CIVIL PROCEDURE — CLASS ACTIONS — FIFTH CIRCUIT HOLDS THAT DISTRICT COURT FAILED TO CONDUCT RIGOROUS CLASS CERTIFICATION ANALYSIS IN LIGHT OF *WAL-MART STORES, INC. V. DUKES*. — *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012).

Before a class can be certified, a court must conduct a "rigorous analysis" of the four prerequisites for class certification set forth in Federal Rule of Civil Procedure (FRCP) 23(a).[1] As a result of conflicting Supreme Court guidance prior to 2011, circuit courts disagreed regarding whether courts must examine the merits of a case in order to determine whether these prerequisites had been satisfied.[2] In *Wal-Mart Stores, Inc. v. Dukes*,[3] however, the Supreme Court stated that courts must examine the merits in some cases, and tightened the commonality prerequisite,[4] increasing the rigor of the required analysis. Recently, in *M.D. ex rel. Stukenberg v. Perry*,[5] the Fifth Circuit vacated an order issued by the District Court for the Southern District of Texas that certified a class comprising foster children in Texas state custody in light of the Supreme Court's opinion in *Wal-Mart*. The court held that the district court had failed to perform a sufficiently rigorous analysis of the commonality requirement of FRCP 23(a)(2), and that the certified class lacked cohesiveness, as required by FRCP 23(b)(2).[6] *M.D.* showcased *Wal-Mart*'s heightened procedural requirements, which this comment dubs "class action hard look review," and which will increase the cost of certifying a class and decrease the viability of the class action as a vehicle for structural change.

The plaintiffs in *M.D.* were foster children in the custody of Texas's Department of Family and Protective Services (DFPS).[7] DFPS provides children with substitute care and therapeutic services[8] and "engage[s] in permanency planning for children in its [permanent custody] . . . to meet the child's safety, permanency, and well-being needs."[9] The plaintiffs alleged classwide injuries caused by systemic

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[1] WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:2 n.4 (5th ed. 2012) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)).

[2] *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1256–57 (2002).

[3] 131 S. Ct. 2541 (2011).

[4] *Id.* at 2550–52. FRCP 23(a)(2) requires "questions of law or fact common to the class."

[5] 675 F.3d 832 (5th Cir. 2012).

[6] *Id.* at 835, 838. FRCP 23(b)(2) requires that "the party opposing the class [have] acted or refused to act on grounds that apply generally to the class" and authorizes a class action when injunctive relief would be appropriate with respect to the class as a whole. RUBENSTEIN, *supra* note 1, § 1:3.

[7] *M.D.*, 675 F.3d at 835–36.

[8] *Id.* at 836.

[9] *Id.*

deficiencies in Texas's management of children in its permanent custody — for example, that DFPS lacked sufficient caseworkers to perform tasks critical to the well-being of class members.[10] The plaintiffs claimed that Texas violated the class members' substantive due process rights to freedom from harm while in state custody, to liberty, to privacy, and to associational family relationships, as well as their procedural due process rights to state law entitlements.[11] The plaintiffs sought classwide declaratory and injunctive relief to remedy these systemic failures in the proper management of the children in permanent custody.[12]

The Southern District of Texas certified a class consisting of the 12,000 children then in DFPS's permanent custody, as well as all future children who would be in its custody.[13] A finding of commonality, the court explained, required only that the class share a single common question of law or fact — that is, "one issue whose resolution will affect all or a significant number of the putative class members."[14] The existence of different claims or a degree of individualized analysis would not be fatal to commonality.[15] The court found that the alleged shortcomings in DFPS's foster care system provided sufficient common questions of fact.[16] The court also found that whether these alleged systemic deficiencies resulted in widespread violations of statutory and constitutional rights provided common questions of law.[17] Next, the court found sufficient cohesiveness to certify the class under FRCP 23(b)(2) because any relief would benefit the entire class.[18] Injunctive relief "aims to improve the DFPS [permanent custody] system as a whole, not to afford relief to individual Plaintiffs."[19]

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[10] *Id.* at 835.

[11] *Id.*

[12] *Id.*

[13] M.D. *ex rel.* Stukenberg v. Perry, No. C-11-84, 2011 WL 2173673, at *1, *19 (S.D. Tex. June 2, 2011).

