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Cover Page Footnote

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ONGOING EMPLOYMENT DISCRIMINATION AGAINST WOMEN IN THE WAKE OF *WAL-MART V. DUKES*

INTRODUCTION

Wal-Mart Stores, Inc. v. Dukes, et al. is the largest employment class action lawsuit in United States history, touching the lives of 1.5 million former and current female employees of the largest employer in the United States.[1] In 2001, Betty Dukes and six former employees filed suit against Wal-Mart in the Northern District of California, alleging the corporation's promotion and salary policies discriminated against women in violation of Title VII of the Civil Rights Act of 1964.[2] Plaintiffs alleged that women employed by Wal-Mart were paid less than men employed in similar positions; that women also received fewer promotions to managerial positions; and that women were humiliated by company executives, including a district manager holding meetings at a local Hooter's restaurant and senior managers referring to female store associates as "little Janie Q's."[3] The plaintiffs based their claims on Wal-Mart's highly subjective intra-corporate systems, which allow individual managers a broad level of discretion in determining eligibility for raises and promotions.[4] Defendant Wal-Mart stressed its official company-wide policy barring discrimination based on sex as well as its consistent efforts to foster diversity among its employees.[5]

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[1] Richard Thompson Ford, *Discounting Discrimination: Dukes v. Wal-Mart Proves that Yesterday's Civil Rights Laws Can't Keep Up With Today's Economy*, 5 HARV. L. & POL'Y REV. 69, 71 (2011).

[2] Tristin K. Green, *The Future of Systematic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERK. J. EMP. & LAB. 395, 406 (2011).

[3] Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 153–55 (2012).

[4] *Id.* at 153.

[5] Green, *supra* note 2, at 415 n.83 (describing the arguments made in Wal-Mart's appellate brief).

Rule 23 of the Federal Rules of Civil Procedure delineates numerous requirements for class action lawsuits.[6] Class certification requires proof that Rule 23's requirements are adequately satisfied, necessitating a preliminary inquiry beyond the mere face of the pleadings required by Rule 12(b)(6), which sets the minimum standard for pleadings and motions as a matter of law.[7] Whether the litigation can move forward as a class action depends on whether or not the class meets Rule 23's requirements.[8] If a district court certifies a class and plaintiffs are allowed to proceed, many additional plaintiffs can join the suit in claims that would not otherwise be brought on an individual basis.[9] If a class is certified and allowed to proceed, defendants often seek resolution by settlement to avoid potential payoffs that would dramatically affect the defendant corporation's structure and operations.[10]

Although the plaintiff class in this case was certified by the District Court of Northern California and the Ninth Circuit Court of Appeals, the United States Supreme Court ultimately denied certification.[11] Writing for the majority, Justice Scalia stated that the plaintiffs failed to prove that Wal-Mart operated under a general policy of discrimination.[12] Plaintiffs put forward sociological and statistical evidence to substantiate their claims including regressions, statistical analyses, and testimony from employees.[13] Scalia described this evidence as "worlds away from significant proof that Wal-Mart operated under a general

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

7 Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

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

9 Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009). Many plaintiffs working minimum wage jobs at places like Wal-Mart cannot afford the cost of litigation against a large corporation like Wal-Mart, which has significant resources at its disposal. *See also* Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, CATO SUP. CT. REV. 319, 323 (2011).

10 *Id.*

11 *See Dukes*, 131 S. Ct. 2541.

12 *Dukes*, 131 S. Ct. at 2556.

13 *Id.* at 2553–55.

policy of discrimination."[14] In her dissent, Justice Ginsburg analyzed the majority's refusal to certify the class, indicating that dismissal of the issue was inappropriate without analyzing the applicable portion of Rule 23, which the majority failed to do.[15]

In failing to address the question or allow an opportunity for potential legal redress, the ideologically divided Court evinced its own biases as well as a broader societal unwillingness to acknowledge ongoing employment discrimination against women throughout the nation. Because of the incredibly stringent burden of proof established by the majority in *Dukes*, many future class action lawsuits involving claims of discrimination will be unable to go forward. The majority's refusal to certify the class simultaneously closes potential avenues of legal redress while allowing monolithic companies to continue implementing decentralized corporate policies that disadvantage women. Despite official corporate policies prohibiting discrimination, an ethos tolerating unarticulated, subliminal discrimination continues to plague corporate America.[16]

Part II of this note discusses past and present employment discrimination against women in the United States by citing relevant legislation and statistics. This portion of the note explains first and second generation discrimination and describes corporate policies perpetuating ongoing employment discrimination. Part III discusses relevant details of the plaintiffs' and defendant's arguments. It outlines the procedural posture and evolution of the case, describes denial of Supreme Court certification, and outlines relevant legal criticism articulated in the dissent.

Part IV of this note discusses the broad implications of the Court's decision on future class action lawsuits, explains the commonality requirement of Rule 23, and describes the impact

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14 *Id.* at 2553–54.

15 *Id.* at 2567 (Ginsburg, J., dissenting).

16 *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, (1995) (describing how the phenomenon of unconscious discrimination can influence decision-making even when it appears the decision maker is following neutral policies).

of *Dukes* on class action litigation. It also analyzes the defense arguments of *Lochnerian* procedural due process and the lack of incentive for corporate change.[17] Part V discusses the future of social framework analysis and expert testimony. It outlines different theories of discrimination as a basis for relief and the changing burdens of proof before and after *Dukes*. This portion of the note also describes uses of social framework testimony, its connection to the Federal Rules of Evidence, and the effect of barring social framework testimony, all in the context of class action litigation. Part VI describes potential avenues of redress for the *Dukes* plaintiffs, including filing smaller class action lawsuits, imposing tort liability theory against corporations, and starting a voluntary refund program for consumers as an alternative to class action litigation. This portion of the note also discusses Home Depot as an example of a large corporation that positively changed its employment practices through internal reform.

Finally, this note concludes by discussing the feminist implications of the *Dukes* decision and highlighting the need to acknowledge employment discrimination as a pervasive issue.[18] It also presents innovative solutions to employment discrimination against women and minorities throughout America.

II. EMPLOYMENT DISCRIMINATION AGAINST WOMEN: PAST AND PRESENT

This part describes past and present employment discrimination against women in the United States by citing relevant legislation and statistics. It will explain first and second generation discrimination and describe corporate policies that perpetuate ongoing employment discrimination against women and minorities.

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[17] The *Lochner* era of the Court favored big business by attempting to grant corporations the same rights as persons under the law.

[18] *See infra* Part VII.

A. *Relevant Legislation and Statistics*

Historically, women suffered significant discrimination in the workplace.[19] In an effort to combat wage inequality between men and women, Congress passed the Equal Pay Act in 1963.[20] One year later, Congress also passed Title VII of the Civil Rights Act to prohibit sex discrimination in all employment related contexts.[21]

While women have made considerable strides as a result of this and similar legislation, sex discrimination continues to be an ongoing problem in the American labor market.[22] Women continue to earn significantly less than men who hold similar positions.[23] In fact, women earn seventy-six cents for every dollar that men earn.[24] While women comprise approximately half of the workforce, they occupy only thirty percent of salaried managerial positions, twenty percent of middle management positions, and five percent of executive positions.[25]

B. *First and Second Generation Discrimination*

One way to look at this historical trend is through the lens of Susan Sturm's theoretical work. Sturm differentiated between two types of workplace discrimination.[26] She used the term "first generation discrimination" to denote blatant discrimination through overt exclusion, segregation of job opportunities,

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19 *See generally* Myrtle P. Bell, Mary E. McLaughlin, & Jennifer M. Sequiera, *Discrimination, Harassment, and the Glass Ceiling: Women as Executive Change Agents*, 37 J. BUS. ETHICS, 65, 66 (2002).

