

# JUDGING CLASS CERTIFICATION AS A MATTER OF LAW

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## INTRODUCTION

Courts have traditionally viewed the question whether to grant or deny class certification as a matter of district court discretion. All of the federal circuit courts agree on this point.<sup>1</sup> This article shows that the consensus view of the intermediate appellate courts is mistaken and that, contrary to the traditional view, courts should decide and review most class certification motions and orders as a matter of law, not discretion.

The legal standard for understanding and reviewing class certification orders is profoundly important. The categorization of an issue as discretionary or legal allocates authority to decide the issue to the district court or appellate courts, respectively. Discretionary decisions have little or no precedential effect, while legal rulings do.<sup>2</sup> The misclassification of class certification

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1. For recent cases arranged in ascending order from the First Circuit to the D.C. Circuit, see, e.g., *Bais Yaakov of Spring Valley v. ACT, Inc.*, 12 F.4th 81, 89 (1st Cir. 2021); *Barrows v. Becerra*, 24 F.4th 116, 130 (2d Cir. 2022); *Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 144 (3d Cir. 2023); *Peters v. Aetna Inc.*, 2 F.4th 199, 242 (4th Cir. 2021); *Mitchell v. State Farm Fire & Cas. Co.*, 954 F.3d 700, 709 (5th Cir. 2020); *In re Ford Motor Co.*, 86 F.4th 723, 727 (6th Cir. 2023); *Ross v. Gossett*, 33 F.4th 433, 435 (7th Cir. 2022); *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 375 (8th Cir. 2018); *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 (9th Cir. 2023); *Black v. Occidental Petroleum Corp.*, 69 F.4th 1161, 1173 (10th Cir. 2023); *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 888 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 1457 (2024) (mem.); *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746, 757 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 818 (2024) (mem.).

2. See *infra* Section I.A.

rulings as discretionary concentrates too much unreviewable power in a single judge, conveys to the public and litigants that discretion and not law governs, and inhibits the development of the law.

The Supreme Court has never announced a standard of appellate review for most aspects of the district court's class certification ruling. And while a vast literature addresses many aspects of the law of class certification, commentators have said little about the appropriate standard for reviewing a class certification order on appeal.<sup>3</sup> Given that the standard of appellate review can determine the outcome of an appeal, getting the standard right is important and warrants close attention.

This article explains why the district court's class certification decision is, at its core, a legal one. Most importantly, the court must determine, as a prerequisite to certification, whether "there are questions of law or fact common to the class."<sup>4</sup> As the Supreme Court has explained, this "commonality" requirement is not satisfied unless the class proceedings can generate "common answers" for most or all class members on one or more elements of their class claims.<sup>5</sup> The thesis of this article is that this assessment is a mixed question of law and fact that courts should analyze and review as a question of law.

Courts should treat commonality as non-discretionary and review a district court's determination *de novo* because a court is doing primarily legal work when it decides whether a given set of facts is capable of

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3. A few commentators have addressed the standard of review issue. See generally Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897 (2014); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009); see also David C. Miller, Note, *Abuse of Discretion and the Sliding Scale of Deference: Restoring the Balance of Power Between Circuit Courts and District Courts for Rule 23 Class Certification Decisions in Oil and Gas Royalty Litigation*, 103 IOWA L. REV. 1811, 1821–22 (2018).

4. FED. R. CIV. P. 23(a)(2).

5. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–52 (2011) (quoting Nagareda, *supra* note 3, at 131–32).

generating common answers for numerous individuals. Specifically, the court must determine whether two or more individuals are similarly situated in relation to the relevant evidence and law, such that an answer for one is the answer for all. This is a legal function similar to the application of *stare decisis*, *res judicata*, or issue preclusion—all doctrines that require a court to determine whether the result for one or more parties in one case should determine the result for one or more parties in another.

As a policy matter, legal review of the essential commonality determination makes sense for several reasons. The class certification ruling is extraordinarily important—it is the difference between a small claim and a case worth millions or billions of dollars.<sup>6</sup> An order granting class certification prompts settlement in the vast majority of cases, such that is usually the final judicial ruling of substance in a class action.<sup>7</sup> A ruling as a matter of law provides a far better and more legitimate foundation for a decision on which millions or billions of dollars turn, provides better guidance to lower courts, fosters better development of the substantive law, and gives more certainty and notice to parties. For these reasons, reviewing Rule 23 commonality determinations *de novo* would have significant benefits for courts, litigants, and the public.

This Article proceeds in four parts. Part I describes the origins of and the theory underlying the proposition

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6. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

7. Class actions rarely proceed to trial, whether because of dismissal or settlement before or after class certification. See, e.g., CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS, 2022 YEAR IN REVIEW 22 (2023), <https://www.cornerstone.com/wp-content/uploads/2023/05/Securities-Class-Action-Filings-2022-Year-in-Review.pdf> [<https://perma.cc/JNC5-5D37>] (figure 21 showing that most securities class actions were resolved by dismissal or settlement); see also Darren Carter, *Notice and the Protection of Class Members' Interests*, 69 S. CAL. L. REV. 1121, 1125–27 (1996) (discussing how “settlement is the norm” in class actions); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 151 n.318 (1996) (noting that jury trials began in 0% to 14% of class actions in a study of four federal districts).

that class certification is discretionary, while showing that the U.S. Supreme Court has never reached that conclusion. Part II explains how amendments to Rule 23 and modern precedent have undercut the proposition that the commonality determination is discretionary and instead lay the groundwork for concluding that commonality is a mixed question of law and fact. Part III offers an overview of how district courts should view and determine commonality. Part IV explains why appellate courts should review the district court's commonality determination de novo, as matter of law.

## I. THE ORIGINS OF CLASS CERTIFICATION AS A MATTER OF DISCRETION

The class action as we know it today is a relatively recent development in the law. Class actions for money damages did not exist in the United States until 1938. In that year, Rule 23 of the Federal Rules of Civil Procedure became effective.<sup>8</sup> The original version of Rule 23 was not a success—judges and commentators criticized it and the Rules Advisory Committee rewrote the rule entirely in 1966.<sup>9</sup> The revised rule stated the four prerequisites of class certification, which are familiar to all class action practitioners today, including the core requirement that “there are questions of law or fact common to the class.”<sup>10</sup> The rule also granted broad discretion to the district

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8. See WILLIAM B. RUBENSTEIN, 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 1:13 (6th ed. 2024); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7A FEDERAL PRACTICE & PROCEDURE § 1752 (4th ed. 2024).

9. See Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 94–99 (1966) (advisory committee's note to Rule 23).

10. *Id.* at 96. Rule 23 establishes four prerequisites that must be met before the district court may certify a class. The rule provides the following:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

court to “conduct” class proceedings; for example, the court may make “appropriate orders” to determine the “course of proceedings,” to give notice of any step in the action to absent class members, and to deal “with similar procedural matters.”<sup>11</sup>

For decades since the drafters created modern-day Rule 23, courts have grappled with the question of what sort of showing the moving party must make to satisfy the prerequisites to class certification.<sup>12</sup> Until relatively recently, however, the U.S. Supreme Court offered little direction on the subject. In the meantime, the circuit courts necessarily decided for themselves when and how a district court may certify a class. All concluded that the decision whether to certify a class is discretionary.<sup>13</sup> Neither the text of Rule 23 nor the Supreme Court’s interpretation of the Rule compelled the intermediate courts to reach the consensus at which they arrived, however, and more recent Supreme Court precedents have undermined it.

### A. *Discretion, Law, Fact, and Mixed Questions*

Generally, a decision is discretionary if different or even opposing determinations from case to case may be reasonable.<sup>14</sup> When an issue is discretionary, a court’s decision on the same issue in a prior case may be interesting but is not controlling. A legal system may delegate discretion to a decisionmaker to preserve flexibility<sup>15</sup> or simply because the question at issue does

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11. Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 97–98 (1966) (amended Rule 23); *see also* FED. R. CIV. P. 23(d).

12. *See* Nagareda, *supra* note 3, at 111–14.

13. *See supra* note 1 (citing cases from every circuit except the Federal Circuit).

14. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1965 (2007) (arguing that “a decisionmaker has discretion in a normative sense when she is under no moral or legal obligation to make a particular choice”).

15. *Pierce v. Underwood*, 487 U.S. 552, 562 (1988) (explaining the abuse of discretion standard provided “needed flexibility” to award attorneys’ fees based on “multifarious” facts).

not have or rarely has an objectively right answer and therefore, by definition, defies legal resolution. For example, a district judge usually has discretion to award attorneys' fees within a broad range because there is no objective standard for fixing precise hourly rates or the numbers of hours any given task should take in a case.<sup>16</sup>

A question of law, on the other hand, has only one "right" answer. The interpretation of a statute, for example, even if uncertain and contestable, is a question of law because statutes cannot (or at least should not) have two meanings. If the question arises in a genuine case or a controversy, then a judge must decide what a statutory prohibition on, say, "vehicles in the public park" means in that case.<sup>17</sup> And if two courts decide this legal question differently, the conflict in the law cannot stand; perhaps the most important reason for the Supreme Court to grant review is the existence of such a conflict.<sup>18</sup>

A question of fact likewise has only one right answer. Many disputed facts are historical in nature and particular to the parties to a case.<sup>19</sup> For instance, Mr. Smith was in the vicinity of First Avenue on the night of the shooting, or he was not. Ms. Smith intended to defraud the bank when she passed the check, or she did not. Courts review a district court's findings of historical facts, "addressing questions of who did what, when or

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16. See *id.* at 561–62.

17. See Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE U. L. REV. 381, 381, 387–88 (1999) (quoting H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958)).

