

Litigation Matters: The Curious Case of *Tyson Foods v. Bouaphakeo*

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Of the three class action cases decided this Supreme Court term, *Tyson Foods, Inc. v. Bouaphakeo*¹—a “donning and doffing” case that asked when it is appropriate to use generalized statistical proof instead of evidence particular to individual plaintiffs—was the most closely watched. As the first class action opinion in a post-Scalia Supreme Court, it offered the possibility of discerning the fate of the class action going forward. Given the increasingly strident fight over the use of statistics in aggregate litigation and the proper bounds of Rule 23’s predominance inquiry, it offered the possibility of greater clarity in that area, as well.

As it turned out, the ultimate decision was underwhelming for those with big theories about class actions or the Court. For the post-Scalia Court watchers, the 6-2 affirmance of class certification was neither the 4-4 deadlock some had feared would become the new *status quo* nor the 5-3 reversal that would have promised a new bloc interested in rigorous review of class certification. Nor did the opinion resolve any of the specific ideological battles being fought out in the Supreme Court and the appellate courts—and, make no mistake, there are specific ideological battles. Instead, it relied heavily on the choices made by the litigators as the case progressed.

The briefing and argument transcripts in this case make clear that the Court was not engaging in a particular project to expand or limit its previous holdings, but instead deciding the case on the unique facts in front of it. That conclusion should provide some comfort to those proponents of rigor in certifying class actions—the Court has not reversed itself on the question of when it is appropriate for

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¹ 136 S. Ct. 1036 (2016).

plaintiffs to rely on “trial by formula.” Instead, faced with a specific substantive rule allowing sampling evidence, and specific litigation choices that kept that evidence alive, the Court made a decision easily limited to its facts.

It would be easy to end the analysis of the case there: the *Tyson Foods* opinion says more about the litigators than the Court. But ending the analysis there misses the most interesting part. The *Tyson Foods* opinion shows that the choices litigators make matter to the development of legal doctrine.

Five years ago, when the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*,² it reignited two important debates among scholars and practitioners. The first of these was well publicized and concerned the proper role of the class action.³ The second, but frankly no less important, debate concerned the true role of courts in the development of legal doctrine—a phenomenon sometimes referred to as “legal change.”

This second debate—more of a difference in approach than a clash in legal argument—showed up in a pair of articles that tried to make sense of the plaintiffs’ loss in *Dukes*. On one side stood Professor Suja Thomas, who, in her article *How Atypical, Hard Cases Make Bad Law*,⁴ argued that the Supreme Court needed a formal doctrine of “judicial restraint” to prevent it from taking difficult cases that might result in unwise legal decisions. As she wrote:

Twombly, [*Dukes*], and *Ricci* are examples of cases in which the Court lacked sufficient effective doctrines of judicial restraint. The Court was not restrained from making legal changes in these cases where the facts were atypical, the facts motivated the legal change, and the legal change affected typical cases.⁵

Professor Thomas’s argument was interesting enough on its own. But what made it relevant to the debate over legal change was its primary assumption: courts, and particularly the Supreme Court,

² 564 U.S. 338 (2011).

³ See Andrew J. Trask, *Reactions to Wal-Mart v. Dukes: Litigation Strategy & Legal Change*, 62 DePaul L. Rev. 791, 793–94 (2013) (summarizing academic debate).

⁴ Suja Thomas, *How Atypical, Hard Cases Make Bad Law* (See, e.g., the Lack of Judicial Restraint in *Wal-Mart*, *Twombly*, & *Ricci*), 48 Wake Forest L. Rev. 989 (2013).

⁵ *Id.* at 991.

are the leading drivers of legal change in the United States. From Professor Thomas's standpoint, the decision in *Dukes* was a failure of the Court, not of the litigators involved.

On the other side stood Professor Suzanna Sherry, who, in her article *Hogs Get Slaughtered at the Supreme Court*,⁶ posited that the reason the Supreme Court made sweeping rulings in two major class action cases in 2011 (*Dukes* and *AT&T Mobility LLC v. Concepcion*⁷) was not because the majority was necessarily pro-business or anti-plaintiff, but because the lower courts, prompted by the plaintiffs' attorneys, had overreached in each case:

[T]hese two cases are not isolated tragedies; they provide a window into a larger problem. Rule 23 turns class counsel into powerful private attorneys general and tempts them to raise the stakes. It allows plaintiffs' lawyers to chart a course not only for their own clients, but for future litigants. If that course is ill-advised—as it is when the lawyers have incentives, as they often do, to frame issues broadly for the “big win”—the consequences can be disastrous for those future litigants.⁸

Like Professor Thomas, Professor Sherry saw the courts as the solution to the issue, but her reasoning was that the incentives compelling class counsel to overreach in their arguments were too strong to resist.⁹

The general assumption when analyzing Supreme Court jurisprudence is that the opinion is the product of a clash between the justices (and their 30-odd clerks) and their specific ideological predilections. And there is no question that judges—especially those on the Supreme Court and the various federal appellate judges—matter in the development of law in the United States. But the role of the *litigator* is often overlooked. Given the adversarial nature of the American justice system, this is surprising. It is the litigator who frames the issues that appear before the judge at each level. It is the litigator who

⁶ Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 S. Ct. Rev. 1.

⁷ 563 U.S. 333 (2011).

⁸ Sherry, *Hogs Get Slaughtered*, *supra* note 6, at 1–2.

⁹ *Id.* at 2 (“It is up to the courts, and especially to the judges most sympathetic to the interests of current and future class-action plaintiffs, to avoid the costs of lawyers’ overreaching.”).

creates the record the judge must examine. And it is the litigator who makes the particular tactical choices that result in the case as it appears before the judge on appeal. Despite its comparatively narrow ruling, *Tyson Foods* is an interesting case because it makes the effects of those choices particularly transparent.

I. A Brief Theory of Litigation Strategy

The strategy of litigation is an underserved area of legal studies.¹⁰ Any decision a lawyer makes is going to involve a tangle of constraints (legal and factual), client demands, limited resources (space, time, and money), and political concerns. So what do I mean by litigation strategy? The facile answer is that it is the strategy that governs a lawsuit.

Legal scholar Marc Galanter came up with an excellent description of litigation decades ago in his seminal article, “Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change.” According to Professor Galanter, litigation is “[t]he presentation of claims to be decided by the courts (or court-like agencies) and the whole penumbra of threats, feints, and so forth, surrounding such presentation.”¹¹ From that perspective—one shared by law professors Lynn M. LoPucki and Walter O. Weyrauch, the only academics to date to really engage with the question of what legal strategy looks like—litigation strategy involves anything in the litigation that is not the making of arguments on the merits. LoPucki and Weyrauch call this the “manipulat[ion of] the environments in which the outcomes are determined.”¹²

My theory of litigation strategy is somewhat different. From a purely descriptive standpoint, it states that litigation strategy is about the optimal deployment of argument. In other words, it involves the various decisions involved in ensuring that, once a party

¹⁰ Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 *Duke L.J.* 1405, 1410 (2000) (“Legal strategy is curiously absent from the realm of legal theory. Extensive accounts of the adversary process do not even mention it.” (internal footnotes omitted)).

¹¹ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & Soc’y Rev.* 95, 95–96 (1974).

¹² LoPucki & Weyrauch, *Theory of Legal Strategy*, *supra* note 10, at 1415 (internal footnotes omitted).

makes an argument, it has the best chance possible of persuading the legal decisionmaker or finder of fact.

From a positive standpoint, it would assert that the arguments adopted by legal decisionmakers are in fact influenced by the ways in which those arguments are presented. Their timing, their context, and the specific rhetorical devices employed are every bit as important to the outcome of the case as the ultimate substantive content of the argument.

The arguments matter on their merits, of course. But there are other factors that influence how well those arguments will be received by the decisionmaker. Some of these factors—such as forum-shopping and private ordering—have received scholarly treatment.¹³ But others, like the specific framing of issues, the deployment of procedural motions, and the investment in credibility, are less-studied but still come into play.