[14] *Id.* at *5 (quoting James v. City of Dallas, 254 F.3d 551, 570 (5th Cir. 2001)) (internal quotation mark omitted).

[15] *Id.* (citing *James*, 254 F.3d at 570).

[16] *Id.* (identifying the following common questions of fact at issue: "(1) [W]hether Defendants failed to maintain a caseworker staff of sufficient size and capacity to perform properly, (2) whether Defendants failed to provide sufficient numbers and types of foster care placements necessary to the Plaintiffs' needs, (3) whether Defendants provided sufficient monitoring and oversight to prevent abuse while in state custody, and (4) whether Defendants' actions in general caused harm or risk of harm to Plaintiffs.").

[17] *Id.* at *8.

[18] *Id.* at *13 (citing Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 59 (3d Cir. 1994)).

[19] *Id.* at *15. The court listed several examples of the general relief sought:

> (1) Requiring Defendants to ensure that all children in the plaintiff class are assigned DFPS workers whose overall caseloads do not exceed . . . caseload standards . . . ;
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> (2) Requiring Defendants to establish, within DFPS, an administrative accountability structure to ensure that all caseworkers, using professionally accepted case practices, ful-

The Fifth Circuit reversed.[20] Writing for the panel, Judge Garza vacated the class certification order and remanded the case to the district court.[21] The court found the common questions of fact identified by the district court deficient. For example, the court explained that "the district court failed to describe how" resolving the question of whether DFPS failed to employ a sufficient number of caseworkers would "decide an issue that is central to the substantive due process claims, family association claims, or procedural due process claims of every class member at the same time."[22]

The court similarly found the common legal questions identified by the lower court deficient in several respects.[23] First, the court found that "the formulation of these common questions of law [was] too general to allow for effective appellate review."[24] Instead, Judge Garza explained, the court should have affirmatively identified the scope of the common questions of law.[25] Second, by failing to look beyond the pleadings, the district court failed to perform the required "rigorous analysis."[26] The court did not adequately demonstrate that these claims depend on a common legal contention that would resolve a central issue in one stroke,[27] and the district court failed "to analyze Texas's argument that dissimilarities within the proposed class precluded commonality with specific reference to the elements or defenses for establishing the class claims."[28] Texas had argued that because the individual class members' substantive due process claims required an individualized inquiry regarding whether Texas's actions "shock[ed] the conscience," the plaintiffs could not aggregate their litigation.[29] While the district court may have been right to reject this contention, it

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> ly identify and address Plaintiff Children's needs for . . . permanency[, adequate] placement[,] . . . and mental health services . . . ;
> (3) Requiring Defendants to establish a process for ensuring that state standards for foster [housing are] . . . consistent with the standards set by [third-party organizations] . . . ;
> (4) Prohibiting Defendants from placing Plaintiff Children in foster [housing] . . . that do[es] not meet [such] standards . . .; [and]
> (5) Prohibiting DFPS from placing any children in privately operated [non-accredited] facilities . . . .

*Id.* (internal citations omitted). The court found that although certain forms of relief would "certainly not apply to all class members, this is not fatal to Rule 23(b)(2) certification." *Id.*

20 *M.D.*, 675 F.3d at 835.

21 *See id.* Judge Garza was joined by Judges Clement and Southwick.

22 *Id.* at 841.

23 *Id.* at 842.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 843.

29 *Id.* (quoting Appellees' Response in Opposition to Appellants' Opening Brief in Connection with Interlocutory Appeal of Order Certifying Class at 33, *M.D.*, 675 F.3d 832 (No. 11-40789)) (internal quotation marks omitted).

should have done so with specific "reference to the elements and defenses and requisite proof for each of the proposed class claims in order to ensure that differences . . . [did] not preclude commonality."[30]

The court further held "that the district court abused its discretion by finding that the proposed class could be certified under Rule 23(b)(2)."[31] Explaining that certification is improper "when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant,"[32] it noted that the class sought "at least twelve broad, classwide injunctions, which would require the district court to institute and oversee a complete overhaul of Texas's foster care system."[33]

