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OPTIMAL CLASS SIZE, DUKES, AND THE FUNNY THING ABOUT SHADY GROVE

William H.J. Hubbard*

INTRODUCTION

Can a class be too big to be certified? This question lurks in the background of Wal-Mart Stores, Inc. v. Dukes, given that the class as certified by the district court was composed of approximately 1.5 million members. Justice Scalia began his opinion in Dukes by noting, "We are presented with one of the most expansive class actions ever." With such an enormous class, one is tempted to ask, as Alexandra Lahav has, "Are some classes so big that they must fail?"

A class can certainly be too small to be certified. But in some sense the claim that a class is too large to be certified flies in the face of the logic of class actions. If the whole point of the class action device is to provide a procedural vehicle for related claims that are so numerous that joinder is impractical, then adding more claims to a class only makes the case for class certification more compelling. As Lahav and others have pointed out, it is not the numbers themselves that raise concerns about very large classes, but rather the intuition that as the size of the class grows the heterogeneity of its members is also likely to increase. With a heterogeneous class, the existence, or

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* Assistant Professor of Law, University of Chicago Law School. I am grateful for comments and research assistance from Andrew Grindrod, Steve Hagenbuch, Christine Ricardo, and Andrew Spruell, and for comments from Charles Silver, Deborah Weiss, and the participants in the Twenty-Second Annual DePaul Law Review Symposium.

2. Id.
4. See FED. R. CIV. P. 23(a)(1).
5. Lahav, supra note 3, at 119 ("The relevant inquiry is whether the class is too heterogeneous to support collective treatment, regardless of the number of plaintiffs the class encompasses."); Rachel Tallon Pickens, Too Many Riches? Dukes v. Wal-Mart and the Efficacy of Monolithic Class Actions, 83 U. DET. MERCY L. REV. 71, 72 (2006) ("[T]he sheer size of a putative class is not prohibitive of a class action. Rather, where a large class seeks to be certified, manageability is the sine qua non for certification."); Aaron B. Lauchheimer, Note, A Classless Act: The Ninth Circuit’s Erroneous Class Certification in Dukes v. Wal-Mart, Inc., 71 BROOK. L. REV. 519, 554 (2005) ("[I]f a class is too large, there are potential issues of manageability and commonality which could preclude certification."). As my fellow panelist Andrew Trask argued during the
at least predominance, of common issues will come into question, as will the manageability of the class action; these concerns about commonality, predominance, and superiority determine the propriety of class treatment, not the size of the class per se. As Charles Silver and others have noted, to argue otherwise would bias the class certification decision in favor of defendants whose wrongdoing is widespread.\textsuperscript{6}

Nonetheless, the question of "How big is too big?" is useful in that it prompts one to think in terms of identifying the right size of a class action. The class action in \textit{Dukes} has been characterized as "monolithic,"\textsuperscript{7} and much of the debate about \textit{Dukes} has focused on individual litigation as the alternative to a class of 1.5 million members. This reflects the natural tendency to think of the class certification decision as a single, up-or-down choice between individual or aggregate litigation. In some cases, including \textit{Dukes}, this may also reflect litigation strategy; plaintiffs may want to present the largest feasible class as the only option for aggregation, while defendants may not want to concede that \textit{any} class is certifiable.\textsuperscript{8}

Yet, as we know, the class action device is quite a bit more subtle, and Federal Rule of Civil Procedure 23 provides numerous mechanisms for adjusting the certified class.\textsuperscript{9} The class certification decision can and should involve consideration of the proper scope and size of the class. Simply because a proposed class might be certifiable under Rule 23's criteria does not mean that another class definition is not superior. This Article presents a framework for determining the optimal class size and argues that an examination of \textit{Dukes} helps operationalize the challenge of making optimal class size a useful consideration in class certification decisions.

\textsuperscript{6} Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357, 1367 (2003); see also Pickens, supra note 5, at 89.

\textsuperscript{7} Pickens, supra note 5, at 90.

\textsuperscript{8} The plaintiffs in \textit{Dukes} did not offer any class definition in the alternative to their nationwide class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who may have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities at 37, Dukes v. Wal-Mart Stores, Inc., No. C-01-02252 MJJ (N.D. Cal. April 28, 2003). Wal-Mart offered no alternative to this class. Cf. Defendant's Opposition to Plaintiffs' Motion for Class Certification at 42, Dukes v. Wal-Mart Stores, Inc., No. C-01-02252 MJJ (N.D. Cal. June 12, 2003).