How can these “other factors” affect the shape of a judicial opinion? There are numerous ways; to list just a few:

- *The selection of causes of action and affirmative defenses will affect the outcome of the case.* Each cause of action in a lawsuit carries with it certain elements that the lawyer must prove. These elements shape the ultimate legal debate, which, in turn, will influence the judge’s reasoning when deciding the case. To take a simple example, a plaintiff may often bring a consumer fraud case under either common law fraud or a state’s deceptive trade practices statute. For class-action plaintiffs, some of these statutes are more appealing because they will not require any proof of reliance, an individualized question that might destroy the cohesiveness of the class.¹⁴
- *The investment in developing the facts will affect the positioning of legal issues.* Facts are not free. Identifying documents, interviewing witnesses, and retaining experts who can understand complex technical ideas and distill them for a lay

¹³ See, e.g., Mark Moller, *The Checks and Balances of Forum-Shopping*, 1 *Stan. J. Complex Litig.* 107 (2012); Jaime Dodge, *The Limits of Private Procedural Ordering*, 97 *Va. L. Rev.* 723 (2011); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 *Wm. & Mary L. Rev.* 507 (2011).

¹⁴ Brian Anderson & Andrew Trask, *Class Action Playbook* (2016 ed.) § 3.02[5] at 90 (Matthew Bender) (“While the plaintiff emphasizes commonalities among the class, the defendant will highlight differences, variations, and nuances.”).

audience all consume both time and money. Therefore, the choice of which facts to develop—which documents to request, which witnesses to interview, which (if any) experts to retain—can have a significant effect on the arguments that wind up in front of a court.

- *The investment in the lawyers' credibility will affect how an argument is received.* As Judge Richard Posner has written, the arguments a lawyer puts forth are “credence goods”: the audience will only accept them if they accept the reputation of their source.¹⁵ As a result, on a macro level, attorneys willing to incur opportunity costs in order to develop reputations for professionalism and integrity may wind up with more effective arguments even when their substance is the same as the average attorney. On the micro level, attorneys who do not invest in proofreading or careful research may find their arguments get less traction from the court.¹⁶
- *The timing of certain arguments will affect their reception.* From a procedural standpoint, the burden of persuasion is different at a motion to dismiss from what it is at summary judgment. (And the burden changes again at trial.) But, in addition, there are differing strategic considerations involved in being the first to make a particular legal argument, as opposed to advocating a position a number of courts have adopted.

In addition to positioning the argument, litigators must also, of course, make the argument itself. This, too, involves strategic choices. An argument is an attempt to persuade. And, to use one economically minded definition, “[p]ersuasion means trying to bring someone around to your opinion on a matter without paying or coercing him.”¹⁷

The first, and most important strategic question surrounding legal argument is just what—and how much—to ask for. Every

¹⁵ Richard Posner, *Overcoming Law* 502 (1996) (“The ideas that a speaker tries to ‘sell’ to his audience often are credence goods, and the significance of the ethical appeal is that it increases the audience’s willingness to repose faith in the speaker.”).

¹⁶ Scott A. Moss, *Bad Brief, Bad Laws, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 *Emory L.J.* 59, 64 & n.9 (2013).

¹⁷ Posner, *Overcoming Law*, *supra* note 15, at 499. For an alternative definition, see Thomas C. Schelling, *The Strategy of Conflict* 23 (1980 ed.).

argument has an “ask.” The greater the ask, the less likely the argument will prevail. (This helps explain why lawyers consistently strive to make their arguments “long-standing” and “well-settled.”) Risky arguments tend to have a larger conceptual “ask,” which is what makes them riskier. (Judge Posner calls this “persuasive distance.”¹⁸) In litigation—particularly civil litigation—it is rarely the case that a party must bring the court around to its opinion of everything. It simply has to persuade enough to win the case. If you accept that judges are minimalist overall, and therefore they prefer to leave some questions open, then incremental arguments make sense.¹⁹

In addition, the litigator must select a rhetorical strategy—that is, she must determine how best to present her arguments. This decision involves selecting the themes to emphasize, the tone to strike, and the evidence and precedent to invoke. It can be difficult to measure the effect of these choices except at the edges: particularly effective strategies might result in the court adopting specific tones or phrasings directly attributable to the argument; particularly ineffective rhetorical strategies might draw judicial rebuke.

The *Tyson Foods* litigation provides an excellent case study for these observations. Doctrinally, it was not particularly complex. An examination of the various stages of the litigation shows how difficult many of these strategic questions can be in the moment. Parties in litigation operate with what can charitably be described as incomplete information. At any moment in a large lawsuit, there are many uncertain issues and competing concerns.

When I say that litigation choices matter, I am emphatically *not* saying that *Tyson Foods* was poorly litigated by the defense. The firms and lawyers involved on both sides have deserved reputations for high-quality work, the briefs were well-written, and the choices the defendants made were clearly within the mainstream for choices in Fair Labor Standards Act (FLSA) class actions. It would be foolhardy to second-guess, from the safety of a laptop and with the benefit of hindsight, decisions made with necessarily limited information under “combat conditions.”

¹⁸ Posner, *Overcoming Law*, *supra* note 15, at 500.

¹⁹ Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 *Colum. L. Rev.* 2087, 2096 (2014).

What I *am* saying is that, as access to briefs and argument transcripts gets easier, it becomes much easier to trace how specific choices in litigation lead to specific outcomes in judicial opinions. These advances mean that it is well past time for a coherent explanation of how litigators affect legal rules.

II. The Strategic Context for *Tyson Foods*

Class actions are, of course, big business. They can transform an individual claim worth a *de minimis* amount into a multimillion dollar lawsuit. The process by which this happens is known as certification of a class, and it is the make-or-break moment in most class actions.²⁰ To certify a class action as a lawsuit, a plaintiff must show that it meets the requirements of Rule 23 of the Federal Rules of Civil Procedure. For the purposes of this article, that means showing that common issues exist (meeting the “commonality” requirement of Rule 23(a)(2)) and that those common issues predominate over any individualized issues (the “predominance” requirement of Rule 23(b)(3)).

The Roberts Court’s class-action opinions have come under scrutiny in the past decade. In the wake of its decisions in *Wal-Mart Stores, Inc. v. Dukes*,²¹ *AT&T Mobility v. Concepcion*,²² and *Comcast Corp. v. Behrend*,²³ a number of commentators began to ask whether the Court was biased either toward big business or against the class-action device.²⁴ And a key component of that view of the Roberts Court was the work of Justice Antonin Scalia, who authored all three of those opinions.

²⁰ Anderson & Trask, *Class Action Playbook*, *supra* note 14, § 5.01 at 188 (“The main event in most class actions is the court’s ruling on a plaintiff’s class certification motion”); see also *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012) (“As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs’ counsel.”).

²¹ 564 U.S. 338 (2011).

²² 563 U.S. 333 (2011).

²³ 133 S. Ct. 1426 (2013).

²⁴ See, e.g., Elizabeth J. Cabraser, *The Class Abides: Class Actions and the “Roberts Court,”* 48 *Akron L. Rev.* 757, 759–60 (2015) (“Plaintiffs’ counsel and consumer advocates, not without reason, have tended to see the currently-configured Supreme Court as hostile to class actions.”); Robert H. Klonoff, *The Decline of Class Actions*, 90 *Wash. U. L. Rev.* 729, 828 (2013) (“Cases such as *Dukes*, *Concepcion*, *American Express*, *Castano*, and *Hydrogen Peroxide* do more than adopt new rules. They suggest a suspicion about class actions generally . . .”).

Tyson Foods became the first class action to be decided after Justice Scalia died, so many were looking to it as the first sign of how a post-Scalia Court would address Rule 23. As one might imagine, proponents of a rigorous application of Rule 23 have lost a powerful voice. But, at the same time, the results were not as catastrophic as feared, and they show that the choices the litigators make in a case may be just as important as one of the more influential justices on the Court.

A. *The Fight over “Trial by Formula”*

Since at least the 1970s, there has been a question of what kind of proof a class-action plaintiff may offer in support of her claims, or in support of certification.²⁵ And a central part of that debate has been whether statistical proof may stand in for more plaintiff-specific proof at certification or when determining liability.²⁶

This controversy reached its peak in *Dukes*, in which the plaintiffs attempted to bypass problems of individualized proof in hiring and promotions at Wal-Mart stores nationwide by introducing statistical proof of a “culture of discrimination.” In rejecting plaintiffs’ argument (which both the trial court and the majority of the Ninth Circuit had embraced), Justice Scalia coined a term for the plaintiffs’ strategy: “trial by formula.”²⁷ He made it clear that he, if not the rest of the Court, “disapprove[d] that novel project.”²⁸

²⁵ David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 Wash. U. L. Rev. 587, 642 (2013).

