Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-Dukes?

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I. INTRODUCTION

“[P]rocedure is power, whether in the hands of lawyers or judges. . . . Substantive rights, including constitutional rights, are worth no more than the procedural mechanisms available for their realization and protection.”

Procedural rules often have enormous influence on the outcome of a case and can effectively deny litigants the opportunity of reaching the merits. Nowhere, perhaps, is this more evident than with class certifications, which require that plaintiffs seeking to sue as a group explicitly obtain approval from a court before their joint claims can go forward. Courts have long recognized that denial of a class can be the “death knell” for a suit because it decreases plaintiffs’ incentives to sue. On the other hand, the granting of class certification in some cases may also raise the stakes so high that defendants feel irresistible pressure to settle.

The potential consequences of low class certification standards are illustrated by a long line of often conflicting cases, but especially by the Supreme Court’s recent decision, Wal-Mart Stores, Inc. v. Dukes. The Court reversed the Ninth Circuit’s certification of a

2. Id. at 1293.
3. See Chamberlan v. Ford Motor Co., 402 F.3d 952, 957 (9th Cir. 2005); In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 102 (D.C. Cir. 2002); Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999) (“For some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff’s claim is too small to justify the expense of litigation.”).
4. Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (“[C]lass certification creates insurmountable pressure on defendants to settle. . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.”).
proposed class represented by six female plaintiffs, who sued for billions of dollars and alleged that various Wal-Mart employees had engaged in sex discrimination.\footnote{Id. at 577, 618.} In an opinion written by Justice Scalia, the Court held that the plaintiffs had failed to present “significant proof” that they had met the requirement of commonality, which is a prerequisite for certification.\footnote{Dukes, 131 S. Ct. at 2553–54.}

Even though \textit{Dukes} has been laid to rest by the High Court, lower courts will likely continue to disagree over the level of proof required for certification because of the factual complexities involved in applying standards of proof to particular cases and the limited analysis regarding “significant proof” in the opinion. While \textit{Dukes}’ holding and analysis clarify that a “significant proof” standard applies to plaintiffs seeking to certify a class based on a claim that a subjective policy of decision making resulted in discrimination, the opinion does not make clear what that standard should entail and whether or when it applies outside of a \textit{Dukes}-like context. Scholars who have advocated a high standard of proof and addressed the issue of how far a court can probe into the merits have also neglected to answer the same questions.\footnote{Many scholars advocate a rigorous analysis of the certification requirements but do not detail what such an inquiry would involve or under what circumstances it should apply. See, e.g., Robert G. Bone & David S. Evans, \textit{Class Certification and the Substantive Merits}, 51 DUKE L.J. 1251, 1276 (2002); Geoffrey C. Hazard, Jr., \textit{Class Certification Based on Merits of the Claims}, 69 TENN. L. REV. 1, 3–6 (2001); Bartlett H. McGuire, \textit{The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits}, 168 F.R.D. 366, 377 (1996); Geoffrey P. Miller, \textit{Review of the Merits in Class Action Certification}, 33 HOFSTRA L. REV. 51 (2004); Seth H. Yeager, Note, \textit{In re New Motor Vehicles Canadian Export Antitrust Litigation: Examining the Requisite Levels of Inquiry into the Merits of a Case at the Class Certification Stage}, 34 DEL. J. CORP. L. 563 (2009); see also Richard A. Nagareda, \textit{Class Certification in the Age of Aggregate Proof}, 84 N.Y.U. L. REV. 97, 100 n.11 (2009) (noting that Geoffrey Miller’s argument for inquiring into the merits has largely been adopted by the courts). A few articles have attempted to describe some aspects of what such an inquiry might look like, but none have set forth a comprehensive standard. See Elizabeth Chamblee Burch, \textit{Introduction: Dukes v. Wal-Mart Stores, Inc.}, 63 VAND. L. REV. EN BANC 91 (2010); Heather P. Scribner, \textit{Rigorous Analysis of the Class Certification Expert: The Roles of Daubert and the Defendant’s Proof}, 28 REV. LITIG. 71 (2008); L. Elizabeth Chamblee, Comment, \textit{Between “Merit Inquiry” and “Rigorous Analysis”: Using Daubert to Navigate the Gray Areas of Federal Class Action Certification}, 31 FLA. ST. U. L. REV. 1041, 1042 (2004).} Thus, this Comment adds to the existing literature by using \textit{Dukes} and some of its notable predecessors as examples to illustrate what a “significant proof” inquiry should entail and when it should be applied.
The next section of the paper, Part II, explains the requirements for class actions and provides a background on \textit{Dukes} and the “significant proof” standard. Part III outlines what a “significant proof” standard should entail; specifically, it argues that plaintiffs should be required to prove commonality and typicality by a preponderance of the evidence, that the amount of proof should increase with the size of the class, that a defendant’s objections and proof on both sides of the case should be considered, and that \textit{Daubert} standards should apply. Part IV argues that a “significant proof” standard should apply outside of the \textit{Dukes} context to cases that share elements similar to those present in \textit{Dukes}. Part V concludes.

\textbf{II. RELEVANT BACKGROUND ON CLASS CERTIFICATION AND \textit{DUKES}}

\textit{A. Requirements for Certification}

The Federal Rules of Civil Procedure provide for three types of class actions, each with its own specific requirements.\footnote{FED. R. CIV. P. 23.} But no matter which type of class action plaintiffs seek, all class action suits must satisfy the following “prerequisites”: “(1) the class is so numerous that joinder of all members is impracticable” (numerosity); “(2) there are questions of law or fact common to the class” (commonality); “(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class” (typicality); and “(4) the representative parties will fairly and adequately protect the interests of the class” (representativeness).\footnote{FED. R. CIV. P. 23(a).}

This Comment discusses the application of the “significant proof” standard to the requirements of commonality and typicality, as these two certification requirements are often the most difficult for plaintiffs to meet. Courts often discuss these requirements together, noting that they “tend to merge” because “[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class 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.”

Although the Supreme Court found it unnecessary to address the “typicality” requirement in *Dukes* and held only that “significant proof” was necessary for the commonality requirement, in light of their similarities it seems that a high standard of proof should apply to both commonality and typicality.

Moreover, as Justice Scalia noted, the commonality and typicality requirements help determine in part whether “maintenance of a class is economical.” One of the key justifications for permitting class actions is that they promote judicial economy, as it is often efficient to hear a large number of similar claims at once. However, the need to fairly and individually assess claims to discover the extent and nature of any possible liability may outweigh the need for judicial economy. When a certification standard is too easy to meet, class actions may actually encourage lawsuits instead of promoting judicial economy. Plaintiffs may bring suit even when their claims are weak if they perceive that they are able to certify a broad class and settle without ever having to prove the merits of their claims. Ensuring the Rule 23 certification requirements of commonality and typicality are actually met is thus critical to avoid such outcomes.

**B. Facts of Dukes and Prior Rulings**

The plaintiffs in *Dukes*, under Rule 23(b)(2) of the Federal Rules of Civil Procedure, sought to certify a nationwide class of approximately 1.5 million female employees in 3,400 stores in 41 regions. They claimed that in comparison with male employees, female Wal-Mart employees received promotions less frequently, waited longer for promotions to management positions, and earned

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13. *Id.* at 2551.

14. *Id.* at 2551 n.5 (quoting *Falcon*, 457 U.S. at 157 n.13).


16. Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (“Class certification magnifies and strengthens the number of unmeritorious claims.”).

