
**CLASS-BASED ADJUDICATION OF TITLE VII CLAIMS IN
THE AGE OF THE ROBERTS COURT**

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INTRODUCTION

Title VII’s most significant set of amendments, the Civil Rights Act of 1991,¹ was in substantial part a response to decisions of the Rehnquist Court issued during its 1988-89 term, including the especially controversial *Wards Cove Packing Co. v. Atonio*.² While the Roberts Court also has issued a number of opinions interpreting employment discrimination laws contrary to the advocacy of civil rights proponents,³ its decisions on substantive

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¹ Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

² 490 U.S. 642, 659 (1989) (asserting, inter alia, that plaintiff claiming disparate impact discrimination must carry burden of persuasion that “a challenged practice serves in a significant way, the legitimate goals of the employer”).

Section 2(2) of the 1991 Act asserted that “the decision . . . in *Wards Cove* . . . has weakened the scope and effectiveness of Federal civil rights protections” 42 U.S.C. § 1981 note (2012). Section 3 stated that a purpose of the Act was “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes” *Id.* See, e.g., *id.* § 1981 (overturning the holding in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)); *id.* § 2000e-2 (modifying the holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); *id.* (modifying the holding in *Martin v. Wilks*, 490 U.S. 755 (1989)); *id.* 2000e-5(e) (modifying the holding in *Lorance v. AT&T Techs.*, 490 U.S. 900 (1989)); see generally Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 5 (1993) (chronicling the “principles, policies and politics that guided the battle to enact the Civil Rights Act of 1991”).

³ See, e.g., *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) (rejecting a claim for vicarious liability where the harassing employee was not “empowered by the employer to take tangible employment actions against the victim”); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (holding that “retaliation claims must be proved

employment discrimination law have been mixed⁴ and have not provoked a cry for a new set of comprehensive amendments.

None of the Roberts Court's interpretations of substantive law, however, seems to have the potential of doing as much damage to the promise of the amended Title VII as do several rulings of the Roberts Court on procedural issues. These rulings include the Court's application of Rule 23,⁵ the Federal Rule of Civil Procedure ("FRCP") governing class actions, to a Title VII case, *Wal-Mart Stores, Inc. v. Dukes*.⁶ They also include the Court's interpretation of the Federal Arbitration Act ("FAA")⁷ in a series of decisions, including *AT&T Mobility LLC v. Concepcion*⁸ and *American Express Co. v. Italian Colors Restaurant*.⁹

In this paper, I want to examine the nature of this damage and ask what legislative response to the Roberts Court's procedural decisions would most benefit employment discrimination claimants. Did the *Wal-Mart* decision, as claimed by some,¹⁰ like *Wards Cove*, substantially restrict the force of

according to traditional principles of but-for causation"); *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (before an employer can engage in race-conscious personnel decisions "for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action"); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007) (finding "the period for filing an [Equal Employment Opportunity Commission] charge" against covert pay discrimination "begins when the [discriminatory] act occurs," not when each payment is made). *Ledbetter* has been reversed by Congress. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 42 U.S.C.).

⁴ See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (holding employer liable when a discriminating supervisor intentionally causes a non-discriminating superior to take an adverse employment action against discrimination victim); *Crawford v. Nashville*, 555 U.S. 271, 273 (2009) (holding that Title VII prohibition on employer retaliation against employees who report workplace discrimination extends to "an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation"); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006) (finding that Title VII prohibits retaliatory adverse employment actions that might "dissuade[] a reasonable worker from making or supporting a charge of discrimination").

⁵ FED. R. CIV. P. 23.

⁶ 131 S. Ct. 2541 (2011).

⁷ 9 U.S.C. §§ 1-16 (2012).

⁸ 131 S. Ct. 1740 (2011).

⁹ 133 S. Ct. 2304 (2013).

¹⁰ See, e.g., Tristin K. Green, *The Future of System Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011) ("[The] 'policy-required' view of systemic disparate treatment, if it succeeds in gaining conceptual foothold beyond *Wal-Mart*, will result in a drastic reshaping of systemic disparate treatment law."); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 449 (2013) (arguing the "heightened commonality" standard created by *Wal-Mart* is

preexisting Title VII law? Did it render almost impossible the prosecution of Title VII private class actions seeking any form of monetary relief, and thereby in effect deny many victims of Title VII-proscribed discrimination the opportunity for compensation, as claimed by others?¹¹ Or do the Court's interpretations of the FAA erect the more substantial barrier against class-based private actions under Title VII?

My conclusions are that the importance of the *Wal-Mart* decision for private class action litigation, while significant, has been exaggerated. The *Wal-Mart* Court's applications of Rule 23, while unfavorable to plaintiffs, were predictable and did not substantially modify any well-established Title VII law.¹² The *Wal-Mart* decision, furthermore, does not prevent the prosecution of Title VII class actions; at least without further restrictive interpretations, Rule 23 still affords plaintiffs and conscientious federal judges the flexibility to utilize class actions to press a broad range of both systemic disparate treatment and disparate impact claims.¹³

Unfortunately, in my view, the importance of the *Wal-Mart* decision is also limited for Title VII class actions, as it is for other kinds of class actions, by the Court's recent decisions in cases dealing with the arbitration of consumer misrepresentation and antitrust claims rather than discrimination claims. Through these decisions, including *Concepcion* and *Italian Colors*, the Roberts Court in effect offered any business outside the transportation industry the option of arbitration as a bar against collective actions brought by any economically subordinate parties, including employees, upon whom the business can impose agreements.¹⁴ These decisions, in tandem with the Court's earlier application of the FAA to employment contracts,¹⁵ empower most employers to preclude not only class-based litigation, but also class-based arbitration.

This Essay proceeds as follows. Part I traces the development of Title VII class actions for both disparate treatment and disparate impact claims. Part II examines the predictability and manageable impact of the primary holding of the *Wal-Mart* decision: its application of Rule 23(a)(2)'s conditioning of certification on the existence of a common issue of fact or law.

part of a larger trend of declining access to civil justice); Noah D. Zatz, *Introduction: Working Group on the Future of System Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 387 (2011) (“*Wal-Mart* threatens to turn the [systemic disparate impact theory] into a dead end, in part by extending to Title VII this [Supreme] Court's general hostility to the class action device.”).

¹¹ See, e.g., John C. Coffee, Jr., “*You Just Can't Get There From Here*”: A Primer on *Wal-Mart v. Dukes*, U.S.L.W., July 19, 2011, at 93 (July 19, 2011).

¹² See *infra* Part II.

¹³ See *infra* Part I.

¹⁴ See *infra* Part IV.

¹⁵ See *Circuit City Stores v. Adams*, 532 U.S. 105, 109 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991); *infra* notes 147-155 and accompanying text.

Part III provides a parallel assessment of the Court's pronouncement on the limits of Rule 23(b)(2) class actions. While this assessment acknowledges the importance of the Court's pronouncements on (b)(2), including troublesome dicta limiting the use of litigation models, the assessment concludes that these pronouncements do not provide insurmountable barriers to Title VII class actions. Part IV, however, explains that such barriers have been erected by the Court's more important interpretations of the FAA.

I. THE SATISFACTION OF RULE 23'S COMMONALITY CONDITION FOR TITLE VII CLASS ACTION CLAIMS

Title VII does not include a provision for private collective actions.¹⁶ The development of Title VII doctrine, however, soon made obvious how the individual private actions contemplated by Title VII¹⁷ not only could be permissively joined under Rule 20 of the FRCP,¹⁸ but also could be certified appropriately as class actions under Rule 23. Rule 23 had been reformulated two years after the passage of Title VII in part to clarify how courts could use class actions to make litigation more efficient under certain conditions.¹⁹ Those conditions, as stressed in *Wal-Mart*, include a requirement for all types of plaintiff class actions that there be some issue of fact or law that is common for a group of claimants too numerous to be efficiently joined as named plaintiffs.²⁰ Without such commonality, there can be no efficiency gains in trying the claims together.

Soon after the passage of Title VII, the Court structured two types of Title VII private actions that often frame a salient common issue of fact for many litigants. One type was modeled on the public civil action provision, § 707, which empowers the Attorney General (now the EEOC)²¹ to bring actions against employers for engaging in a "pattern or practice of resistance to the full enjoyment of any of the rights secured" by Title VII and to seek injunctive relief to restrain the practice.²² The "rights secured" by Title VII of course

¹⁶ The Fair Labor Standards Act, which provides rights of action for both the Age Discrimination in Employment Act and the Equal Pay Act, by contrast, does include a provision for an employee or employees bringing actions "for and in behalf of himself or themselves and other employees similarly situated" who opt into the action by giving "consent in writing." 29 U.S.C. § 216(b) (2012).

¹⁷ See 42 U.S.C. § 2000e-5(f) (2012).

¹⁸ FED. R. CIV. P. 20.

¹⁹ See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967).

²⁰ The conditions are that the class be "so numerous that joinder of all members is impracticable," that there be "questions of law or fact common to the class," that the "claims or defenses of the representative parties are typical," and that the "representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

²¹ See 42 U.S.C. § 2000e-6(a), (e).

²² *Id.* § 2000e-6(a).

include the right to be free of the unlawful discrimination prohibited by section 703.²³ Further, under section 703, generally inanimate corporate employers are held responsible for their authorized agents taking into account, with or without animus, one of Title VII's prohibited status categories in making personnel decisions.²⁴ Thus, if private individuals claim that they have been victimized by the same agent or agents because of the same discriminatory bias, they may be presenting a common issue of fact for litigation, the same predominant issue that would be presented in a public "pattern or practice" case brought under section 707—whether or not such a practice or pattern existed for these agents.

By structuring pattern or practice litigation into two phases, moreover, the Court made it even more potentially efficient and thus appropriate to employ a private class action to attack a pattern or practice of intentional discrimination. The Court contemplated a first phase of litigation to determine the existence *vel non* of the pattern or practice and to consider general injunctive remedies, and then a second phase to determine the identity of the actual victims and the consequent relief available to individuals. The Court first suggested this division in *Franks v. Bowman Transportation Co.*,²⁵ a decision reviewing and reversing the denial of retroactive seniority relief to members of a certified class of blacks who had been denied employment as over-the-road drivers by a company that had been determined to have a general company-wide pattern of discrimination against hiring blacks for such positions.²⁶ The Court held that absent special circumstances the lower courts generally should grant class-based retroactive seniority as an aspect of the relief provided identifiable victims of illegal discrimination, but that the identification of these victims would have to await further proceedings that assume the finding of the general pattern or practice in the class action.²⁷ The Court also significantly explained that the finding of a pattern of discrimination in the first phase would determine how the second phase would be conducted: "[P]etitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of

²³ *See id.* § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.")