²⁶ *Id.*; see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 101 (2009) (“[T]he flashpoints today over class certification concern the role of aggregate proof of a statistical or economic nature.”). For examples of this tactic, see *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05-C-6583, 2010 U.S. Dist. LEXIS 80002, at *16 (N.D. Ill. Aug. 9, 2010) (plaintiffs offered statistical proof to demonstrate common employment-discrimination issues among African-American financial advisers in discrimination class action); *In re Neurontin Mktg. & Sales Practice Litig.*, 244 F.R.D. 89, 111 (D. Mass. 2009) (plaintiffs offered statistical evidence to show that marketing campaign caused increase in off-label drug prescriptions in pharmaceutical marketing class action); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 488 (D. N.J. 2000) (plaintiffs offered statistical proof of tendency for cars to catch fire as evidence of common causation in products liability class action).

²⁷ *Dukes*, 564 U.S. at 367.

²⁸ *Id.*

Since that time, courts, litigants, and legal scholars have engaged in a contentious debate over just what constitutes “trial by formula,” and just when it might be permitted. A number of courts, particularly in the employment context, adopted Justice Scalia’s statement as an essential part of the case.²⁹ Others, however, have fought to preserve the use of statistical sampling. The Ninth Circuit, for example, has held that statistical sampling is permissible in determining liability in wage-and-hour cases.³⁰ Other courts have allowed the use of statistical formulae, at the very least, to assist in the calculation of damages, reasoning that calculating damages qualitatively is different from determining liability.³¹

Meanwhile, legal scholars like Alexandra Lahav have argued that using statistical sampling to decide liability questions (by, say, extrapolating verdicts from a sample of bellwether trials) is not just acceptable, but recommended.³² Others, like Jay Tidmarsh, have argued for using statistical sampling to create a presumptive award for the “average” class member.³³ Scholars like these tend to focus on the cost savings that “trial by formula” could achieve, or its ability to enhance the deterrent effect of class actions.³⁴

²⁹ See, e.g., *Davis v. Cintas Corp.*, 717 F.3d 476, 490 (6th Cir. 2013) (affirming denial of certification of Title VII class in part because the “Supreme Court rejected this system under the Rules Enabling Act, holding that it abridged or modified Wal-Mart’s statutory right to assert individual defenses to individual awards of backpay”); *Bustillos v. Hidalgo Cty.*, 310 F.R.D. 631, 660 (D.N.M. 2015) (denying certification of wage-and-hour class action because “trial by formula” was no longer available).

³⁰ *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (“Since *Dukes* and *Comcast* were issued, circuit courts including this one have consistently held that statistical sampling and representative testimony are acceptable ways to determine liability . . .”).

³¹ In re *Urethane Antitrust Litig.*, 768 F.3d 1245, 1256–57 (10th Cir. 2014) (“Dow’s liability as to each class member was proven through common evidence; [statistical] extrapolation was used only to approximate damages.”); *Bowerman v. Field Asset Servs., Inc.*, No. 13-cv-00057-WHO, 2015 U.S. Dist. LEXIS 37988 (N.D. Cal. Mar. 24, 2015) (“This is not the sort of ‘Trial by Formula’ rejected in *Dukes*.”); In re *Electronic Books Antitrust Litig.*, No 11 MD 2293, 2014 U.S. Dist. LEXIS 57473, at *31–32 (S.D.N.Y. Apr. 24, 2014) (“[C]lass plaintiffs simply seek to apply an expert economist’s measure of damages to each class member’s individual transaction records. Apart from the word ‘formula,’ this method bears no relationship to the ‘Trial by Formula’ prohibited in *Dukes*.”).

³² See Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 *Tex. L. Rev.* 571, 634 (2012).

³³ Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 *Minn. L. Rev.* 1459, 1464 (2015).

³⁴ *Id.* at 1466.

Why was there so much controversy in this area? Because deciding whether to allow statistical sampling is often tantamount to deciding whether class members and defendants will receive the same due process protections they would enjoy in individual lawsuits. In an individual discrimination case, for example, it is unlikely that a court would allow a plaintiff to offer statistical evidence that her workplace had a “culture of discrimination” in lieu of proving that her superiors had actually discriminated against her when passing her over for promotion. In fact, in an individual case, one would likely conclude that a plaintiff who offered generalized statistics but not hard proof likely did not have a compelling case in the first place.

There are valid, good-faith arguments for using statistics in a class action that do not require one to assume the plaintiffs’ case is invalid on its face. Proving discrimination in promotions on a case-by-case basis, for example, might be extremely expensive and time-consuming. And there may be times (albeit rarely) when individual evidence is compelling, but statistical evidence is even more so.

Nevertheless, strong as the temptation may be to bypass traditional, individualized methods of proof, these arguments tend to run up against a foundational (one could even say constitutional) problem. Class actions are a device authorized by the Federal Rules of Civil Procedure. As a result, they exist only because of the Rules Enabling Act, the statute that gives the Federal Rules the force of law. And the Rules Enabling Act requires that no rule may “abridge, enlarge or modify any substantive right.”³⁵ Changing the kind of evidence required to prove a claim—from, say, direct evidence of discrimination to a statistical study—would enlarge the plaintiff’s substantive rights at the same time as it abridged the defendant’s ability to raise defenses.

The starkest example of the problems raised by “trial by formula” comes when it allows the imposition of liability on individuals who might be *statistically* liable, but *actually* not. Suppose, for example, you had an independent expert report that established conclusively that there was a 50.1 percent chance that any personnel decision at a company was motivated by bias against women. In a group of 1,000 women passed over for promotion, that means 501 would have a good case, and 499 would not. If a statistical sampling were all that

³⁵ Rules Enabling Act, ch. 651, Pub. L. No. 73–415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072(b) (2012)).

were required to prove discrimination, all 1,000 women could bring successful discrimination claims, even though 499 of them would lose at trial if they had to rely on the facts of their individual cases.³⁶ That result violates most people's intuitive sense of the proper result, and a number of scholars have spent time teasing apart the nuances of probability theory and our understanding of "preponderance of the evidence" in attempts to reconcile the needs of due process with modern understandings of evidentiary burdens.³⁷

B. The Fight over Predominance

As a result of these dilemmas, the problem of "trial by formula" has become a flashpoint in the larger battle over when class actions are appropriate and how rigorous the inquiry into certification should be.

This larger fight intensified in 2013, when the Supreme Court decided *Comcast Corp. v. Behrend*. In *Comcast*, the plaintiffs filed a class action accusing the cable company of monopolizing the market for cable services in Philadelphia, thereby driving up prices in violation of Section 2 of the Sherman Act.³⁸ In arguing for certification, the plaintiffs offered expert testimony that showed the effects of four different practices on cable prices. The trial court certified a class based on only one of the four challenged practices, referred to as "overbuilding," in which the company provided more infrastructure than demand supported, a tactic designed to deter competitors.³⁹ When Comcast objected that plaintiffs had not provided classwide evidence that overbuilding had led to the price increases they challenged, the lower court held that the expert report was sufficient to serve as classwide proof, and delving any further would be an impermissible merits inquiry. The Third Circuit affirmed.

The Supreme Court reversed in a 5–4 opinion authored by Justice Scalia. It noted the standard for commonality it had applied in *Dukes*,

³⁶ See generally G. Alexander Nunn, *The Incompatibility of Due Process and Naked Statistical Evidence*, 68 *Vand. L. Rev.* 1407 (2015).

³⁷ See, e.g., Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 *Yale L.J.* 1254, 1269–71 (2013); Stephen E. Fienberg, *Gatecrashers, Blue Buses, and the Bayesian Representation of Legal Evidence*, 66 *B.U. L. Rev.* 693, 693–98 (1986).

³⁸ *Comcast Corp.*, 133 S. Ct. at 1430.

³⁹ *Id.* at 1430–31.

and then held that “[t]he same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a).”⁴⁰ It then held that the plaintiffs’ theory must remain consistent enough that the class certified will reflect the actual case tried, including the theory of damages: “at the class-certification stage (as at trial), any model supporting a plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.”⁴¹ This, held the Court, was the lower courts’ error. They had certified a class based on an expert opinion that did not match the theory of the case the class would pursue at trial.

