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INTRODUCTION

Sometimes uncertainty among the lower federal courts can spur needed clarification, without Supreme Court intervention. So it is for the parameters that govern judicial rulings on motions for class-action certification. The past decade has witnessed a welcome degree of convergence across the federal courts of appeals on this subject, at least in part.

Gone are earlier suppositions that the court must accept as true the allegations contained in the class complaint[1]—a view that would lead to class certification in virtually every proposed instance by turning the question into an exercise in pleading rather than a matter of affirmative proof.[2] Gone, too, are approaches whereby the court, in ruling on class certification, must avoid any question that

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* To the greatest extent possible this essay is being presented here in the form that it was left by Professor Richard Nagareda when he passed away on October 8, 2010. The text has been edited only for grammatical and factual correctness. Material has been added to the footnotes without comment where statements in the text could be supported by reference to official documents or material cited by Professor Nagareda elsewhere in the original essay.

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1. *See* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.").

2. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008) ("[T]he requirements set out in Rule 23 are not mere pleading rules.").

overlaps with the parties' dispute on the merits.[3] And gone, as well, are approaches whereby the court merely asks whether expert submissions offered in support of a class certification motion are so unfounded as to be inadmissible as a matter of law in the event of trial.[4]

In place of these earlier views, a body of doctrine has emerged from the lower federal courts with the promise of eventually yielding a distinctive law of class certification. Rather than look simply for "some showing"[5] of compliance with the requirements for class certification in Rule 23 of the Federal Rules of Civil Procedure, the court must affirmatively determine that those requirements are indeed satisfied. This obligation obtains, even when the parties' dispute over class certification overlaps with their dispute on the merits.[6] On these points, there is no longer disagreement in the declared positions of the federal appellate courts, a matter that is no small achievement in the absence of Supreme Court involvement. Still, all is neither well nor cohesive in the law of class certification, and the Court should stand aside no longer.

The crucial question in the substantial majority of disputes over class certification today is whether the members of the proposed class are the victims of the same wrong, amenable to unitary adjudication, or whether they are the victims of differing, individualized wrongs, such as to defeat calls for class treatment. The text of Rule 23 focuses on this distinction between proposed classes whose members are relevantly the same and those whose members are relevantly different. Rule 23(b)(3) for opt-out class actions calls for the court to "find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members." Rule 23(b)(2) for mandatory class actions similarly speaks of conduct by the defendant "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."

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3. *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 33 (2d Cir. 2006) [hereinafter *IPO Securities*].

4. *See id.* at 36, 42 (disavowing "fatally flawed" standard of *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 134–35 (2d Cir. 2001)).

5. *See id.* at 42 (rejecting "some showing" standard in Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 293 (2d Cir. 1999)).

6. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 594 (9th Cir. 2010); *Hydrogen Peroxide*, 552 F.3d at 307; Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 368 (5th Cir. 2007); *IPO Securities*, 471 F.3d at 41–42.

Speaking to the parameters for judicial determination of class certification questions, several circuits have come squarely to rest on a preponderance-of-the-evidence standard[7]—a metric distinct from the inquiry on a motion for summary judgment into whether a genuine issue of material fact exists on the merits. This approach entails judicial evaluation of the evidence and legal argumentation both ways as to whether class members are relevantly the same. Most important of all, the court ultimately must decide which view is, on balance, correct—if only for the limited purpose of making the class certification ruling, with no preclusive effect as to subsequent proceedings in the case.[8]

The 2010 decision of the Court of Appeals for the Ninth Circuit, sitting en banc in *Dukes v. Wal-Mart Stores, Inc.*,[9] opens a significant fault line in the law of class certification. By a 6-5 vote, the *Dukes* court prescribes an approach that limits the court to asking whether the plaintiffs' evidence frames common "questions" across the proposed class.[10] The court's wording is neither fleeting nor accidental. Language cast in terms of common "questions" or a common "theory" appears repeatedly when the court describes the parameters for judicial inquiry in the posture of class certification.[11]

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7. *See Hydrogen Peroxide*, 552 F.3d at 307 ("Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence."); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008) ("[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements."). *Accord* ALI PRINCIPLES, *supra* note †, § 2.06(b) ("When deciding a question of fact . . . the court should apply a preponderance-of-the-evidence standard."). Use of a preponderance standard for class certification squares with the Supreme Court's characterization of the class action device as one of a limited number of specific exceptions to the general rule against preclusion of non-parties. *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2172–73 (2008). This characterization of the class action implies the need for some more-than-passing justification for deviation from the general rule in a given instance.

The preponderance standard likewise applies to pre-trial evidentiary rulings on the admissibility of expert testimony, which, like rulings on class certification, might effectively determine the viability of the proponent's lawsuit in a given instance. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 n.10 (1993); *cf.* Bourjaily v. United States, 483 U.S. 171, 175 (1987) (holding that the preponderance standard governs the admissibility of evidence under the co-conspirator exception to the rule against hearsay, even in a criminal trial that would use a beyond-a-reasonable-doubt standard of proof on the merits).

8. *See IPO Securities*, 471 F.3d at 41. *Accord* ALI PRINCIPLES, *supra* note †, § 2.06(b) ("The court's decision on a question of fact for purposes of a class-certification ruling . . . should not be binding in subsequent proceedings in the litigation.").

9. 603 F.3d 571 (9th Cir. 2010) (en banc).

10. *Id.* at 577–78.