20 Karen M. Wolford, *Gender Discrimination in Employment: Wage Inequity for Professional and Doctoral Degree Holders in the United States and Possible Remedies*, 31 U. ILL. J. EDUC. FIN., 82, 83 (2005).

21 Bell et al., *supra* note 19, at 65

22 Ford, *supra* note 1, at 79.

23 Bell et al., *supra* note 19, at 65.

24 *Id.*

25 *Id.*

26 *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–74 (2001).

and conscious stereotyping against women and minorities.[27] First generation discrimination sought remedies through formal rule-regulated redress: rules prohibiting unequal treatment based on race and gender; rules to provide back pay to victims of discrimination; and rules to ensure implementation of remedial and preventative measures.[28]

It is important to note that class action litigation was an important tool of the civil rights movement to combat first generation discrimination.[29] Class action litigation addresses a collective injury, which encompasses "a pattern and practice of discrimination."[30] Sturm described "smoking gun" examples of discrimination as explicit statements against a particular group of people (i.e. Irish need not apply).[31] Rule 23(b)(2) of the Federal Rules of Civil Procedure was used during the civil rights movement to strike down facially discriminatory legislation and promote integration.[32]

By contrast, "second generation discrimination" occurs as the result of animus on a more subliminal, individualized level to disadvantaged members of particular minority groups in society.[33] Bias often evinces itself in subtle ways that are difficult to trace to particular individuals or policies.[34] Today, it remains difficult to prove specific instances of sex or race discrimination if the facts presented fail to establish a prima facie case of discrimination.[35] Statistics can indicate the pervasiveness of discrimination within a company but do not provide information about specific individuals who may have experienced or been subject to discrimination.[36]

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27 *Id.* at 466.
28 *Id.* at 467.
29 Ford, *supra* note 1, at 75.
30 *Id.*
31 Sturm, *supra* note 26, at 459–60.
32 Ford, *supra* note 1, at 75; Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, CATO SUP. CT. REV. 319, 324 (2011).
33 Sturm, *supra* note 26, at 468–69.
34 *Id.*
35 Ford, *supra* note 1, at 78.
36 *Id.* at 75.

Sturm described "a second generational manifestation of workplace bias" as such because corporate policies are not facially discriminatory.[37] Instead of overt exclusion based on conscious, deliberate stereotypes, workplace bias manifests itself through the actions of particular individuals.[38] Bias can rarely be seen unless viewed collectively.[39]

C. Corporate Policies Perpetuating Employment Discrimination

Sturm's work allows us to see that companies contribute to the existence of second generation discrimination by creating flexible decision-making systems.[40] Variable decision-making systems exist in place of formally articulated, rule-driven policies for employment related decisions.[41] Ambiguous criteria provide insufficient guidance for employees in positions requiring decision-making.[42] These policies undermine efforts at compliance with official corporate policies prohibiting discrimination.[43] The *Dukes* plaintiffs made this exact argument, stating that Wal-Mart's policies, with respect to salary and promotion, are overly broad, rendering them vulnerable to subjectivity, bias, and discrimination.[44]

As Justice Ginsburg so aptly described in her dissent, gender discrimination and exclusion occur in a largely diffuse way.[45] Second generation discrimination often occurs in the absence of clear, corporate compliance policies delineating appropriate criteria for promotions and salary increases.[46] Without formal rules or policies to incentivize compliance, employees in posi-

37 Sturm, *supra* note 26, at 460.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 461.
42 Sturm, *supra* note 26, at 461
43 *Id.*
44 Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011).
45 *Dukes*, 131 S. Ct. 2541 (Ginsburg, J., dissenting).
46 Sturm, *supra* note 26, at 462.

tions of authority are susceptible to personal bias infiltrating their decision-making processes.[47]

III. THE *WAL-MART STORES, INC. v. DUKES* LITIGATION

This part briefly explains Rule 23 of the Federal Rules of Civil Procedure and outlines the Rule's stipulated requirements for a class action lawsuit. It also discusses relevant details of the plaintiffs' and defendant's arguments, including the plaintiffs' allegations, grounds for redress, and the evidentiary basis for the plaintiffs' allegations. It outlines the procedural posture and evolution of the case including rulings of the District Court and the Court of Appeals. It describes denial of certification by the Supreme Court and the majority's criticism of social framework analysis. This part also explains relevant legal criticism articulated in the dissent including a defense of social framework analysis.

A. Class Action Litigation and Rule 23

The essential question in all class action litigation is class certification.[48] If the trial court cannot certify a proposed class, the litigation cannot proceed as a class action.[49] Thus, meeting the class certification requirements found in Rule 23 is of the utmost importance to the plaintiffs' case.

Rule 23 has several requirements. Rule 23(a) ensures a threshold inquiry into whether a suit is appropriate to bring as a class action.[50] Specifically, whether a class can be certified is contingent upon members of the class suffering a common wrong because of the named defendant.[51] This requires a threshold inquiry into whether a suit is appropriate to bring as a class action.[52] Rule 23(a)(2) allows for certification of a plaintiff

47 *Id.* at 485.
48 Weiss, *supra* note 3 at 132.
49 *See* FED. R. CIV. PRO. 23(a).
50 FED. R. CIV. PRO. 23(a).
51 *Id.*
52 *Id.*

class only if "there are questions of law or fact common to the class."[53] This is known as the "commonality requirement."[54] Commonality is the legal linchpin in all class action litigation because it is the key to class certification and must be present for the litigation to go forward.[55]

The depth and intent of the commonality requirement is incredibly controversial. Numerous civil procedure professors contend that the drafters of the Federal Rules of Civil Procedure intended a simple inquiry, not a determination of the merits.[56] Richard Nagareda, a civil procedure professor at New York University School of Law, disagrees, and argues that existence of a genuine dispute over satisfying the requirements of certification per Rule 23 is insufficient to certify a class.[57] This crucial area of disagreement in the *Dukes* litigation is explored throughout the majority as well as dissenting opinions.[58] Justice Scalia relied heavily on Professor Nagareda's interpretation of Rule 23 in the majority opinion, while the dissent favored the former interpretation.[59]

In class action lawsuits addressing discrimination against women and minorities, social framework analysis is used by plaintiff classes to satisfy the commonality requirement.[60] In the *Dukes* litigation, the testimony of Dr. William Bielby, an organizational psychologist specializing in organizational behavior and personnel practices, identified the high amount of discretion given to managers for salary and promotional purposes as contributing to bias and stereotyping.[61] This is another important area of disagreement and controversy. The use of social frame-

53 FED. R. CIV. PRO. 23(a)(2).
54 Green, *supra* note 2, at 405-06.
55 *Id.*
56 Weiss, *supra* note 3 at 134.
57 Nagareda, *supra* note 9, at 114.
58 *See generally* Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541 (2011).
59 *Dukes*, 131 S. Ct. at 2547.
60 *Id.* at 2549.
61 Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 49–50 (2009).

work analysis is a crucial vehicle for plaintiffs to prove that their allegations are true.[62] Discrediting social framework evidence and altering the bar for its admission has tremendous consequences for the future of class action litigation.