²⁴ Title VII defines the term "employer" to include "any agent." *Id.* § 2000e(b). The Court has confirmed that this means employers are liable for the adverse "tangible" results of their authorized agents' discriminatory employment actions. *See, e.g.,* *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70-71 (1986).

²⁵ 424 U.S. 747 (1976).

²⁶ *Id.* at 750.

²⁷ *Id.* at 772.

previous hiring discrimination.”²⁸

The Court formalized both this separation of pattern and practice litigation into two phases, and also the reversal of the burden of proof onto an employer-defendant in the second phase, the following year in *International Brotherhood of Teamsters v. United States*,²⁹ a § 707 public action brought against another trucking company and a union for a similar company-wide policy of discrimination against blacks in hiring for over-the-road trucking positions. The Court explained:

[A] court’s finding of a pattern or practice justifies an award of prospective relief. . . . As was true of the particular facts in *Franks*, and as is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. . . . As in *Franks*, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.³⁰

Seven years later, the Court confirmed the applicability of *Teamsters* to private class actions.³¹

The use of the *Teamsters* two-phase litigation structure for pattern and practice cases in private class actions should not be surprising. The *Teamsters* structure makes resolution of the common issue of whether agents of the employer engaged in a pattern or practice of discrimination central to the entire litigation. Every subsequent issue and the way it is to be resolved, including the individual relief assigned to the second stage, turns on resolving this common issue. The efficiency of resolving at one time the issue for all those potentially affected by the alleged discriminatory pattern or practice is obvious.

The disparate impact cause of action provides the other doctrinal support for Title VII class actions. In this cause of action, first formulated in the seminal *Griggs v. Duke Power Co.*³² case and later codified by the 1991 Act,³³ a plaintiff can establish illegal discrimination either (1) by demonstrating that a

²⁸ *Id.*

²⁹ 431 U.S. 324 (1977).

³⁰ *Id.* at 361-62.

³¹ “While a finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class.” *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (holding that a finding of the absence of a pattern or practice does not preclude individual claims of discrimination); *see id.* at n.9 (“Although *Teamsters* involved an action litigated on the merits by the Government as plaintiff under § 707(a) of the Act, it is plain that the elements of a prima facie pattern-or-practice case are the same in a private class action.”).

³² 401 U.S. 424 (1971).

³³ 42 U.S.C. § 2000e-2(k) (2012).

particular, perhaps ostensibly neutral, practice of an employer has a disproportionate or disparate impact on the employment opportunities of members of the plaintiff's Title VII-defined status group—unless the employer can demonstrate the practice is “job related” and “consistent with business necessity”; or, even if the employer can make the latter demonstration, (2) by demonstrating an alternative practice, not adopted by the employer, that could serve the employer's business purpose without such an impact.³⁴ Like plaintiffs demonstrating a pattern or practice of intentional discrimination, plaintiffs pressing a disparate impact claim can obtain a prospective order to eliminate the practice by making one of these demonstrations, but cannot obtain individual relief such as back pay and reinstatement to a position denied them without further litigation to determine in which cases the challenged practice actually caused the denial.³⁵

This further remedial litigation in disparate impact cases, like the second stage of pattern-or-practice litigation, thus turns on answering common questions in a first stage. Under disparate impact doctrine, potential liability to numerous members of a plaintiff's Title VII-defined status group will turn on common answers to three questions—whether the ostensibly neutral practice has a disparate impact on the plaintiff's Title VII-defined status group, whether the practice is job-related and consistent with business necessity, and whether an effective alternative practice was not adopted. Answering these common questions in one trial for all those potentially affected, like answering the central common question in a pattern-or-practice case, obviously serves the efficiency goal of Rule 23.

The centrality of common questions in both disparate impact and intentional pattern-or-practice cases, however, does not mean that any Title VII claim of a particular type of prohibited Title VII discrimination, such as race or sex discrimination, shares common questions with all other possible claims of that type of discrimination against the same employer. The Court rejected such an “across-the-board rule” for certification of all employment discrimination classes in *General Telephone Co. of the Southwest v. Falcon*.³⁶ The *Falcon* Court reminded lower courts that since Title VII “contains no special authorization for class suits,”³⁷ an individual litigant must meet all the prerequisite conditions of Rule 23 for class certification, including commonality: “a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the

³⁴ *Id.*

³⁵ Plaintiffs cannot recover compensatory or punitive damages for disparate impact claims. 42 U.S.C. § 1981a(a)(1).

³⁶ 457 U.S. 147, 159 (1982) (“If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action.”).

³⁷ *Id.* at 156.

prerequisites of Rule 23(a) have been satisfied.”³⁸ Furthermore, the Court noted this rigorous analysis sometimes may have “to probe behind the pleadings.”³⁹ The Court concluded that plaintiff Falcon’s case should not have been certified because his “complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans.”⁴⁰ He did not, in other words, make allegations to support a theory that any prohibited national origin discrimination to which he was subjected by an agent of the employer-defendant also affected decisions not to hire members of the class of Mexican-Americans he sought to represent. Predictably, the Court noted, the actual joint trial of Falcon’s individual promotion discrimination and class hiring claims under different theories provided no utility, so the claims “might as well have been tried separately.”⁴¹

II. THE *WAL-MART* COURT’S HOLDING ON COMMONALITY

Given the above history, and especially the *Falcon* Court’s iteration that courts should not certify Title VII class actions without rigorous analysis of the satisfaction of Rule 23’s prerequisites, no one should have been surprised by the Roberts Court’s refusal to sanction the certification of the *Wal-Mart* class, because it failed to pose a common issue of law or fact for members of the requested class.⁴² The lower courts in *Wal-Mart* had approved the certification of a class of a million and a half current and former female employees of Wal-Mart who alleged sex-based discrimination in their pay and promotions.⁴³ Under settled and uncontroversial law, Wal-Mart as a corporate principal would be strictly liable for any discriminatory pay or promotion decision made by any of its human agents with the delegated authority to determine pay or promotion.⁴⁴ This common strict liability, however, did not present a common issue upon which to base certification. Given the size and decentralized personnel operational structure of Wal-Mart, it was not possible for the plaintiffs to claim that the same group of decision makers made all the allegedly discriminatory pay and promotion decisions. Plaintiffs instead stressed that Wal-Mart’s senior management delegated discretion over pay and promotion to local managers.⁴⁵ Proving a pattern or practice of discrimination by some of these managers would not prove discrimination by others or justify any burden-shifting presumption of discrimination in individual cases

³⁸ *Id.* at 161.

³⁹ *Id.* at 160.

⁴⁰ *Id.* at 158.

⁴¹ *Id.* at 159.

⁴² See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556-57 (2011).

⁴³ *Id.* at 2547.

⁴⁴ See *supra* note 24 and accompanying text.

⁴⁵ *Wal-Mart*, 131 S. Ct. at 2547-48.

involving other managers.⁴⁶ Thus, a theory of Wal-Mart disparate treatment liability based on settled and accepted agency law could not present an issue capable of common resolution upon which to base certification.

Plaintiffs' attorneys had another theory upon which to base disparate treatment liability that might present a common issue relevant to any and all claims of discriminatory decisions by local managers. That theory, as acknowledged by Justice Scalia in his majority opinion, was that Wal-Mart should be liable for its senior management's awareness of and failure to respond to the disproportionate exercise of local discretion in favor of men; in other words, "its refusal to cabin its managers' authority amounts to disparate treatment."⁴⁷ Under this theory, the fault upon which Wal-Mart's liability is based is not the fault of the various and varied local decision makers, but rather the fault of the senior managers who are responsible for the entire company.⁴⁸

After acknowledging this theory in his statement of the case, Justice Scalia failed to address it directly in his analysis of commonality. Instead, relying on language from a footnote in *Falcon*, he simply asserted that demonstrating commonality for certification of a companywide class of alleged discrimination victims requires either isolating some "testing procedure or other companywide evaluation method that can be charged with bias" or providing "significant proof" that the employer "operated under a general policy of discrimination."⁴⁹ Justice Scalia then explained that the *Wal-Mart* plaintiffs met neither requirement. He stressed that Wal-Mart had a formal policy forbidding sex discrimination and "imposes penalties [on managers] for denials of equal employment opportunity";⁵⁰ and he asserted that the plaintiffs' only evidence of a "general policy of discrimination" was testimony from a sociologist who testified "that Wal-Mart has a 'strong corporate culture' that makes it 'vulnerable' to 'gender bias,'" but who could not calculate the level of discrimination that might result.⁵¹

Plaintiff lawyers might be disappointed by some of Justice Scalia's language and his quick treatment of the theory that Wal-Mart's liability should be based on the failure of senior management to control discrimination by local managers, rather than on the local managers' acts of discrimination. The theory may seem a promising way to achieve expanded, company-wide certification. With the approval of the Supreme Court,⁵² lower courts, borrowing from the

⁴⁶ See *id.* at 2554 ("[D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.").

⁴⁷ *Id.* at 2548.

⁴⁸ See *id.*

⁴⁹ *Id.* at 2553 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *Faragher v. City of Boca Raton*, 524 U.S. 775, 799-800 (1998) (approving lower court cases that "uniformly judg[e] employer liability for co-worker harassment under a

common law tort of negligent supervision,⁵³ have consistently applied a negligence standard for employer liability for co-worker discriminatory harassment of other employees,⁵⁴ where there would be no strict *respondeat superior* liability under agency law because the harassment was outside the scope of employment.⁵⁵ Demonstrating senior management negligence is not necessary for company liability for decisions, like those setting pay and promotions, within the scope of employment and the authority of corporate managers, but it could establish commonality for purposes of an expanded class certification.

The fact that Justice Scalia did not address this potential basis for commonality ultimately should not be surprising, however. First, the plaintiffs' attorneys in *Wal-Mart* did not, and on the facts of the case could not, forcefully advance a negligence-based theory of company liability on which to base commonality. Negligence-based company liability for discriminatory harassment requires only supervisory agents' knowledge or constructive knowledge of and failure to control co-worker discriminatory harassment.⁵⁶ Unlike harassment, however, authorized personnel decisions, like those governing promotions and pay, are not ostensibly problematic. Negligence-based liability for ostensibly appropriate decisions would require knowledge or constructive knowledge not only of the decisions, but also of a discriminatory motivation underlying the decisions. In *Wal-Mart*, no strong evidence of senior management knowledge of widespread discriminatory motivation was advanced.⁵⁷

negligence standard").