17. *Dukes*, 131 S. Ct. at 2547.

lower pay, even where they had higher performance ratings and levels of seniority. The plaintiffs further asserted that a decentralized structure of subjective decision making and a strong “corporate culture” facilitated a companywide policy of discrimination that “infect[ed], perhaps subconsciously the discretionary decisionmaking” of every manager at Wal-Mart “thereby making every woman at the company the victim of one common discriminatory practice.” The proposed class included all female employees, ranging from part-time workers to salaried managers, and the women sought billions of dollars in back pay and punitive damages. Some asserted that the class would have been the largest in United States history if certified.

The district court certified the class, and on appeal, the Ninth Circuit affirmed the lower court’s certification, holding that the requirements for commonality and typicality had been met. The Ninth Circuit majority opinion concluded that the plaintiffs had provided “substantial evidence of Wal-Mart’s centralized firm-wide culture and policies, thus providing a nexus between the subjective decision making and the considerable statistical evidence demonstrating a pattern of lower pay and fewer promotions for female employees.” The Supreme Court granted certiorari on the issue of whether “claims for monetary relief can be certified under . . . 23(b)(2)” and also asked the parties to “brief and argue

21. Dukes, 603 F.3d at 578.
23. Dukes, 603 F.3d at 578.
24. Id. at 612–13. However, the court also held that the district court erred in certifying the claim for punitive damages under 23(b)(2) without determining whether monetary relief predominates. Id. at 621. The court remanded to allow the district court to make this determination. Id.
25. Id. at 612 (citation omitted).
the following question: ‘Whether the class certification ordered under Rule 23(b)(2) was consistent with 23(a).’” 27

In June of 2011, the Supreme Court issued its decision, Wal-Mart Stores, Inc. v. Dukes, reversing certification on two grounds: (1) on the monetary relief issue, it unanimously held that the back pay claims “were improperly certified under [Rule] 23(b)(2),” 28 and (2) the Court also held in a 5-4 split that the plaintiffs had not met the requirements for certification because they failed to establish commonality. 29 This Comment focuses on the split decision and the standard of proof for meeting the requirements for class certification under Rule 23.

C. Supreme Court Decision

Before determining whether the class met the requirements for certification, the Supreme Court first addressed a question that all courts face when making a certification decision: how far should it probe into the merits of the case? Prior to Dukes, Supreme Court guidance in this area had been murky and inconsistent. The two earlier High Court cases that addressed this question seemed contradictory. In the first case, Eisen v. Carlisle & Jacquelin, 30 the Court reasoned, “[w]e 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.” 31 However, later in General Telephone Co. of the Southwest v. Falcon, the Court concluded, without overruling Eisen, that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,” 32 and that a class “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” 33 Because of this

29. Id. at 2550–57.
31. Id. at 177.
33. Id. at 161.
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apparent contradiction, courts often struggled to reconcile these precedents and applied them inconsistently prior to *Dukes*.34 The Supreme Court resolved this “split that ha[d] existed for over two decades”35 by making clear that a court may go as far into the merits as necessary to determine whether the requirements for certification have been met. In an opinion written by Justice Scalia, the majority explained that rigorous analysis will “[f]requently” involve “some overlap with the merits of the plaintiff’s underlying claim,”36 but this “cannot be helped” as “class determination[s] generally involve[ ] considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.”37 Scalia further asserted that having to explore the merits “in order to resolve preliminary matters . . . is a familiar feature of litigation.”38 Accordingly, the Court had no problem delving into the merits under the facts of the case, reasoning that the “proof of commonality necessarily overlap[ed]” with the merits of the plaintiffs’ discrimination claim.39

After resolving the merits issue, the Supreme Court then held that the plaintiffs failed to meet the requirements for certification because they did not present “significant proof” that Wal-Mart

34. For example, the First Circuit had asserted that a court can look at the merits insofar as they touch upon certification requirements; although the certification decision should not turn into an “unwieldy trial on the merits,” courts are not to “put blinders on as to an issue simply because it implicates the merits of the case.” *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008) (quoting *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 17 (1st Cir. 2005)). In contrast, the Second Circuit held that “[t]he district court is not permitted to conduct a preliminary inquiry into the merits of the plaintiff’s case at the class certification stage.” *Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219, 231 (2d Cir. 2006), overruled in part by *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (declining to “follow the dictum in *Heerwagen* suggesting that a district judge may not weigh conflicting evidence and determine the existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits”); see *Bone & Evans*, supra note 9, at 1276 (“When a court believes it is important to probe the merits, it will make an effort to distinguish *Eisen*, if possible. On the other hand, when . . . a court wishes to avoid a careful certification analysis—because, for example, the evidence is complex or the benefits of class treatment are perceived to be substantial—it need only cite *Eisen* to support its result.”).


37. Id. at 2552 (quoting *Falcon*, 457 U.S. at 160).

38. Id.

39. Id.
“operated under a general policy of discrimination.”40 Thus, they failed to show “the existence of any common question” of law or fact.41 The Court based42 this standard on a footnote in *Falcon* stating that “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.”43

The Ninth Circuit had emphatically objected to this standard, calling it a “hypothetical” in dicta,44 and devoted a whole section of its opinion to why a “significant proof” standard is unwarranted.45 Justice Scalia, writing for the majority, rejected the lower appellate court’s analysis. He emphasized that “[t]he class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual name parties only,’”46 and asserted that “to justify a departure from that rule” all the requirements of Rule 23 must be met.47 A party seeking class certification “must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are, in fact, sufficiently numerous parties, common questions of law or fact, etc.”48

Overall, the Court’s analysis and holding make clear that a “significant proof” standard applies to plaintiffs seeking to certify a class based on a claim that a subjective policy of decision making resulted in discrimination, as this is what was required in *Falcon*.49 But the opinion does not make clear what the “significant proof” standard is, or whether it should apply outside the *Dukes* context.

40. *Id.* at 2553.
41. *Id.* at 2556–57.
42. The “significant proof” standard also hearkens back to Judge Ikuta’s dissent at the Ninth Circuit. *See Dukes v. Wal-Mart Stores*, 603 F.3d 571, 632–33 (9th Cir. 2010) (Ikuta, J., dissenting), rev’d, 131 S. Ct. 2541 (2011).
44. *Dukes*, 603 F.3d at 594–95.
45. *Id.*
46. *Dukes*, 131 S. Ct. at 2550 (quoting Califano v. Yamasaki, 442 U.S. 682, 700–701 (1979)).
47. *Id.* (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)).
48. *Id.* at 2551.
49. *Id.* at 2553.
III. WHAT A “SIGNIFICANT PROOF” STANDARD SHOULD ENTAIL

This Comment sets forth some suggestions as to what a “significant proof” standard ought to include. This Part proceeds, first, by discussing in detail the Supreme Court’s analysis of the plaintiffs’ evidence in *Dukes* to glean any helpful indicia related to the “significant proof” standard. Then, to recommend a more detailed, uniform standard, more factors will be derived from what other circuits have done.

