Three Myths About *Wal-Mart Stores, Inc. v. Dukes*

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ABSTRACT

The Supreme Court's landmark decision in Wal-Mart Stores, Inc. v. Dukes *raised the bar for plaintiffs seeking class certification and will have a significant impact on all class actions for decades to come. Some lower courts, however, have adopted narrow readings of the Supreme Court's decision, which has led commentators to underestimate the long-term importance of* Dukes*. This article seeks to debunk three myths about—and misinterpretations of—*Dukes *on which plaintiffs have relied, with some initial success, to circumvent its key holdings: (1) that* Dukes *is relevant only to large, nationwide class actions, (2) that "Trial by Formula" is still a viable method of classwide adjudication, and (3) that the* Dukes *majority conflated Rule 23's commonality and predominance requirements. Properly understood,* Dukes *applies to all class actions regardless of the size of the class or the underlying substantive law, precludes the use of statistical sampling and extrapolation to deprive a class action defendant of its right to present individualized defenses, and did not merely conflate the commonality and predominance requirements, but instead clarified that both requirements are concerned with identifying common questions that can produce common answers.*

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INTRODUCTION

This Article seeks to debunk three myths about—and misinterpretations of—the Supreme Court's landmark class action decision

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in *Wal-Mart Stores, Inc. v. Dukes*[1]: (1) that *Dukes* applies only to factually and procedurally similar class actions, (2) that "Trial by Formula" is still a viable method of classwide adjudication after *Dukes*, and (3) that *Dukes* conflated Federal Rule of Civil Procedure 23's commonality and predominance requirements.[2] Plaintiffs, with some initial success, have advanced these incorrect readings of *Dukes* in an effort to avoid the consequences of the Supreme Court's ruling.[3] The prevalence of these myths has generated confusion about the meaning of *Dukes* and, in some cases, has led courts to adopt a mistaken view of the Supreme Court's decision.[4] These court decisions misinterpreting *Dukes* have, in turn, led commentators to underestimate its long-term impact and significance.[5]

The first myth is that *Dukes* can be limited to its facts—class actions involving extremely large, nationwide classes alleging employment discrimination and certified under Rule 23(b)(2).[6] The Supreme Court in *Dukes*, however, interpreted Rule 23,[7] which applies regardless of the size of a class or the underlying substantive law.[8] Moreover, many of the Court's rulings in *Dukes* were not specific to Rule 23(b)(2) class actions.[9] Yet the incorrect view that *Dukes* can be limited to its specific factual and procedural context has been adopted by a handful of courts,[10] despite the clear applicability of the Court's guidance to all types of class actions.

The second myth is that "Trial by Formula"—the use of statistical sampling and extrapolation to deprive a class action defendant of its right

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1 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

2 FED. R. CIV. P. 23.

3 *See infra* notes 31–38, 72 and accompanying text.

4 *See infra* notes 32–38 and accompanying text.

5 *See, e.g.*, Quinn Emanuel Urquhart & Sullivan, LLP, Dukes *Is No Hazard: Eight Months On, District Courts Have Been Largely Unmoved by* Wal-Mart Stores, Inc. v. Dukes, JDSUPRA BUS. ADVISOR (Feb. 17, 2012), http://www.jdsupra.com/legalnews/dukes-is-no-hazard-eight-months-on-dis-95775/ ("With few exceptions, district courts have continued to hew to their rulings issued prior to the Supreme Court's decision, as the unique circumstances in *Dukes* have allowed district courts to shrug their collective shoulders."); *Interpreting* Dukes*: 2012 in Review*, IMPACT LITIG. J. (Dec. 28, 2012), http://www.impactlitigation.com/2012/12/28/interpreting-dukes-2012-in-review/ ("While many predicted that 2012 would be the year in which interpretations of the U.S. Supreme Court's ruling in *Dukes* . . . would effectively spell the end of class actions, this year has instead produced numerous pro-class judicial decisions, despite the more rigorous standards imposed by *Dukes*.").

