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INTRODUCTION: WAL-MART V. DUKES AND THE FUTURE OF CLASS ACTION LITIGATION

*Christopher S. Burrichter**

“Individuals don’t win; teams do.”¹

What defines “too big?” The answer may be objective or subjective: “This car is too big for our garage door,” versus, “This house is too big for the two of us.” Commentators argue that everything from banks to sodas has now become “too big.”² America too has become bigger, and in recent years its companies and labor force have continued to grow.³ Although nothing is legally wrong with growing corporate successes, the late Justice Brandies once cautioned that “size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put.”⁴ Thus, America must eventually decide if and when corporations may become “too big.”

In recent years, certain corporations and banks received government assistance due to their perceived position as “too big to fail.”⁵ The American government does not maintain a rubric explaining when companies become “too big to fail.” Rather, the title “too big to fail” was awarded in an ad hoc manner throughout 2007 and 2008 to companies that appeared to pose a systemic threat to the American economy.⁶

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1. SAM WALTON WITH JOHN HUEY, *MADE IN AMERICA* 282 (1993).

2. See Gretchen Morgenson, *How to Cut Megabanks Down to Size*, N.Y. TIMES, Jan. 19, 2013, at MB1; Michael Grynbaum, *Court Halts Ban on Large Sodas in New York City*, N.Y. TIMES, March 12, 2013, at A1.

3. Current labor statistics are available at *Experimental Size Class Employment, Hours Earnings Series from the Current Employment Statistics Survey*, U.S. DEPARTMENT LAB. (July 26, 2012), <http://www.bls.gov/ces/cessizeclass.htm>.

4. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 163 (1913).

5. See, e.g., Celeste Headlee, *Auto Bailout: Necessary or Dangerous?*, NAT’L PUB. RADIO (Nov. 12, 2008), <http://www.npr.org/templates/story/story.php?storyId=96909271>; Heidi N. Moore, *U.S. Banks: Too Big to Fail. Too Big to Save?*, WALL STREET J. (Apr. 21, 2008), <http://blogs.wsj.com/deals/2008/04/21/us-banks-too-big-to-fail-too-big-to-save>.

6. See Donal Griffin & Ian Katz, *Citigroup \$45 Billion Rescue Based on ‘Fear of the Unknown’ Barofsky Says*, BLOOMBERG (Jan. 13, 2011), <http://www.bloomberg.com/news/2011-01-13/citigroup-45-billion-rescue-based-on-fear-of-the-unknown-barofsky-says.html> (stating that bailout

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court did not have occasion to opine on a corporation's "too big to fail" status. Rather, the Court faced two other issues regarding the elusive concept of "too big": (1) whether a class may become "too big" to file suit; and (2) whether saying so would render certain companies "too big" to sue. To use Wal-Mart's famous marketing term, the Supreme Court needed to decide whether a class action "rollback" was warranted.

The 22nd Annual DePaul Law Review Symposium: *Class Action Rollback? Wal-Mart v. Dukes and the Future of Class Action Litigation* sought to address this question from every angle. The event was greeted with great enthusiasm from the community of DePaul University College of Law, national and international attorneys, and professors from across the country. Several of the twelve speakers agreed to write articles relating to their presentations, and those articles may be found within the following pages. As one attendee suggested, this issue of the *DePaul Law Review* can rightly be considered an "Advanced Handbook" for practitioners addressing the *Dukes* decision.

Suzette Malveaux's article, *The Power and Promise of Procedure*, addresses the civil rights ramifications inherent in the *Dukes* decision. Professor Malveaux points out that *Brown v. Board of Education*, one of the Supreme Court's most defining and cherished opinions, was in fact a class action lawsuit. Professor Malveaux argues that the *Dukes* decision is not resigned to the world of Wal-Mart. Instead, she convincingly argues that the *Dukes* decision, and other heightened civil procedure requirements, may serve to "compromise[] employees' access to justice."

Mark Perry's *Issue Certification Under Rule 23(c)(4): A Reappraisal* offers a counterpoint to those who contend that the class action mechanism is under attack. Perry explains that class actions have historically existed as the exception to the rule that litigation should be conducted on behalf of an individual. Perry's article thus maintains that *Dukes* is not, in fact, a "rollback" of plaintiff's rights, but rather a reminder that the rules of civil procedure must be closely adhered to. Finally, Perry argues against the theme of George Robot's article, and contends that certification under Rule 23(c)(4) should not provide a new outlet for class action litigation.

Anthony Fata's discussion of *Dukes* offers four principals that stem from both the Supreme Court's opinion and subsequent case law interpreting that opinion. Fata explains in detail that the evidence used

awards were "strikingly ad hoc"); see also Lok Sang Ho, *Systematic Risks: Implications for Regulation and the Bailout*, SEEKING ALPHA (Jan. 19, 2009), <http://seekingalpha.com/article/115305-systematic-risks-implications-for-regulation-and-the-bailout>.

to comply with Rule 23 will now be subject to “rigorous analysis,” and that questions of commonality will closely track the uniformity of defendant’s practices. His article goes on to contend that affirmative defenses will play a more prominent role in Rule 23(b)(3) certification, while complex damage calculations alone will not defeat predominance.