\textsuperscript{9} See, e.g., Fed. R. Ctv. P. 23(c)(4)-(5). The extent to which the district court has the power or discretion to tailor the size of the class suffers from some complications, which I address in Part IV.
Part II provides a basic model for examining optimal class size.\textsuperscript{10} David Betson and Jay Tidmarsh provide a very useful framework for conceptualizing the problem of determining the optimal class size in a tractable and illuminating manner. Their key idea is to think of the class certification decision as \textit{choosing the class size}, which can be anything from one up to the total number of people conceivably harmed by the defendants' alleged wrongdoing.\textsuperscript{11}

Part III takes some initial steps towards making this model useable for courts by tying the costs and benefits of increasing class size to observable qualities of a case. To make the analysis more concrete, Part III applies the factors identified to the \textit{Dukes} class.

Part IV connects the idea of optimal class size to the doctrinal question of the extent to which Rule 23 gives district courts discretion in certifying classes. While the rule has long been that the certification decision is entrusted to the discretion of the district court, language in a recent Supreme Court case, \textit{Shady Grove Orthopedic Associates v. Allstate}, suggests that a district court lacks discretion to deny class certification. Moreover, the majority opinion in \textit{Dukes} appears to disregard the "abuse of discretion" standard of review for class certification orders. This Article argues that these seemingly conflicting approaches can be rationalized by framing class certification not as the binary choice to certify or not, but instead as a choice of optimal class size.

\section*{II. Visualizing Optimal Class Size}

Consider a court tasked not merely with accepting or rejecting a motion for certification of a specific class, but also with setting the size of the class of plaintiffs who will litigate together in a single action.\textsuperscript{12} How might the court conduct this analysis? This Article begins with the unrealistic assumption that the court has enough information to make judgments about the costs and benefits of adding any given potential class member to the class action.\textsuperscript{13}

\footnotesize
\begin{itemize}
  \item This Part relates closely to David Betson and Jay Tidmarsh's article, \textit{Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies}, \textit{79 Geo. Wash. L. Rev.} 542 (2011).
  \item An optimal class size of one would result in the denial of certification and would require individual litigation. I will treat "the total number of people conceivably harmed by the allegedly wrongdoing of the defendant" as the maximum "possible" class size.
  \item It is worth noting that when the question is framed this way, the procedural mechanisms available include not only class actions, but also consolidated or mass actions if joinder is practicable.
  \item In Part III, I address how we can apply this model under the more realistic assumption of limited information.
\end{itemize}

The first step is to distinguish between the "fixed" and "marginal" costs and benefits of adding individuals to the class. The term "fixed costs" refers to only those costs that are essential to undertaking an activity and do not vary the scale of that activity. For purposes of this Article, these are costs that relate to the litigation of issues common to the class. For example, in a class action arising out of a discharge of pollutant chemicals, one common question may be whether the defendant complied with relevant regulations for the containment of the chemicals. There is nothing about this question that would be specific to any individual plaintiff. Regardless of whether the case is litigated with a single plaintiff or as a class action with 200 class members, this issue must be litigated. Therefore, this is a fixed cost because the cost of litigating this issue in a single action does not change with the number of class members. Additionally, fixed benefits may also exist. For example, a structural injunction against a discriminatory employment policy that harms a class of individuals may be equally beneficial regardless of whether it was obtained in an action involving one plaintiff or a class of plaintiffs.

The term "marginal costs" refers to those costs that vary with the scale of the class action. To be more precise, the marginal cost of adding a class member is the increment in cost caused by the addition of that class member. The cost of giving notice to that class member is an example of a marginal cost.

When assessing marginal costs and benefits, it is important to identify the baseline against which they are calculated. The baseline from which to judge the costs and benefits of a class action is the alternative situation in which each potential class member is left to litigate on an individual basis. In a case with high individual damages, the baseline will be individual lawsuits. In a case with low individual damages, such as a consumer class action in which each individual has potential damages in the hundreds of dollars, no class member would be willing to litigate on an individual basis. In this latter scenario, the baseline is no litigation, no costs, and no benefits.

Accordingly, the cost of litigating individual issues would not count as a marginal cost of expanding the class when those individual issues would be litigated in individual litigation regardless. When no individual lawsuits are viable, those costs would not otherwise arise, and

14. It is possible, though, that the amount that the parties invest in litigation of that issue will depend on the number of plaintiffs in the action. If so, the additional increment in cost is a marginal cost. See Part III.A for further discussion.
15. See FED. R. CIV. P. 23(b)(3).
therefore the costs of litigating any individual issues would be a marginal cost of adding a class member.