While *Wal-Mart* imposed a strengthened commonality requirement, focusing on the *substantive* decision of the lower court to certify a class,[34] *M.D* evidences a subtly different effect. The Fifth Circuit reversed not because the district court drew the wrong substantive conclusion,[35] but because it had failed to conduct a sufficiently "rigorous analysis."[36] Incidentally to heightening the commonality requirement, *Wal-Mart* tightened the procedural requirements a district court must satisfy in reaching its substantive conclusion. This strengthened rigorous analysis requirement, coupled with the 1998 amendments to the Federal Rules of Civil Procedure allowing interlocutory appeals of class certification decisions,[37] has created a procedural requirement similar to administrative law's "hard look" review,[38] which requires a court to review carefully the procedure by which an administrative

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[30] *Id.* at 843–44.

[31] *Id.* at 845.

[32] *Id.* (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011)) (internal quotation mark omitted).

[33] *Id.*

[34] *Wal-Mart*, 131 S. Ct. at 2550–52.

[35] *M.D.*, 675 F.3d at 839.

[36] *See id.* at 840; *see also id.* at 839 ("[T]he *Wal-Mart* decision has heightened the standards for establishing commonality under Rule 23(a)(2), rendering the district court's analysis insufficient.").

[37] *See* Christopher A. Kitchen, Note, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal for a New Guideline*, 2004 COLUM. BUS. L. REV. 231, 242 (discussing the promulgation of Rule 23(f), which allows interlocutory appeal of certification decisions). Rule 23(f) was promulgated, in part, to allow circuit courts to more clearly specify class certification standards. *Id.* As a result, circuit courts heightened certification standards. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) (instituting stricter certification standards by requiring that trial courts adjudicate Rule 23 requirements by a preponderance of the evidence, resolve factual and legal disputes relevant to certification even if they overlap with the merits, and evaluate expert testimony).

[38] While the Supreme Court has required a "rigorous analysis" of Rule 23's certification requirements since the 1970s, *see* E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) ("[C]areful attention to the requirements of [Rule] 23 remains . . . indispensable."), the analysis lacked teeth until the introduction of Rule 23(f) and the decision in *Wal-Mart*, *see* Amy Dudash, Hydrogen Peroxide*: The Third Circuit Comes Clean About the Rule 23 Class Action Certification*, 55 VILL. L. REV. 985, 994 (2010).

agency reached its decision in order to ensure the agency has engaged in well-reasoned decisionmaking.[39] As a result of this tightening of requirements, the Court rendered it more expensive and difficult for a class to be certified, decreasing the viability of the class action as a vehicle for structural change.

*Wal-Mart* and decisions under Rule 23(f) have created an administrative law–style hard look procedural requirement. Trial courts must examine the relevant facts to determine whether there are common answers that could resolve a central issue in a single stroke, and if so, adequately articulate the nature of that resolution.[40] In conducting its analysis, the court must look into the merits to understand "the claims, defenses, relevant facts, and applicable substantive law."[41] In addition to requiring that lower courts examine the merits of cases, *Wal-Mart* also hinted that a trial court must conduct the analysis set forth in *Daubert v. Merrell Dow Pharmaceuticals*[42] in evaluating expert testimony.[43] If the reviewing court, like the Fifth Circuit in *M.D.*, is not satisfied, it can reverse and remand on these procedural grounds alone, regardless of the accuracy of the substantive conclusion.

In *M.D.*, the Fifth Circuit held that the district court's review was insufficient under the new procedural hard look requirements. With regard to questions of law, the district court failed to enunciate the common contention of law, thus preventing evaluation of its analysis. With regard to questions of fact, the district court found, for example, a common question of fact concerning whether DFPS maintained a caseworker staff of sufficient size and capacity but did not explain how

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[39] Hard look review requires a court to examine the relevant data to determine whether the agency articulated a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)) (internal quotation marks omitted); *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 543–45 (1985) (explaining that, to satisfy hard look review, an agency must meet procedural requirements, including "supply[ing] a reasoned analysis" for its decision, *id.* at 545 (quoting *State Farm*, 463 U.S. at 57) (internal quotation marks omitted)); Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1912–14 (2009) (discussing modern hard look doctrine).

[40] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982))).