The *Comcast* opinion was notable for several reasons, but primarily for its plain statement of the “demanding” predominance standard, and for its extension of the predominance inquiry into calculations of damages, an area where courts had traditionally allowed class action plaintiffs more leeway. Since then, a number of appellate courts have walked back the Court’s pronouncements about predominance where they could, while others have attempted to follow its holdings. *Comcast*’s mixed reception was obvious enough that reporters and scholars alike have noticed the war over predominance.⁴² The end result of this “chaos on the ground” has been confusion over the proper application of the predominance requirement. Given this confusion, class-action plaintiffs have pushed to certify sprawling classes based on less rigorous predominance requirements.⁴³ Defendants have pushed back as hard as possible for categorical rules that confine predominance findings to only a few specific cases.⁴⁴

⁴⁰ *Id.* at 1432.

⁴¹ *Id.* at 1433.

⁴² See, e.g., Alex Parkinson, *Comcast Corp. v. Behrend* and Chaos on the Ground, 81 U. Chi. L. Rev. 1213, 1219 (2014) (noting “the rapid proliferation of diverse lower court interpretations of the case”); Alison Frankel, The Supreme Court’s Class Action Underachiever, Reuters (Feb. 11, 2015), <http://blogs.reuters.com/alison-frankel/2015/02/11/the-supreme-courts-class-action-underachiever/> (“in case after case since 2013, federal appeals courts have declined to construe *Comcast* broadly”).

⁴³ See, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).

⁴⁴ See, e.g., Mark Moller, Common Problems for the Common Answer Test: Class Certification in *Amgen* and *Comcast*, 2012–2013 Cato Sup. Ct. Rev. 301, 323 (2013).

These cases, in front of both the Supreme Court and the various federal courts throughout the land, formed the backdrop against which the *Tyson Foods* case was litigated.

III. The *Tyson Foods* Litigation

While the Supreme Court was deciding *Dukes* and *Comcast*, and while the lower courts were hashing out the implications of each of those decisions, an unassuming employment class action was wending its way through the federal courts governing cases in northern Iowa. For the most part, this lawsuit was a typical wage-and-hour case. But a few tactical nuances wound up heavily influencing its journey through the appellate courts and playing a large role in the ultimate holdings.

A. The District Court Litigation

Bouaphakeo v. Tyson Foods, Inc. was an employment class action, specifically a variant colloquially known as a “donning and doffing” case. Donning and doffing cases allege that employees were not sufficiently paid for the time that they spend putting on and taking off clothing necessary to perform their jobs.

In this case, the plaintiffs worked in Tyson Foods’ pork processing plant in Storm Lake, Iowa, in its kill, cut, and “retrim” departments.⁴⁵ Employees in those departments had to carry knives and wear personal protective equipment of different types, usually “hard hats, hairnets, beard nets (if applicable), rubber soled or steel-toed boots, hearing protection, rubber or cotton or kevlar or mesh gloves, company issued shirts and pants (‘whites’), frocks, belly guards, aprons, and arm guards.”⁴⁶ Given the dangerous nature of the work (which involves using sharp instruments on carcasses moving down a conveyor line), the protective gear was vital to the workers’ safety.

Generally, the employees were paid using a process known as “gang time,” which measured the time the entire department was productive. Gang time began when the first hog or pork “hit the floor” of the department, and ended when the last did.⁴⁷ To compensate them

⁴⁵ 564 F. Supp. 2d 870, 878 (N.D. Iowa 2008).

⁴⁶ *Id.*

⁴⁷ *Id.*

for their donning and doffing protective equipment, the employees received several extra minutes of credited time (known in the plant as a “K-code” value).⁴⁸ The plaintiffs challenged the method of calculating their donning and doffing time, alleging that the combination of gang time and K-code time undercompensated them.

It is worth noting at the beginning of this discussion one of the first key strategic choices. Tyson chose not to settle the case when it was first filed. Settlement early in a case influences legal development by ending the litigation; if a case does not proceed to some judicial disposition, the law will not develop from where it is. However, choosing to settle can also have an affirmative effect on the legal landscape: in mature areas of law, settlement information will leak to other litigators, affecting both the terms of subsequent settlements and the choice to bring similar lawsuits.⁴⁹ There can be many reasons not to settle a case early on; among them, Tyson may have been convinced it would win on the merits, or it may not have wanted to set a factual precedent of easily settling wage-and-hour cases.⁵⁰

The early litigation of the case (at least, as described in the published opinions) centered on the commonality of Tyson’s “gang time” system. It culminated in a class-certification hearing, at which the trial judge pithily framed the central issues this way: “Does Defendant’s ‘gang time’ compensation system allow Plaintiff employees to gang up on Defendants?”⁵¹

The fight over certification in this case contained a number of strategic wrinkles. First, the plaintiffs moved for conditional certification of a collective action under the FLSA and certification of a class

⁴⁸ *Id.* at 879.

⁴⁹ Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 *Cornell L. Rev.* 957, 960 (2010) (“[P]rior settlements exert ‘peer pressure’ on similarly situated parties, effectively weakening their position in comparable disputes. Innovative settlements serve as benchmarks to ambitious lawyers, making plaintiffs in future disputes more demanding and thus more reluctant to accept settlements below those that parties in prior settlements received.”); see also Thomas J. Miceli, *Legal Change: Selective Litigation, Judicial Bias, and Precedent*, 38 *J. Legal Stud.* 157, 158 (2009) (discussing “selective litigation model of legal change” in which selection and settlement of cases influences aggregate common law).

⁵⁰ Galanter, *Why the “Haves” Come Out Ahead*, *supra* note 11, 9 *L. & Soc’y Rev.* 98; see also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 *Mich. L. Rev.* 319, 329 (1991).

⁵¹ *Tyson Foods*, 564 *F. Supp. 2d* at 877.

action under Rule 23 at the same time.⁵² Second, neither party requested oral argument.⁵³ This is a valid, but risky, tactic in a certification battle: it signals to the judge that the case is, on its face, a simple one. But, particularly for defendants, conceding analytical simplicity often concedes rhetorical ground to the plaintiffs, who usually have a simpler story to tell at certification.⁵⁴

Without access to internal memoranda, it is impossible to say why Tyson did not request argument, but the most plausible reason is that it believed that issues unrelated to Rule 23 would decide the certification fight. (It is also possible that it was cost-conscious, or that it believed that requesting argument would signal to the judge that it believed plaintiffs' arguments had merit.) Instead of focusing on Rule 23 requirements, Tyson argued (1) that the FLSA pre-empted the plaintiffs' state-law claim (under the Iowa Wage Payment Collection Law, or IWPCCL), and (2) that the plaintiffs could not bring claims under the IWPCCL and the FLSA simultaneously.⁵⁵ (This is where recent historical context becomes important. Hybrid FLSA/Rule 23 actions were extremely common, and were challenged frequently, as even the trial court noted.⁵⁶)

After a lengthy analysis, the district court rejected Tyson's pre-emption argument. The gist of its reasoning was that the FLSA did not present itself as an exclusive remedy, and therefore allowing the state law claim would not interfere with achieving the FLSA's purpose.⁵⁷

⁵² *Id.* at 878. This has become a common tactic in these cases. When the suit was certified in 2008, dual-filing was still controversial. See generally William C. Martucci & Jennifer K. Oldvader, Addressing the Wave of Dual-Filed Federal FLSA and State Law "Off-the-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform, 19 Kan. J. L. & Pub. Pol'y 433, 434 (2010). Since that time, it has become more accepted among courts.

⁵³ Tyson Foods, 564 F. Supp. 2d at 878.

⁵⁴ Anderson & Trask, Class Action Playbook, *supra* note 15, § 5.03[2] at 210 ("While the plaintiff emphasizes commonalities among the class, the defendant will highlight differences, variations, and nuances.").

⁵⁵ Tyson Foods, 564 F. Supp. 2d at 880. Tyson was likely willing to leave the FLSA claim untouched because the scope of liability for its "opt-in" collective action would be less than the "opt-out" class action available for the IWPCCL.

⁵⁶ *Id.* (citing *Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 459 n.19 (W.D. Pa. 2007)).

⁵⁷ *Id.* at 886.