6 *See infra* notes 32–43 and accompanying text.

7 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

8 *See infra* note 24 and accompanying text.

9 *See Dukes*, 131 S. Ct. at 2550–57.

10 *See infra* notes 31–38 and accompanying text.

to present individualized defenses—has survived *Dukes*.[11] In *Dukes*, the Supreme Court unanimously rejected the "novel project" of "Trial by Formula" as a clear violation of the Rules Enabling Act.[12] Plaintiffs have nonetheless argued that this method of proof remains viable in state court class actions.[13] These arguments ignore the fact that "Trial by Formula" violates a defendant's right to due process for the same reason that it is incompatible with the Rules Enabling Act.[14]

The third myth is that the Court conflated Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s predominance requirement.[15] Although it is true that *Dukes* announced a heightened conception of the commonality requirement, it did not do so by merely importing the standards of the distinct predominance requirement.[16] Instead, the Court in *Dukes* did something much more significant: it clarified that the only common questions that are relevant to class certification are those that have the potential to generate common *answers*.[17] After *Dukes*, establishing that a question is truly common requires plaintiffs to prove that classwide adjudication of that question would "resolve an issue that is central to the validity of each one of the claims in one stroke."[18] This redefinition of the nature of a common question impacts both commonality and predominance, and to view *Dukes* as merely conflating these distinct requirements obscures the true significance of the Court's ruling.

I. MYTH #1: *DUKES* APPLIES ONLY TO FACTUALLY AND PROCEDURALLY SIMILAR CLASS ACTIONS

There is no doubt that the underlying facts in *Dukes* were unique. The plaintiffs sought "to litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action."[19] Plaintiffs' desire "to sue about literally millions of employment decisions at once" resulted in "one of the most expansive class actions ever," which covered "about one and a

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11 *See infra* note 72 and accompanying text.

12 *Dukes*, 131 S. Ct. at 2561; *see* Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012).

13 *See infra* note 72 and accompanying text.

14 *See infra* notes 75–78 and accompanying text.

15 *See infra* notes 92–98 and accompanying text.

16 *See infra* notes 95–96 and accompanying text.

17 *See Dukes*, 131 S. Ct. at 2551.

18 *Id.*; *see infra* notes 97–98 and accompanying text.

19 *Dukes*, 131 S. Ct. at 2548.

half million plaintiffs."[20] The sprawling nature of the *Dukes* class obviously presented substantial barriers to class certification and impeded the plaintiffs' ability to identify some "glue" that could hold together the claims of the class.[21]

Despite the unique factual circumstances that were before the Court in *Dukes*, it is a mistake to limit the Court's interpretation of Rule 23 to those cases involving similar factual and procedural circumstances—large, nationwide employment discrimination class actions seeking certification under Rule 23(b)(2). The requirements for class certification do not vary depending on the size or scope of the class nor the underlying substantive law at issue.[22] Rather, as noted in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[23] "Rule 23 provides a one-size-fits-all formula for deciding the class-action question."[24] Thus, the Court's guidance in *Dukes*—including its "significant restatement of the commonality requirement,"[25] its clarification that courts considering whether to certify a class must engage in a "rigorous analysis" that will "frequently . . . entail some overlap with the merits,"[26] and its unanimous rejection of "Trial by Formula"[27]—extends to *all* class actions, not just those that involve hundreds of thousands, or millions, of class members in multiple jurisdictions asserting employment discrimination claims. As one court has aptly put it, the argument that "*Dukes* is limited to its facts and is distinguishable . . . misconstrues the role of Supreme Court precedent in our three tier system of federal jurisprudence," which requires lower courts to "apply both the narrow holdings of *Dukes* as well as the reasoning, analysis, and legal rules applied in reaching its result."[28] Moreover, although *Dukes* involved a class certified under Rule 23(b)(2), most of its key holdings apply beyond the Rule 23(b)(2) context, as they concern either fundamental principles of class certification relevant to all types of class actions[29] or Rule 23(a)(2)'s universally applicable commonality

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20 *Id.* at 2552, 2547.

