

An expected Supreme Court case involving Wal-Mart may radically alter the American legal landscape.

The Anti-Constitutional Culture of Class Action Law

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The culture of class action law discourages constitutional scrutiny of class action litigation. But that culture is fraying. The Supreme Court may pull the thread that unravels it in *Dukes v. Wal-Mart*, a mammoth sex discrimination class action.

In 2000, Betty Dukes sued Wal-Mart under Title VII of the Civil Rights Act of 1964, alleging gender discrimination. The suit grabbed headlines because of its posture: Dukes sought court approval of a class action seeking remedies for 1.5 million women who worked for Wal-Mart since 1998. Dukes claims the women, like her, lost promotions and pay because of their gender. The suit, in turn, threatens Wal-Mart with, according to some estimates, as much as \$510 billion in punitive damages.

The trial court “certified” (that is, authorized) a class in 2004. On February 6, 2007, a three-member panel of the Ninth Circuit affirmed class status by a 2-1 vote. It is the single largest class action certification in history.

Wal-Mart has requested that the full Ninth Circuit review the case — a preliminary step toward a request for review by the U.S. Supreme Court. In clever bid to enhance the chances of Supreme Court review, Wal-Mart’s lawyers, led by Theodore Boutros of Gibson, Dunn, and Crutcher, have challenged the constitutionality of “class-wide” punitive damage awards on this gargantuan scale. Wal-Mart’s argument relies on Supreme Court decisions in *BMW of North America v. Gore* and *State Farm*

Mutual Automobile Insurance Co. v. Campbell, which bar awards of punitive damages that are not proportional to compensatory damages assessed on an individual basis. Because plaintiffs do not seek compensatory damages, however, it is impossible to measure the ratio between punitive damages and compensatory damages, as the Supreme Court’s cases require. Hence, Wal-Mart argues, those cases throw serious constitutional doubt on Dukes’ punitive damages request.

While these arguments are worthy, *Dukes*, in its very scale and ambition, raises concerns that go well beyond the punitive damages precedents. Why are any class actions on the scale of *Dukes* constitutional? That is a question that is rarely, if ever, asked by serious students of the class action.

This constitutional know-nothing-ism is the product of three pervasive myths about



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the nature of class actions, with deep roots in the culture of class action litigation. The myths, however, are due for critical reassessment. If Wal-Mart successfully appeals to the Supreme Court and wins there, Wal-Mart's victory would set the stage for that critical reassessment.

MYTH 1: THE CONSTITUTION DOES NOT RESTRAIN CIVIL "REMEDIES."

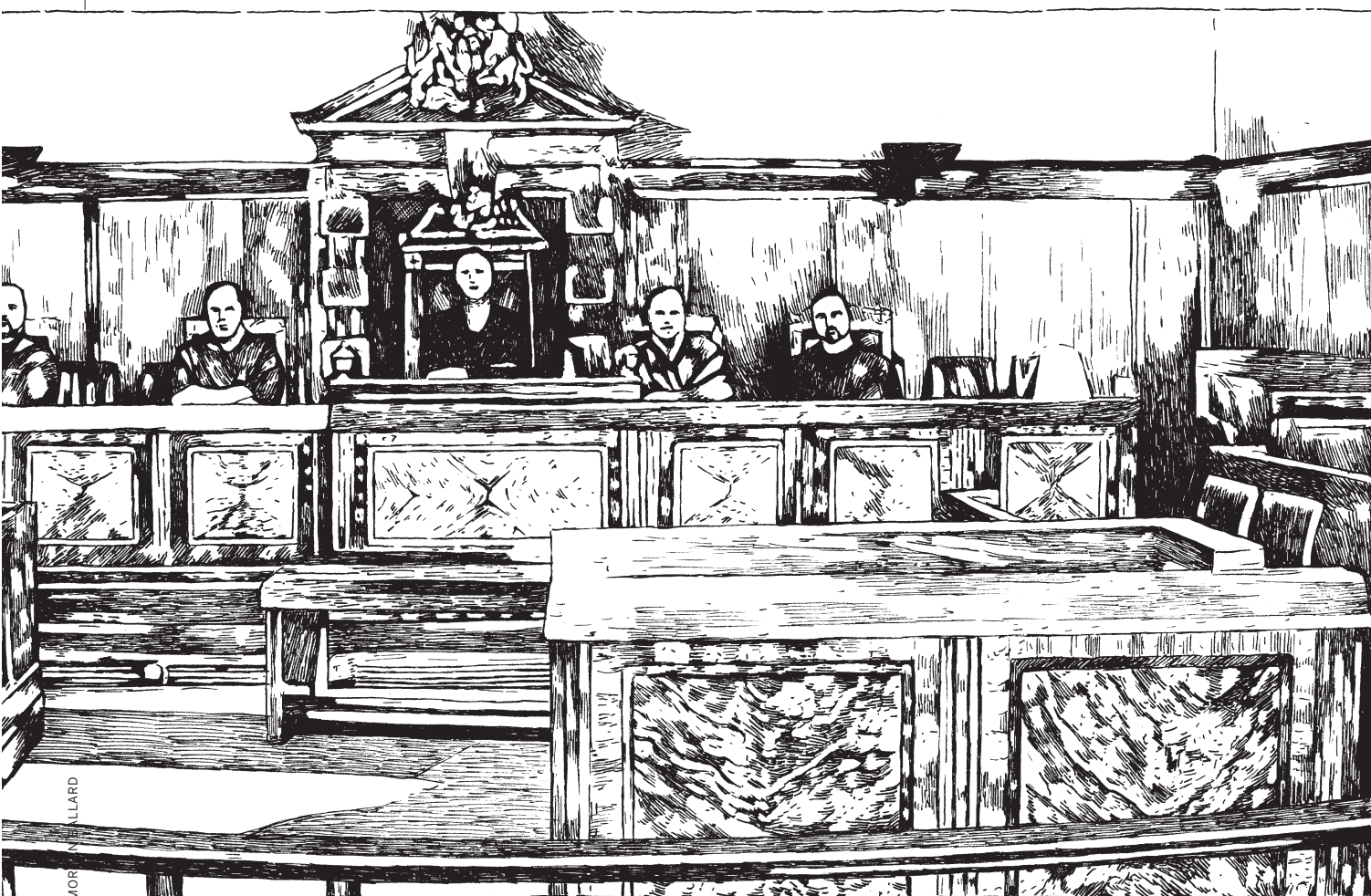
The first myth is perhaps the most invidious. Class action lawyers reflexively treat class actions as a discretionary "remedial" device that falls outside the scope of serious constitutional attention. The logic follows the "rights-remedy" distinction, a traditional way of legal thinking with roots in the 19th century. It goes like this: The Constitution cares about how "rights" are defined by courts in the constitutional context and how they are created by Congress in the legislative context. By contrast, "remedies" are a matter for judicial discretion; the Constitution simply does not constrain this power beyond guaranteeing parties minimal notice and a meaningful chance to participate in remedial proceedings. The rights-remedy distinction infects the debate over class actions, which are commonly viewed as a form of "remedy." The distinction is apparent in the Ninth Circuit's *Dukes* opinion, which shows a total lack of concern about the trial court's assertions of "broad" discretion to authorize class treatment.

