Sorting Through the Certification Muddle

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I. THE PROBLEM DEFINED 106
II. SORTING THROUGH THE MUDDLE.. 108
   A. The Purpose of the Standard of Proof 109
   B. Justifying a Standard of Proof................................ 110
III. CHARTING A MORE SENSIBLE COURSE 112

Dukes v. Wal-Mart is an extraordinary case in many ways. The class that the district court approved, which included roughly 1.5 million current and former employees, is the largest employment discrimination class ever certified.[1] The defendant, Wal-Mart, is the largest retail company in the nation, one of the largest private employers in the world, and an extremely powerful economic actor in the global economy. The plaintiffs' theory of structural gender-based discrimination is legally complex. And the Ninth Circuit's certification decision raises fundamental questions that go to the heart of policy conflicts that confound the class device.

This brief Essay focuses on one of the issues raised by Wal-Mart in its petition for certiorari: the appropriate standard of proof for a certification determination.[2] Wal-Mart argues that the Ninth Circuit should have used a tougher, "significant proof" standard. Under the "significant proof" standard, the judge must conduct a full-blown *Daubert* analysis to qualify expert testimony and "definitively *resolve*

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1. The case was filed in the Northern District of California, and the district judge certified a 23(b)(2) class action. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 187 (N.D. Cal. 2004). The Ninth Circuit's en banc decision limited the 23(b)(2) class to only those female employees who were actually employed as of the date of filing. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 623–24 (9th Cir. 2010) (en banc). This might have cut the size of the class by as much as two-thirds. *Id.* at 578 n.3. Still, the Ninth Circuit allowed for the possibility that a separate 23(b)(3) damages class might be certified for former employees.

2. Petition for Writ of Certiorari at 18–26, Dukes v. Wal-Mart Stores, Inc., No. 10-277 (U.S. filed Aug. 25, 2010), *available at* http://www.scotusblog.com/wp-content/uploads/2010/08/Wal-Mart-petition-8-25-10.pdf.

factual and legal disputes" relevant to certification, including disputes between experts.[3] This Essay criticizes the Ninth Circuit's approach, argues that the only sensible way to analyze the standard of proof problem is to consider the policies Rule 23 is meant to serve, and proposes a flexible standard modeled on the likelihood-of-success requirement for preliminary injunctive relief.

I. THE PROBLEM DEFINED

The class certification inquiry is particularly tricky in *Dukes* because the certification requirements merge with the core liability issue. The *Dukes* plaintiffs can establish prima facie liability—and thus obtain injunctive and declaratory relief under the pattern-or-practice disparate treatment theory they allege—*if and only if* they can prove the existence of a company-wide discriminatory policy. However, that same discriminatory policy is exactly what furnishes the commonality necessary to satisfy 23(a)(2) and (b)(2) certification requirements. If plaintiffs must prove by a preponderance of the evidence that a company-wide policy exists in order to obtain certification, the core of the lawsuit would have to be fully litigated, tried, and resolved (at least insofar as injunctive and declaratory relief is concerned) before the class could be certified. This would seem to put the trial "cart" ahead of the certification "horse."

This point deserves more discussion. Wal-Mart argues that any gender discrimination is a consequence of decisions made at the individual store level, not the corporate level, and that as a result there is no common thread uniting the very large, geographically dispersed, and heterogeneous class. The plaintiffs argue, to the contrary, that Wal-Mart has a company-wide policy of discrimination which supplies the unifying element supporting class treatment. This policy, which involves excessive delegation of subjective discretion to store managers, is discriminatory because it serves as a "conduit" for the improper influence of gender stereotypes.[4]

To understand the significance of these competing arguments, it is useful to distinguish between two different models of the class action: the case-aggregation model and the litigating-group model. The

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3. *Id.* at 22, 25 (emphasis in original). A "definitive resolution" is normally based on limited pre-certification discovery and does not bind the ultimate factfinder. *Cf. infra* note 30 and accompanying text (briefly analyzing a proposal to make certification contingent on a final decision of the common question).