⁵³ See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.04 (Proposed Final Draft 2014) ("Except to the extent precluded by a workers'-compensation law or other law, an employer is subject to liability for harm to an employee caused by breach of the employer's duty to exercise reasonable care in selecting, retaining, or supervising employees or agents whose independently tortious acts resulted in the harm.").

⁵⁴ See, e.g., *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002) ("To establish employer liability for a non-supervisory co-employee, a plaintiff must demonstrate that the employer 'knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate action.'"); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) (affirming employer liability where employer knew or should have known about alleged co-employee harassment and did not take prompt remedial action when notified of allegations).

⁵⁵ See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 757 (1998) ("The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.").

⁵⁶ See *Crowley*, 303 F.3d at 401; *Hacienda Hotel*, 881 F.2d at 1516.

⁵⁷ The plaintiffs did not offer sufficient evidence even to impel Justice Scalia to respond to a theory of senior management negligence. Justice Scalia considered and dismissed plaintiffs' company-wide and region-wide statistics and anecdotal evidence of discrimination only as proof of a company-wide policy of discrimination, not as proof of senior management knowledge of pervasive discrimination by many junior managers. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555-57 (2011).

Plaintiffs' attorneys might hope that senior managers should be assigned constructive knowledge of their subordinates' discriminatory motivation based on general statistics of the sort presented by the *Wal-Mart* plaintiffs' experts. These statistics showed that females generally had fared worse in pay and promotions throughout the company.⁵⁸ An assignment of constructive knowledge of discrimination based on such statistics, however, effectively would entail making companies vulnerable to judicial control of their personnel policies whenever their senior management failed to secure proportional success for every Title VII-defined status group. Hoping for the pronouncement of such law from a conservative Court that disfavors anything that would encourage "quotas"⁵⁹ certainly seems chimerical.⁶⁰ If senior management negligence is to be a basis for commonality in future attempts to secure companywide certification, it will have to be through evidence of senior management indifference to known pervasive discriminatory motivation, not simply to known disproportionate statistics.

Furthermore, unlike establishing liability through the demonstration of a company-wide policy of discrimination, establishing company liability based on senior management indifference to known discriminatory delegated decision making by subordinate managers would not necessarily justify a presumption of discrimination by all subordinate managers. It is not clear therefore that resolution of the issue of senior management negligence advances any claims for individual relief for past discrimination. Claimants for individual relief still would have the burden of proving they were victims of a particular subordinate manager's discrimination even after proving senior management's negligence. The latter proof would justify only company-wide prospective remedies and thus perhaps only certification of a class seeking such remedies.⁶¹

The *Wal-Mart* plaintiffs' strongest case for commonality was based not on their disparate treatment pattern or practice claim, but rather on their claim that Wal-Mart's delegation to local managers of authority over pay and promotions had a disparate impact on female employees. This delegation was a central

⁵⁸ See *id.* at 2555.

⁵⁹ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (finding an employer engages in unlawful discrimination if it does not have a strong basis of evidence of prior illegal discrimination before changing an employment practice in order to achieve a distribution of employment positions more proportionate to distribution of minorities in labor pool).

⁶⁰ Aside from this political realism, Michael Selmi has argued that holding employers liable for imbalances in their work forces solely because senior management is aware of those imbalances could result in more tolerated discrimination because it would discourage employers from collecting information that might lead to such awareness. See Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 *BERKELEY J. EMP. & LAB. L.* 477, 504 (2011). Assuming different political realities, and a different Supreme Court, however, the law could impose affirmative obligations on employers to study and remedy unjustified imbalances.

⁶¹ See *infra* notes 83-86 and accompanying text.

policy of the company that affected all members of the class for which certification was sought. Like any disparate impact claim, it thus seemed to present the common issues of impact and justification.⁶² Moreover, in 1988 the Court had held in *Watson v. Fort Worth Bank & Trust*,⁶³ a case involving a bank's delegation of personnel discretion to supervisors, that disparate impact analysis could be applied to "subjective employment criteria."⁶⁴

Apart from providing a possible common issue for certification, using disparate impact analysis to challenge a company's system of delegated discretion, rather than some subjective criteria or other factor guiding that discretion, seems odd and unpromising. The same statistics that would demonstrate a disproportionate impact from a general system of unguided delegation on a plaintiff's Title VII-defined status group would also demonstrate that the company was pervaded with discriminating decision makers. The delegation of personnel discretion will result in a discriminatory effect only if the delegees are exercising that discretion with discriminatory intent. Furthermore, proof of only a discriminatory impact, as opposed to proof of a discriminatory intent, can be rebutted by a business justification,⁶⁵ which is not hard for any business to identify for its delegation of discretion to supervisors.

Given that a disparate impact challenge to the unguided delegation of discretion, like a systemic disparate treatment challenge, ultimately can be successful only by proving that some of the delegees were intentionally discriminating, it is not surprising that Justice Scalia applied the same commonality analysis to both. Neither challenge turns on a common issue because each ultimately requires a determination of how discretion is exercised by individual delegees: "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."⁶⁶ For certification of a company-wide class in either type of challenge, then, plaintiffs must "identif[y] a common mode of exercising discretion that pervades the entire company."⁶⁷ Justice Scalia, quoting language from Justice O'Connor's opinion in *Watson*, suggested that this will only be possible for a disparate impact challenge that identifies "a specific employment practice," whether or not subjective, that is to guide the discretion of all the company's decision makers.⁶⁸

Justice Scalia's interpretation of *Watson* to prevent its use as a basis for commonality for a class like that sought in *Wal-Mart* may or may not have retracted its problematic application to unguided delegations. It clearly did not,

⁶² See *supra* notes 32-35 and accompanying text.

⁶³ 487 U.S. 977 (1988).

⁶⁴ *Id.* at 990.

⁶⁵ 42 U.S.C. § 2000e-2(k) (2012).

⁶⁶ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011).

⁶⁷ *Id.* at 2554-55.

⁶⁸ *Id.* at 2555 (quoting *Watson*, 487 U.S. at 994).

however, preclude finding commonality in disparate impact challenges to a range of subjective policies. As long as the policy is to be applied by those making or affecting the personnel decisions challenged by all members of the class, there is the potential for commonality. That potential might be negated in challenges to subjective policies, as in challenges to objective policies, where plaintiffs cannot demonstrate that any disparate impact from the policy is likely to pervade the class. However, for most challenges to subjective policies—as for challenges to objective standards—that confine, rather than just expand managerial discretion, the commonality criterion for certification of a class affected by multiple supervisors or other decision makers should not block certification.

This has already been demonstrated in lower court decisions since *Wal-Mart*. For instance, in *McReynolds v. Merrill Lynch*,⁶⁹ Judge Posner for a unanimous panel reversed a district court's pre-*Wal-Mart* denial of certification of a class of seven hundred black brokers, currently or formerly employed by Merrill Lynch, who claimed a racial impact deriving from two company policies that framed the discretion of district and branch managers over decisions affecting pay.⁷⁰ Judge Posner distinguished the challenge to these policies from the challenge to *Wal-Mart*'s delegation of unconfined discretion by stressing that the policies—allowing brokers to form their own account teams and distributing accounts on the basis of past performance affected by the teams—“are practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim.”⁷¹ Similarly, in *Ellis v. Costco Wholesale Corp.*,⁷² on remand from the Court of Appeals for reconsideration after *Wal-Mart*, a district court held that the commonality requirement could be satisfied for a class of current and former female employees who were denied managerial promotions at Costco because the plaintiff had identified specific companywide employment practices within Costco's promotion system.⁷³ While some of these practices—such as the non-posting of open positions and reliance on promotable lists of desired candidates—presumably would have a disparate impact on women only if combined with conscious or unconscious discriminatory intent,⁷⁴ the plaintiffs

⁶⁹ 672 F.3d 482 (7th Cir. 2012).

⁷⁰ *Id.* at 489-90.

⁷¹ *Id.* at 490.

⁷² 285 F.R.D. 492 (N.D. Cal. 2012).

⁷³ *See id.* at 531.

⁷⁴ To the extent that central policies only cause discrimination by enabling lower level managers to discriminate, such policies are no different than the policy of full delegation rejected as a basis for commonality in *Wal-Mart*. Some of the Costco policies, such as “placing a premium on schedule flexibility and ability to relocate,” could have a disparate impact in the absence of discriminatory intent, however. *Id.*; *cf.* *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115, 1127 (N.D. Cal. 2013) (leaving managers “without meaningful guidance in applying . . . impossibly vague criteria” does not present common question because discrimination will turn on how discretion is exercised by various managers).

also presented evidence of the involvement of high level central management throughout the promotion process to bolster their commonality case for their disparate impact as well as their systemic disparate treatment challenge.⁷⁵

Since *Wal-Mart*, courts like that in *Ellis*⁷⁶ also have held the commonality requirement can be satisfied for employer or companywide classes asserting systemic disparate treatment claims where the alleged degree of involvement of central management in the allegedly discriminatory decisions made plausible that every member of the class could have been affected by the same discriminatory intent.⁷⁷ The *Wal-Mart* Court's holding on commonality has been the basis for courts denying class certification only in cases where all

⁷⁵ *Ellis*, 285 F.R.D. at 511-14 (discussing top management's "consistent" and "pervasive" involvement in the promotion process). *See also, e.g.*, *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 116-17 (4th Cir. 2013) (finding amended complaint made sufficient allegation of potential disparate impact from common companywide policies affecting the entire class); *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 118 (S.D.N.Y. 2012) (declining to strike class allegations in complaint because complaint identifies a number of specific companywide "employment practices" and "testing procedures," including a co-employee review process and quartile ranking system); *Calibuso v. Bank of Am. Corp.*, 893 F. Supp. 2d 374, 377 (E.D.N.Y. 2012) (distinguishing *Wal-Mart* because of allegations of companywide policies that "systematically favor[] male[s]").

Courts also have continued to recognize the common issues for class certification presented in cases challenging objective employment practices such as scored aptitude tests or physical requirements. *See, e.g.*, *Gulino v. Bd. of Educ.*, 907 F. Supp. 2d 492, 506 (S.D.N.Y. 2012) (finding commonality existed in the alleged disparate impact of standardized tests); *cf. Stockwell v. S. F.*, 749 F.3d 1107, 1117 (9th Cir. 2014) (finding commonality where change in promotional examination alleged to have disparate impact on the basis of age in violation of the Age Discrimination in Employment Act); *Easterling v. Conn. Dept. of Corr.*, 278 F.R.D. 41, 51 (D. Conn. 2011) (declining to decertify class after resolution of common issue that a required timed 1.5 mile run had a disparate impact on female applicants for employment).

