural protections of notice and opt out for absent class members."[108] Despite having similar due process concerns as in *Allison*, *Robinson* suggests that (b)(2) certification is still possible even where non-incidental damages are involved.[109]

Most recently, the Ninth Circuit has weighed in regarding the issue with an adoption of the ad hoc approach of *Robinson* while taking a stricter view of notice and opt out due process concerns.[110] *Molski v. Gleich* involved claims brought under the Americans with Disabilities Act and by a class of mobility-impaired individuals alleging denial of access to public accommodations at Arco gas stations.[111] In reversing the consent decree issued by the district court, the appellate court held that directed notice was inadequate to preserve the due process

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[104] No punitive damages were sought. However, the analysis and relevance of this case should still apply to those seeking punitive damages. There is no reason to think that punitive damages are different in nature from compensatory damages.

[105] *Robinson*, 267 F.3d at 155.

[106] *Id.* at 164.

[107] *Id.* at 165.

[108] *Id.* at 166.

> [A]ny due process risk posed by (b)(2) class certification of a claim for non-incidental damages can be eliminated by the district court simply affording notice and opt out rights to absent class members for those portions of the proceedings where presumption of class cohesion falters—i.e., the damages phase of the proceedings.

Id.

[110] *Molski*, 318 F.3d at 951-53.

[111] *Id.* at 942.

rights of absent class members.[112] The court did not, however, find that certification under (b)(2) constituted a *per se* abuse of discretion by the lower court. The reversal was merely based on specific inadequacies of the directed notice of the consent decree.[113]

It is important to recognize two significant points from *Molski* relating to (b)(2) certification after *Allison*. First, the appellate court's decision upheld certification under (b)(2), and found that the lower court did not abuse its discretion; second, the district court exercised its discretion under 23(d)(2) to address the notice and opportunity to opt out concerns set forth in *Allison*.[114] Despite their refusal to adopt the per se predomination test established in *Allison*, the Ninth Circuit gives a great deal of attention to what it views as the Supreme Court's "growing concern regarding the constitutionality of certifying mandatory classes when monetary damages are at issue."[115]

The *Molski* court's efficiency concerns are evidenced through its adoption of the Fifth Circuit's definition of incidental damages.[116] However, rather than halting the inquiry for class certification under (b)(2), the court looks to the specific facts and circumstances of each case so as to understand the underlying intent of the plaintiffs.[117] In this way, the *Molski* approach is most similar to *Robinson*'s ad hoc approach. However, *Molski* provides further guidance to district courts as to the manner and circumstances in which it should exercise their (d)(2) discretion.

Adopting *Allison*'s predomination rule in *Jefferson v. Ingersoll*, the Seventh Circuit has shown greater flexibility in certification of claims involving so-called "non incidental" damages.[118] The Seventh Circuit's hybrid approach to certification both satisfies due process concerns and permits the application of (b)(2) in claims involving money damage.[119] The hybrid approach allows for (b)(2) certification because the damages aspects of the case are certified under (b)(3).[120] However, the court dismissed the hybrid approach as a practical matter because of its concern that a trial of the damages claims must be held in order to preserve the right to a jury trial under the Seventh Amendment.[121] As the Seventh Circuit observed, if the damages claims must be tried first, it would require time

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112 *Id.*

113 *Id.* at 956.

114 *Id.* at 950, 952.

115 *Molski*, 318 F.3d at 948-49 (citing *Ortiz*, 527 U.S. 815).

116 *Id.* at 950. The court later clarifies that its definition relates to monetary damages that are "secondary," which seems to part with the *Allison* definition. Regardless of the court's exact definition, it is clear that the court was unwilling to bind themselves through any language indicative of a per se rule. *Id.*

117 *Id.*

118 *Ingersoll*, 195 F.3d at 898.