4. The plaintiffs also claim that Wal-Mart has a "strong, centralized corporate culture" (the so-called "Wal-Mart Way") and that certain features of this culture are particularly conducive to the influence of gender stereotypes. *See Dukes*, 222 F.R.D. at 151–54.

case-aggregation model treats the class action as a device to aggregate individual claims, where aggregation achieves litigation efficiency, improves substantive law enforcement, or avoids unfair effects from individual litigation.[5] An example of this is a 23(b)(3) securities fraud class action in which class members rely on a fraud-on-the-market theory to prove reliance.[6]

The litigating-group model, by contrast, views the class action as a procedural device for litigating a group wrong and granting a group remedy. While each class member has an individual legal right that can support an individual claim, all of the rights and claims are united by the group character of the legal wrong alleged and the injunctive remedy sought. In these cases, the individual rights at stake focus on conduct that is wrongful because of the way it treats the group *qua* group and harms individuals by virtue of their status as group members. Many civil rights suits for injunctive relief fit this model, and 23(b)(2) was designed to accommodate it.

The *Dukes* plaintiffs argue for a litigating-group model and try to fit as much of their lawsuit into this model as possible. Viewed from this perspective, the *Dukes* class is united not by common issues or common evidence, but rather by a pattern-or-practice theory of Title VII liability that treats the class as a unitary whole. According to this theory, Wal-Mart owes a duty of nondiscrimination to all of its female employees individually and as a group, and the alleged wrong involves a breach of the duty owed to individuals as members of the group. Moreover, the injunctive remedy, if obtained, will benefit the class as a whole and automatically benefit each member simply because she is a female employee and thus belongs to the class.

Treating the *Dukes* class action under the litigating-group model exposes a critical tension. On the one hand, the case for certification is particularly strong. Indeed, a class action seems to follow inexorably, even tautologically, from the group character of the alleged wrong and the injunctive remedy sought. On the other hand, the litigating-group model presents the problem of liability fusing with certification in a particularly acute way. The group character of the substantive law means that liability turns on proof of a group wrong, but that same wrong is what unites the class and determines the propriety of certification. The combination of these two factors creates the tension: the certification decision seems to presuppose a favorable decision on the core liability issue.

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5. The first two goals fit under 23(b)(3) and the third fits under 23(b)(1).

6. *See, e.g.*, *In re* Initial Pub. Offerings Sec. Litig. (*In re IPO*), 471 F.3d 24, 30–31 (2d Cir. 2006).

To be sure, this tension is not unique to civil rights suits like *Dukes*. There are strong policies behind securities fraud class actions, for example, and the certification decision in those cases often depends on collective proof of liability issues, such as proving reliance by using a fraud-on-the-market theory. Still, certification seems less inevitable for class actions that fit the case-aggregation model, and the policy reasons for class treatment can seem less compelling when civil rights are not involved.[7] Moreover, certification in 23(b)(3) class actions turns on the status of *specific* liability issues (typically reliance in securities fraud suits and antitrust impact in antitrust suits), not on the existence of a core element that also determines liability overall. Thus, there are reasons a court might feel that a case like *Dukes* creates tension between certification and merits determinations in a particularly acute way.

The tension is acute, however, only if we assume that plaintiffs must actually prove the existence of a company-wide discriminatory policy by the preponderance standard in order to satisfy 23(a)(2)'s common question requirement and the demands of (b)(2). But we need not go that far—there are many other options. For example, the standard might be set lower than a preponderance of the evidence, or it might focus exclusively on the plaintiffs' prima facie evidence and ignore any rebuttal evidence that the defendant offers. Moreover, the standard might require only evidence free of obvious flaws, or even just a facially plausible theory without any requirement of evidentiary support. Or it might permit a decision on only very limited discovery or require a more complete evidentiary record.

The problem, therefore, is to determine the appropriate standard of proof. In other words, how confident must a judge be that the plaintiffs can prove the common liability elements that unite the class?

II. SORTING THROUGH THE MUDDLE

Judicial analysis of this problem is often plagued by loose language and sloppy argument, and the Ninth Circuit's en banc opinion is no exception. The following discussion examines several argumentative flaws that fall roughly into two broad categories: (1) misconceiving the purpose of the standard of proof and (2) adopting a standard without adequate justification.

7. Case-aggregation class actions certified under 23(b)(1) are a possible exception because of the strong fairness-based policy reasons for class treatment, but (b)(2) class actions still have a sense of inevitability that (b)(1) class actions do not share.