21 *Id.* at 2552.

22 *See* FED. R. CIV. P. 23.

23 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

24 *Id.* at 399.

25 Walter v. Hughes Commc'ns, Inc., No. 09-2136 SC, 2011 WL 2650711, at *7 (N.D. Cal. July 6, 2011).

26 *Dukes*, 131 S. Ct. at 2551.

27 *Id.* at 2561.

28 Rodriguez v. Nat'l City Bank, 277 F.R.D. 148, 154 (E.D. Pa. 2011) (internal quotation marks and citation omitted), *aff'd*, 726 F.3d 372 (3d Cir. 2013).

29 *See Dukes*, 131 S. Ct. at 2550–51.

requirement.[30]

Plaintiffs in some early post-*Dukes* cases have nonetheless been able to avoid the impact of *Dukes* by advancing the flawed argument that the Supreme Court's decision can be limited to its facts.[31] Indeed, both the Third and Seventh Circuits have suggested that *Dukes* can be factually distinguished, although both of these decisions were subsequently overturned by the Supreme Court.[32] In *Behrend v. Comcast Corp.*,[33] an antitrust case in which the Supreme Court eventually reversed class certification, the Third Circuit stated in a footnote that *Dukes* "neither guide[d] nor govern[ed] the dispute" because "[t]he factual and legal underpinnings of [*Dukes*]—which involved a massive discrimination class action and different sections of Rule 23—are clearly distinct from those of this case."[34]

Similarly, in *Ross v. RBS Citizens, N.A.*,[35] a wage-and-hour class action, the Seventh Circuit held "that *Dukes* d[id] not change the district court's commonality result" because there were "significant distinctions" between *Dukes* and *Ross*, including "the size of the class and the type of proof the *Dukes* plaintiffs were required to offer."[36] The court in *Ross* also labeled the defendant's contention that it had a "right to present its affirmative . . . defenses on an individualized basis" as a "[m]isreading [of] *Dukes*" and, without explanation, suggested that the Supreme Court's rejection of "Trial by Formula" did not apply where plaintiffs were "seeking only monetary relief through a Rule 23(b)(3) class."[37]

Based on these and similar decisions by lower courts,[38] some commentators have concluded that *Dukes* can, in fact, be distinguished and

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30 *See id.* at 2551–56.

31 *See infra* notes 32–37 and accompanying text.

32 *See* Ross v. RBS Citizens, N.A., 667 F.3d 900, 908–10 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013) (mem.); Behrend v. Comcast Corp., 655 F.3d 182, 203 n.12 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013).

33 Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013).

34 *Id.* at 203 n.12.

35 Ross v. RBS Citizens, N.A., 667 F.3d 900 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013) (mem.).

36 *Id.* at 908–09 ("In *Dukes*, 1.5 million nationwide claimants were required to prove that thousands of store managers had the same discriminatory intent in preferring men over women for promotions and pay raises. Here, there are 1,129 Hourly class members and substantially fewer ABMs, all of whom are based only in Illinois. The plaintiffs' IMWL claim requires no proof of individual discriminatory intent.").

37 *Id.* at 908 n.7.

38 *See, e.g.*, Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 169–73 (S.D.N.Y. 2011); Johnson v. Gen. Mills, Inc., 276 F.R.D. 519, 521–24 (C.D. Cal. 2011).

limited to its facts. For example, one author has noted, with approval, that the "cases finding *Dukes* inapposite in antitrust and other Rule 23(b)(3) contexts are mounting."[39] Another commentator, citing *Ross*, has argued that the "Trial by Formula" holding of *Dukes* "was addressing procedures unique to Title VII cases" and "is irrelevant in other contexts."[40] Professor Joseph A. Seiner has similarly argued that *Dukes* "should be cabined and restricted to its facts."[41] He contends that the Supreme Court's decision should be viewed as holding only that "where a massive claim has been brought against a massive employer, the plaintiff will have a heightened burden of proof in establishing commonality."[42] Professor Seiner further recommends that "[t]he procedural strategy of cabining [*Dukes*] should be advanced by plaintiffs and seriously considered by the courts."[43] In short, there is an erroneous yet growing impression that *Dukes* can be ignored in most class actions.

