

COMMON SENSE ABOUT COMMON CLAIMS

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I. A FORTY-YEAR-OLD NIGHTMARE COMES TO LIFE

Class actions are so accepted a part of federal litigation that people forget what a departure they are from “our deep-rooted historic tradition that everyone should have his own day in court.”¹ Under Rule 23 of the Federal Rules of Civil Procedure,² which authorizes those departures, “all members of the class, whether of a plaintiff or a defendant class, are bound by the judgment entered in the action unless . . . they make a timely election for exclusion.”³ Not all class members have the right to elect exclusion, however; in many cases, courts are not required to give class members notice that they are in a class, let alone an opportunity to do anything about it.⁴ Under the Rule, it is therefore possible for

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1. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)); see *Amchem Prods. v. Windsor*, 521 U.S. 591, 617-18 (1997) (“[In recent decades] class action practice has become ever more ‘adventuresome’ . . .”).

2. FED. R. CIV. P. 23. On December 1, 2007, Rule 23 was amended, according to the revisor's notes, “to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.” In this article, all quotations from the Rule are as it stood prior to that revision.

3. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 (1996) (quoting 2 HERBERT H. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 2755 (1977)).

4. *E.g.*, *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999) (“If the action proceeds under Rule 23(b)(3), then each member of the class must receive notice and an opportunity to opt out and litigate (or not) on his own behalf. If it proceeds under Rule 23(b)(2), by contrast, then no notice will be given, and no one will be allowed to opt out. Because of this difference, Rule 23(b)(2) gives the class representatives and their lawyers a much freer hand than does Rule

someone to first learn of his membership when he sues a defendant, only to learn by way of a plea of *res judicata* that somebody has already presented his claim for him, and lost it.⁵

When a judge “certifies” a class—when he permits a plaintiff to represent other people—he certifies that he has satisfied himself that the plaintiff can so fully present the claims of other people that there is no need to give them a chance to speak for themselves. This would not be difficult if certification could be reserved for cases the class members will win, as people don’t usually mind favorable judgments. But Rule 23 requires that certification decisions be made early in a federal case, before the outcome is predictable.⁶

In these circumstances, one might expect judges to approach certification warily, and to press aspiring representatives to explain why, exactly, they think it will be fair to bind class members if things don’t go as well as they hope. Yet, I have never heard a judge ask questions like that before certifying a class, and I have had no luck compelling those seeking class certification to answer interrogatories propounding that question. There are many considerations to weigh before certifying a class,⁷ but ensuring there is nothing unfair about locking an entire class of people out of the courtroom surely heads the list.⁸

23(b)(3).”)

5. Rule 23 authorizes defendant classes, as well as plaintiff classes, but the great majority of class actions involve plaintiff classes suing defendants, and I shall assume that to be the case throughout this article. FED. R. CIV. P. 23(a).

6. FED. R. CIV. P. 23(c)(1) (“When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.”); *cf.* *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 163 (1982) (Burger, C.J., concurring) (“[A] judge’s decision to certify a class is not normally to be evaluated by hindsight . . . since the judge cannot know what the evidence will show . . .”).

7. *E.g.*, *Amchem Prods. v. Windsor*, 521 U.S. 591, 618 (1997) (“[Class actions satisfy] concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue.”); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 (1982) (“[T]he efficiency and economy of litigation . . . is a principal purpose of the procedure.”) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)); *Deposit Guar. Nat’l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”).

8. *Cf.* *H.L. v. Matheson*, 450 U.S. 398, 432 n.9 (1981) (Marshall, J., dissenting) (“The binding effect of the class action’s disposition poses serious due process concerns where the interests of class members are not properly represented.”) (citing 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1785 (3d ed. 2005)).

Yet, many judges are biased in *favor* of certification,⁹ and others require little more to go on than allegations suggesting widespread wrongdoing.¹⁰ Forty years ago, Chief Judge Godbold of the Fifth Circuit warned:

Over-technical limitation of classes by the district courts will drain the life out of Title VII [a statute prohibiting employment discrimination], as will unduly narrow scope of relief once discriminatory acts are found. But without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend. And, what may be most significant, an over-broad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. . . . It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?¹¹

9. *See, e.g.*, *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 225 (2d Cir. 2006) ("When reviewing a denial of class certification, we accord the district court noticeably less deference than when we review a grant of certification." (citing *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003))); *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 424 (4th Cir. 2003) ("[F]ederal courts should 'give Rule 23 a liberal rather than a restrictive construction'" (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989))); *Liles v. Am. Corrective Counseling Servs.*, 231 F.R.D. 565, 572-73 (S.D. Iowa 2005) ("It is well-settled that: 'When doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed as a class action.'" (quoting *Williams v. Empire Funding Corp.*, 227 F.R.D. 362, 372 (E.D. Pa. 2005))); *Robinson v. Gillespie*, 219 F.R.D. 179, 183 (D. Kan. 2003) ("When in doubt, a court should err in favor of the maintenance of a class action." (citing *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968))); *In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 282 (S.D.N.Y. 2002) ("Courts have recognized that class actions are generally appropriate when plaintiffs seek redress for violations of the securities laws." (citing *In re Blech Sec. Litig.*, 187 F.R.D. 97, 102 (S.D.N.Y. 1999)).

10. *See, e.g.*, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (common claim established by "evidence that tends to establish that being Black has a statistically significant effect on an employee's likelihood of being promoted"); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) ("Allegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a)." (citing *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 617 (5th Cir. 1983))).

11. *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring.).

Judge Godbold's vision became a reality in 2004, when a district court judge certified six women as the representatives of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices."¹² Seven women brought the case, but neither the district court nor the court of appeals thought it necessary to say which of the seven were the representatives.¹³ Perhaps they thought the women were fungible, for neither court thought their individual claims or circumstances worth discussing, or even describing, except in passing.¹⁴

In any event, the district court authorized six of the seven plaintiffs to speak for what the court of appeals would later say was a class of "approximately 1.5 million employees, both salaried and hourly, with a range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country,"¹⁵ and to claim on their behalf that "women employed in Wal-Mart stores: (1) are paid less than men in comparable positions . . . and (2) receive fewer—and wait longer for—promotions to in-store management positions than men."¹⁶ Membership in the class is mandatory, and nobody is entitled to exclude herself except in one peculiar respect: the certification order permits class members to "opt-out of claims for punitive damages."¹⁷ Everything else, including the all-important issue of Wal-Mart's liability for *any* damages, will be litigated by the representatives—everything, that is, except the right to compensatory damages, which the representatives told the court they are not seeking on behalf of the class.¹⁸ The court did not explain why it authorized the representatives to waive other people's

12. *Dukes v. Wal-Mart Stores, Inc. (Dukes I)*, 222 F.R.D. 137, 188 (D. Cal. 2004), *aff'd* 509 F.3d 1168 (9th Cir. 2007).

13. *See Dukes v. Wal-Mart, Inc. (Dukes II)*, 509 F.3d 1168, 1195 n.12 (Kleinfeld, J. dissenting) ("The plaintiffs' names add up to seven: Dukes, Surgeson, Arana, Williamson, Gunter, Kwapnoski, Cleo. The district court and the majority say there are six named plaintiffs. One not concerned with individual justice may not care about one woman more or less, but in our system we must and do.").

14. *Dukes I*, 222 F.R.D. at 166 ("[Plaintiffs' evidence] raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner.").

15. *Dukes II*, 509 F.3d at 1176-77.

16. *Id.* at 1174. *But see id.* at 1195 n.12 (Kleinfeld, J., dissenting) (making the somewhat unsettling observation that seven plaintiffs brought the action rather than the six identified by the district court and the majority).

17. *Id.* at 1188.