A. The Supreme Court’s Certification Analysis in *Dukes*

The Supreme Court did not provide detail as to what a “significant proof” standard should entail specifically, but its rejection of the proof that the plaintiffs offered provides some indication of what should be required. First, the Court held that the sociological expert testimony presented using social framework analysis was “worlds away” from the “significant proof” required to show that Wal-Mart had a general policy of discrimination.50 The sociologist had testified that Wal-Mart “has a ‘strong corporate culture,’ that makes it ‘vulnerable to gender bias,’” but could not estimate what percent of employment decisions may have been based on discrimination.51 This seems to indicate that “significant proof” requires that experts be held to a high standard, and that a court will not accept junk science, bald allegations, or even rough conclusions based on limited evidence. Further, although not reaching the issue, the Court also signaled that the *Daubert* standard for admitting expert testimony52 should apply during the certification stage.53 While the district court had concluded that “*Daubert* did not apply to expert testimony at the certification stage,” Justice Scalia stated that he “doubt[ed] that is so.”54

Second, the Court rejected the statistical evidence showing pay and promotion disparities, as well as anecdotal accounts of

50. *Id.* at 2554.
51. *Id.* at 2553 (internal citations omitted) (explaining that the expert could not say whether .5 percent or 95 percent of decisions were based on discrimination).
52. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (requiring the judge to act as a gatekeeper for admitting scientific evidence by ensuring the evidence is “relevant to the task at hand” and has a “reliable foundation,” meaning it is based on sound “scientifically valid principles” and methodology).
53. *Id.* at 2553–54.
54. *Id.*
discrimination, asserting that such evidence “falls well short” of showing that “all managers would exercise their discretion in a common way.” The statistical evidence consisted of two regression studies. One done on the regional level showed gender disparity when comparing the number of women promoted within the pool of those who could be promoted with male employees; the other showed that Wal-Mart promoted a lower percentage of women when compared with other national retailers. The Court rejected this analysis, explaining that showing disparity at the regional and national level is not sufficient to “establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.” The opinion further explained that “[e]ven if” the evidence had established a pattern that differs from other national promotion and pay figures in each of Wal-Mart’s stores it “would still not demonstrate that commonality of issue exists” because the disparity could be based on many different reasons, such as women being unavailable where Wal-Mart stores are located, few women being interested in Wal-Mart jobs, few women being qualified, etc.

Thus, the Court rejected the statistics and studies provided by the plaintiffs because they did not sufficiently support the plaintiffs’ specific theory that a policy of subjective decision making resulted in widespread discrimination across multiple regions and Wal-Mart stores. On a broader level, the implications for future class actions may be that commonality must be adequately proven, not inferred using weak or circumstantial evidence. As noted earlier, the Court reasoned that “a party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are, in fact . . . common questions of law or fact.”

The Court also concluded that plaintiffs’ anecdotal evidence “suffers from the same defects” as the statistical evidence because 120 affidavits compared to the potential 1.5 million proposed members of the class “is too weak to raise any inference that all the

55. Id. at 2555.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id. at 2551.
individual, discretionary personnel decisions are discriminatory.”

The Court compared the evidence in *Dukes* with a prior case, *Teamsters v. United States*, in which the plaintiff provided 40 accounts of discrimination for a class of 334 alleging discrimination. Scalia explained that this represents an anecdote for one out of every eight members of that class, while the plaintiffs in *Dukes* offered one for every 12,500 members. Although it seems unlikely that the Court is looking for a specific amount of evidence, statistical studies, or ratio of anecdotes to class members, the opinion does indicate that the larger the proposed class is, the more evidence will be required to adequately show that commonality and typicality exist among the class members.

**B. What the Standard of Proof Should Entail**

Based on both the *Dukes* opinion and various circuit court decisions, this Comment recommends that a “significant proof” standard should entail the following: the amount of proof should increase with the size of the class, proof on both sides of the case should be considered, the defendant’s criticisms of the plaintiff’s proof should be taken into account, and the *Daubert* standard should apply. In sum, a court should probe as far into the merits as necessary to conclude that the certification requirements have been met by a preponderance of the evidence, with the caveat that any determination involving the merits of the case should not influence the court’s final decision but only apply to the certification inquiry.

1. **Nature of the evidence required**

“Significant proof” should require that plaintiffs actually prove that they meet the requirements of commonality and typicality by

61. *Id.* at 2556.
62. *Id.*
63. *Id.*
64. This limitation is necessary because when courts assess the merits at the certification stage the safeguards that are usually present at trial are absent. A few academics have argued that, because of the substantial policy implications of granting certification and its influence on the ultimate outcome of the case, a court should do a full inquiry into the merits—including issues not related to the certification requirements. See, e.g., Bone & Evans, *supra* note 9, at 1327–29; Hazard, *supra* note 9; McGuire, *supra* note 9, at 374–76. However, similar to the case law and the Supreme Court’s decision in *Dukes*, 131 S. Ct. at 2551–52, this Comment argues that an inquiry into the merits should be limited strictly to what is necessary to ensure the requirements for certification have been met.
presenting sufficient evidence. This proof can include statistical
evidence and expert testimony as well as direct evidence such as
affidavits and testimonies from class members. Both direct and
indirect types of evidence should be required on a sliding scale,
depending on the quality and quantity of the evidence. For example,
in *Dukes* this required, as the Supreme Court ruled, sufficient
evidence to prove a pattern or practice of discrimination. Since the
expert testimony and statistical evidence submitted was weak in
*Dukes*, a substantial number of affidavits relative to the size of the
class was required. If, instead, there had been strong statistical
proof that had not been significantly discredited, then only a few
affidavits may have been necessary.

Overall, the amount of proof required (whether direct or
indirect) should also increase with the size of the class. This was
illustrated by the Supreme Court’s criticism of the number of
affidavits that the plaintiffs offered relative to the proposed class size
in *Dukes*. Furthermore, prior to *Dukes*, other courts had recognized
that the size of the class matters because of the pressure to settle that
a large class may create and because of the difficulty of proving
commonality and typicality in such a case. For example, the Third
Circuit explained that “the unwarranted pressure” that the “size of
the class and number of claims” may create is “a factor we weigh in
our certification calculus.” The very feature that makes these
actions efficient (aggregating claims for adjudication) places
substantial settlement pressure on companies, which means courts
typically will never have the opportunity of reaching the merits of
these cases. As one scholar explains, encouraging large class actions
“does nothing to advance judicial efficiency. Rather, it simply creates
a gigantically burdensome and threatening legal weapon.” To
prevent these negative effects, at the very least, the amount of proof
required ought to increase with the size of the class.

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65. See supra Part III.A.
66. See supra Part III.A. The Court implied that there must be a reasonable number of
 anecdotes relative to the size of the class (such as one to every ten).
 Cir. 2001).
68. This seems true of many types of class actions and not just those in the employment
discrimination context.
69. Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for
2. Rigorous analysis: ensuring that proof is, in fact, significant

Another component of the “significant proof” standard is that the evidence supporting certification must survive “rigorous analysis,”70 and thus any legal or factual disputes related to the prerequisites for certification should be resolved—even if it requires delving deeply into the merits.71 Courts should not take the plaintiffs’ claims at face value because Rule 23 is more than “a mere pleading standard.”72 Instead, courts should consider both the plaintiffs’ and defendants’ evidence, and respond to any objections the defendants may have to the plaintiffs’ evidence. Only after such a process should a court decide if commonality and typicality exist by a preponderance of the evidence.

The Third Circuit has adopted a similar method, asserting that the court should “make findings that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties.”73 Similarly, the Seventh Circuit has held that the “district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification.”74 And the Second Circuit has noted that “[a] district judge is to assess all of the relevant evidence admitted at the class certification stage to determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.”75

For example, in contrast to the Ninth Circuit, the Supreme Court in Dukes seemed to consider Wal-Mart’s objections to the plaintiffs’ claims in its analysis of the plaintiffs’ sociological expert testimony. In its appeal to the Ninth Circuit, Wal-Mart had argued that the sociological expert’s testimony was “vague” and “imprecise”

70. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)). Although courts frequently assert that “rigorous analysis” should be performed, none have really attempted to define what this should entail.
71. Burch, supra note 9, at 94–96.
72. Dukes, 131 S. Ct. at 2551.
74. Am. Honda Motor Co., Inc. v. Allen, 600 F.3d 813, 817 (7th Cir. 2010); see also Szabo v. Bridgeport Machs., Inc, 249 F.3d 672, 676 (7th Cir. 2001) (“Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.”).
and did not prove that stereotyping occurred, especially since the plaintiffs asserted that discrimination resulted from decisions made by individuals at the store level, yet their statistical analysis was done on the regional level. While the Ninth Circuit seemed to ignore these objections, the Supreme Court took note. Although not characterizing them as Wal-Mart’s objections, the Supreme Court rejected the sociological expert testimony based on Wal-Mart’s arguments.