18. See U.S. SUP. CT. R. 10(a); *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts . . .").

19. In contrast, broad propositions of fact that are not particular to the parties to a case are often called "legislative facts." See *United States v. Davis*, 726 F.3d 357, 366 (2d Cir. 2013) (quoting *United States v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995)). "Legislative facts" are "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FED. R. EVID. 201 advisory committee notes to 1972 proposed rules (note to subdivision (a)). Unless otherwise indicated, this article refers to historical or party-specific facts when discussing questions of fact.

where, how or why” for “clear error.”<sup>20</sup> Appellate courts may defer to a district court’s findings of fact because the district court is in a better position to review the evidence, as when the court observes live witness testimony. Even if both the district court and the appellate court are in the same position to view the evidence, moreover, reviewing all findings of case-specific historical fact *de novo* on appeal would be inefficient.<sup>21</sup>

Sometimes courts describe an issue as one involving a “mixed question” of law and fact,” meaning that the court must decide whether a set of given facts satisfies a “legal test” or “standard,” “or to put it another way, whether the rule of law as applied to the established facts is or is not violated.”<sup>22</sup> Merely identifying an issue as one involving a mixed question of law and fact does not, by itself, “add much focus.”<sup>23</sup> In one sense, *every* case requires the resolution of mixed questions of law and fact because, after the court decides what the relevant law provides, it must decide whether such law requires one outcome or another based on the facts alleged or presented or that a reasonable jury could find. For example, courts routinely decide whether the facts alleged in a complaint are sufficient to state a claim and whether certain undisputed facts entitle a moving party to summary judgment.<sup>24</sup> But these sorts of rulings are not what courts and commentators typically have in mind when they refer to mixed questions of law and fact.<sup>25</sup> Rather, the “mixed question” category

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20. U.S. Bank Nat’l Ass’n *ex rel.* CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC, 583 U.S. 387, 394 (2018) (citations omitted) [hereinafter *Lakeridge*].

21. *See* Anderson v. Bessemer City, 470 U.S. 564, 574–75 (1985).

22. *Lakeridge*, 583 U.S. at 394 (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 & n.19 (1982)).

23. Hewlett-Packard Co. v. Comm’r, 875 F.3d 494, 497 (9th Cir. 2017).

24. *See, e.g.*, Guerrero-Lasprilla v. Barr, 589 U.S. 221, 227 (2020) (noting that courts decide as a matter of law whether facts alleged in a complaint meet the applicable legal standard).

25. Randall H. Warner, *All Mixed up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 128–29 (2005).

encompasses a single determination based on many varying facts, such that stating a single rule to govern those facts is difficult or undesirable or impossible, cannot be legislated, and requires case-by-case adjudication.

Two recent Supreme Court cases illustrate how a court may categorize an issue as a “mixed question” of law and fact and then go on to decide whether it should review the lower court’s determination of the mixed question de novo or for clear error. In *U.S. Bank N.A. ex rel. CWC Capital Asset Management LLC v. Village at Lakeridge, LLC*, the bankruptcy court held an evidentiary hearing, made findings of fact, and then, finally, decided whether a creditor was an “insider” for purposes of approving a reorganization plan.<sup>26</sup> The Court reasoned that although the “insider” question required the application of a legal test to historical facts, that mixed question boiled down to an essentially factual inquiry that pertained only to the parties in the case: whether the creditor had conducted a transaction as though he were a stranger to the counter-party.<sup>27</sup> The court that heard the witnesses was in the best position to draw that factual inference from the entire record.<sup>28</sup>

More recently, in *Google LLC v. Oracle America, Inc.*, the Court held that whether Google had a “fair use” defense against copyright infringement claims was a mixed question of law and fact to be decided based on the complex facts of that case.<sup>29</sup> Whether a defendant’s use of copyrighted materials is “fair” is, again, not something that a rulemaker can legislate in advance, and must instead be evaluated by judges applying standards. The Court reasoned that “fair use” was “originally a concept fashioned by judges” and that courts explain what “fair

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26. *See Lakeridge*, 583 U.S. at 391–92, 394–95.

27. *See id.* at 397 (“Thus the mixed question becomes: Given all the basic facts found, was Rabkin’s purchase of MBP’s claim conducted as if the two were strangers to each other?”).

28. *See id.* at 397–98.

29. 593 U.S. 1, 23–24 (2021).

use” means.<sup>30</sup> The conclusion that “fair use” is a legal determination makes sense because fairness is not a historical fact or inference but instead a judgment.

As the *Lakeridge* and *Google* cases show, categorizing an issue as a “mixed question” does not by itself establish the appellate standard of review. Rather, the standard of review for such a mixed question depends, as the Court stated in *Lakeridge*, on “whether answering it entails primarily legal or factual work.”<sup>31</sup> The assumption is that appellate courts are better positioned to do legal work and trial courts are better positioned to find and evaluate facts.<sup>32</sup> Still, the question remains: how does a judge know if answering a question entails, or should entail, “legal” work? While courts can consider whether a legal test ultimately calls for a factual inference or a judgment, this is ultimately a policy decision about allocation of authority between the courts and whether development of legal principles would help or hinder in a particular area.<sup>33</sup> A determination of a mixed question warrants *de novo* review if the subject at issue would benefit from development and refinement of legal principles or “general guidance.”<sup>34</sup> In other words, if the question is important and *should* be the subject of judgment, as when mixed questions implicate constitutional rights,

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30. *See id.* at 24 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

31. *Lakeridge*, 583 U.S. at 396.

32. *See Miller v. Fenton*, 474 U.S. 104, 113–14 (1985).

33. If Congress has enacted a statute that controls or indicates the standard of review, then the proper standard would be a matter of statutory interpretation. *See Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227–28 (2020) (construing the statutory phrase “question of law” to encompass mixed questions of law and fact). And even if all mixed questions are questions of law, courts still must distinguish between mixed questions and discretionary matters. *See Wilkinson v. Garland*, 601 U.S. 209, 211–12 (2024) (whether noncitizen’s removal would result in exceptional and extremely unusual hardship was a “question of law,” not a discretionary determination).

34. *See Google LLC*, 593 U.S. at 24 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592–93 (1994)); *see also Lakeridge*, 583 U.S. at 398.

then de novo review is appropriate to clarify and elaborate the governing law.<sup>35</sup>

Although categorizing an issue as a “mixed question” does not finally determine the applicable standard of review, it *does* eliminate one possibility: abuse of discretion. Mixed questions exist when fact patterns are complicated and legal standards are necessarily general, not because the framers, or Congress, or the Supreme Court intended to delegate power to district courts to choose among a range of acceptable choices. Thus, in *Lakeridge*, the Court decided whether to apply a “clear error” or “de novo” standard of review, not whether the district court abused its discretion.<sup>36</sup>

To be sure, when an appellate court reviews a finding of fact, distinguishing between “clear error” and “abuse of discretion” review on appeal may be unproductive.<sup>37</sup> But this does not mean that courts should think of factfinding as discretionary. To paraphrase the late Senator Daniel Patrick Moynihan, judges are entitled to their own discretion, but not their own facts.<sup>38</sup> Thus, when a court finds facts, it strives to be accurate and faithful to the evidence. When it exercises discretion, it strives to be wise in choosing among multiple valid options. And when a court answers a mixed question of law and fact, it strives to be right.

With this background in mind, we can turn to the text of Rule 23 and its many provisions, some of which

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35. *Lakeridge*, 583 U.S. at 396 n.4 (“In the constitutional realm, for example, the calculus changes.”); *see also* *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984), *overruled on other grounds by* *Est. of Merch. v. Comm’r*, 947 F.2d 1390 (9th Cir. 1991) (“The predominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights.”).

36. *Lakeridge*, 583 U.S. at 389 (emphasis omitted); *see also* *Williams v. Garland*, 59 F.4th 620, 636–37 (4th Cir. 2023) (explaining distinction between mixed questions and issues for which the decisionmaker has discretion).

37. *See* *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990); *see also* *Abrams v. Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983).

38. *People Are Entitled to Their Own Opinions but Not to Their Own Facts*, QUOTE INVESTIGATOR (Mar. 17, 2020), <https://quoteinvestigator.com/2020/03/17/own-facts/> [<https://perma.cc/HBA3-SC6H>] (“Everyone is entitled to his own opinion, but not his own facts.”).

require a district court to make findings of fact, some of which require an exercise of discretion, and some of which require the court to determine mixed questions of law and fact.

### *B. The 1966 Amendments to Rule 23*

Following the recommendation and presentation of the Advisory Committee on Civil Rules, the Supreme Court adopted an amended version of Rule 23, effective July 1, 1966.<sup>39</sup> Paragraph (a) of Rule 23 then provided the following:

One or more members of a class may sue or be sued as representative parties on behalf of all *only if* (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>40</sup>

As the phrase “only if” indicates, the moving party must meet all of the requirements listed under paragraph (a) of Rule 23. Reinforcing the point, paragraph (b) stated that “[a]n action may be maintained as a class action *if* the prerequisites of subdivision (a) are satisfied, *and in addition*: [other conditions exist].”<sup>41</sup> A class action may be appropriate if prosecuting individual actions would “create a risk” of “inconsistent . . . adjudications . . . that would establish incompatible standards of conduct,” or when a “party opposing the class has acted or refused to act on grounds that apply

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39. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 356–58 (1967) (citations omitted).

40. *Id.* at 415 (emphasis altered) (quoting FED. R. CIV. P. 23(a) (amended 1987)).

41. *Id.* (emphasis omitted and added) (quoting FED. R. CIV. P. 23(b) (amended 1987)).

generally to the class,” such that injunctive relief is appropriate.<sup>42</sup>

Lastly, the district court may certify a class “if Rule 23(a) is satisfied” and “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>43</sup> This last form of class action authorizes a plaintiff to bring class claims for money damages—if and “only if” he or she can meet all of Rule 23’s requirements. The essential requirements that a moving party must meet to maintain a class action are the same today as they were in 1966.<sup>44</sup>

By modern textualist lights, the conclusion that paragraphs (a) or (b) of Rule 23 confer any “discretion” on a district court to make determinations as to whether a moving party met mandatory criteria may seem surprising. As the Second Circuit stated in 2006, “[i]t would seem to be beyond dispute that a district court may *not* grant class certification without making a determination that all of the Rule 23 requirements are met.”<sup>45</sup> And yet, relying on prior decisions, the same court also stated that it would review the district court’s underlying determinations, as well as its final conclusion, for “abuse of discretion.”<sup>46</sup> Tracing that precedent back to the first cases that interpreted the 1966 version of Rule 23 and those that followed, one finds that Rule 23 “discretion” is rooted in the idea that class actions were essentially a trial or case management tool, to be used as provisionally and expediently as the district court saw fit.