Nor was the court convinced by Tyson's "dual certification" argument. It acknowledged the "procedural differences between a Rule 23 class action and FLSA collective action" and "unique challenges created when such actions are maintained in the same suit," but did not find those challenges great enough to deter it.⁵⁸ (Notably, it questioned Tyson's sincerity in raising this argument, an indication that Tyson was having credibility difficulties for some reason.⁵⁹)

The trial court's analysis of the certification requirements was reasonably thorough. It found numerosity (not unusual: defendants often do not challenge numerosity). And it found that the "gang time" system satisfied both Rule 23's commonality and typicality requirements: since it was a central, uniform-pay policy, the differences among class members would amount only to the specific knives and protective equipment the workers wore. Those differences, it reasoned, would not be great enough to justify denying certification.⁶⁰

The lower court did find that the named plaintiffs could not represent the class as constituted: there were several departments that were named in the complaint but not represented among the plaintiffs.⁶¹ But instead of denying certification to the entire class, it reasoned that redefining the class to limit its scope would suffice.⁶²

The controversial part of the decision, however—the part that would launch eight years of appeals, culminating in briefing before the Supreme Court—was the court's discussion of predominance. The predominance requirement is part of Rule 23(b)(3); it exists to ensure that class actions for money damages contain adequate due process protections for the class members and the defendants.⁶³ In 2008, when the trial court was making its decision, the predominance requirement was not as controversial as it became after the Supreme Court decided *Behrend*, but it was still frequently ground zero for fights over whether the facts in a given case justified certification.⁶⁴

⁵⁸ *Id.* at 888.

⁵⁹ *Id.* at 889 ("the court does not believe this is a serious or valid concern, or that Tyson genuinely shares this concern") (internal citation omitted).

⁶⁰ *Id.* at 903–5.

⁶¹ *Id.* at 906.

⁶² *Id.*

⁶³ *Dukes*, 564 U.S. at 362.

⁶⁴ Anderson & Trask, *Class Action Playbook*, *supra* note 15, § 2.09[2] at 57–59.

Oddly, given its later prominence in the case, the plaintiffs did not submit any statistical evidence at certification, so Tyson did not argue against its use, and the trial court did not consider whether statistical evidence would be appropriate.

Instead, the Court's predominance inquiry centered on whether the donning and doffing at issue would raise separate factual issues. The plaintiffs framed the question as one of common evidence: they were challenging the gang time compensation system, and it was either suitable for determining whether donning and doffing tipped into overtime or not. Tyson tried to argue that the probable outcome of a trial would show individual issues predominated: this was a class where some members might be able to prove they had worked overtime, but others would not. In other words, the ultimate question of injury would depend on individualized, rather than common, evidence. The court decided that the challenge to Tyson's gang time system was the defining question of the litigation, and so found that common issues predominated.⁶⁵

Tyson did not seek interlocutory review under Rule 23(f), which allows for immediate appeal of class certification decisions. It did, however, subsequently file a motion to decertify the class after the Supreme Court issued its opinion in *Dukes*.⁶⁶ At that point, for the first time, the plaintiffs announced their intention to use expert testimony to demonstrate the average harm suffered by each class member.⁶⁷ Tyson opposed the proposal as the same kind of "trial by formula" the Court had just criticized in *Dukes*.⁶⁸ The trial court denied Tyson's motion, and the case proceeded to trial.

B. The District Court Trial

The plaintiffs tried to show that they had worked the necessary overtime to recover, but they hit a snag. Tyson had not kept adequate records of the donning and doffing time for each employee.

So the plaintiffs elected to rely on "representative evidence." They submitted employee testimony. More importantly, they submitted video recordings of employees putting on and taking off the

⁶⁵ Tyson Foods, 564 F. Supp. 2d at 909.

⁶⁶ Brief of Petitioners at 8, Tyson Foods, 136 S. Ct. 1036.

⁶⁷ *Id.* at 8–9.

⁶⁸ *Id.* at 9.

necessary protective equipment for the various departments represented. And they supplemented those tapes with testimony from an industrial relations expert, Dr. Kenneth Mericle. Dr. Mericle conducted hundreds of video observations of employees (744, to be precise), from which he calculated an “average” time for donning and doffing for each department.⁶⁹ The plaintiffs then used that calculation as part of their proof of injury, adding the donning and doffing time to the records they already had of time worked.

Tyson offered a general defense, but it made several tactical choices during the trial that would have large repercussions later in the case. The first of these was that Tyson apparently refused to bifurcate the proceedings.⁷⁰ The plaintiffs had proposed conducting a trial on the compensability of donning and doffing time under the FLSA and then a separate proceeding to determine damages. Tyson refused, insisting “upon a single proceeding in which damages would be calculated in the aggregate and by the jury.”⁷¹

The choice whether to bifurcate is a tricky one. On the one hand, a defendant does not want to grant the plaintiffs’ proposals to aggregate legitimacy by simply allowing them to proceed unchallenged; moreover, allowing bifurcation might create the risk of an appellate court affirming liability, an outcome no defendant likes. On the other hand, if plaintiffs’ method of determining liability was truly a problem because it would implicate individualized issues, then allowing them to proceed with a liability-only phase and registering the appropriate objections at the time would make it clear to any appellate court that individualized inquiries infected the liability inquiry, not just the damages inquiry. (Courts are far more tolerant of individualized damages inquiries than they are of individualized liability inquiries.)

Tyson clearly intended to challenge any classwide liability determination. Indeed, the Supreme Court later noted that Tyson “argued to the jury that the varying amounts of time it took employees to don and doff different protective equipment made the lawsuit too speculative for classwide recovery,”⁷² an argument that mirrored part of its class certification opposition. But because Tyson had refused to

⁶⁹ Tyson Foods, 136 S. Ct. at 1043.

⁷⁰ *Id.* at 1044.

⁷¹ *Id.*

⁷² *Id.* at 1044.

separate out the factfinding on those issues when it had the chance, it undermined any arguments it made later about whether the entanglement between liability and damages had prejudiced it.

The second tactical choice Tyson made was to not challenge plaintiffs' Dr. Mericle on *Daubert* grounds.⁷³ (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁷⁴ is the Supreme Court's definitive statement on the admissibility of expert evidence. Its name has become shorthand for challenges to expert testimony.) It is not entirely clear why Tyson refrained from this attack. At oral argument, Tyson's counsel contended that it had not employed a *Daubert* challenge because "the methodology isn't inherently flawed. The problem with the methodology is it's applied to the theory of liability in this case."⁷⁵ However, Tyson's merits brief before the Court (discussed in greater detail below) spent several pages attacking Dr. Mericle's methodology.⁷⁶

There is no question that *Daubert* challenges can be time-consuming and expensive, but they rarely present much tactical risk. Most courts do not leap immediately from a denial of a *Daubert* challenge to a total acceptance of plaintiffs' expert as the sole voice of authority in a case. On the other hand, leaving proffered expert testimony unchallenged (or unrebutted) risks the court's accepting that testimony, which is usually a foundation for an entire case.

At trial, the jury clearly credited Dr. Mericle's testimony. It found Tyson liable for underpaying its employees and returned a class verdict of close to \$2.9 million. (After liquidated damages, the judgment reached more than \$5.7 million.)⁷⁷

Tyson moved to set aside the verdict, on the grounds that the class should never have been certified in the first place.⁷⁸ The court denied the motion, and Tyson appealed the verdict.

⁷³ *Id.*

⁷⁴ 509 U.S. 579 (1993).

⁷⁵ Transcript of Oral Arg. at 8:19–21, Tyson Foods, 136 S. Ct. 1036.

⁷⁶ Brief of Petitioners at 11–13, Tyson Foods, 136 S. Ct. 1036.

⁷⁷ *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 796 (8th Cir. 2014).

⁷⁸ Tyson Foods, 136 S. Ct. at 1044. It is unclear from the reported cases whether Tyson had also sought interlocutory review under Rule 23(f) after the trial court certified the class. Denials of Rule 23(f) review are frequent and not always reported. Diane P. Wood, FTC Workshop—Protecting Consumer Interests in Class Actions, September 13–14, 2004: Workshop Transcript: Panel 2: Tools for Ensuring that Settlements Are "Fair, Reasonable, and Adequate," 18 *Geo. Legal Ethics* 1197, 1213 (2005).

C. The Appellate Opinion

On appeal, Tyson argued that the lower court had made a number of errors, including allowing the plaintiffs to join an FLSA collective action to a Rule 23 class action based on state law. Tyson also challenged commonality based on what was then the recent *Dukes* opinion, as well as recent Eighth Circuit precedent.⁷⁹ And it argued that the trial court had erred because, even if it had undercompensated every one of its employees, some still would not qualify for the overtime that was necessary to recover in the case at issue.