In addition to responding to a defendant’s objections to the plaintiff’s proof, a court should also consider any counterevidence that the defendant may offer. Although the Supreme Court did not discuss it, Wal-Mart also performed its own statistical analysis, determining that there was no statistically significant difference in hourly pay between men and women when the analysis was performed at the sub-store level (i.e., by department). The Supreme Court may not have addressed Wal-Mart’s evidence because it thought it unnecessary, as it had already found the plaintiffs’ evidence to be insufficient. Generally, however, counterevidence should be considered when making a certification decision. Courts should not avoid resolving whether there was sufficient proof to support certification by taking the plaintiff’s statistics at face value and refusing to confront the defendant’s criticisms, as the Ninth Circuit seemed to do. Evidence submitted by defendants at the certification stage should be carefully considered and addressed by the court.

When a defendant’s evidence and arguments that challenge the plaintiff’s proof are not taken into account, courts unfairly favor the plaintiff. Requiring a court to probe far enough into the merits to ensure Rule 23 requirements have actually been met helps to cabin the discretion the judge has in assessing the evidence and drives

76. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 601 (9th Cir. 2010), rev’d, 131 S. Ct. 2541 (2011)
77. Id. at 604–05.
78. See supra Part III.A.
79. Dukes, 603 F.3d at 637.
80. The Ninth Circuit concluded that it could reject Wal-Mart’s proof because Wal-Mart’s tests were not performed at the store level either. Id. at 608. However, as one of the dissenting opinions properly noted, this argument is a red herring: “[T]he quality of [Wal-Mart’s] statistics [was] not the issue […]; rather, it [was] the plaintiffs’ burden to produce significant proof of policy of discrimination.” Id. at 638 (Ikuta, J., dissenting).
81. See Newman, supra note 22, at 7.
uniformity in the certification process.\textsuperscript{82} Otherwise, a judge’s decision to certify might be unduly influenced by her bias for plaintiffs, perhaps based on her own political objectives against certain corporate interests, and the decision could succumb to the judge’s opinion of the importance of the underlying action.\textsuperscript{83} One scholar explains:

A deep and increasingly important trend in contemporary class certification disputes concerns the degree to which ostensible battles over conflicting proof on the certification question are the stalking horse for something else: underlying disputes that often have little to do with the proof or the facts and everything to do with the proper meaning of governing law.\textsuperscript{84}

Requiring the court to resolve disputes over the facts and the parties’ evidence supporting commonality and typicality (whether statistical, direct, or otherwise) restrains the court from making the certification decision on the basis of anything other than the certification requirements themselves.

3. Courts should apply Daubert prior to certification

Courts should also apply “\textit{Daubert} standards” to the expert testimony that a plaintiff offers to prove commonality and typicality.\textsuperscript{85} A “full \textit{Daubert}” analysis would require the judge to consider the defendant’s criticisms of the plaintiff’s expert’s testimony.\textsuperscript{86} As the Seventh Circuit has argued, merely accepting in full the plaintiff’s proof when there is conflicting expert testimony (as the Ninth Circuit did in \textit{Dukes}), “amounts to a delegation of judicial

\textsuperscript{82} See Armstrong v. Davis, 275 F.3d 849, 871–72 n.28 (9th Cir. 2001) (discussing the discovery that may be permitted in order to certify the class), abrogated on other grounds by \textit{Johnson v. California}, 543 U.S. 499, 504–05 (2005).

\textsuperscript{83} Bone & Evans, \textit{supra} note 9, at 1272 ("Another factor that appears to affect willingness to probe the merits has to do with the judge’s prior beliefs about the value of the class action. Judges seem more willing to overlook evidentiary weaknesses and certify a class the more strongly they believe in the importance of the class action for enforcement of the substantive law.").

\textsuperscript{84} Nagareda, \textit{supra} note 9, at 101.

\textsuperscript{85} \textit{Daubert v. Merrell Dow Pharm., Inc.}, 509 U.S. 579, 597 (1993) (requiring the judge to act as a gatekeeper for admitting scientific evidence by ensuring the evidence is “relevant to the task at hand” and has a “reliable foundation,” meaning it is based on sound scientifically valid principles and methodology).

\textsuperscript{86} See Burch, \textit{supra} note 9, at 96; Chamblee, \textit{supra} note 9, at 1042.
power to the plaintiffs, who can obtain class certification just by hiring a competent expert. 87

Despite the benefits of applying Daubert at the certification stage, the Supreme Court missed an opportunity to provide clear guidance on this matter. On the one hand, even though the Court did not reach the issue of whether Daubert applies because it found that the sociological testimony offered by plaintiffs was already insufficient, the opinion seems to signal that Daubert should apply during certification. 88 On the other hand, the Court did not explicitly overturn the Ninth Circuit’s analysis either, which indicates that Daubert does not apply.

At the Ninth Circuit, Wal-Mart challenged whether the sociologist’s expert theory was reliable and criticized his methodology, alleging that he “misrepresented aspects of the literature upon which he relied, made unsustainable extrapolations from that literature, failed to consider evidence that tended to undermine his theory, and failed to test his data.” 89 But the Ninth Circuit rejected these arguments. 90 Although claiming not to reach the question of whether Daubert applies, 91 the Ninth Circuit’s majority opinion states that Daubert does not have “exactly the same application at the class certification stage as it does . . . at trial,” 92 and instead asserts that all that is required of the expert is that he “presents enough of a basis . . . to provide a foundation for his opinions.” 93 This is because ultimate credibility of the testimony is a

87. West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002).
88. See supra Part III.A. At least one federal district court judge believes that signal was sufficiently strong to be unambiguous. See In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 2011 U.S. Dist. LEXIS 82452, at *17 (C.D. Cal. July 25, 2011) (asserting that the Supreme Court “strongly indicated” that Daubert should apply and then applying it to the case at hand).
90. Id.
91. Id. Although the Ninth Circuit majority opinion strongly suggests that Daubert does not apply pre-certification, it claimed not to actually reach the question, explaining that even if Daubert did apply it would not help Wal-Mart because Wal-Mart didn’t challenge the expert’s methodology. Id. at 602 (majority opinion). However, as explained earlier, Wal-Mart clearly took on the plaintiffs’ expert.
92. Id. at 603 n.22.
93. Id. at 602.
question of the merits, which the Ninth Circuit concluded that a court should not reach pre-certification.94

Now that the Supreme Court has held that a court may inquire into the merits as far as necessary to determine that the certification requirements are met, the better argument is that *Daubert* should fully apply at the certification stage, when relevant, to effectively implement the “significant proof” standard. Unfortunately, however, because the *Dukes* decision is not clear lower courts seem likely to disagree over the proper application of *Daubert*.