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42. FED. R. CIV. P. 23(b)(1)–(2).

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

44. Compare FED. R. CIV. P. 23(a)–(b), with *Green v. Wolf Corp.*, 406 F.2d 291, 296 n.8 (2d Cir. 1968) (quoting FED. R. CIV. P. 23 (amended 1987)) (reproducing 1966 version of Rule 23).

45. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006) (emphasis added).

46. *Id.* at 31–32.

Subparagraph (c) of the 1966 version of Rule 23 once supported the proposition that class certification was a provisional ruling. The 1966 version of the rule provided that a court should issue an order granting or denying class certification “[a]s soon as practicable after the commencement of an action.”<sup>47</sup> It also provided, in a line that since has been modified, that “[a]n order under this subdivision *may be conditional*, and may be altered or amended before the decision on the merits.”<sup>48</sup> Rule 23 was amended in 2003 to eliminate the possibility of “conditional” certification, but until that amendment, courts were able to view certification as a tentative procedural step.<sup>49</sup> Under this view, whether and when to certify a class was discretionary.

### C. *The Class Action As Case Management Device*

Early courts viewed Rule 23 as a flexible procedural instrument whose malleability would allow judges to bend it into the right shape from case to case. A good example is *Green v. Wolf Corp.*, in which the Second Circuit commented that Rule 23’s “flexibility” enabled it “to view liberally claims which assert a right to a class action in 10b-5 [securities] cases at the early stages of the litigation.”<sup>50</sup> Thus, under cases such as *Green*, courts could decide class certification at the very beginning of the case and deal with any complications later. As the Tenth Circuit stated, “if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial

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47. Kaplan, *supra* note 39, at 415 (emphasis omitted) (quoting FED. R. CIV. P. 23(c)(1) (amended 1987)).

48. *Id.* (emphasis omitted and added) (quoting FED. R. CIV. P. 23(c)(1) (amended 1987)); *see also In re Nat’l Football League Players Concussion Inj. Litig.*, 775 F.3d 570, 579 (3d Cir. 2014) (discussing amendment to the “may be conditional” provision of Rule 23).

49. *See Wolff, supra* note 3, at 1911–15 (reviewing judicial “experimentation” with Rule 23 after the 1966 enactments under the version of the rule that authorized conditional certification).

50. 406 F.2d 291, 298 (2d Cir. 1968) (footnote omitted).

so require.”<sup>51</sup> Reiterating this theme a few years later in 1974, the Second Circuit held that an interlocutory appeal from a class certification order was unavailable because the “determination to permit the City’s action to proceed as a class action is very much ‘tentative,’ subject always to reconsideration as the cause of action unfolds.”<sup>52</sup>

The tentativeness of early class certification rulings, coupled with faith in the district judge to set things right later in the case, meant that an interim class certification ruling itself was rarely problematic for either side—it could always be fixed or adjusted. The mere possibility of developing acceptable class procedures later in the case led to a remarkable ruling in *Green* itself, at least by today’s standards. There, the Second Circuit saw “no sound reason” why certification of a securities fraud class action would be inappropriate even if the district court determined that the element of “reliance” required *individual trials*.<sup>53</sup> This ruling underscores the provisional nature of 1960s- and 1970s-era certification rulings, which would not have been possible if the court had to confront the reality of conducting hundreds or thousands of individual trials on the element of reliance.

*Green* itself did not state a standard of review in reversing the district court’s order striking class action allegations from the complaint.<sup>54</sup> But the circuit courts

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51. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968) (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 566 (2d Cir. 1968)); see also *Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir. 1975), *abrogated by* *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478 (1978) (quoting *Esplin*, 402 F.2d at 99); *Green*, 406 F.2d at 298 (quoting *Esplin*, 402 F.2d at 99).

52. *Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 646–47 (2d Cir. 1974) (footnote omitted).

53. See *Green*, 406 F.2d at 301. *But see* *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 2006 U.S. Dist. LEXIS 52991, at \*59 n.161 (S.D.N.Y. Aug. 1, 2006), *aff’d*, 546 F.3d 196 (2d Cir. 2008).

54. Before the 1998 amendments to Rule 23 expressly authorized the courts of appeals to review class certifications orders on an interlocutory basis, the appellate courts reviewed such orders pursuant to district court certification under 28 U.S.C. § 1292(b), the collateral order doctrine, or by writ of mandamus.

built on its reasoning to hold that if Rule 23 is a flexible case management device, then district courts must have discretion to wield it as such.<sup>55</sup>

#### *D. The Supreme Court*

The U.S. Supreme Court has never held that Rule 23 commits every aspect of the district court's certification decision, or the determination whether a moving party has met Rule 23's requirements, to the court's discretion. In fact, the first post-1966 Supreme Court opinion to interpret Rule 23's requirements—*Eisen v. Carlisle & Jacquelin*—held that the Rule's requirement to direct individual notice of class certification to identifiable class members was “not a discretionary consideration.”<sup>56</sup>

In its next decision interpreting Rule 23, *Califano v. Yamasaki*, the Court held that nothing in Rule 23 precluded the district court from certifying a nationwide class (as opposed to a narrower class), if otherwise proper, and if the court had jurisdiction over the class members' claims.<sup>57</sup> In a line that would launch the “abuse of discretion” standard of review, the Court stated that “[t]he certification of a *nationwide* class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court.”<sup>58</sup> The Court did not say which issues arising under Rule 23 are discretionary, apart from the only issue it addressed: whether to certify a nationwide class, as distinguished from a smaller class, when the party seeking certification had met all the Rule's requirements.

Similarly, in *Reiter v. Sonotone Corp.*, the Supreme Court rejected the defendant's argument that consumers

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*See, e.g.,* Blackie v. Barrack, 524 F.2d 891, 894–95 (9th Cir. 1975) (granting petition for interlocutory review of class certification under 28 U.S.C. § 1292(b)).

55. *See, e.g.,* Lamphere v. Brown Univ., 553 F.2d 714, 719 (1st Cir. 1977) (“The underlying theme is flexibility . . .”).

56. 417 U.S. 156, 176 (1974).

57. 442 U.S. 682, 703 (1979).

58. *Id.* (emphasis added).

lacked statutory standing to assert antitrust claims under the Clayton Act, but warned that district courts “must be especially alert to identify frivolous claims brought to extort nuisance settlements” and noted that “they have broad power and discretion vested in them by [Rule 23] with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions.”<sup>59</sup> This warning—apparently meant to discourage class certifications in cumbersome cases—was dicta, given that the district court had not expressed any opinion on the “certifiability of the class” before certifying the statutory antitrust standing question for interlocutory review.<sup>60</sup>

The Supreme Court has not stated what legal standard or standard of review applies to the district court’s determination that a moving party *has met* all the relevant requirements for class certification under Rule 23(a).<sup>61</sup> In particular, it has never held that the district court’s “commonality” determination under Rule 23 is discretionary. Individual members of the Court have referred to a broad “abuse of discretion” standard, but only in dissenting opinions that rely on *Califano* and *Reiter*.<sup>62</sup> That this broad “abuse of discretion” standard appears only in a few dissenting opinions, while the

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59. 442 U.S. 330, 345 (1979) (citation omitted).

60. *See id.* at 336.

61. In *Shady Grove Orthopedic Associates P.A. v. Allstate Insurance Co.*, the Supreme Court observed that the word “may” in subdivision (b) of Rule 23 conferred discretion on the plaintiff to maintain a class action “if the prescribed preconditions are satisfied.” 559 U.S. 393, 399–400 (2010) (citation omitted). *Shady Grove* did not comment on whether the district court had any discretion to determine whether the preconditions stated in paragraph (a) of Rule 23 have been met. If anything, *Shady Grove* tends to suggest that district courts lack discretion to determine whether a class action may be maintained. *See Wolff, supra* note 3, at 1900 (noting that “the Court used language that could be read to deprive district courts of any discretion when deciding whether certification is appropriate in a given case” but arguing that such language should not be construed as affecting district court discretion (footnote omitted)).

62. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011) (Ginsburg, J., concurring in part and dissenting in part); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 868 (1999) (Breyer, J., dissenting); *Amchem Prods. v. Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., concurring in part and dissenting in part).

corresponding majority opinion declines to articulate a standard in those cases, shows that the Supreme Court has not articulated a standard of appellate review for determining whether a party *has met* Rule 23's requirements.

To be sure, starting in 1982, the Supreme Court has stated that district courts must conduct a "rigorous analysis" of Rule 23's requirements.<sup>63</sup> The "rigorous analysis" requirement furnishes a reason for an appellate court to reverse if it concludes that the district court should have been more careful or thorough in its reasoning.<sup>64</sup> It signals that appellate courts should scrutinize class certification rulings but does not provide clear direction in terms of standard of review.<sup>65</sup>

One might argue that the Supreme Court's silence on the subject of how to determine whether a moving party has *met* the requirements for class certification implies that the district court has discretion to make that determination. But as discussed below, if that conclusion was ever tenable, it no longer is. Changes in Rule 23 and evolving Supreme Court jurisprudence rule out the conclusion that class certification is discretionary.

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63. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) ("[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" (citation omitted)); *Wal-Mart Stores, Inc.*, 564 U.S. at 351 (same).

64. *See Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 550–51 (5th Cir. 2020).

65. The "rigorous analysis" requirement is no substitute for determining and reviewing commonality as a matter of law because the conclusion that the district court failed to conduct such analysis does not give any substantive guidance to the courts or the parties. It is akin to a schoolteacher chiding a student for not showing his or her work. Thus, a reversal for failure to conduct rigorous analysis mainly kicks the can down the road and extends the class certification proceedings for more briefing and analysis. *See, e.g., In re Ford Motor Co.*, 86 F.4th 723, 729 (6th Cir. 2023) (remanding for more rigorous analysis without deciding whether class certification would be proper); *see also Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 130 (3d Cir. 2018) (same).