Under current Supreme Court precedent, however, this

distinction is not a very useful way of thinking about the class action. To see why, let us consider punitive damages in more detail. Punitive damages are also a "remedy," but one that, as we have discussed, receives heightened attention under the Due Process Clause. Class action judgments can resemble punitive damage awards in important ways, and hence the punitive damage experience suggests the direction that the law in the class context should take — if we take the logic of the Court's punitive damage precedents seriously.

PUNITIVE DAMAGE EXPERIENCE Punitive damages do not fit easily into the traditional rights-remedy distinction. For one thing, punitive damages are designed, in part, to express the state's outrage at the conduct — to "send a message." In this sense, they fulfill much the same role that James Fitzjames Stephens attributed to the criminal law: to "persecute the grosser forms of vice."

Assessing punitive damages is also a deeply discretionary exercise — far more so than simply "pricing" an injury in an individual case. That discretion is unavoidable, given the goals of punitive damages. Punitive damages are designed to deter future wrongdoing, not simply compensate a plaintiff. In one sense, all legal remedies do so — for example, simple tort remedies do not just compensate, but instead, theoretically, promote effective deterrence, at least in a world without high litigation costs. The difference is that punitive damages promote



deterrence wholesale by levying damages that are not confined to the harms presented in an individual case. Therefore, they require a jury to assess the extra “deterrent” damages beyond the value of the harm presented in court. This is no mechanical task. Devising the right metric requires added judicial inventiveness — and thus, added discretion. This added discretion might be analogized to that involved when a legislator or an agency fashions a criminal fine for certain categories of conduct.

The Supreme Court’s due process jurisprudence assumes that both features — the “expressive” and “deterrent” facets of punitive damages and the special discretion they involve — mark out this judicial “remedy” for special constitutional attention. As Justice Kennedy put it in *State Farm*, punitive damages qualify for heightened scrutiny because they “serve the same purposes as criminal penalties,” but are assessed without “the protections applicable in a criminal proceeding.”

The Court’s chief concern is that local juries, biased against large corporations, will assess punitive damages based on prejudice toward the corporate defendant. The risk arises because of the “fine-like” nature of the award. Absent standards keyed to some objective benchmark like the scope of an individual injury, jury discretion to assess the “fine” creates an acute problem of bias and over-punishment, just as too much discretion in criminal sentencing creates a risk of excessive punishment. The Supreme Court’s due process analysis attempts to solve the problem by prescribing minimum ground rules to ensure that damages reflect rational deterrent or normative goals.

Among those rules, reaffirmed by the Supreme Court in *Philip Morris v. Williams*, are three requirements:

- a punitive damages multiplier must assess damages in proportion to fault in “individual” cases,
- the punitive award cannot be used to punish harms incurred by persons not before the court, and
- punitive damages must be assessed under a procedural framework that gives the defendant “an opportunity to present every available defense” to liability.

These rules assume that it is easier for a jury to indulge bias when imagining the hypothetical harm done by a hated defendant to nameless others, than it is when focusing on the concrete facts of a flesh-and-blood case.