18. *Id.* at 1174.

claims for compensatory damages.

The district court did not want its certification order “construed in any manner as a ruling on the merits or the probable outcome of the case,” and was thus open to the possibility that Wal-Mart might prevail.¹⁹ Yet, it did not explore the consequences of a judgment adverse to the class. Nor did it explain why it was authorizing the representatives to waive the right of 1.5 million women to seek compensatory damages, without giving them any say in the matter. The size of the class gave it pause, but, it noted that Title VII,²⁰ the anti-discrimination statute invoked by the representatives, “contains no special exception for large employers.”²¹ Which is true: Title VII says nothing about class actions at all.

A divided panel of the Ninth Circuit affirmed, looking to Rule 23 rather than Title VII. The majority was uneasy about including women in the class who had left Wal-Mart employment before the action was filed in June 2001, and it wanted the district court to give that part of its order more thought.²² Otherwise, it seemed to have no problems with the scope of the class. It did consider and reject Wal-Mart’s argument that the company’s due process rights were threatened by the proposed proceedings,²³ but did not consider the possibility that the members’ rights to due process might be threatened too. Perhaps that was because there was nobody to speak for the class members. Wal-Mart had no incentive to challenge the decision to free it of liability for compensatory damages or to emphasize the unfairness of allowing it res judicata relief if dissatisfied members sue later. In the end, the court said: “We hold that the district court acted within its broad discretion in concluding that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly.”²⁴ Which is odd, for the district court said nothing of the sort.

As we shall see in Part II, however, the appellate court did not seem confident that “innumerable individual[s]” will still be in the class when the case is over.²⁵ And it must have known that the Supreme Court has

19. *Dukes I*, 222 F.R.D. at 142.

20. 42 U.S.C. § 2000e-2 (2000).

21. *Dukes I*, 222 F.R.D. at 142.

22. *Dukes II*, 509 F.3d at 1189.

23. *Id.* at 1191.

24. *Id.* at 1193.

25. *Id.*

refused to bind the individual absent members of a class that lost a pattern or practice employment discrimination action, so long as they did not present the same pattern or practice theory that had already failed.

In Part III, we will see that the majority managed to square the district court's unwieldy class with the requirements of Rule 23 by finding that the plaintiffs have evidence of a pattern or practice of discrimination. That evidence will then be evaluated at trial, along with the defendant's evidence, and a decision can then be made as to whether the evidence actually proves the plaintiff's case. It is therefore not clear what the purpose of the certification order is, as the findings that validate it will be made later.

And in Part IV, we will see that many courts, probably including both *Wal-Mart* courts, use class actions as a way of authorizing class counsel to enforce statutes the courts deem important.²⁶ Yet, the Federal Rules of Civil Procedure cannot expand a plaintiff's standing to challenge acts and practices. A plaintiff who does not represent a class has standing to ask the court to enjoin any practice or act that aggrieves him, and cannot broaden that standing by challenging acts or practices that do not aggrieve him, even if he represents people they do aggrieve. Class treatment, then, adds nothing to the ability of a litigant to enforce a statute.²⁷

Although the focus here is on the *Wal-Mart* decision, the Ninth Circuit did nothing that other courts don't do; it just did it more ambitiously than anyone else. This, then, is an article about wide-spread misuse of Rule 23 in modern class actions, and the *Wal-Mart* decision is a spectacular example of what has gone wrong.

II. RESURRECTING THE SPURIOUS CLASS ACTION

Like any federal action, a class action begins with a complaint giving the defendant notice of the claims against it and people suing it:²⁸ "The policies of ensuring essential fairness to defendants . . . are satisfied," the Supreme Court has said

when . . . a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number

26. See *infra* note 133.

27. See *infra* notes 144-47.

28. FED. R. CIV. P. 8, 10.

and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.²⁹

Because plaintiffs who file such a complaint assert the right to speak for people who have not asked them to do so, Rule 23 requires that the district court review the assertion at the outset of the litigation³⁰ and “define the class and class claims,” for itself.³¹ Then, having identified the absent parties and their claims, and certifying that the plaintiffs can speak for those persons with respect to those claims, the court may proceed to adjudicate the case in the usual manner.

However, many courts make use of what are, in effect, “provisional” certification orders; orders allowing litigation to proceed without finally committing the class attorneys to represent any particular group of people. In *Wal-Mart*, the Ninth Circuit seemed to have had something like that in mind; for it gave the district court’s certification order “very limited” review and went on to say:

Rule 23 provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court. . . . If later evidence disproves Plaintiffs’ contentions that common issues predominate, the district court can at that stage modify or decertify the class.³²

The Court also discounted concerns about managing the behemoth it had just approved for the same reason: the lower court’s “discretion to modify or decertify the class should it become unmanageable.”³³ It is, therefore, not yet clear which 1.5 million class members are entitled to rely on the class attorneys to represent them, who Wal-Mart will litigate against, or who will be bound by the judgment when the case is over. Those decisions will apparently be made as the evidence comes in.

29. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55 (1974).

30. FED. R. CIV. P. 23(c)(1)(A).

31. FED. R. CIV. P. 23(c)(1)(B); *see* Fed. R. Civ. P. 23(c)(1) advisory committee’s note (1966) (“In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained.”).

32. *Dukes II*, 509 F.3d 1168, 1176 (9th Cir. 2007).

33. *Id.* at 1193.

This approach to class certification contrasts sharply with the Supreme Court's 1975 approach in *Sosna v. Iowa*,³⁴ when a class representative challenged an Iowa residency statute as unconstitutional. While the case was before the Court, the representative's claim became moot, and Iowa moved to dismiss the case.³⁵ Although the Court agreed that the representative had lost her own Article III standing to challenge the residency requirement, it allowed the class members to proceed without her, reasoning that the district court's certification order meant it had been "contemplated that the [judgment would] bind all persons who have been found at the time of certification to be members of the class," giving the members a "legal status separate from the [representative's] interest"³⁶ The Court then approved the propriety of the certification order and affirmed the judgment against the class.³⁷

Sosna does not say what it means to "contemplate" that class members will be bound by a judgment, but its holding that they had Article III standing to proceed on their own is instructive.³⁸ Litigants cannot have standing unless it is "likely, as opposed to merely 'speculative,' that [their injuries] will be redressed by a favorable decision,"³⁹ and "contemplating" that class members will be bound by a judgment must therefore mean that the court has satisfied itself that their exclusion from the class is unlikely.⁴⁰ "After certification," Justice Powell said in *United States Parole Commission v. Geraghty*,⁴¹ "the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an

34. 419 U.S. 393 (1975).

35. *Id.* at 399.

36. *Id.* at 399 & n.8.

37. *Id.* at 410.

38. *See id.* at 402.

There must not only be a named plaintiff who has . . . a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court . . . but there must be a live controversy at the time this Court reviews the case The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

Id.

39. *United States v. Hays*, 515 U.S. 737, 742-43 (1995) (citations omitted) (setting out elements of Article III standing); *see also* *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976) ("The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.").

40. *See Sosna*, 419 U.S. at 402.

41. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 415 n.8 (1980) (Powell, J., dissenting).

appointed fiduciary.”⁴² It follows that a certification order should not be approved on the theory that it can be modified if things don’t work out; the court must be satisfied that things *will* work out. A judge contemplating the possibility of changes in the class definition is in no position to contemplate that any particular member will be bound by the ultimate judgment.⁴³

Rule 23 provides that certification orders “may be altered or amended before final judgment,”⁴⁴ and courts that certify classes must be alert to the possibility that they erred and may need to make corrections.⁴⁵ Yet, the *Wal-Mart* majority did not seem to be talking about correcting errors, but about tailoring the class definition to the evidence as it develops. The power to alter or amend an order is not an invitation to enter orders that will have to be altered or amended, any more than the power to alter or amend a judgment is an invitation to enter a judgment that will have to be altered or amended.⁴⁶ Nor is it an invitation to defer deciding the question of whether the class members have standing to participate in the case. Standing, like all other jurisdictional questions, must be decided at the outset of any case

42. *Id.*

43. *Cf.* *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007) (“[T]he plain text of Rule 23 requires the court to ‘find,’ not merely assume, the facts favoring class certification.” (quoting *Unger v. Amedisys, Inc.*, 401 F.3d 316, 321 (5th Cir. 2005))); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006) (“[A] district court may not grant class certification without making a determination that all of the Rule 23 requirements are met.”); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (“[A]n order certifying a class usually is the district judge’s last word on the subject; there is no later test of the decision’s factual premises”). *But see, e.g.*, *Kuehner v. Heckler*, 778 F.2d 152, 163 (3d Cir. 1985) (“Initially framing the class in broad strokes and later filling in the details is a standard practice of courts faced with difficult class actions in which several relevant facts will not become known until discovery is well underway.”).

44. FED. R. CIV. P. 23(c)(1).

45. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (“[The court normally has] the opportunity . . . when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254 (11th Cir. 2003) (“[B]asic consideration of fairness requires that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representative[] at all stages of the litigation where absent members will be bound by the court’s judgment.” (alteration in original) (quoting *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1374 (11th Cir. 1984))); *In Re Integra Realty Res., Inc.*, 262 F.3d 1089, 1112 (10th Cir. 2001) (“Once the decision to certify a class has been made, the court remains under a continuing duty to monitor the adequacy of representation to ensure that class counsel provides zealous, competent representation through the proceedings and to address conflicts of interests if they develop.”); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. 1999) (“A district court has a duty to assure that a class once certified continues to be certifiable”).

46. *Cf.* FED. R. CIV. P. 59(a), 60(b) (authorizing courts to alter or amend final judgments).

brought in a federal court.⁴⁷

Even if the *Wal-Mart* majority did not contemplate that changes in the class definition would occur, it would be hard to believe that it meant its statement about barring “innumerable individual suits” to be taken literally. The *Wal-Mart* representatives hope to prove a “pattern-or-practice” claim of discrimination,⁴⁸ yet the Supreme Court held in *Cooper v. Federal Reserve Bank*⁴⁹ that an adverse judgment in a pattern or practice case does not bar individual actions by absent members. In *Cooper*, a bank objected to being sued for race discrimination in employment by individual members of a class that had just lost a case against it for a pattern or practice of race discrimination in employment.⁵⁰ The Supreme Court overruled the objection with the commonsense observation that “rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim.”⁵¹ The Court held that the class action judgment resolved only the class claims, as well as any individual claims that had actually surfaced during the class proceedings.⁵² But class members whose individual claims had not been considered were free to try their own luck at suing the bank, provided they based their right to relief on the animus of a supervisor, manager or, perhaps, on the policy of a department or other unit smaller than the bank.⁵³ It follows that *Wal-Mart* class members will be free to sue the store if their representatives lose, unless they appear individually in the district court proceedings. And, that is not likely to happen on a large scale; the district court made it clear that it has no intention of allowing

47. *E.g.*, *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.”).

48. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1190 n.16 (9th Cir. 2007).

49. 467 U.S. 867 (1984).

50. *See id.* at 878.

51. *Id.*

52. *Id.* at 873 n.7 (“Two [individual] claims were rejected by the District Court [during the class proceedings] and two by the Court of Appeals; all four of those determinations are now equally final.”). “That [class action] judgment (1) bars the class members from bringing another class action against the Bank alleging a pattern or practice of discrimination for the relevant time period and (2) precludes the class members in any other litigation with the Bank from relitigating the question whether the Bank engaged in a pattern and practice of discrimination against black employees during the relevant time period. The judgment is not, however, dispositive of . . . the individual claims . . .” *Id.* at 880.

53. *See id.*

innumerable members to participate in the class action.⁵⁴

Cooper seems to be a straightforward application of the due process rule that “the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation”⁵⁵ The representatives’ pattern-or-practice theory required proof of a bank-wide policy of discrimination, but did not require exploration of the possibility that class members were subjected to the bias of particular supervisors or departments.⁵⁶ The collapse of the one-size-fits-all theory therefore left members with individual claims that had not been fully aired, and they were free to see if lawyers devoted to their own interests could do better for them than the lawyers who represented the class.⁵⁷ The *Cooper* Court explained:

The crucial difference between an individual’s claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual’s claim is the reason for a particular employment decision, while “at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.”⁵⁸

Because the *Cooper* Court prefaced its holding with the observation that “a properly entertained class action is binding on class members in any subsequent litigation,” its refusal to bind class members suggests the class action against the bank was not “properly entertained”; that, in other words, the district court erred in certifying the class in the first place.⁵⁹ Yet, *Cooper* is generally read to mean something quite different; that pattern or practice actions may be brought on behalf of a class without jeopardizing the members’ right to seek relief for

54. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 174 (2004) (“Given that the scope of the instant class is company-wide, Defendant is no more entitled to 3,244 individual store-by-store trials than it would be entitled to try each class member’s individual claim in a case of smaller scope.”), *aff’d*, 509 F.3d 1168 (9th Cir. 2007).

55. *Sam Fox Publ’g Co. v. United States*, 366 U.S. 683, 691 (1961) (citing *Hansberry v. Lee*, 311 U.S. 32, 44 (1940)).

56. See *Cooper*, 467 U.S. at 875-76.

57. See *Richards v. Jefferson County*, 517 U.S. 793, 801 (1996) (“[A] prior proceeding, to have binding effect on absent parties, would at least have to be ‘so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.’” (citing *Hansberry*, 311 U.S. at 43)).

58. *Cooper*, 467 U.S. at 876 (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 n.46 (1977)).

59. *Id.* at 874.

themselves.⁶⁰ Pattern or practice actions, in this view, differ from individual actions in that they raise different claims, and the resolution of one claim is not the resolution of the other.⁶¹

That is an extremely unlikely reading of *Cooper*, for several reasons. For one thing, it would have the Supreme Court endorsing the notion that an individual denied a single promotion may seek relief for losing one promotion twice—first as a class member and then as an individual.⁶² For another, the Supreme Court’s employment discrimination jurisprudence militates against the idea that pattern-or-practice claims exist apart from individual claims.⁶³ The anti-discrimination statute invoked by the *Cooper* representatives “requires [a] focus on fairness to individuals rather than fairness to classes,”⁶⁴ and claims of intentional discrimination in employment—the Court calls them “disparate treatment” claims—turn on whether individual claimants were subjected to a discriminatory animus.⁶⁵ This is as true in individual actions⁶⁶ as in pattern-or-practice actions.⁶⁷

60. See, e.g., *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105-06 (10th Cir. 2001) (“If plaintiffs were simply attempting to collectively assert their individual claims of discrimination, the decision to decertify would appear to be entirely proper. The problem, however, is that plaintiffs were asserting a pattern-or-practice claim [T]he district court . . . failed to recognize the pattern-or-practice nature of the class claim.”); accord 4 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 81.11[1] (2d ed. 2003) (“Preserving the individual class member’s right to action on claims not involving common questions is thus consistent with the purpose of Rule 23.”); 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4455 (2d ed. 2002) (“The purpose of the [*Cooper*] class action was to permit disposition of the issues common to the class [and not individual claims].”).