## II. THE TRANSITION TO CLASS CERTIFICATION BASED ON SIGNIFICANT PROOF OF COMMONALITY

Two developments in the law since 2000 clarify that the commonality determination under Rule 23(a)(2) is not provisional or predictive; to the contrary, courts should base their determination on the evidence. First, the 2003 amendments to Rule 23 eliminated the possibility of “conditional certification,” making clear that a district court may not certify a class unless and until the moving party has met Rule 23’s requirements. Second, in 2011, the Supreme Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes*, which held that a party seeking class certification must present “[s]ignificant proof” that a factfinder may determine a common contention that is central to the validity of the class claims “in one stroke.”<sup>66</sup>

### A. *The 2003 Amendments to Rule 23*

In 2003, Rule 23 was amended in several important respects. The drafters replaced the requirement to determine whether to certify a class “as soon as practicable after commencement of an action” with a requirement to decide class certification “at an early practicable time.”<sup>67</sup> This change recognized that class certification before discovery was unrealistic, especially given a “critical need” to “determine how the case will be tried.”<sup>68</sup> The Advisory Committee Notes also recognized that some courts require a trial plan in support of a motion for class certification, describing the issues and testing whether they are “susceptible of class-wide proof.”<sup>69</sup>

The 2003 amendments eliminated the district court’s authority to enter a “conditional” class

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66. 564 U.S. 338, 350, 353 (2011) (citation omitted).

67. FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment; *see also* FED. R. CIV. P. 23(c)(1)(A).

68. *See* FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment.

69. *Id.* (citation omitted).

certification order. The Advisory Committee Notes state unequivocally, “A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”<sup>70</sup> This modification precluded district courts from adopting a “certify-first-ask-questions-later” approach.<sup>71</sup> Instead, under the current Rule 23, the district court’s ruling must be “definitive” and cannot rely on “later developments” in the case.<sup>72</sup>

The 2003 amendments eliminated the textual basis for regarding the class certification decision as a discretionary case management tool. A “conditional” decision is subject to revision, and if the district court were as likely as not to retract a conditional certification, then the conditional certification resembles a ruling concerning the scope of discovery. Such a ruling would greatly affect the litigation expense each side would incur but would not ultimately determine liability. Under the current Rule 23, however, the district court must *determine* whether there are questions of law or fact common to the class based on the existing record.

One may ask why Rule 23 directs the court to determine whether to certify a class at “an early practicable time”<sup>73</sup> if the class certification decision is meant to be a durable order that lasts through final judgment, subject to any needed amendments to account for changes to the class definition.<sup>74</sup> Given that extensive

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70. *Id.*

71. See *In re Nat'l Football League Players Concussion Inj. Litig.*, 775 F.3d 570, 579 (3d Cir. 2014) (noting that amendments was prompted by “concern[] that district courts were conditionally certifying putative class actions without undertaking a thorough analysis of the Rule 23(a) and (b) certification requirements”); see also *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 39 (2d Cir. 2006).

72. *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 202 (3d Cir. 2009) (citations omitted).

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

74. Before 2003, a court could not alter its class certification order after a “decision on the merits.” *In re Nat'l Football League Players Concussion Inj. Litig.*, 775 F.3d at 579 (citation omitted). The 2003 amendments changed that—permitting courts to alter an existing class certification order “before final judgment.” FED. R. CIV. P. 23(c)(1)(C). The committee explained that the change

discovery is necessary in some cases to resolve the class certification issue, describing the ruling as taking place “early” in the proceedings is counter-intuitive. The word “early” here is best construed as referring to the *sequence* of judicial determinations, not close temporal proximity between the time the action commenced and the time of the order on class certification. The drafters sought to strengthen the rule against one-way intervention,<sup>75</sup> such that the court must decide certification before the merits.<sup>76</sup> Thus, “early” means before a ruling on summary judgment, before pretrial motions in *limine* or motions to exclude experts at trial, and before trial, unless the defendant waives the protection of the rule against one-way intervention in connection with any of these proceedings.<sup>77</sup>

That Rule 23 requires district courts to determine class certification based on the existing record—as opposed to leaving the question open and subject to future events—also facilitates interlocutory appellate review. In 1998, the advisory committee and judicial conference had added subparagraph (f), which authorizes the courts of appeals to hear appeals from orders granting or denying class certification. While the rulemakers added the interlocutory-review provision

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“avoids the possible ambiguity in referring to ‘the decision on the merits.’” FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment. And it noted that a court should have flexibility to amend an existing class certification order after a “determination of liability,” which might reveal a “need to amend the class definition or subdivide the class.” *Id.*

75. “[O]ne-way intervention” refers to the situation in which a potential class member is able to wait until after a merits adjudication before deciding whether to participate in the class and bring his or her own lawsuit. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). If the adjudication is favorable, the class member could remain in the class; if unfavorable, he or she could opt out and avoid the unfavorable result. *See id.* The unfairness of this situation is the reason why a defendant may demand that class certification precede merits adjudication. *See id.*

76. *See In re Citizens Bank, N.A.*, 15 F.4th 607, 617 (3d Cir. 2021). The advisory committee explicitly stated that the amendment “does not restore the practice of ‘one-way intervention.’” FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment.

77. *See In re Citizens Bank, N.A.*, 15 F.4th at 618–19 (footnote omitted) (citing *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3d Cir. 1974) (en banc)).

before they eliminated the provision allowing for conditional certification in subparagraph (c), the amendments work sensibly together to ensure that an appellate court has a concrete order to review. Thus, an appellate court may consider whether the evidence before the district court supports a commonality finding, including on interlocutory review. And if the amendments left any doubt on this point, the Supreme Court would soon resolve it in its most important commonality decision yet.

### B. *Wal-Mart Stores, Inc. v. Dukes*

After granting a petition for interlocutory review under Rule 23(f), the Ninth Circuit considered a gargantuan class action in *Wal-Mart Stores, Inc. v. Dukes*. The district court had certified a class defined to include all women who had been employed at any Wal-Mart store since December 26, 1998, and “who [had] been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.”<sup>78</sup> As certified, the class included women employed at “3,400 stores in 41 regions” around the country during a ten-year period.<sup>79</sup> Despite the magnitude of the case, the Ninth Circuit emphasized that its review would be limited and deferential.<sup>80</sup>

The Ninth Circuit stated that it would reverse “only upon a *strong showing* that the district court’s decision was a *clear* abuse of discretion.”<sup>81</sup> It held that its review of an order granting a motion for class certification was even more deferential than its review of an order denying certification.<sup>82</sup> The Ninth Circuit concluded that this

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78. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 578 (9th Cir. 2010) (en banc), *rev’d*, 564 U.S. 338 (2011) (citation omitted).

79. *See id.*

80. *See id.* at 579.

81. *Id.* (emphasis added) (internal quotation marks omitted) (quoting *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005)).

82. *See id.* As others have noted, nothing in the text of Rule 23 supplies a basis for concluding that courts should review orders granting class certification

level of deference was warranted even though it agreed with the Second Circuit's statement that the Rule 23 inquiry "is really a mixed question of fact and law."<sup>83</sup> With respect to the element of commonality in particular, the Ninth Circuit stressed, "our task here is to determine whether the district court *abused its discretion*."<sup>84</sup> Under that deferential standard, the Ninth Circuit affirmed the district court's class certification order in most respects.<sup>85</sup>

The U.S. Supreme Court's opinion in *Dukes*, on the other hand, was not deferential to the district court. The opinion clarified unmistakably that the commonality inquiry turns on the *evidence* presented in support of class claims. Thus, merely *asking* whether employees have sustained an injury under the employment discrimination law does not raise a common question within the meaning of Rule 23.<sup>86</sup> Rather, a question is common when the factfinder can evaluate the evidence and deliver a "common answer" to the question for members of the class.<sup>87</sup> As the Court explained, the factfinder must evaluate a "common contention"—specifically, a common contention of fact—the resolution of which is "central to the validity" of the class claims.<sup>88</sup>

The claim in *Dukes* was that Wal-Mart engaged in a pattern or practice of discrimination against women that affected all members of the employee class. The Court explained that the evidence was insufficient to show that the class members were similarly situated. It stated, "[w]ithout some glue holding the alleged *reasons* for all

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more deferentially than orders denying certification. See Wolff, *supra* note 3, at 1904 n.23.

83. See *Dukes*, 603 F.3d at 585 n.6 (quoting *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 40 (2d Cir. 2006)).

84. See *id.* at 607 (citations omitted).

85. See *id.* at 628. The Ninth Circuit declined to address Wal-Mart's challenge to the district court's trial plan because of its "tentative nature." *Id.* And it noted that the district court "ha[d] the discretion to modify or decertify the class" if it became "unmanageable." *Id.*

86. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011).

87. See *id.* at 352.

88. *Id.*

those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.”<sup>89</sup> The “glue” in the Court’s metaphor is evidence of commonality, *i.e.*, evidence that the class members were relevantly similarly situated with respect to their claims against Wal-Mart.

The Court offered two examples of evidence that could demonstrate commonality in an employment discrimination case. First, if an employer used a “biased testing procedure” to evaluate applicants and employees, the persons subjected to such procedure could present a common question about whether the procedure disfavored them.<sup>90</sup> Second, “[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. . . .”<sup>91</sup>

“Significant proof” of a general corporate policy of discrimination was lacking in *Dukes*. Canvassing the evidence, the Court started with the expert opinion of Dr. William Bielby, but even after crediting his opinion, it did not amount to “[s]ignificant proof” of an employment policy.<sup>92</sup> Next, although plaintiffs had “convincingly” established that Wal-Mart had a corporate policy to give discretion over employment matters to local supervisors, such a policy would not enable a jury to make common findings. This is because “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.”<sup>93</sup> Put another way, managerial discretion, without more, does not show that employees are similarly situated with respect to

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89. *Id.* at 352.