Rule 23(b)(2) and (3) primarily address and determine appropriate legal remedies. Rule 23(b)(2) requires a decisive degree of similarity among members of the proposed plaintiff class.[63] Courts allow class actions to proceed under Rule 23(b)(2) if there are no fundamental differences in the legal remedy requested by the plaintiff class.[64] Rule 23(b)(2) implicitly "assumes 'a homogeneous and cohesive group with few conflicting interests among its members.'"[65] Similarly, courts denying certification view unsuccessful class action claims as individual in nature and, therefore, unsuitable to treatment as a cohesive group of plaintiffs.[66]

Rule 23(b)(3) is known as the predominance requirement, and it requires plaintiffs to show first that common issues predominate over individual issues and claims,[67] and second that a class action is the best legal mechanism to address the plaintiffs' claim.[68] Many courts assess the predominance requirement component of the Rule by examining the extent of common relief requested and by determining defendant liability and causation.[69] Once the commonality requirement of Rule 23(a) is satisfied, then the predominance requirement determines whether differences exist within the class that would make class action litigation an inappropriate legal remedy.[70] These points are addressed at length later in this note, particularly in the con-

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62 *Id.* at 39.
63 Nagareda, *supra* note 9, at 110.
64 Weiss, *supra* note 3, at 151.
65 Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319, 325 (2012) (quoting Allison v. Citgo Petrol. Corp., 151 F.3d 402, 413 (5th Cir. 1998).
66 Green, *supra* note 2, at 11.
67 Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, CATO SUP. CT. REV. 319, 323 (2011).
68 *Id.*
69 *Id.* at 325–26.
70 *Id.* at 322–23.

text of analyzing the majority and dissenting opinions in *Dukes*.[71]

B. Background

The *Dukes* litigation began with seven named plaintiffs.[72] Plaintiff Betty Dukes and her colleagues brought an action on behalf of themselves and 1.5 million female employees of Wal-Mart, alleging that the corporation denied female employees equal pay or promotions on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964.[73] The plaintiffs claimed that the broad discretion given to local managers over pay and promotions was exercised disproportionately in favor of men, which led to an unlawful disparate impact on female employees.[74]

Plaintiffs alleged that women employed by Wal-Mart were paid less than their male colleagues every year in every geographical region.[75] The plaintiffs supported their position by providing evidence demonstrating that women in hourly positions made an average of $1,100 less than men annually, while the average difference in salaried management positions between women and men was $14,500 annually.[76] Plaintiffs argued that women were promoted less often than men, and had to wait longer to receive promotions.[77] Plaintiffs also stated that gender disparities existed because Wal-Mart's system allowed for excessive amounts of managerial discretion regarding raises and promotions.[78] The sweeping discretionary policies, they argued, allowed the individual's bias to creep into the decision-making process, disparately impacting women throughout the company.[79]

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71 See *infra* notes 100–139 and accompanying text.
72 Trask, *supra* note 67, at 328
73 Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).
74 *Id.* at 2548.
75 Hart, *supra* note 61, at 48.
76 *Id.*
77 *Id.* at 49.
78 Hart, *supra* note 61, at 49.
79 *Id.*

Plaintiffs used a variety of sources to substantiate their allegations, including statistical studies, testimony of social scientists, testimony of managers and other employees, and testimony of women making allegations of gender discrimination against Wal-Mart.[80] Plaintiffs particularly emphasized the work of Dr. Bielby, whose report cited a number of statistics demonstrating that Wal-Mart's allowances for discretion and subjectivity in its salary and promotional practices were colored by gender discrimination.[81]

Specifically, the report showed that although seventy-two percent of Wal-Mart employees were women, only one-third of Wal-Mart's managers were women.[82] Women comprised less than ten percent of all store managers, approximately four percent of all district managers, and only one of the twenty executive positions in the entire corporation.[83] This report, a form of social framework evidence,[84] was used by plaintiffs in an effort to satisfy Rule 23(a)'s commonality requirement among members of the plaintiff class.[85]

The *Dukes* plaintiffs articulated two theories in their pleadings as a basis for relief: systemic disparate treatment theory, and systemic disparate impact theory.[86] Under systemic disparate treatment theory, even when no prima facie evidence of discrimination exists, plaintiffs can cite statistics and other evidence to demonstrate widespread discrimination (based on a protected characteristic) throughout a company.[87] Under this theory, an employer is liable for facially neutral policies which disproportionately affect protected groups.[88]

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80 Green, *supra* note 2, at 407.

81 Hart, *supra* note 61, at 49–50.

82 Green, *supra* note 2, at 407 n.47.

83 *Id.*

84 *See infra* Part IV.

85 Hart, *supra* note 61, at 50.

86 Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2547–48 (2011).

87 Green, *supra* note 2, at 401.

88 *Id.*

Defendant Wal-Mart moved to strike a substantial portion of the evidence submitted by the proposed plaintiff class.[89] Wal-Mart offered its own proof to defeat plaintiffs' arguments in favor of commonality, typicality, and adequate representation, particularly striking at Dr. Bielby's social framework analysis of Wal-Mart's corporate culture.[90] Wal-Mart used statistical evidence, contending that respondents' monetary claims could not be certified under Rule 23(b)(2) for two reasons.[91] First, Wal-Mart claimed that the Rule addresses only injunctive and declaratory relief, and does not address the question of monetary damages in the form of back pay in this case.[92] Second, Wal-Mart claimed that back pay claims could not be manageably tried without depriving Wal-Mart of its due process right to present certain statutory defenses.[93] Wal-Mart also argued that the size of the class dispelled the notion of commonality.[94] Because of the sheer number of plaintiffs comprising the class, there were certainly numerous variations in the types of claims the court would have to resolve.[95]

C. Procedural Posture

The District Court certified the class, stating that respondents satisfied Rule 23(a) and 23(b)(2)'s requirements.[96] The Ninth Circuit Court of Appeals, sitting en banc, affirmed, stating that respondents met Rule 23(a)(2)'s commonality requirement, and that back pay claims could be certified as a part of the 23(b)(2) class.[97] The Court of Appeals stated that evidence of commonality sufficed to raise a common question among class members as to whether Wal-Mart's female employees were subject to a

89 *Dukes*, 131 S. Ct. at 2549.
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 *Dukes* 131 S. Ct. at 2549.
95 Trask, *supra* note 67, at 340.
96 *Dukes*, 131 S. Ct. at 2549.
97 *Id.* at 2549–2550.

single set of corporate policies that unlawfully discriminated against women in violation of Title VII, and did not merely experience a number of independent discriminatory acts.[98] The Ninth Circuit further stated that the plaintiffs' claims were sufficiently typical of the class as a whole to satisfy Rule 23(a)(3), and the named plaintiffs could serve as class representatives.[99]

D. Supreme Court Decision Regarding Class Certification

Writing for the majority, Justice Scalia authored the opinion of the Supreme Court and focused his analysis on the commonality requirement of Rule 23(a)(2).[100] Throughout the majority opinion, Scalia frequently cited the work of Professor Nagareda, who stated that the language of Rule 23(a)(2) is frequently misread because any well-crafted argument can raise questions common to a class of people.[101] Scalia adamantly maintained that commonality requires plaintiffs to demonstrate that class members have suffered the same injury based on a common contention capable of class-wide resolution.[102]

Scalia stated that because the plaintiffs' claims lacked "significant proof" that an employer "operated under a general policy of discrimination," it was impossible to say that examination of all the class members' claims would produce a common answer to the discrimination question.[103] Scalia articulated that the only convincing evidence presented by plaintiffs involved Wal-Mart's discretionary policy allowing local supervisors latitude in regard to employment matters.[104] However, the mere possibility that a Title VII claim *could* have existed does not mean that it *actually* existed.[105]

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98 *Id.* at 2549.
99 *Id.*at 2550.
100 *Id.*
101 *Dukes*, 131 S. Ct. at 2551.
102 *Id.*
103 *Id.* at 2553.
104 *Id.*
105 *Id.* at 2554.