[41] Coastal Neurology, Inc. v. State Farm Mut. Auto. Ins. Co., 458 Fed. App'x 793, 794 (11th Cir. 2012) (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1254 (11th Cir. 2004)).

[42] 509 U.S. 579 (1993) (requiring a court to evaluate whether scientific expert testimony is reliable before it can be admitted).

[43] *See* Sherry E. Clegg, Comment, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure Rule 23(a)(2) in* Wal-Mart v. Dukes, 44 TEX. TECH L. REV. 1087, 1117 (2012) (citing *Wal-Mart*, 131 S. Ct. at 2552). Whether courts must conduct a *Daubert* analysis is before the Court this Term in *Comcast Corp. v. Behrend*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, No. 11-864, 2012 WL 113090 (U.S. June 25, 2012).

this failure would resolve an issue central to one of the claims. The Fifth Circuit found that the court needed to supply reasoning to fill this conceptual gap and to do so with specific reference to the elements of the underlying claim. For example, the plaintiffs alleged that the lack of sufficient caseworker staff led to overworked caseworkers who were thus hampered in their ability to visit children.[44] Because they were thus hampered, they inadequately monitored foster families and failed to protect children from abuse or find homes that could accommodate whole families.[45] Thus, the resolution of the issue of staff-number sufficiency could determine whether the state violated the children's rights. However, it remains an open question whether these issues could be sufficiently analyzed without at least limited discovery.[46] An informed answer about the required staff size would seem to require internal information such as records of abuse and other statistics.

The result of heightening this procedural requirement will be more expensive, time-consuming, and duplicative litigation.[47] Some putative class actions may never meet the heightened procedural requirement, and the fewer successful certifications will be more expensive. Plaintiffs will probably need to conduct at least limited discovery,[48] incurring the resulting costs, to provide sufficient factual material for the court to supply the legal reasoning necessary to satisfy class action hard look review.[49] After *Wal-Mart*, courts have recognized this necessity and explained that precertification discovery should ordinarily be available.[50] These heightened procedural requirements exacerbate the

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[44] *See* Appellees' Response in Opposition to Appellants' Opening Brief in Connection with Interlocutory Appeal of Order Certifying Class at 12, *M.D.*, 675 F.3d 832 (No. 11-40789).

[45] *See, e.g.*, *id.* at 13–16 (listing examples of the inadequate services provided to children).

[46] *See* Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 626–27 (2011) (discussing the information inequality problem occurring when an agency has the information a court may need to conduct a sufficiently rigorous analysis).

[47] *See* Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 DUKE J. CONST. L. & PUB. POL'Y 73, 79 (2011) (explaining that rigorous analysis "essentially will require a determination of the merits at the time of class certification").

[48] *See* Malveaux, *supra* note 46, at 626–27 (discussing the information inequality problem).

[49] *See* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) ("Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find."); *see also* Sarah Rajski, In re Hydrogen Peroxide*: Reinforcing Rigorous Analysis for Class Action Certification*, 34 SEATTLE U. L. REV. 577, 604 (2011) ("Requiring plaintiffs to prove more of their case at the precertification stage limits their access to the judicial system . . . .").

[50] *See, e.g.*, Burton v. District of Columbia, 277 F.R.D. 224, 230–31 (D.D.C. 2011) ("The Supreme Court's ruling in *Wal-Mart* confirms that pre-certification discovery should ordinarily be available where a plaintiff has alleged a potentially viable class claim because *Wal-Mart* emphasizes that the district court's class certification determination must rest on a 'rigorous analysis' . . . ."); Artis v. Deere & Co., 276 F.R.D. 348, 350–53 (N.D. Cal. 2011) (ordering discovery limited by protective order).

robustness of the "mini-trial" on commonality, increasing the amount of superfluous litigation (and thus cost) because merits determinations at certification do not bear on merits determinations in later stages of the litigation.[51]