11. *See, e.g.*, *id.* at 587 ("[I]t is the plaintiff's *theory* that matters at the class certification stage, not whether the theory will ultimately succeed on the merits."), 590 ("[T]he district court's inquiry at [the class certification] stage remains focused on . . . common *questions* of law or fact

The *Dukes* court shies from determining whether the questions framed by plaintiffs are indeed common across the class, even in the face of vehement disagreement from Wal-Mart as to their common character. For the *Dukes* court, "[t]he disagreement *is* the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation."[12] In the Ninth Circuit's view, the role of the factfinder at trial warrants such an approach, for "[r]equiring even more findings and further analysis from the district court would be to force a trial on the merits at the certification stage."[13]

The dispute between the *Dukes* court and other circuits thus is joined: On a motion for class certification, does the judicial role consist exclusively of identifying questions said by class counsel to be common across the proposed class, or does it instead entail an obligation actually to assess their common character for the limited purpose of class certification—again, with no preclusive effect on the merits? The disagreement surrounding this question is no minor technicality. As a descriptive matter, class certification stands not as a mere judicial byway on the road toward full-fledged trial on the merits but, almost invariably, as the last significant judicial checkpoint on the road toward settlement. When the pre-trial determination of whether to certify the class effectively *is* the trial, both sides—not surprisingly—understand full well how much rides on the parameters for that determination.

The setting of *Dukes* accentuates the preceding point. If anything, at first glance, the class action device might well seem an especially appropriate—even inevitable—procedural format for the *Dukes* litigation.[14] The proposed plaintiff class would encompass all

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under Rule 23(a)(2), or predominance under Rule 23(b)(3), not the proof of answers to those questions or the likelihood of success on the merits."), 603 ("At the class certification stage, it is enough that [plaintiffs' expert sociologist] presented scientifically reliable evidence tending to show that a common question of fact—i.e., 'Does Wal-Mart's policy of decentralized, subjective employment decision making operate to discriminate against female employees?'—exists with respect to all members of the class.").

12. *Id.* at 609; *see also id.* at 594 ("[W]hat must be satisfied for the commonality inquiry under Rule 23(a)(2) is that plaintiffs establish common *questions* of law and fact, and answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment.").

13. *Id.* at 609.

14. Such a view appears to underlie the remark of one judge in the *Dukes* majority as to the "simplicity of [its] unremarkable holding" that "[c]urrent female employees may maintain a Rule 23(b)(2) class action against their employer . . . when they challenge as discriminatory the effects of their employer's company-wide policies." *See id.* at 628 (Graber, J., concurring). This remark overlooks the crucial question of whether such "company-wide policies" more likely than not

female hourly and salaried employees nationwide for the largest private employer in the United States.[15] The merits concern the alleged existence of a company-wide policy of intentional sex discrimination with respect to pay and promotion to management positions.[16] With no such de jure policy in place at Wal-Mart, the dispute on the merits centers on whether the plaintiffs can demonstrate the existence of a company-wide discriminatory policy on a de facto basis—specifically, through proof of a "pattern or practice" of intentional sex discrimination.[17] On plaintiffs' account, the wrong of Wal-Mart at the national level consists of its functioning as a "conduit" or "nexus"[18] for discrimination by delegating pay and promotion decisions to its local managers on "excessively subjective" terms.[19]

The evidence put forward by class counsel in support of the motion for class certification, moreover, proceeds from an aggregate standpoint. As is characteristic of pattern-or-practice discrimination cases, the *Dukes* class relies for its desired inference of a company-wide policy on expert submissions said to reveal statistically significant differences in pay and promotion along male-female lines at Wal-Mart.[20] Other expert submissions speak to the susceptibility of Wal-Mart's overall corporate "culture" to sex discrimination.[21] On the merits, what one properly may infer from both of these forms of expert submissions has long been controversial.[22] The enterprise of this Essay is broader, however, for the potential impact of *Dukes* on the law of class certification extends well beyond the employment discrimination context.

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exist, such as to bring the case within the demand of Rule 23(b)(2) for action by the defendant "on grounds that apply generally to the class."

15. *See id.* at 578 (majority opinion).

16. *See id.* at 577–78.

17. *Id.*

18. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145, 148, 150 (N.D. Cal. 2004), *aff'd*, 603 F.3d 571 (9th Cir. 2010) (en banc).

19. *Dukes*, 603 F.3d at 613.

20. *See id.* at 604.

21. *See id.* at 597 n.18.

22. *See, e.g.*, D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533 (2008) ("[P]roblems stem from the fact that regression does not begin with any definition of a causal effect, much less one that would lead to the near-exclusive focus on coefficients characteristic of most modern expert and judicial analysis."); John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715 (2008) (concluding that high quality social science research can be valuable, but that expert witnesses should not link general findings to the facts of a specific case).

A wide range of settings for disputes over class certification center on submissions in the nature of "aggregate proof"—that is, "evidence that presupposes the proposed class as a unit and, from that vantage point, seeks to trigger an inference concerning the situation of each class member individually under applicable law."[23] In *Dukes*, the plaintiffs' desired inference is that class members are not the victims of separate wrongs at the hands of particular store managers but, rather, that the pattern revealed by aggregate statistical and sociological analysis supports a legal inference of a single wrong: intentional sex discrimination pursuant to a company-wide policy *sub silentio*.[24] But aggregate proof also surfaces in disputes over class certification across the gamut of substantive areas for class litigation—from disputes over the applicability of the fraud-on-the-market doctrine in securities fraud litigation to disputes over the operation of product markets in litigation under the antitrust and racketeering laws. What courts must do, and what they may not do, when ruling on a motion for class certification thus stands to sweep across the landscape of civil law.

This Essay spotlights the crucial conceptual error in *Dukes*: its premise that the raising of common "questions" suffices for class certification. Properly understood, class certification does not turn upon the mere raising of common questions by way of expert submissions or any other form of evidence. Class certification instead turns on the capacity of a unitary proceeding to yield common answers. In assessing that capacity in a given instance, courts should determine whether common answers more likely than not exist, based upon the evidence and legal argumentation offered both ways. Properly confined to the class certification determination and understood as a matter distinct from a ruling on summary judgment, such an approach for class certification poses no concern in the nature of intrusion upon the role of the factfinder in the (unlikely) event of a class-wide trial. The error of the Ninth Circuit lies in its effective collapsing of the distinct standards for class certification and summary judgment.[25]

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23. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 115 (2009).