CLASS ACTIONS If punitive damages are subject to constitutional scrutiny given their resemblance to criminal punishment and the heightened possibility of bias, class certification should not be treated any more gingerly under the Due Process Clause.

First, very large class actions can further the same goals as criminal punishment. A suit on the scale of hundreds of thousands or millions of claims can, as Richard Epstein observes, “amplify” the rights at stake. One way class actions do so is by advertising the scope of the wrongdoing to the public in a very visible way, generating negative press and reputational penalties in a way that individual cases typically do not. Even a mere certification order — the initial step in a class action — can do

so. Wal-Mart, for example, has been dogged by a relentless stream of negative press since *Dukes* was first filed, and the retailer shed over 1 percent of its total market capitalization immediately after the class action was authorized in 2004. If the most preliminary stages of a class action have such ripple effects, then a class liability judgment of billions of dollars can serve an even larger “expressive” goal — sending a particularly strong message that society has little tolerance for “the grosser forms of vice.”

Moreover, while class action scholarship has typically treated class actions as pure compensatory remedy, more recent scholarship recognizes that the best justification for modern class actions is not compensation, but deterrence — the same goal that animates punitive damages and the criminal law. As Myriam Gilles and Gary Friedman wrote in a recent article:

There is but one ... valid normative measure by which to gauge any class action procedure or practice.... All that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions.

That deterrence objective, which also justifies punitive damage regimes, serves distinctively public goals. This point, as Gilles and Friedman note, is not new; it was made by Harry Kalven and Maurice Rosenfield in 1941, when they described the class suit as a “vehicle for paying lawyers handsomely to be the champions of semi-public rights.”

Second, class actions not only serve the same public law goals as punitive damages, but also involve a special degree of judicial discretion. Frequently, certification orders must redefine the rights litigated so that they are capable of being litigated en masse — and capable of achieving the “right” level of deterrence. Courts do so, of necessity, by severing class liability from a full-blown inquiry into the scope of an actual individual injury. Instead, in a very large class action, the court or jury must approximate the harm incurred by large numbers of people whose circumstances cannot be examined on an individual basis. Figuring out how to approximate the harm incurred on this scale is a deeply discretionary task.

This dynamic can be seen most clearly if we imagine a case, on the scale of *Dukes*, that seeks “compensatory,” but not “punitive,” damages. Of course, the plaintiffs in *Dukes* sought punitive damages and prospective injunctive relief, but their legal theories would have been equally applicable to claims for compensatory damages. By viewing the case through a compensatory lens, it is easier to see how more garden variety, large-scale class actions, when litigated under the aggressive theories of plaintiffs in *Dukes*, might raise legitimate due process problems in general — and not just in punitive damage cases.

In this imaginary case, as in *Dukes*, two different conceptions of plaintiffs’ rights are presented. In order to support a finding that liability to plaintiffs could be proven using evidence “common” across the class, plaintiffs, like those in *Dukes*, argue, in effect, that damages can be calculated in a way that reflects a rough estimate of possible harm — essentially, the heightened risks of injury — created by Wal-Mart’s decentralized promotion policies. Under this theory, defendant’s creation of a heightened risk of discrimination, not its discrim-

ination in fact, matters most to the defendant's liability. Were that interpretation accepted by the court, it would make the plaintiff's claims of injury more amenable to "rough" statistical proof and therefore to class treatment.

Like Wal-Mart in *Dukes*, our imaginary defendant argues that risky employment practices are not necessarily a sufficient basis for monetary liability under the statute. Plaintiffs cannot recover damages if defendants ultimately show, on a case-by-case basis, that individuals were not actually discriminated against. Thus, the defendant could not be held monetarily liable to persons who were fired for theft or absenteeism or drug use, no matter how "risky" its promotion policies might have been. Of course, were this interpretation accepted by the court, a class could not be certified because "actual injury" is not very easy for one trial judge or special master to litigate in a single sitting involving millions of persons. Our defendant's practices, like Wal-Mart's, are implemented in a highly decentralized fashion and so may have played out differently

Wal-Mart employees face. Making such predictions, however, requires drawing lines — by defining how significant a risk must be to trigger a right of recovery and by defining how to identify the persons who may validly complain of the risk of discrimination. This is, ultimately, a statistical inquiry. Statistics allow "rough" estimates of the frequency and aggregate size of harm inflicted across populations of persons where all variables relevant to harm in individual cases cannot be considered. Statistical analysis does so by studying relationships between subsets of variables. And so, when a court opens the door to this kind of proof, a court faces a second choice, as it must green-light the variables that may be included in the statistical inquiry and those that may be left out.

In practice, then, class actions force courts to decide whether to depart from an individualized model of proof, how far to depart from that model, and the form or model that that departure might take. In cases where statutory guidance is minimal, as in our hypothetical case, those determinations can

Class certification decisions are susceptible to political bias and bias that stems from courts' interest in docket clearance.

from department to department, or from employee to employee, in a way that resists reliable aggregate measurement.