The majority of the Eighth Circuit's three-judge panel was not convinced: it affirmed the trial court 2-1. It distinguished *Dukes* by noting that "Tyson had a specific company policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members."⁸⁰ And it noted that, unlike the expansive *Dukes* class, which covered every Wal-Mart employee nationwide, the class before it was confined to three departments within a single plant. The appellate court was also unimpressed with Tyson's method of argumentation, specifically calling it out for "exaggerat[ing] the authority" underlying its standing argument.⁸¹

Notably, however, the court conceded one of Tyson's points: at trial, the plaintiffs had relied on expert testimony that drew inferences from a statistical sample of donning and doffing observations. Nevertheless, the court held that "this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946) (allowing liability based on 'just and reasonable inference' when complete records do not exist)."⁸²

The court's reference to *Mt. Clemens* requires further discussion: it both explains the result in this case, and helps to show that *Tyson Foods* may not have much application beyond its own facts.

If *Tyson Foods* is a donning-and-doffing case, then *Mt. Clemens* was a "walking" case. The plaintiffs, all employees of Mt. Clemens Pottery Company, had sued it for not compensating them for the time

⁷⁹ *Tyson Foods*, 765 F.3d at 797 (citing *Dukes*, 564 U.S. at 350; *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 374-76 (8th Cir. 2013); *Bennett v. Nucor Corp.*, 656 F.3d 802, 815 (8th Cir. 2011)).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

they spent walking across the factory campus to begin “productive work” at the appointed time. The company had not kept records of that time, and neither had the plaintiffs. So the disputed issue in *Mt. Clemens* was whether the plaintiffs could rely on some formula to determine the time they had spent walking. The master appointed to hear their claims said no. The district court disagreed. The appellate court overturned the district court. And then the Supreme Court heard the case.

The *Mt. Clemens* Court held that “the Circuit Court of Appeals, as well as the master, imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act.”⁸³

In particular, the Court was worried about the effect that requiring employees to prove their claims with evidence that was not in their control would have on the then-newish FLSA. “The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee.”⁸⁴

So the *Mt. Clemens* Court decided that, in cases like these, the burden should shift.

In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.⁸⁵

In other words, long before the Rules Advisory Committee adopted what we consider to be the modern Rule 23 in 1966, the use of representative evidence in these circumstances was already part of

⁸³ *Mt. Clemens*, 328 U.S. at 686.

⁸⁴ *Id.* at 687.

⁸⁵ *Id.* at 687–88.

the substantive law of the FLSA. *Mt. Clemens* created a rare beast for class-action practitioners, a pre-existing substantive rule that allowed representative evidence under specified circumstances.

The invocation of *Mt. Clemens* was the turning point for the entire appellate opinion. Relying on its creation of a separate evidentiary rule, the Eighth Circuit held that the plaintiffs had not proved liability “only for a sample set of class members.”⁸⁶ Instead, they had proven it “for the class as a whole,” in a process “comparable to a jury applying testimony from named plaintiffs to find classwide liability.”⁸⁷ The mere use of statistics or samples in litigation was “not necessarily trial by formula,”⁸⁸ the Eighth Circuit held. Instead, given the applicable substantive rule, this was the appropriate method for plaintiffs to prove their case.

The dissent was not overly bothered by the majority’s invocation of *Mt. Clemens*. Instead, it focused on the controversial tactic of bringing both an FLSA claim and a state-law claim at the same time, and worried that doing so may have relieved the plaintiffs of their burden of demonstrating commonality.⁸⁹

Tyson moved for a rehearing *en banc*. The Eighth Circuit denied that request by a narrow majority, 6–5.⁹⁰

D. The Briefing and Argument

At this point in the proceedings, each side made an investment in credibility. The plaintiffs brought on Public Citizen Litigation Group, and Tyson hired Carter Phillips of Sidley Austin LLP. The use of Supreme Court litigators has become more pronounced over the years, and while theoretically any lawyer can join the Supreme Court bar, there is an elite cadre that practices before the Court regularly.⁹¹ That investment in dedicated Supreme Court counsel pays off: Supreme Court litigators have long demonstrated higher success rates than

⁸⁶ Tyson Foods, 765 F.3d at 798.

⁸⁷ *Id.* (emphasis added).

⁸⁸ *Id.*

⁸⁹ *Id.* at 800–4 (Beam dissenting).

⁹⁰ Brief of Petitioners at 16, Tyson Foods, 136 S. Ct. 1036.

⁹¹ Thomas G. Hungar & Nikesch Jindal, Observations on the Rise of the Appellate Litigator, 29 Rev. Litig. 511, 512 (2010) (“[t]he growth of the private appellate bar—especially before the U.S. Supreme Court—is well documented”).

their less-specialized counterparts, in both obtaining review and obtaining results.⁹²

Tyson made two basic arguments before the Court. First, it argued that the trial court had improperly relied on statistical evidence that masked differences among class members rather than accounting for them.

Tyson spent several pages of its merits brief attacking Dr. Mericle's expert testimony. It contended that his observations included, in his own words "a lot of variation,"⁹³ that "Mericle made no attempt to ensure that his time study was based on a statistically representative sample of class members,"⁹⁴ and that "he made no effort to control for all the different combinations of equipment worn by individual workers."⁹⁵ In short, argued Tyson, Dr. Mericle's averages were "flawed."⁹⁶

Tyson in particular opposed the use of *Mt. Clemens*, which it argued did not authorize the use of statistical averaging: "Nothing in that decision allows an employee to prove that she was not properly compensated based on the amount of time that a *different employee*—much less a fictional "average" employee—spent performing *different activities* that admittedly took *different amounts of time* to perform."⁹⁷

Second, it argued that the trial court should not have certified a class that included members who could not recover any damages. It contended that, by certifying a class without an adequate "culling" mechanism to weed out uninjured class members, the lower court had "reduced" the predominance requirement to "a nullity."⁹⁸ It also disputed the Eighth Circuit's conclusion that it had invited the error by not challenging Dr. Mericle's testimony, arguing that it had opposed certification vigorously at each stage.⁹⁹

In contrast to Tyson Foods' merits brief, the plaintiffs' response brief was focused and direct. Before the Court, the plaintiffs

⁹² *Id.* at 515–16.

⁹³ Brief of Petitioners at 11, Tyson Foods, 136 S. Ct. 1036.

⁹⁴ *Id.*

⁹⁵ *Id.* at 12.

⁹⁶ *Id.* at 13.

⁹⁷ *Id.* at 42 (emphases in original).

⁹⁸ *Id.* at 51.

⁹⁹ *Id.* at 52–53.

stressed the fact that Tysons had not kept records of its employees' donning and doffing time, a situation that they contended required application of *Mt. Clemens*.¹⁰⁰ Plaintiffs also argued that Tyson had not contended donning and doffing times were individualized when opposing certification, and therefore could not raise the argument now.¹⁰¹

The amicus briefing in this case was particularly intense. All told, 30 amici filed briefs, including the United States, large corporations like Wal-Mart and Dow Chemical, think tanks like the Cato Institute, advocacy groups like the American Association of Justice (a plaintiff trial lawyer group) and the Defense Research Institute, and various consortia of law professors, including Civil Procedure Professors in support of plaintiffs, Civil Procedure Scholars in support of neither party, Complex Litigation Law Professors in support of plaintiffs, and Economists and Other Social Scientists in support of plaintiffs.¹⁰²

What is particularly notable about the amicus briefing is that even some of the amici who disagreed with how the lower courts had handled the case (such as the Civil Procedure Scholars) warned against any pronouncements about overall reliability of statistical evidence. As the Civil Procedure Scholars (who filed a brief sharply critical of the lower courts) put it, the Court should exercise "caution and restraint" because "[a] single broad sentence in an opinion about pork processing could unsettle the myriad fields where class actions promote access to justice, including civil rights, antitrust, securities, and consumer protection."¹⁰³

Unlike some Supreme Court arguments, the argument in this case served as an excellent preview of how individual justices would wind up voting. And that makes it all the more interesting that Justice Anthony Kennedy began the argument with some very difficult questions for Tyson's counsel. Justice Kennedy previewed his

¹⁰⁰ Brief of Respondents at 2, *Tyson Foods*, 136 S. Ct. 1036.