There are also marginal benefits associated with adding an individual to the class. Marginal benefits can come in two forms: damages and cost savings. In the case of a class action without which individual claims would not be brought, adding an individual to the class has a marginal benefit equal to her expected damages.\(^{16}\) (There are no cost savings because, in the absence of a class, there are no individual suits and thus no costs.) In a case in which individual litigation would occur regardless, damages are not a marginal benefit because they would be awarded in individual litigation, but the cost savings of avoiding repeatedly paying the fixed cost of litigating a common issue in individual lawsuits is a marginal benefit. Each individual added to the class thereby reduces the number of times the fixed cost is expended in individual litigation.\(^{17}\)

The next step in the analysis is to assess the marginal costs and benefits of different class members. Not every potential class member will have the same marginal costs or marginal benefits associated with adding her to the class. For some individuals, the marginal costs of adding them to the class may be large because their individual issues are particularly complex. For others, the marginal benefits may be large because they have higher damages to claim.

One can therefore array the potential class members in the order that they would be added to a class. When searching for claimants to form a class, one would initially choose to add those claimants with the highest marginal benefits and lowest marginal costs. In more concrete terms, these claimants are likely to be individuals whose claims are strongest and therefore easiest to prove. These claimants will be subject to fewer individualized defenses, have more concrete evidence of damages, and so forth.\(^{18}\) On the other end of the spectrum are the

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\(^{16}\) In equating marginal benefits with individual damages, I am assuming that the benefits relevant to the court are the benefits to individual plaintiffs. While this assumption simplifies the discussion, it is not unassailable. Damages represent a transfer of wealth from the defendant, and the loss to the defendant is ignored. Of course, this loss is presumably offset by the benefit to society of deterring defendants' wrongful conduct. It is not obvious that these two effects exactly cancel, but for simplicity this discussion assumes that they do, and that the relevant benefit is the damages recovered by the plaintiff.

\(^{17}\) Note that there is an asymmetry in how fixed costs and fixed benefits affect the costs and benefits of aggregating plaintiffs into a class action. Aggregation has the benefit of saving fixed costs by requiring that they be spent just once, rather than repeatedly in individual actions. There is no corresponding benefit (or detriment) from aggregation due to fixed benefits. A structural injunction has no greater or lesser effect in either context.

\(^{18}\) Easy-to-litigate individual issues imply lower marginal costs, but also suggest a stronger individual case, and therefore potentially higher marginal benefits. This inverse relationship be-
individuals who would only be added after every other conceivable class member has already been included. These are the individuals with high marginal costs and low marginal benefits. In concrete terms, these are individuals who are likely to have particularly dubious claims, lack evidence to substantiate their claims, or otherwise appear as unattractive candidates for class membership.

This gives us the relationship between declining marginal benefit and rising marginal cost illustrated in Figure 1. The optimal class size is determined by the intersection of the two curves; the optimal class size in Figure 1 is marked $N$. For all individuals to the left of that point, the marginal benefits of including them in the class exceed the marginal costs, while for all individuals to the right of that point the reverse is true.

The relationship between marginal costs and marginal benefits is illustrated in Figure 1. The interested reader should note, however, that this inverse relationship is not necessary to the model in this Article. So long as potential class members are arrayed in order of net marginal benefit (marginal benefit minus marginal cost), the analysis is the same.

Figure 1 reveals an important dimension along which I have chosen to depart from the model of Betson and Tidmarsh. Betson and Tidmarsh argue that the marginal cost of expanding the size of the class decreases as class size increases. Betson & Tidmarsh, supra note 10, at 551. This is contrary to the assumption that economists usually make, which is that marginal cost goes up as one increases the quantity of something. The justification that Betson and Tidmarsh give for this departure from standard economic models is that many aspects of the plaintiffs' case are costly to litigate, for example, the cost of litigating a common legal question, but the costs must be borne regardless of the size of the class. Id. at 552. As such, the cost of the very first plaintiff litigating individually is likely to be very high. But such costs are not marginal costs; they are the "fixed costs" of litigating the action. While these costs are important to account for when making the decision whether to litigate, they cannot be assigned to the marginal cost of any individual plaintiff because they are not costs associated with the addition of that plaintiff's claim. See infra note 21. Once fixed costs are separated from marginal costs, we should expect that the marginal cost associated with adding additional plaintiffs should rise (or at least not fall) as the size of the class increases. For further support for this point, see supra note 18 and infra Part III.B. It should also become clear that Betson and Tidmarsh's concern about multiple equilibriums dissipates. Betson & Tidmarsh, supra note 10, at 560–66.