The increased costs imposed by class action hard look review will deter litigation.[52] This deterrent effect is especially worrisome for cases similar to *M.D.*: attorneys will lack incentives to bring cases for injunctive relief on behalf of disadvantaged plaintiffs. But the deterred litigation will not likely be the expensive class actions that worried commentators and the *Wal-Mart* Court because, even if it is tougher for classes to be certified in such actions, there remains the potential for an enormous payoff for the class and for plaintiffs' attorneys.[53] Still, Rule 23(b)(2) classes, by definition seeking injunctive relief, do not have this incentive.[54] Because of the decreased likelihood of certification and increased costs to certify classes, fewer attorneys will bring class actions similar to *M.D.*[55] While fee shifting is authorized by Congress for many civil rights actions,[56] the attorney is unlikely[57] to recoup fees unless the class wins on the merits or reaches a settlement. The statute authorizes fee shifting only for "prevailing parties,"[58] and winning a class action on the merits is not possible without certification. Settlement is implausible since, in the absence of plaintiff class certification, the defendant lacks the degree of financial risk that usually pressures settlement.[59]

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[51] *See In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006) (noting that class certification is not binding on merits determinations and discussing the risk that a Rule 23 hearing will extend into a protracted minitrial); *see also* Mark Perry & Joe Sellers, *Class Actions in the Wake of* Dukes v. Wal-Mart, 8 J.L. ECON. & POL'Y 367, 370–71 (2011).

[52] *See* Clegg, *supra* note 43, at 1108–09.

[53] *Cf.* Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive*, 26 BERKELEY J. EMP. & LAB. L. 405, 425 (2011) (explaining, in the context of Title VII litigation, how procedural costs, such as requiring notice, may increase costs on plaintiffs, which in turn "may discourage class counsel from bringing meritorious civil rights cases").

[54] *See* Clegg, *supra* note 43, at 1109.

[55] *See Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1811 (2000) (explaining the "immense costs of litigating a class action and the accompanying risk to [class counsel's] own financial well-being").

[56] *See* 42 U.S.C. § 1988(b) (2006).

[57] Although unlikely, it is possible for an attorney seeking classwide injunctive relief to litigate the case on behalf of a few class members after denial of certification and if victorious, to secure a broad injunction and thus receive the full fee. *See* P.G. Szczepanski, Note & Comment, *For a Few Dollars Less: Equity Rides Again in the Denial of Section 1988 Attorney's Fees to a Prevailing Plaintiff in* Farrar v. Hobby, 5 TEMP. POL. & CIV. RTS. L. REV. 219, 230 (1996).

[58] 42 U.S.C. § 1988(b).

[59] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011) (noting the risk of "in terrorem" settlements that class actions entail (quoting Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677–78 (7th Cir. 2009)) (internal quotation marks omitted)); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (explaining that defendants facing billions in potential liability might not dare risk litigating the case and will be "under intense pressure to settle");

In addition to the problematic results of class action hard look review, there are reasons to be wary of adopting standards that resemble hard look review from the administrative setting because the nature of the judicial rule and the problems presented in these contexts differ. Administrative hard look review "reflects an ideal vision of the administrative sphere as driven by experts, although also demanding that [agencies] take into account and respond to the contributions of interested parties."[60] The strictness of hard look review results from a desire to ensure that the vast power of the modern administrative state is exercised in accord with this vision and that agency actions are not distorted by industry capture.[61] But class action in the structural reform context counterbalances problems of scale and resources; claims that may not be efficient to litigate alone are aggregated and thus may economically be brought forth.[62] The central concern here is compensating and deterring constitutional, common law, and statutory violations.[63] Hard look review has been recognized as the culprit most responsible for discouraging agency rulemaking.[64] While a more extended examination of this analogy is necessary to draw strong conclusions, it is sufficient to note that there is reason for concern when adopting similarly rigorous procedural standards in the class action context.

*M.D.*'s reasoning exemplifies an intriguing and underappreciated effect of *Wal-Mart*: the creation of class action hard look review. This procedure comes with costs, in both time and money. The specificity required to satisfy class action hard look review will make it difficult to certify classes alleging claims of a systemic nature. As *M.D.* demonstrated, class action hard look review decreases the utility of class actions for structural reform litigation.

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*see also* Julie Slater, Comment, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-*Dukes*?*, 2011 BYU L. REV. 1259, 1270.

[60] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001).

[61] *See* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 675 (1992).

[62] Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1884 (2006).

[63] *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 936 (1987).

[64] Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 490 (1997).