24. 603 F.3d at 613 (noting that "the discrimination [the plaintiffs] claim to have suffered occurred through alleged common practices—e.g., excessively subjective decision making in a corporate culture of uniformity and gender stereotyping").

25. Even the Ninth Circuit would not apply to class certification determinations the kinds of extremely light-touch inquiries undertaken by courts with respect to some other sorts of pre-trial procedural questions. *See, e.g.*, St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283,

Part I explains the need for correction of the Ninth Circuit's understandable misstep, above and beyond the usual sorts of calls for Supreme Court review to resolve circuit splits. Part II then shows why the capacity of the proposed class action to yield common answers, not merely the raising of common questions, is what matters for class certification.

The key is to situate rulings on class certification by comparison to the familiar framework for rulings on summary judgment—the motion that really does regulate the relationship between the court and the factfinder. Class certification concerns disputes over whether the members of the proposed class are relevantly the same or relevantly different. Summary judgment, by contrast, engages the question of whether the unit for adjudication—whatever its scope—should lose on the merits because of a fatal shortfall of proof throughout that adjudicatory unit.

Failure to delineate clearly between class certification and summary judgment can lead not only to judicial underreach (as in *Dukes*) but also to judicial overreach (as Part II shall elaborate by reference to decisions from other circuits in recent years). The range of substantive contexts in which errors in one or the other direction have occurred reinforces the desirability of Supreme Court clarification—in particular, clarification that would cut neither uniformly for, nor inevitably against, class certification across the gamut of civil law.

I. CERTIORARI AND THE ANOMALOUS CERTIFYING COURT

The existence of a circuit split forms one of the most familiar considerations that counsel in favor of the Supreme Court expending its limited resource of certiorari review. But a circuit split by no means guarantees a place on the Court's docket.[26] Simply in terms of total numbers, moreover, the docket has shrunk substantially in recent years from its height during the Burger Court.[27] The circuit split generated by the Ninth Circuit's decision in *Dukes*, however, is no passing matter.

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289 (1938) (amount in controversy for diversity jurisdiction exists, absent a "legal certainty" that the plaintiff cannot recover the requisite jurisdictional amount); Newburyport Water Co. v. City of Newburyport, 193 U.S. 561, 579 (1904) (federal question jurisdiction exists, unless the federal claim is "so attenuated and unsubstantial as to be absolutely devoid of merit").

26. *See* Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 S. CT. ECON. REV. 171, 195 tbl. 4 (2001) (comparing existence of circuit split with other variables bearing on likelihood of certiorari grant).

27. *See* Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1446 fig. 1 (2009).

The kinds of national-market disputes[28] in which aggregate proof tends to arise for class certification are such that a single divergent circuit stands to swallow up the stance of all others, as a practical matter. When the allegation on the merits consists of nationwide discrimination, nationwide securities fraud, nationwide price-fixing, or nationwide racketeering, no particular local nexus exists for the dispute—unlike, say, in the classic sorts of civil rights class actions exemplified by *Brown v. Board of Education*, centered on Topeka, Kansas.[29] The national scope of the dispute on the merits, instead, will position class counsel to file the class complaint essentially anywhere. And, unless class counsel is foolish, there is every reason to believe that she will—quite understandably—make the choice of forum strategically. This is no criticism of class counsel, obliged to represent zealously the proposed class. It is, however, a reason for heightened concern on the part of the law with respect to circuit splits over the parameters for class certification.

With respect to rulings on class certification, especially in national-market cases, "a single positive trumps all the negatives."[30] It does not matter whether all other circuits adopt a preponderance standard and properly conceptualize its use vis-à-vis summary judgment when one circuit shies from such an approach out of fear of intrusion on the role of the factfinder. Such a doctrinal landscape virtually invites class certification disputes in national-market cases to gravitate toward the circuit with the least probing approach, with any resulting positive rulings then "trump[ing] all the negatives" that would have been anticipated from other circuits.[31]

Prior to the adoption of the Class Action Fairness Act of 2005 ("CAFA"), the problem of the anomalous court—one inclined to certify when the vast majority of others across the country would not[32]—was thought to stem from state courts in locales excoriated in defense-side

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28. For elaboration of this concept, see Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1660–75 (2008).

29. 347 U.S. 483, 486 (1954).

30. *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003).

31. This is the counterpart among the federal circuits of the usual concern in the literature on federalism over the prospect of a single anomalous state governing the nation, in practical effect. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1355 (2006) ("[w]hen claims of state sovereignty do pose risks to the rest of the country . . . not only may the benefits of heterogeneity and interstate competition fail, but also the citizens of other states are deprived of the political means of compelling democratic accountability on economic actors shielded by other states' claims of sovereignty.").

32. Issacharoff & Nagareda, *supra* note 28, at 1664.

publications as "judicial hellholes."[33] CAFA makes national-market class actions involving state-law claims much more readily removable to federal court,[34] so as to empower the lesser degree of divergence within the federal system on class certification effectively to trump the single anomalous positive certification ruling among the various state courts. Still, it is not as if divergence as to class certification is entirely absent within the federal system itself. On that score, the circuit split created by *Dukes* exhibits an internal logic akin to the impetus for CAFA and demands a similar, national response—just, this time, from the Supreme Court, with respect to the proper understanding of Rule 23, rather than any amendment of existing law by Congress.