Scalia characterized Dukes' litigation as an attempt to prove that the discrimination endured by Dukes and other female employees of Wal-Mart was common to all of Wal-Mart's female employees.[106] Scalia stated that the basic theory of the plaintiffs' case was that "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decision-making of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice."[107] For the *Dukes* plaintiffs, Wal-Mart's refusal to reign in its managers' authority amounted to both systemic disparate treatment as well as systemic disparate impact.[108] Scalia responded to this assertion by saying that the plaintiffs failed to identify a common mode of exercising discretion within the company.[109]

The Court struck down the social framework analysis based on Dr. Bielby's work and statistical regressions performed by Dr. Drogin, another expert witness.[110] Scalia claimed that plaintiffs' data was "worlds away from 'significant proof' that Wal-Mart operated under a general policy of discrimination."[111] He stated that in a company of Wal-Mart's size, it was unlikely that all managers would exercise their discretion in a similar fashion without some common direction.[112] Merely showing that Wal-Mart's policy of discretion produced a sex-based disparity was insufficient.[113] Because plaintiffs failed to identify a common mode of abusing discretion, they could not demonstrate a discriminatory employment practice.[114] Scalia stated that claims for back pay, even if taken at face value, were improperly certified under Rule 23(b)(2), and that Wal-Mart had the right to

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

107 *Id.*

108 Green, *supra* note 2, at 407.

109 *Dukes*, 131 S. Ct. at 2555.

110 *Id.* at 2554–55.

111 *Id.*at 2554.

112 *Id.* at 2555.

113 *Id.* at 2556.

114 *Dukes*, 131 S. Ct. at 2555.

assess each claim individually to determine whether plaintiffs are entitled to any kind of back pay or damages.[115]

E. Dissent

Representing the minority, Justice Ruth Bader Ginsburg authored a partial concurrence as well as a dissent in the case.[116] While Ginsburg and the minority agreed that the class should not have been certified under Rule 23(b)(2), she analyzed the remaining portion of the majority opinion in a thoughtful dissent.[117] Ginsburg pointed out that the Court improperly focused on Rule 23(b)(3), pointing instead to Rule 23(a) as the relevant portion of the Rule for this case.[118] She cited Scalia's agreement with Professor Nagareda's perspective and reframed the argument.[119] Ginsburg clarified that both Nagareda and the Advisory Committee of the Federal Rules of Civil Procedure explained that Rule 23(a)(2)—requiring questions of law or fact common to the class—is the vital preliminary requirement for maintaining a class action.[120] The District Court found that plaintiffs easily met the requirement of "one significant issue common to the class."[121] Absent an error of law or an abuse of discretion, an appellate body cannot alter the District Court's finding of commonality.[122]

Ginsburg analyzed the statistics submitted by the plaintiffs and stated that they were largely uncontested.[123] She examined Wal-Mart's compensation policies as well as the discretionary decisions made by Wal-Mart supervisors, and stated that the policies for promotion and compensation in place at Wal-Mart were uniform throughout the country, and were not created in a

115 *Id.* at 2557.
116 *Id.* at 2561.
117 *Id.* at 2561–62.
118 *Id.*
119 *Dukes*, 131 S. Ct. at 2562.
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.* at 2563.

vacuum.[124] In addition to continuous monitoring of stores, there were frequent meetings to reinforce a common corporate culture and transfers of managers to ensure uniformity throughout the country.[125]

Ginsburg said that "gender bias suffused Wal-Mart's company culture," particularly evinced by comments including senior management referring to female associates as "little Janie Qs," managers telling employees that "men are here to make a career and women aren't," and the limiting of career advancement opportunities for women within Wal-Mart.[126] In response to the majority's attack on the social framework analysis and statistical data presented by the plaintiffs, Ginsburg stated that Dr. Drogin adequately controlled for gender-neutral variables.[127] She said that the statistical regressions could be viewed as adequately demonstrative proof of gender discrimination within the stores themselves.[128]

Ginsburg also cited *Watson v. Fort Worth Bank Trust*, which held that "discretionary employment practices" can give rise to Title VII claims not only when motivated by discriminatory intent, but also when they produce discriminatory results.[129] In *Watson*, the Court held that disparate impact analysis applies to subjective employment practices, particularly with respect to "an employer's undisciplined system of subjective decision-making . . ." causing exclusion or the expression of bias.[130] In accordance with the *Watson* standard, subjective employment practices that produce a disparate impact against women and people of color should prompt an inquiry into those practices.[131]

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124 *Dukes*, 131 S. Ct. at 2563.

125 *Id.*

126 *Id.* at 2563–64.

127 *Id.* at 2564.

128 *Id.*

129 *Dukes*, 131 S. Ct. at 2564–65.

130 *Id.* at 2554 (quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 990 (1988)).

131 *Id.* at 2565.

Specifically, courts should investigate the adequacy, fairness, and accountability that produce the disparate impact.[132]

Ginsburg's assertion that risk is heightened when managers are predominantly of one sex and "steeped in a corporate culture that perpetuates gender stereotypes" was derived from logic taken straight from *Watson*.[133] In *Watson*, the Court took particular note of the subjective reasons the employer utilized to make promotional decisions, and stated that the absence of formal criteria for evaluating candidates mandated an analysis under disparate impact.[134] Ginsburg noted that discriminatory employment practices give rise to Title VII claims not only because of a motive to discriminate, but also when they produce discriminatory results.[135]

Ginsburg also criticized the majority for its failure to recognize a key issue in the case: whether Wal-Mart's discretionary pay and promotion policies were actually discriminatory.[136] Ginsburg accused the majority and its vigorous endorsement of Nagareda's views of blending crucial threshold criteria of Rule 23(a)(2)'s commonality requirement with 23(b)(3)'s predominance requirement to create a much more stringent and rigorous test.[137] Ginsburg maintained that dissimilarities among members of the class per Rule 23(b)(1) should not bar a class from proceeding as long as the threshold commonality requirements of Rule 23(a) are sufficiently addressed.[138] The majority's focus on dissimilarity misguided its analysis, leading it away from the *Watson* precedent which established that a system of delegated discretion is actionable under Title VII when it produces discriminatory outcomes.[139]

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132 *Id.*
133 *Id.* at 2564.
134 *Watson*, 487 U.S. at 988, 991.
135 *Dukes*, 131 S. Ct. at 2564–65.
136 *Id.* at 2565.
137 *Id.* at 2565.
138 *Id.* at 2566.
139 *Id.* at 2567.

IV. BROAD IMPLICATIONS OF *DUKES* FOR FUTURE CLASS ACTION LITIGATION

This part will discuss the broad implications of the Court's decision in *Dukes* on future class action lawsuits and litigation, including a general description of class action litigation and the interpretations of Rule 23. This section also analyzes the defense argument of *Lochnerian* procedural due process and the lack of incentive for corporations to change their policies in the wake of *Dukes*.

A. Interpreting Rule 23

The plaintiff class in *Dukes* sought redress as a class because class action lawsuits allow a large number of people access to courts, avoiding the cost of litigating similar claims that would occur without the possibility of consolidating them.[140] Without combining their efforts as a class, it is unlikely that the *Dukes* plaintiffs could individually afford adequate legal representation against a corporate monolith like Wal-Mart.