90. *See id.* at 353 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

91. *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15).

92. *See id.* at 354–55.

93. *Id.* at 355–56.

their claims, such that the evidence for one employee would require the same answer for another employee.

The Court also considered statistical evidence showing disparities between men and women at Wal-Mart. Even “taken at face value,” however, the statistical evidence was “insufficient to establish” commonality.<sup>94</sup> Regional or national data did not show that employees were similarly situated.<sup>95</sup> As the Court observed, employee pay disparity could vary from store to store, such that regional data would not determine managers’ conduct at any particular store.<sup>96</sup> Similarly, anecdotal reports were insufficient to show that Wal-Mart treated all class members in the same way.<sup>97</sup> The plaintiffs filed 120 affidavits relating to 235 out of 3,400 stores.<sup>98</sup> In effect, the sample size was too small, both in terms of the number of individual affidavits and the number of stores.<sup>99</sup>

Although the Court did not say so specifically, its reasoning shows that it analyzed the “commonality” issue as a mixed question of law and fact, without deference to the lower courts. The Court set out a legal standard for adjudicating commonality that could apply broadly to any fact pattern. Then it analyzed the facts and evidence to assess whether the facts met the legal standard. The Court held that the facts did not meet the commonality standard. This was a “mixed question” analysis.

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94. *Id.* at 356.

95. *See id.* at 356–57.

96. *See id.*

97. *See id.* at 358.

98. *See id.* (citation omitted).

99. *See id.* The *Dukes* decision has its detractors who contend that the U.S. Supreme Court got it wrong. *See, e.g.,* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 444 (2013); *see also* Erin Shaughnessy, Note, *Too Big to Be Sued?: Class Actions and the Commonality Requirement After Wal-Mart v. Dukes*, 57 U. LOUISVILLE L. REV. 125, 125 (2018). These commentators correctly note that the *Dukes* is a watershed ruling on commonality while attributing the ruling to the Supreme Court’s policy or political preferences. This article accepts *Dukes* as correctly decided and endeavors to build upon the analysis in *Dukes* and subsequent decisions.

As noted, the Court did not announce a standard of review before analyzing and deciding the issue before it. This omission may seem conspicuous in light of the importance of the standard of review in the Ninth Circuit’s opinion. But on closer inspection, the omission makes sense because the parties did not ask the Court to decide which standard of review should apply and the Court’s prior precedents did not resolve the issue. No subsequent U.S. Supreme Court decision has explicitly announced a standard of review of a district court’s commonality determination.

### III. DETERMINING COMMONALITY BASED ON EVIDENCE THAT CLASS MEMBERS ARE RELEVANTLY SIMILARLY SITUATED

The commonality inquiry and really, the entire class action enterprise, is concerned with whether putative class members are similarly situated for purposes of asserting class claims. The problem is that similarly-situated-ness is hard to analyze in a rigorous and rule-based way. With that problem in mind, the goal in this section is to offer an overview for understanding the commonality determination and to distinguish it from predominance. The next section turns to the reasons why courts should make and review commonality determinations as a matter of law.

#### A. *The Nature of the Commonality Determination*

The purpose of class certification is to enable a class to assert class claims at trial before a jury or court. If we suppose that the class has 10,000 members, only a small percentage of them could testify. The idea is that the named plaintiffs will present evidence in support of the class claims on behalf of absent class members.<sup>100</sup> The

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100. See, e.g., *Cody v. City of St. Louis for & on behalf of Medium Sec. Inst.*, 103 F.4th 523, 530 (8th Cir. 2024) (“Common questions are those where the same evidence will suffice for each member to make a prima facie showing [or] the

crucial question is whether the representative evidence has approximately the same relevance and probative force with respect to the absent class members as it does for the named class members. If so, then the evidence can support common answers to questions that are common to the class. If not, then the jury could give different answers for named plaintiffs and absent class members, respectively, or from class member to class member.

With respect to elements of a claim or affirmative defenses, if the jury reasonably could give different answers for absent class members than it would give for the named plaintiffs, then there is no commonality among them and the evidence pertaining to the named plaintiffs does not permit the jury to decide the absent class members' claims. To make the concept more concrete, suppose that the operative complaint identifies ten named plaintiffs. If the jury reasonably could arrive at different determinations for each one of them individually, then they do not present common questions of fact, even if all assert the same claim. To assess whether individuals are similarly situated, a side-by-side comparison between "John" and "Susan" will illustrate the point.

A defendant opposing class certification typically will argue that the facts are different as between John and Susan, such that a factfinder must consider each of them individually. In this situation, plaintiffs have three possible responses. First, they can argue that the factual differences between John and Susan are immaterial and thus could not lead a jury to make different determinations. Second, they can propose to identify all persons who, like John, belong to category "A" and all persons who, like Susan, belong to category "B," respectively, and divide them into subclasses or exclude

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issue is susceptible to generalized, class-wide proof." (alteration in original) (internal quotation marks omitted) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016))). As California's Civil Jury Instructions instruct the jury, "You may assume that the evidence at this [stage of the] trial applies to all class members [except as I specifically tell you otherwise]." Judicial Council of California Civil Jury Instruction No. 115 (2024) (alterations in original).

one category from the class of persons asserting claims altogether. Third, they can argue that nobody or an immaterial number of class members with John's or Susan's characteristics really exists, such that the need for considering them separately is purely hypothetical or illusory. Each of these arguments requires different analysis.

To begin with a frequently recurring example, suppose a plaintiff seeks to certify a class of persons who allege that they purchased securities in reliance on the defendant company's false statements. A defendant could point out that John, who read the statement, is different from Susan, who did not. The person who did not see or hear the statement did not purchase stock in reliance on the statement. Plaintiffs would respond that this factual difference is immaterial because of the "presumption of reliance" on information reflected in the price of the stock.<sup>101</sup> If no such legal argument is available, however, then factual differences among class members could and should cause the jury to reach different verdicts as to those class members, precluding class certification.<sup>102</sup>

In the absence of a conclusive legal response to factual differences (such as the legal presumption of reliance), a plaintiff may simply argue that certain factual differences are immaterial and do not preclude common determinations. For instance, a company might use six different variations of an online advertisement during a three-month period. Even if no evidence shows which version or versions the class members saw, that

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101. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 461 (2013) (footnote omitted) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 241–49 (1988)).

102. *See Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 119 (2021) (without the presumption of reliance, "individualized issues of reliance ordinarily would defeat predominance and 'preclude certification' of a securities-fraud class action" (citations omitted)). In this situation, the plaintiffs probably have no way to prove the required "reliance" element of their securities fraud claim with common evidence. *See White v. Symetra Assigned Benefits Serv. Co.*, 104 F.4th 1182, 1194–96 (9th Cir. 2024) ("marketing materials" not sufficient evidence to infer reliance on misrepresentations or omissions relating to sale of annuities).

factual variation would not preclude a jury from giving common answers in a false advertising case if the jury would reach the same conclusion regardless of which version it considered. On the other hand, if a jury reasonably could conclude that some versions were misleading and others were not, and there is no common way to tell which version any given class member saw, then the evidence does not permit a common determination of the question whether class members detrimentally relied on a false advertisement.<sup>103</sup>

Even where factual differences preclude common answers, plaintiffs may argue that they can identify all the relevant factual differences programmatically or with an algorithm and then separate people with factual differences into distinct categories. For example, a defendant may argue that some class members entered into arbitration agreements and therefore may not be members of a litigation class.<sup>104</sup> But if plaintiffs can show that the defendant's own records permit programmatic identification and exclusion of all such persons who entered into arbitration agreements, then the existence of those arbitration agreements would not preclude certification of a class of persons who did *not* enter into the agreements. In effect, plaintiffs would define (or redefine) the class as excluding persons who entered into arbitration agreements, and then show that the class is ascertainable through resort to conclusive data sets. Of

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103. One may ask why a defendant should avoid class certification based on a lack of evidence showing a causal connection between alleged misconduct (e.g., false advertising) and injury to individual class members. In other words, if a jury could estimate that 50% of class members saw a false advertisement but has no way of determining *which* class members, are damages appropriate? The answer is “no” because the purpose of the class action is to provide a remedy to injured parties, just as in an individual case, not to punish the defendant generally or impose fines based on alleged misconduct. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (“Article III does not give federal courts the power to order relief to any uninjured plaintiff . . . .” (citation and footnote omitted)); *Tyson Foods, Inc.*, 577 U.S. at 466 (Roberts, C.J., concurring) (“[I]f there is no way to ensure that the jury’s damages award goes only to injured class members, that award cannot stand.”).

104. *See, e.g., O’Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018).

course, whether the plaintiffs can identify the persons who agreed to arbitrate through programmatic interrogation of data sets may itself become a subject of litigation.

Finally, a plaintiff may argue, in response to a defendant's argument that factual differences preclude common answers, that the claimed factual differences do not exist or exist in such small numbers that the court may set those differences aside. This type of clash arises when a defendant asserts that an affirmative defense or rebuttal evidence defeats class claims or that the claims are simply inaccurate with respect to some class members.<sup>105</sup> For example, a defendant may argue in response to a claim under the Telephone Consumer Protection Act (TCPA), which generally prohibits automated calls made without consent,<sup>106</sup> that class members consented to receive the calls. A plaintiff may respond that the defendant's argument is hypothetical or speculative and that no evidence shows any class member, in fact, consented to receive the calls.<sup>107</sup>

A total absence of rebuttal or affirmative-defense evidence that could apply to any class member presents a relatively easy case, but what happens when a defendant presents concrete evidence that, say, three absent class members consented to receive the automated calls in our TCPA example? The plaintiffs' first move may be to argue that the court should treat these three class members as unique or aberrations and

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105. Courts often address this issue in the context of the "predominance" under Rule 23(b)(3). *See, e.g.,* *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016); *see also* *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 422–23 (N.D. Cal. 2014), *overruled on other grounds sub nom. TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). But that mode of inquiry makes sense only if the court determines that it or a factfinder can identify the class members to whom the defendant's argument pertains. If it can, then the court may go on to assess whether those class members' individual questions would predominate over the common ones. *See* FED. R. CIV. P. 23(b)(3). If the court or factfinder cannot identify the class members to whom the defendant's argument pertains, then the court should determine whether the defendant's argument defeats commonality, or not.