Only weeks after *Dukes*, for example, the Eight Circuit explicitly held that a “full” *Daubert* analysis need not be applied at the certification stage.95 Instead, the court affirmed the district court’s application of a “focused” or “tailored” *Daubert* analysis that “examined the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered.”96

In contrast, prior to *Dukes*, the Second,97 Fourth,98 and Fifth99 Circuits had held in various certification actions not involving employment discrimination that expert testimony may be rejected if it fails to meet strict standards. Additionally, the Third100 and Seventh101 Circuits require both a full *Daubert* analysis and, more generally, that a court resolve any factual disputes that exist between parties prior to certification. For example, the Third Circuit reasoned that “[t]he district court may be persuaded by the testimony of

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94. *Id.*
96. *Id.* at *8, *15.
97. *See Heerwagen v. Clear Channel Commc’ns.*, 435 F.3d 219, 231 (2d Cir. 2006), *overruled in part by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (declining to “follow the dictum in *Heerwagen* suggesting that a district judge may not weigh conflicting evidence and determine the existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits”); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 311, 314 n.13 (5th Cir. 2005) (affirming the district court’s decision to exclude expert testimony based on *Daubert* and noting that the court may consider “at least the reliability” of the testimony at the certification stage).
99. *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005) (“In many cases, it makes sense to consider the admissibility of the testimony of an expert proffered to establish one of the Rule 23 elements. . . . [T]he Court must first determine whether Plaintiff’s expert testimony supporting class certification is reliable.” (citations omitted)).
100. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008).
either (or neither) party’s expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.”102 Similarly, the Seventh Circuit has explicitly applied Daubert, noting that “failing to clearly resolve the issue of [the expert report’s] admissibility before certifying the class” is reversible error.103 All of these cases predate the Supreme Court’s opinion in Dukes, but Dukes should only strengthen their position due to its mandate to implement a high standard of proof. Based on the Court’s dicta in Dukes and other circuit court precedent, it seems clear that Daubert is an essential component of the “significant proof” standard.

4. Preponderance of the evidence

Altogether, the evidence should raise more than an inference of commonality or typicality and, instead, make out a case for certification by a preponderance of the evidence.104 Both the Second and Third Circuits have held that a preponderance of the evidence standard is appropriate.105 The Third Circuit, in particular, has explained that

[Class certification requires a finding that each of the requirements of 23 have been met. Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.106

102. Hydrogen Peroxide, 552 F.3d at 323.
103. Am. Honda, 600 F.3d at 817–18.
104. Richard A. Nagareda, Common Answers for Class Certification, 63 VAND. L. REV. EN BANC 149, 151 (2010) (explaining that several circuits have adopted a preponderance of the evidence standard for meeting the certification requirements).
105. See Hydrogen Peroxide, 552 F.3d at 307; Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008) (“[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23’s requirements.”); cf. Shepherd v. Babcock & Wilcox of Ohio, 2000 U.S. Dist. LEXIS 6349, at *7 n.5 (S.D. Ohio Mar. 3, 2000) (applying a preponderance of the evidence standard but also noting that “[o]ne might argue that a lesser burden, such as establishing a prima facie case that the prerequisites of Rule 23(a) have been satisfied, is applicable, particularly when, as in this litigation, the issue has been decided on papers without an evidentiary hearing having been conducted”).
106. Hydrogen Peroxide, 552 F.3d at 320 (citations omitted).
Given that the “preponderance of the evidence” standard is the “typical burden of proof in a civil suit”\textsuperscript{107} and already has been used by several federal circuits for certification, it may seem curious that the Supreme Court did not define \textit{Falcon}’s “significant proof” standard as such. One could argue that this oversight implies that “significant proof” may require \textit{more or less} than a preponderance of the evidence. However, requiring a higher standard for class certification than those same plaintiffs would later face at trial makes no sense, and requiring less proof would not be sufficient to show that commonality and typicality exist. Further, as this Comment recommends, “significant proof” involves more than just the weight of the evidence, which is what a preponderance of the evidence describes.\textsuperscript{108} It also requires a court to rely on a sufficient amount of evidence relative to the size of the class. And, in addition to allowing defendants to present their own evidence, it also requires the court to respond to any objections the defendant may have to the plaintiffs’ evidence, including applying \textit{Daubert}.

Some have argued that requiring a preponderance of the evidence, examining conflicting evidence, and assessing the reliability of expert testimony amounts to premature litigation of the case; yet this argument seems even less persuasive in light of the Supreme Court’s recent holding that examining the merits of the case is permissible to the extent necessary to assess the standards for certification.\textsuperscript{109} As the Eleventh Circuit has asserted, “before a district court determines the efficacy of class certification, it may be required to make an informed assessment of the parties’ evidence. That a trial court does so does not mean that it has erroneously ‘reached the merits’ of the litigation.”\textsuperscript{110}

\textsuperscript{107}. \textit{See} Chamblee, \textit{supra} note 9, at 1048 (noting that the preponderance of the evidence standard is the “\textit{typical burden of proof in a civil suit}”)

\textsuperscript{108}. A preponderance of the evidence is based on the greater weight or more convincing part, not the amount of evidence supporting a particular determination. \textit{See, e.g.}, WEBSTER’S NEW WORLD LAW DICTIONARY, \textit{available at} http://law.yourdictionary.com/preponderance-of-the-evidence (2010) (defining preponderance of the evidence as “[a] more convincing amount of evidence than the other side has”). For example, one reliable and knowledgeable witness may provide a preponderance of the evidence over a dozen witnesses with ambiguous testimony. However, in a class action with multiple members and claims, the amount of relevant evidence presented to show commonality and typicality is as critical as the proper weighing of it.

\textsuperscript{109}. \textit{See supra} Part II.C.

IV. WHERE THE “SIGNIFICANT PROOF” STANDARD APPLIES

In addition to failing to explain what a “significant proof” standard should entail, the Court also failed to explain to what type of cases it should be applied. While the opinion largely focused on applying the standard to employment discrimination cases where plaintiffs assert that a policy of subjective decision making resulted in discrimination, this Comment argues that a “significant proof” standard should apply to other types of cases as well.

Courts have already successfully applied high standards of proof to class actions outside of the employment discrimination context. For example, in a Tenth Circuit case, which involved an action challenging a social security program, the court cited the *Falcon* employment discrimination case after explaining that “[a] party seeking to certify a class is required to show ‘under a strict burden of proof that all requirements of [Rule] 23(a) are clearly met.’”111 Similarly, shortly after the Supreme Court’s decision in *Dukes*, a district court in New York certified a class of plaintiffs seeking to recover unpaid wages after noting that plaintiffs presented the “significant proof” necessary to bridge “the ‘conceptual gap’ between an individual’s claim of injury and the existence of a class of persons who have suffered the same injury.”112

A high level of proof in other contexts is especially compelling where a court’s certification decision can be justified by reasoning similar to that in *Dukes*. Two factors in that decision seemed essential: (1) the complexity of the claims, and (2) the diversity of the class. The “significant proof” standard should apply to all cases which are highly complex and diverse to ensure that the requirements of commonality and typicality are met. Indeed, prior to *Dukes*, some circuit courts had already applied a high standard of proof to cases sharing these same features, particularly in the antitrust and tort contexts.

Where a suit meets only one of the two factors noted above, courts may struggle in deciding whether to require a high level of proof for certification. In such cases, courts should consider whether

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111. Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir. 1988) (quoting Rex v. Owens ex rel. Okla., 585 F.2d 432, 435 (10th Cir. 1978)).

implementing a “significant proof” standard is consistent with the policy objectives of class actions.

A. Factors Relevant to Ensuring Commonality and Typicality Exist

It is inherently difficult to prove commonality and typicality where the claims are complex and the class is diverse, and, thus, a high level of proof should be required in these types of cases. Although these two factors are also related, they will be discussed separately.