⁷⁶ *See Ellis*, 285 F.R.D. at 511 (finding the plaintiffs' disparate treatment claims to present a common issue because of the involvement of central high level management in all promotion decisions).

⁷⁷ *See, e.g.*, *Kassman v. KPMG LLP*, 925 F. Supp. 2d 453, 464 (S.D.N.Y. 2013) (finding common issue where plaintiff's complaint alleged companywide policies and practices originating in New York headquarters, including a policy of automatically demoting women, but not men, who transfer from an international office); *Parra v. Bashas', Inc.*, 291 F.R.D. 360, 373-76 (D. Ariz. 2012) (finding commonality satisfied by allegation of two tier pay disparity between two different jointly owned store chains to which plaintiffs were discriminatorily assigned); *Johnson v. Flakeboard Am. Ltd.*, No. 4:11-2607-TLW-KDW, 2012 WL 2237004, at *5 (D.S.C. Mar. 26, 2012) (involving an allegation of racially hostile work environment perpetrated and tolerated by same group of decision makers in two small plants in one small town); *cf. Cronas v. Willis Grp. Holdings, Ltd.*, No. 06 Civ. 15295(RMB), 2011 WL 5007976, at *3 (S.D.N.Y. Oct. 18, 2011) (approving a settlement class in part because "the delegation policy [the class] challenge[s] has subjected them all to discrimination at the hands of the same regional officers").

members of the putative Title VII class have not allegedly been affected by the discriminatory actions of the same decision makers.⁷⁸ One good example is the futile attempt of the *Wal-Mart* lawyers to obtain certification of a smaller class defined by Wal-Mart's California regions, rather than by the local managers to whom discretion to make the challenged personnel decisions had been delegated.⁷⁹ The *Wal-Mart* lawyers failed to identify "a core group of biased upper-level managers who influenced all of the challenged decisions by lower-level managers."⁸⁰ This ultimately is the unsurprising lesson iterated by the Supreme Court in *Wal-Mart*: class litigation is appropriate only where it will be more efficient because each member of the requested class has a potential Title VII claim that turns on resolution of a common issue—either the existence of discriminatory intent, whether conscious or unconscious, from the same decision makers, or the unjustified disparate impact of a specific employment practice applied to all members of the class.

III. THE *WAL-MART* COURT'S PRONOUNCEMENT ON RULE 23(B)(2)

Satisfaction of the commonality standard and of the three other conditions set forth in Rule 23(a) of course is not sufficient for certification. Plaintiffs also must fit a requested class into one of the three categories specified in Rule 23(b).⁸¹ Interpreting the second of these specifications, (b)(2), the Court's opinion in *Wal-Mart* offered, with the support of every Justice, an alternative reason why the certification of the class could not stand.⁸² Although this interpretation poses a greater threat to the certification of Title VII class actions than does the Court's holding on commonality, it need not present an insurmountable barrier to the efficient and effective class litigation of meritorious Title VII claims.

Rule 23(b)(2) allows certifications where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting

⁷⁸ See, e.g., *Davis v. Cintas Corp.*, 717 F.3d 476, 487-89 (6th Cir. 2013) (upholding finding of no commonality where "thousands of Cintas managers at hundreds of Cintas facilities" made challenged hiring decisions); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013) (finding no "common mode of exercising discretion that pervade[d] the entire company"); *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896 (7th Cir. 2012) (reversing certification because claim challenged no companywide policy, only exercise of discretion of various supervisors at 262 construction work sites); *Bennett v. Nucor Corp.*, 656 F.3d 802, 808 (8th Cir. 2011) (affirming denial of certification of class of employees in all departments because of delegation of discretion to departmental managers).

⁷⁹ See *Dukes*, 964 F. Supp. 2d at 1127 (denying motion for class certification based on "the same problems identified by the Supreme Court, but on a somewhat smaller scale").

⁸⁰ *Id.* at 1122; see also *Ladik v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263, 270 (W.D. Wis. 2013) (finding no common issue because plaintiffs did not explain how decisions of various managers in region were linked).

⁸¹ See FED. R. CIV. P. 23(b).

⁸² See *infra* note 86 and accompanying text.

the class as a whole.”⁸³ The rule drafters in 1966 intended this provision to support civil rights actions seeking prospective injunctive and declaratory relief⁸⁴ and it certainly fits Title VII actions seeking to declare illegal and enjoin some discriminatory practice or policy of an employer, as the modification of such a practice or policy could affect the interests of many employees. Some lower courts, however, also had employed (b)(2) as a basis for certification of Title VII classes seeking individual monetary relief, especially the “equitable restitution” of back pay, in addition to prospective injunctions.⁸⁵ The Court in *Wal-Mart* rejected this use of (b)(2), unanimously pronouncing that any claim for monetary relief, including a Title VII claim for backpay, that “is not incidental to the injunctive or declaratory relief” cannot be certified for class adjudication under Rule 23(b)(2).⁸⁶

The Court’s interpretation of (b)(2) is significant for Title VII class actions because it requires such actions to proceed under the more stringent requirements of (b)(3).⁸⁷ These requirements include notification to all class members of the nature of the action and their right to be excluded from the class if they so choose.⁸⁸ The notice requirement discourages class actions because it imposes on plaintiffs’ attorneys costs that generally can be recouped only through settlement or a favorable judgment.

More significantly, the requirements also include obtaining findings from the court “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.”⁸⁹ Rule 23(b)(3) further states that these findings must take into account, *inter alia*, “the likely difficulties in managing a class action.”⁹⁰ These requirements of predominance and superiority may be difficult to meet for Title VII class actions, like *Wal-Mart*, seeking monetary

⁸³ FED. R. CIV. P. 23(b)(2).

⁸⁴ See Advisory Committee’s Note, 39 F.R.D. 69, 102 (1966) (using “the civil-rights field” to illustrate various actions under Rule 23(b)(2)).

⁸⁵ See, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971) (“[T]he award of back pay, as one element of the equitable remedy, conflicts in no way with the limitations of Rule 23(b)(2).”); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969) (finding no justification to limit Title VII class action suits to injunctive relief because one clear purpose of Title VII is “to make whole, in pecuniary fashion, those who have suffered” from improper discrimination).

⁸⁶ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

⁸⁷ There have been no Title VII class actions certified or persuasively proposed under Rule 23(b)(1), as the provisions of this subsection are framed to cover limited situations where proceeding through individual adjudications could result in incompatible orders to the party opposing the class or prejudice to other class members. See FED. R. CIV. P. 23(b)(1).

⁸⁸ FED. R. CIV. P. 23(c)(1)(2)(B). Rule 23(b)(1) and (b)(2) class actions, unlike (b)(3) actions, are mandatory; class members have no right to withdraw from the class.

⁸⁹ FED. R. CIV. P. 23(b)(3).

⁹⁰ FED. R. CIV. P. 23(b)(3)(D).

relief for individual class members, because such relief only can be granted after a second stage of litigation to determine which members of the class have been adversely affected by a defendant's policy or practice of discrimination and to what extent.⁹¹ A defendant opposing certification therefore can argue—especially for a particularly numerous class, like that proposed in *Wal-Mart*—that the many questions governing individual claims predominate over the common issue of the existence of the practice or policy of discrimination and that the difficulty of managing so many claims in one court prevents the class action from being a superior means of adjudication.⁹²

The *Wal-Mart* Court's explanation of why the back pay relief sought by the plaintiffs could not qualify as "incidental" to their requested injunctive and declaratory relief includes particularly troublesome dicta that seems to reject the most direct way of dealing with this manageability problem. The *Wal-Mart* plaintiffs had argued that back pay should be treated as incidental for purpose of (b)(2) certification in part because the Court of Appeals had approved a remedial trial stage to determine a percentage of valid claims through depositions relevant to a representative sample set of the claimant class. That percentage would have been multiplied by the total number of members in the class and the average back pay award in the sample set to determine a total back pay recovery to be distributed equally to all members of the class, after a reduction of attorneys' fees of course. By rejecting this "Trial by Formula"⁹³ as a modification of the two-phase trial established in *Teamsters* and a denial of Wal-Mart's entitlement "to individualized determinations of each employee's eligibility for backpay,"⁹⁴ Justice Scalia suggested that the *Teamsters* system also could not be modified for the purposes of making a (b)(3) class more manageable.

Although Justice Scalia's "Trial by Formula" dicta is particularly troublesome and open to challenge,⁹⁵ the Court's unanimous interpretation of (b)(2) should not have been more surprising than its divided interpretation of (a)(2). The structure of Rule 23 draws a clear line between relief that must be

⁹¹ See *supra* Part I (explaining this second stage).

⁹² The availability of such an argument against certification of a (b)(3) class indeed means that the Court's unanimous strict interpretation of (b)(2) renders almost non-consequential the *Wal-Mart* Court's strict interpretation of the (a)(2) commonality requirement; the *Wal-Mart* majority could have upheld a denial of certification under subsection (b) even if it had assumed all of the subsection (a) conditions, including commonality, were met. Justice Ginsberg's dissent from the Court's interpretation of (a)(2), while concurring in its interpretation in its interpretation of (b)(2), thus carries little force. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). In effect, she can charge only that "the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment." *Id.* at 2562.

⁹³ *Id.* at 2561.

⁹⁴ *Id.* at 2560.

⁹⁵ For a compelling critique, see Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 *BERKELEY J. EMP. & LAB. L.*, 455, 464-68 (2011).

provided in the aggregate and individual relief that only may be aggregated where it is efficient to do so.⁹⁶ As Justice Scalia explained, where the only relief sought is injunctive or declaratory “respecting the class as a whole,” there is no need for a court before certification to consider predominance or superiority or to require notification of an opportunity to withdraw from the class.⁹⁷ “Predominance and superiority are self evident” because all issues are common for all appropriate members of the requested class.⁹⁸ Notification is not necessary for a “mandatory” (b)(2) class because individual class members are not allowed to withdraw from litigation that will efficiently settle the same issues for all class members without resolution of any distinct claims of individuals that they may wish to litigate separately.⁹⁹ If representatives of a putative class seek any form of individual monetary relief, this analysis does not apply; the separate issues posed by the individual claims require consideration of predominance and superiority, and even if those separate issues can be managed easily, individuals with special claims are due the opportunity to elect to litigate them separately.¹⁰⁰

The Court’s unanimous interpretation of (b)(2) thus is both a barrier to easy certification of Title VII class actions and unlikely to be reversed. It does not, however, present an insurmountable barrier. Even though Justice Scalia’s “Trial by Formula” dicta restricts courts’ ability to make (b)(3) classes more manageable, the Court’s (b)(2) analysis does not, contrary to Professor

⁹⁶ As Justice Scalia also stressed, the history of the Rule’s development and interpretation highlights the same line. *Wal-Mart*, 131 S. Ct. at 2557-58.