106. *See* 47 U.S.C. § 227(b)(1)(A).

107. *See* *Bridging Communities Inc.*, 843 F.3d at 1125.

separate them from the main class, such that their existence does not impede class certification. If the defendant's rebuttal or argument is genuinely limited to the three individuals, then a common question may exist as to everyone else, and the remaining question is whether the common question or instead questions pertaining to the three individuals predominate.

Given that the existence of a handful of absent class members as to whom the defendant has strong defenses or counter-evidence is unlikely to preclude class certification, a defendant is likely to contend that its arguments pertain to a large number of class members, not merely its exemplars. If the plaintiffs dispute that the number of class members to whom a defense or other argument applies is large or significant, then the district court must resolve the dispute. If many absent class members are subject to defenses or arguments that cannot be adjudicated based on common evidence, then a jury cannot give common answers on class claims. On the other hand, even if the defendant identifies a defense or rebuttal that pertains to many class members, plaintiffs might still obtain class certification by showing that they can identify relevant factual differences in some programmatic way and divide class members into categories that are suitable for subclass adjudication.

In sum, the commonality determination involves an assessment of whether a jury or factfinder can deliver common answers for a class or subclass based on common evidence. This assessment is complex because it requires an analysis of the elements of claims and defenses and whether the plaintiffs' evidence and the defendant's evidence is relevant and applies to a substantial and ultimately identifiable proportion of the class. This is a legal question, not a case management issue. To highlight the difference, the next section shows how the commonality determination is different from and relates to the predominance determination under Rule 23(b)(3).

### B. *Distinguishing Commonality from Predominance*

In considering how commonality and predominance inquiries differ, it may be useful to return to *Wal-Mart Stores, Inc. v. Dukes*, in which the majority and minority opinions disagreed about how to determine commonality.<sup>108</sup> Four Justices declined to join Part II of the majority opinion, with Justice Ginsburg writing for herself and Justices Breyer, Sotomayor, and Kagan.<sup>109</sup> The minority opinion states, “The Court errs in importing a ‘dissimilarities’ notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry.”<sup>110</sup> The majority-minority split was about judging commonality.

Justice Ginsburg stated that “a ‘question’ ‘common to the class’ must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members’ claims.”<sup>111</sup> This formulation asks whether an answer would be useful but would not require the district court to determine whether the action has the *capacity* to deliver such a common answer. Having formulated a commonality test that merely requires the asking of useful questions about “disputed issues,”<sup>112</sup> the minority opinion nevertheless goes on to discuss the evidence.<sup>113</sup> This discussion was unnecessary if plaintiffs needed only to ask a question about a relevant and disputed issue.

Justice Ginsburg’s critique of the majority opinion ultimately turned on the proposition that the majority had rendered the predominance inquiry superfluous, stating, “If courts must conduct a ‘dissimilarities’ analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).”<sup>114</sup> This is right in a limited sense: If

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108. *Compare* 564 U.S. 338, 342 (2011), *with id.* at 367 (Ginsburg, J., concurring in part and dissenting in part).

109. *See id.* at 367 (Ginsburg, J., concurring in part and dissenting in part).

110. *Id.* at 378 (Ginsburg, J., concurring in part and dissenting in part).

111. *Id.* at 369 (Ginsburg, J., concurring in part and dissenting in part) (footnote omitted).

112. *See id.* at 369 n.3 (Ginsburg, J., concurring in part and dissenting in part).

113. *See id.* at 370–72 (Ginsburg, J., concurring in part and dissenting in part).

114. *Id.* at 376 (Ginsburg, J., concurring in part and dissenting in part).

there is no commonality under Rule 23(a)(2), then no class can be certified, and there is no need to analyze predominance. But even if the evidence *can* drive common answers, the question still remains whether common issues would predominate over the individual ones. This analysis does not repeat the commonality analysis, but instead requires the court to assess how many individual issues it must address and whether those individual issues outweigh the common ones.

This latter predominance inquiry is akin to trial calendar management. If the court's commonality ruling is correct, then at the predominance stage the court should be determining whether it has time on its calendar to try both the common issues and the individual ones. And if the trial court has correctly sorted issues into common and individualized categories, an order granting class certification should not affect the defendant's procedural rights, because the individual issues should receive individual attention. In other words, when defendants argue that a class action will devolve into a "series of mini-trials,"<sup>115</sup> what they are really and mainly saying is that there is no common issue worth trying. In a "series of mini-trials" world,<sup>116</sup> even after resolution of any common issue, no liability determination would be possible for an unacceptably large number of individual class members.

In large cases, the parties have no practical incentive to litigate whether individual issues would predominate over common ones. The larger the class, the more likely it is that predominance will have relatively little role to play and no "mission" to serve. When a class is large, the existence of individualized issues for *any* significant percentage of class members will quickly overwhelm the capacity of any trial court to try them. For example, suppose a class has one million members; if even one percent has an affirmative defense that cannot be resolved by mass adjudication based on common

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115. *E.g.*, *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002).

116. *Id.*

evidence, then ten thousand people would need a “mini-trial” to resolve their claims. A court or jury cannot make ten thousand findings in a single case, and so no class certification would be possible unless a factfinder can use common evidence to identify and exclude the one percent of class members with an affirmative defense in a programmatic way. Here again, a dispute would ensue about whether the persons with individual defenses or arguments are identifiable, with defendants arguing that a trial of each person would be needed to find them, and plaintiffs arguing that an algorithm or search can identify and exclude any problematic class members that might have otherwise impeded certification.

The upshot is that for large classes, *neither* side is likely to argue that *both* common and individual issues exist and that one or the other *predominates*. This may sound counter-intuitive, given that courts are generally receptive to predominance arguments.<sup>117</sup> What I mean is that plaintiffs are unlikely to concede that any significant number of individual issues exist, while defendants are unlikely to concede that any worthwhile common issues exist.

Rather, plaintiffs will argue that they can identify a group of similarly situated class members as to whom a jury or factfinder may make liability determinations based on common evidence. The claims of any significant number of individuals that do not fit within this group would be excluded as incompatible with the class, *not* managed and litigated alongside the class claims. Similarly, from the defendant’s perspective, identifying individual issues is of little use unless the individualized issues impede the capacity of the proceedings to drive common answers for *any* significant group. Thus, although predominance is distinct from commonality, in practice, the parties have no interest in balancing

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117. See, e.g., *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 195 (3d Cir. 2001) (“Clearly, individual issues predominate . . . .”); see also *N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Tr.*, 477 F. App’x 809, 812 (2d Cir. 2012) (“Predominance is the key Rule 23 requirement in dispute here and the only one we address.”).

common and individual issues and hashing out whether one or the other predominates. When classes are large, similarly-situated-ness is an all-or-nothing contest that leaves little room for a trial court to make a discretionary trial-calendar-management determination.

Although *Wal-Mart Stores, Inc. v. Dukes* makes clear that district courts should analyze whether parties are similarly situated such that common evidence can drive common answers as part of their “commonality” inquiry under Rule 23(a)(2), many courts continue to assert that “predominance” is a far more demanding element for the moving party to meet.<sup>118</sup> This is understandable, insofar as the Supreme Court said in 1997—before *Dukes*—that “the predominance criterion is far more demanding.”<sup>119</sup> But *Dukes* erodes this qualitative comparison because the majority explicitly rejected Justice Ginsburg’s argument that “[t]he Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3),”<sup>120</sup> stating, “That is not so.”<sup>121</sup> The majority also noticeably omitted Justice Ginsburg’s characterization of Rule 23(b)(3) as “more demanding” in its summary of her argument.<sup>122</sup>

The predominance element may have been more “demanding” before *Dukes*, when many courts reasoned that the mere asking of common questions satisfied commonality and did all the hard similarly-situated-ness work at the predominance stage. But it no longer is. To the extent that courts determine whether common evidence enables mass adjudication of class claims as part of their commonality inquiry, for most if not all large

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118. See, e.g., *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019) (“[T]he Rule 23(b)(3) predominance requirement is far more demanding than the commonality requirement found in Rule 23(a).” (citation omitted) (internal quotation marks omitted)).

119. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (citation omitted).

120. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 375 (2011) (Ginsburg, J., concurring in part and dissenting in part).

121. See *id.* at 359.

122. Compare *id.*, with *id.* at 375 (Ginsburg, J., concurring in part and dissenting in part).

classes, the predominance determination naturally follows. Either plaintiffs have established that they can identify a group of people whose claims can be tried on the basis of common evidence, or they have not. That determination, and not the predominance or manageability of individual questions, usually drives the class certification decision.

#### IV. REASONS FOR REVIEWING COMMONALITY AS A MATTER OF LAW

While *Dukes* defines a legal standard for commonality under Rule 23(a)(2), the Supreme Court had no occasion to decide whether commonality under that standard is a mixed question of law and fact and, if so, what standard of review should apply. Courts that consider those issues should hold, first, that whether a moving party has established “commonality” is a mixed question of law and fact, and second, that appellate courts should review the commonality determination *de novo*, as a matter of law. The text of the rule, existing decisions and commentary, public policy, and the demonstrated workability of *de novo* review all support these conclusions.

##### A. *The Plain Text of Rule 23*

Given that the U.S. Supreme Court has never explicitly ruled on the standard of review applicable to the commonality determination,<sup>123</sup> if that Court or a circuit court sitting *en banc* were to consider the issue, its analysis would begin with the Rule’s text and plain meaning.<sup>124</sup> As noted, the relevant text of subdivision (a) of Rule 23 provides: “One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . there are questions of law or fact

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123. *See supra* Part I.D.