119 *Id.*

120 *Id.*

121 This note will not be examining Seventh Amendment issues. For a discussion of these problems, see Hart, *supra* note 15, at 831-35.

and resources that would predominate over the injunctive or declaratory claims, thus making certification under (b)(2) problematic.[122]

V. STRATEGIC CHOICES OF *DUKES*: OPTIMALLY SET FOR SUPREME COURT REVIEW

When the plaintiffs' lawyers filed the complaint in *Dukes*, they were confronting the circuit split and its potential application to a suit that involves a nationwide class seeking both injunction and compensatory relief.[123] The lawyers made several strategic choices in the face of this split, some of which have helped to make *Dukes* an ideal candidate for Supreme Court review. One of the most significant of these decisions was to create a broad coalition of plaintiffs' attorneys offering varying expertise from around the country.[124] The choice was also made in an effort to limit the make-up of the class to only female employees, as opposed to employees and applicants, thus focusing on the company's promotion practices alone.[125] Additionally, plaintiffs limited their claims to employment discrimination under federal law to avoid concerns about conflicting state laws.[126] Finally, plaintiffs' lawyers volunteered to provide class notice to minimize due process concerns.[127]

In a time when class suits are often criticized for benefiting the lawyers far more than their clients, the coalition of attorneys in *Dukes* made it a point to place its motives in the forefront. Much of the criticism of large-scale class actions focuses on self-proclaimed public interest suits that all too often result in private payout settlements. This leaves defendants feeling as if they have been blackmailed, and clients wondering why they recovered so little.[128] The lead attorneys in *Dukes* have made clear their broader social goals in bringing this lawsuit as a backdrop for their unwillingness to settle for mere financial satisfaction.[129] These attorneys agree that this case will serve "as a means by

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122 *Ingersoll*, 195 F.3d at 898. In spite of the court's rationale for ruling out the possibility of hybrid certification, it again expressed interest in treating "a Rule 23(b)(2) class as if it were under Rule 23(b)(3), giving notice and opportunity to opt out on authority of Rule 23(d)(2)." *Id.*

123 *See* Complaint, *supra* note 2.

124 *Id.*

125 Brad Seligman, *From Duke Power to Wal-Mart: Title VII Class Actions Then and Now*, *in* 20 STEVEN SALTZMAN & BARBARA WOLVOVITZ, NAT'L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES HANDBOOK (Supp. 2004), *reprinted in* http://www.impactfund.org/pdfs/Duke%20Power%20Article.pdf (last visited Mar. 25, 2006).

126 *Id.*

127 *Id.*

128 Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 HARV. J. ON LEGIS. 515, 518-19.

129 Plaintiffs' "lawyers say they will not settle the case unless Wal-Mart makes ironclad pledges to treat women better and agrees to a substantial settlement, larger than any previous settlement in a job-discrimination case." Steven Greenhouse & Constance L. Hays, *Wal-Mart Sex-Bias Suit Given Class Action Status*, N.Y. TIMES, June 23, 2004, at A1. "We think changing Wal-Mart for the better is going to help change everybody for the better." *Id.*

which to expose Wal-Mart's questionable labor practices and force Wal-Mart to engage in large-scale labor reforms."[130]

The leadership of nonprofit organizations, such as that of The Impact Fund and Equal Rights Advocates (ERA), has helped to give the suit a public interest face. The Impact Fund is a public organization that provides representation, technical assistance and funding for complex public interest litigation.[131] Its goal is to address systemic problems of social and environmental injustices in addition to human and civil rights as well as larger issues of poverty.[132] The Impact Fund also functions as a sort of clearinghouse for civil rights class action lawsuits. Each year the organization hosts national conferences for plaintiff-side employment discrimination class action lawyers.[133] They also have established a national Title VII class action LISTSERV to help ensure better coordination of legal efforts and strategies.[134] The organization's founder, Brad Seligman, is well known as one of the pioneers in employment discrimination law as well as one of the leading class action experts in the country.[135] His role as both lead attorney and spokesperson for *Dukes* has brought a unique voice that a private law firm could not provide, no matter how committed to the public interest. Seligman's involvement also makes it more difficult for Wal-Mart to criticize the suit as one focused on financial gain rather than civil rights.