A. The Purpose of the Standard of Proof

Like many courts that have addressed the issue, the *Dukes* majority muddles clear thinking by insisting that a merits inquiry is not an estimate of likely success but only a determination that Rule 23's requirements are satisfied.[8] This claim is misleading, especially in a case like *Dukes*. The obvious reason to require evidence, and not just allegations, is to verify that the common question—which also happens to be the core liability issue—is strong enough to warrant class treatment, and testing strength necessarily involves, explicitly or implicitly, evaluating likely success. The same can be said for other class actions as well.[9] For example, a judge considering predominance for purposes of 23(b)(3) certification must predict the relative importance of common versus individual issues.[10] She might do so on the basis of the complaint alone by considering a typical case that fits the allegations, but this approach invites strategic pleading. Alternatively, the judge might require evidentiary support to check that the common issues are strong enough to count and to predominate in terms of litigation investment.[11]

The connection between certification and likely success is even clearer when one considers the policy reasons motivating the trend over the past decade toward imposing stricter standards for certification. It appears that one reason courts are scrutinizing the merits more closely may have to do with a concern about improper settlement leverage, and in particular the risk that certification might

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8. *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 587 (9th Cir. 2010) ("[T]he district court must focus on common questions and common issues, not common proof or likely success on the questions commonly raised."). Many courts do this as a way to deal with the Supreme Court's unfortunate decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Eisen* can be distinguished in other ways, however, for it dealt with a completely different issue than the standard of proof for certification. *See generally* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1280–86 (2002) (distinguishing *Eisen*). In any event, the Supreme Court is not bound by this precedent if it grants certiorari.

9. *See* Bone & Evans, *supra* note 8, at 1268–76 (discussing some of the different ways that 23(b)(3) certification can implicate substantive issues and related evidence).

10. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008).

11. Some courts try to distinguish for purposes of (b)(3) predominance between proving a common issue, which is not appropriate for certification, and demonstrating that an otherwise individual issue is common because it is capable of proof by common evidence. *See id.* at 311–12. However, it is important not to exaggerate this difference. Often the way the plaintiff demonstrates that individual issues can be proved with common evidence is to propose a theory, such as fraud-on-the-market supporting a class-wide presumption of reliance, and then show that the theory applies by proving its essential conditions, such as the existence of an efficient market. By proving the application of the theory, however, the common question itself is often proved.

pressure unjustified settlements in frivolous and weak class action suits.[12] With a stronger showing on merits-related issues, a judge is better equipped to avoid certifying when common issues have flimsy support. In this regard, changes to certification standards share much in common with changes to pleading and summary judgment requirements over the past twenty-five years.[13]

To be sure, the likelihood assessment is confined only to specific, certification-related issues and does not involve a global evaluation of plaintiffs' claims. However, a global evaluation might actually be preferable on policy grounds (putting aside any Rule 23 constraints) if the purpose of the likelihood assessment is to avoid granting certification in lawsuits that are frivolous or too weak, with an eye to preventing the unjustified settlements that class certification can create. Indeed, limiting the assessment to specific issues could be counterproductive from this perspective, for it permits only a partial look when a more complete look might better reveal serious merits deficiencies.

Thus, selecting a standard of proof involves choosing, if only implicitly, a requisite level of trial judge confidence that the plaintiffs will prevail on the merits issues at trial. It follows that any standard should be justified with this purpose in mind.[14]

B. Justifying a Standard of Proof

Like other courts to consider the issue, the Ninth Circuit gives short shrift to policy and focuses mainly on Rule 23's text and Supreme Court precedent.[15] Neither text nor precedent, however, is up to the justificatory task.[16]

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12. *Dukes*, 603 F.3d at 591 ("Nearly every circuit to consider the issue has recognized the practical importance of the certification decision as leverage for settlement."); *see also In re Hydrogen Peroxide*, 552 F.3d at 310; *In re* New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 26 (1st Cir. 2008); Unger v. Amedysis, Inc., 401 F.3d 316, 322 (5th Cir. 2005); Szabo v. Bridgeport Mach., Inc., 249 F.3d 672, 675–76 (7th Cir. 2001). Another reason is to avoid the waste of investing in a class action that plaintiffs cannot win. *See In re New Motor Vehicles*, 522 F.3d at 29. Given the high frequency of class settlement, however, this should not be a major concern.

13. This includes the Court's strengthening of summary judgment in the *Celotex* trilogy and its tightening of pleading standards in *Twombly* and *Iqbal*. *See* Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

14. This is true even for formulations of the standard that require the trial judge to actually decide the issue based on all the evidence submitted. In this situation, the judge implicitly chooses a confidence level when she decides how much discovery to allow and how complete a hearing to conduct.