Rule 23(a) ensures a threshold inquiry into whether a suit is appropriate to bring as a class action.[141] The drafters of the Federal Rules of Civil Procedure intended a simple inquiry, not a determination of the merits.[142] Professor Nagareda disagrees and argues instead that the existence of a genuine dispute regarding Rule 23's certification requirements would necessitate a judicial inquiry of the merits of the dispute in reference to any Rule 23 requirement.[143]

An amicus curiae brief filed by civil procedure professors in favor of *Dukes'* plaintiffs, however, adamantly argued against an inquiry into the merits.[144] In the forty-five years since the adop-

[140] Brief for Lahav et al. as Amici Curiae Supporting Respondents at 3, Dukes v. Wal-Mart, 131 S.Ct. 2541 (2011) (No. 10-277) [hereinafter Brief for the Respondents].
[141] *Id.* at 5.
[142] Green, *supra* note 2, at 6.
[143] Nagareda, *supra* note 9, at 100.
[144] Brief for the Respondents, *supra* note 140, at 8.

tion of the class action litigation rule, no court has held that Rule 23(a)'s commonality requirement necessitates a determination of the merits.[145] Courts have held that determinations about certification are not binding on the merits of litigation.[146] Even courts with a stringent view of certification requirements agree that certification determines whether the requirements of Rule 23 have been met and does not affect the merits of the underlying claims.[147]

The essential question with respect to Rule 23(a) commonality is whether each case, if litigated separately, would require a court to consider one or more of the same questions of law or fact.[148] This is the most effective question to ask with respect to class certification because it considers relevant policy considerations regarding class action and litigation, enforcing the substantive law while simultaneously promoting economical, efficient adjudication.[149] While consideration of some facts may pertain to evaluating the merits, the primary focus of the court should be on Rule 23(a)'s requirements.[150]

The professors believed in the necessity of maintaining a separation between Rule 23(a)'s commonality requirements and Rule 23(b)(3)'s predominance inquiry requirement, an argument that later appeared in Justice Ginsburg's dissent.[151] If the merits are evaluated during certification hearings, a strong probability of importing the predominance requirement—a more stringent judicial standard—into a Rule 23(a) inquiry exists.[152] "It is well settled that 'all questions of law and fact need not be common to satisfy [the commonality] requirement, and the existence of shared legal issues with divergent factual predicates may be adequate.'"[153]

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145 *Id.* at 6.
146 *Id.* at 8.
147 *Id.*
148 *Id.* at 10.
149 Brief for the Respondents, *supra* note 140, at 11.
150 *Id.* at 11–12.
151 *Id.* at 13.
152 *Id.*
153 *Id.* at 18.

B. Lochnerian *Jurisprudence and Wal-Mart's Defense of Procedural Due Process*

Business advocates appreciate and benefit from the higher standard of proof established in *Dukes* for class certification.[154] Robin Conrad, executive vice president of the U.S. Chamber of Commerce's National Chamber Litigation Center said,

> "[The] ruling reinforces a fundamental principle of fairness in our court systems: that defendants should have the opportunity to present individualized evidence to show they complied with the law. Too often the class action device is twisted and abused to force businesses to choose between settling meritless lawsuits or potentially facing financial ruins."[155]

Mark Moller, a professor at DePaul University College of Law, has written a lengthy response to this portion of Wal-Mart's argument.[156] A self-identified originalist, Moller argues this aspect of Wal-Mart's argument is not compelling.[157] Wal-Mart's claim that it has a right to mount a full defense by presenting any probative evidence to rebut the plaintiff's assertion of commonality is typical among defendants involved in class action litigation.[158] Defense attorneys appeal to salient

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154 Tony Mauro, *Supreme Court Erects Major Barriers to Class Actions in Wal-Mart Ruling*, NATIONAL LAW JOURNAL (June 20, 2011), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202497930736&src=EMC-Email&et=editorial&bu=National%20Law%20Journal&pt=NLJ.com-%20Daily%20Headlines&cn=20110621NLJ&kw=Supreme%20Court%20erects%20major%20barriers%20to%20class%20actions%20in%20Wal-Mart%20ruling&slreturn=1&hbxlogin=1 (last visited Mar. 15, 2012).

155 Press Release, U.S. Chamber of Commerce, U.S. Chamber Applauds Supreme Court Ruling in Wal-Mart v. Dukes (Jun. 20, 2011), *available at* http://www.uschamber.com/press/releases/2011/june/us-chamber-applauds-supreme-court-ruling-wal-mart-v-dukes.

156 *See* Moller, *supra* note 65 at 319 n1.

157 *Id.* at 390.

158 *Id.* at 332.

concerns about plaintiffs and courts abusing class action lawsuits to pressure defendants into settling unmeritorious claims.[159]

There is no historical tradition supporting these types of due process claims, however.[160] In fact, historically, the judiciary has had the right to limit the defendants' opportunities to present evidence.[161] It was only during the *Lochner* era that the Court created a new area of law that the conservative wing of the Court is trying to bring back to life—procedural due process.[162] Because the *Lochner* court treated property as a fundamental interest, property merited a heightened level of Constitutional protection, and thereby more procedural rights.[163] As a result, defendants demanded meaningful hearings, which included the opportunity to present a "full defense" based on "any rebuttal evidence they chose."[164]

Moller cited Wal-Mart's attempt to use due process as a classic example of trying to exercise non-existent procedural due process rights.[165] Moller argued that attempting to resurrect *Lochner* in the name of originalism actually undermines the arguments of class action defendants seeking to trump recent precedent.[166] Thus, the *Lochnerian* view actually departs from a historical understanding of the Due Process clause after the ratification of the Fifth Amendment.[167] It is a thinly veiled attempt to improve corporate interests under the guise of originalism.

The *Dukes* majority wholly endorsed this aspect of Wal-Mart's argument to promote and protect the interests of large

159 *Id.* at 320.
160 *Id.* at 390.
161 Moller, *supra* note 65, at 387-88.
162 *Id.*
163 *Id.* at 384.
164 *Id.* at 332.
165 *Id.* at 389. The rights are fictitiously imputed to fictitious people (i.e. corporations) who are not entitled to receive those types of benefits, *Lochner v. New York*, 198 U.S. 45 (1905) never successfully obtained these rights for corporations. Most gains associated with the *Lochner* era court for big business were overturned in 1937, when the Court did a dramatic about-face with respect to big business and laissez-faire economics.
166 Moller, *supra* note 65, at 390.
167 *Id.* at 391.

corporations.[168] Since the Court's refusal to certify the class in *Dukes*, corporate defense attorneys have successfully litigated and succeeded in preventing the certification of numerous class actions in a variety of areas: overtime pay, insurance overcharges, and litigation involving the release of toxins in a residential neighborhood.[169]

Wal-Mart and its supporters repeatedly cited Dukes' and fellow plaintiffs' inability to point to any specific policies instituted by the company that indicate a pattern of discrimination.[170] They claimed that the allegations against the company were merely anecdotal, and not at all symptomatic of a greater problem within the corporation as a whole.[171] Since the plaintiffs' allegations were deemed anecdotal and lacking adequate proof, Scalia deemed them unworthy of close consideration.

C. Dukes *Creates a Lack of Incentive to Change Corporate Policy*

The majority's refusal to certify the *Dukes* class has broad legal ramifications. The civil procedure professors who authored the aforementioned amicus brief emphasized the important role of class action lawsuits balancing access to the courts with efficient adjudication.[172] Unlike Rule 56 Motions for Summary Judgment or Rule 12(b)(6) Motions to Dismiss, the goal of class certification is not to screen out lawsuits that fail to state an adequate claim for relief.[173] Class certification exists to determine whether the class's essential purpose and policy (i.e. the aforementioned goal of efficient litigation) is served by proceeding forward in litigation as a class.[174]

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168 Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541 (2011).
169 Martha Burk, *Wal-Mart's Gender Washing*, Ms. MAGAZINE (Sep. 15, 2011), http://msmagazine.com/blog/blog/2011/09/15/wal-mart's-gender-washing/.
170 Ford, *supra* note 1, at 72.
171 *Id.*
172 Brief for the Respondents, *supra* note 140, at 1.
173 *Id.* at 2.
174 *Id.*

With the more stringent standard of proof established in *Dukes* serving as a prerequisite for certification, class action litigation may be at a virtual end. If the *Dukes* class proceeded successfully, the potential threat of courts imposing monetary damages on corporations who fail to implement more stringent policies would incentivize monolithic corporations like Wal-Mart to either change or clearly codify their employment practices. As a result of the majority's refusal to certify the class, no incentive exists for corporations to investigate and ferret out diffuse discrimination endured by female or minority employees. Corporations like Wal-Mart have no need to reign in the discretion granted to its management team and modify its policies to effectively police and prevent discrimination.

