

Common Problems for the Common Answers Test: Class Certification in *Amgen* and *Comcast*

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Introduction

Just a few years ago, class-action law was, by all accounts, a terrible mess. The origins of that mess were various. Its deepest roots lay in Federal Rule of Civil Procedure 23's vague requirements for class certification, which offer little insight into how its framers thought the rule ought to be applied. But an even deeper source lay in the astounding fact that, for decades, the Supreme Court had provided lower courts with minimal clarification about how those requirements should be interpreted. Worse, the guidance the Court had offered seemed inconsistent. The result was a three-decade-long babble of different approaches to class certification across the circuits, as lower courts struggled, without meaningful direction, to put Rule 23 into effect.

Hope arrived in 2011, when the Supreme Court, after more than a decade of silence, entered the fray in *Wal-Mart Stores, Inc. v. Dukes*¹ and attempted to, finally, sort out the mess. The solution *Wal-Mart* offered was a new guiding principle that could discipline the class-certification inquiry across its various domains.

That principle declared that the goal of certification is to determine "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."² Of course, on its face, this statement raises as many questions as it answers. Its promise as a source of discipline for class-action law lay not in its words, but in its origin. The test was drawn from a series of elegant,

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¹ 131 S. Ct. 2541 (2011).

² *Id.* at 2550.

rigorous articles by the late Professor Richard Nagareda.³ By drawing on Nagareda's work, the Court, in the process, self-consciously harnessed his larger explanatory framework as a source of future guidance for lower courts.

The special value of Nagareda's work lay not only in its detail and rigor, but in Nagareda's focus on one of the deepest legitimacy problems plaguing the class-action procedure: its widely acknowledged, and much criticized, capacity to alter or abridge plaintiffs' and defendants' substantive rights. Professor Nagareda's framework was self-consciously, as he put it, "pro law"—that is, designed to put substantive law back in charge of judicial uses of the class procedure.⁴

This term provides an opportunity to assess how that project is working out. In two of the term's most important class-action cases, *Amgen v. Connecticut Retirement Plans and Trust Funds*⁵ and *Comcast v. Behrend*,⁶ the Court revisited the common answers test, extending it to new problems in the fields of securities and antitrust law.

For those keeping score of which side, plaintiffs or defendants, won this term, *Amgen* goes to the plaintiffs and *Comcast* to defendants. But for those watching to find out if the common answers test would mark a new "pro law" direction that can rescue substantive law from procedural distortion, both decisions proved to be modest disappointments. In different respects, both decisions reflect a continuation rather than a break with the procedure-driving-substance problem that Professor Nagareda's work tried to combat.

Part I starts by reviewing the state of law on the eve of *Wal-Mart* and then summarizes Nagareda's "common answers" framework, which *Wal-Mart* adopted. This part takes some time to tease out different principles that guide that framework, which is necessary to make sense of *Amgen* and *Comcast*. Part II proceeds to walk through

³In particular, it drew on Nagareda's article *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) [hereinafter *Aggregate Proof*]. Nagareda also summarized some of the main points of that article in what was basically a "Reader's Digest" version, which was published shortly after his death in *Vanderbilt Law Review's* online supplement, as the Court deliberated about *Wal-Mart*. See Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149 (2010).

⁴Nagareda, *Aggregate Proof*, *supra* note 3, at 135.

⁵133 S. Ct. 1184 (2013).

⁶133 S. Ct. 1426 (2013).

Amgen and *Comcast* in turn, providing a brief reader's guide to the ways the decisions apply that framework and fumble in the process.

I. The Common Answers Test: A Guide for the Perplexed

A. Origins

At the turn of the millennium, the circuits were riven by a jumble of conflicting approaches to class certification. The source of the problem lay partly in Rule 23's famously vague standards and partly in the Supreme Court's spare, cross-cutting directions about how to apply those requirements.

One significant source of confusion turned on when the underlying "merits"—that is, questions bearing on defendants' ultimate liability—should be considered in the course of deciding to certify a class. Initially, federal courts synthesized the class-action rule to more familiar joinder devices, particularly Rule 20, whose permissive joinder provisions had long been assessed initially based on the pleadings. Following that model, "first-generation" class-action law, approached certification questions in the same pleading-focused way.⁷

In these early years, the Supreme Court did not control so much as observe the developments in the lower courts, tinkering on the margins. The Court's first major contribution in the first two decades of class-action law's development came in its 1974 opinion in *Eisen v. Carlisle & Jacquelin*, where it announced that district courts cannot condition certification on an assessment of the plaintiff's likely success on the merits.⁸ The meaning of *Eisen* was muddied by another Supreme Court decision several years later, 1982's *General Telephone Co. v. Falcon*.⁹ There, the Court directed that certification demands "actual, not presumed" compliance with Rule 23's requirements,

⁷ Nagareda, Aggregate Proof, *supra* note 3, at 111–12.