Likewise, ERA is an organization devoted to promoting equality and economic justice for women through impact litigation.[136] As the second firm listed on the complaint, the involvement of ERA brings with it both experience and expertise in the area of gender discrimination.[137] Sheila Thomas, the lead attorney from ERA, has also acted as a spokesperson for the plaintiffs, voicing her interests in bringing about significant social reforms to improve the status of women in the workplace.[138] Both The Impact Fund and ERA helped to facilitate outreach to the enormous potential class base in each of Wal-Mart's forty-one regions.[139] In addition to the two public interest organizations, the plaintiffs' team also consists of employment firms throughout the country, the reputation and experience of which greatly increase the ability to get the word out during the search for plaintiffs and

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130 Ritu Bhatnagar, Recent Development, Dukes v. Wal-Mart *as a Catalyst for Social Activism*, 19 BERKELEY WOMEN'S L.J. 246, 247 (2004).

131 *See* The Impact Fund, http://www.impactfund.org (last visited Mar. 25, 2006).

132 *See id.*

133 *See* The Impact Fund Training Program, http://www.impactfund.org/pages/trainings.htm (last visited Mar. 25, 2006).

134 *See* Seligman, *supra* note 125.

135 *See* The Impact Fund: Attorney Profiles, http://impactfund.org/pages/about/attorney.htm (last visited Mar. 25, 2006).

136 *See* The Equal Rights Advocates, ERA: Welcome, http://www.equalrights.org (last visited Mar. 25, 2006).

137 *See* ERA: Historical Highlights, http://www.equalrights.org/about/history.asp (last visited Mar. 25, 2006).

138 *Id.*

139 *See* Seligman, *supra* note 125.

witnesses.[140] This quasi-activist approach was helpful in making the case for adequacy under 23(a) requirements. The leadership and involvement of non-profit and grass roots organizations also proved effective in drawing significant media attention to the *Dukes* suit.[141]

Plaintiffs' attorneys developed a comprehensive strategic approach in pleading the suit to help make the narrowly defined class less susceptible to attacks.[142] As a means of preempting defense concerns of commonality and typicality, only store employees were included in the class. Had the plaintiffs included claims by outside applicants, upper management, and employees at other facilities, the court would have quite possibly denied certification. By limiting the group of plaintiffs to only those women who had worked in Wal-Mart stores, plaintiffs were able to avoid major attacks under *Rodriguez* and *Falcon*—that the class was not representative and thus does not satisfy commonality and typicality requirements under Rule 23(a).[143]

The Supreme Court in *Rodriguez* was particularly concerned that plaintiffs situated in different positions within a company would experience harm differently, and therefore, require different remedies.[144] Also addressing these concerns, plaintiffs in *Dukes* alleged that women working in stores throughout the country suffered similar harms because of the existence of discriminatory national policies.[145] If, for example, plaintiffs chose to include claims of discriminatory hiring *and* promotion practices, plaintiffs would not have likely succeeded in certifying the class. They would have had to face the additional burden of trying to prove that all claimants possessed the same interest and suffered the same injury.[146]

The issues in the suit were therefore pared down to claims for equal pay and promotion to management. The plaintiffs intentionally drafted the complaint to exclude any allegations relating to hiring practices[147] because courts have continuously expressed reluctance in certifying classes that included both current as well as potential claimants.[148] The problem is that damages from discriminatory

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[140] *Id.*

[141] *See* Nathan Koppel, *Firms, Non Profit Team in "Wal-Mart": Is Paring of Plaintiffs' Lawyers Merely to Hide Motive for Profit?*, NAT'L L.J., Aug. 16, 2004, at 7; Steven Malanga, *Class Action? Third Aisle to the Left*, WALL ST. J., June 29, 2004, at 24; Donna Horowitz et al., *Wal-Mart Plaintiff Still Loves the Store*, L.A. TIMES, June 24, 2004, at B1.