1. Complexity of the claims

A high standard of proof should apply where the claims are factually complex. *Dukes* is a notable example of complexity because it is inherently difficult to prove that there are common questions of law and fact when plaintiffs assert that discrimination resulted from subjective decision making processes. By definition, such a decision making process is not objective or clearly articulated. As Justice Scalia noted in his opinion, there is a “wide gap” between an individual asserting that he suffered from discrimination and an assertion that a class of persons have suffered the same injury and that his is a typical claim of the class such that there is commonality among the claims. As Justice Scalia explained that the claims in *Dukes* were fact intensive because even if some decisions were discriminatory, other managers may have made decisions based on a wide variety of reasons. Some may

select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may

113. Accordingly, the Supreme Court has also held that a mere “policy of leaving promotion decisions to the unchecked discretion of lower-level supervisors should itself raise no inference of discriminatory conduct.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

114. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982)). *Falcon* also asserted that if substantial proof of commonality is not required, plaintiffs would be able to turn every instance of discrimination into a class action suit merely by asserting that one incident of discrimination occurred and there is “nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation.” 457 U.S. at 159. Although all discrimination, by definition, is against a class, allowing certification based on such allegations would be too expansive—which is why common questions of law or fact are required.

115. *Dukes*, 131 S. Ct. at 2554.
choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.116

These difficulties are likely why Falcon specified that the “significant proof” standard applies in cases where there are “entirely subjective decision making processes.”117

Other cases might similarly have a “wide gap” between proving an individual claim and showing that there is commonality among the class because the claims are so complex. For example, tort claims seeking damages from injuries are often highly fact-intensive and individualized. Typically, there is extensive variation in (i) how the alleged injuries were caused (including the number and type of contributing factors involved, making the claims non-uniform and/or difficult to prove); (ii) the nature and extent of injuries from defective products or services; and (iii) the resulting damages (including loss of wages and impact of any disabilities on future employment). Thus, in deciding whether to certify tort-based claims courts have required significant inquiry into the merits of the case. In a class action products liability case the Seventh Circuit asserted that “[b]efore deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23.”118 Courts may also deny certification when there is a “lack of a track record establishing the merits of the claim.”119 For example, in In re Rhone-Poulenc, the Seventh Circuit reversed the certification of a class because the defendants had won most of the previous suits involving the same products, and because certification would give too much power to the plaintiffs to pressure the defendant into settling a case that appeared to be based on a number of weak claims.120

116. Id.
117. Falcon, 457 U.S. at 159 n.15.
118. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).
119. McGuire, supra note 9, at 385.
120. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).
Reaping the Benefits of Class Certification

Since *Dukes*, although not explicitly calling it a “significant proof standard,” a Michigan state court similarly required a high level of proof in a mass environmental tort case.\(^{121}\) In that case the court refused to certify a class of 2500 plaintiffs “[b]ased on the Supreme Court’s decision in Wal-Mart” and concluded that the “plaintiff has failed to provide this Court with sufficient information” to establish commonality.\(^{122}\) The court explained that there was an “absence of a ‘glue’ to hold all of the plaintiffs’ claims together” because “whether and how the individual plaintiffs were injured” by the release of toxins depends on “highly individualized factual inquiries.”\(^{123}\)

2. Diversity of the proposed class

In addition to complexity, when a class is broad and diverse, claiming commonality and typicality is particularly problematic and a “significant proof” standard is especially necessary. As the Department of Commerce asserted in its amicus brief in *Dukes*, “diversity is the antithesis of typicality.”\(^{124}\)

The facts of *Dukes* illustrate the unique difficulties that a broad and diverse class can create. As Justice Scalia explained, quoting Chief Judge Kozinski’s dissent at the Ninth Circuit, the members of the *Dukes* class

held a multitude of different jobs, at different levels of Wal-Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.\(^{125}\)

Commonality and typicality are difficult to prove where a class is geographically broad. For example, where subjective decision making involves discretion to implement different policies, it seems unlikely that if discrimination occurred, it would occur in the same way across

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122. *Id*.
123. *Id* at 5.
125. *Dukes*, 131 S. Ct. at 2557 (quoting *Dukes v. Wal-Mart Stores, Inc.*., 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting), rev’d, 131 S. Ct. 2541 (2011)).
thousands of separate stores in varying geographic locations. As one scholar summarizes,

Usually, the stories involved in these cases have little in common with each other and each claim would require a full trial on its own merits to reach the fact-intensive questions about motivation, facts and circumstances, and adverse impact involved.\textsuperscript{126}

These types of cases are “virtually impossible” for employers to defend against because they are so “abstract” that “the battle becomes one-sided.”\textsuperscript{127}

It is also hard to prove commonality and typicality when the class includes a wide variety of employees. For example, in \textit{Bacon v. Honda of America Manufacturing, Inc.}, the court denied certification of a class of all African-American plaintiffs because the plaintiffs failed to show how managers and workers have the same interests.\textsuperscript{128} The court explained, “We view with skepticism a class that encompasses [ ] both workers and supervisors . . . . Because class members have such different jobs, we find it difficult to envisage a common policy regarding promotion that would affect them all in the same manner.”\textsuperscript{129}

Further, it is also difficult to show commonality and typicality when decision making is decentralized. Wal-Mart has a “tiered managerial system,” where individual store managers have “substantial discretion” for determining compensation, making it “virtually impossible for corporate headquarters to control decisions made at the local level.”\textsuperscript{130} As decentralized decision making involves independent decisions made by many autonomous individuals, prior to the Supreme Court ruling in \textit{Dukes} many courts already required a high level of proof in similar types of cases.\textsuperscript{131} Lower courts

\begin{thebibliography}{131}
\bibitem{126} Kirk, supra note 69, at 166.
\bibitem{127} Id.
\bibitem{128} 370 F.3d 565, 571 (6th Cir. 2004).
\bibitem{129} Id.
\bibitem{130} Lauchheimer, supra note 15, at 534.
\bibitem{131} See, e.g., Talley v. ARINC, Inc., 222 F.R.D. 260, 267 (D. Md. 2004) (denying certification where plaintiffs did “not demonstrate a sufficiently cohesive ‘pattern’ to satisfy the commonality requirement” and failed to show that “centralized decision-making” existed); Donaldson v. Microsoft Corp., 265 F.R.D. 558, 567 (W.D. Wash. 2001) (denying certification of a class of female African-American employees in varying positions in all departments of the corporation throughout the country and asserting that it “is not possible to make a finding of commonality where [a] putative class involves extensive diversity in terms of geography, job requirements, and/or managerial responsibilities”); Stastny v. S. Bell Tel. &

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recognized that establishing commonality is “particularly difficult where . . . multiple decisionmakers with significant local autonomy exist.” As Wal-Mart’s petition for certiorari asserts,

no other court has ever certified a class of employees who challenge the exercise of delegated discretion at thousands of facilities where the claim requires proof of decision making by managers in separate facilities. This is because the essential elements of the claim, including discriminatory intent and actual injury, could never be proven on a class wide basis.

Like *Dukes*, other types of cases might similarly involve a diverse proposed class with a broad geographical scope, where plaintiffs differ in their relationship with the defendant, and/or there is a concern of decentralized decision making. For example, in *Garcia v. Johanns* the D.C. Circuit applied a high standard of proof where a group of farmers asserted that the USDA discriminated in its decisions as to who qualified for agency loans. In that case, there was a similar concern of a broad class and decentralized decision making that would make it difficult to prove commonality because the program was administered through local county committees in over 2700 counties across the nation. The majority explained, “Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII *to make a significant showing* to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer’s challenged employment decisions.”