⁹⁷ *Id.* at 2558.

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ This analysis strongly suggests that no individualized monetary relief can be sought by a (b)(2) class regardless of whether awarding the relief would “introduce new substantial legal or factual issues, []or entail complex individualized determinations.” *Id.* at 2560 (quoting *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). Justice Scalia quotes this test, without endorsing it, to demonstrate that plaintiffs could not meet it, including through use of the “Trial by Formula,” which he rejects even if it applied. *Id.* at 2561. His general analysis of the structure of Rule 23, however, indicates that (b)(2) classes can seek no individual monetary relief, regardless of how easily such relief could be calculated, as some class members might want to have the opportunity to litigate their own claims, and such individual litigation, in contrast to seeking an injunction covering the whole class, would be feasible. It seems likely that the Court would hold that the only permissible monetary relief available to a (b)(2) class not given the opportunity to opt-out would be aggregate monetary relief such as a fund for a training program or for a monitoring system to prevent further discrimination. *But see, e.g., Johnson v. Meritor Health Servs. Emp’t Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) (“Should it appear that the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program, . . . the district court can award that relief without . . . converting this (b)(2) action to a (b)(3) action.”).

Coffee,¹⁰¹ sound the death knell for Title VII class actions.

First, it should not be gainsaid that the Court's interpretation does not obstruct the use of (b)(2) classes to enjoin the continuation of discriminatory practices or policies. The elimination of future discrimination is a primary purpose of the statute.¹⁰² Prospective injunctions may include the imposition of somewhat burdensome monitoring requirements on employers.¹⁰³ If a court recognizes a cause of action for a company's senior management's negligent control of discriminating supervisors,¹⁰⁴ moreover, the court might issue a particularly restrictive injunction. While courts may enjoin discriminatory practices in private disparate impact cases without class certification, the courts of appeals uniformly have held that private pattern or practice cases only can proceed as class actions.¹⁰⁵

Admittedly, for employers weighing settlement the threat of a court order imposing only prospective injunctive relief is not comparable to the threat of significant monetary damages. Therefore, bringing an action for only prospective injunctive relief is not as attractive to lawyers seeking a settlement fund from which to draw attorneys' fees exceeding the hourly fees made available to prevailing parties under Title VII's attorneys' fees provision.¹⁰⁶ Lawyers will hesitate to bear the risks of losing any complicated pattern or practice case if they cannot compensate for those risks with the expectation of a bonus if they are successful. Furthermore, the threat of monetary damages may be more effective than prospective injunctions in eliminating the continuation of future discrimination.

The *Wal-Mart* decision, however, neither precludes successful (b)(2) class actions for prospective injunctive relief being the basis for successful individual actions for monetary relief, nor prevents the lawyers bringing such (b)(2) actions from profiting from the subsequent actions. The *Wal-Mart* decision, as noted, expressly endorses the two-phase *Teamsters* litigation system, and the decision does not suggest that the presumption of liability to all class members established by a finding of a general practice of

¹⁰¹ See Coffee, *supra* note 11 (arguing that the Court's rejection of a "Trial-by-Formula" option renders any large class action not certifiable).

¹⁰² See 42 U.S.C. § 2000e-5(g)(1) (2012) (authorizing injunctions against employers continuing to engage in "an unlawful employment practice charged in [a] complaint"); *id.* § 2000e-6(a) (2012) (authorizing injunctions against "a pattern or practice of resistance" to compliance with the Act).

¹⁰³ See, e.g., *Gulino v. Bd. of Educ.*, 907 F. Supp. 2d 492, 509 (S.D.N.Y. 2012) (granting plaintiff's monitoring requests).

¹⁰⁴ See *supra* notes 52-55 and accompanying text.

¹⁰⁵ See *Chin v. Port Auth. of N.Y.*, 685 F.3d 135, 149-50 (2d Cir. 2012) ("[A]ll of our sister circuits to consider the question have held that the pattern-or-practice method of proof is not available to private, nonclass plaintiffs.").

¹⁰⁶ See 42 U.S.C. § 2000e-5(k). The Supreme Court has adopted the "lodestar" or hourly rate method of calculating attorneys' fees for civil rights cases. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1986).

discrimination in the first phase would not carry over into the second phase where that second phase is conducted through individual actions.¹⁰⁷ At the least, preclusion law could benefit the members of a prevailing class; the employer could be collaterally estopped from denying the general discriminatory practice in subsequent individual actions brought by class members.¹⁰⁸ The lawyers representing the (b)(2) class could expect to bring some of the individual actions, filing jointly in many cases. The class action lawyers also could expect to reap some financial gains from the referral of other cases.¹⁰⁹

Judge Posner explained how certification of a 700-member (b)(2) class was appropriate in the *McReynolds*¹¹⁰ case not only to determine whether Merrill Lynch's allegedly discriminatory practices should be enjoined, but also to determine the issue of the illegality of the practices for simplification of the resolution of individual claims for pecuniary relief.¹¹¹ After noting that the stakes in the individual brokers' claims would "make individual suits feasible," Judge Posner observed that without a prior class wide determination of legality of the practices, "the lawsuits will be more complex if, until issue or claim preclusion sets in, the question whether Merrill Lynch has violated the antidiscrimination statutes must be determined anew in each case."¹¹²

Judge Posner was not troubled by the prospect of the employer asserting claim preclusion in subsequent individual actions for monetary relief. Other courts of appeals have recognized "that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage action claims," even though claim preclusion would defeat the damage action

¹⁰⁷ See *supra* notes 93-94 and accompanying text.

¹⁰⁸ See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335 (1979) (plaintiffs may assert even non-mutual collateral estoppel in legal action based on prior equitable action not tried to a jury). Of course, if the employer successfully defended against the (b)(2) class's claim of a general discriminatory practice, the employer would be able to assert collateral estoppel against any individual claimant that attempted to reassert such a practice. But individual claimants could still assert individual instances of discrimination. See *Cooper v. Fed. Reserve Bank*, 467 U.S. 876, 880 (1984).

¹⁰⁹ The injunctive relief indeed could include a requirement that the employer notify class members of the employer's possible liability to them because of its general discriminatory practices.

¹¹⁰ *McReynolds v. Merrill Lynch*, 672 F.3d 482, 492 (7th Cir. 2012).

¹¹¹ See *supra* note 69 and accompanying text.

¹¹² *McReynolds*, 672 F.3d at 492. Judge Posner also invoked Rule 23(c)(4) to certify the class to resolve the general legality of the challenged practices for any subsequent claims for pecuniary relief. *Id.* This apparent invocation of (c)(4) to justify a certification beyond those permitted by the three categories in 23(b) was problematic. It was also unnecessary, however, because determining whether the practices should be enjoined for the (b)(2) class required resolution of the issues of general legality, and that resolution would have the same effect on actions for monetary relief without any further class certification.

had the first action been an individual suit.¹¹³ This recognition must be correct at least for class actions for injunctive relief that could not add claims for individual monetary either through (b)(2) class certification or through a (b)(3) class certification. Claim preclusion is not appropriately asserted against claims that could not have been asserted in the earlier action.¹¹⁴

To be sure, the filing of many potential Title VII class actions would be discouraged if plaintiffs' lawyers cannot obtain certification of a class that can seek or at least settle claims for monetary damages. Many individual employment discrimination claims do not offer the potential pecuniary recovery of the Merrill Lynch broker claims considered by Judge Posner and thus would have no positive value for class action lawyers without aggregation in a numerous class. In cases featuring such claims, plaintiff attorneys probably must have some control over the monetary claims of class members for negotiation of a settlement fund from which to recover fees and costs.

Since the *Wal-Mart* decision, however, numerous courts have held that (b)(3) Title VII plaintiffs' classes can be certified. Some courts have continued to endorse the practice, approved by some courts of appeals and not rejected in *Wal-Mart*, of certifying a mandatory (b)(2) class to consider injunctive relief and an opt-out (b)(3) class to consider individual monetary relief.¹¹⁵ Although some of these decisions may take too sanguine a view of the manageability of individual claims for monetary relief,¹¹⁶ all can be justified by an appropriate

¹¹³ *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996) (“[E]very federal court of appeals that has considered the question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for damages.” (quoting *In re Jackson Lockdown/MCO Cases*, 568 F. Supp. 869, 892 (E.D. Mich. 1983))); see also *Gooch v. Life Investors Inc. Co. of Am.*, 672 F.3d 402, 428 n.16 (6th Cir. 1996) (“[P]reclusion is not possible here, where any monetary relief would be certified under Rule 23(b)(3).”); 18A CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. JURIS. § 4455 (2d ed. 1987) (“[A]n individual who has suffered particular injury as a result of practices enjoined in a class action should remain free to seek a damage remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief . . .”).

¹¹⁴ In his analysis of the scope of (b)(2), Justice Scalia does state in *Wal-Mart* that a member of a class that had unsuccessfully sought back pay “might be collaterally estopped from independently seeking compensatory damages based” on the same allegedly discriminatory employment decision. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011). This, however, only confirms that members of a plaintiff class who lose on a litigated issue are estopped from re-litigating that issue against the defendant in a subsequent action. This dicta has no relevance to the availability of claim preclusion against members of a plaintiffs' class that was successful on related claims in the prior action.

¹¹⁵ See, e.g., *Gulino v. Bd. of Educ.*, 907 F. Supp. 2d 492, 505 (S.D.N.Y. 2012); *Johnson v. Flakeboard Am. Ltd.*, No. CA 4:11-2607-TLW-KDW, 2012 WL 2237004, at *7 (D.S.C. Mar. 26, 2012); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 535-44 (N.D. Cal. 2012); *United States v. New York*, 276 F.R.D. 22, 32 (E.D.N.Y. 2011); *Easterling v. Conn. Dept. of Corr.*, 278 F.R.D. 41, 47 (D. Conn. 2011).