For ease of exposition, I have discussed the case in which claimants with high marginal costs have low marginal benefits, and vice versa. More generally, though, net marginal benefits (i.e., marginal benefits minus marginal costs) determine optimal class size. As Figure 1 illustrates, class size is optimal when net marginal benefit of adding another class member is zero.

The reader may wonder where the fixed costs of the class action factor into the certification decision. Fixed costs are relevant to the determination of optimal class size in the following way: if, at the class size given by the intersection of the marginal cost and marginal benefit curves, the total of all of the individual marginal costs plus the fixed cost of litigating the class action exceed the total of all of the individual marginal benefits, then the optimal class is zero. In other words, if the total costs of litigation outweigh the total benefits, even at best possible class size, then no litigation should occur at all.
III. MAKING THE MODEL PRACTICAL

To say that marginal benefit falls and marginal cost rises as the class grows, and that therefore there will be a class size for which the two are equal and that this represents the optimal class size, is only the starting point for our analysis. Without more, one has no way of knowing where this optimal point lies. Indeed, as Betson and Tidmarsh pointed out, the optimal class size in any particular case may be small, large, or even the maximum possible class size.\(^\text{22}\)

To make this conceptual framework operational, one must understand when marginal benefits and marginal costs are smaller or greater in a specific case. The problem is that assigning precise numerical values to the marginal cost and marginal benefit of adding any particular claimant is infeasible. It is, however, realistic to discuss the different qualities that a case might have that could impact the marginal benefits and marginal costs of expanding the class. For example, optimal class size will tend to be smaller for a group of potential class members for which one expects the marginal benefits of increasing class size to be low or falling rapidly, or for which one expects the

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\(^{22}\) See Betson & Tidmarsh, supra note 10, at 555–63.
marginal costs to be high or rapidly rising. The following Part discusses some factors that could be considered in making judgments about the relative marginal costs and benefits of increasing class size in a given case.

A. Marginal Benefit Factors

This Part focuses on three benefits of including a potential class member in the class. This is not intended to be an exhaustive list, but rather a set of factors that may often be relevant to the question of the scope or scale of a class definition.

1. Economies of Scale

A fundamental rationale for class actions is that they take advantage of economies of scale in the litigation of related claims. If each potential class member has to litigate on an individual basis, the costs of litigating a common issue may be duplicated in every individual case. Adding an individual to the class creates the marginal benefit of avoiding this duplicated expense. All else equal, increasing class size and decreasing the number of individual actions improves the economies of scale.

Related to the cost savings from economies of scale are arguable improvements in the quality of adjudication, given that plaintiffs—or more accurately the attorneys representing plaintiff classes—will have incentives to invest into investigating the facts and law relevant to the common issues presented in the litigation. Consequently, one can expect the results of the adjudication to be better informed.

Further, as David Rosenberg has argued, if in the absence of a class action the defendant can gain some economies of scale in preparing its defense to multiple litigations, but plaintiffs (perhaps because of high coordination costs) cannot, then the defendant will have an inherent advantage in the litigation of common issues in each individual law-

23. Note that there are alternative means, other than class certification, to control the costs of redundancy associated with individual actions that share common issues. If multiple plaintiffs are represented by the same counsel, the costs of factual investigation and legal research can be consolidated. Joinder, transfer, and multi-district litigation can reduce many of the costs of redundancy as well. See David Rosenberg, Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t, 37 HARV. J. ON LEGIS. 393, 397–99 (2000). The model of optimal class size can be understood as a model of optimal aggregation, in which smaller “class” sizes are accomplished through mechanisms other than class certification. See supra note 12.

24. This is true at least in circumstances in which individual suits would be brought. For situations in which individual suits are not feasible, see infra Part III.A.2.
suit. Adding plaintiffs to a class reduces this advantage, up to the point that the entire potential class is litigating as a single unit.