⁸ 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). Because *Eisen*'s specific holding concerned who bears the cost of notice to class members that a class has been certified, and not the certification of the class itself, the statement, applied to class certification, was, as the Court recently put it, the "purest dictum." See *Wal-Mart*, 131 S. Ct. at 2552 n.6.

⁹ 457 U.S. 147 (1982).

and added that Rule 23 sometimes demands “prob[ing] behind the pleadings.”¹⁰

Together, *Eisen* and *Falcon* produced confusion and a substantial constellation of different approaches among the circuits, particularly with respect to the relation between certification and the merits, which persisted for over two decades.¹¹ Surveying the mess just a decade ago, Robert Bone and David Evans lamented that class certification cases reflected “a patchwork of discretionary decisions difficult to justify on principled grounds.”¹²

In 2011, the Supreme Court re-entered the fray in *Wal-Mart Stores v. Dukes* and attempted to sort out the mess. For help, it turned to the work of Professor Nagareda, who in a series of articles, had set out to synthesize the existing law in the lower courts while articulating some underlying principles that fit its basic contours and could give it some larger theoretical coherence.

The lower courts, he argued, had been evolving toward an understanding of Rule 23’s requirements that he paraphrased as an inquiry into the “capacity” of a “unified proceeding” to generate “common answers” that can “resolve” class members’ dispute with the defendant.¹³ This “common answers” test for certification was not, in his telling, meant as an explanation for one of Rule 23’s discrete certification requirements. Instead, building on the observation that

¹⁰ *Id.* at 160.

¹¹ The confusion was exacerbated by the fact that it wasn’t clear what *Falcon* was trying to get at in these passages. To take just one example, *Falcon*’s suggestion that district courts may sometimes need to “probe behind the pleading” was followed immediately by a recommendation that courts ought to demand more *specificity* in class pleadings before coming to rest on certification, which suggested less a rejection of a pleading-focused approach to certification than a qualification that courts should not accept overly vague pleadings bearing on the propriety of certification. *Id.* at 160–61 (emphasizing “the need for ‘more precise pleadings’” because “‘without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate’”) (quoting *Johnson v. Georgia Highway Express*, 417 F.2d 1122, 1125–27 (5th Cir. 1969) (Godbold, J., dissenting)).

¹² Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 *Duke L.J.* 1251, 1254 (2002).

¹³ Nagareda, *Aggregate Proof*, *supra* note 3, at 131–32 (the focus of certification is on “the prospects for joint resolution of class members’ claims through a unified proceeding”); *id.* (“What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.”).

those requirements (commonality, typicality, adequacy, predominance, and so forth) all point to a larger set of underlying organizing principles unstated in the rule itself,¹⁴ Nagareda's work, brilliantly, presented itself as a synthesis of one of those underlying organizing principles.¹⁵

In *Wal-Mart*, the Supreme Court lifted his common answers test into Rule 23 into class-action doctrine verbatim. "What matters to class certification . . . is not the raising of common 'questions'—even in droves," said the Court, quoting Nagareda. It is "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."¹⁶

B. Applications

1. The Common Answers Test as a Practical Inquiry

Understanding the common answers test requires appreciating its roots in one of the original purposes of Rule 23: ensuring, before the resources and time of the parties are consumed by class litigation on the merits, that a class proceeding can actually produce a judgment that will resolve the underlying dispute.¹⁷ This prejudgment screening is a comparatively recent innovation in class-action procedure. Eighteenth- and nineteenth-century equitable practice did not provide one.¹⁸ Rather, the primary avenue for challenging the pro-

¹⁴ See, e.g., *General Telephone Co. v. Falcon*, 457 U.S. 147, 157–58 & n.13 (1982) (noting the rule's requirements "tend to merge" into an underlying inquiry into whether "maintenance of a class action is economical" and "the class claims are so interrelated that the interests of class members will be fairly and adequately protected in their absence").

¹⁵ See, e.g., Nagareda, *Aggregate Proof*, *supra* note 3, at 131 (framing the common answers test as one that gets at the "overarching picture" of class cohesion, toward which Rule 23's various requirements point). For this reason, Justice Ginsburg construed Nagareda too narrowly when she suggested, in her *Wal-Mart* dissent, that his common answers test was a limited explication of Rule 23(b)(3)'s predominance requirement. See *Wal-Mart*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting).