124. *See Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989).

common to the class . . . .”<sup>125</sup> The word “common” in this context means “shared.”<sup>126</sup> Thus, the phrase “common to the class” means that class members’ claims raise the same question, such that answering the question resolves part or all of the claim or defense for those who share the question in common. And the question whether class members present the *same* question of law or fact is itself a legal question.

Courts consider whether two different litigants have presented the same legal or factual question all the time. The doctrines of stare decisis, res judicata, and issue preclusion all require judges to ascertain the sameness of questions presented by different parties.<sup>127</sup> Whether a precedent is binding on lower courts, for example, depends on whether the appellate court already resolved the question at issue. Determining whether a precedent is distinguishable or binding may require a close and difficult examination of the law and facts, but the task remains a legal one.<sup>128</sup> Similarly, in the context of res judicata, determining whether two cases involve the same cause of action is a legal question that courts review de novo.<sup>129</sup>

While determining whether two factual or legal questions are the same is a legal inquiry, the commonality element presents a mixed question of law and fact because determining whether class members

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125. FED. R. CIV. P. 23(a)(2).

126. See *Common*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/common> [<https://perma.cc/8XD4-GYTD>] (defining “common” to mean, *inter alia*, “belonging to or shared by two or more individuals or things or by all members of a group”).

127. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (“Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.” (footnote omitted) (citing *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328–329 (1971)); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1033 (2003) (“Stare decisis and issue preclusion operate in much the same way . . . .” (footnote omitted)).

128. See, e.g., *United States v. Chin*, 913 F.3d 251, 257 (1st Cir. 2019); *In re Gledhill*, 76 F.3d 1070, 1078–79 (10th Cir. 1996).

129. See, e.g., *Maldonado v. U.S. Att’y Gen.*, 664 F.3d 1369, 1375 (11th Cir. 2011).

share a question in common requires an assessment of the particular facts of the case. There is no governing rule to apply in every case; rather, the question is whether the specific facts meet the standard of relevant sameness, such that the evidence will permit common answers.<sup>130</sup>

### *B. Courts and Commentators*

As the Second Circuit stated in *Initial Public Offering*, determining whether a litigant has met the elements of class certification is a “mixed question of fact and law.”<sup>131</sup> Professor Richard Nagareda agreed with and cited the Second Circuit’s “mixed question” characterization of the class certification inquiry in his landmark 2009 article on the subject.<sup>132</sup> Nagareda argued that appellate courts frequently should exercise de novo review over class certification decisions.<sup>133</sup>

Professor Nagareda’s reasons for advocating a stronger form of appellate review are complementary and consistent with the thesis of this article, but different from those discussed here. Specifically, Nagareda argued that an offer of aggregate proof may pose a question of law when the proof depends on the general nature of markets, economics, sociology, and the like.<sup>134</sup> To the extent that class certification depends on accepting broad propositions about how the world works,

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130. See Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 167–68 (2010) (urging courts to decide “whether the members of [the] proposed class are relevantly the same or relevantly different”).

131. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006); see also *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008) (referencing potential application of “mixed question[]” standard in class certification context (citation omitted)).

132. See Nagareda, *supra* note 3, at 114; see also Robert H. King, Jr., *Four Lessons from Wal-Mart v. Dukes and Their Application to Montana Class Action Law*, 73 MONT. L. REV. 255, 273 n.116 (2012).

133. See Nagareda, *supra* note 3, at 173.

134. See *id.* at 133–53.

his article contends, such rulings are more akin to a determination of law.<sup>135</sup>

Importantly, Nagareda explicitly called for de novo review of the plaintiffs' theory of class certification in *Dukes* itself.<sup>136</sup> That the Supreme Court seems to have delivered such de novo review in reversing the order granting class certification in *Dukes*, in an opinion that explicitly adopted Nagareda's formulation of "[w]hat matters to class certification," suggests that the Court is open to de novo review.

Another commentator, Professor Tobias Barrington Wolff, has explored the ways in which a district court retains discretion over the class certification decision,<sup>137</sup> but much of his article can be reconciled with this one. In particular, Wolff argued that a judge has "the discretion *not* to certify a class even though the threshold requirements of the Rule appear to be satisfied."<sup>138</sup> This point about ultimate discretion to deny certification even when requirements have been met is consistent with the proposition that a district court has no discretion to determine whether the moving party has satisfied the required element of commonality.

Professor Wolff correctly argues that the Supreme Court's decision in *Shady Grove* did not, by itself, change the standard of review in class actions,<sup>139</sup> but he gives relatively less attention to *Dukes*, which *does* demonstrate that courts need not review the question of relevant sameness and relevant difference, *i.e.*, commonality, for abuse of discretion. This may be because his article focuses on the district court's ultimate discretion *after* determining whether the underlying

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135. *See id.* at 101–02, 101 n.14 (citing John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986)). Class certification rulings may implicitly or explicitly find such broad, society-wide facts, which finding is the functional equivalent of a declaration of law. *See id.*

136. *See id.* at 159–61, 164.

137. Wolff, *supra* note 3, at 1940–52.

138. *Id.* at 1899 (emphasis added), 1926–39.

139. *See id.* at 1946–51.

mandatory conditions have been met, and not commonality in particular.<sup>140</sup>

In short, Professor Nagareda's influential account of the district court's ruling on class certification secured the approval of the U.S. Supreme Court. And while the Court did not incorporate his entire article into law, of course, the adoption of his framework indicates that his conclusions regarding the "mixed question" nature of the common-questions analysis may find favor as well. In any event, as argued here, it is correct. Thus, courts should reject the abuse of discretion standard with respect to the element of commonality and, in an appropriate case, take the next step and hold that determining whether two or more class members share the same question in common is predominantly a legal question, as in other contexts that require courts to determine relevant sameness or difference as between parties and cases.

### *C. Public Policy*

The drafters of amendments to the Rule and courts have recognized that an order certifying a class is not a tentative and provisional case management device, but instead the most important event in the case. An order granting or denying class certification, unless reversed on interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure or modified on a motion to decertify, will often be the final event, either reducing the plaintiffs' proposed class to an individual level or, alternatively, multiplying the individual claim thousands or millions of times over to create a juggernaut that forces settlement.<sup>141</sup> Given that tens or hundreds of millions of dollars often turn on a single judge's class certification ruling, if for no other reason, it would be extraordinary to suppose that the underlying

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140. *See id.* at 1897–1901.

141. For an empirical study of the appellate courts' use of Rule 23(f) to review class certification rulings, see Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. APP. PRAC. & PROCESS 283, 303–25 (2022).

commonality requirement could be discretionary. A fair system of law does not create a discretionary power whose exercise can, as a practical matter, reallocate tens or hundreds of millions of dollars and alter economy-wide business practices.

Thus, an important reason to review the commonality determination as a matter of law is to promote respect for the rule of law. When judges have discretion, by definition, law and facts have diminished importance in the appellate court. When the law and facts matter less, the identity of the assigned judge matters more. And then the most important question for the parties and lawyers in the trial court is: Who is the judge? The identity of the judge, not the law, can dictate the value of the case. Because we aspire to live under a “government of laws and not of men,”<sup>142</sup> however, a better system does not leave the question whether the evidence can generate common answers for thousands or millions of people to the discretionary judgment of a single judge.

Moreover, under a discretionary regime, the meaning of a class certification ruling is up for grabs. If a reviewing court concludes that the commonality determination is discretionary, then it need not and *must* not look too closely at whether the lower court was right to conclude that a body of evidence would enable the resolution of common claims and defenses. An affirmance leaves lower courts and litigants unable to discern whether the district court was right in the first instance. Only those relatively rare cases in which appellate courts conclude that the district court abused its discretion provide reliable guidance as to whether certain fact patterns are relevantly the same or relevantly different.

To be sure, a district court may abuse its discretion by making an error of law.<sup>143</sup> No court has discretion to make legal errors, so a skeptic might argue that the

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142. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (Frankfurter, J., concurring).

143. See *Koon v. United States*, 518 U.S. 81, 100 (1996).

standard for reviewing the “commonality” determination makes no practical difference.<sup>144</sup> The point here, however, is that the question whether class members share questions in common is itself a question of law, leaving no room for the exercise of discretion in connection with the commonality determination. In other words, the class certification decision itself unavoidably poses a question of law. In effect, commonality is a declaration that a verdict for or against person A requires the same verdict for person B as a matter of law. This is possible only if the differences among them cannot permit different outcomes.

If an appellate court defers to the district court’s implicit or explicit determination that certain differences are irrelevant and thus compel the factfinder to make the same finding for all class members who share the question at issue in common, it fails to develop the law. This problem can arise, for example, in assessing whether putative class members consented to contract terms, were misled by advertising, or experienced discrimination. In these scenarios and others, the plaintiffs will argue that the relevant evidence is narrowly circumscribed, while the defendant will argue that the relevant evidence is broad and permits varying outcomes, such that it would be legal error to say that a verdict for or against person A *requires* the same verdict for person B.

Courts develop the law by sorting out these disputes about which facts can lead to different findings. This is predominantly legal work because the crucial task is not fact-finding *per se*, but instead deciding whether the existence of specified facts enables a jury to return a verdict for or against all those who share the facts in common, and whether differences in specified facts would permit a jury to return different verdicts. When

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144. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, for example, *amici* argued that standard of review would affect only a “small number of cases” adjudicating the constitutionality of punitive damages. 532 U.S. 424, 441 (2001) (citations omitted). The Court rejected that view, however, noting that *de novo* review could have made a difference in the very case before the Court. *See id.*

courts treat these determinations as discretionary, however, recurring legal issues may escape resolution.