[142] The use of anecdotal evidence during the certification hearings also served a media strategy that gave newspapers and television stations a local angle for their stories. "The primacy of injunctive relief claims was emphasized at every stage and all plaintiffs averred that changing Wal-Mart policies and practices was the main purpose of the litigation." Seligman, *supra* note 125, at 15.

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

[144] "The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been real victims of that discrimination." *Rodriguez*, 431 U.S.at 405-06.

[145] Complaint, *supra* note 2, at ¶ 21.

[146] *Falcon*, 457 U.S. at 156.

[147] *See* Seligman, *supra* note 125, at 14.

[148] *See, e.g., Falcon*, 457 U.S. 147; *Rodriguez* 431 U.S. 395.

hiring practices may be very difficult, if not impossible, to accurately address. Additionally, it would be a long and cumbersome process for the court to review each and every instance where a woman was not hired to determine if she was indeed discriminated against on the basis of gender. In this way, plaintiffs were effective in weakening potential attacks by defendants who were seeking to characterize the case as an "across the board" suit.[149] The same reason motivated the limitation of the number of claims as well as the nature of the class of claimants. In his rejection of defendant's arguments on the matter, Judge Jenkins characterized the issues as "substantially more limited."[150]

Furthermore, the complaint was carefully crafted to circumvent problems that arise when class action suits raise state claims.[151] One particular concern is that a class action might not be manageable in light of state law variations.[152] In *Castano v. American Tobacco Co.*, the Fifth Circuit expressed doubt that the potential class was manageable where the claim involved "eight causes of action, multiple jurisdictions, millions of plaintiffs, eight defendants, and over fifty years of alleged wrongful conduct."[153] By confining the suit to only federal claims, plaintiffs in *Dukes* have been able to avoid potential problems that might arise had multiple jurisdictional issues been involved in the action.

Another concern raised by the court in *Castano* is that "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance."[154] Although predominance is a requirement for class certification only under 23(b)(3), it was nonetheless important for the lawyers in *Dukes* to avoid what has become a significant barrier in multi-state actions.[155] In the event that a higher court finds certification improper under (b)(2), plaintiffs will be better prepared to survive the additional tests requiring both predominance and superiority.

Recognizing the growing concern for due process protection where substantial money damages are at stake, plaintiffs' lawyers also took significant steps to address these concerns.[156] Most importantly, they volunteered to give notice and opt out rights to potential class members, despite seeking to be certified under 23(b)(2).[157] These actions were most likely a response to the Supreme

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149 *See* Seligman, *supra* note 125, at 14.

150 *Dukes*, 222 F.R.D.at 142.

151 *See generally Castano*, 84 F.3d 734. This decision also limited the types of claims for gender discrimination under the 1964 Civil Rights Act, and in limiting the claims to violations of federal law, the plaintiffs were able to avoid federalist concerns involving punishment for behavior that may be legal in other jurisdictions. *Id.*

152 *Id.* at 743.

153 *Id.*

154 *Id.* at 741.

155 *Id.* at 750 ("Prior to certification, the district court must determine whether variations in state law defeat predominance. While the task may not be impossible, its complexity certainly makes individual trials a more attractive alternative and ipso facto, renders class treatment not superior."); *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (1995).

156 *See Ticor*, 511 U.S. 117 (per curiam).

157 *See* Seligman, *supra* note 125.