¹⁶ 131 S. Ct. at 2551 (emphasis in original).

¹⁷ The test has its origin in a key insight by Allan Erbsen about the connection between Rule 23 and the "resolvability" of the claims. Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 *Vand. L. Rev.* 995 (2005).

¹⁸ For the seminal treatment of the class-action rule's equitable precursors, see Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987).

ceeding's propriety came after the fact, in subsequent collateral suits targeting the defendant in which individual class members sought to avoid the preclusive effect of the class judgment.¹⁹

In these collateral attacks on the class judgment, the class member might try to avoid that judgment by showing that she had not been adequately represented because the class representative's interests conflicted with hers.²⁰ Or, if the class were unsuccessful, she might assert an alternative theory of relief for the same wrong, one not advanced in the class proceeding because it could not have been litigated on a class basis.²¹ Too many of such after-the-fact challenges to a class judgment, and the result is that the original class proceeding would have ended up settling nothing—a monumental waste of time for all concerned.

Rule 23, by contrast, moves the scrutiny of the class proceeding forward, before the class judgment, by requiring a front-end determination that the class device can produce a fair, accurate judgment entitled to binding effect at the back end. By doing so, Rule 23 economizes on judicial process, by screening out proposed actions in which the class device is incapable of facilitating a fair and accurate resolution of the underlying dispute.²²

The common answers test is, in turn, derived from this economizing purpose. Rather than ask whether the claims are amenable to common proof in the abstract, the test asks whether claims are capable of being “productively litigated at once.”²³ The key word here is “productively”—the test boils down to whether, as a practical matter, class members are situated such that the question of defendants' liability to the class can be “resolved in a unified proceeding.”²⁴

¹⁹ A classic example of this pattern is *Hansberry v. Lee*, a collateral attack on an Illinois state law class judgment entered, after the fashion of traditional equitable practice, without any “prejudgment” certification process. See *Hansberry v. Lee*, 311 U.S. 32 (1940).

²⁰ *Id.* at 44–45.

²¹ See, e.g., Restatement (Second) of the Law of Judgments § 26(c); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (holding that class members' individualized claims are not merged and barred by a prior class judgment arising out of the same transaction or occurrence).

²² See Erbsen, From “Predominance” to “Resolvability,” *supra* note 17, at 1023–50.

²³ 131 S. Ct. at 2551.

²⁴ Nagareda, Aggregate Proof, *supra* note 3, at 131.

The test's practical focus is illustrated by the basic reasoning of the Court in *Wal-Mart*. There, the named plaintiffs alleged Wal-Mart was liable to the class based on allegations of gender discrimination, but class members might have proven that liability in more than one way. One would be through proof of a top-down corporate-wide policy or practice, either adopted by Wal-Mart with an impermissible discriminatory motive or, in operation, yielding an impermissible discriminatory impact. The other would turn on proof of store-level, rather than company-wide, gender discrimination for which Wal-Mart could be held vicariously liable.²⁵

Obviously, then, if plaintiffs were unable to offer sufficient proof of a company-wide discriminatory policy, class members' rights to relief would collapse into a welter of dissimilar investigations into store-level practices that could not be resolved in a single proceeding. Accordingly, the Court rightly made class certification contingent on whether plaintiffs could demonstrate the existence of a company-wide corporate discriminatory practice at the outset.²⁶ And, finding plaintiffs were unable to produce proof of such a policy, it reversed the certification of the class.

2. Two Mistakes in Application: "Underreaching" and "Overreaching"

In the course of explaining the common answers test, Nagareda also highlighted two common ways that lower courts fall into error when applying it.²⁷ The first, which he called "underreaching," involves judicial efforts to ascertain the "fit" between class procedure and the substantive law applied through it. The resolvability of claims as a class depends on the amenability of the claims to common proof. And often the amenability of claims to common proof turns on a contested question of substantive law about how the claims can be proven. Yet sometimes, he noted, courts certified a class without resolving that question. The sources of this abdication are too various to summarize here. The gist is that judges may have

²⁵ 131 S. Ct. at 2552. See also *Cooper v. Federal Reserve Bank of Richmond*, 457 U.S. at 881 (noting that class claims premised on a company-wide pattern or practice and individual claims targeting particular supervisors present alternative theories for remedying the same underlying injury).

²⁶ 131 S. Ct. at 2552.