2. Solving the “NEV Problem” for High-Merit, Low-Stakes Cases

In some cases, adding a person to a class creates an opportunity for redress of a meritorious claim that could not, as a practical matter, be brought on an individual basis. This is the case in the context of the so-called “negative expected value” or “NEV” lawsuit—an individual lawsuit for which the plaintiff’s cost of litigating the claim is greater than her expected recovery. For an individual who has a claim that (by assumption) is meritorious, but the amount of damages she can recover is relatively small (e.g., hundreds or a few thousand dollars), it is not economically sensible to file suit individually. Consequently, the expected recovery from her claim is a marginal benefit of adding her to the class because the alternative is no redress at all. Conversely, an individual whose meritorious claim is likely to garner a large award (e.g., millions of dollars) has a viable alternative to class litigation; her expected recovery is not a marginal benefit of adding her to the class.

Thus, economies of scale are most important when cases will be litigated individually and will involve high fixed costs. Conversely, the NEV problem arises when meritorious cases will not be individually litigated.

3. Consistency and Deterrence

As the size of the class grows, the likelihood that one has included all of the potential class members who were injured by the alleged wrongdoing of the defendant increases, which has at least two benefits. First, one might argue that it is important to treat similarly situated parties consistently. This desire for consistency may be grounded in inchoate intuitions about fairness or in a more explicit set of beliefs

26. Id. at 397–98. Strictly speaking, equality in investment should be achieved once one adds all of the potential plaintiffs who would have litigated individually. Rosenberg focused on mass torts and did not consider classes involving claims that would not be brought on an individual basis. See id. at 395.
27. “Expected recovery” refers to the damages sought, discounted by the probability of prevailing.
28. Catherine Fisk & Erwin Chemerinsky, The Failing Faith in Class Actions, 7 DUKE J. CONST. L. & PUB. POL’Y 73, 74-75 (2011) (“[L]arge entities have incentives to engage in widespread but small violations of law because their lawyers know that most people cannot afford to sue over a small transgression.”). Some scholars argue that this concern is especially serious in the context of employment discrimination claims. See Melissa Hart, Will Employment Discrimination Class Actions Survive?, 37 AKRON L. REV. 813, 841–42 (2004).
about how the civil justice system should operate. By making all of the parties injured by the defendant subject to the same judgment, the class action may further this end. Second, adequate deterrence of wrongdoing requires that the defendant be answerable for the full amount of harm that it has caused. The class action that fails to include all of the victims of the wrongdoing may be insufficient to deter future wrongdoing, especially if those individuals excluded from the class will not file individual suits.

B. Marginal Cost Factors

One must also consider costs when evaluating optimal class size. Each of the costs of including a potential class member in the class is, in some sense, a mirror image of the corresponding benefit listed above.

1. Diseconomies of Scale: Administrative and Agency Costs

Some aspects of class litigation are more expensive than individual litigation. For example, many class actions require notice to class members. The cost of notice is a marginal cost of increasing the size of the class. This marginal cost is likely to rise as the class grows; the plaintiffs must give notice to ever more remote and harder-to-identify class members.

The “agency costs” associated with the attorney-client relationship also rise with class size. The larger the class, the less incentive any individual class member has to expend effort monitoring class counsel. This is the familiar free-rider problem, and it gives the class counsel the ability to represent the class in ways that may serve the counsel’s interests at the expense of the class. Concern about this agency problem has motivated a number of unique procedural features in class action litigation, such as court-appointed class counsel and court approval of class settlements. These measures mitigate the potential agency costs of larger classes, but these mechanisms are themselves costly.

2. Creating an “NEV Problem” for Low-Merit, High-Stakes Cases

The NEV problem applies not only to cases with high merit and low stakes, but also to cases with low merit and high stakes. The differ-

29. See FED. R. CIV. P. 23(c)(2).
30. See FED. R. CIV. P. 23(e), (g).
31. See Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 DUKE L.J. 1251, 1295–96 (2002) (discussing how low-merit cases that are not viable on an individual basis may have settlement value when aggregated); see also Fisk & Chemerinsky, supra
ence is that, as a normative matter, it is probably a good thing that the NEV problem discourages the filing of low-merit cases. Thus, adding a person with a low-merit, high-stakes claim to a class action may make a claim viable that ought not to be. Further, to increase class size, one has to include individuals with progressively weaker claims, and thus the marginal cost of the NEV problem is likely to rise with class size.

3. Inconsistency and Underdeterrence

As the size of the class grows, the likelihood that one has included individuals who do not properly belong to the class increases. Thus, the harms caused by potential overinclusion are essentially the mirror image of the benefits of including the individuals who properly belong to the class. First, dissimilar individuals are treated similarly. Second, by forcing defendants to risk liability to individuals that they did not harm, larger classes undermine the effectiveness of deterrence, which depends on potential wrongdoers perceiving greater liability if they break the law than if they comply with it.\(^{32}\)

C. Applying the Model to Wal-Mart v. Dukes

To illustrate the application of these factors, I turn my attention to the subject of this Symposium: *Wal-Mart v. Dukes* and its class of 1.5 million members.