¹¹⁶ See, e.g., *Ellis*, 285 F.R.D. at 540 (finding claims for individual relief from 700-

reading of Rule 23 that is consistent with *Wal-Mart*. The (b)(3) certifications seem least problematic for claims for which no jury is requested, including disparate impact claims for which Title VII provides no right to legal damages or a jury trial;¹¹⁷ such cases provide the option of using magistrates to determine which class members do not deserve back pay because of the employer defenses recognized in *Teamsters*.¹¹⁸ In some cases, moreover, it might be possible to calculate back pay on an aggregate basis without modifying the substantive law through a “Trial by Formula” as rejected by Justice Scalia in *Wal-Mart*.¹¹⁹ Yet even the (b)(3) certifications of large Title VII classes seeking legal damages for intentional discrimination can be justified by use of the authority provided district judges by Rule 23(c)(4).¹²⁰

Rule 23(c)(4) provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”¹²¹ This does not provide an additional category to supplement the three alternative types of class actions listed in Rule 23(b); certification requires meeting the requirements of one of the three parts of Rule 23(b).¹²² Rule 23(c)(4), however,

member class manageable).

¹¹⁷ See 42 U.S.C. § 1981A(a)(1) (2012) (no damage relief in disparate impact cases); *id.* § 1981A(c) (right to jury trial available only where complaining party seeks damages).

¹¹⁸ See *supra* notes 29-31 and accompanying text.

¹¹⁹ For instance, in *Easterling*, the court concluded that the number of women excluded by an unjustified physical test could be determined by a comparison of a prior period during which the test was not used. *Easterling*, 278 F.R.D. at 50 n.6. The *Easterling* court also noted that determining which women would have been hired but for the test “would be impossible” because the test was used as a screening device early in the hiring period. *Id.* at 48-49. The court concluded that individual issues such as current qualifications and individual mitigation efforts could be treated without making the class unmanageable. *Id.* at 50; see also *New York*, 276 F.R.D. at 48 (stating, in a challenge to discriminatory written examinations, “[b]ecause it is impossible to determine exactly which non-hire victims would have received job offers and which delayed-hire victims would have been hired in the absence of discrimination, the court must first determine the aggregate amount of individual relief to which the subclasses are entitled and then distribute that relief pro rata to eligible claimants”).

¹²⁰ For invocation of this authority in recent Title VII decisions considering hybrid certifications, see, e.g., *McReynolds v. Merrill Lynch*, 672 F.3d 482, 490 (7th Cir. 2012); *Gulino*, 907 F.Supp.2d at 507; *Ellis*, 285 F.R.D. at 544; *New York*, 276 F.R.D. at 33.

¹²¹ FED. R. CIV. P. 23(c)(4).

¹²² Rule 23(c) provides supplementary rules and tools for courts; it does not add to the three class action categories set forth in (b). See Laura Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L. J. 709, 752-59 (2003) (interpreting the 1966 advisory committee’s intent to have Rule 23(c) complement, not supplant, the Rule 23(b) categories). One of the tools, (c)(4), is to maintain a class action “with respect to particular issues.” FED. R. CIV. P. 23(c)(4). Such an issue class has to meet the three requirements of one of the parts of subsection (b). See Hines, *supra*, at 759 (“The text and structure of Rule 23(c)(4)(A) . . . strongly suggest that it [does not] empower[r] courts to circumvent subdivision (a) or (b) requirements.”).

allows courts to consider whether the requirements of Rule 23(b) would be met if the cause of action were bifurcated by issues, only some of which would be litigated for the entire class.¹²³ Contrary to the claims of management attorneys who would like to extract the (c)(4) provision from Rule 23,¹²⁴ this unambiguous and generally accepted meaning of (c)(4)¹²⁵ does not obviate the predominance and superiority requirements of (b)(3).¹²⁶ If (c)(4) is employed to sever certain issues for class treatment, the predominance and superiority requirements still must be applied to determine whether class treatment of just those issues will serve the efficiency goal of Rule 23.¹²⁷ In some cases, class litigation of a common but peripheral issue that is not antecedent to separate individual issues, rather than of an antecedent pivotal issue that could dispose of all individual claims, will not be efficient. Class litigation of a peripheral, non-pivotal issue may be wasted litigation if more complicated individual actions involving the same facts must follow before relief can be granted or

¹²³ See, e.g., *McReynolds*, 672 F.3d at 491; *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 221 (2d Cir. 2006); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); see generally Joseph Seiner, *The Issue Class*, 56 B.C. L. REV. 121 (2015).

¹²⁴ See, e.g., *Labor and Employment and ERISA Class Actions After Wal-Mart and Comcast – Practice Points for Defendants (Part II-Rule 23(b))*, 41 Emp. Dis. Rep. (BNA) 862, 863-65 (Dec. 11, 2013).

¹²⁵ See, e.g., MANUAL FOR COMPLEX LITIGATION § 21.25 (4th ed. 2004) (observing that Rule 23(c)(4) authorizes a court to “achieve the economics of class action treatment for a portion of a case, the rest of which may either not qualify under Rule 23(a) or may be unmanageable as a class action”); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:89 (5th ed. 2013) (“The ability to certify issue classes accords the courts the discretion to realize the advantages and efficiencies of classwide adjudication of common issues when there also exist individual issues that must be tried separately.”); 7AA CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. 2014) (“[T]he theory [of Rule 23(c)(4)] is that the advantages and economy of adjudicating issues that are common to the entire class on a representative basis may be secured even though other issues in the case may need to be litigated separately by each class member.”).

¹²⁶ In *Castano v. American Tobacco Co.*, the Court of Appeals for the Fifth Circuit seemed to endorse the view that (c)(4) cannot be used to sever issues to achieve predominance:

Reading Rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of Rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996). In *Castano*, a national mass tort class action against the cigarette companies seeking compensation for nicotine addiction, variations in governing state law rendered predominance questionable even after severance. Subsequent decisions of this court, however, have found predominance where particular issues can be decided together and would be pivotal to all cases. See, e.g., *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1998) (“[T]he common issues in this case . . . are not only significant, but also pivotal.”).

¹²⁷ See *supra* note 122 and accompanying text.

denied. Similarly, severance of a common issue of fact or law does not necessarily render class litigation of that issue and individual litigation of other issues a superior method of adjudication. Severance may make the litigation of the common issue manageable, but the other “matters pertinent” to superiority listed in (b)(3) may weigh in favor of separate actions.¹²⁸ Other litigation already may have begun and the variance in the value of claims may indicate that class members should control the prosecution of all their particular cases, including the common issue.

In the typical Title VII disparate impact or disparate treatment pattern or practice case, however, the issue of whether challenged employment practices or decision-making processes are discriminatory and illegal is almost always the central predominant issue upon which individual actions for monetary relief must hinge.¹²⁹ Deciding that issue collectively rather than in individual actions almost always will be more efficient and fairer than deciding it multiple times and in various ways in individual actions.¹³⁰ Furthermore, deciding the issue in a separate collective action does not present manageability challenges. Deciding it in a separate action instead simplifies and advances actions for individual relief.¹³¹ Although other factors “pertinent”

¹²⁸ These include “the class members’ interests in individually controlling” their claim; the extent and nature of litigation already begun; and whether it is desirable to concentrate the litigation in the particular forum. *See* FED. R. CIV. P. 23(b)(3)(A)-(C).

¹²⁹ *Cf.*, *e.g.*, *Myers v. Hertz*, 624 F.3d 537, 548 (2d Cir. 2010) (stating that the central predominance analysis involves whether the denial of overtime pay was legal because the plaintiffs were exempt employees).

¹³⁰ The predominance inquiry involves not a comparison of number of issues, but rather whether certification “would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Myers*, 624 F.3d at 547; *see Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (holding that Rule 23(b)(3) is intended “to cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results”).

¹³¹ Using a (b)(3) issue class also may be appropriate in systemic disparate treatment litigation for the common issues posed by punitive damages claims. In *Kolstad v. American Dental Association*, the Court held that such damages are available when the discriminating agent knew of or recklessly disregarded the illegality of his action, common law agency-based liability principles apply, and the employer has not made good-faith efforts to comply with Title VII. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 538, 545-46 (1999). In a systemic disparate treatment case, all of these prerequisites present common issues that can be decided most efficiently and fairly in one case rather than in numerous individual cases. A jury empaneled for a (b)(3) systemic disparate treatment case could decide whether the employer’s conduct was not only illegal, but also subject to liability for punitive damages. This jury also might set a multiplier factor that could be applied to successful individual claims for other monetary relief consistent with the maximum allowed by the caps on compensatory and punitive damages set by the 1991 Act. *See* 42 U.S.C. § 1981a(b)(3) (2012). As explained by the court in *Ellis*, having the availability of punitive damages

to superiority may weigh against certification in some cases,¹³² there is no non-formalistic argument of any merit for never using the Rule 23(c)(4) provision to make Title VII litigation more efficient and fair through issue severance.¹³³

Contrary to the claims of some management attorneys,¹³⁴ certification of Title VII (b)(3) issue classes is not prevented by the Court's post-*Wal-Mart* decision in *Comcast Corp. v. Behrend*,¹³⁵ a case involving antitrust claims of a class of consumers in a regional product market.¹³⁶ The Court in *Comcast* stated that before certifying (b)(3) classes courts must provide the same "rigorous analysis" to the requirement of predominance that the *Wal-Mart* decision required be given to commonality under (a)(2).¹³⁷ This rigorous analysis, the Court held, must include consideration of whether "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."¹³⁸ The Court held that the district court certifying the class in *Comcast* failed to apply this strict standard because plaintiffs did not offer an efficient means to calculate damages flowing from the theory of antitrust liability that the district court recognized could potentially establish liability to all members of the requested class of consumers.¹³⁹

As stressed by the *Comcast* dissenters, however, the majority opinion "should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable on a class-wide basis."¹⁴⁰ As the dissent also noted, lower courts in a range of cases have held that

determined by the same jury that determines the existence of a pattern or practice of discrimination would avoid potential Seventh Amendment problems posed by subsequent juries reexamining findings of the (b)(3) liability jury because the "classwide liability question . . . may overlap substantially with the question of whether Defendant acted with malice or reckless indifference." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 543 (N.D. Cal. 2012).

¹³² See *supra* note 128.

¹³³ Management attorneys have not so argued. Although Professor Hines criticizes using "issue class actions as an alternative to non-predominating (b)(3) class actions" to achieve "automatic predominance," she seems to accept applying the (b)(3) standards to the full action after use of the (c)(4) issue class tool. See Hines, *supra* note 122, at 723, 725-28.

¹³⁴ See, e.g., Joel S. Feldman and Daniel R. Thies, *Comcast's Lasting Impact: Crystallization and Affirmation of the Rule 23(b)(3) Predominance Requirement*, 82 CLASS ACTION LITIG. REP. (BNA) 1815 (2014); Sascha Henry & John M. Landry, *The New Normal: The Need for Damages Proof To Certify Consumer Classes Post-Comcast*, 82 CLASS ACTION LITIG. REP. (BNA) 1861 (2014).

¹³⁵ 133 S. Ct. 1426 (2013).