133. Petition for A Writ of Certiorari at 23 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010) (No. 10-277). That is, no one ever certified such a case until the Ninth Circuit did in *Dukes*.
134. *Garcia*, 444 F.3d at 628.
135. Id. at 629.
136. Id. at 631–32 (internal quotation marks omitted); see also *Love v. Johanns*, 439 F.3d 723, 729–30 (D.C. Cir. 2006) (quoting Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994) (“[P]laintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the
Similarly, in a torts case a federal district court noted its concerns about the broad nature of a proposed class and the diversity of the claims and circumstances. In that case, the plaintiffs alleged that they had received injuries as a result of exposure to welding fumes, and that this had occurred in many locations across the country, resulting in thousands of injuries.\textsuperscript{137} The court held that because of the “large size of the class, the differences in defendants’ conduct, and the variable working environments in which all of the welder plaintiffs performed,” the plaintiffs did not meet the requirements for certification.\textsuperscript{138} Indeed, the court concluded that the claims of the class members were so “distinct” that class certification was “inappropriate.”\textsuperscript{139}

\textbf{B. Other Relevant Policy Considerations}

While a “significant proof” standard should clearly apply where claims are complex and the class is diverse, where one of these factors is weak or absent, a court may have other reasons to apply a high standard of proof. Courts should take into account whether the critical policy considerations for class actions would still be met with a lower standard of proof and if they are not consider applying the “significant proof” standard.

Specifically, courts should factor in whether the potential damages asserted are high, the need for clarity and uniformity, and whether the class has been pursued under Rule 23(b)(2). Again, these policy considerations might influence a judge’s decision where only one of the factors outlined above are present in a case (i.e., the claims are complex but the class is not diverse, or the class is diverse but the claims are not complex).


\textsuperscript{138} Id. at 303. Class size can often influence both the diversity and complexity of the case, but is not a separate factor in deciding whether the “significant proof” standard should apply because a non-diverse, large class with simple claims that are largely uniform would not require a large amount of proof to meet the requirements of commonality and typicality. And, as explained earlier, class size is already part of the standard in that it affects how much proof is required under the “significant proof” standard. \textit{See supra} Part III.B.1 (explaining that the amount of proof required varies with the size of the class).

\textsuperscript{139} Welding Fume Prods., 245 F.R.D. at 303.
Reaping the Benefits of Class Certification

1. High damages

As a policy matter, class action suits with a potential for high damages can have significant negative implications for corporations, even if they are without merit, and thus should be carefully assessed before they are permitted to go forward. For example, allegations of back pay and punitive damages for up to 1.5 million employees would have cost Wal-Mart billions of dollars if proven. This extensive potential liability would be especially damaging to smaller corporations. Notably, the Federal Rules now permit an immediate interlocutory appeal of the certification decision “in recognition of the fact that a class certification almost always dictates the outcome in these cases—a forced settlement.”

When potential damages are high and there is significant pressure placed on the defendant to settle, some of the traditional justifications for allowing class actions are weak or absent. One of the primary rationales for class action suits is to provide a mechanism for aggregating small private claims that would likely never be brought on their own because of the costs involved in pursuing a lawsuit. In some types of cases, “[f]ailure to have a proposed class certified may sound the ‘death knell’ of a class action lawsuit as it virtually eliminates the incentive of at least some plaintiffs to pursue their claims because their potential individual damages are small relative to the costs of litigation.” However, this justification is not as persuasive where claims are large. These types of claims could likely easily be brought as individual suits, regardless of whether they are based on subjective decision making in the employment discrimination context or otherwise.

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141. Kirk, supra note 69, at 167; see also Bone & Evans, supra note 9, at 1255 (“In many cases, the mere decision to certify creates intense pressure for defendants to settle, and this settlement leverage makes the class action attractive to plaintiffs with frivolous and weak claims.”).
144. Cf. Melissa Hart, Will Employment Discrimination Class Actions Survive?, 37 AKRON
Cases in other areas of the law besides employment discrimination frequently involve high damages. For example, in tort cases where livelihood is impacted, compensatory damages will be high, and punitive damages may also be significant. In a products liability case where the defendants faced up to $25 billion dollars in damages the Seventh Circuit referred to these large class actions as “blackmail settlements.” Accordingly, as there is less concern in many cases within the tort context that denying certification would be a death knell for claims, a high level proof is often required.

Courts have also required a high level of proof in the antitrust context in part because there is significant concern that certification may impose enormous pressure on a corporation to settle, even when the claims are weak, due to the huge damages that may be imposed. One study relates that “[g]iven the uncertainties associated with the legal process, as well as the provisions for treble damages and one-way fee shifting in favor of successful plaintiffs, [antitrust] class certification often results in large settlements.” Accordingly, in antitrust suits, certification often “turns on the plaintiffs’ ability to demonstrate impact from the alleged violation using common proof on a class-wide basis.” For example, the Third Circuit held that “the decision to certify a class calls for findings by the court, not merely a ‘threshold showing’ by a party, that each requirement of Rule 23 is met.” The court also quoted Falcon in reasoning that “[c]lass certification is proper only ‘if the trial court is satisfied after a rigorous analysis, that the prerequisites’ of Rule 23 are met.” Similarly, the First Circuit has explained in an

146. See infra, Part IV.A.1.
147. Yeager, supra note 9, at 577 (allowing courts to inquire into the merits in the antitrust context could “protect defendants from unfair settlement pressure”).
148. Cremieux, Simmons & Snyder, supra note 143, at 939.
149. Id.
151. Id. at 309 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982)).
antitrust case that if the premises for the class are disputed, a court may “probe behind the pleadings” in order to assess whether the proposed class meets the legal requirements for certification.\textsuperscript{152}

When significant damages are alleged, a low certification standard for determining commonality and typicality could result in “the balance of power shifting substantially in favor of employees and against employers and [the imposition of] significant additional cost to United States businesses, employees, and consumers.”\textsuperscript{153} Or, in the antitrust context, the power would shift to inefficient competitors, and in the tort context, to disgruntled (but uninjured) consumers.

Instead, certifying classes only where evidence of commonality and typicality is relatively clear will decrease the ability of plaintiffs to impose unjustified damages on defendants. For example, in a \textit{Dukes}-type context plaintiffs who fail to certify will have to proceed individually and prove discrimination and the resulting harm from each employment practice.\textsuperscript{154} Or if applied in the torts context, plaintiffs would be forced to prove injury and damages separately if there was nothing to tie their claims together.

This would ensure that cases really are resolved based on the merits, and the result will be much more likely to be accurate and equitable. As Intel explained in the amicus brief it filed with the Supreme Court for \textit{Dukes}, when claims are brought individually, the defendant can be assured that, on average, the correct result will occur because errors will be distributed across cases.\textsuperscript{155} However, “[i]n a class action, the defendant is forced to gamble all at once against thousands or even millions of opponents. . . . Because the price of a single error (however remote the prospect) could be [millions or billions] . . . [t]he only rational strategy is to settle.”\textsuperscript{156}

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154. Id.
156. Id.; see also McGuire, \textit{supra} note 9, at 371 (“[A small degree of risk—e.g., ten percent—can lead to a substantial settlement if the aggregate class claims are in the million or billion-dollar range.”).
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Courts should not ignore the pressure that an enormous class with significant damage claims will create, regardless of the type of class action at issue.

2. Uniformity and clarity

As was just illustrated, many courts have applied various versions of a significant-proof type standard to different types of cases. Thus, applying the same standard every time the Rule 23 prerequisites are assessed for at least the types of cases outlined above would increase clarity and uniformity. Where claims are complex or the class is diverse, courts should consider applying the “significant proof” standard outlined earlier in this paper.