²⁷ Nagareda, *Aggregate Proof*, *supra* note 3, at 135 (noting "judicial errors" taking two forms: "underreaching" and "overreaching").

been led by a heavily fact-focused certification process to lose sight of broader legal questions bearing on whether claims are actually amenable to common proof.²⁸

Wal-Mart again offers an example. There, Nagareda noted, the plaintiffs presented “common proof,” in the form of statistical analysis and anecdotal evidence, purporting to show company-wide gender discrimination. The U.S. Court of Appeals for the Ninth Circuit, focusing on the “commonality” of the proof developed by plaintiffs to the class claims, certified the class. Yet, Nagareda noted, that proof reflected a highly contested view of the type of discrimination proscribed in Title VII. It was, in effect, a “stalking horse” for a larger legal theory of proscribed sex discrimination. By certifying the class without first examining whether that theory was right, the Court advanced that contested account of the law “in real-world operational terms, if not explicitly in doctrine.”²⁹

At least two concerns follow when courts certify claims but ignore the substantive questions that bear on the availability of common proof. First, the case-ending nature of a certification order means that when courts refuse to resolve important questions of substantive law concerning whether common proof of plaintiffs’ claims is possible, plaintiffs in effect get to dictate both the law and the result of their case (that is, a settlement at a premium reflecting the *in terrorem* effect of certification).³⁰ This is obviously inconsistent with the basic impartiality constraint to which all fair processes of dispute resolution must conform.

Second, when courts, in the course of certifying a class, refuse to resolve substantive questions bearing on class members’ rights to relief, they violate norms favoring transparent and accountable law declaration. This second point also follows from the link between certification and settlement. Other defendants in different but factually analogous cases will, in the interest of avoiding being pressed into a similar settlement, treat such certification orders much like a judicial decision declaring the contested substantive question in

²⁸ *Id.* at 125–30 (discussing this problem).

²⁹ *Id.* at 161–62.

³⁰ *Id.* at 128 (noting that when courts certify claims based on the existence of common proof supporting the class claims, without deciding whether that proof is consistent with the governing law, class certification “proceeds only upon the say-so of one side”).

plaintiffs' favor, even though the certification order does not, as a matter of doctrine, announce itself as such.³¹ Thus, the result is akin to lawmaking in operation, if not in doctrine, because its effect on potential defendants' incentives and behavior is law-like.³² Yet this "operational" law reform avoids the critical constraints of public judicial deliberation, accountability, and transparency to which above-board acts of law declaration are subject.

Accordingly, Nagareda argued that courts must take care to resolve questions of law that bear on how the claims can be proven at the outset of the certification inquiry.³³ He suggested, in turn, the best practice is to address those legal questions first, and "only then" turn to apply the common answers test.³⁴ The legal determination informs which factual dissimilarities among class members are material to the liability question. And thus it guides the subsequent inquiry into whether resolution of class members' claims in a single proceeding is possible.

The second form of judicial error that Nagareda highlighted involved not "underreaching," by failing to decide questions of law that bear on the amenability of the claims to common answers, but "overreaching," by pushing the merits inquiry beyond the scope of the Rule 23 common answers test.³⁵ Thus, he said, courts miscarry by deciding mixed law-fact questions related to the merits when their resolution is not necessary to determine the resolvability of the dispute in a class-wide proceeding.³⁶ This type of overreaching is par-

³¹ *Id.* at 137–38 (noting that when courts certify claims based on evidence organized around contested but generalizable principles, the result assumes a "law-like character" in operation).

³² *Id.* at 161 (criticizing the tendency of class-action law toward "law transformation" through "class certification and the well-nigh inevitable denouement of class settlement . . . [which] achieve in practical terms what the legislative process has not yet delivered and, indeed, may be disinclined to provide").

³³ *Id.* at 125, 133.

³⁴ *Id.* at 164 ("the notion of declaring the governing law and, only then, ascertaining compliance with Rule 23 requirements . . . would lend coherence to the law of class certification").

³⁵ *Id.* at 135.