Court's *per curium* opinion in *Ticor Title Insurance Co. v. Brown*, in which the Court gave some indication that it might be unwilling to uphold certification under 23(b)(2) where monetary damages are sought.[158]

In *Ticor*, the Court dealt with the question of whether constitutional due process issues were implicated where absent class members did not have the chance to opt out of the class.[159] The Court refused to grant certiorari and stated that there was "at least a substantial possibility" that actions seeking monetary damages could only be certified under Rule 23 (b)(3) and that it "may have been wrong" to certify under either 23 (b)(1)(A) or (b)(2) where plaintiffs were seeking both equitable and monetary relief.[160] It is important to note, however, that the Court's opinion only rescinds a grant of certiorari and therefore does not create a definitive rule of law. Nevertheless, the preemptive actions taken by plaintiffs' counsel in *Dukes* to provide notice to all potential class members would seem to defuse possible due process concerns.[161]

Plaintiffs' voluntary actions also went above and beyond the requirements of both the Ninth and Second Circuits for claims seeking (b)(2) certification.[162] In *Molski*, the Ninth Circuit expressed due process concerns about claims involving non-incidental damages.[163] The court refused to adopt a *per se* rule that would require due process protections for absent class members where monetary damages are involved.[164] Instead, they "indicated that certification of a mandatory class *may* be appropriate even when monetary damages are involved."[165] Contrastingly, the Second Circuit in *Robinson* was primarily concerned with claims that involve compensatory damages, where entitlements may vary depending on the circumstances of each class member.[166] Nevertheless, the court fell short of requiring notice as the majority was convinced that "any due process risk posed by (b)(2) class certification of a claim for non-incidental damages can be eliminated by the district court simply affording notice and opt out rights to the absent class members."[167] Plaintiffs in *Dukes* were able to avoid these due process concerns by

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158 *Ticor*, 511 U.S. at 121.

159 *Id.*

160 *Id.*

161 Even the Fifth Circuit has suggested that given procedural safeguards, certification under (b)(2) may be possible.

> By providing (b)(2) class members with the procedural safeguards of notice and opt-out, the district court can permit civil rights class actions to proceed under 23(b)(2) without requiring that such actions meet the stiffer substantive requirements of 23(b)(3), yet still ensure that the class representatives adequately represent the interests of unnamed class members.

Allison, 151 F.3d at418 n.13.

162 *See generally Molski*, 318 F.3d 937; *Robinson*, 267 F.3d 147.

163 "Notice for a Rule 23(b)(2) class is discretionary under Rule 23(d)(2)." *Molski*, 318 F.3d at 952.

164 *Id.* at 949.

165 *Id.* (emphasis added).

166 *Robinson*, 267 F.3d. at 147. In these types of cases, "[t]he presumption of class homogeneity and cohesion falters, and thus, adequate representation alone may prove insufficient to protect absent class members interests." *Id.* at 165-66.

167 *Id.*

preempting possible criticism by the district court. At the same time, plaintiffs optimally positioned themselves for Supreme Court review by alleviating the Court's perceived concern about claims for non-incidental damages.[168]

Dukes has gained significant media attention in addition to spawning widespread academic debate over issues ranging from Title VII litigation to the larger ongoing class action debate.[169] Such widespread allegations make it difficult for any court, let alone the Supreme Court, to ignore. In fact, the importance of the issues raised in the complaint played a significant role in the district court judge's decision to certify the class.[170] Perhaps the aspect of the suit most inviting of Supreme Court review is its sheer size and magnitude, which alone will undoubtedly ensure the case a permanent place in history. Much of the media attention surrounding the suit has been focused on the fact that it is "the largest civil rights class action ever certified."[171] Judge Jenkins, who referred to his decision in *Dukes* as "historic," made the point at the outset of his opinion that "[i]nsulating our nation's largest employers from allegations that they have engaged in a pattern and practice of gender or racial discrimination—simply because they are large—would seriously undermine" the purpose of Title VII in preventing workplace discrimination on the basis of gender.[172] Judge Jenkins also noted the historical significance of the ruling coming in the year that marks the fiftieth anniversary of the Supreme Court's decision in *Brown v. Board of Education*.[173] The opinion was written in a tone that "serves as a reminder of the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs."[174] Under this guise, Judge Jenkins was quick to point out that "while the size of the proposed class is unique, the issues are not novel, and [that] Plaintiffs' claims are relatively narrow in scope."[175]

Plaintiffs have alleged that Wal-Mart has engaged in an "on-going and continuous pattern and practice of intentional sex discrimination in assignments, pay, training and promotions, and reliance on policies and practices that have an adverse impact on female employees."[176] Some of the specific allegations were that Wal-Mart failed "to consistently post job and promotional openings to ensure that all employees have notice of and an opportunity to seek advancement or more

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168 *Dukes*, 222 F.R.D. 137.