This flawed view of *Dukes* is almost identical to the initial reaction to the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.[44] Like *Dukes*, *Twombly* represented a significant reconceptualization of one of the Federal Rules of Civil Procedure: it was the first time that the Court interpreted Rule 8(a) to require plaintiffs to plead a "plausible entitlement to relief."[45] In the immediate aftermath of *Twombly*, plaintiffs frequently argued—and some courts agreed—that the interpretation of Rule 8(a) in *Twombly* was limited to the facts of that case and did not extend beyond the antitrust context.[46] In *Ashcroft v. Iqbal*,[47] the Supreme Court put an end to

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[39] Ellen Meriwether, *The "Hazards" of* Dukes*: Antitrust Class Action Plaintiffs Need Not Fear the Supreme Court's Decision*, 26 ANTITRUST 18, 22 (2011).

[40] Kimberly A. Kralowec, Dukes *and Common Proof in California Class Actions*, COMPETITION (Antitrust & Unfair Competition Law Section of the State Bar of Cal., San Francisco, Cal.), Summer 2012, at 9, 9, 12 & nn.22 & 25; *see also id.* at 12 ("Unlike Title VII, most statutory causes of action provide for no special phase of trial as in *Dukes*, and, indeed, no common-law claims do. The 'trial by formula' problem in *Dukes*—which meant that this special phase of trial would not be 'incidental' to the rest of the case under Rule 23(b)(2)—simply does not exist in most litigation. Any other interpretation of *Dukes* is a '[m]isreading' of the decision." (alteration in original) (footnotes omitted)).

[41] Joseph A. Seiner, *Weathering* Wal-Mart, 89 NOTRE DAME L. REV. 1343, 1366 (2014).

[42] *Id.*

[43] *Id.* at 1368.

[44] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[45] *See id.* at 557, 559.

[46] *See, e.g.*, Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc., 525 F.3d 8, 17 (D.C. Cir. 2008) ("*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim."); United States v. Harchar, No. 1:06-cv-2927, 2007 WL 1876510, at *2 (N.D. Ohio June 28, 2007) ("*Twombly* merely held that a complaint that alleged only parallel conduct did not state a claim for an antitrust conspiracy. . . . The

these misguided attempts to limit *Twombly* to its facts.[48] The plaintiff in *Iqbal* argued that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute."[49] The Court concluded, however, that this argument was "incompatible with the Federal Rules of Civil Procedure" and held that "*Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[50] This same reasoning—that the meaning of a Federal Rule of Civil Procedure does not depend on the underlying subject matter of a particular civil action—is what will ultimately doom any attempts to limit *Dukes* to its facts.

Fortunately, there are signs that the tide has begun to turn, as both the Supreme Court and the Ninth Circuit have recently issued significant decisions confirming the broad scope and applicability of *Dukes*.[51] In *Wang v. Chinese Daily News, Inc.*,[52] the Ninth Circuit vacated certification of a wage-and-hour class action certified under Rule 23(b)(3), which involved only about 200 employees working at the same office within a single state.[53] The Ninth Circuit instructed the district court to apply *Dukes* on remand.[54] Significantly, the court specifically noted that *Dukes* "[wa]s factually distinguishable" because the class in *Wang* was "much smaller" and the "[p]laintiffs' claims d[id] not depend upon establishing commonalities among 1.5 million employees and millions of discretionary employment decisions."[55] Despite these differences in the size and scope of the two classes, the Ninth Circuit made clear that the district court had to apply the interpretation of Rule 23 outlined in *Dukes* and recognized the possibility that even within a small, targeted class action "there are potentially significant differences among the class members."[56]

Supreme Court did not purport to change the applicable 12(b)(6) standards . . . ."); Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007) ("The Court used 'plausibility' in its antitrust context, to resolve an existing problem in antitrust law, and it is a misreading of *Twombly* to extend 'plausibility' beyond that context.").