15. The *In re IPO* case is a particularly notable example of superficial argument. *See In re* Initial Pub. Offerings Sec. Litig. (*In re IPO)*, 471 F.3d 24, 30–31 (2d Cir. 2006) (assuming that a

At one point, the court relies on the language of 23(a)(2) itself. Because 23(a)(2) requires only a "common question of law or fact," the court reasons, the plaintiffs should only have to present a question, not prove an answer.[17] This argument misunderstands the importance of 23(a)(2) to litigating-group class actions certified under (b)(2). The "common question" in litigating-group cases is not some legal or factual issue that can be efficiently litigated for all class members at once, as in case-aggregation class actions certified under 23(b)(3). Rather, the "common question" in a case like *Dukes* goes to the very existence of the class as a litigating entity. In effect, it asks whether the glue that binds the class actually exists. In *Dukes*, for example, the 1.5 million women are bound together by the existence of a company-wide discriminatory policy, not by the question of whether such a policy exists.

This marks an important distinction in how 23(a)(2) operates as between (b)(2) and (b)(3) class actions. Since one of the primary purposes of (b)(3) is to improve litigation efficiency by adjudicating common questions in one proceeding, the mere existence of common questions favors class treatment. The goal is to bind the class to whatever the answers happen to be.

A litigating group certified under 23(b)(2) is quite a different thing. The main policy behind (b)(2) certification is not so much to achieve litigation efficiency as it is to secure optimal enforcement of the substantive law by facilitating a group-wide remedy. In a case like *Dukes*, for example, class action treatment facilitates the grant of an injunction that can root out discriminatory practices at their source. To achieve this remedial goal, however, there must be a common source to root out. This is, after all, why (b)(2) requires that the unlawful action be targeted at the group *qua* group—so that a single injunction can remedy the problem for the class as a whole.[18] Thus, the answer to the common question matters for certification. This does

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strict standard follows directly from what it means to "make a determination that every Rule 23 requirement is met").

16. The 2003 amendments to Rule 23 can be read in conjunction with the advisory committee note to reject an extremely cursory approach, but they do not indicate how much stricter the approach should be. *See, e.g.*, *In re Hydrogen Peroxide*, 552 F.3d at 318–20 (analyzing the implications of amendments to Rule 23(c)(1)(A) and (c)(1)(C)).

17. *Dukes*, 603 F.3d at 590; *accord* Hnot v. Willis Grp. Holdings Ltd., 241 F.R.D. 204, 211 (S.D.N.Y. 2007).

18. Another way to state the problem with the Ninth Circuit's analysis is that the court fails to understand how (a)(2) merges with (b)(2) for litigating-group class actions.

not necessarily mean that plaintiffs should have to *prove* an answer.[19] But it does mean that merely presenting the question does little to justify the class.

The Ninth Circuit also relies on precedent, and in particular *General Telephone Co. v. Falcon*, for a "rigorous analysis" standard of proof.[20] This formulation is singularly unhelpful. The phrase says nothing at all about how much the plaintiffs must show or prove. When the *Falcon* Court referred to a "rigorous analysis," it was responding to a line of precedent that liberally allowed across-the-board class actions in employment discrimination cases without seriously attending to Rule 23's requirements. But as long as a judge applies Rule 23 carefully, it is not apparent why a "rigorous analysis" necessarily requires her to look beyond the pleadings to assess 23(a)(2).[21]

III. CHARTING A MORE SENSIBLE COURSE

These flaws stem in large part from a failure to seriously engage the competing policies at stake and offer guidance based on those policies. The case law is replete with different verbal formulations of the standard of proof, but thin on careful analysis.[22] The following discussion briefly sketches the type of analysis that courts should undertake. One key point is the importance of settlement. Since virtually all class actions are settled, the alternatives should be evaluated mainly in terms of their settlement effects.

In general, the main benefit of a stricter standard lies in reducing the number of erroneous certifications and thus the social costs associated with these false positive errors. One such cost is

19. Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class." But it does not follow from this language that the plaintiff must actually prove that the relevant acts are unlawful.

20. *Dukes*, 603 F.3d at 581 (citing Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)). The dissent in *Dukes* focuses on *Falcon*'s "significant proof" language, *see Dukes*, 603 F.3d at 628, 632–34 (Ikuta, J., dissenting), but this phrase is not terribly helpful either, even assuming it applies to a case like *Dukes*.

21. The en banc majority at one point says that "it is the plaintiff's *theory* that matters at the class certification stage, not whether the theory will ultimately succeed on the merits." *Dukes*, 603 F.3d at 587 (citing United Steel Workers v. ConocoPhillips Co., 593 F.3d 802, 808–09 (9th Cir. 2010)). But if the *theory* is all that matters, then it is unclear why a judge should ever have to look beyond the plaintiff's complaint.

22. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) ("close look"); *Falcon,* 457 U.S. at 161 ("rigorous analysis"); *Dukes*, 603 F.3d at 628, 632–34 (Ikuta, J., dissenting) ("significant proof"); *In re Hydrogen Peroxide*, 552 F.3d at 320 ("definitive determination"); *New Motor Vehicles*, 522 F.3d at 25 ("searching inquiry").

wasted investment in managing a class suit that does not further the goals of a class action. This cost is limited, however, by the fact that most class actions result in settlement. The more serious potential cost is the cost of unjustified settlements leveraged by certification of frivolous or very weak class action suits. This cost depends, in turn, on the amount of improper leverage certification creates, which is likely to vary with the type of class action involved.

A stricter standard will also create costs of its own. First, it can lead to mistaken denials of certification. This might happen, for example, if the plaintiff is unable to obtain through limited pre-certification discovery the information necessary to satisfy a strict standard. The cost of these false negative errors is the cost of failing to realize class action goals. Second, a stricter standard shifts more litigation investment to the pre-certification stage. The need to invest heavily before knowing the certification outcome increases the risk for class action attorneys who rely on successful certification to make litigation investment worthwhile, and this heightened risk might chill the filing of meritorious class action suits or discourage skilled attorneys from taking these cases.[23] Third, to the extent class actions are settled promptly after certification, a stricter standard is likely to increase litigation costs by forcing discovery and merits deliberations that would otherwise have been avoided through settlement.[24]

Balancing these benefits and costs is a difficult undertaking. The magnitude of the expected benefits depends on empirical information about the frequency of frivolous class action filings, the settlement leverage created by certification, and the social cost of unjustified settlement—all of which can vary with the type of class action. For example, it seems doubtful that the 23(b)(2) class for injunctive relief and back pay approved by the Ninth Circuit in *Dukes* would involve large enough stakes to create serious and improper settlement pressure on Wal-Mart, given the company's substantial financial resources.[25]

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23. In theory, it is possible that the greater cost of obtaining certification for a litigating class action might encourage more settlement class actions. However, the Supreme Court's holding in *Amchem*, requiring a more-or-less ordinary certification analysis for approval of a settlement class, creates a major obstacle to this strategy. *Amchem Prods., Inc.*, 521 U.S. at 620–22.

24. A stricter standard might require duplicative preparation if the class action eventually goes to trial, but very few class actions ever reach trial.

25. The most salient factor in the 23(b)(2) class is the impact of the expected aggregate back pay award, but this must be evaluated in light of the smaller size of the class (about 500,000 members). To be sure, Wal-Mart might fear disclosure of embarrassing information through discovery, but this is possible for an individual suit as well. And adverse publicity by itself would seem unlikely to pressure Wal-Mart to settle a frivolous or weak suit.

The cost side of the balance is also difficult to measure. The frequency of false negative errors depends on empirical information about trial judge capacity to limit discovery in a way that still preserves access to necessary merits-related evidence, as well as on information about how different types of class suits are financed. Moreover, the cost of false negatives depends on the goals that the class action is meant to serve, which vary with the type of class action involved. For example, the social cost of an erroneous failure to certify the class in *Dukes* might be more substantial than in other cases because of the civil rights at stake and the scale of the alleged wrong.[26]

Given the complexity of the task, and especially the importance of reliable empirical information and difficult value tradeoffs, the job of choosing a standard (or multiple standards) that optimally balances costs and benefits should be handled through the formal rulemaking process rather than through a case-by-case, common-law-like process of working out the implications of Rule 23. I have made a similar point about elevated pleading standards elsewhere, and many of the same arguments apply to class certification as well.[27] Furthermore, certification standards should be coordinated with stricter pleading standards in the wake of *Twombly* and *Iqbal* in order to prevent excessive screening. This is so because the Supreme Court's new plausibility pleading standard also serves a screening function. System-wide coordination requires a global perspective, which the formal rulemaking process can provide.

Until the rulemaking committees act, however, the courts should look for guidance to the principles governing the determination of preliminary injunction motions, and in particular to the substantial-likelihood-of-success standard and its sliding-scale relationship to the balance of harms.[28] There are important similarities between class certification and preliminary injunctions. Both motions are often heavily litigated and both shift costs from a later stage of the litigation to an earlier stage. In addition, both decisions can have a major impact on outcome and both exert their influence by affecting subsequent settlement bargaining.