169 See Malanga, *supra* note 141; Reh, *supra* note 128. The debate has been defined by whether class action litigation is an appropriate and effective means for resolving social ills. Much of the criticism of so-called "activist judges," who are accused of using the courtroom as their own personal legislature, comes from debate over class action lawsuits.

170 *Dukes*, 222 F.R.D. at 142.

171 Koppel, *supra* note 141.

172 *Dukes*, 222 F.R.D. at 142.

173 Brown v. Board of Education, 347 U.S. 483 (1954).

174 *Dukes*, 222 F.R.D. at 142.

175 *Id.* "While . . . the proposed class size is extremely large, the types of claims asserted are relatively limited in the context of other judicially sanctioned class actions." *Id.* at n.4.

176 Complaint, *supra* note 2, at ¶ 29.

desirable assignments and training,"[177] that the company engaged in "[p]re-selection and grooming of male employees for advancement, favorable assignments and training,"[178] and that Wal-Mart retaliated against "female employees who have complained either internally or externally."[179]

The staggering statistics alleged in the complaint made it difficult to ignore what was depicted as a national problem affecting hundreds of thousands if not millions of women. More than 72% of the hourly sales employees at Wal-Mart are female and yet they only make up one-third of management positions.[180] Contrastingly, it was alleged that men comprise less than 28% of the hourly sales workers and yet hold two-thirds of all store management positions and more than 90% of the top Store Manager positions.[181] If one is to accept these statistics as even remotely factual it would be difficult to ignore such a gross disparity, even absent a showing of a pattern and practice of discrimination.

Nevertheless, plaintiffs went on to provide an extensive explanation of the nature of Wal-Mart's pattern and practice of discrimination nation-wide.[182] They alleged that there was a failure to consistently post job and promotional openings that would ensure that all employees were given notice and given the opportunity to seek advancement.[183] They also alleged that there was a general reliance upon unweighted, arbitrary, and subjective criteria used by a nearly all male managerial workforce.[184] These subjective criteria were applied when making assignments, training, pay, performance review, and promotional decisions.[185]

The *Dukes* court certified plaintiffs' claim for equal pay with respect to all forms of relief.[186] However—with respect to plaintiffs' promotion claim—the court certified all claims except for those for lost pay and punitive damages where there was no objective data documenting class members' interest in the challenged promotion.[187] Specifically, these claims were denied for being unmanageable.[188] In adopting the framework set out in *Robinson* and *Molski*, Judge Jenkins looked to the overall structure and goals of the lawsuit to determine whether the claims were injunctive or declaratory in nature.[189] The court considered several factors in

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177 *Id.* at ¶ 29(a).

178 *Id.* at ¶ 29(d) (internal citations omitted).

179 *Id.* at ¶ 29(l).

180 *Id.* at ¶ 1.

181 Complaint, *supra* note 2, at ¶ 1. It is further alleged that women comprise an even smaller percentage of upper management positions. "Plaintiffs are informed and believe that women comprise less than 10% of all Store Managers and approximately 4% of all District Managers." *Id.* at ¶ 27.

182 *Id.* at ¶ 29(a).

183 *Id.*

184 *Id.* at ¶ 29(b).

185 *Id.*

186 *Dukes*, 222 F.R.D. at 143.