³⁶ *Id.* at 132–33 ("[c]ourts today properly engage aggregate proof as a question of class certification . . . when disputes concerning that proof pertain to whether there exist disabling dissimilarities" that would "prevent common resolution" of the claims); *id.* at 130, 135 (warning of "judicial overreach" in the form of "the displacement

ticularly problematic because plaintiffs must prove that they meet the requirements of Rule 23 by a preponderance of the evidence, a higher standard than they must meet to survive summary judgment. As a result, forcing plaintiffs to prove issues relating to the merits when doing so is not required by Rule 23 undoes the careful judge-jury balance struck by the federal rules.³⁷

Securities fraud claims offer a ready example. A plaintiff asserting such a claim must prove not only that a securities issuer made material representations that inflated her stock's price, but she must also prove that she sold the security at a loss that was proximately caused by the misrepresentation.³⁸ The defendant is thus not liable to the plaintiff if the defendant shows that the collapse in the price of plaintiff's stock was caused by some intervening event that triggered a market-wide sell-off and ensuing general collapse in stock prices affecting both plaintiff and purchasers of unrelated securities indiscriminately.³⁹

Securities-fraud defendants have sought to argue that this question of "loss causation" bears on certification, largely in the hope of taking advantage of a potentially case-ending judicial assessment under the more demanding preponderance standard applicable to certification. Still, because disentangling the relative contributions of the disclosure and larger market trends to the injurious price reduction is often an issue inherently common to the class, the issue of

of summary judgment" when consideration of the merits does not "bear upon the application of a Rule 23 requirement"); *id.* at 114 ("the concept that does the work" in the common answers test "consists of what one might dub a 'tethering' doctrine," under which a court "oversteps its proper bounds" if it conducts a merits inquiry "untethered" to Rule 23's resolvability requirements).

³⁷*Id.* at 140–41 ("The distinction between a class certification question and a summary judgment question is far from trivial. A requirement of a genuine issue of material fact remains much easier for plaintiffs to satisfy" than Rule 23's preponderance standard); *id.* at 149 ("law declaration" in conjunction with certification is warranted only to the extent it can reveal dissimilarities in the class; going beyond this intrudes on the "proper domain of summary judgment, such as to implicate the role of the court vis-à-vis the factfinder at trial"). Nagareda also emphasized the party neutrality accomplished by tethering the merits inquiry to a resolvability analysis—"[p]roper delineation of the law-declaring component of class certification" along these lines "does not uniformly favor either plaintiffs or defendants." *Id.* at 136.

³⁸ *Erica P. John Fund, Inc. v. Halliburton*, 131 S. Ct. 2179, 2186 (2011).

³⁹ *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342–43 (2005).

loss causation is frequently amenable to common answers.⁴⁰ When that is so, the competing merits of the causation issue should have no bearing on whether the class exhibits “fatal dissimilarities” that could impede, as a practical matter, the capacity of a single class proceeding to resolve the underlying dispute. Rather, the loss-causation issue is a matter fit for the summary judgment phase.⁴¹ This was exactly the conclusion to which the Court came in *Erica P. John Fund v. Halliburton*, decided the same term as *Wal-Mart*.⁴²

II. Checking in on the Common Answers Test: A Look at *Amgen* and *Comcast*

Between the two biggest class-action cases this term, *Amgen v. Connecticut Retirement Plans and Trust Funds* and *Comcast v. Behrend*, every justice signed onto majority opinions that applied some version of the common answers test, confirming that the test is here to stay. Yet for those hoping that the Court’s adoption of the test would curtail the class procedure’s warping effect on substantive law, both are modest disappointments. Between the two cases, both the liberal and conservative wings separately indulged in precisely what Professor Nagareda’s framework was designed to prevent: law reform without accountability.

A. Lawmaking via Procedure in *Amgen*

1. Some Securities Law Background

Amgen involved a lawsuit, filed by an institutional investor, targeting a biotechnology company’s public statements about its “flagship drugs.”⁴³ As is characteristic of securities-fraud suits, the plaintiffs alleged that these statements were false and misleading, inflating the value of *Amgen*’s stock and leading to financial losses for the company’s shareholders when the misrepresentations were later corrected.⁴⁴ A central problem in the case concerned proof of the “reliance” element of claims alleging securities fraud under Section 10(b)

⁴⁰ Nagareda, *Aggregate Proof*, *supra* note 3, at 139–40.

⁴¹ *Id.* at 140.

⁴² 131 S. Ct. 2179 (2011).

⁴³ *Amgen*, 133 S. Ct. at 1193.

⁴⁴ *Id.* (describing the allegations of the complaint).

of the Securities Exchange Act of 1934 and so it helps to review the contours of that element before looking at the case.⁴⁵

Proof of securities fraud under Section 10(b), as with all claims of fraud, requires not only identifying misrepresentation but showing that the misrepresentation *caused* the plaintiff's injury. Causation, in traditional fraud claims, is proven by showing the plaintiff knew of the misrepresentation and reasonably relied on it to her detriment. Yet, mostly to facilitate class enforcement of securities-fraud actions, the Supreme Court, in *Basic v. Levinson*,⁴⁶ dispensed with the ordinary common law burden of proving individualized reliance in Section 10(b) fraud actions.