More importantly, large corporations have no motivation to implement any kind of remedial measures or change the existing culture or ethos to ensure a place for women and minorities. Wal-Mart retains the ability to simply write policies prohibiting the most egregious, overt acts of discrimination in conformance with the bare bones requirements of Title VII and Title IX. As long as courts deem clearly written corporate policies prohibiting blatant discrimination on paper an adequate form of due diligence, corporations will do nothing to proactively prevent subtle, covert acts of discrimination against individuals.

V: The Future of Social Framework Analysis and Expert Testimony

This part discusses the future of social framework analysis and expert testimony. It outlines different theories of discrimination as a basis for relief, and the changing burdens of proof before and after *Dukes*. It describes the implications of a more stringent burden of proof, implications for expert testimony regarding social framework analysis in future class action litigation, and relevant criticism of social framework testimony. This part also describes the uses of social framework testimony, its connection to the Federal Rules of Evidence, and the effect of barring social framework testimony on class action litigation.

A. *Burden of Proof Before and After the* Dukes *Litigation*

Precedent prior to *Dukes* allowed the government to bring civil actions under Title VII where there existed "reasonable cause" to believe that any person or group of persons is engaged in "a pattern or practice" of discrimination.[175] The Court's refusal to certify the class in *Dukes* indicates that a showing of discrimination within an organization is no longer adequate; now, plaintiffs must demonstrate that the employer adopted a policy of discrimination.[176]

As previously stated, *Dukes* plaintiffs articulated two theories in their pleadings as a basis for relief: systemic disparate treatment theory and systemic disparate impact theory.[177] The probability that a plaintiff will be able to meet the *Dukes* burden of proof is minute at best. Requiring plaintiffs to meet this stringent requirement also has serious implications for expert testimony in class action litigation. Evidentiary testimony by experts specializing in psychological and sociological fields has now been rendered useless. Demonstrating a policy of discrimination requires proving that someone—likely a prominent officer or administrator within the company—consciously chose to discriminate.[178] The social framework evidence presented by plaintiffs in *Dukes*—Dr. Bielby's social framework evidence and the statistical regressions prepared by Dr. Drogin—failed to meet the standard of "significant proof" demonstrating that the employer "has a company-wide policy of discrimination" because of its perceived improbability to provide certainty.[179]

The standard described by Professor Nagareda and largely adopted by Scalia in *Dukes* stated that plaintiffs' statistical evidence was insufficient not only because it failed to demonstrate a companywide policy of discrimination against women, but also because women did not experience significantly more discrimi-

175 Green, *supra* note 2, at 404.
176 *Id.* at 405.
177 *See infra* notes 86–88 and accompanying text.
178 Green, *supra* note 2, at 408.
179 *Id.* at 407.

nation at Wal-Mart than they would in the broader context of the labor market.[180] This nebulous construction of discrimination tacitly acknowledges that women face discrimination in the labor market. The standard that Professor Nagareda articulated does not deal with finding an ultimate end or remedy to sex discrimination in the employment context; it simply states that the discriminatory treatment women receive at one corporation cannot be more egregious than at another, similar company.[181]

B. Value of Social Framework Testimony in Class Action Litigation

Law and society rarely tolerate overt acts of discrimination.[182] Consequently, individuals and corporations in modern society rarely discriminate overtly, consciously, and purposefully.[183] Current psychological, sociological, and legal research indicates that bias operates and influences peoples' behavior even absent deliberate purpose, conscious animus, or overt prejudice.[184] Professor Linda Hamilton Krieger articulates that in order to establish liability in accordance with a theory of disparate treatment discrimination, Title VII plaintiffs would need to establish that being a member of a particular group was a factor in an employer's action or decision without proving a conscious intent to discriminate.[185]

Social framework testimony submitted by the plaintiffs in *Dukes* is a crucial component of numerous employment discrimination suits.[186] Many plaintiffs include expert testimony on this subject to substantiate and contextualize claims of discriminatory treatment in the workplace.[187] Scholars cite subtle forms of discrimination, particularly in the context of "subjective deci-

180 *Id.* at 413.
181 Nagareda, *supra* note 9, at 172.
182 Green, *supra* note 2, at 418.
183 *Id.*
184 Green, *supra* note 2, at 419.
185 Krieger, *supra* note 16, at 1186–88.
186 Hart, *supra* note 61, at 41.
187 *Id.*

sion-making structures without sufficient guidance or monitoring as likely to exclude or otherwise disadvantage women and minorities in the workplace."[188] This research is particularly valuable in litigation associated with gender discrimination to describe phenomena that prevent female advancement in the corporate world, including the "glass ceiling" and "maternal wall" phenomena.[189]

When an expert gives social framework testimony to bolster a plaintiff's claim, he or she helps identify problematic areas of a company's policy that research typically associates with an increased tendency towards prejudice and discrimination.[190] Dr. Bielby's testimony as an expert organizational psychologist identified the extensive amount of managerial discretion for salary and promotional purposes as a factor that contributed to bias and stereotyping.[191] The District Court judge accepted Dr. Bielby's report in support of plaintiff's attempt to satisfy Rule 23(a)'s commonality requirement. However, Scalia's opinion spilled considerable ink discrediting the report and the surrounding evidence submitted by the plaintiffs.[192] The Supreme Court's rejection of highly relevant social framework expert testimony goes hand in hand with its refusal to certify the *Dukes* class.[193] If the Court's refusal to acknowledge the authenticity of Dr. Bielby and Dr. Drogin's work in *Dukes* serves as a litmus test, the admissibility of social framework expert testimony in

188 *Id.*

189 *Id.* at 44. The "glass ceiling" refers to women and men who obtain the same level of education and success, yet demonstrates the difficulty women face when seeking professional advancement. The "maternal wall" refers to the bias women encounter in the workplace because they are mothers. Women dealing with the maternal wall phenomena describe feeling that, because colleagues discover they are mothers, they are assumed to be incompetent and lack focus in their professional lives. *See* Bell et al., *supra* note 19, at 68 (discussing the glass ceiling). *See also* Hart, *supra* note 61, at 44–45 (discussing the barriers women face in the workplace).

190 *Id.* at 45.

191 *Id.* at 44.

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

193 Hart, *supra* note 61, at 39.

future employment discrimination cases or class action lawsuits is highly unlikely.

C. *Criticism and Uses of Social Framework Testimony*

Defendants cite the following criticisms of social framework evidence: it is unhelpful to the jury; it is more prejudicial than probative; there is no unanimity in the social science about research related to the social framework analysis; studies done in a lab cannot be generalized to the workplace; and experts cannot accurately quantify the degree to which stereotyping influenced decisions in the workplace.[194] The Federal Rules of Evidence do not require absolute unanimity among experts to make their testimony admissible as substantive evidence.[195] Most defense arguments in class action litigation attempt to rebut the validity of plaintiff claims first by their essential validity and then by denying any attempt to prove commonality.[196]

The discovery process provides experts access to a wealth of materials otherwise unavailable, including the employer's written policies, the employer's personnel database, deposition testimony, and other highly salient materials.[197] Social framework testimony helps shed light on how the policies of a particular corporation could create a question common to a class of litigants.[198] It assists the trier of fact—particularly in complex litigation—to reach a more thorough understanding of the evidence before it, ensuring proper legal redress and due process of law.[199] A plaintiff's inability to obtain class certification virtually cuts off the litigation at the knees. Barring this type of

194 *Id.* at 51.