In this hypothetical, however, we will pretend that the Civil Rights Act is silent about which side is right: it neither clearly authorizes nor forbids monetary recovery based on proof showing defendant exposed a class of persons to heightened risk but falling short of showing that individual class members were actually injured. (In fact, the Civil Rights Act of 1964, as amended in 1991, is much clearer than this, as I will discuss later.) Thus, the class certification request forces the court to grapple with a difficult question without any clear guidance. Our imaginary court, however, sides with the plaintiffs — adopting, like the Ninth Circuit in *Dukes*, a probabilistic characterization of the rights at stake. Thus, as in *Dukes*, members of the gargantuan class can recover compensatory damages merely by showing that they faced an increased risk of discrimination as a result of Wal-Mart's policies; individualized hearings on whether the class members are actual victims in any meaningful sense are not permitted because they would be unwieldy across a class this size. As in *Dukes*, the defendant can only challenge whether the plaintiffs' statistical models and formulas accurately identify whether employees were subjected to this heightened risk.

By doing so, our imaginary court must face a second choice: how to identify the victims who can recover. Now, the size of the damages award no longer depends on a full-blown examination of individual plaintiff's injuries. Instead, the class award is assessed based on "rough" predictions about the risks

entail one or more acts of discretion that are almost as large as that of a jury asked to decide the "right" method for measuring the punitive damages needed to "deter" a defendant from harming persons in future cases.

RISK OF POLITICAL BIAS In the class context, the "expressive," "deterrent," and "discretionary" nature of class action awards ripens into a constitutional problem once we factor in the risk of bias. Class certification decisions are susceptible to two sources of bias: political bias and bias that stems from courts' own self-interest in docket clearance.

First, loose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, "sending a message" that they must respect the little guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so. Conversely, a pro-business trial judge might want to go out of the way to deny class certification of meritorious claims.

The procedural rule that governs class actions, Federal Rule of Civil Procedure 23, gives judges ample elbow room to indulge such political biases. The rule requires a showing that the class raises "common issues," that the named plaintiffs' claims are "typical" of those of the class members, and, in cases seeking damages, that common issues "predominate." The precedents interpreting those murky standards are no less opaque than the standards themselves. They do not tell us how

to assign burdens of proof to plaintiffs and defendants, and therefore offer little check on courts' ability to redefine how violations of rights are proven in a class setting.

The rules governing the statistical evidence that plaintiffs can submit to prove "class-wide" inquiry, in theory, might provide some check against judicial bias in the class context that the certification standards lack. This might be the case, for example, where a court decides to allow plaintiffs to prove class-wide injuries probabilistically. In such cases, certification depends on plaintiffs' ability to show that there are reliable, but low-cost, ways to prove the size of injury across the class without individualized hearings. If the plaintiffs' statistical methods risk unacceptably high rates of error, rules barring use of weak statistical evidence might prevent a biased judge from improperly certifying the class. Conversely, if the plaintiffs' statistical methods are sound, that rule might prevent a pro-defendant court from improperly denying certification. In either case, evidentiary rules would do what Rule 23 is unable to do: check judicial bias.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court directed trial courts to apply a searching, multi-factored review of expert evidence (including statistical evidence) when deciding whether expert evidence can be admitted, and that test has since been codified in the Federal Rules of Evidence. *Daubert*, however, is an inadequate restraint on biased certification rulings, for three reasons: First, *Daubert* does not speak to questions about how the burden of proof should be assigned to plaintiffs. As we have seen, determining the proper burden often makes or breaks certification decisions because an individualized burden usually precludes large scale proceedings. *Daubert*, however, offers little or no check against the initial judicial choice to convert a traditional, individualized standard of proof into a standard that may be proven on a class-wide basis based on statistical inferences.

Second, mounting evidence suggests *Daubert* also is not a firm external restraint on judicial admissibility determinations once a court has chosen to entertain statistical evidence. For example, liberal and strict interpretations of *Daubert* tend to follow ideological lines — a red flag that *Daubert*'s application tends to reflect the preconceptions of judges that apply it. Furthermore, a 2005 study by Edward Cheng and Albert Yoon found that there is no statistically significant difference between the admissibility determinations of *Daubert* and non-*Daubert* jurisdictions — suggesting that *Daubert*, in practice, leaves trial judges with substantial discretion over admissibility. That discretion is only compounded by the highly deferential standard of appellate review that trial courts' *Daubert* determinations receive.

Worse still, the open-ended nature of Rule 23 compounds the porousness of *Daubert* because some courts, including the Ninth Circuit, have discerned in Rule 23's vague text a basis for ignoring the *Daubert* test entirely when assessing whether certification of a class action is proper. Rule 23 directs that certification decisions should be made "at an early practicable time" and, in design, forces certification decisions to be made before a trial of the case. Based on this, a number of courts, including the Ninth Circuit panel that decided *Dukes*, have

held that consideration of the "merits" is entirely off-limits at the class certification stage. *Daubert* is a merits-based inquiry because it relates to the admissibility of evidence at trial; therefore, these courts argue that a full-blown *Daubert* analysis is premature at the class certification stage. This reading is not the only one, however, because other portions of Rule 23 point in an opposite direction. As Judge Frank Easterbrook notes, "if some of the [other] considerations under Rule 23(b)(3), such as 'the difficulties likely to be encountered in the management of a class action', overlap the merits — as they do . . . where it is not possible to evaluate impending difficulties without [a merits-based inquiry] — then the judge must make a preliminary inquiry into the merits." The bottom line: because Rule 23's text points in different directions, it spawns confusion that invites exploitation by judges who would prefer to ignore *Daubert* entirely.