61. *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004) (“[T]he pattern-or-practice method of proving discrimination is not available to individual plaintiffs [A] pattern-or-practice claim is focused on establishing a policy of discrimination; because it does not address individual hiring decisions, it is inappropriate as a vehicle for proving discrimination in an individual case.” (citing *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), vacated on other grounds, 527 U.S. 1031 (1999)); *Diaz v. Ashcroft*, 301 F. Supp. 2d 112, 116 (D.P.R. 2004)).

62. See *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003); *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 591 (1997); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 158-59 (1982).

63. See *Cooper*, 467 U.S. at 878.

64. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

65. *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, slip op. at 11 (U.S. May 29, 2007) (“A disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent.”).

66. See *Furnco Constr. Corp., v. Waters*, 438 U.S. 567, 577 (1978) (“The central focus of the inquiry in a case such as this [individual case] is always whether the employer is treating ‘some people less favorably than others because of their race, color, religion, sex, or national origin.’” (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977))).

67. *Teamsters*, 431 U.S. at 335 n.15 (“Proof of discriminatory motive is critical [in a disparate treatment case], although it can in some situations be inferred from the mere fact of differences in

Ash v. Tyson Foods, Inc.,⁶⁸ for example, was an individual action brought by two blacks who proved that the manager who denied them promotions used derogatory terms to refer to blacks, thereby establishing the manager's racial animus and creating a presumption that his decisions reflected that animus.⁶⁹ The case was not over—the manager could still rebut the presumption by showing he would have rejected one or both had he evaluated them fairly⁷⁰—but proof of his animus established a critical element of both plaintiffs' claims.⁷¹ Similarly, in *Teamsters v. United States*,⁷² the seminal pattern-or-practice case, the government proved that a trucking company had a policy of hiring only whites for better paying jobs, thereby establishing “racial discrimination was the company's standard operating procedure” and creating a presumption that the company's decisions reflected that animus—the same presumption established in *Ash*.⁷³ Again, the case was not over—the company could still rebut the presumption that it would have rejected particular blacks had it considered them fairly—but each class member had proven a critical element of his case.⁷⁴ Thus, proof of the manager's animus in *Ash* established a critical element of the plaintiffs' claims,⁷⁵ just as proof of the discriminatory policy in *Teamsters* did for many more people.⁷⁶ A pattern-or-practice claim differs from an individual claim in the scope of the alleged animus; if a plaintiff claims it affected enough personnel decisions, the case can move from one category to the other.

Finally, the conventional reading of *Cooper* would have the

treatment.”).

68. 546 U.S. 454 (2006).

69. *Id.* at 456.

70. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003) (“[A]n employer [may] ‘avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play . . . a role [in its decision].’” (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989))).

71. *Teamsters*, 431 U.S. at 335 n.15 (“Proof of discriminatory motive is critical [in a disparate treatment case], although it can in some situations be inferred from the mere fact of differences in treatment.”).

72. 431 U.S. 324 (1977).

73. See *Ash*, 546 U.S. at 456-57.

74. See *Teamsters*, 431 U.S. at 362 (“The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. . . . [T]he burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.”).

75. See *Ash*, 546 U.S. at 455-56.

76. See *Teamsters*, 431 U.S. at 362.

Supreme Court sanctioning a procedure in which class members wait to see how their representatives do before deciding whether to sue, themselves. That has not been permitted since the old “spurious” class action was abolished forty years ago, as the Court made clear in *American Pipe & Construction Co. v. Utah*.⁷⁷

Under Rule 23 as it stood prior to its extensive amendment in 1966, a so-called “spurious” class action could be maintained when “the character of the right sought to be enforced for or against the class is . . . several, and there is a common question of law or fact affecting the several rights and a common relief is sought.” The Rule, however, contained no mechanism for determining at any point in advance of final judgment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment. Rather, “[w]hen a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted.”⁷⁸

Terming this result an “abuse,” the Court held Rule 23 was “designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.”⁷⁹ Now, “a determination whether an action shall be maintained as a class action is made . . . ‘[a]s soon as practicable after the commencement of an action brought as a class action’”⁸⁰ Class members entitled to opt-out of the class must do so immediately or “abide by the final judgment, whether favorable or adverse.”⁸¹ Yet the *Cooper* members did not have to abide by the final judgment, making it difficult to see how the *Cooper* class could have been a proper Rule 23 class.⁸²

77. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

78. *Id.* at 545-46 (alteration in original) (citations omitted) (quoting FED. R. CIV. P. 23 (1937) (amended 2003)); 3B James WM. Moore et al., *Moore’s Federal Practice* ¶ 23.10 (2d ed. 1996).

79. *Id.* at 547.

80. *Id.* (second and third alteration in original) (quoting Fed. R. Civ. P. 23(c)(1) (1937) (amended 2003)). The rule now provides that the determination must be made “at an early practicable time,” instead of “[a]s soon as practicable” Fed. R. Civ. P. 23(c)(1).

81. *Am. Pipe*, 414 U.S. at 549.

82. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (“Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound”); *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 881 (1984).

American Pipe was followed by *Eisen v. Carlisle & Jacquelin*,⁸³ in which a district court certified a class, and then, after a preliminary hearing, convinced that the class was likely to win at trial, ordered the defendant to pay most of the cost of notifying class members of their right to opt-out of the class.⁸⁴ The Supreme Court disapproved of the district court's decision to assess the merits of the case while members were still free to opt-out.⁸⁵

We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "as soon as practicable after the commencement of [the] action."⁸⁶

Yet, the *Cooper* representatives secured the benefits of a class action and obtained a determination on the merits of the claims they advanced on behalf of the class, without binding the class members, making it difficult to see how the *Cooper* class could have been a proper Rule 23 class.⁸⁷

In *General Telephone Co. of the Southwest v. Falcon*,⁸⁸ decided two terms before *Cooper*, the Supreme Court reversed a certification order because there was no "specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class [the putative representative] sought to represent."⁸⁹ As a result:

The trial of this class action followed a predictable course. Instead of raising common questions of law or fact, respondent's evidentiary

83. 417 U.S. 156 (1974).

84. *Id.* at 168.

85. *Id.* at 177.

86. *Id.* at 177-78 (alteration in original) (quoting FED. R. CIV. P. 23(c)(1)).

87. *See Cooper*, 467 U.S. 867, 880 (1984).

88. 457 U.S. 147 (1982).

89. *Id.* at 158, 161.

approaches to the individual and class claims were entirely different. He attempted to sustain his individual claim by proving intentional discrimination. He tried to prove the class claims through statistical evidence of disparate impact. . . . As the District Court's bifurcated findings on liability demonstrate, the individual and class claims might as well have been tried separately. It is clear that the maintenance of respondent's action as a class action did not advance "the efficiency and economy of litigation which is a principal purpose of the procedure."⁹⁰

If individual and class claims are to be tried together, using the same evidentiary approach, can there be a meaningful difference between an individual claim and a class claim? And, if the representative for a class of people loses his case and leaves the court having to re-try the individual cases in addition to the failed class action, what "efficiency and economy" is gained? When the *Cooper* Court said: "a judgment in a properly entertained class action is binding on class members in any subsequent litigation," it meant just that.⁹¹

In sum, Wal-Mart may lose to every class member, but it can only win against those whose individual claims are submitted to the district court.⁹² The court has simply approved an old-fashioned spurious class action, on a truly grand scale.

III. BUT CAN THEY LOSE IN COMMON?

How can the *Wal-Mart* court have so badly missed the mark? Its review of the lower court's certification order may have been "very limited," but it was designed, the court said, to ensure that the lower court "correctly selected and applied Rule 23's criteria."⁹³ Yet the court affirmed the improbable conclusion that six people can represent 1.5 million people, any one of whom may want to prove that a particular supervisor in the Wal-Mart hierarchy held her sex against her.⁹⁴ It does not seem to have asked itself the question posed by the dissent: If the representatives fail to prove Wal-Mart discriminated against everybody, will it be reasonable to infer it discriminated against nobody?⁹⁵ Or, if it

90. *Id.* at 159 (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)).