47 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

48 *Id.* at 684.

49 *Id.*

50 *Id.* (citation omitted).

51 *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013); Wang v. Chinese Daily News, Inc., 737 F.3d 538, 541 (9th Cir. 2013).

52 Wang v. Chinese Daily News, Inc., 737 F.3d 538 (9th Cir. 2013).

53 *Id.* at 543–45.

54 *Id.* at 544.

55 *Id.*

56 *Id.*

The Supreme Court's decision in *Comcast Corp. v. Behrend*[57] also represents a rejection of misguided attempts to narrowly read *Dukes* as limited to its facts.[58] As noted above, the Third Circuit in that case had taken the position that *Dukes* was irrelevant to its decision because it involved different underlying substantive law and different sections of Rule 23.[59] Yet in reversing class certification, the Supreme Court repeatedly cited *Dukes* and concluded that the Third Circuit's refusal to assess the validity of a "damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination," was in direct conflict with its guidance in *Dukes* that the class certification analysis "will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'"[60]

Thus, although *Comcast* did not expressly reject the Third Circuit's attempt to limit *Dukes* to its facts, the Court's ruling implicitly confirms that such narrow readings of *Dukes* are erroneous.[61] Indeed, the Court subsequently vacated and remanded the Seventh Circuit's decision in *Ross*—a case that had represented plaintiffs' most significant victory in their effort to cabin *Dukes* to its specific factual and procedural circumstances—for reconsideration in light of *Comcast*.[62] The clear signal from the Supreme Court is that it will not tolerate class certification decisions that attempt to evade, rather than faithfully apply, *Dukes*.

In sum, although the size of the class and the nature of the underlying Title VII claims exacerbated the impropriety of what plaintiffs were attempting to achieve in *Dukes*, its key holdings—its restatement of the commonality requirement, its clarification that inquiry into the merits is appropriate at class certification, and its rejection of "Trial by Formula"—are applicable to all class actions, and these holdings have had, and will

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57 Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

58 *See id.* at 1433.

59 Behrend v. Comcast Corp., 655 F.3d 182, 203 n.12 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013).

60 *Comcast*, 133 S. Ct. at 1432–33 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

61 *See id.*

62 RBS Citizens, N.A. v. Ross, 133 S. Ct. 1722, 1722 (2013) (mem.). Although the Supreme Court vacated the Seventh Circuit's decision in *Ross*, some courts have continued to rely on its flawed interpretation of *Dukes*. *See, e.g.*, Huyer v. Wells Fargo & Co., 295 F.R.D. 332, 339 (S.D. Iowa 2013) (discussing *Ross* and finding that "*Dukes* is inapplicable to and/or distinguishable from this case"); Williams v. Superior Court, 165 Cal. Rptr. 3d 340, 346–48 (Ct. App. 2013) (citing *Ross* and "agree[ing] with those courts that have found *Dukes* distinguishable").

continue to have, a significant impact on a wide variety of class actions.[63]

II. MYTH #2: "TRIAL BY FORMULA" REMAINS VIABLE IN STATE COURT

Perhaps the most significant aspect of *Dukes* is its unanimous rejection of what the Supreme Court labeled "Trial by Formula"—a procedure in which liability is determined based on an assessment of the claims of a sample set of class members, with the results of this assessment extrapolated across the remainder of the class.[64] The Ninth Circuit en banc majority in *Dukes v. Wal-Mart Stores, Inc.*,[65] relying on its prior decision in *Hilao v. Estate of Marcos*,[66] had concluded that individualized issues could be effectively managed by the trial court if it were to randomly select a subset of class members, hold individualized proceedings as to the claims of those class members, and then extrapolate from the sample to calculate Wal-Mart's aggregate liability to the entire class, without assessing evidence relating to class members not within the sample.[67]