Finally, empirical studies outside of the class context reinforce our intuition that underdetermined standards, like those of Rule 23 or *Daubert*, are vulnerable to ideological application. Take, for example, Richard Revesz's study of the D.C. Circuit's voting patterns in challenges to Environmental Protection Agency regulations filed between 1970 and 1996. He found that in cases where the D.C. Circuit reviewed EPA decisions under vague "abuse of discretion" standards such as tests governing administrative fact-finding, ideological voting was more pronounced than in cases where the court of appeals reviewed the EPA under relatively clear rules such as tests of governing agency interpretation of statutes. Revesz concluded that it may be "professionally less costly for judges to vote consistently with their ideological preferences in cases . . . in which [the governing standard] inherently is ambiguous." Given the ambiguity of the standards that govern when classes can be certified and that govern how wide-scale injuries can be proven, Revesz's study bolsters our intuition that class certification is vulnerable to ideological manipulation.

JUDICIAL SELF-INTEREST Even if ideology was not a source of bias, trial courts remain at special risk of bias in class actions because they have a material interest in promoting certification, for one simple reason: certification promotes docket clearance.

Dockets are congested because of the explosion of statutes and because of the modern rules that govern when legal issues can be litigated more than once (called "preclusion"). The explosion of vague, overlapping laws gives plaintiffs many potential vehicles for prosecuting complaints against a defendant. Women who failed to be promoted may sue for gender discrimination under different theories of Title VII liability, including disparate impact, pattern and practice disparate treatment, individual disparate treatment, mixed-motive discrimination, and pure "single motive" discrimination. Others may sue under an even larger welter of state antidiscrimination laws reaching the same conduct. And still other women passed over for promotion (those with very creative lawyers) might attack the discriminatory impact of Wal-Mart's policies under other federal laws, including retirement protection, disability, and racketeering laws.

At the same time, modern rules of “preclusion” apply more strictly to defendants than plaintiffs. A defendant who loses a lawsuit against one plaintiff typically cannot re-litigate his failed defenses against a different plaintiff asserting similar claims. By contrast, under the Supreme Court’s modern preclusion cases, different plaintiffs can fire a barrage of repetitive legal claims arising out of the same transaction against the same defendant, even if previous plaintiffs unfailingly lost similar suits. That barrage can include repetitive class actions in cases where prior plaintiffs have unfailingly lost their class certification motions; in that case, the failure of the losing plaintiffs does not bind other, later plaintiffs from seeking certification — even if they seek certification based on the same losing arguments advanced by the previous ill-fated plaintiffs in earlier suits.

In this sorry state of affairs, one set of wrongdoing against large numbers of people can trigger countless lawsuits. Some of the suits may duplicate the same legal theories, but on

text. Like punitive damages and criminal sanctions, class actions punish and deter corporations. Yet, class certification standards, and subsidiary standards that discipline how class-wide injuries may be statistically estimated, are vulnerable to biased application. Manipulation of those fuzzy standards is a special concern in the class context because courts are a deeply interested party in class certification requests. For these reasons, courts’ broad discretion to certify should be just as suspect under the Due Process Clause as juries’ broad discretion to award punitive judgments.

Nor does the fact that certification orders merely set the stage for a future class judgment lessen constitutional concerns. In the recent *Philip Morris v. Williams* decision, for example, the Court found a jury instruction on how to calculate punitive damages unconstitutional — without considering whether the jury’s actual award was excessive. Much like the jury instruction considered in *Williams*, certification orders help set the stage for an award by shaping the burdens of proof

Class certification standards, and subsidiary standards, are vulnerable to biased application because those standards are fuzzy.

behalf of different plaintiffs. Other suits may attack the same underlying conduct not only on behalf of different plaintiffs but under subtly different legal theories. In either category, the repetitive suits may involve multiple requests for class actions brought by different named plaintiffs targeting the same conduct. Because the statutory firmament offers so many potential vehicles for suits and because rules of preclusion allow re-litigation of previously failed lawsuits by many different plaintiffs, the assault of repetitive suits cannot be extinguished by dismissing lawsuits and certification requests filed by the first few plaintiffs.

Enter the class action settlement. Just as class actions bind all class members to the results of litigation, settlements between representatives of a certified class and the defendant bind all class members to the settlement’s terms. Settlements typically include broad “release clauses” that bar any claim that a class member could have brought on the facts of the underlying dispute, whether or not he actually did. This broad contractual agreement does what preclusion rules cannot: cheaply wipe out the universe of all possible claims arising out of the defendant’s underlying conduct en masse.