91. *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 874 (1984).

92. *See Dukes II*, 509 F.3d 1168, 1176 (9th Cir. 2007).

93. *Dukes II*, 509 F.3d at 1176.

94. *See id.* at 1183-85.

95. *Id.* 509 F.3d at 1199 (Kleinfeld, J., dissenting) ("All the members of the class will be bound by the judgment or settlement because, under Rule 23, the judgment 'shall include' all class

did ask itself that question, it did not care that the only possible answer would be “no.”

Subsection (a) of Rule 23 provides certification is appropriate if, among other things:

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.⁹⁶

There is an obvious tension between the first and last requirements. If litigants are too numerous to make joinder practicable, they are probably too numerous to be adequately represented as a group; somebody’s interests are likely to get lost in the crowd.

The second and third requirements of Rule 23(a)—commonality and typicality—alleviate that tension between the numerosity and adequacy requirements, the Supreme Court has said, by “effectively ‘limit[ing] the class claims to those fairly encompassed by the named plaintiff’s claims.’”⁹⁷ They serve, the Court said

as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.⁹⁸

The only interrelationship of claims likely to assure the members adequate representation is one that requires a class representative to prove essential elements of everybody’s claims if he is to prove his own.⁹⁹ Claims arising out of an airline crash would be interrelated in that way, as the airline cannot be negligent to one passenger but not

members, ‘whether or not favorable to the class.’ What if the plaintiffs’ class loses?” (quoting FED. R. CIV. P. 23(c)(3)).

96. FED. R. CIV. P. 23(a); *Dukes II*, 509 F.3d at 1176.

97. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *Gen. Tel. Co. of the Sw. v. EEOC*, 446 U.S. 318, 330 (1980)).

98. *Id.* at 157 n.13.

99. *See id.* at 157-58.

another, and a passenger chosen to represent the other passengers must prove their claims to prove his. He would not so much be a representative, as a litigant with a representative claim. If he presents his claim competently, the court may reasonably tell the airline and other passengers that one adjudication of the negligence issue is enough and dispose of everybody's claim in the way it disposes of his.¹⁰⁰ The claims need not be identical in *all* respects—damages suffered by passengers in the crash may vary, for example—but certification should be limited to issues of interest to class members that the representative must prove if he is to recover.¹⁰¹

The key to commonality and typicality, then, is *self-interest*. If a representative cannot win relief for himself without representing the members of the putative class, a judge has a basis for certifying that he will adequately represent those other members throughout the case.¹⁰² When the case is over, a judge asked to bar disappointed members from suing again will at least know the representative had an incentive to avoid the disappointment.¹⁰³

Class action decisions frequently refer to the class representative's *individual* claim, as distinct from the representative's *class* claim.¹⁰⁴ But

100. Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (“Collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.” (footnote omitted)).

101. Cf. FED. R. CIV. P. 23(c)(4)(A) (“[A]n action may be brought or maintained as a class action with respect to particular issues . . .”).

102. See, e.g., *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006) (“The representative party’s interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members. For that essential reason, plaintiff’s claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff’s proof of his own individual claim.”); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 303 (3d Cir. 2005) (“Because the claims of all class members here depend upon the existence of [a particular] scheme, ‘their interests are sufficiently aligned [such] that the class representatives can be expected to adequately pursue the interests of the absentee class members.’” (alteration in original) (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 312 (3d Cir. 1998))); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182-83 (3d Cir. 2001) (“Typicality ensures the interests of the class and the class representatives are aligned ‘so that the latter will work to benefit the entire class through the pursuit of their own goals.’” (quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 (3d Cir. 1998))).

103. Cf. *Integra Realty Res., Inc. v. Fid. Capital Appreciation Fund*, 262 F.3d 1089, 1112 (10th Cir. 2001) (“Fidelity’s purported conflicts did not render it inadequate to represent the [defendant] class Although we recognize that Fidelity’s potential liability far exceeded that of any other class member, its interests were aligned with those of the other class members in that all concerned wished to limit their liability to the lowest possible amount.”).

104. E.g., *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1296 (5th Cir. 1994) (upholding finding that class representative failed to prove class claim or individual claims); *Pegues*

if a representative can prevail by proving an individual claim, how can a court confidently certify at the outset that he will be focusing on the class claim at the finish, months or years later? In *Wal-Mart*, for example, the representatives can establish a presumptive right to relief for themselves by proving the nationwide policy of discrimination they alleged, by proving a regional, store-wide, or departmental, policy of discrimination, or by proving their supervisors were biased.¹⁰⁵ Who can certify that they won't, at some point in the proceedings, consciously or unconsciously divert resources from the more ambitious class claim to a more modest showing that will serve them equally well?¹⁰⁶ For that matter, who can certify that they won't use their ability to abandon some or all of the class members as a bargaining chip in settlement talks?¹⁰⁷

v. Miss. State Emp. Serv., 899 F.2d 1449, 1451 (5th Cir. 1990) ("After . . . trial . . . the trial court dismissed the individual and class claims on the merits."); *Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 60-61 (D.C. Cir. 1982) ("The district court . . . ruled against Valentino on both her individual and class claims."); *Johnson v. Garrett*, No. 73-702-Civ-J-12, 1991 U.S. Dist. LEXIS 8185, at *6-7 (M.D. Fla. Mar. 6, 1991) ("At Stage One of the proceedings, the Court shall determine (1) the individual claims of the named plaintiffs . . . and (2) the pattern and practice claims of the class."); *Ottaviani v. State Univ.*, 679 F. Supp. 288, 297 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 365 (2d Cir. 1989) ("Plaintiff Roberta Ottaviani is the class representative. . . . Each individual plaintiff brings separate claims against [the defendant] . . ."); *see also Wagner v. Taylor*, 836 F.2d 578, 593 (D.C. Cir. 1987) ("Employees are unlikely to undertake a Title VII class action unless they feel that they themselves have encountered discriminatory treatment. When it comes to whether the proposed class meets the commonality requirement of Rule 23(a), the mere fact that the undertaking involves evidence of both individual and class discrimination is not determinative one way or the other.").

105. *See Dukes II*, 509 F.3d 1168, 1178, 1184 (2007) (citing *Dukes I*, 222 F.R.D. 137, 145 (N.D. Cal. 2004)).

106. *Cf.*, MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(B) (2007) ("A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client . . .").

107. *Dukes II*, 509 F.3d at 1199 (Kleinfeld, J., dissenting) ("[Class action] lawyers have a powerful financial incentive to settle the case on terms favorable to themselves, but not necessarily favorable to their unknown clients with varying individual circumstances that are unknown to their purported lawyers."); *see also Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 32 (2d Cir. 2005) ("Finding that plaintiffs were abusing this private cause of action by bringing meritless class actions-so-called 'strike suits' in the hope of coercing large settlements, Congress enacted the PSLRA in 1995 to provide more stringent and uniform standards for securities fraud class actions and other suits that alleged fraud in the securities markets." (citing *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001))); *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) ("Once one understands that the issues involved . . . are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement."); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) ("[C]lass actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth.").