Basic reasoned that securities purchasers do not rely directly on representations about a company when purchasing its stock. Instead, they rely on the "integrity of the market price" for the security.⁴⁷ They are, that is, willing to pay for the stock not because of any specific representation about the company that issued it, but because they assume that, thanks to the efficient operation of the market and the watchful eye of regulators, the security's price reflects a fair valuation of the company embodying accurate public information disseminated about it. Given this, the Court relaxed plaintiff's traditional burden of proving they directly relied on the misrepresentation sued upon and held that, instead, "an investor's reliance on any public material misrepresentations . . . may be presumed for purposes of a [securities fraud] action [under Section 10(b)]."⁴⁸

⁴⁵ Section 10(b) of the Securities Exchange Act proscribes the "use or employment, in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Pursuant to Section 10(b), the SEC promulgated Rule 10b-5, which makes it illegal "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(b). Relying on both Section 10(b) and Rule 10b-5, federal courts inferred a private right of action for securities fraud with the Supreme Court's eventual approval. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729–31 (1985) (reviewing history of the implied right of action for securities fraud under Section 10(b)).

⁴⁶ 485 U.S. 224 (1988).

⁴⁷ *Id.* at 247.

⁴⁸ *Id.*

Since *Basic*, it has been understood that class plaintiffs may take advantage of this presumption only if they establish three things: (1) that the securities they and class members purchased were in fact traded in an open and efficient market capable of translating public information into the security's price; (2) that misrepresentations were disseminated publicly;⁴⁹ and, (3) that the representations were "material," meaning a reasonable investor would have relied on the representation when deciding whether to purchase it.⁵⁰

Of the three elements on which the presumption depends, materiality, though, is special. Unlike questions about the efficiency of the market in which the security was traded or about the publicity of the representation, materiality is essential to establishing the defendant's liability to each class member, even if plaintiffs are *not* legally entitled to the *Basic* reliance presumption.

To understand *Amgen*, this last point bears emphasis. If plaintiff is unable to prove either that the market in which the security is traded is efficient or that the representation was disseminated to the market, that dooms the availability of the *Basic* presumption. Without the presumption of reliance, a plaintiff must establish reliance individually, the old-fashioned way: by showing that she in fact knew of the representation and relied on it when deciding to purchase the security at a given price. But even in that case, the Section 10(b) fraud action, like the common-law fraud actions on which it is modeled, requires proof that the defendant's representations were materially false or misleading.⁵¹ Thus, even in the absence of the *Basic* presumption, the issue of materiality remains in the case. And so, even in the

⁴⁹ Another requirement often associated with the presumption—that the class members must have purchased the securities "between the time the misrepresentations were made and the time the truth was revealed"—is, as the Court noted, technically relevant to the class definition and the Rule 23(a) requirements of typicality and adequacy of representation, rather than the presumption itself. *Amgen*, 133 S. Ct. at 1198.

⁵⁰ *Id.* at 1195.

⁵¹ Specifically, Rule 10b-5 makes it illegal "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(b). Based on the text of Rule 10b-5, the Court has treated materiality as a separate element that must be satisfied regardless of whether plaintiff can take advantage of *Basic's* presumption. See *Matrixx Initiatives v. Siracusano*, 131 S. Ct. 1309, 1317 (2011).

absence of the presumption, if plaintiffs are unable to prove that the misrepresentation would be material to a reasonable investor, they lose.

2. Justice Ginsburg's Common Answers Analysis

The certification question in *Amgen* focused on proof relating to the *Basic* presumption. *Amgen* conceded that the market in which the class securities were sold was efficient, but it contested the materiality of the representations at issue.⁵² As a result, materiality was the sole issue on which the availability of the *Basic* presumption hinged.

Amgen argued that materiality is an issue that must be resolved as part of the inquiry into whether the claims could be certified. Its reasoning was straightforward: If materiality is decided against the class, the reliance element would depend on individualized inquiries into whether each class member actually saw the representation and relied on it, impeding common answers to the liability question.

In an opinion by Justice Ruth Bader Ginsburg, the *Amgen* majority, however, held that the question of materiality can be kicked down the road and resolved *after* the class is certified, either at the summary judgment stage or at trial.⁵³ Although surprising at first glance, the majority's holding turns out to be a straightforward application of the common answers test.