The evidentiary record in *Dukes* is dense, a feature typical of heated disputes over class certification centered on one or more forms of aggregate proof. The Court, nonetheless, need not fear a long, hard slog through the evidentiary record. The legal misstep of the Ninth Circuit in *Dukes*, instead, is readily amenable to the certiorari equivalent of a surgical strike—namely, a Court decision that would insist upon actual determination by the lower courts in *Dukes* of whether the members of the proposed class are relevantly the same or relevantly different.

II. COMMON ANSWERS TO COMMON QUESTIONS

With the need for Supreme Court oversight in mind, this Part turns to the job of pinpointing the proper framework for judicial rulings on class certification. The first section of this Part explains how the nature of employment discrimination litigation has a tendency to invite confusion about the relationship of class certification to summary judgment. The next two sections then explain how a distinctive conception of these two pre-trial motions, respectively, enables one to see that the confusion in the employment discrimination context is far from *sui generis*. Rather, analysis of the logical structure of the contending arguments over class certification in *Dukes* enables one to see a critical similarity to many other contexts for certification disputes that involve aggregate proof. Placement of *Dukes* within this wider context highlights how Supreme Court

33. For the latest edition, see AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2009/2010 (2009), *available at* http://www.atra.org/reports/hellholes/report.pdf.

34. *See* 28 U.S.C. § 1332(d)(2) (2006) (providing for diversity jurisdiction over proposed class action involving state-law claims based on minimal diversity of citizenship and more than $5 million in controversy).

clarification of the law of class certification can provide a more stable, and ultimately fairer, framework for judicial analysis.

A. Understanding the Impulse to Aggregate

The *Dukes* court's decision to grant the plaintiffs' request for class certification stems from an understandable—if ultimately misplaced—impulse. An allegation of discrimination said to become apparent only upon consideration of a "pattern" of adverse employment actions has an inherently aggregate dimension.[35] The Supreme Court itself has acknowledged the still-broader proposition that discrimination on a basis prohibited by Title VII of the Civil Rights Act of 1964 "is by definition class discrimination."[36] Still, as Justice Stevens underscored for the Court, "the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified."[37] Rather, a "wide gap" exists between an allegation of discrimination on the merits and the use of the class action format based on a company-wide "policy of discrimination."[38] The existence of a bridge across that gap, based on the evidence and applicable law, is the point for judicial determination in order to decide the class certification question.

In the early 1980s, the "wide gap" of which the Court spoke concerned lower-court decisions that endorsed the notion of "across-the-board" class actions—that is, definition of the plaintiff class so as to encompass all manner of adverse employment actions at a given work facility with respect to, say, Mexican-Americans as to both initial hiring and subsequent promotion.[39] In noting the "wide gap" between the inherently class-wide nature of discrimination and the permissible procedural modes for adjudication on the merits, the Supreme Court in its 1982 decision in *General Telephone Co. of the Southwest v. Falcon*[40] effectively distinguished the former (ultimately for determination by the factfinder, absent summary judgment) from the

35. *Dukes*, 603 F.3d at 597 ("[W]here the individual plaintiffs seek to prove their own cases through pattern or practice methods, they are *necessarily* dependent on proving facts relevant to others of the same protected group subject to the same policy, class action or no class action."); *id.* at 625 n.53 ("[T]he pattern or practice *has* to be proven on a group basis.").

36. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982).

37. *Id.*

38. *Id.*

39. *Id.* at 153–54.

40. 457 U.S. at 157.

latter (exclusively for the court to decide). The setting of *Dukes* calls for the same sort of differentiation between the inherently aggregate, systemic nature of the alleged company-wide policy of discrimination and the choice of procedural mode.

The *Dukes* court is correct that the role of the factfinder in the event of trial encompasses a determination, under the preponderance standard for proof on the merits in civil cases, of whether Wal-Mart intentionally discriminated against the estimated one-half million women in the class.[41] There is no doubt in *Dukes*, moreover, that—absent a grant of summary judgment to Wal-Mart—the six would-be class representatives could choose to put their respective claims of sex discrimination before the factfinder at trial. As the *Dukes* dissenters readily acknowledged, "the six [representative] plaintiffs here may have individualized claims of discrimination."[42]

For that matter, the six representative plaintiffs might choose to put forward at trial expert evidence—statistical, sociological, or otherwise—concerning the existence of a company-wide policy of discrimination, at least if that evidence is admissible under the usual standard for expert testimony.[43] As I shall elaborate momentarily, the six might well have a much more straightforward way to prove that they were the victims of sex discrimination.[44] The point, for now, remains that they clearly could—if they wish—seek to prove the existence of a company-wide discriminatory policy. The question whether the jury will get to the merits in *Dukes* thus is not the crux of the dispute. The real question instead concerns the scope of the adjudicatory unit on which the jury would stand to act.

Though the *Dukes* opinion is not entirely clear on the matter, the sticking point for the Ninth Circuit appears to be that a no-certification ruling at the pre-trial stage might well disable large numbers of women in the proposed plaintiff class from pursuing their claims at all, as a practical matter. Individual sex discrimination actions are commonplace. The existence of a company-wide policy of discrimination on Wal-Mart's part, however, is what stands to "bridge

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41. *Dukes*, 603 F.3d at 578 (estimating class size); *accord id.* at 652 (Kozinski, J., dissenting).

42. *Id.* at 641 (Ikuta, J., dissenting).

43. *See* FED. R. EVID. 702 (establishing when expert testimony is admissible).

44. *See* Part II.B *infra* (distinguishing between "plain, old, ordinary" sex discrimination, whereby Wal-Mart would be liable under the doctrine of respondeat superior for the pay and promotion decisions of its managers and the *Dukes* plaintiffs' account of "structural discrimination," whereby Wal-Mart would be liable on the basis of a company-wide policy of sex discrimination, understood in terms of excessively subjective delegation).

the gap" between individual suits and the nationwide class sought in *Dukes*.[45] The dimensions of the proposed class would then convert wage and promotion claims that might not be economically viable in many individual instances into claims worth pursuing in the aggregate.[46] In economic terms, class certification is what facilitates the spreading of high fixed costs over a larger number of units, the marginal costs of which may be comparatively modest.