There is no discussion in the *Wal-Mart* majority opinion of the representatives' claims or individual circumstances, just a passing reference to the fact that one holds a salaried management position and the others hold hourly positions.¹⁰⁸ That is not much to go on when trying to determine if anyone's claims are "so interrelated [with theirs] that [her] interests . . . will be fairly and adequately protected in [her] absence,"¹⁰⁹ and the court did not try. Instead, it accepted the lower court's determination that the representatives' evidence of a "significant proof" of a corporate policy of discrimination¹¹⁰ established commonality, for it thought that evidence could prove that:

[E]ven though individual employees in different stores with different managers may have received different levels of pay and were denied promotion or promoted at different rates, because the discrimination they *allegedly* suffered occurred through an *alleged* common practice—*e.g.*, excessively subjective decision-making in a corporate culture of uniformity and gender stereotyping—their claims *may* be sufficiently typical to satisfy Rule 23(a)(3).¹¹¹

Had the court been able to affirm a *finding* that a corporate policy of discrimination existed, it would be easy to see why it thought the class representatives had claims common to, and typical of, the class members, for people challenging the same policy for the same reason have a common claim.¹¹² But there was *no* such finding to affirm; the lower court explicitly stated that it did not want its certification order "construed . . . as a ruling on the merits or the probable outcome of the case."¹¹³ In plain terms, then, it deferred deciding whether a corporate policy of discrimination actually exists until trial, when "both parties

108. *Dukes II*, 509 F.3d at 1184-85 ("There is no dispute that the class representatives are 'typical' of the hourly class members, because almost all of the class representatives hold hourly positions. Instead, Wal-Mart contends that the class representatives are not typical of all female in-store managers because only one of six class representative holds a salaried management position, and she holds a somewhat low-level position. However, because all female employees faced the same alleged discrimination, the lack of a class representative for each management category does not undermine Plaintiffs' certification goal." (citing *Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994))).

109. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.18 (1982).

110. *Dukes II*, 509 F.3d at 1178.

111. *Id.* at 1184 (emphasis added).

112. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 331-33 (1977) (finding that class representative establishes minimum height and weight requirement for prison guards discriminates on the basis of sex).

113. *Dukes I*, 222 F.R.D. 137, 142 (N.D. Cal. 2004), *aff'd*, 509 F.3d 1168 (9th Cir. 2007).

will present evidence on the issue of whether any disparities between male and female employees with respect to pay and promotion are the result of a pattern or practice of intentional gender discrimination or legitimate factors.”¹¹⁴ The court of appeals not only approved the lower court’s refusal to find the policy establishing commonality and typicality, but added a disclaimer, of its own, saying its “findings [also] relate only to class action procedural questions; we neither analyze nor reach the merits of Plaintiffs’ allegations of gender discrimination.”¹¹⁵

Thus, Wal-Mart may yet defeat the claims of commonality and typicality at trial, but it will deprive itself of the benefits of a class action if it does. Perhaps that is what the court of appeals had in mind when it said that if “later evidence disproves Plaintiffs’ contentions that common issues predominate, the district court can at that stage modify or decertify the class.”¹¹⁶ Nothing has yet been decided, then, except that the representatives might be able to provide evidentiary support for the district court’s certification order, *nunc pro tunc*.¹¹⁷

The *Wal-Mart* approach is hardly unique; courts often certify cases because they think representatives might ultimately prevail.¹¹⁸ But a certification hearing is not a summary judgment proceeding, at which a court assures itself there is an issue for a fact finder to resolve at trial.¹¹⁹

114. *Id.* at 187.

115. *Dukes II*, 509 F.3d at 1193 (“The [district] court noted that Wal-Mart raised a number of challenges to Plaintiffs’ evidence of commonality but concluded that, in fact, most of these objections related not to the Rule 23(a) requirement of commonality but to the ultimate merits of the case and ‘thus should properly be addressed by a jury considering the merits’ rather than a judge considering class certification. . . . We agree.”).

116. *Id.* at 1176.

117. *See id.*

118. *E.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 280 F.3d 124, 135 (2d Cir. 2001) (“The question for the district court at the class certification stage is whether plaintiffs’ expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive.”); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (“Allegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a).”); *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (“The commonality requirement was satisfied because the following issue pervades all the class members’ claims—has Union National Bank discriminated against black employees by denying them promotions and giving them lesser promotions than those given whites similarly situated?”); *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531-32 (M.D. Fla. 1996) (certification appropriate because “Plaintiffs have demonstrated at least a ‘colorable method’ of proving [common injury] at trial.”).

119. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”)

It is a proceeding at which the court determines that the requirements of Rule 23(a) are, or are not, satisfied.¹²⁰ If a court cannot make that determination *until* trial, it cannot, consistent with Rule 23, certify the class *before* trial.¹²¹

The short shrift the *Wal-Mart* majority gave the adequacy of representation requirement—which goes to “the competency of class counsel and conflicts of interest”¹²²—reinforces the impression that the court was deferring serious consideration of the certification issue to a later date. “Wal-Mart argued,” the court said:

that Plaintiffs cannot satisfy [the adequacy of representation] factor because of a conflict of interest between female in-store managers who are both plaintiff class members and decision-making agents of Wal-Mart. . . . [T]he district court recognized that courts need not deny certification of an employment class simply because the class includes both supervisory and non-supervisory employees. We agree. Finally, because Wal-Mart does not challenge the district court’s finding that Plaintiffs’ class representatives and counsel are adequate, we need not analyze this factor.¹²³

And with no more than that, the court disposed of the adequacy of representation inquiry.¹²⁴

120. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (“The success of the 1966 amendments (which are still in force) depends on making a definitive class certification decision before deciding the case on the merits, and on judicial willingness to certify classes that have weak claims as well as strong ones. A court may not say something like ‘let’s resolve the merits first and worry about the class later’ . . . or ‘I’m not going to certify a class unless I think that the plaintiffs will prevail.’”).

121. See FED. R. CIV. P. 23(c)(1) advisory committee’s note on 2003 amendments (“A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”).

122. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

123. *Dukes II*, 509 F.3d 1168, 1185 (9th Cir. 2007) (citations omitted).

124. Compare *Dukes II*, 509 F.3d at 1185 (“Finally, because Wal-Mart does not challenge the district court’s finding that Plaintiff’s class representatives and counsel are adequate, we need not analyze this factor.”), with *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 484 (5th Cir. 2001) (“Precedent and due process concerns require that courts protect potential class members by ensuring that the named plaintiffs demonstrate their adequacy.”), and *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (“[T]he court plays the important role of protector of the absentees’ interests, in a sort of fiduciary capacity, by approving appropriate representative plaintiffs and class counsel.”), and *McNeil v. Guthrie*, 945 F.2d 1163, 1167 (10th Cir. 1991) (“[T]he district court must constantly scrutinize class counsel to determine if counsel is adequately protecting the interests of the class.”), and *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (“[T]he fear that class actions will prove less beneficial to class members than to their attorneys has been often voiced by concerned courts and periodically

This pro forma treatment of the potential for conflicts of interest in a class of 1.5 million people, united only by gender and employer, is too obviously inadequate to be the court's considered judgment on the subject.¹²⁵ The fact that a third of Wal-Mart's managers are class members is by itself enough to prompt more discussion¹²⁶—people challenging personnel decisions would not seem to have interests aligned with those who made them¹²⁷—as is the representatives' decision to waive their charges' right to compensatory damages.¹²⁸

In sum, the *Wal-Mart* class action is a spurious class action with a difference: the older procedure had no certification mechanism. This one does, however, and, anyone who has been involved in certification

bolstered by empirical studies.” (citations omitted)), and *Stewart v. GMC*, 756 F.2d 1285, 1293 (7th Cir. 1985) (“[T]he district court has a fiduciary duty to protect the class members and thus motions to substitute counsel must be carefully scrutinized.”).