DUE PROCESS AND THE CLASS ACTION To recap: punitive damages create due process concerns because punitives are used to punish and deter, but the statutory standards that govern punitive damage awards are often so amorphous that juries are at liberty to arbitrarily penalize unpopular defendants. As we have discussed, a similar problem arises in the class con-

plaintiffs and defendants must meet in a class setting, and therefore the terms of class-wide “compensation” and “punishment.” As in *Williams*, this is a matter with which due process is centrally concerned.

The goal of this due process scrutiny must be to limit possibilities for biased application of certification standards. One way to do so might draw inspiration from *Philip Morris v. Williams*. In *Williams*, the Court decided that the problem of bias in the punitive damage context requires juries to assess punitive damages in individual cases, in light of all possible facts. A similar rule might be developed in the class context, by barring special “class action-only” burdens of proof, even in class actions that do not involve punitive damages. In a small suit involving one or just a handful of plaintiffs, there is no doubt that individual features of the plaintiffs’ employment history would be the subject of sustained inquiry — including the employee’s actual job performance, skills, performance reviews, and evidence of her supervisor’s comments and attitudes. Under Rule 23, a court that wants to “punish” a corporation by certifying a big class or clear its docket via a class settlement would be hard pressed to devise a trial plan that allows a jury to examine all of those facets in each individual case if the class is very large. It might, however, greenlight a class action by permitting plaintiffs to employ a very permissive evidentiary shortcut, allowing the jury to “estimate,” in a very rough way, the probability of harm to each class member. However, under the test proposed, if the shortcut would not make sense in an individualized proceeding, it

cannot be used in the class setting. In most individual fraud cases, for example, there should be no need for recourse to circumstantial statistical evidence. In a class composed of many thousands of such typical fraud cases, the proposed due process rule would bar recourse to such circumstantial evidence as well. This test would, obviously, narrow the range of courts' discretion relative to a world where courts have complete discretion to permit liberal methods of "estimating" harm across a large population.

To be sure, this rule may deprive some plaintiffs of avenues for relief in cases where class actions are the only viable way of enforcing their rights. But this problem might be fixed if "clear" legislative permission to use evidentiary shortcuts provides courts a due process "safe harbor." A legislative safe harbor might satisfy due process concerns because Congress is not subject to courts' biases, lacking, as it does, the courts' interest in docket clearance. In this way, a due process inquiry might also serve as a democracy-reinforcing mechanism, which puts

Constitution is not indifferent. As Justice Stevens emphasized in *Chevron v. Natural Resources Defense Council*, in places where the Constitution vests the federal government with power to make big, policy-laden market interventions, it vests that power with "political" decisionmakers who are democratically accountable, not federal judges "who have no constituency."

To be sure, if Congress has given courts broad discretion to use the class device as they see fit, separation of powers objections might be less of a problem. But Congress has made no such delegation. When Congress gave courts power to enact procedural rules governing federal litigation, it included an important caveat in the Rules Enabling Act: rules of procedure "shall not abridge, enlarge, or modify any substantive right." In other words, said Congress, courts have to take rights as they find them — even if the rights are impossible to litigate in the class proceedings.

Perhaps a more subtle argument might help. We might, for example, treat Congress's "substantive" statutes as if

Federal agencies are more democratically accountable because they are controlled by the White House and Congress's power of the purse.

Congress, rather than courts, in charge of calibrating how plaintiff- or defendant-friendly class action redress should be.

As with most other areas of constitutional law, finding the optimal test is not easy or mechanical. But — and this is the key point — that has not deterred the Court from sustained constitutional inquiry in the punitive damage context, and it should not deter sustained constitutional inquiry here, either.

MYTH 2: CONGRESS HAS GIVEN FEDERAL COURTS BROAD DISCRETION TO ACHIEVE "ROUGH JUSTICE" THROUGH THE CLASS DEVICE.

Class certification orders not only raise due process problems, they raise questions about separation of powers between the branches of government. It is not obvious that wrongs on the scale of thousands or even millions should be addressed in a one-shot court proceeding, as opposed to an agency proceeding. Agencies are more democratically accountable than courts because they are controlled by the White House and Congress's power of the purse. Accountability is important when settling rights on a massive scale because the problem of unintended consequences is much more significant in mass cases. It is reasonable to think that regulatory decisions entailing a heightened risk of massive unintended consequences should be pursued subject to democratic checks — leaving only modest, lower-risk interventions to life-tenured judges.

Yet, certification orders, like that in *Dukes*, spend no ink weighing those tradeoffs. That is a balancing toward which our

they were "encoded" with implicit legislative instructions that courts should adopt, when necessary, so that wide-scale violations of the statute can be litigated in a "rough" way in the class context. That may sound strange, but a similar approach to interpretation has been developed in administrative law; there, statutes entrusted to agencies are assumed to "travel with" presumptions that the agency has a certain amount of freedom to creatively interpret the statute in light of agency policies. That assumption does not rest on any express evidence of Congress's intent; it is a judge-made presumption — in effect, a legal fiction. The *Dukes* opinion gestures toward such a fiction by suggesting that the trial court is presumptively allowed to promote "the deterrence objectives of the substantive laws" by creatively "modifying" the statutory rights being litigated so that they can be "fit into" a class action.