The *Dukes* court acts on an understandable impulse—one whereby the format for adjudication inevitably would synchronize with the aggregate character of the allegations on the merits, at least when those allegations rise to the level of presenting a triable case. In speaking to the two sides' dueling expert statistical analyses of wages and promotions at Wal-Mart at the class certification stage, the *Dukes* court emphatically stated: "*[E]ven if* we were to find, based on an independent review of the record, that Wal-Mart's statistical evidence was more persuasive than Plaintiffs'—which we do not, in any event—this alone would not allow us to find that the district court improperly relied on" the testimony of plaintiffs' statistical expert in granting class certification.[47] "That the jury might later find Wal-Mart's statistical analysis more persuasive does not detract from the district court's determination, after extensive review, that [the] regional analysis [of wages and promotions presented by plaintiffs' expert] raises common issues appropriate for class adjudication."[48]

For the *Dukes* court, the overlap between the dispute over class certification and the dispute on the merits calls for particular caution. As the Ninth Circuit correctly observes, the framework for class certification determinations that has emerged in the lower-court decisions to date comes with its own built-in limitation. The judicial obligation to make an affirmative determination that the relevant requirements of Rule 23 are satisfied is coextensive with those requirements themselves. Put differently, the court has no authority to undertake a free-floating inquiry into the merits unrelated to its required inquiry into satisfaction of a pertinent certification requirement.[49] In particular, the court lacks authority to condition class certification upon a gestalt assessment of the plaintiffs' overall

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45. *See* 603 F.3d at 632 (Ikuta, J., dissenting).

46. For further discussion of the practical difficulties that attend individual litigation of pattern-or-practice discrimination claims, see Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619, 628 (1986).

47. 603 F.3d at 608 (emphasis added).

48. *Id.*

49. *Id.* at 581; *IPO Securities*, 471 F.3d at 41; *Hydrogen Peroxide*, 552 F.3d at 311.

likelihood of success on the merits, a la the usual standard for a preliminary injunction pending trial.[50]

The confusion in *Dukes* consists not of the notion that class certification rulings must remain confined to pertinent certification requirements but, instead, over the meaning of those requirements themselves. The fundamental problem with *Dukes* consists of the court's confusion between the class certification determination and the most familiar type of pre-trial ruling that regulates the respective roles of the court and the factfinder at trial: summary judgment. On the Ninth Circuit's account, the two are intertwined such that the court regards itself as duty-bound not to withhold class certification when the plaintiffs have put forward a triable case as to the existence of a company-wide policy of discrimination on Wal-Mart's part. Yet it is only if such a policy of nationwide scope exists that Wal-Mart has acted "on grounds that apply generally to the class," so as to make appropriate relief "respecting the class as a whole" within the meaning of Rule 23(b)(2)—the basis for the *Dukes* certification.[51]

For the *Dukes* court, a triable case on the merits is what gives rise to the common "question" to be answered only by the factfinder at trial. Properly understood, however, class certification and summary judgment ask two distinct questions. And courts can confuse the two in ways that might hurt either plaintiffs or defendants in a given instance.

Class certification ascertains the appropriate unit for adjudication by asking whether the proposed class is relevantly the same or relevantly different.[52] Summary judgment asks whether the unit for adjudication—whether individual or class-wide—presents a triable case *as a unit*. To put the point less formally, the plaintiff class should lose on its motion for class certification if the proposed class is relevantly different. But they should lose on a defense motion for summary judgment only if they are relevantly *the same*, in the sense that all class members—not just some—lack a triable case as to one or more aspects of the merits. To boil down the point even further: class certification asks whether the proposed class is likely to be amenable to common answers on the merits, whereas summary judgment asks what the content of any such common answers should be.

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50. This was the misstep of the district court that warranted reversal in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 165–69 (1974).

51. *See* 603 F.3d at 577.

52. The wisdom of Cookie Monster on *Sesame Street* thus extends to class certification: The court properly asks whether some of the proposed plaintiff class members are not like the others.

As the next section explains, disentanglement of class certification from summary judgment would not only correct the misstep in *Dukes* but also bring much-needed clarification to class certification analysis generally. For all its particulars, the class certification dispute over the allegations of employment discrimination in *Dukes* is far from unusual. Comparison of *Dukes* with recurring certification questions in the contexts of securities, antitrust, and RICO class litigation shows how broadly the Ninth Circuit's approach would sweep if left in place.

B. When Class Members May be Relevantly Different Based on Multiple Theories on the Merits

Simply put, there are at least two accounts of sex discrimination under which a given female hourly employee at Wal-Mart might prevail on the merits. The first consists of what one might label informally as plain, old, ordinary discrimination, for which Wal-Mart as a national enterprise would be liable under the familiar doctrine of respondeat superior. The second involves discrimination pursuant to a company-wide policy, for which Wal-Mart would be directly responsible. The important starting point in *Dukes* consists of the recognition that these two theories of liability are not necessarily coextensive. Nor, for that matter, are they mutually exclusive. As to a given individual employee, a case for liability in the nature of "my manager is sexist" is different from one along the lines of "my company is sexist." The employee might prevail on the merits as to one such theory of liability but not necessarily the other, both such theories, or neither.