¹⁰¹ *Id.* at 13.

¹⁰² For a complete listing, see *Tyson Foods, Inc. v. Bouaphakeo*, Scotusblog, <http://www.scotusblog.com/case-files/cases/tyson-foods-inc-v-bouaphakeo>.

¹⁰³ Brief of Civil Procedure Scholars as Amici Curiae in Support of Neither Party at 26, *Tyson Foods*, 136 S. Ct. 1036.

concerns almost immediately in the oral argument, and they hinged on the strategic choices that Tyson had made:

JUSTICE KENNEDY: Well, but you didn't—
MR. PHILLIPS: —in certain circumstances in—
JUSTICE KENNEDY: —the statistical mechanism of your own, you didn't have a *Daubert* objection to the testimony, and you suggest in your brief that uninjured plaintiffs are included in aggregate damages, but you were the one that objected to the bifurcated trial. And so far as uninjured plaintiffs recovering, that has to be determined on remand anyway. I—I just don't understand your arguments.¹⁰⁴

Tyson's counsel worked valiantly to defend these strategic choices. He argued that Tyson did not have to bring in an expert, but it is clear from the argument transcript that several justices remained convinced the adverse verdict may well have been a self-inflicted wound.

Justice Elena Kagan similarly zeroed in immediately on the role that *Mt. Clemens* played in the lower courts' analysis, asking: "the question that you really are putting before us is not a Rule 23 question, it's a question of whether this sort of evidence complies with the *Mt. Clemens* standard; isn't that right?"¹⁰⁵ When Tyson's counsel argued that the Rule 23 analysis should precede the *Mt. Clemens* evaluation of the evidence, she immediately countered with the Court's acceptance of the "fraud-on-the-market" presumption in an earlier securities class case, *Halliburton Co. v. Erica P. John Fund, Inc.*,¹⁰⁶ another instance where the Court allowed a substantive evidentiary rule to justify certification in a swath of cases.¹⁰⁷

In general, reading the questioning of both the petitioner and the respondent gives the impression that the Court had serious reservations about overturning the Eighth Circuit, and comparatively fewer about allowing its decision to stand. (This is in contrast to the

¹⁰⁴ Transcript of Oral Arg. at 4:13–24, Tyson Foods, 136 S. Ct. 1036.

¹⁰⁵ *Id.* at 10:2–5.

¹⁰⁶ 563 U.S. 804 (2011).

¹⁰⁷ Transcript of Oral Arg. at 10:13–24, Tyson Foods, 136 S. Ct. 1036 (referring to *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) and *Halliburton*, 563 U.S. 804).

argument in *Dukes*, where the justices visibly struggled with the various substantive issues throughout the argument.)¹⁰⁸

E. The Court's Opinion

The Court issued its opinion on March 22, 2016. It affirmed the lower courts by a six-justice majority. Chief Justice John Roberts and Justice Kennedy joined the “liberal wing” of the Court, while Justices Clarence Thomas and Samuel Alito dissented. Justice Kennedy wrote the majority opinion.

The Court defined both “individual” and “common” questions.

An individual question is one where “members of a proposed class will need to present evidence that varies from member to member,” while a common question is one where “the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.”¹⁰⁹

The Court’s opinion focused in quickly on whether inferring donning and doffing times from statistics was permissible.¹¹⁰ If the plaintiffs *could* rely on a statistical average, then the class was properly certified. On the other hand, if plaintiffs were not entitled to rely on the statistical average, then certification would be inappropriate.

The Court’s opinion expressed serious reluctance about offering any broad rule or “categorical exclusion.”¹¹¹ Relying on several of the amicus briefs, the Court reasoned that “[e]vidence of this type is used in various substantive realms of the law.”¹¹² In particular, antitrust and securities fraud plaintiffs often successfully relied on statistical evidence to help establish their claims. Since there was no absolute philosophical objection to using statistical evidence, “[w]hether

¹⁰⁸ Andrew Trask, *Wal-Mart v. Dukes—Postgame, Class Action Countermeasures* (Mar. 30, 2011), <http://www.classactioncountermeasures.com/2011/03/articles/certification-1/walmart-v-dukes-postgame>.

¹⁰⁹ *Tyson Foods*, 136 S. Ct. at 1045 (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 4:50, 196–97 (5th ed. 2013)).

¹¹⁰ *Id.* at 1046.

¹¹¹ *Id.*

¹¹² *Id.* (citing Brief for Complex Litigation Law Professors as Amici Curiae Supporting Respondents at 5–9, *Tyson Foods*, 136 S. Ct. 1036; Brief for Economists et al. as Amici Curiae Supporting Respondents at 8–10, *Tyson Foods*, 136 S. Ct. 1036).

and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on ‘the elements of the underlying cause of action.’”¹¹³ Given those observations, it focused on whether the evidence before it would be permissible in an FLSA case.

A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. See Fed. Rules Evid. 401, 403, and 702.¹¹⁴

Justice Kennedy’s opinion also flipped the traditional stereotype of Rules Enabling Act arguments. Traditionally, defendants invoke the act to show that a plaintiff may not short-circuit difficult individualized evidence merely by designating her claim as a class action. Here, by contrast, Kennedy argued that, since *Mt. Clemens* allowed for the use of representative evidence in an individual FLSA case, “that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act’s pellucid instruction that use of the class device cannot ‘abridge . . . any substantive right.’”¹¹⁵ For those who believe that the Rules Enabling Act places an important constraint on the Rule 23 class action, Justice Kennedy’s rhetorical judo move here is an important one, not because of the certification it allowed, but because of the underlying principle it affirmed. In essence, Kennedy was telling class-action defense lawyers that if they had a problem with this case, it was not with him—it was with *Mt. Clemens*.

That reasoning also provided guidance on how a court could determine whether statistical or representative evidence would pass muster in future cases. If the named plaintiff could show that “each class member could have relied on that sample to establish liability if he or she had brought an individual action,” then the evidence would be acceptable as classwide evidence.¹¹⁶

¹¹³ *Id.*

¹¹⁴ *Id.* at 1046.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Nor, Justice Kennedy reasoned, did allowing Mericle's study "deprive petitioner of its ability to litigate individual defenses."¹¹⁷ Why not? Because the best defense against Mericle's study was to discredit it. And, like in *Amgen*, discrediting the study would mean that *no* class member could use it as alternative evidence. The "all or nothing quality" of that tactic meant that the defense in this case would be a classwide defense.

The Court did not ignore Justice Scalia's "trial by formula" language in *Dukes*. It did, however, distinguish it from the case before it. According to the Court, "[t]he plaintiffs in [*Dukes*] proposed to use representative evidence as a means of overcoming this absence of a common policy."¹¹⁸ In other words, the *Dukes* plaintiffs were using statistical evidence to "enlarge" the substantive rights of the class members, and simultaneously to "deprive[] defendants of their right to litigate statutory defenses to individual claims."¹¹⁹ By contrast, because Tyson had not kept records of individual workers' donning and doffing times, *Mt. Clemens* authorized individual plaintiffs to submit the Mericle study in their own individual lawsuits as valid, probative evidence of their hours worked.¹²⁰

The Court specifically stated that not "all inferences drawn from representative evidence in an FLSA case are 'just and reasonable.'"¹²¹ But, it stressed that because Tyson had not challenged plaintiffs' experts under *Daubert*, "there is no basis in the record to conclude it was legal error to admit that evidence."¹²² In short, the lack of a *Daubert* challenge proved fatal to Tyson's attempts to challenge the use of statistical evidence later.

The Court was adamant that it was not adopting a "broad and categorical rule[] governing the use of representative and statistical evidence in class actions."¹²³ Instead, the permissibility of sampling would "depend on the purpose for which the sample is being introduced and on the underlying cause of action."¹²⁴

¹¹⁷ *Id.* at 1047.

¹¹⁸ *Id.* at 1048.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (citing *Mt. Clemens*, 328 U.S. at 687).

¹²² *Id.* at 1049.

¹²³ *Id.*

¹²⁴ *Id.*

What about the problem of uninjured class members? The Court decided to postpone that inquiry for another day. (The dissenting justices concurred in that part of the decision.)¹²⁵ It conceded that “the question whether uninjured class members may recover is one of great importance.”¹²⁶ However, it held that the question was not “yet fairly presented by this case” because there had been no disbursement of damages, or any indication of how that disbursement would happen.¹²⁷ Under those circumstances, any damages award might still comply with the requirements of Rule 23. Therefore, remanding the case to the trial court seemed the most appropriate treatment of the issue.