1. Economies and Diseconomies of Scale

There is no doubt that a class of 1.5 million members increases the potential for economies of scale. However, the nature of the substantive claims in *Dukes* was such that many aspects of the litigation would not have the benefit of economies of scale. For example, as the *Dukes* Court pointed out, questions of statutory defenses necessarily have to be addressed on an individual basis.\(^{33}\) Further, with such a large class, agency costs are also likely to be significant. The fact that many relevant issues are individualized exacerbates agency costs because attorneys tasked with representing the class as a whole will be placed in the difficult position of managing intraclass conflicts with respect to issues like statutory defenses, injunctive relief, and dam-

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ages. Further, as noted below, few of the potential class members have claims that would be economically feasible to bring on an individual basis. In this case, while a class action could solve a NEV problem, it would not save the costs of litigating common issues in individual litigation. Consequently, this factor points away from a large class size being optimal.

2. The NEV Problem(s)

This factor is more ambiguous. Dukes may present a NEV problem due to low stakes, which cuts in favor of larger class size. If the alleged pay differentials between what the plaintiffs were paid and what they would have been paid are small, damages may be low enough that the class device is the only meaningful mechanism for relief. While the demand for backpay suggests that individual damages could be large, the plaintiffs alleged that this was not the case. In their brief to the Supreme Court, the plaintiffs argued, "Significantly, individual class claims for back pay in this case are likely to be relatively small, amounting to an average of $1,100 per year for hourly workers. Prosecution of such claims individually would be largely impracticable ..."34

Notably, though, the plaintiffs requested punitive damages. Perhaps the prospect of collecting such damages would be sufficient to induce individual suits. Assuming that these are high-merit cases, it is possible, though perhaps unlikely, that individual suits would be viable for at least some class members.

Complicating the analysis is the fact that this case may also have presented a NEV problem due to low merit. The plaintiffs' legal theory was muddled,35 and it was not clear how the allegations of a company-wide policy of decentralized decision making would, if proven, have done anything to further any individual plaintiff's claim to damages.36 As such, while the low stakes may counsel in favor of ensuring

35. As Deborah Weiss noted:
   First, the idea of a "conduit of infection" was a metaphor, not a legal theory. Plaintiffs nominally advanced both a disparate impact and a disparate treatment claim but made no serious effort to situate their conduit theory within these traditional legal categories.
   Second, to the extent that a specific claim could be discerned, it was inconsistent with widespread notions of what is fair in structural cases.
36. Matt Rozen argues that Dukes should stand for the rule that a class complaint cannot create a "common question" out of a disputed issue that would not be required to be proven in the context of an individual action. In Dukes, even if a company-wide policy of delegated discre-
that a class is large enough to be economically viable, the *Dukes* plaintiffs' peculiar theory of liability suggests that the optimal class size may not be much larger than that. A class of hundreds or thousands could make the action economically viable. However, a class of 1.5 million members would risk exacerbating, rather than ameliorating, a NEV problem.

3. **Consistency Across Cases**

The fact that a central pillar of the *Dukes* plaintiffs' legal theory was that Wal-Mart had a policy of decentralized decision making reduces concerns about consistency across individuals. Any concerns that we may have about like people being treated alike are not triggered by a claim that presupposes that class members with different supervisors would have been treated differently.

So, too, does the allegation of decentralized decision making weaken concerns that smaller class size will weaken deterrence. The argument that maximum class size is necessary for optimal investment in developing the plaintiffs' case rests on the assumption of a well-defined class of people who were in fact injured if the plaintiffs' theory of the case is true. This is simply not the case in *Dukes*; there is little doubt that some share of the 1.5 million class members were not, in fact, discriminated against, even if there is little doubt that a certain share was.

Putting these three sets of factors together suggests a few conclusions. A class of maximum size is not optimal; however, a smaller class size may be. The class size should be large enough so that individual claims—averaging perhaps $1,100 per class member, plus punitive damages—become viable when aggregated. Further, the class should be structured so as to avoid the agency problems associated

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37. As noted above, this argument as developed by David Rosenberg does not address class actions in which individual actions have negative expected value. See Rosenberg, supra note 23, at 393–95. Class members who have no entitlement to relief even if the plaintiffs' theory is true certainly qualify as claimants whose individual actions would have negative expected value.