Clear recognition of the differing theories of discrimination on the merits in *Dukes* serves, in turn, to pinpoint the distinctive inquiries for class certification and summary judgment. Class certification asks whether there is reason to think it more likely than not that the company-wide discrimination policy at the heart of the second theory of liability actually exists. Only then are the individual instances of adverse employment actions as to pay and promotion connected together as instantiations of the same underlying wrong. If not, then all the women of Wal-Mart do not necessarily lose on the merits. Rather, they still have a theory of plain, old, ordinary discrimination that will depend upon the particulars of their respective situations and, as such, would not be amenable to unitary adjudication. The job of class certification is to determine *as to whom* the merits inquiry should apply. The job of summary judgment is to

assess whether there is a need for trial on the merits as to the given unit for adjudication, not to define the parameters of that unit itself.

The structure of the two liability theories in *Dukes* is far from unique. The same structure recurs across major domains for class action litigation. The *Dukes* opinion exhibits something of an awareness of this point by attempting to distinguish the situation at hand from a string of important class certification disputes in the context of proposed class actions for securities fraud.[53] Proper understanding of those securities cases reveals their structural similarity to *Dukes*.

In many settings for securities fraud class actions concerning ordinary trading on major stock exchanges—say, the New York Stock Exchange—class certification is relatively straightforward. The reason stems from the fraud-on-the-market doctrine in the substantive law of securities fraud, whereby all persons who bought or sold the relevant shares during the period in which the fraud remained uncorrected are presumed to have relied upon the fraud in undertaking their trading activity.[54]

With technical nuances suppressed for ease of exposition, the basic idea is that, in an efficient capital market, uncorrected fraud remains embedded in the price at which the relevant securities trade, such that all who traded during the relevant time period relied on the integrity of the prevailing market price. Application of the fraud-on-the-market doctrine eases considerably the path to class certification by raising a presumption of reliance on the part of all persons in the proposed plaintiff class. And that presumption, in turn, suffices to demonstrate that it is more likely than not that all investors within the proposed class relied on the fraud, quite apart from whether they heard of it or specifically took it into account when buying or selling the relevant shares.[55]

A spate of securities fraud class actions in recent years deviate from this familiar path to class certification. The recent cases concern not ordinary trading on major stock exchanges but, instead, one or another securities market of a more unusual sort—for instance, the

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53. *See Dukes*, 603 F.3d at 591–94.

54. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 241–42 (1988).

55. The presumption of reliance remains subject to individualized rebuttal on the merits. *See id.* at 242. The point is simply that the applicability of the presumption suffices at the class certification stage to make it more likely than not that the proposed class is relevantly the same as to the reliance element.

market for initial public offerings of shares.[56] The big question for class certification here concerns the applicability of the fraud-on-the-market doctrine to the relevant securities market—specifically, whether that market exhibits the features of an efficient capital market that underlie the presumption of reliance in the substantive law of securities fraud. Given the economic dimensions of the debate in a specific instance, it is not surprising that disputes over the applicability of the fraud-on-the-market doctrine characteristically entail competing expert submissions from economists, as well as other controverted evidence about the operation of the market at issue.

The structure of debates over class certification as to unusual securities markets mirrors that in *Dukes*. Absent the application of the fraud-on-the-market doctrine, it is not as if all investors in the would-be plaintiff class necessarily should lose on the merits. Rather, the inquiry into whether they relied on the underlying fraud simply takes an individualized form not amenable to unitary adjudication. They must—insofar as they can—demonstrate plain, old, ordinary reliance in the common-law sense,[57] just as a given individual employee of Wal-Mart might demonstrate plain, old, ordinary sex discrimination on the part of her particular manager, so as to make Wal-Mart liable on a respondeat superior basis.

In addressing class certification disputes as to unusual securities markets, courts do not stop at a determination that class counsel has put forward a triable case that the relevant market exhibits the characteristics of an efficient capital market, such that all class members will be presumed to have relied on the fraud. Rather, courts in the posture of class certification engage the question whether the market at issue really does exhibit such characteristics, more likely than not.[58] Among other examples, a major decision from the

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56. *See IPO Securities*, 471 F.3d at 42–43; *see also* Unger v. Amedisys Inc., 401 F.3d 316, 322–25 (5th Cir. 2005) ("small-cap stocks traded in less-organized markets"); Freeman v. Laventhol & Horwath, 915 F.2d 193, 197 (6th Cir. 1990) (market for newly issued municipal bonds).

57. For further exposition of the two conceptions of reliance that plaintiffs might use in securities fraud litigation, see Merritt B. Fox, *After* Dura: *Causation in Fraud-on-the-Market Actions*, 31 J. CORP. L. 829, 832, 837 (2006).

58. *See IPO Securities*, 471 F.3d at 42–43 (denying class certification upon evaluating the evidence concerning the operation of the market for initial public offerings and concluding that it does not conform with the attributes of an efficient capital market); *Unger*, 401 F.3d at 322–25 (reversing class certification for lack of sufficient inquiry into efficiency of less-organized markets for small-cap stocks); *Freeman*, 915 F.2d at 197 (denying class certification upon concluding that market for newly issued municipal bonds is not efficient as a matter of law).

In seeking to distinguish the securities fraud context from pattern-or-practice employment discrimination litigation, the *Dukes* court relied heavily on a decision of a district court within

Second Circuit involving the market for initial public offerings—authored by Judge Jon Newman and joined by then-Judge Sonia Sotomayor—makes this point with admirable clarity.[59] Under this approach, courts do not reach out to make a gestalt assessment of the merits but, instead, assess the characteristics of the securities market at issue because the applicability of the fraud-on-the-market doctrine in substantive law will determine whether the proposed investor class is relevantly the same so as to warrant class certification.