Upon review, appellate courts should ensure that any certification decision below was based on a clear and specific standard so that they can more easily determine if the certification requirements were met. This would help cabin judicial discretion in making the certification decision (which has a large impact on the ultimate outcome of the case). Otherwise judges would have room to grant certifications at will, essentially failing to apply the Rule 23 requirements by giving them only lip service.\textsuperscript{157} For instance, judges could decide certification issues based largely on “the value of the class action.”\textsuperscript{158} Indeed, several scholars have found that some judges may be “more willing to overlook evidentiary weaknesses” if they “believe in the importance of the class action for enforcement of the substantive law.”\textsuperscript{159} All of this would be prevented by implementing a uniform high standard of proof to all class certifications with large class sizes involving complex or diverse claims and requesting significant damages, as these types of cases are sufficiently similar to the employment discrimination context and the \textit{Dukes} ruling.

The argument could also be made that the same standard should apply to \textit{all} certifications regardless of the complexity of the claims

\textsuperscript{157} Bone & Evans, \textit{supra} note 9, at 1270–71.

\textsuperscript{158} \textit{Id.} at 1272.

\textsuperscript{159} \textit{Id.} This may have been what occurred in \textit{Dukes}. Both the district court and the Ninth Circuit avoided the strict inquiry required by 23(b)(2) by asserting that a court should not probe too far into the merits. However, this refusal to probe sufficiently behind the pleadings seemed, in effect, to be a refusal to admit that the claims lacked commonality—i.e., the plaintiffs were promoted and demoted for a variety of reasons, and thus their claims should have been assessed individually. Perhaps this was because the court believed in the inherent value of the class action, wanting it to go forward so the discrimination claims could be heard regardless of whether the plaintiffs actually met the certification requirements.
and diversity of the class because the same prerequisites apply to every case. Certainly, a preponderance of the evidence standard should always be used to weigh the proof available. However the question is whether, for the sake of clarity and uniformity, the proof that is weighed for certification should be “significant” (i.e., also increase with the size of the class and be subjected to Daubert standards) even in simpler, less diverse cases where the damages alleged are not high. In such cases that might stretch the bounds of Dukes too far by, in essence, allowing a full blown pretrial on the merits instead of just requiring courts to “conduct a preliminary inquiry into the merits”\textsuperscript{160} or “probe behind the pleadings before coming to rest on the certification question.”\textsuperscript{161} In brief, applying Dukes’s “significant proof” holding to all cases may overreach the benefits of a high standard of proof.

3. Suits brought under Rule 23(b)(2)

Another consideration that courts should weigh in deciding when to apply a “significant proof” standard is whether, like Dukes, the class is pursued under Rule 23(b)(2), which has less stringent standards than the other two types of class actions. The Supreme Court in Dukes held that the plaintiffs’ claims were inappropriately certified under 23(b)(2).\textsuperscript{162} The Court explained that “individualized monetary claims belong in Rule 23(b)(3)” because “[t]he procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2).”\textsuperscript{163} Further, it reiterated that “[i]n the context of a class action predominately for money damages we have held that the absence of notice and opt out violates due process.”\textsuperscript{164} This can be a serious problem if some members of a class have stronger claims than others and would fare better by litigating their claims individually but are dragged into a broad class action created by a lower standard of proof.\textsuperscript{165}

\textsuperscript{162}. Id. at 2558–59.
\textsuperscript{163}. Id.
\textsuperscript{164}. Id. at 2559 (citing Philips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).
The same concerns could arise, however, where a class of plaintiffs pursues primarily injunctive or declaratory relief under Rule 23(b)(2). For certain class members, monetary damages rather than equitable relief may be more meaningful, and the lack of due process protections in 23(b)(2) puts them at a disadvantage. Or some class members may have stronger claims than others. Thus, to better protect plaintiffs, a “significant proof” standard should be applied to injunctive or declaratory relief cases where meaningful monetary damages could be asserted by individual plaintiffs but are not asserted by the class. In brief, courts should be wary of all 23(b)(2) class actions because giving notice to all class members is not required, and members of the class cannot opt out.

The lack of certain due process protections in 23(b)(2) that are available under 23(b)(3) affects defendants as well, irrespective of the nature of the case. Simply put, 23(b)(2) generates more lawsuits given its easier certification requirements. Indeed, plaintiffs alleging employment discrimination “have made aggressive use of Rule 23(b)(2).”166

Additionally, some scholars have asserted that Congress never intended for 23(b)(2) class actions to be used in the expansive way that they are today.167 Two scholars have argued that the Federal Rules of Civil Procedure are based on historical antecedents, and the historical antecedent of 23(b)(2) involved class-wide injunctions to prohibit racial segregation.168 Another has claimed similarly that 23(b)(2) was primarily created to provide a mechanism for obtaining an injunction against future discrimination.169 Overall, 23(b)(2) actions were originally permitted to grant equitable relief against conduct directed towards the class as a whole, rather than individual members, and were not to be used to provide compensatory damages,170 as the Supreme Court held.171

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168. Perry & Brass, supra note 166, at 681.
170. Perry & Brass, supra note 165, at 687, 701, 704. There is an abundance of scholarly debate over whether punitive damages and back pay should be allowed for 23(b)(2) actions, but this debate is beyond the scope of this Comment.
discrimination suits, typically for monetary damages, or even antitrust or tort suits pursuing injunctive relief differ greatly from historical de jure segregation and equitable actions, and thus likely are a use of 23(b)(2) that Congress did not foresee. Where 23(b)(2) class actions are permitted due to more relaxed certification standards and historically overbroad application to a wide variety of cases, a court should at the very least consider applying a high standard of proof to protect both plaintiffs and defendants.

V. CONCLUSION

Because the certification decision can have such enormous consequences for the ultimate outcome of the case, the nature of the “significant proof” standard and when it should apply needs to be made clear. Based on the Supreme Court decision in Dukes and other circuit court precedent, such a standard should require (i) that the amount of proof required increase with the size of the class, (ii) that defendant(s)’ legal and factual objections and any relevant counterevidence offered by defendant be considered, (iii) that a full Daubert analysis is applied, and (iv) that ultimately plaintiffs prove commonality and typicality by a preponderance of the evidence.

Further, the “significant proof” standard should apply to other types of cases outside the employment discrimination context that, like Dukes, involve complex claims and a diverse class. Where one of these factors is weak or missing courts should also take into account policy considerations, such as whether (i) the alleged damages are high, (ii) implementing the standard well help increase uniformity and clarity, and (iii) the class is being pursued under Rule 23(b)(2). A number of jurisdictions have already applied various versions of a “significant proof” standard in cases with these features.

Overall, the debate over the amount of proof required for class certifications demonstrates that the line between procedure and substance is becoming increasingly hazy. “Significant proof” ensures that the benefits of class certification, including cost-sharing and efficiency, actually materialize by requiring adequate evidence that

172. Although the Supreme Court has discouraged “judicial inventiveness” in class action suits, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 629 (1997), 23(b)(2) certifications for employment discrimination suits have nonetheless been broadly allowed and even confirmed by the Supreme Court on several occasions, as evidenced by Eisen and Falcon.

173. Perry & Brass, supra note 166, at 682. The article also notes that tort actions, which are also often certified under 23(b)(2), are also a use that Congress did not foresee. Id.
shows commonality and typicality among claims clearly exists, whether in the employment context or otherwise. When a procedural decision can result in a forced settlement that could cost a company billions of dollars and possibly prevent some litigants from pursuing what may be stronger individual claims, requiring a “significant proof” standard is critical to ensuring that substantive rights are adequately protected and justice is eventually done.

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