125. Cf. *Dukes II*, 509 F.3d at 1196 (Kleinfeld, J. dissenting).

The majority opinion . . . [gives the adequacy requirement] little attention Based on their own descriptions of the wrongs done to them in the complaint, the interests of the seven named plaintiffs diverge from each other, as will the interests of other members of the class. Women who still work at Wal-Mart and who want promotions have an interest in the terms of an injunction. But an injunction and declaratory judgment cannot benefit women who have quit or been fired and do not want to return. For them, compensatory and punitive damages are what matter. Those who are managers, and many Wal-Marts have female store managers, have interests in preserving their own managerial flexibility under whatever injunction may issue, while those who are not and do not want to be managers may not share this concern. Those who face strong defenses, such as if they did indeed steal time or money, have a considerable interest in a fast, mass settlement, while those who have impressive performance records have an interest in pushing their individual cases to trial.

Id.

126. *Dukes II*, 509 F.3d at 1194 (Kleinfeld, J., dissenting) (“Plaintiffs’ only evidence of sex discrimination is that around 2/3 of Wal-Mart employees are female, but only about 1/3 of its managers are female.”).

127. Owners of property subject to a racially restrictive covenant seeking to enforce the covenant:

could not be said to be in the same class with or represent those whose interest was in resisting performance If those who thus seek to secure the benefits of the agreement were rightly regarded . . . as constituting a class, it is evident that those . . . interested in challenging the validity of the agreement . . . are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.

Hansberry v. Lee, 311 U.S. 32, 44 (1940).

128. *Cooper v. S. Co.*, 390 F.3d 695, 721 (11th Cir. 2004) (“[T]o the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief that consisted of an admonition to follow general principles of settled law, it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members.” (citation omitted)).

proceedings knows how cumbersome they can be, and the drain they can put on the resources of both the parties and courts. But, a certification proceeding that does not settle anything is worse than none at all.

IV. USE THE RIGHT TOOL FOR THE RIGHT JOB

The Supreme Court attributes at least three purposes to class actions: resolving multiple claims in a single proceeding, allowing people with small claims to share costs by presenting their claims in a single proceeding, and bringing everyone with claims against a limited fund before the court at the same time.¹²⁹ The *Wal-Mart* majority's reference to the desirability of preventing "innumerable individual" suits suggests the first,¹³⁰ but the dissent's observation that "the substantial value of sex discrimination claims, the availability of lawyers on contingent fee, and statutory attorney's fees awards" made a class action unnecessary, suggests it had the second in mind.¹³¹

Many lower courts use Rule 23 for a third purpose, however, enforcing statutes they deem important.¹³² The *Wal-Mart* district court,

129. See *supra* note 7.

130. See *Dukes II*, 509 F.3d at 1193.

131. *Id.* at 1199 (Kleinfeld, J., dissenting) (Class actions . . . are designed largely to solve an attorneys' fees problem. . . . That need does not pertain here. . . . Many sex discrimination cases satisfy the three elements that make a contingent fee case worth accepting, good liability, high damages potential, and collectibility of a judgment, sweetened by the lagniappe of statutory attorneys fees awards. . . . [W]omen discriminated against by Wal-Mart . . . can, with contingent fee agreements, afford to hire their own lawyers and control what the lawyers do for them." (footnote omitted) (quoting *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 420 (5th Cir. 1998)).

132. See, e.g., *Yang v. Odom*, 392 F.3d 97, 109 (3d Cir. 2004) ("Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, since the effectiveness of the securities laws may depend in large measure on the application of the class action device." (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985)); *Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1337 (11th Cir. 2000) ("[A] class action is an available, important means of remedying violations of the [Truth in Lending Act]."); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990) ("[W]here the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the 'superior' and only viable method to achieve those objectives . . ."); *Gay v. Waiters' Union*, 549 F.2d 1330, 1334 (9th Cir. 1977) (declaring that a trial court considering certifying a class action in a Title VII employment discrimination case "must liberally interpret and apply Rule 23 so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination"); *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1145 (D. Nev. 2007) ("Though efficiency may underlie the purpose of seeking class-wide relief, the interest in bringing a class action and/or a pattern-or-practice claim is the same: to prevent against unlawful employment practices affecting a group of individuals with related claims."); *In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229, 231 (D. Minn. 2001) ("Given 'the important role class actions play in the private enforcement of antitrust actions, courts resolve doubts in these actions in favor of certifying the

for example, prefaced its certification decision with the observation that the plaintiffs were suing under a statute enacted

during the height of the civil rights movement [to forbid] gender and race-based discrimination in the American workplace. Two years later, federal class action rules were amended to facilitate the vindication of these rights on a broader basis. . . . Insulating our nation's largest employers from allegations that they have engaged in a pattern and practice of gender or racial discrimination—simply because they are large—would seriously undermine these imperatives. Indeed, it is interesting to note, as a matter of historical perspective, that Plaintiffs' request for class certification is being ruled upon in a year that marks the 50th anniversary of the Supreme Court's decision in *Brown v. Board of Education* [which] serves as a reminder of the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs.¹³³

This reasoning has roots in Ninth Circuit precedent,¹³⁴ and the court of appeals' willingness to base its commonality and typicality determinations on evidence that cannot be evaluated until trial suggests sympathy with the lower court's view. If its concern had been the disposal of class members' claims one way or the other, it would not have cared whether the representatives had evidence to support their claim, for it would have thought a claim without evidentiary support as appropriate for class treatment as any other. If its concern was with enforcing statutory imperatives, however, it would presumably have wanted to reserve a certification decision until it knew whether the statute invoked by the plaintiffs needs enforcing. In that case, basing commonality and typicality determinations on the representatives' ability to prove their case makes sense, as does its admonition that “[i]f later

class.” (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 688-89 (D. Minn. 1995)); cf. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (“For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the ‘private attorney general’ for the vindication of legal rights; obviously this development has been facilitated by Rule 23.”).

133. *Dukes I*, 222 F.R.D. 137, 142 (N.D. Cal. 2004) (citations omitted), *aff'd*, 509 F.3d 1168 (9th Cir. 2007).

134. E.g., *Six Mexican Workers*, 904 F.2d at 1306 (“[W]here the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the ‘superior’ and only viable method to achieve those objectives”); *Gay*, 549 F.2d at 1334 (9th Cir. 1977) (a trial court considering certifying a class action in a Title VII employment discrimination case “must liberally interpret and apply Rule 23 so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination.”).

evidence disproves [the] contentions that common issues predominate, the district court can at that stage modify or decertify the class”¹³⁵

Still, the notion that a refusal to certify class actions insulates employers from pattern-or-practice of discrimination claims is counter-intuitive, as it suggests that Rule 23 creates a cause of action for pattern-or-practice claims for which only those invoking the Rule can seek redress. That is obviously not the law; the *Brown v. Board of Education*¹³⁶ decision cited by the trial court is a forceful reminder that individuals injured by a pattern-or-practice of discrimination may seek relief without qualifying as class representatives.¹³⁷

Were it otherwise, employers could defend against individual claims of discrimination by showing that discrimination is company policy, and one likes to think the *Wal-Mart* district court would make short work of that defense and find all the authority it needs to enforce the law with an injunction authorized by Rule 65.¹³⁸ Thus, it makes no sense to think of Rule 23 as anything but a way of resolving similar claims that would otherwise have to be brought separately in repetitious proceedings. Simply put, the Rule was designed to allow courts an opportunity to determine before litigation if they can kill several birds with one stone, not as a device for deputizing private attorney generals to root out violations of the law.

Moreover, even if that were the purpose of the Rule, fundamental considerations of federal jurisdiction would prevent district courts from using Rule 23 to expand their ability to “facilitate the vindication of . . . rights on a broader basis” than might be possible in an individual action.¹³⁹ Like any other plaintiff, a putative class representative must establish his own Article III standing to challenge the acts or practices he wants to put at issue, by showing that they aggrieved him personally.¹⁴⁰ That showing fixes the bounds of his lawsuit; Rule 23 will not permit him to go beyond those bounds and challenge acts or practices that aggrieved other people, but not him.¹⁴¹ He would not only lack common

135. *Dukes II*, 509 F.3d at 1176.