If anything, the structural similarity noted here extends even further with respect to aspects of antitrust class actions. Disputes over class certification in antitrust price-fixing cases can arise with respect to the element of "antitrust impact"—informally speaking, the required showing of injury from the price-fixing conspiracy on the part of each individual within the proposed class.[60] Here, the question for class certification often centers on competing expert economic analyses, with class counsel—not surprisingly—proffering the one said to show that all members of the proposed class suffered the requisite injury of elevated prices. Defendants predictably urge a different account, one whereby the question of antitrust impact turns on finer-grained assessments of particular segments of the overall product market—some of which might be affected by price fixing (if any) but others of which are not.[61]

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the Second Circuit in the aftermath of *IPO Securities*. *See Dukes*, 603 F.3d at 592 (relying on Hnot v. Willis Grp. Holdings Ltd., 241 F.R.D. 204 (S.D.N.Y. 2007)). *Hnot* forms the genesis for the *Dukes* court's sense of obligation to afford class certification based simply upon the presence of a triable "question" as to the existence of a company-wide policy of discrimination. *See Hnot*, 241 F.R.D. at 210 ("[P]laintiffs and defendants disagree on whose statistical findings and observations are more credible [as to the existence of a company-wide policy of discrimination], but this disagreement is relevant only to the merits of plaintiffs' claim—whether plaintiffs actually suffered disparate treatment—and not to whether plaintiffs have asserted common *questions* of law or fact.").

The *Hnot* court misreads the guidance of its circuit in *IPO Securities*. If it really were the case that the mere raising of common questions suffices for class certification, then *IPO Securities* would have affirmed, not reversed, the class certification there. The Second Circuit would have had no business deciding whether the market for initial public offerings more likely than not conforms to the characteristics of an efficient capital market. Yet the Second Circuit unmistakably did so—again, not to decide a merits question unrelated to class certification but because the applicability of the fraud-on-the-market doctrine was critical to whether the plaintiff investors were relevantly the same as to the reliance element so as to be suitable for unitary adjudication. *See IPO Securities*, 471 F.3d at 42 (noting both sides' recognition that the inapplicability of fraud-on-the-market doctrine would make class certification inappropriate, due to the presence of disabling individualized questions of reliance).

59. *See id.* at 42–43.

60. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2009).

61. *See id.* at 312–15 (summarizing competing expert submissions on antitrust impact).

Their particulars aside, disputes over class certification with respect to the element of antitrust injury along the foregoing lines should sound familiar. Class certification turns on whether the product market is relevantly the same (such that price fixing affects prices throughout), or whether that market is relevantly different (so as to warrant a more segmented analysis of pricing effects). Failure of the market-wide theory of antitrust injury would still leave available an alternate theory focused on the particular market segment in which a given plaintiff happens to find herself. In this manner, the structure of class certification disputes over antitrust injury mirrors that seen in both *Dukes* and securities fraud litigation involving unusual securities markets.

In a significant opinion for the Third Circuit, Judge Anthony Scirica corrected the same misstep by the district court that has recurred in the employment discrimination setting in *Dukes*.[62] The district court had believed itself duty-bound not to "make judgments about whether plaintiffs have adduced enough evidence [of class-wide antitrust injury] or whether their evidence is more or less credible than defendants'."[63] On appeal, the Third Circuit deemed "erroneous" the district court's "[assumption that] it was barred from weighing [the competing expert accounts of pricing in the relevant product market] for the purpose of deciding whether the requirements of Rule 23 had been met."[64] Here, too, the court does not reach out to engage improperly the question of antitrust injury but, instead, does so because it will determine whether the members of the proposed class are relevantly the same.

If the certification decisions concerning unusual securities markets and the element of antitrust injury are right, then *Dukes* must be wrong, for the certification question there is structurally the same. If anything, the certification question in *Dukes* calls for more, not less, probing judicial inquiry than those recounted in the securities and antitrust contexts. There is no doubt as a matter of current securities doctrine that conformity with the attributes of an efficient capital market warrants a presumption of reliance on the part of investors during the relevant time period. And there is no doubt as a matter of current antitrust doctrine that evidence demonstrating that the economic effects of a price-fixing conspiracy have permeated

62. *See Hydrogen Peroxide*, 552 F.3d 305.

63. *Id.* at 321 (quoting *In re* Hydrogen Peroxide Antitrust Litig., 240 F.R.D. 163, 170 (E.D. Pa. 2007)).

64. 552 F.3d at 322.

market-wide warrants a commensurately market-wide finding of antitrust injury. In *Dukes*, however, it remains unclear at best whether the law of Title VII permits an inference of a company-wide policy of discrimination based on the picture that the plaintiff's own evidence paints of Wal-Mart.

Though statistically significant in the view of plaintiffs' expert, the differences in pay and promotions across male-female lines at Wal-Mart remain well short of the "near-total gender segregation" readily amenable to an inference of a company-wide policy of discrimination in old-school pattern-or-practice cases from decades past.[65] Rather, on plaintiffs' own evidence, the disparities at Wal-Mart essentially replicate the disparities in pay and promotion along the dimension of sex across the United States economy as a whole.[66] On plaintiffs' account, this is precisely the point: Wal-Mart at the national level serves as a "conduit" for discrimination by delegating pay and promotion decisions to local managers on "excessively subjective" terms.[67] Indeed, an emerging scholarly literature urges a reconceptualization of the meaning of discrimination under Title VII to encompass accounts in the nature of "structural discrimination"[68] on conduit-like lines.

The goal here is not to decide the proper meaning of discrimination under Title VII, any more than the point is to decide which expert evidentiary submission is correct. The crucial point, instead, lies in clear recognition of the obligation to decide on the court's part when the dispute—however characterized as factual, legal, or a mixed question of the two[69]—speaks to whether the members of proposed class are relevantly the same or relevantly different. Recognition of the further legal dimension of the class

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65. Roger Parloff, *The War over Unconscious Bias*, FORTUNE, Oct. 15, 2007, at 90, 96 (discussing Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992)).

66. *See* Nagareda, *supra* note 23, at 154 (comparing plaintiffs' statistical evidence in *Dukes* with statistical analyses of pay and promotion disparities along male-female lines across the U.S. economy).