The Supreme Court firmly rejected this shortcut approach to addressing individualized issues in a class action and held that this "novel project" ran afoul of the constraints of the Rules Enabling Act.[68] The Court explained that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[69] In other words, because "Trial by Formula" deprives a defendant of an opportunity to litigate individualized defenses, it results in an impermissible modification of substantive law that is prohibited by the Rules Enabling Act.[70] Therefore, it is clear after *Dukes* that a federal court cannot rely on "Trial by Formula"

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63 *See Comcast*, 133 S. Ct. at 1432–33; Wang v. Chinese Daily News, Inc., 737 F.3d 538, 543–45 (9th Cir. 2013). In addition to *Comcast* and *Wang*, the broad applicability of *Dukes* is further confirmed by other decisions reversing or decertifying class actions in a variety of other contexts. *See, e.g.*, Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2011 U.S. Dist. LEXIS 73938, at *8, *16–19 (N.D. Cal. July 8, 2011) (applying *Dukes* and decertifying wage-and-hour class action); Price v. Martin, 79 So. 3d 960, 967, 969–70, 977 (La. 2011) (applying *Dukes* and reversing class certification of environmental contamination claims).

64 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

65 Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

66 Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

67 *Dukes*, 603 F.3d at 625–27.

68 *Dukes*, 131 S. Ct. at 2561.

69 *Id.* (citations omitted) (quoting 28 U.S.C. § 2072(b) (2012)).

70 *See id.*

as a shortcut to facilitate the adjudication of class claims.[71]

Plaintiffs and some commentators have nonetheless argued that the very same method of adjudication that has now been unanimously disapproved of by the Supreme Court is still permissible in state courts, emphasizing that the "Trial by Formula" holding in *Dukes* was premised on the Rules Enabling Act and Rule 23.[72] Thus, under this view, state courts remain free to employ the same procedures repudiated in *Dukes*.[73] These arguments ignore the clear due process underpinnings of the Supreme Court's rejection of "Trial by Formula."[74]

The Supreme Court has repeatedly held that "[d]ue process requires that there be an opportunity to present every available defense,"[75] and as the Court explained in *Dukes*, the fundamental problem with "Trial by Formula" is that it deprives a defendant of an opportunity to litigate its defenses to individual claims.[76] Because this deprivation of defenses violated the Rules Enabling Act, it was unnecessary for the Court to expressly rule that this deprivation also violated due process. Yet given its prior precedents recognizing that due process includes the right to present every available defense,[77] and the Court's clear determination that "Trial by Formula" did in fact preclude the presentation of individualized defenses,[78] there is little doubt that the Court would have found a due

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[71] *See id.* *Dukes* thus resolved a circuit split between the Ninth Circuit's decisions in *Hilao* and *Dukes* and the decisions of other courts of appeals that had rejected similar approaches to adjudicating class actions. *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231 (2d Cir. 2008), *abrogated on other grounds by* Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639 (2008); Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 342–43 (4th Cir. 1998).

[72] *See, e.g.*, Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391, 399 (Ct. App.) ("Under plaintiffs' plan, the trial would have proceeded in three phases: (1) Task identification and classification, (2) use of a class-wide survey followed by the selection of a random sample of plaintiffs who would be made the subjects of the trial, and (3) damages."), *review granted*, 275 P.3d 1266 (Cal. 2012); Kralowec, *supra* note 40, at 12–13 ("Another common misreading of *Dukes* is that by using the term 'trial by formula,' the Supreme Court somehow placed a constitutional due process limitation on the class action device generally, or of statistical extrapolations in class litigation particularly. . . . It is therefore error to read *Dukes* either as resting on federal constitutional principles of any kind, or as binding on state courts for that reason. By its plain text, *Dukes* rests on Rule 23, the Rules Enabling Act, and Title VII.").