195 *Id.*

196 See, generally Allan Erbsen, Aggregating and Resolving Dissimilar Claims in Rule 23(b)(3) classes, SCOTUS blog, http://www.scotusblog.com/2011/09/aggregating-and-resolving-dissimilar-claims-in-rule-23b3-classes/ (last accessed March 24, 2012)(discussing the typical defense strategy in class certification proceedings).

197 Hart, *supra* note 61, at 54.

198 *Id.* at 63.

199 Green, *supra* note 2 at 447.

evidence does more than prevent the plaintiff class from proceeding in litigation; it stifles any possibility of efficient legal redress for the plaintiff class without any determination based on the merits of their claims.

Allowing individuals to aggregate their claims meritorious of redress through class action litigation provides a much higher opportunity for success. It is rare that one person will have adequate resources to find counsel comparable to that of a large corporation, regardless of the strength of his or her case. When contrasted with the defendant's argument about its right to due process, the notion of dismissing a class out of hand is a much more egregious violation of a plaintiff's right to due process of law.

Based on the stringent burden of proof in *Dukes*, combined with the Court's refusal to acknowledge the validity of social framework evidence, class action lawsuits against corporations will continue to be defeated. The newly established burden of proof on plaintiffs will ensure maintenance of the status quo in favor of a more laissez-fair approach to business regulation. Corporations will continue using decentralized, discretionary personnel policies that disadvantage women and minorities while closing off viable options for formal legal redress.

VI. ALTERNATIVE AVENUES OF REDRESS

This part describes potential avenues of redress for the *Dukes* plaintiffs including: filing smaller class action lawsuits, the imposition of tort liability theory against corporations, and a voluntary refund program for consumers as an alternative to class action litigation. This part also uses the example of Home Depot as a large corporation that chose a proactive path towards change through internal reform of its employment practices.

In *Dukes*, the Supreme Court foreclosed the possibility of back pay based on Wal-Mart's *Lochnerian* argument favoring procedural due process.[200] Not all attorneys, however, think

[200] Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011).

that Wal-Mart will escape liability.[201] Brad Seligman, attorney for the plaintiffs, maintained that "Wal-Mart is not off the hook."[202] The plaintiffs can splinter off from the class and pursue individual claims against Wal-Mart, either through the Equal Employment Opportunity Commission or in court.[203] The Court never reached the actual issue of whether Wal-Mart did or did not discriminate against its female employees.[204] It will be difficult, however, for plaintiffs to go up against Wal-Mart. The legal and financial resources available to Wal-Mart certainly differ tremendously from women who used to work there and make minimum wage, providing a huge disincentive for them to bring suit against the corporate monolith.

A. Smaller Class Action Suits

There is potential for members of the *Dukes* plaintiff class to bring smaller class action lawsuits against Wal-Mart instead of proceeding as a gigantic class.[205] Equal Rights Advocates ("ERA"), a civil rights organization committed to advancing the cause of equal opportunity for women, is working in conjunction with three private law firms to participate in a smaller class action suit.[206] ERA is reviewing and assessing the claims of potential class members and determining new potential classes for reorganization.[207] Proceeding forward with the litigation, even on a smaller scale, however, would be challenging for most plaintiffs attempting to aggregate their claims; they will have to keep the newly revamped, stringent standard of proof in mind. With the Court setting the bar so high, it is unlikely that the plaintiffs in *Dukes* would be able to aggregate their claims suc-

201 Mauro, *supra* note 154.
202 *Id.*
203 *Id.*
204 *Dukes*, 131 S. Ct. at 2565.
205 Mauro, *supra* note 154.
206 Judy Patrick, *Walmart Decision Raises the Question, How Will Women Receive a Fair Work Place?* (June 21, 2011), http://womensfoundationofcalifornia.com/2011/06/21/walmart-decision-raises-the-question-how-will-women-achieve-a-fair-workplace/
207 *Id.*

cessfully on a smaller scale. Additionally, it may be cost prohibitive for women making minimum wage to hire attorneys capable of effectively litigating against Wal-Mart.

B. Tort Theories of Employer Liability

Another potential avenue of redress for the *Dukes* plaintiffs would include a legal paradigm shift with respect to systemic disparate treatment theory. Borrowed from criminal law, the principal-agent view imposes liability on corporate entities for failing to adequately police the actions of individual employees.[208] The principal-agent view essentially imposes a version of respondeat superior on companies who refuse to implement adequate measures to prevent discrimination by their employees.[209] The principal-agent theory holds tremendous appeal because it attacks instances of discrimination against identifiably vulnerable individuals.[210]

Tristin K. Green, professor at University of San Francisco School of Law, espoused a slightly different viewpoint he terms "entity liability."[211] Entity liability addresses institutional influence on individual behavior, exploring whether the environment within the four walls of a particular institution exerts influence on the behavior of its employees.[212] Green based his theory on social science research demonstrating that people act within the context created by their employers.[213] Title VII already imposes liability on employers for their own discriminatory acts as well as those of their appointed agents—whether they knew of them or not.[214] Research demonstrates that corporations promoting the achievement of "bottom line results" are more likely to have legal and ethical violations.[215] By contrast, if employees believe

208 Green, *supra* note 2, at 398.
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*
213 Green, *supra* note 2, at 399.
214 *Id.* at 423.
215 *Id.* at 435.

strongly in upper management's commitment to ethically and socially desirable conduct, that belief would positively contribute to establishing a corporate ethos of compliance.[216]

Under the theory of entity liability, Green proposes that the employer is held responsible for its actions; its responsibility turns not just on particular incidents of disparate treatment, but its role in promoting disparate treatment.[217] According to entity liability, individuals act within the context of an organization or institution that the corporate entities themselves actively shape.[218] If a corporation knew that it would be directly liable for promoting disparate treatment under entity liability, it would proactively take steps to rectify potentially detrimental policies by policing individual behavior and taking steps to reduce discrimination throughout the entire corporate enterprise.[219]

C. Voluntary Refund Program

In a radical departure from the aforementioned means of resolving plaintiffs' desire for redress, Eric Voight suggests an option entirely outside the realm of class action litigation: a refund program established by the defendant corporation to preempt class action lawsuits.[220] Voight argues that class action litigation often benefits the attorneys at the expense of class members, who rarely receive sufficient compensation.[221] Instead, companies can circumvent the entire process of class action litigation by receiving legal and financial incentives to establish a voluntary refund program.[222] Establishing a voluntary refund program increases corporate revenue, conserves judicial time, and circumvents the average time of over three years

216 *Id.*
217 *Id.* at 436.
218 Green, *supra* note 2, at 438-39.
219 *Id.* at 438.
220 Eric P. Voight, *A Company's Voluntary Refund Program for Consumers can be a Fair and Efficient Alternative to a Class Action to Warrant the Denial of Class Certification*, REV. OF LITIG. 617, 618 (2012).
221 *Id.* at 619.
222 *Id.* at 620-21.

for settling class action litigation.[223] Voight cites the language of the Advisory Committee notes indicating that "other available methods for the fair and efficient adjudication of the controversy" include non-judicial methods like the voluntary refund program.[224]

In the context of the *Dukes* litigation, a voluntary refund program would be inappropriate because the Supreme Court's refusal to certify the class provides little or no incentive for Wal-Mart to take proactive steps to alter the status quo. Voight's interpretation of the intent behind Rule 23, however, is quite innovative. If the standard established in *Dukes* effectively bars future advancement of employment discrimination class action litigation, plaintiff lawyers will need to start thinking outside of the box to achieve legal and equitable relief for their clients.