The key is to remember that, under the common answers test, an inquiry into the underlying merits of the claims must be "tethered" to determining whether, as a practical matter, dissimilarities among class members will impede the ability of the class device to resolve the underlying dispute in a single proceeding.⁵⁴ Under the test, some elements of the *Basic* presumption, like market efficiency, clearly must be resolved in plaintiffs' favor in order to render the case resolvable on a class basis. If the question of the market's efficiency were resolved against the class, defendants' liability to the class would necessarily collapse into individual inquiries about each class

⁵² 133 S. Ct. at 1190 (noting "Amgen has conceded the efficiency of the market for the securities at issue and has not contested the public character of the allegedly fraudulent statements").

⁵³ *Id.* at 1196.

⁵⁴ Nagareda, *Aggregate Proof*, *supra* note 3, at 114 (discussing the requirement that a peek at the merits must be "tethered" to a common answers analysis).

member's subjective reliance. Therefore, resolving that substantive question up front is necessary to decide whether the claims form an efficient trial unit that is capable of being resolved in a single proceeding.⁵⁵

By the same logic, however, resolving the materiality question is *not* necessary to determining whether the claims are resolvable in a single proceeding. The point flows from the special nature of the materiality issue. Determined in favor of the class, materiality will cement the availability of the *Basic* presumption, eliminating individualized issues of reliance across the class. Yet, because materiality is so irreducibly essential to establishing fraud liability, a determination that representations are not material will simply doom the claims on the merits altogether, again as a unit.⁵⁶ They will be "dead on arrival," presumption of reliance or no.⁵⁷ Since its resolution will thus have no effect on the resolvability of the class claims in a single proceeding, the merits of the materiality issue are irrelevant to certification.

Justice Clarence Thomas, in a portion of the dissent joined only by Justice Anthony Kennedy, sharply criticized this reasoning. Rule 23's certification standards, he argued, mandate that plaintiffs show "that the elements of the claim are susceptible to classwide proof."⁵⁸ "Without that proof," he wrote, "there is no justification for certifying a class because there is no 'capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'"⁵⁹

Because, Justice Thomas continued, the element of reliance is susceptible to "common proof" only if plaintiffs are entitled to rely on the *Basic* presumption, and because the presumption depends on a prior determination that the misrepresentations are material,

⁵⁵ Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2552 n.6 (2011).

⁵⁶ *Id.* ("Absent proof of materiality, the claim of the Rule 10b-5 class will fail in its entirety; there will be no remaining individual questions to adjudicate."); *id.* (noting that "failure to present evidence of materiality to defeat a summary-judgment motion or to prevail at trial" would not "cause individual reliance questions to overwhelm questions common to the class" but "would end the case for one and all; no claim would remain in which individual reliance issues could potentially predominate").

⁵⁷ Amgen, 133 S. Ct. at 1211 (Thomas, J., dissenting).

⁵⁸ *Id.* at 1210 (citing Wal-Mart, 131 S. Ct. at 2552 n.6).

⁵⁹ *Id.* (quoting Wal-Mart, 131 S. Ct. at 2551) (emphasis in original).

the district court ipso facto must determine the materiality issue in plaintiffs' favor in order to certify the class. As he put it, a "plaintiff who cannot prove materiality does not simply have a claim that is 'dead on arrival'" once the case proceeds to summary judgment or trial. He "has a class that should never have arrived at the merits at all because it failed Rule 23(b)(3) certification from the outset."⁶⁰

If Nagareda's work and *Wal-Mart's* holding are any guide, though, the majority would seem to have the better of the argument. The fact that materiality has a metaphysical bearing on whether the reliance element can be conceptualized as governed by "common proof" is simply beside the point. The common answers test does not require that courts decide that every element of the claim is amenable in theory to common proof. It requires that the claims must be "productively . . . litigated" in a class proceeding because they are susceptible to common resolution *in practice*.⁶¹ Because resolving the materiality issue one way or another has no bearing on that practical question, it is just not relevant to certification.

3. *A Problem the Court Ignored*

Although the dissent's argument misfires, lurking behind it was one point of valid criticism. That criticism lies in the fact that hidden away behind *Amgen* was a significant contested legal question bearing on how the *Basic* presumption is proven. Because the decision to certify the claims is practically case-ending, the majority's approach in turn avoids transparently addressing that legal question. This is the kind of unaccountable lawmaking via procedure that Professor Nagareda warned against.