[73] *See* Kralowec, *supra* note 40, at 12–13.

[74] *See infra* notes 75–80 and accompanying text.

[75] Lindsey v. Normet, 405 U.S. 56, 66 (1972) (internal quotation marks omitted); *see also* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007); Philip Morris USA Inc. v. Scott, 131 S. Ct. 1, 3–4 (Scalia, Circuit Justice 2010).

[76] *See Dukes*, 131 S. Ct. at 2561.

[77] *See supra* note 75 and accompanying text.

[78] *See Dukes*, 131 S. Ct. at 2561.

process violation if it had been necessary for it to reach the issue.

In fact, even before *Dukes*, the Second Circuit in *McLaughlin v. American Tobacco Co.*[79] held that a procedure similar to the "Trial by Formula" rejected in *Dukes* "offend[ed] both the Rules Enabling Act and the Due Process Clause."[80] Additionally, in a post-*Dukes* decision, the Third Circuit in *Carrera v. Bayer Corp.*[81] held that "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."[82]

At least one state appellate court has already recognized that "Trial by Formula" violates the due process rights of class action defendants and is no longer viable in state court class actions after *Dukes*.[83] In *Duran v. U.S. Bank National Ass'n*,[84] the California Court of Appeal reversed a judgment entered for a class of bank employees in a wage-and-hour class action after concluding that the trial plan, which relied on sampling and extrapolation, violated due process because the defendant was not allowed to introduce evidence challenging the claims of class members outside the sample.[85] Acknowledging the clear parallel with the proposed trial plan rejected in *Dukes*, the court noted that "[t]he same type of 'Trial by Formula' that the U.S. Supreme Court disapproved of in [*Dukes*] is essentially what occurred in this case."[86]

While the *Duran* decision is encouraging, as it recognized that "Trial by Formula" violates due process and is therefore equally impermissible in

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79 McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008), *abrogated on other grounds by* Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639 (2008).

80 *Id.* at 231.

81 Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013).

82 *Id.* at 307 (citing *Dukes*, 131 S. Ct. at 2561; *McLaughlin*, 522 F.3d at 231–32).

83 *See* Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391 (Ct. App.), *review granted*, 275 P.3d 1266 (Cal. 2012).

84 Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391 (Ct. App.), *review granted*, 275 P.3d 1266 (Cal. 2012).

85 *Id.* at 429–34.

86 *Id.* at 429. Recently, another California Court of Appeal decision cast further doubt on the viability of statistical sampling and extrapolation under California law. *See* Dailey v. Sears, Roebuck & Co., 154 Cal. Rptr. 3d 480, 500 (Ct. App. 2013) ("We have found no case . . . where a court has deemed a mere proposal for statistical sampling to be an adequate evidentiary *substitute* for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist. If the commonality requirement could be satisfied merely on the basis of a sampling methodology proposal such as the one before us, it is hard to imagine that any proposed class action would *not* be certified.").

both state and federal courts,[87] the California Supreme Court has granted review in *Duran*,[88] and there is a possibility that the Court will erroneously conclude that "Trial by Formula" remains viable in California state courts.[89] If it adopts this approach, the U.S. Supreme Court should grant review and confirm what *Dukes* itself makes clear—that the class action procedural device cannot be used to alter substantive law and deprive a defendant of its right to fully defend itself by presenting individualized defenses.[90]

III. MYTH #3: *DUKES* CONFLATED THE COMMONALITY AND PREDOMINANCE REQUIREMENTS

As has been widely recognized, *Dukes* "represents a significant restatement of the commonality requirement."[91] Some confusion exists, however, as to the exact nature of the Court's recasting of this requirement.[92] Much of this confusion is likely rooted in the suggestion by the dissenting justices in *Dukes* that the Court had simply "blend[ed]" Rule 23(b)(3)'s predominance requirement with Rule 23(a)(2)'s commonality requirement.[93] The dissent's reading of *Dukes* as merely importing the predominance standards into the commonality analysis overlooks what is truly important about the Court's decision: its fundamental reconceptualization of the definition of a common question.[94]

Although it is true that *Dukes* did outline a more robust commonality requirement, it did not do so by requiring plaintiffs to establish that common questions are predominant in order to establish commonality. As

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87 *See Duran*, 137 Cal. Rptr. 3d at 420–21, 429–34.