187 *Id.*

188 *Id.* at 183. Noting that absent an objective data set, there would be no way "to identify those class members who would be eligible to participate in a lump sum backpay award, and to fashion a formula to calculate such an award." *Id.*

189 *Id.* at 171.

coming to its conclusion that "[p]laintiffs' claim for punitive damages was secondary to their primary goal of achieving broad equitable relief," and that, therefore, "the equitable relief sought predominates over the claim for punitive damages."[190]

The court first considered the "significant" effects that a successful claim would achieve.[191] Judge Jenkins agreed with plaintiffs that such an outcome would provide "long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotion decisions nationwide that would benefit not only current class members, but all future female employees as well."[192] Declarations written by various named class representatives also helped to affirm the central motivation of *Dukes*. Many of these declarations stressed the claimants' primary goal as the desire to bring gender equality to Wal-Mart through equal pay and employment opportunities as opposed to mere personal pursuit for damages.[193] Judge Jenkins went to great lengths to adhere to the concerns expressed by the Court in *Falcon,* noting that Title VII certification must be done through a meticulous application of Rule 23 requirements. A large portion of the opinion is devoted to an analysis of the facts and statistics presented by experts from both sides during pre-certification hearings.[194]

The court took a qualitative approach to the commonality requirement, focusing on factual and legal questions shared by the class members. The court considered evidence from three major categories: "(1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence . . . of discriminatory attitudes held or tolerated by management against class members around the country."[195]

The court looked to the overall pay and promotional structure set by the home office to prove the existence of company-wide policies and practices.[196] The regime outlined by the court is illustrative of a national pay structure for both hourly and salaried employees whose pay and promotion is ultimately determined by local managers.[197] It is actually the subjective nature of the company's policies governing compensation of hourly and salaried employees that allowed the court to

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190 *Id.*

191 *Dukes*, 222 F.R.D. at 171.

192 *Id.*

193 *Id.* Betty Dukes, for example, stated that her "primary goal [in this litigation] [was] to ensure that the employment practices of Wal-Mart which hinder the progress of women wishing to enter management be changed to ensure fair and equitable treatment of female employees, and to ensure women receive equal pay." Declaration of Betty Dukes in Support of Plaintiffs' Motion for Class Certification, *Dukes*, 222 F.R.D. 137 (No. C-01-2252 MJJ).

194 *See id.*

195 *Id.* at 145.

196 *Dukes*, 222 F.R.D. at 148.

197 *Id.* Local managers include store managers, district managers and regional managers. Each of these has a certain level of discretion to increase pay within a general restrictive guidelines set by the home office. *Id.*

find a "significant uniformity" across stores.[198] The court's findings were based on the theory that Wal-Mart willingly and actively engaged in a practice that it knew or should have known actually perpetuated a climate of discrimination across its stores.[199]

The court relied heavily on statistical analysis and testimony by plaintiffs' expert, the bulk of which effectively proved the existence of a discriminatory corporate culture manifested through compensation and promotion practices. Plaintiffs' expert concluded that Wal-Mart's lag in promotion of women to in-store management positions "cannot be explained in terms of a lack of qualifications, interest, or availability among female employees."[200] The court agreed that this conclusion supported an inference of class-wide discrimination.[201]

VI. CONCLUSION

The certification of the largest gender discrimination lawsuit ever presents the Supreme Court with a unique opportunity to reconcile the Civil Rights Act of 1991 with class certification under Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs in *Dukes* have carefully crafted their claim so as to present the Court with an ideal model that will allow for the preservation of employees' rights without compromising ideological barriers to class actions. In a time when plaintiff's attorneys have come under attack for being more interested in money than for the causes they purport to represent, *Dukes* has come forward as a historic departure from this image. There is no doubt that the forces behind this lawsuit are truly interested in change.

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198 *Id.*

199 *Id.* at 149 ("While some level of subjectivity is inherent in, and in fact a useful part of, personnel decisions, courts have long recognized that the deliberate and routine use of excessive subjectivity in an employment practice that is susceptible to being infected by discriminatory animus.").

200 *Id.* at 165.

201 *Dukes*, 222 F.R.D. at 166.