67. *See supra* notes 18–19.

68. *See* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006) (criticizing structural discrimination accounts).

69. *See IPO Securities*, 471 F.3d at 40 ("Although there are often factual disputes in connection with Rule 23 requirements, and such disputes must be resolved with findings, the ultimate issue as to each requirement is really a mixed question of fact and law.").

certification dispute in *Dukes* only strengthens this account, for the factfinder has no role in deciding what the category of discrimination actionable under Title VII properly encompasses.

C. When Class Members are Relevantly the Same

To recognize that class certification and summary judgment address distinct matters is not to suggest that all is well in the lower-court case law, apart from *Dukes*. The Ninth Circuit underreaches in *Dukes*, declining to decide whether class members are relevantly the same, out of an understandable, but misplaced, conviction that those members are entitled to proceed to trial as a class as long as they present a triable question concerning the existence of a company-wide discriminatory policy. Elsewhere, however, other courts have overreached by engaging in the posture of class certification matters appropriately decided on a motion for summary judgment. That, however, is simply the flip side of the error in *Dukes*.

The flashpoint for overreach in class certification analysis consists of situations in which the dispute is not over whether the members of the proposed class are relevantly the same or relevantly different but, instead, over whether they are the same in such a way as to indicate that *all* class members should lose on the merits. An element of the private causes of action for both securities fraud and violation of RICO, respectively, consists of a proximate causal connection between the alleged wrongful conduct of the defendant and the loss for which the plaintiffs seek to recover.[70] Indeed, the nomenclature of both securities law and RICO doctrine occasionally converges in speaking of a need for the plaintiffs to demonstrate "loss causation."[71]

The structure of disputes over proximate cause has tended to take a form distinct from that over antitrust injury, as described in the previous section of this Part. Here, the concern is not that the members of the proposed class are relevantly different, with some segments of the market conceivably overcharged but others not. Rather, the concern is that the members of the proposed class are relevantly the same, such that they all should lose on the merits. Specifically, the concern is that no members of the plaintiff class can

70. *See* Hemi Grp. LLC v. City of New York, 130 S. Ct. 983, 989 (2010) (discussing loss causation element of RICO); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 652–56 (2008) (same); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005) (discussing loss causation element of securities fraud).

71. *See Dura*, 544 U.S. at 338; *Bridge*, 553 U.S. at 654.

show the requisite proximate causal connection—as distinct from a more attenuated or circuitous connection—to the defendant's alleged misconduct.[72]

This concern arises in the securities fraud context when the general business prospects for the industry in which the issuing firm operates have tanked so dramatically as to overwhelm entirely any effect on the issuer's share price causally related to the alleged fraud.[73] In the RICO setting, the concern is that revelation of the defendant's racketeering activities likewise had no effect at all on product prices—not some effect for some consumers and no effect for others.[74]

In both securities fraud and RICO litigation, some courts have overstepped the proper bounds for class certification when the concern as to the proximate causation element is that no one in the class can satisfy it.[75] When the concern is that the members of the proposed class really are the same and that they therefore should lose because that similarity is fatal on the merits across the entire class, the proper mode of judicial analysis is summary judgment, not class certification. The difference is potentially dramatic in practical terms. Summary judgment is warranted only in the absence of a genuine issue of material fact, not based on a determination that the defendant's view is, on balance, more persuasive than plaintiffs' account at the class certification stage. Defense allegations of a common answer on the merits, in short, properly warrant the kind of regard for the role of the factfinder at trial that the *Dukes* court mistakenly accords to common questions.

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72. This is not an inherent feature of the proximate cause element, as to which some, but not all, members of a given plaintiff class might fail to muster a triable case. As to antitrust injury, moreover, it may be the case in a given litigation that no members of a given plaintiff class can demonstrate the requisite injury—a situation appropriately engaged as a question of summary judgment, not one of class certification along the lines analyzed in the preceding section.

73. *See* Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 263 (5th Cir. 2007) (alleged securities fraud by a telecommunications company in the midst of a precipitous downturn in share prices across the telecommunications industry generally).

74. *See* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 227 (2d Cir. 2008) (alleged RICO fraud by tobacco industry amidst "the lack of an appreciable drop in the demand or price of light cigarettes" upon publication of a major government study that corrected misimpressions about their health effects).

75. *See McLaughlin*, 522 F.3d at 226–27; *Oscar Private Equity*, 487 F.3d at 271.

CONCLUSION

Supreme Court clarification of the framework for class certification along the lines offered here would not amount to a sweeping empowerment of courts to the displacement of the factfinder at trial. Rather, a convincing account of what class certification must do—and what it may not do—situates motions on that topic as a distinctive mode of pre-trial analysis, in contrast to summary judgment. On this view, some lower-court decisions underreach, as does *Dukes*. Here, in the words of Judge Frank Easterbrook for the Seventh Circuit, courts "may not duck hard questions by observing that each side has some support" for its respective view that the class members are relevantly the same (on plaintiffs' account) or relevantly different (in the defendant's view); rather, those questions "must be faced and squarely decided."[76] But, so, too, do some lower-court decisions overreach by subjecting to the more demanding preponderance standard for class certification disputes that are appropriately engaged under the more plaintiff-friendly metric for summary judgment.

By correcting the misstep in *Dukes*, the Supreme Court can lend much-needed clarity and consistency to the law of class certification. If left unchecked, the underreach in *Dukes* threatens to undermine the progress made in the law of class certification elsewhere among the federal appellate courts by virtually inviting certification efforts in the anomalous circuit—indeed, by doing so especially in the kinds of high-stakes, national-market class actions in which careful certification analysis is most needed. But, just as importantly, the Court can ensure that courts unduly advantage neither plaintiffs nor defendants in a world in which pre-trial battles over class certification effectively comprise the trial for national-market disputes.

76. West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002).