This subtler argument, too, has serious problems. First, there is no evidence that Congress wants its statutes to be treated as though they are "encoded" with special instructions in the class context. Any such assumption would be, as in administrative law, a legal fiction of dubious provenance. Second, even putting aside the problem of legal fictions, the "special instructions" *Dukes* implicitly reads into the Civil Rights Act are far more generous toward interpretive discretion than those that travel with statutes in administrative law. It is very hard, from a separation of powers standpoint, to justify such a liberal approach to interpretation. If anything, democratically unaccountable courts should be more restrained when inter-

preting statutes than accountable agencies.

To see this disjunction in approaches clearly, let us compare *Dukes* and a famous administrative law case, *INS v. Cardoza-Fonseca*. In that case, the Supreme Court reviewed an Immigration and Naturalization Service interpretation of the Refugee Act, which allows the government to grant asylum to persons who can demonstrate a “well-founded fear” of persecution if they are repatriated. As we have discussed, administrative law assumes statutes contain the following implicit “code”: agencies have to abide by the “clear” meaning of statutes they administer. But when the statute is ambiguous, agencies can play with the meaning of the statute in order to promote executive policies. In effect, administrative law treats the ambiguity as a delegation of lawmaking power to the agency. Clarity, by contrast, revokes that delegation.

The INS read the act restrictively, arguing it entitled asylum-seekers to relief only if they could show a “clear probability” of persecution. But the Supreme Court disagreed. The Refugee Act, the Supreme Court decided, was not ambiguous enough to constitute a delegation. Congress had spoken clearly enough to overcome INS discretion.

It is true that the question the Court asked in *Cardoza-Fonseca* — was the Refugee Act clear or ambiguous? — was less than precise. It is the way the question was resolved that is revealing. As administrative law guru Cass Sunstein has noted, the Refugee Act’s asylum standard was not clear in the colloquial sense. It had “open-texture” — requiring interpretation. As Sunstein says, the Court, by nonetheless treating the act as a clear constraint on the INS, acknowledged Congress’s preeminence:

Even in the aftermath of the New Deal, it is for Congress, not the agencies, to make the law.... An understanding that would allow the agency to prevail merely because there is some room for disagreement [about a statute’s meaning] would pose an undue threat to the basic principle of congressional supremacy in law-making, risking as it would administrative subversion of statutory standards.

In other words, administrative law requires agencies to interpret their authority in light of background non-delegation norms — by treating the probable meaning of statutes as a clear restraint on the agency even if the statute is susceptible to a plausible, although not probable, contrary reading.

The culture of class action law exhibits a quite different attitude toward Congress’s instructions, as *Dukes* demonstrates. There, remember, plaintiffs are suing Wal-Mart under a civil rights statutory framework that entitles persons to sue for punitive as well as compensatory damages and back pay. Defendants argued that the framework permits recovery of damages only when a person has been affirmatively discriminated against — not when the claimant merely has been subjected to a heightened risk of discrimination because of bad promotion policies. Reliable individualized proof of injury, however, is virtually impossible across a class of millions. Defendants therefore argued that plaintiffs could not respect the terms of the statute and certify a class on the scale presented to the court.

There is plenty of evidence that the parts of the 1991 amendments to the Civil Rights Act at issue envision an individualized conception of monetary liability for damages. The text of the statutory scheme gives a private right of monetary recovery to “aggrieved individuals” who have suffered discrimination in hiring, pay, or promotion “because of” their gender; precludes recovery of punitive damages solely based on proof that an employment practice has a “disparate impact” on a protected class; prohibits recovery of back pay by persons injured “for any reason other than discrimination”; and bars damages when plaintiffs cannot prove bias was the decisive factor in an employment decision — strong signals that intentional causation of actual harm to an individual plaintiff is an irreducible component of any successful theory for recovering damages.

Even so, the Ninth Circuit permitted a class suit based on evidence that was probative of heightened risk to employees, but was not sufficient to prove actual individual injury. It justified this choice by arguing that the Civil Rights Act presumptively grants courts “broad discretion” to certify, even if actual injury is impossible to prove on a class-wide basis. Accordingly, said the Ninth Circuit, courts can modify the way the claims are proven in order to ensure a “rough” class remedy.

Obviously, had the Civil Rights Act stated beyond a shadow of a doubt that individualized proof was required for monetary recovery come hell or high water, no court would have modified the claims in this way. Thus, while not explicit, the decision tracks the following logic: The Civil Rights Act of 1991 does not clearly require individualized proof in every case seeking damages, especially where that proof renders a class difficult to certify. More clarity on this point was needed before the court would accept that its presumption of discretion to certify the gargantuan class — and adapt the statute to the class context — has been displaced. Put in plain English, the court assumed the Civil Rights Act, because it is not completely crystal clear, had delegated to the court special power to adapt claims to the class device — if necessary, by jettisoning individualized burdens of proof.

The contrast with administrative law is striking. If the fuzzy statute in *Cardoza-Fonseca* defeated the INS’s presumption that it had been delegated special power to promote its anti-asylum policies, it is hard to see why the Civil Rights Act also was not clear enough to defeat the trial court’s presumption that it had special power to jettison individualized burdens of proof in the service of class certification. Compared to the statute held to be clear in *Cardoza-Fonseca*, the civil rights statutes’ individualized structure fairly jumps off the page.