As an example, plaintiffs regularly bring federal class actions based on state statutes that prohibit call recording without consent. In 2006, in *Kearney v. Salomon Smith Barney, Inc.*, the California Supreme Court commented in dicta that “[a] business that adequately advises all parties to a telephone call, at the outset of the conversation, of its intent to record the call would not violate [the call recording statute].”<sup>145</sup> In subsequent class action cases, plaintiffs argued that under *Kearney* and cases stemming from *Kearney*, if a defendant did not give notice of call recording at the outset of the call, then the call recipient did not consent to call recording, even if the recipient had received notice at some other time or consented in some other way.<sup>146</sup> This dispute went without precedential resolution until 2023, when an intermediate appellate court held that the call-recording statutes do not require explicit notice at the outset of every call.<sup>147</sup> In the meantime, most of these cases and many other settled for many millions of dollars.<sup>148</sup>

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145. 137 P.3d 914, 930, 39 Cal. 4th 95, 118 (2006) (footnote omitted).

146. See, e.g., *Brinkley v. Monterey Fin. Servs., LLC*, No. 16-CV-01103, 2022 U.S. Dist. LEXIS 162574, at \*16–17 (S.D. Cal. Sept. 8, 2022); *Mendell v. Am. Med. Response, Inc.*, No. 19-CV-01227, 2021 U.S. Dist. LEXIS 54854, at \*22–23 (S.D. Cal. Mar. 22, 2021); *Zaklit v. Nationstar Mortg. LLC*, No. 15-CV-2190, 2017 U.S. Dist. LEXIS 117341, at \*14–18 (C.D. Cal. July 24, 2017); *Raffin v. Mediredit, Inc.*, No. CV 15-4912, 2017 U.S. Dist. LEXIS 5311, at \*16–20 (C.D. Cal. Jan. 3, 2017); *Maghen v. Quicken Loans Inc.*, 94 F. Supp. 3d 1141, 1146 (C.D. Cal. 2015), *aff’d in part, dismissed in part*, 680 F. App’x 554 (9th Cir. 2017); *Ades v. Omni Hotels Mgmt. Corp.*, No. 2:13-CV-02468, 2014 U.S. Dist. LEXIS 129689, at \*31–38 (C.D. Cal. Sept. 8, 2014); *White v. FIA Card Servs., N.A.*, No. 12-CV-2034, 2013 U.S. Dist. LEXIS 27053, at \*17 (S.D. Cal. Feb. 26, 2013); *Torres v. Nutrisystem, Inc.*, 289 F.R.D. 587, 594 (C.D. Cal. 2013).

147. See *Rojas v. HSBC Card Servs. Inc.*, 311 Cal. Rptr. 3d 393, 412–14, 93 Cal. App. 5th 860, 881–84 (2023).

148. See Exhibit A, Motion for Preliminary Approval of Class Action Settlement at 6, *CS Wang & Assoc. v. Wells Fargo Bank, N.A.*, No. 16-CV-11223, 2020 U.S. Dist. LEXIS 162424 (N.D. Ill. Sept. 4, 2020) (settlement of \$28 million); Exhibit A, Declaration of Todd M. Friedman in Support of Plaintiff’s Motion for Preliminary Approval of Class Settlement & Certification of Settlement Class at 7, *Zaklit v. Nationstar Mortg. LLC*, No. 5:15-CV-2190, 2017 U.S. Dist. LEXIS 117341 (C.D. Cal. July 24, 2017) (\$6.5 million); *Flowers v.*

Deciding and reviewing class certification as a matter of law would bring greater predictability and consistency to the law, and thus ultimately would create a fairer regime for plaintiffs and defendants alike. Especially when a procedural device reallocates massive resources across a broad swath of the public and effectively operates as a regulatory device, the class certification decision is itself a matter of public interest and public policy. Courts, parties, and the public should know what that policy is.

#### *D. Demonstrated Workability*

In the wake of *Dukes*, the Supreme Court has analyzed certain fact patterns and decided whether the evidence permits common answers. For example, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, it decided that a securities fraud plaintiff need not prove that an alleged misrepresentation is “material” to obtain class certification.<sup>149</sup> In effect, the Court held that with respect to the securities fraud element of materiality, putative class members are similarly situated *as a matter of law* because a statement that moves (or does not move) the price of the stock will be the same for all putative class members.<sup>150</sup>

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Twilio, Inc., No. RG16804363, 2019 Cal. Super. LEXIS 70388, at \*11 (Alameda Cnty. Super. Ct. Jan. 15, 2019) (\$10 million); Raffin v. Mediacredit, Inc., No. CV-15-4912, 2018 U.S. Dist. LEXIS 232064, at \*5 (C.D. Cal. Nov. 30, 2018) (\$5 million); Mirkarimi v. Nev. Prop. 1, LLC, No. 12-CV-2160, 2016 U.S. Dist. LEXIS 25528, at \*2 (S.D. Cal. Feb. 29, 2016) (\$14.5 million); McDonald v. Bass Pro Outdoor World, LLC, No. 13-CV-889, 2014 U.S. Dist. LEXIS 109080, at \*3 (S.D. Cal. Aug. 5, 2014) (\$6 million); Reed v. 1-800 Contacts, Inc., No. 12-CV-02359, 2014 U.S. Dist. LEXIS 255, at \*4–5 (S.D. Cal. Jan. 2, 2014) (\$11.7 million); Medeiros v. HSBC Card Servs., No. CV-15-09093, 2017 U.S. Dist. LEXIS 178484, at \*4 (C.D. Cal. Oct. 23, 2017) (\$13 million); McCabe v. Six Continents Hotels, Inc., No. 12-cv-04818, 2016 U.S. Dist. LEXIS 15822, at \*2 (N.D. Cal. Feb. 8, 2024) (\$11.7 million).

149. See 568 U.S. 455, 459 (2013).

150. See *id.* at 459–60. The fraud-on-the-market doctrine itself is a legal ruling that shareholders are presumptively similarly situated with respect to their reliance on the price of a stock. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 278–79 (2014) (explaining presumption of reliance).

In *Tyson Foods, Inc. v. Bouaphakeo*, plaintiffs alleged that a meatpacking company failed to pay overtime wages for time employees spent “donning and doffing” protective gear.<sup>151</sup> An industrial relations expert determined that employees spent an average of 18 minutes per day on these work-related activities in one department and an average of 21.25 minutes per day in another.<sup>152</sup> Plaintiffs proposed to rely on the expert’s determination of *average* donning and doffing time for each class member,<sup>153</sup> even though an average would rarely represent the actual amount of time any given class member spent on these tasks.

As the Court indicated, under plaintiffs’ theory of overtime, the class members at issue were relevantly the same: the plaintiffs presented evidence and argued that each class member spent the same amount of time changing in and out of protective gear.<sup>154</sup> The question then was simply whether using an *average* time rather than an exact time assumes away too much relevant difference. The Court’s critical legal move was to hold that the *variances* from the average were small enough to be ignored under the circumstances, which included the employer’s statutory duty to keep proper records and the employee’s difficulty in proving how much overtime he or she worked with precision.<sup>155</sup>

In other words, the propriety of class certification in *Tyson Foods* turned on the legal rule that a plaintiff need not prove overtime with exactness under the Fair Labor Standards Act and an average or representative sample may be used as proof when variance from the average is not too high.<sup>156</sup> The amount of the variance itself was a matter of un rebutted and admissible expert opinion, leaving only the question whether the jury needed to address those potential variances, which the Court

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151. 577 U.S. at 446–47.

152. *See id.* at 450.

153. *See id.* at 454.

154. *See id.* at 456–57.

155. *See id.*

156. *See id.* at 459–60.

answered in the negative.<sup>157</sup> This holding developed and clarified the employment law by showing what constitutes adequate proof of unpaid overtime.

Cases such as *Dukes*,<sup>158</sup> *Amgen*,<sup>159</sup> and *Tyson Foods*<sup>160</sup> demonstrate that courts can decide issues of relevant sameness and difference as a matter of law based on the evidence, claims, and defenses.<sup>161</sup> The work is predominantly legal because the crucial issue usually will be whether a claim or defense requires consideration of certain evidence or differences among the putative class members. This resolution of that issue may affect not only the class certification decision, but also the substantive law governing the claim or defense in any case.

The appellate courts' decisions about whether an award of punitive damages is constitutional serve as another example of how courts resolve mixed questions of law and fact as a matter of law. Under the Supreme Court's decision in *State Farm*, courts must consider the "reprehensibility of the defendant's misconduct," the relationship between plaintiff's actual harm and the punitive damages, and the relationship between punitive damages and fines imposed in like cases.<sup>162</sup> This is a complex, fact-intensive adjudication.<sup>163</sup> And yet courts determine whether punitive damages are constitutional as a matter of law.<sup>164</sup> This determination enables the parties to assess the possible range of outcomes and to

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157. *See id.*

158. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

159. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013).

160. 577 U.S. 442.

161. Another example is *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), in which the Supreme Court held that where an antitrust damages model was not tied to a common theory of antitrust injury, no class could be certified. *Id.* at 37–38. As a matter of law, the common evidence in that scenario did not permit a fair damages calculation for absent class members. *See id.* at 38.

162. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

163. As the Court summarized its lengthy analysis in *State Farm*, it was "[a]n application of the [Court's] guideposts to the facts of this case." *Id.* at 429.

164. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34 (2001).

make legal arguments before a district judge that punitive damages in a given case are constitutional or not. A binding precedent of the court of appeals is far more valuable to the parties in litigation than the non-binding discretionary determination of a district court.

The same can and should be true for class certification analysis in the appellate courts. Interlocutory review under Rule 23(f), together with rulings as a matter of law, would help to ensure courts certify classes when the evidence lawfully permits common determinations and deny certification when it does not. A district court's analysis based on case law is more "rigorous" than an exercise of discretion. And rigorous analysis should not stop in the district court, given the stakes for the parties and society as whole and the nature of the determination.

### CONCLUSION

The U.S. Supreme Court has never held that courts should review the commonality determination for abuse of discretion. More recent case law and amendments to Rule 23 show that an abuse of discretion standard no longer makes sense, if ever did. There is a right answer to the commonality question in each case and to get it right, if there is an appeal under Rule 23(f) or from final judgment, the appellate courts should judge the commonality determination as a matter of law, not discretion.