¹³⁶ See *id.* at 1430.

¹³⁷ *Id.* at 1432.

¹³⁸ *Id.* at 1433.

¹³⁹ *Id.* at 1433-34; see *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1257-58 (10th Cir. 2014) (observing that *Comcast* did not rest on the ability to measure damages on a class-wide basis).

¹⁴⁰ *Comcast*, 133 S. Ct. at 1435-36 (Breyer & Ginsburg, JJ., dissenting).

individual damage calculations do not normally preclude (b)(3) class certification.¹⁴¹ What made the *Comcast* certification special, beyond the fact that “the need to prove damages on a class-wide basis” was not challenged by the plaintiffs,¹⁴² was the lack of a demonstrated connection between the theory of common liability accepted by the district court for class litigation and the proof of individual damages.¹⁴³ Proof of antitrust liability to class members under the theory recognized as viable by the district court would not have been a basis for moving forward individual claims for damages because the plaintiffs offered no method to isolate for individual claims the antitrust impact accepted by the court for class treatment from other “distortions” of a pure competitive market that the plaintiff’s expert attributed to the defendant’s actions.¹⁴⁴ Thus, the plaintiffs’ liability case was not consistent with and could not advance their claim for damages.

By contrast, under the *Teamsters* two-phase model for Title VII pattern and practice litigation, proof of liability based on a discriminatory pattern or practice is consistent with and would advance the adjudication of individual claims for monetary relief. Those individual claims might or might not make unmanageable litigation of the entire action in one court, but proof of a general practice of discrimination would still be the predominant issue in the action, and the manageability problem could be mitigated by the use of an issue class for the general liability issue. Nothing in the *Comcast* decision, like nothing in the *Wal-Mart* decision, calls into question such a use of (c)(4) to make class certification an efficient and fair tool for litigation.¹⁴⁵

¹⁴¹ *Id.* at 1437.

¹⁴² *Id.*

¹⁴³ *Id.* at 1433-34.

¹⁴⁴ *Id.*

¹⁴⁵ There also is nothing in the *Wal-Mart* or *Comcast* decisions suggesting that the Seventh Amendment would restrict litigating through a (b)(3) issue class only the determination of whether the employer engaged in a pattern or practice of discrimination, leaving damage calculations to subsequent cases before different juries. The Reexamination Clause of the Seventh Amendment prohibits any reconsideration in a subsequent case of what has been decided by a jury: “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States” U.S. CONST. amend. VII. Separate juries thus cannot decide the same issue. The *Teamsters* two-phase system, however, fully separates the issue of the existence of a pattern or practice of discrimination from the issues that must be decided to determine which members of the plaintiff’s class actually have been affected by any such discriminatory pattern or practice and to what extent those affected have been harmed. *See supra* notes 29-30 and accompanying text. The second remedial phase only proceeds if a pattern or practice is demonstrated, and where it has been demonstrated, its existence is accepted as an unchallengeable premise for litigation in the second phase. *See supra* notes 29-30 and accompanying text. Nothing has changed since Professor Hart’s explanation in Melissa Hart, *Will Employment Class Actions Survive?*, 37 AKRON L. REV. 813, 831-33 (2004) (explaining that the Reexamination Clause does not require liability and damages to be tried by the exact same jury).

In sum, the *Wal-Mart* decision's predictably restrictive interpretation of Rule 23 need not pose insuperable barriers to private class actions under Title VII. Its pronouncements, on both subsection (a)(2) and subsection (b)(2), should not have been a surprise to the plaintiffs' bar, and even its most troublesome dicta against "Trial by Formula" need not be heard and has not been heard as a death knell for Title VII class actions.

The Roberts Court, however, through aggressive interpretations of the FAA has offered most private employers the option of foreclosing such actions.¹⁴⁶ It is these interpretations, much more than the *Wal-Mart* decision, that Congress must address if class actions are to continue to play an effective role in the enforcement of Title VII's commands.

IV. ARBITRATION AS A CLASS ACTION BARRIER

The Court's use of the FAA to erode the private right of action offered not only by Title VII, but also by other federal anti-employment discrimination and employee-protection laws, began about the time Congress attempted to strengthen Title VII through passage of the Civil Rights Act of 1991. In *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁴⁷ a closely divided Court held that an employer could enforce an employee's agreement to process in private arbitration rather than in court a claim under the Age Discrimination in Employment Act ("ADEA"),¹⁴⁸ even though the agreement was not negotiated and had to be signed as a condition of the employee's employment.¹⁴⁹ The agreement enforced in *Gilmer* was imposed by a third-party regulator.¹⁵⁰ However, a decade later, the Court confirmed that the FAA covers most employment contracts in *Circuit City Stores, Inc. v. Adams*,¹⁵¹ a state anti-discrimination law case challenging an agreement to arbitrate imposed by Circuit City's employment application.¹⁵² The *Circuit City* Court interpreted "involving commerce" in the FAA's operative section 2¹⁵³ to cover all employment contracts subject to Congressional regulation outside the transportation industry,¹⁵⁴ even though the FAA was enacted in 1925 before the Court expanded Congress' power to regulate interstate commerce, and even though section 1 of the FAA exempts "contracts" not only of "seamen" and "railroad employees," but also "any other class of workers engaged in foreign

¹⁴⁶ See *infra* Part IV.

¹⁴⁷ 500 U.S. 20 (1991).

¹⁴⁸ 29 U.S.C. §§ 621-34 (2012).

¹⁴⁹ *Gilmer*, 500 U.S. at 23.

¹⁵⁰ In order to secure employment with Interstate, Gilmer had to register as a securities representative with the New York Stock Exchange, which required him to submit to arbitration "any controversy" with his employer. *Id.*

¹⁵¹ 532 U.S. 105 (2001).

¹⁵² *Id.* at 109.

¹⁵³ 9 U.S.C. § 2 (2012).

¹⁵⁴ *Circuit City*, 532 U.S. at 109.

or interstate commerce.”¹⁵⁵ There is nothing in *Gilmer* or *Circuit City* that suggests the Court would treat differently obligations imposed on employees by their employers to arbitrate Title VII claims, and the courts of appeals without dissent now accept such impositions.¹⁵⁶

Providing employers with the discretion to require their employees to accept the redirection of statutory anti-discrimination claims from judicial to private arbitral forums also would seem to enable employers to require their employees to sacrifice bringing any collective action in a judicial rather than in an arbitral forum. More recent decisions of the Roberts Court, moreover, have clarified that employers also can require employees to agree to only individual arbitrations and thus to sacrifice the option of bringing a collective action in any forum.

There are two important limitations on the force of the FAA, both potentially applicable to employment contracts, and both potentially protective of employees’ ability to press actions collectively, at least in arbitration. First, section 2 of the FAA includes a savings clause that allows the invalidation or non-enforcement of arbitration agreements on “grounds as exist at law or in equity for the revocation of any contract.”¹⁵⁷ Since such grounds include a contract being unconscionable, section 2 might provide one tool to limit the FAA’s restriction of collective actions. Second, the Court has iterated in numerous decisions that the FAA allows only the waiver of a procedural right to a judicial forum, not the waiver of any substantive rights; thus, a “prospective litigant” must be able to “effectively vindicate” a “federal

¹⁵⁵ See 9 U.S.C. § 1. The Court’s decision in *Circuit City*, like its decision in *Gilmer*, was closely divided. The dissents objected to the majority’s strained interpretation of the exemption in section 1 of the FAA of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” See *Circuit City*, 532 U.S. at 124-29 (Stevens, J., dissenting). Justice Souter contrasted the majority’s expansive interpretation of “involving commerce” in the operative section 2 to cover all contracts within current Congressional power with the majority’s restrictive interpretation of “interstate commerce” in section 1’s exemption to cover only the transportation industry. See *id.* at 133-34 (Souter, J., dissenting). Justice Stevens in his dissent used the legislative history to explain why the exemption’s express exclusion of “seaman” and “railroad employees” was consistent with Justice Souter’s interpretation of the FAA rather than with that of the majority. See *id.* at 133 (Stevens, J., dissenting).

¹⁵⁶ See, e.g., *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 748 (9th Cir. 2003) (rejecting the argument that the Civil Rights Act of 1991 precluded enforcement of agreements to arbitrate Title VII claims). The Court noted in *Gilmer* the range of statutory claims that it has held may be subject to an enforceable arbitration agreement, including those under the securities laws, the antitrust laws, and RICO. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991). The *Gilmer* Court iterated that a party to an arbitration agreement has the burden of demonstrating that Congress “intended to preclude a waiver of a judicial forum” under a particular statute. *Id.* at 26.

¹⁵⁷ 9 U.S.C. § 2.

statutory right in the arbitral forum.”¹⁵⁸ If a substantive right guaranteed by Title VII or by another anti-discrimination statute cannot be “effectively vindicated” in an individual action, perhaps because of its low potential value, compelling individual arbitration could be treated as compelling the sacrifice of a substantive rather than only of a procedural right.

In light of recent decisions of the Roberts Court, however, neither limitation on the force of the FAA can be used to preserve employees’ ability to bring collective actions, even in arbitration, simply because of the relatively low value of individual discrimination claims. First, in *AT&T Mobility LLC v. Concepcion*, a narrowly divided Court, in a predictable alignment, held that California’s unconscionability doctrine could not be applied to condition enforcement of an imposed agreement to arbitrate on the imposing party’s consent to class-based or collective arbitration.¹⁵⁹ The Ninth Circuit Court of Appeals had found an arbitration agreement in AT&T’s “Terms and Conditions” for wireless service both procedurally and substantively unconscionable under California law because it precluded class actions through a contract of adhesion and thereby allowed the company “to deliberately cheat large numbers of consumers out of individually small sums of money.”¹⁶⁰ Justice Scalia, writing for the majority, asserted that despite the savings clause in section 2, the FAA can preempt state law that, although neutral on its face, is “applied in a fashion that disfavors arbitration.”¹⁶¹ Thus, California’s unconscionability law cannot be used as “an obstacle to the accomplishment of the FAA’s objectives,” and “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration,” and discourages its adoption.¹⁶² Class arbitration, Scalia argued, “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”¹⁶³ Furthermore, class wide arbitration poses risks beyond even those posed by class-wide litigation for defendants because of the absence of close and multilayered judicial review.¹⁶⁴ Despite Justice Scalia’s attacks on class arbitration, however, he left the door ajar to an “effective vindication” argument in a response to the dissenting Justices’ argument that class

¹⁵⁸ See, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer*, 500 U.S. at 29; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985).

¹⁵⁹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). The five-Justice majority included the Chief Justice and Justices Scalia, Kennedy, Thomas, and Alito. *Id.* at 1743.