Chief Justice Roberts wrote a concurring opinion (which Justice Alito joined in part) only to “express [his] concern that the District Court may not be able to fashion a method for awarding damages only to those class members who suffered an actual injury.”¹²⁸

Justice Thomas (joined by Justice Alito) dissented to protest the use of representative evidence. According to him, the key issue in the case was whether plaintiffs could avoid an individualized issue of liability “by using representative evidence as common proof of an otherwise individualized issue.”¹²⁹ The majority affirmed certification, “redefining class-action requirements and devising an unsound special evidentiary rule” for FLSA cases.¹³⁰

IV. Conclusions

As discussed in greater detail above, *Tyson Foods* was closely watched for several reasons, most notably that it was the first post-Scalia class-action opinion. It is difficult to say what influence Scalia might have had in conference but, from a numbers perspective, his presence did not affect the outcome of this case. This was not a 4-4 affirmance, but a 6-2 majority opinion (with Justice Alito separately both concurring and dissenting). Both Justice Kennedy and Chief Justice Roberts joined the traditionally liberal

¹²⁵ *Id.* at 1060 (Thomas, J., dissenting).

¹²⁶ *Id.* at 1050.

¹²⁷ *Id.*

¹²⁸ *Id.* (Roberts, C.J., concurring).

¹²⁹ *Id.* at 1053 (Thomas, J., dissenting).

¹³⁰ *Id.*

wing in affirming the decision. It is easier to say what influence the case itself will have, both on the conduct of class actions and (one hopes) on the study of the relationship between litigation and legal change.

A. The Effect on Class Actions

The Court's holding is a middle-of-the-road take on statistical evidence. The Court essentially decided that if a party could use statistical or representative evidence to prove an individual claim, then the mere fact that a case had been brought as a class action would not disqualify that evidence. In this case, given the similarities among the class members, it was likely they would all rely on the same expert opinions to fill in the gaps in Tyson's recordkeeping.

The Court treated this case as much closer to *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*¹³¹ than to *Dukes*. *Amgen* involved an alleged securities fraud committed by Amgen Inc., a biotechnology company. Amgen allegedly made a number of misstatements about safety concerns and the results of clinical trials for two of its most popular drugs. When the truth about the drugs came to light, Amgen's stock price dropped, and its shareholders sued under Rule 10b-5, which prohibits securities fraud.¹³²

When the plaintiffs moved for certification, relying on the fraud-on-the-market theory to demonstrate classwide reliance, Amgen responded that they had not shown that the alleged misstatements were material¹³³ (a requirement the Supreme Court appeared to impose in an earlier case, *Basic, Inc. v. Levinson*¹³⁴). There was one problem: materiality was both a "prerequisite" for applying the fraud-on-the-market presumption *and* an essential element of a 10b-5 claim. So the question facing the Court was when a party actually needed to prove materiality: at certification, or when it proved the claim on the merits?

¹³¹ 133 S. Ct. 1184 (2013).

¹³² *Id.* at 1193.

¹³³ *Id.* at 1193–94.

¹³⁴ 485 U.S. 224 (1988).

Justice Ruth Bader Ginsburg's opinion for the majority focused not on the timing of proving materiality, but its role in the certification process:

[T]he key question in this case is not whether materiality is an essential predicate of the fraud-on-the-market theory; indisputably it is. Instead, the pivotal inquiry is whether proof of materiality is needed to ensure that the questions of law or fact common to the class will "predominate over any questions affecting only individual members" as the litigation progresses. Fed. Rule Civ. Proc. 23(b)(3). For two reasons, the answer to this question is clearly "no."¹³⁵

The first reason Justice Ginsburg cited was that materiality must meet an objective "reasonable investor" standard that offered no room for variation, making it common proof.¹³⁶ The second reason was remarkably similar to the logic in *Tyson Foods*: Ginsburg held there was "no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating."¹³⁷ If the plaintiffs could not prove an essential element of their case, it would be dismissed. Like in *Amgen*, *Tyson Foods* turns on the fact that there is a uniting common question: in *Amgen*, that question was materiality; in *Tyson Foods*, it is the validity of the representative evidence offered under *Mt. Clemens*.

Plaintiffs will not find it easy to pass the test outlined in *Tyson Foods*. For example, as the Court pointed out in distinguishing *Dukes*, the plaintiffs there still could not have relied on their proposed statistical evidence. There was no "lost" evidence of hiring and promotion. Instead, the *Dukes* plaintiffs had proposed using statistical evidence to *create* a common issue in defiance of Wal-Mart's common, stated, antidiscrimination policy. Similarly, the *Tyson Foods* case would not change the outcome for the *Comcast* plaintiffs, who had proposed statistical evidence that did not properly fit their theory of damages.¹³⁸

¹³⁵ *Amgen*, 133 S. Ct. at 1195.

¹³⁶ *Id.* at 1195–96.

¹³⁷ *Id.* at 1196.

¹³⁸ *Comcast*, 133 S. Ct. at 1425.

Nor does the *Tyson Foods* opinion deprive defendants of ways to challenge improper statistical evidence. They can still employ *Daubert* challenges (which, notably, Tyson did not do). And they can still show *how* the expert evidence would not prove some class members' claims.

This result challenges both plaintiffs and defendants not to take shortcuts at certification. Diligent plaintiffs can still get classes certified. Diligent defendants stand a better chance of beating certification.

B. The Effect on the Theory of Strategy

My primary argument is that the result in *Tyson Foods* is better explained as a product of both sides' strategic choices than it is as any specific reflection of justices' ideology. How well does the *Tyson Foods* opinion illustrate the theory that litigation choices matter, even at the Supreme Court?

The majority opinion does seem to support the intuition that courts will often respond better to incremental arguments than to sweeping ones. In general, empaneled courts prefer narrow, particularized reasons for ruling, which allow for less conflict at the moment.¹³⁹ Or, as Professor Sherry put it when trying to explain how plaintiffs' overreaching had lost the *Dukes* and *Concepcion* cases in 2011, "hogs get slaughtered" at the Supreme Court.¹⁴⁰ In this case, Tyson's argument for a categorical rule against "trial by formula" was ultimately more difficult to support than the plaintiffs' request for a recognized exception to the common proof requirement under longstanding (if obscure) FLSA precedent.

Moreover, Justice Kennedy's opinion makes clear that he at least was explicitly swayed by parties' tactical choices. In particular, Tyson's choice not to challenge Dr. Mericle on *Daubert* grounds and its choice to refuse bifurcation both undermined its arguments that it had been prejudiced by the lower courts' conduct.¹⁴¹

It is common to argue that inconvenient appellate opinions should be limited to their facts. But, in this case, it is clear from the litigation

¹³⁹ See Cass Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733 (1995).

¹⁴⁰ Sherry, *Hogs Get Slaughtered*, *supra* note 6, at 2.

¹⁴¹ *Tyson Foods*, 136 S. Ct. at 1049 (*Daubert*), 1050 (bifurcation).

history (and the Court's own protests) that *Tyson Foods* is not broadly applicable. After reviewing the twists and turns of the litigation that led to the final opinion, it is easy to see why. So much of the framing of *Tyson Foods* arose from the specifics of the case in the lower court that it would be next to impossible to find another case sufficiently similar to allow a court to extend the rule on statistical proof outward.

And, at the same time, since litigators make their living adapting to a changing legal landscape, it is very likely that, in future cases, those defending donning and doffing cases will ensure (1) that adequate records exist, and (2) that if they do not, they take the appropriate precautions against representative evidence coming in.

Doctrinally, *Tyson Foods* is a fairly simple case. From a theoretical standpoint, however, it is messier because it undercuts one of the key assumptions commentators had made about the Roberts Court and class actions—that it is the Court, rather than the litigants, that determines the outcome of cases. No one doubts that the Supreme Court does more than just—in Chief Justice Roberts's famous words—calling balls and strikes.¹⁴² But in an age of increasing access to court documents and increasing sophistication of analysis, it is foolish to try to comprehend the game solely by watching the umpires. If you want to know why some calls are balls and others strikes, you have to watch the pitcher and the batter, too.

¹⁴² See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (“I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).