The difference in approaches betrays two diametrically opposed cultures in the law. The first is an administrative law culture that treats agencies’ assumptions about the scope of the authority delegated to them with a healthy dose of suspicion. The second is a class action culture that treats courts’ assumptions about the scope of the discretion delegated to them with supreme confidence. Yet, if we are to take the background constitutional norms that color administrative law seriously, unaccountable courts should act with at least the restraint expected of agencies. Norms against delegation and

in favor of congressional supremacy have an equally strong claim to inform courts' interpretation of their statutory discretion to certify class actions.

MYTH 3: CONSTITUTIONALIZING CLASS ACTION LAW IS NAÏVE

The last gambit of class action proponents is to paint constitutional objectors to class litigation as hopelessly naïve. Here, class action proponents sound themes reminiscent of the New Deal-era defenders of the administrative state. Class litigation of modern sweep, we are told by plaintiffs' lawyer extraordinaire Elizabeth Cabraser, is a necessary concession to the "massive risks" of a "mass market economy." Importing due process concerns and separation of powers concerns of Enlightenment-Age vintage on these proceedings is, so this argument goes, a fool's errand.

Once again, comparison with administrative law pays dividends. Administrative law raises regulatory problems of similar scale and complexity. Defenders of the administrative state have also warned about the folly of ambitious constitutional analysis. And yet, the administrative state is the target of a continuous, modestly fruitful dialogue about the constitutional requirements of due process and separation of powers. A grossly simplistic measure of the disparity can be found in a quick search of the Lexis law review database. A Lexis search of the vast administrative law literature yields nearly 80 law review articles and 39 state or federal cases published in the last 20 years that include the terms "due process" and "separation of powers" in close (15 word) proximity to the word "agency." A similar search for articles that use both terms in conjunction with discussion of "class actions" yields a mere four articles and no cases. If the administrative law is any indication, the complexity of the regulatory problems at stake is not the reason that courts have avoided more searching constitutional analysis of class litigation.

The cause of the disparity is a matter for conjecture, but one explanation is that class actions have benefited from their deeply technical, procedural aura. Put bluntly, many ambitious constitutional theorists may be bored to tears by class actions — products of an accretion of tedious procedural reform by gray flannel judicial committees and the daily grist of labor for unsung law firm associates and obscure trial judges. By contrast, administrative agencies, the creation of a tectonic shift in the American political landscape, the subject of endless political debate, and a necessary stop on the ladder of many an elite lawyer's career track, excite. Put sim-

ply, class actions' relative lack of prestige has saved them from the sustained, nuanced constitutional scrutiny that they, like agencies, deserve.

TWILIGHT OF THE IDOLS?

The persistence of the above three myths underscores the importance of Supreme Court review of a case like *Dukes v. Wal-Mart*. Of course, *Dukes* does not raise, and (if it takes the case) the Court need not decide, the constitutional issues sketched above. *Dukes* presents a constitutional question on a smaller scale: Does the Supreme Court's punitive damage precedents permit class-wide punitive damages when the case is litigated without a full-blown inquiry into fault toward and actual harm to individuals? This is a question that is confined to class actions for punitive damages, and so is conceptually narrower than the larger constitutional questions sketched above, which implicate all class actions.

Even so, the importance of the case should not be discounted. Legal change, as Oliver Wendell Holmes said, proceeds through "molar [and] molecular motions." As we have seen, *Dukes* pays court to the myths that have perpetuated constitutional underenforcement in the class context. Wal-Mart's challenge, in turn, runs against the cultural grain of class action law. A decision in favor of Wal-Mart, then, stands a chance of shaking the myths' hold on the legal imagination. Holding the certification order unconstitutional, for example, would further undermine the notion that the "remedial" nature of class certification orders largely immunizes such orders from constitutional challenge. A holding that the trial court's discretion to certify must comply with due process precedents in punitive damage cases cuts against generous assumptions about the special constitutional sweep of courts' discretion in the class context.

Challenging both myths, in turn, brings us closer to a healthier class action culture — one that treats larger due process and separation of powers challenges to the class device with the seriousness they deserve. **R**

Readings

- "Class Actions: Aggregation, Amplification, and Distortion," by Richard Epstein. *University of Chicago Law Review*, Vol. 70 (2003).
- "Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals," by Martin Redish. *University of Chicago Legal Forum*, 2003.
- "Cracks in the 'New Property': Adjudicative Due Process in the Administrative State," by William van Alstyne. *Cornell Law Review*, Vol. 62 (1977).
- "Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers," by Myriam Gilles and Gary B. Friedman. *University of Pennsylvania Law Review*, Vol. 155 (2006).
- "Law and Administration after *Chevron*," by Cass R. Sunstein. *Columbia Law Review*, Vol. 90 (1990).
- "Nondelegation Canons," by Cass R. Sunstein. *University of Chicago Law Review*, Vol. 67 (2000).
- "The Preexistence Principle and the Structure of the Class Action," by Richard Nagareda. *Columbia Law Review*, Vol. 103 (2003).