88 Duran v. U.S. Bank Nat'l Ass'n, 275 P.3d 1266 (Cal. 2012) (granting review).

89 Indeed, a recent California Court of Appeal decision claimed that "California law permits statistical sampling to determine damages" and suggested that "Trial by Formula" is merely a "method of calculating damages." Williams v. Superior Court, 165 Cal. Rptr. 3d 340, 349 & n.6 (Ct. App. 2013).

90 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

91 *See* Walter v. Hughes Commc'ns, Inc., No. 09-2136 SC, 2011 WL 2650711, at *7 (N.D. Cal. July 6, 2011); *see also* WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3:18 (5th ed. 2011) ("[T]he Supreme Court awakened new interest in the commonality analysis when, in . . . *Dukes*, it held that a lack of commonality barred class certification.").

92 *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 319 n.125 (2013) ("One wonders whether the threshold commonality requirement of Rule 23(a)(2) has now been converted into a predominance requirement previously textually limited to cases under Rule 23(b)(3).").

93 *See Dukes*, 131 S. Ct. at 2565–66 (Ginsburg, J., concurring in part and dissenting in part); Miller, *supra* note 92, at 319 n.125.

94 *See Dukes*, 131 S. Ct. at 2551–57.

the Court made clear, the commonality requirement can still be satisfied through the identification of a single common question.[95] Rather, *Dukes* changed the commonality requirement by limiting the universe of common questions that are sufficient to satisfy the requirement to only those questions that can actually facilitate classwide adjudication.[96] Specifically, the Court explained that to obtain class certification a plaintiff must identify a "common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke."[97] In other words, the only types of common questions that matter to class certification are those for which "'a classwide proceeding [can] generate common *answers* apt to drive the resolution of the litigation.'"[98]

Significantly, although *Dukes* did not directly address the predominance requirement of Rule 23(b)(3), a side effect of its approach to commonality is that it altered the nature of the predominance requirement by raising the bar for the identification of common questions.[99] In other words, *Dukes* heightened both the commonality and the predominance requirements by modifying the meaning of a term critical to both requirements—the nature of "questions of law or fact common" to the class.[100]

The long-term impact of the Supreme Court's clarification of what types of common questions are relevant to class certification is much more significant than a mere conflation of the commonality and predominance requirements. Indeed, if that were all the Court in *Dukes* had done, it would have left Rule 23(b)(3) class actions entirely unaffected, because establishing the predominance of common questions was already a prerequisite for class certification under that provision.[101] The Court instead altered a definition shared by the two requirements[102] and in the process significantly raised the bar for certification of all types of class actions.

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95 *See id.* at 2556.

96 *See id.* at 2551.

97 *Id.*

98 *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

99 *See id.* at 2551–57 (discussing commonality requirements).

100 *See* FED. R. CIV. P. 23(a)(2), (b)(3).

101 FED. R. CIV. P. 23(b)(3).

102 *See supra* note 100 and accompanying text.

CONCLUSION

Properly understood, *Dukes* represents a fundamental change in class action jurisprudence that will have a wide-ranging effect on class actions for years to come. Realizing the heightened burden they face under *Dukes*, plaintiffs will likely continue their efforts to sow confusion about the scope and nature of this landmark ruling. These attempts to limit *Dukes* do not withstand scrutiny, and they should be soundly rejected by the lower courts. If, however, these myths and misinterpretations continue to lead lower courts astray, the Supreme Court should act and make clear that it meant what it said in *Dukes*.