38. Keep in mind that this discussion does not address the factors, like commonality, that Rule 23 by its terms requires before a class of any size is certified. The factors related to certification generally also relate to optimal class size, though. For example, agency costs associated with larger classes are highly relevant to the adequacy and typicality prongs of the Rule 23(a) analysis.
with including plaintiffs who are subject to distinct supervisory chains of command, or with interest in different types of relief. Taken together, classes based on stores or groups of stores, and limited only to former or only to current employees, may be optimal. Because the class certified by the district court in *Dukes* clearly failed to account for these issues, the class exceeded its optimal size.

IV. *Shady Grove* and *Dukes*

This Part turns from practical considerations to doctrinal ones. Framing the class certification decision in terms of optimal class size is helpful in resolving a seemingly unrelated wrinkle in appellate procedure that makes an appearance in *Dukes*.

There are two aspects of the Court’s appellate review in *Dukes* that may appear puzzling. First is the majority opinion’s inattention to the standard of review. It is widely recognized that the class certification decision is committed to the discretion of the district court and is reviewed on appeal for abuse of discretion. The dissent in *Dukes* recognized this standard of review, but the majority opinion ignored it. Thus, Catherine Fisk and Erwin Chemerinsky have chided the *Dukes* Court for “[i]gning the abuse of discretion standard of review normally applicable to class certification decisions” in rejecting the district court’s class certification findings and judgment. Instead, Fisk and Chemerinsky argue that “Justice Scalia substituted his own findings of fact, granted no deference to the lower courts, and effectively engaged in a *de novo* review.”

Second is the majority’s decision to address commonality under Rule 23(a)(2). That decision is peculiar given the Court’s unanimous agreement that, under Rule 23(b)(2), certification is improper “where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.”

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39. *See, e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004); Armstrong v. Davis, 275 F.3d 849, 871 n.28 (9th Cir. 2001) (noting the norm that the district court has “broad discretion” to certify class); Hartman v. Duffy, 19 F.3d 1459, 1471 (D.C. Cir. 1994); *see also* Pickens, *supra* note 5, at 80.


41. “Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court’s finding of commonality.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547, 2562 (2011) (Ginsburg, J., concurring in part and dissenting in part).


43. *Id.* at 84.

44. *Dukes*, 131 S. Ct. at 2557.
The Court’s opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* helps explain these puzzling aspects of *Dukes*. Although *Shady Grove* is best known as the Supreme Court’s latest word on the so-called “Erie Doctrine,” it also serves as a signpost in the Supreme Court’s class action jurisprudence. In fact, the irony of *Shady Grove* is that its discussion of the *Erie* Doctrine fails to command a majority of the Court, and thus is not binding precedent. The only legal analysis with precedential value in *Shady Grove* is the discussion of class action rules.

Writing for the court, Justice Scalia discussed the specific language of Rule 23:

Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court “to certify a class in each and every case” where the Rule’s criteria are met. But that is exactly what Rule 23 does: It says that if the prescribed preconditions are satisfied “[a] class action *may be maintained*”—not “a class action *may be permitted*.” Courts do not maintain actions; litigants do. The discretion suggested by Rule 23’s “may” is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 automatically applies “in all civil actions and proceedings in the United States district courts.”

Presumably, the Court’s motivation in writing this passage was to quickly dispose of an argument it found weak. But the Court’s language does more than this. To say that the phrase “a class action may be maintained” gives discretion to the plaintiff but not to the district court seems to interpret the language of Rule 23 to make certification mandatory, so long as the listed factors are satisfied. This seems to be in tension with the notion that the class certification decision is committed to the discretion of the district court.

This tension is relieved by the fact that at least some of the requirements for class certification—numerosity, adequacy, superiority, and so on—seem to require not only the application of law to fact, but an exercise of judgment on the part of the court about whether those factors are met in a given case. Thus, for example, a ruling that joinder is practicable in a case with a small putative class requires not only conclusions of law (subject to *de novo* review) and findings of fact (subject to clear error review), but an exercise of discretionary judg-

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46. Only Parts I and II-A of Justice Scalia’s opinion speak for the Court, but its discussion of the *Erie* Doctrine begins in Part II-B. See id. at 1434, 1442.
47. Id. at 1438 (citations omitted).
48. Allstate argued that Rule 23 addressed only whether a claim is in fact “certifiable” rather than whether it is “eligible” for certification. See id.
ment about practicability (subject to abuse of discretion review). Nonetheless, discretion to say the requirements for class certification are not met and discretion to deny class certification if the requirements are met are functionally identical. And the passage from Shady Grove quoted above states that it is the litigant, not the court, who has discretion under Rule 23.