William Hubbard’s article, *Optimal Class Size, Wal-Mart, and the Funny Thing about Shady Grove*, squarely addresses the question of whether a class can be “too big to be certified.” Hubbard does not end his analysis by simply stating that the Supreme Court would not certify a class of 1.5 million employees. Rather, he begins his analysis there, and lays out a framework for identifying “optimal class size” in future cases. Hubbard additionally overlays the *Dukes* decision with the Supreme Court’s decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, and uses these two cases to explain the contours of a district court’s discretion in certifying a class.

Marcia McCormick’s *Implausible Injuries* identifies the three-way intersection of *Dukes*, *Twombly*, and *Iqbal*, and expresses concern with the level of discretion granted to trial court judges. McCormick contends that classes will become increasingly difficult to certify when the alleged injuries stem from separate incidents, especially because a judge is necessarily forced to determine whether the asserted commonality is “plausible.” Such a question is critical at the class certification stage, yet rests largely on an individual judge’s worldview. McCormick offers suggestions for how attorneys may best proceed in the face of such discretion, but suggests that the time may be right to move certain discrimination claims away from the courthouse and towards other public forums.

Naomi Schoenbaum’s *The Family and the Market at Wal-Mart: A Study of Title VII’s Recognition of the Family* explores the largely uncharted realm of gender discrimination through geographic mobility. Given that the concepts of time and space largely form the bedrock of human existence, Professor Schoenbaum argues that gender inequality made manifest in *time* disparity has stolen scholastic attention away from *spatial* gender inequality issues. Her article explains how Wal-Mart’s managerial relocation policies resulted in gender-inequitable outcomes that courts and scholars have thus far ignored. Professor Schoenbaum concludes by suggesting that Title VII claims may not adequately address employment policies that, when combined with common family structures, lead to inequitable outcomes.

Andrew Trask’s tour-de-force *Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change* looks briefly at the historical roots

of class action litigation, while focusing especially on the “two models of class actions.” Trask divides the current commentary on class actions not between favoritism towards plaintiffs or defendants, but instead between a “progressive” model (more class actions equal more justice) and a “reform” model (more class actions pervert plaintiffs’ motives and ignore absent class members). Trask proffers a third model, the “strategic” model. Bridging the chasm between progressive and reform, this strategic model acknowledges that class actions allow for certain efficiencies in litigation, but must be constantly monitored to avoid abuse.

Lesley Wexler’s *Extralegal Whitewashes* offers a fascinating step away from the realm of law and into the realm of corporation’s “extralegal behavior.” Professor Wexler’s article takes a common premise—that threat of legal action or regulation changes corporate behavior—and turns it on its head. Wexler argues instead that such threats often entice corporations to “whitewash” their behavior through public relations and other diversions. The article goes on to explain previous instances of environmental and human rights whitewashing, and argues that Wal-Mart’s response to the *Dukes* litigation may amount to nothing more than a newer, bigger whitewash.

George Robot’s work, “*Carving at the Joint*”: *The Precise Function of Rule 23(c)(4)*, discusses an area of class action litigation that is still in germination: issue certification under Rule 23(c)(4). The article proves especially interesting because the Seventh Circuit’s *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* decision, which this article largely discusses, was issued on the day of the *Class Action Rollback?* symposium. Robot argues that the Supreme Court may have closed a door on class certification in *Dukes*, but the Seventh Circuit clearly opened a new window for future class action issue certification in *McReynolds*.

I must thank all of our presenters and moderators who braved the cold weather and made this symposium such a success: Keynote Speaker Professor Suzette Malveaux (Catholic University of America), Professor Suja Thomas (University of Illinois), Mark Perry (Gibson Dunn), Professor Wendy Netter Epstein (DePaul University College of Law), Marcia McCormick (Saint Louis University), William H. J. Hubbard (University of Chicago), Andrew Trask (McGuire Woods), Naomi Schoenbaum (University of Chicago), Lesley Wexler (University of Illinois), Steven Greenberger (DePaul University), George Robot (Stowell & Friedman, Ltd.), Anthony Fata (Cafferty Clobes Meriwether & Sprengel LLP), Mark Moller (DePaul University College of Law) and Mark Weber (DePaul University College of

Law). I also owe a great debt of gratitude to the *DePaul Law Review*, David Bell, Kurtzman Carson Consultants, and the DePaul University College of Law for making this event such a resounding success.

Many people told me that a *Wal-Mart v. Dukes* symposium with such a long speakers list was “too big.” Through the hard work of innumerable people, I am thankful to announce that the event proved “too big to fail.”