136. 347 U.S. 483 (1954).

137. *See Dukes I*, 222 F.R.D. at 142.

138. FED. R. CIV. P. 65.

139. *Dukes I*, 222 F.R.D. at 142 (citing FED. R. CIV. P. 23(b)(2); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 n. 16 (5th Cir. 2004)).

140. *See O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (“[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”).

141. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (“Rule 23’s requirements

claims with those people, but also, more fundamentally, he would lack the Article III standing he needs to mount the attack.¹⁴²

Therefore, Rule 23 does not enhance a plaintiff's ability to seek out and end illegal activity. If anything, a plaintiff's reach under Article III may exceed his reach under Rule 23; a white person may protest discrimination against blacks if it deprives him of the right to associate with blacks,¹⁴³ but he is unlikely to qualify as a representative of those blacks, too.¹⁴⁴ Class actions do broaden a court's power to award people monetary compensation for wrongful acts the class representatives prove,¹⁴⁵ which makes the *Wal-Mart* courts' approval of the decision to waive the class members' right to seek compensatory damages all the more surprising. But that broadening comes at a high price—the right of people to present their own claims for themselves in their own way—and

must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" (quoting Rules Enabling Act, 28 U.S.C. § 2072(b) (2000)); *see also* FED. R. CIV. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . .").

142. *See Anchem*, 521 U.S. at 624-25 (explaining that because of the "disparate questions undermining class cohesion" in the case, there was not significant commonality between the class members, so certification was denied); *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976))); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) ("The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.").

143. *See, e.g., Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972) (permitting white tenants to sue apartment complex for excluding minority persons if they allege a "loss of important benefits from interracial associations."); *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994) (holding that a statute forbidding discrimination in employment "grants special protection to whites who are denied association with members of other groups because of an employer's discriminatory practices"); *Clayton v. White Hall Sch. Dist.* 875 F.2d 676, 679-80 (8th Cir. 1989) (white woman had standing to complain that her employer's discrimination against blacks violated her right "to work in an environment free of unlawful discrimination . . .").

144. *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 811 (5th Cir. 1982) ("[A] host of district courts have refused to permit black females to represent black males in class actions alleging both race and sex discrimination when a conflict of interest appears."); *Strong v. Ark. Blue Cross & Blue Shield, Inc.*, 87 F.R.D. 496, 508 (E.D. Ark. 1980) ("Both evidenced and innate antagonisms foreclose certifying these black female plaintiffs as representatives both of all blacks and all females.").

145. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) ("Courts of Appeals that have confronted the issue are unanimous in recognizing that backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members.").

adds nothing to the court's power to enforce statutes like Title VII.¹⁴⁶

Article III, as we have seen earlier, is not the only constitutional constraint on the power of federal courts to conduct class actions; the due process clause of the Fifth Amendment is a consideration, too.¹⁴⁷ The casual way in which many courts certify that the requirements of Rule 23 are met suggests that they are counting on later judges to repudiate their certification orders if things go wrong, but that is gambling with other people's constitutional rights.¹⁴⁸

[The argument] that aggrieved class members can collaterally attack the judgment . . . is a smoke screen for justifying the blatant realization that some litigants have not been or may not be afforded due process under the procedures followed in the first case. It is, of course, far better to utilize appropriate procedures at the first trial, then [sic] to throw the burden upon the litigants who, *in the face of a seemingly valid judgment directly on the matter in controversy*, must attempt to regroup as a subclass and argue, after-the-fact, that they were not adequately represented. Furthermore, allowing or encouraging liberal collateral attacks on (b)(2) class actions [which do not require that class members be given notice of their membership] defeats one of the prominent purposes of class certification—that of achieving a finality of claims with respect to the defendants.¹⁴⁹

The district court judge who said this was confronted with the dissatisfied members of a class certified in a case that led to what he correctly called one of “the monumental decisions” in the early development of employment discrimination law, yet they convinced him that the earlier certification order “suffers . . . from the plaintiffs’ attempt to include a broad class of litigants and yet prepare and advocate with force the claims of some class members to the detriment of a distinct and aggrieved alternate portion of the class.”¹⁵⁰ Would that “monumental decision” have been less effective in developing employment discrimination law if the class had been more carefully tailored to the requirements of due process?

146. See *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 874 (1984).

147. See *supra* text accompanying notes 140-42.

148. See *Lewis v. Philip Morris, Inc.*, 419 F. Supp. 345, 352 (E.D. Va. 1976), *vacated by* 577 F.2d 1135 (4th Cir. 1978).

149. *Id.* at 352.

150. See *id.* at 351 (referring to *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968)).

CONCLUSION

For better or for worse, the modern Rule 23 was designed to strip class members of a right that they had once enjoyed in spurious class actions: the right to let others litigate for them, without losing the right to litigate on their own. Procedural rules can change over time under the incremental impact of court decisions, and that seems to be what has happened to Rule 23—the notion that the 1966 amendments to the Rule was designed to protect *defendants* is startling to many, if not most, lawyers, who view it as a tool for bringing corporate miscreants to justice. But, the design and shape of the rule imposes limits on the uses to which it can be *sensibly* put; a claw hammer can be used to extract screws from the wall, after all, but its design and shape guarantee that the extraction will cause damage to the surrounding woodwork. The woodwork surrounding Rule 23 is made up of constitutional values, and ignoring the design of the Rule jeopardizes those values.

The *Cooper* litigation discussed earlier is a case in point; people should not have to go to the Supreme Court to establish the obvious point that “rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim.”¹⁵¹ Yet, the *Wal-Mart* majority not only endorsed a nation-wide pattern and practice claim, but made a point of saying the district court could “conclud[e] that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly.”¹⁵² In some future case, when a former class member in Albany or Honolulu or Zanesville comes forward with a claim overlooked in the ambition of the class litigation, *Wal-Mart’s* counsel will be remiss in their duty to their client if they fail to argue that she has brought one of the “innumerable individual suits” that the *Wal-Mart* majority had in mind. But, *if* the plaintiff has the fortitude to press her claim, and *if* she can obtain counsel to help her, she will most likely be able to carry her burden of showing that the *Wal-Mart* court erred in certifying that she would be adequately represented.

The design of Rule 23 also imposes non-constitutional limits on the uses to which the Rule can be put. The certification procedures added by subsection (a) of the modern Rule in 1966 often require courts and

151. See *Cooper*, 467 U.S. at 878.

152. *Dukes II*, 509 F.3d 1168, 1193 (9th Cir. 2007).

parties to invest considerable resources in making determinations about the nature of the plaintiff's claim and its relationship to the claims of the putative class members, in an effort to avoid the old spurious class action. If those proceedings do not accomplish that end—if they do not define a class whose members can win, as well as lose, a case—they are a waste of everybody's time and resources.¹⁵³ Why not, if the real certification decision is to be deferred until later, defer the certification proceedings, too? That would do less violence to the purpose of Rule 23 than apparent compliance that is no compliance at all.

The threshold question at a certification hearing should, then, be: why do the aspiring representatives think class members should be bound if they lose? If the representatives have a convincing answer, and if the other requirements of Rule 23 are met, the case can go forward as a class action. Otherwise the court should confine itself to litigating the claims of the people who have appeared in the case either personally or through counsel and asked it to adjudicate their claims.

153. See FED. R. CIV. P. 1 (“[Federal rules] shall be construed and administered to secure the just, speedy and inexpensive determination of every action.”).