¹⁶⁰ *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854 (9th Cir. 2009) (quoting *Shroyer v. New Cingular Wireless Servs. Inc.*, 498 F.3d 976, 986 (9th Cir. 2007)).

¹⁶¹ *AT&T Mobility LLC*, 131 S. Ct. at 1747.

¹⁶² *Id.* at 1748.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1752.

proceedings are necessary to ensure the prosecution of small claims: AT&T's agreement, Justice Scalia noted, provided that it would pay claimants "a minimum of \$7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer."¹⁶⁵

Two years later in *American Express Co. v. Italian Colors Restaurant*, the Court nonetheless slammed the door shut on the "effective vindication" argument as a basis for preserving the option for class wide arbitration of claims that are otherwise not economically viable.¹⁶⁶ In this case, Italian Colors and other merchants brought a class-wide action in court against American Express, alleging that American Express's credit "card acceptance agreement" violated antitrust law.¹⁶⁷ The Court, in another predictable 5-4 alignment, held that the merchants could not bring the action because the agreement included a commitment to arbitrate claims without use of class arbitration.¹⁶⁸ The merchants contended that enforcing the class waiver would prevent the "effective vindication" of their rights because none of the merchants individually would have an adequate economic incentive to pay for the expert analysis necessary to prove the claim.¹⁶⁹ Justice Scalia, again writing for the majority, rejected any argument based on economic incentives, narrowly construing the "effective vindication" doctrine to apply only if there was an obstruction of access to a forum to vindicate the rights.¹⁷⁰ Justice Scalia asserted that the high cost of proving a statutory claim is distinct from the "elimination of the right to pursue the remedy."¹⁷¹ He instead concluded that "FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."¹⁷²

Thus, as long as the waivers preserve formal access to some forum, employees cannot abrogate imposed waivers to litigate or arbitrate individual claims jointly by demonstrating that they cannot achieve "effective vindication" through individual actions. If such formal access is preserved, the "effective vindication" doctrine only guarantees collective or class litigation or arbitration of collective rather than individual rights. If the right only can be asserted collectively, then a waiver of collective or class litigation and arbitration would constitute a waiver of a substantive rather than only a procedural right.

Title VII, however, provides no private collective action. Section 707 of the Act authorizes the government, but not private victims of illegal discrimination, to bring actions against "a pattern or practice of resistance" to

¹⁶⁵ *Id.* at 1753.

¹⁶⁶ *See* *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013).

¹⁶⁷ *Id.* at 2308.

¹⁶⁸ *See id.* at 2308-12.

¹⁶⁹ *Id.* at 2310.

¹⁷⁰ *See id.* at 2310-11.

¹⁷¹ *Id.*

¹⁷² *Id.* at 2312 n.5.

the Act's antidiscrimination commands.¹⁷³ Title VII private class actions are aggregations of the private individual civil actions that are authorized under section 706(f) when the government chooses not to settle or litigate a charge of discrimination.¹⁷⁴ The Court's development and use of the same two-phase *Franks-Teamsters* procedural model in private section 706 class actions,¹⁷⁵ as well as in public section 707 actions, does not convert the substantive rights asserted in the former into a general collective right like that asserted in the latter. Nor does such a conversion derive from the lower courts not accepting use of this procedural model in non-collective private actions.¹⁷⁶ Similarly, the 1991 Act's codification of the disparate impact "unlawful employment practice" did not include any provision for a collective substantive right to be asserted independently of the individual actions authorized under section 706(f).¹⁷⁷

Thus, the Court through its interpretations of the FAA, rather than through its interpretation of Rule 23, has provided employers outside the transportation industry with a clear route to escape class and other forms of collective actions under Title VII or other employment regulatory statutes. Employee-rights activists, like consumer advocates and shareholder activists, should give priority to the modification of the FAA, rather than to modification of Rule 23.

Given the alignment of the current Court, a comprehensive modification will have to come from congressional action. It will not derive from the clever recent attempt of the National Labor Relations Board to dilute the Court's FAA jurisprudence for employment law. The Board first held in *D.R. Horton, Inc.*¹⁷⁸ in 2012, and then reaffirmed in *Murphy Oil USA, Inc.*¹⁷⁹ in October 2014, that employers violate the National Labor Relations Act ("NLRA") by requiring their employees to waive the right to bring collective actions in either a judicial or an alternative arbitral forum.¹⁸⁰ This holding has not been accepted in any court of appeals and would be rejected by the current Supreme Court.¹⁸¹

¹⁷³ 42 U.S.C. § 2000e-6(a) (2012).

¹⁷⁴ *Id.* § 2000e-5(f).

¹⁷⁵ *See supra* notes 29-31 and accompanying text.

¹⁷⁶ *See supra* note 105 and accompanying text.

¹⁷⁷ *See* 42 U.S.C. § 2000e-2(k).

¹⁷⁸ 357 N.L.R.B. 184 (2012).

¹⁷⁹ 361 N.L.R.B. 72 (2014).

¹⁸⁰ *Id.*

¹⁸¹ *Horton* itself was rejected by a divided panel in the Court of Appeals for the Fifth Circuit. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 345 (5th Cir. 2013) (holding that the Board's decision did not give proper weight to the FAA). Two other courts of appeals in decisions reversing the denial of motions to compel arbitration have rejected the reasoning of *Horton* in dicta. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-54 (8th Cir. 2013). For a compelling criticism of the Fifth Circuit decision, see generally Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of D.R. Horton and Concepcion*, 35

To be sure, the NLRA secures from employer interference the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection,”¹⁸² and employers cannot condition employment on an individual employee’s willingness to waive that right in whole or in part.¹⁸³ Furthermore, the Board has long appropriately understood litigation as an activity that can take a protected concerted form.¹⁸⁴ Employers thus cannot condition employment on employees’ willingness to commit to not take concerted action to utilize, secure, or expand any available procedural rights to engage in collective adjudications.

The NLRA’s substantive protection of employees’ concerted utilization of procedural rights does not mean that the NLRA requires employers to grant particular procedural adjudicatory rights, however.¹⁸⁵ The NLRA itself neither guarantees any right to proceed collectively in a judicial or arbitral forum nor assumes any such right exists. Rule 23, for instance, was not even adopted until several decades after the enactment of the NLRA.¹⁸⁶ Indeed, before *D. R. Horton*, the Board had never interpreted the NLRA to require employers to participate with multiple employees in any particular procedural system short of the collective bargaining with a majority representative that the Act directly

BERKELEY J. EMP. & LAB. L. 175 (2014).

¹⁸² 29 U.S.C. § 157 (2012).

¹⁸³ To permit employers to condition employment on an employee’s willingness to sacrifice the protection of concerted activity of course would negate the “right to self-organization” guaranteed by the Act. *See id.* (providing this right); *see also id.* § 103 (codifying the Norris-LaGuardia Act invalidation of contractual promises not to join or remain a member of a union). Thus, while the Board has allowed majority collective bargaining representatives to waive certain rights to concerted action, *e.g.*, *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 81 (1953) (holding that a no-strike clause in collective agreement renders concerted economic strike unprotected), it has never allowed such waiver by individual employees.

¹⁸⁴ *See, e.g.*, *Le Madri Restaurant*, 331 N.L.R.B. 269, 275-76 (2000); *Novotel New York*, 321 N.L.R.B. 624, 633 (1996); *Spandisco Oil & Royalty Co.*, 42 N.L.R.B. 942, 949 (1942); *see also Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011).

¹⁸⁵ The Board’s expansion in *D.R. Horton* of the scope of employee rights secured by the NLRA can be highlighted by contrasting the right to concerted action approved by the Court in *NLRB v. Weingarten*, 420 U.S. 251 (1975). As stated in *Weingarten*, the Board construes the NLRA to create “a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.” *Id.* at 256. The Board, however, does not require the employer to provide such an interview with a union representative present. *Id.* at 259. Thus, the employee has a right to take concerted action with a union representative to attempt to secure a collective procedure, but the employee does not have a right to be granted that procedure.

¹⁸⁶ The NLRA was passed in 1935, 49 Stat. 449 (Wagner Act), and substantially amended in 1947, 61 Stat. 136 (Taft-Hartley Act) and 1959, 73 Stat. 519 (Landrum-Griffin Act). Rule 23 was adopted in 1966. *See* 7AA CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 1753 (3d ed. 2014).

protects.¹⁸⁷ Thus, the NLRA's substantive protection of employee utilization of collective adjudication depends on the availability of such adjudication as defined by external procedural law, including Rule 23, which the Court in its decisions interpreting the FAA has held is subject to modification in employment contracts with both individual employees¹⁸⁸ and collective bargaining representatives.¹⁸⁹ The Court that decided *Circuit City*, *Concepcion*, and *Italian Colors*—albeit all wrongly in my view—will not allow the Board to expand NLRA-guaranteed rights for the purposes of advancing the procedure of collective adjudication. The Court has made clear that the FAA, not any other federal statute, sets the procedural rules governing arbitration of employment contracts within its scope.

Since the Court will not allow a federal agency, or any lower court, to mark a route to circumvent the Court's FAA jurisprudence, the plaintiffs' employment bar and civil rights advocates should join forces with many other interested parties, including consumer advocates and other class action lawyers, to seek a legislative modification of the FAA. Such a modification in the FAA, not in Rule 23, should be given priority.¹⁹⁰ Even in the absence of a post-*Wal-Mart* amendment, Rule 23 can be employed by realistic and pragmatic lawyers as an effective tool in the enforcement of Title VII.

¹⁸⁷ Employees, for instance, have no NLRA-guaranteed right to present grievances to their employer, either individually or as a group. *See Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 61 n.12 (1975).

¹⁸⁸ *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

¹⁸⁹ *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009).

¹⁹⁰ Congress already has passed legislation restricting pre-dispute agreements to arbitrate certain types of employee claims. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 18 U.S.C. § 1514(e)(2) (2012) (rendering invalid pre-dispute agreements requiring arbitration of certain whistleblower claims under federal law); Dept. of Defense Appropriations Act, 2010 Pub. L. No. 111-118, § 8116 (prohibiting federal defense contractors with contracts of over a \$1,000,000 from conditioning employment on agreement to arbitrate Title VII claims or tort claims involving sexual assault or harassment); *see also* Exec. Order No. 13,673, § 6, 74 Fed. Reg. 45,309 (Aug. 5, 2014) (requiring federal contractors with contracts exceeding \$1,000,000 to agree not to arbitrate Title VII claims or tort claims for sexual assault or harassment absent a voluntary post-dispute agreement).