

Digesting the Supreme Court's Wal-Mart Decision

[Adam Martin](#) 12:10 PM ET 29 Views [Comment](#)

The U.S. Supreme Court yesterday [rejected one of the largest class-action suits in history](#), telling a group of women who sued Wal-Mart ten years ago on sex discrimination charges that they were too spread out and their job classifications too diverse to warrant class-action treatment. The general interpretation of the decision on *Dukes v. Wal-Mart* is that it's not only a loss for those who brought the suit, but it will mean class-action suits will be [harder to bring, and to win](#), in the future. But commentators are split on whether that's a good thing or a bad thing, and what else the decision means.

Here at *The Atlantic*, Andrew Cohen characterized the decision as a [victory for Wall Street over Main Street](#), and a defeat for women's rights. "What's not to stop other big companies from formally de-centralizing their employment decisions so as to try to make them 'class-action proof?'" he wrote. However, "the court's progressive wing was unwilling to completely scuttle the class-action case brought by the women of Walmart. For Justice Ginsburg, the 'discretion' of mid-level managers didn't exempt the company from a class-action case. Instead, it provided convenient legal cover for discriminatory practices." In the end, the Wal-Mart case was about much more than defining class-actions, Cohen concluded. In fact, it was about gender equality, just like it said:

It is impossible therefore to view the *Dukes* decision--and the conflicting opinions it generated from two of the most senior justices on the Court--without sensing the impact of the continuing gender gulf in America. It exists still on the Court, it inhabits still the nooks and crannies of the law, and there is little doubt, even short of a class-action trial, that it's a part of the atmosphere at Walmart ("senior management often refer to female associates as 'Little Janie Qs,'" Justice Ginsburg noted among the allegations). Maybe *that* is the legacy of this *Dukes* case; it doesn't tell us how far we've come in addressing gender bias in the law, it tells us how much further we have to go.

But at the Cato Institute, the decision is [unsurprisingly viewed as a good one](#). The idea, argued in the suit, that a decentralized management structure led to de-facto discrimination in the absence of enforceable corporate policies, does not jibe with Cato's advocacy of personal liberty. "We should be glad lawyers at every big company aren't yet insisting that every local HR decision be sent to a distant headquarters for fear of liability," concluded blogger Walter Olson. And the fact that the suit was brought as a class action, he wrote, was unfair.

To sweep hundreds of thousands of workers (or consumers or investors) into a class as plaintiffs even if they personally have suffered no harm whatsoever — to use sexism at Arizona stores to generate back pay awards in Vermont, and statistical disparities to prove bias without allowing defendants to introduce evidence that a given worker's treatment was fair — bends the class action mechanism beyond its proper capacity. Also to the point, it is unfair.

The Daily Beast's Michelle Goldberg [focused more closely on the actual charges of sex discrimination](#) in the suit, arguing that the decision was a loss not just for the women of Wal-Mart, but for women everywhere. "Monday's ruling didn't really deal with the underlying evidence of pervasive discrimination at Walmart, which has been well documented both statistically and anecdotally," she wrote. "Women make up more than 70 percent of Walmart's employees but only a third of its salaried managers, though women at the company have lower turnover rates and higher performance ratings than men." In the end, Goldberg saw the decision as a continuation of the court's poor civil-rights record.

This was in keeping with the conservative majority's extremely narrow approach to civil-rights law. "One of the constants of this court, they don't believe that discrimination exists unless you have direct and obvious proof," said Jeffrey Toobin, author of *The Nine: Inside the Secret World of the Supreme Court*. "They don't believe in proof by statistics or proof by corporate culture. They are extremely demanding of plaintiffs for proof, and it's very hard to find that kind of proof."

In its [editorial criticizing the decision](#), *The New York Times* touched on why the issue of class action and that of sex discrimination go together in a suit like this.

Without a class action, it will be very difficult for most of the women potentially affected to pursue individual claims. The average wages lost per year for a member of the rejected Wal-Mart class are around \$1,100 — too little to give lawyers an incentive to represent such an individual. For the plaintiffs, for groups seeking back pay in class actions, and for class actions in general, it was a bad day in court.