If the Dukes majority was, in fact, reluctant to give district courts discretion to deny class certification, this helps explain why the majority was eager to address Rule 23(a)(2), despite the Court’s unanimous ruling on the Rule 23(b)(2) issues. If a district court has no discretion to refuse to certify a Rule 23(b)(2) class action, so long as the prerequisites in the text of Rule 23(a) are met, then any court (including the Supreme Court) would feel pressure to define the Rule’s prerequisites more strictly, or at least in a manner that requires courts to make pragmatic judgments about the feasibility and desirability of a class action—judgments that are explicitly demanded only by the predominance and superiority requirements of Rule 23(b)(3).

Viewed in this light, it is no surprise that the Dukes majority drew criticism from the dissent for doing exactly this. In dissent, Justice Ginsburg noted, “The Court’s emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions ‘predominate’ over individual issues. And by asking whether the individual differences ‘impede’ common adjudication, the Court duplicates 23(b)(3)’s question whether ‘a class action is superior’ to other modes of adjudication.”49

Nonetheless, the puzzle remains; the majority’s discomfort with investing district courts with discretion to certify classes runs up against decades of class action practice, as well as the practice since Shady Grove and Dukes.50 Most jarringly, it contradicts the case that the Shady Grove majority cited in the passage quoted above, Califano v. Yamasaki.51 In that case, the Court reviewed a dispute over the certification of a nationwide class under Rule 23(b)(2) and concluded: “The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the dis-

49. Dukes, 131 S. Ct. at 2566 (Ginsburg, J., concurring in part and dissenting in part) (citation omitted).
50. See, e.g., Prof’l Firefighters Assn. of Omaha, Local 385 v. Zalewski, 678 F.3d 640, 645 (8th Cir. 2012) (“The district court is accorded broad discretion to decide whether certification is appropriate, and we will reverse only for abuse of that discretion.”); In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 678 F.3d 409, 416 (6th Cir. 2012) (“The district court has broad discretion to decide whether to certify a class. . . . We review class certification for an abuse of discretion.”) (citation omitted)).
trict court. On the facts of this case, we cannot conclude that the District Court . . . abused that discretion . . . .”

One way to reconcile the seemingly absolutist attitude toward Rule 23 in *Shady Grove* and *Dukes* with the continuing (and otherwise uncontroversial) practice of abuse of discretion review is to view class certification as involving not only the decision to certify or not to certify a class, but also the decision to determine what class size is most appropriate. One can be faithful to the text of Rule 23 as interpreted by *Shady Grove* by accepting the proposition that the district court has no discretion not to certify a class if the requirements of Rule 23 are met, while still recognizing that a district court has discretion in setting the proper size of the class that gets certified. In this respect, it may be worth noting that while Rule 23’s language that a “class action *may be maintained*” may imply that discretion rests in the plaintiff to bring, or not to bring, an action on a class basis, the Rule does not imply that the plaintiff has discretion to define the size or scope of the class. This gloss on Rule 23 also has the benefit of confirming meaningful appellate review of the judgment that the elements of Rule 23 have been satisfied, while allowing district court judges to retain some discretion to make pragmatic decisions about the allocation of judicial and societal resources between individual and aggregate litigation.

V. Conclusion

In some sense, the class in *Dukes* was “too big.” Studying what made that class too sprawling to be certified lends some insight into the question of how to better tailor the size of classes to the justifications for class treatment. And by framing the class certification decision in terms of optimal class size, one can gain some insight into other aspects of *Dukes* and its not-so-distant cousin, *Shady Grove v. Allstate*.

52. Id. at 703.
53. See *Shady Grove*, 130 S. Ct. at 1438.
54. The Rule appears to favor the district court over the plaintiff on this point. Rule 23(c)(1)(B) states, “An order that certifies a class action must define the class and the class claims,” which may vest the district court, not the plaintiff, with the discretion to set the scope of the class. FED. R. CIV. P. 23(c)(1)(B). More helpfully, Rule 23(c)(4) (“Particular Issues”) and Rule 23(c)(5) (“Subclasses”) both begin with “When appropriate,” which suggests an appeal to sound judgment of the district court, rather than solely to the discretion of the plaintiff, in cabining the scope of a class. FED. R. CIV. P. 23(c)(4)-(5).