D. Successful Intra-Corporate Reform: The Home Depot Example

In addition to lawyers thinking outside of the box, corporations can also proactively seek to reform their policies to prevent employment discrimination.[225] Susan Sturm points out the advantages and importance of innovative internal problem solving within corporations.[226] She describes three large corporations who successfully implemented unique measures to combat discrimination internally: Deloitte Touche, Intel, and Home Depot.[227] The example of Home Depot nearly mirrored that of the *Dukes* litigation, where a number of female Home Depot employees brought a class action lawsuit alleging gender discrimination with respect to hiring, promotion, and salary as a result of subjective decision-making processes.[228] However, the Home

223 *Id.* at 621.

224 *Id.* at 625.

225 Sturm, *supra* note 26, at 491.

226 *Id.*

227 *Id.*

228 *Id.* at 510.

Depot litigation was resolved through a court ordered mediation process ending in a global settlement and consent decree.[229]

A key component of the Home Depot consent decree included the implementation of an automated hiring and promotional system called Job Preference Process ("JPP").[230] JPP is an in-store system that installed computer and phone kiosks where employees can register their job preferences, describe their relevant qualifications, and indicate future positions of interest within the company.[231] Because the JPP system is entirely automated, it eliminated the potential for managers to exercise influence on employees based on stereotypes, expanded the pool of applicants for positions, and provided additional avenues of advancement for employees.[232] While the JPP system may be problematic because of its mechanical replacement of a person's ability to factor intangible qualities into the hiring process, it is a very innovative approach to the problem of eliminating bias and discrimination in the workplace.

It is unclear why Wal-Mart chose not to pursue this avenue of redress when the facts of each respective case are so substantially similar. Wal-Mart likely chose not to pursue this course of action because it lacked motivation. However, if the government were to grant tax breaks to large corporations choosing to implement policies combating sex discrimination, financial incentives would likely spur them into action. Additionally, if companies volitionally set progressive policies in motion, they could reap the benefits. Corporations could improve their image in the media, increase their job applicant pool, and potentially increase revenue from their customer bases.

229 *Id.* at 511.
230 Sturm, *supra* note 26, at 512.
231 *Id.* at 513.
232 *Id.* at 514.

VII. CONCLUSION—INNOVATIVE SOLUTIONS TO EMPLOYMENT DISCRIMINATION

The majority's decision in *Dukes* has significant ramifications for Rule 23 and future class action litigation. The majority's refusal to certify the class creates a stringent burden of proof for future class action lawsuits. Additionally, the Court's refusal to acknowledge the validity of social framework evidence simultaneously creates an impossibly high bar for the burden of proof while providing virtually no incentive for corporations to modify existing personnel policies that disadvantage women and minorities. *Dukes* demonstrates that a cultural bias against women and their professional advancement continues to exist throughout corporate America, and will continue to go unpunished.

Dukes' plaintiffs alleged that they were told to "dust the cobwebs off of their make-up" and "doll up" appropriately for work.[233] Plaintiffs also alleged that they were addressed in condescending gendered terms and had to sit through meetings scheduled by management at Hooter's.[234] Despite these allegations, the majority in *Dukes* never attempted to reach the question of whether Wal-Mart did, in fact, discriminate against its female employees; it refused to even acknowledge the problem of employment discrimination against women.[235] While Justice Ginsburg's dissent acknowledged that "gender bias suffused Wal-Mart's company culture," neither the majority opinion nor the dissent acknowledged employment discrimination against women as an ongoing problem.[236]

The Supreme Court's refusal to acknowledge employment discrimination against women as a pervasive issue mirrors the attitude of American society.[237] Overt demonstrations of bias and animus against groups with innate, unalterable characteris-

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233 Hortense Spillers, *Another Day at the Races*, THE FEMINIST WIRE (June 24, 2011), http://thefeministwire.com/2011/06/another-day-at-the-races/

234 Weiss, *supra* note 3, at 154-55.

235 Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2565 (2011).

236 *Id.*

237 Ford, *supra* note 1, at 75; *See also* Krieger, *supra* note 16, at 1186–88.

tics are rare.[238] Yet discrimination continuously operates at a more subliminal, individualized level to disadvantage women and minorities.[239]

From its beginnings, feminism has blossomed into a quest for true equal protection under the law: ensuring that women could make authentic choices with the same freedom as their male counterparts.[240] Today, equal choices for women exist exclusively on paper. The passage of the Equal Pay Act, Title VII, and Title IX ensures that formalized discrimination against women is unacceptable.[241] Women are no longer barred from obtaining education at the best institutions of higher learning or pursuing any career they choose; they consistently outnumber their male cohorts at virtually every level of higher education.[242] Yet statistics reliably demonstrate that women receive fewer promotions, earn less (both monetarily and in terms of reputational prestige), advance more slowly, and often endure sexual harassment.[243]

Since formal legal redress continuously fails to provide adequate solutions to workplace discrimination against women and minorities, it appears that innovative, non-formalistic approaches warrant further exploration. While existing laws remain important, formal and informal education should become readily available for women seeking guidance and professional advancement.[244] A combination of formal and informal organizational efforts—both from external pressures as well as internally driven policies within corporate America—must be made to reduce sex discrimination. Women must be employed in non-

238 Green, *supra* note 2, at 418–19 (discussing how acts of overt discrimination declined after the enactment of Title VII).

239 *Id.* (discussing social science research); *See also generally* Hart *supra* note 61.

240 *See generally* Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, October 26, 2003, *available at* http://www.nytimes.com/2003/10/26/magazine/the-opt-out-revolution.html?scp=5&sq=opt+out+revolution&st=nyt.

241 Bell et. al., *supra* note 19, at 65.

242 *See* Belkin, *supra* note 240.

243 Bell et. al, *supra* note 19, at 65.

244 Wolford, *supra* note 20, at 93.

stereotyped positions, involved in decision-making and policy-making processes, and paid on par with their male counterparts.[245]

While it is impossible to eradicate all instances of discrimination, it is possible for companies to promote policies and remain sensitive towards women and minorities deserving of elevated legal protection in the workplace. By providing financial and/or tax incentives through more progressive legislation—at local, federal, and state levels—large corporations would benefit from promoting and protecting women's rights in their hiring, promotion, advancement, and retention policies. An innovative, proactive effort within corporations to end sex discrimination in the workplace would create a more positive corporate ethos as well as a more productive workforce. Without any external catalysts or motivation to kick-start the process, however, it remains highly improbable that corporations will change existing policies.

In addition to the solutions proposed in this note, it is the responsibility of women and women's advocates to act individually as well as collectively to alter the existing status quo. In order to truly remedy the existing problems of racism and sexism we see manifested in cases like *Dukes*, women need to realize the value of continuing to work together to achieve the ultimate goal of the feminist movement: an authentic exercise of choice and autonomy of women everywhere.

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[245] Bell et al., *supra* note 19, at 71.

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and Elder Law. Joelle previously worked at a small commercial litigation firm and as a judicial extern to Illinois Appellate Court Justice Robert E. Gordon. Joelle currently serves as chairperson of the Decalogue Student Committee, student liaison to the Decalogue Board of Managers, and co-president of the Women's Law Caucus. Joelle is very thankful to her current and former professors and mentors including: Professor Sarah Klaper, Professor Cheryl Kettler, Professor Deborah Tuerkheimer, Professor Bruce Ottley, Professor Roberta Kwall, Professor Steven Resnicoff, Mitch Goldberg, and Justice Robert E. Gordon. Joelle is especially thankful for outstanding friends and colleagues, and dedicates this article to the memory of her mother (a"h) and her grandparents (a"h).