Analogizing to the preliminary injunction is significant for two main reasons. First, it reinforces the importance of weighing the evidence on both sides when making a likelihood determination,

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26. At the same time, the possibility of store-level class actions should mitigate these costs to some extent.

27. *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 883–85 (2010); Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 935–36 (2009).

28. *See* Bone & Evans, *supra* note 8, at 1279–80.

rather than just checking the plaintiffs' evidence for superficial plausibility. Second, the sliding scale approach in preliminary injunction determinations provides support for linking the certification standard of proof to the relative costs of erroneously granting versus denying certification. To be sure, these costs are difficult to measure, which is one reason I recommend that rulemaking committees get involved, but judges can still make rough evaluations, as they do now for preliminary injunctions, and invite the parties to present evidence and argument.

Applying this approach to *Dukes*, the trial judge should conduct a *Daubert* analysis to test the reliability of expert testimony and critically evaluate the plaintiffs' statistical model in light of the defendant's objections and rebuttal evidence.[29] As far as the requisite level of trial judge confidence in plaintiffs' success is concerned, it is at least worth considering whether 23(b)(2) certification should depend on a favorable *final* determination of the common question based on full discovery and a trial. Under this approach, certification would be granted only if the court finally decided that a company-wide discriminatory policy actually exists. This option may seem strange given that it reverses the customary order of certification and trial, and it might be inconsistent with the current version of Rule 23.[30] But there are more telling objections.

For one thing, the Seventh Amendment creates potential problems for cases involving jury trial rights, and those cases are likely to include the damage lawsuits that generate the most serious risks of improper settlement leverage. Also, it is not clear that the proposal makes sense for (b)(2) class actions seeking only injunctive relief and back pay, as long as the potential aggregate back pay award is not too large. To be sure, postponing certification until a final determination of the common question makes it more difficult for plaintiffs in frivolous and weak suits to use the threat of high stakes to trigger defendant risk aversion and thereby pressure unjustified settlements. But this benefit is likely to be substantial only for those

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29. The certification inquiry should not be limited to merely checking whether the merits issues are clearly frivolous, as might be appropriate for the pleading stage. *See* Bone, *Plausibility Pleading Revisited*, *supra* note 27, at 876 (arguing that *Twombly* is best understood as establishing an epistemological pleading threshold). The grant of certification has the potential to alter the stakes and settlement dynamics too radically, and certification is often the last practical opportunity to check the merits. Moreover, a denial of certification, unlike a 12(b)(6) dismissal, does not necessarily doom the lawsuit. In *Dukes*, for example, individual suits or even store-level class actions could still be filed.

30. Among other things, it might be too similar to one-way intervention, which the 1966 Advisory Committee specifically excluded, *see* FED. R. CIV. P. 23(c)(3) advisory committee's note—though in my opinion this is not a strong objection.

cases with very large back pay awards. Moreover, by increasing the parties' pre-certification costs, the proposal strengthens frivolous plaintiffs' ability to obtain an unjustified settlement in a different, although weaker, way: they can threaten to impose high discovery costs on the defendant. In addition, front-loading litigation costs might discourage class attorneys from taking meritorious suits, although this depends on how the class litigation is financed.

While a more careful analysis is needed, this brief appraisal at least casts doubt on the desirability of the final-determination approach. In fact, insofar as the 23(b)(2) class in *Dukes* is concerned, the balance of costs and benefits would seem to call for a fairly lenient standard of proof, unless the expected aggregate back pay award is very large. An erroneous certification is not likely to produce substantial settlement pressure for Wal-Mart, and an erroneous denial could frustrate Title VII policies by making it more difficult to root out company-wide discrimination at its source.[31] The matter is quite different, however, for the potential punitive damages class. A stricter standard of proof should be applied to certification of that class action given the substantially higher stakes and stronger settlement leverage.

In conclusion, the problem of selecting an appropriate standard of proof necessarily involves choosing a requisite level of judicial confidence that the relevant merits issues are not frivolous or too weak to warrant certifying a class. Any sensible choice has to be sensitive to the competing policies, and those policies implicate substantive values and the fundamental purposes of class litigation. The Supreme Court has an opportunity to clarify the law in this important area by granting certiorari in *Dukes*, but it can succeed only if it heeds these lessons and provides guidance that is sensitive to the policies at stake.

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31. Moreover, in considering the back pay component, the trial judge should take account of the importance of monetary recovery to attorney incentives to invest in the litigation, which is a particularly salient factor given Wal-Mart's substantial litigation resources.