This lurking question of law relates to how evidence of "price distortion"—the effect of the misrepresentation on the market price of the security—ought to bear on the merits of a securities fraud claim. Evidence of price distortion can be said to shed light on two different questions. One is the question of loss causation discussed in the last part of this essay. If misrepresentation doesn't cause movement in the price of the security, then class members' losses are not attributable to the misrepresentation. In *Erica P. John Fund v. Halliburton Co.*, the Court settled, consistent with the common

⁶⁰ *Id.* at 1211.

⁶¹ *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added).

answers test, that loss causation raises a question of generalizable proof appropriately considered at the summary judgment—not the class-certification—stage.⁶²

Even so, defendants have argued that price distortion is separately relevant to the *Basic* presumption. The argument turns on the idea that the *Basic* presumption is premised on the market's incorporation of the misrepresentation into the price of the security. Through its incorporation into the price, investors are treated as relying on the misrepresentation indirectly. This is where evidence of price distortion becomes relevant. If the presumption reflects the idea that plaintiffs rely indirectly on the misrepresentation because it is embedded in the stock's price, then the premise supporting the presumption is defeated if evidence shows that the representation does not affect the price at all. If it is not embedded in the price, then purchasers do not rely on it, even "indirectly."

Defendants have framed their argument about the relevance of price distortion as a question that goes to the "materiality" of the misrepresentation to the market. From defendants' standpoint, the tactical wisdom of the push to bring price distortion evidence through the materiality element is impeccable: The problem for defendants, as Professor Donald Langevoort explains, is that evidence of price distortion or a lack thereof is rarely clear-cut.⁶³ As a result, it is difficult to defeat plaintiffs on the issue under the lenient summary judgment standard, which requires plaintiffs to show only that a reasonable jury might decide for them on the price distortion issue. The result is that the conflicting evidence goes to the jury, which defendants fear tend to skew heavily in plaintiffs' favor.

Defendants would prefer to get a judge to pass on the merits of the issue, unshackled from the plaintiff-friendly summary judgment standard. This is the basic impetus behind efforts to bring proof of price distortion into the *Basic* presumption. By doing so, defendants have hoped to make price distortion relevant to class certification. At the class-certification stage, the judge can get out from under the

⁶² 131 S. Ct. at 2186.

⁶³ Donald C. Langevoort, *Amgen and the Fraud-on-the-Market Class Action: Frozen in Time?*, at 8–9, available at <http://ssrn.com/abstract=2281910> (explaining that "once the inquiry extends to a potentially lengthy period of time between the original lie and the corrective disclosure" it is "hard—if not impossible—to disentangle all the effects with an econometric rigor").

restraints of the summary judgment standard and determine the price distortion question based on the preponderance standard applicable to certification. A determination of the issue in defendants' favor at the certification stage will, in turn, end the case as a practical matter.⁶⁴

Smart tactics aside, the merits of the conception of materiality are open to question. Based on a careful reading of *Basic*, Langevoort has argued at length—in terms too involved to review here—that the *Basic* presumption might make much more conceptual sense if price distortion were not viewed as a “predicate to” the presumption of reliance. Instead, on his carefully argued view, *Basic* reflects the simple idea that plaintiffs are entitled to rely on the integrity of the stock price. Proof that the price was “distort[ed],” on this view, “merely establishes the injury from the misplaced reliance,” rather than doing the double work of establishing the reliance element itself.⁶⁵

The majority dodged the merits question about how price distortion bears on the presumption by kicking that question to later stages of litigation that, in practice, will be superseded by settlement. One suspects that the justices who joined the majority opinion did so because they saw Amgen's procedural position for what it was: a transparent attempt to manipulate the interface between securities fraud's substance and class-action procedure in order to gut much of the presumption's power “in operation, if not in doctrine.”⁶⁶

⁶⁴ *Id.* at 2–3 (discussing these concerns).

⁶⁵ *Id.* at 16 (summarizing the argument). See also Donald C. Langevoort, *Basic* at Twenty? Rethinking Fraud on the Market, 2009 Wisc. L. Rev. 151, 198. Langevoort's argument is that *Basic* should not be read as adopting the theory that purchasers rely on the misrepresentation “indirectly” because it is embedded in the stock price. He argues that *Basic*'s holding would make more sense if it is instead read as holding the reliance “is on the presumed absence of distortion (price integrity),” so that “distortion merely establishes the injury from the misplaced reliance.” Langevoort, *Frozen in Time?*, *supra* note 63, at 16.

Of course, many think *Basic* was simply wrongly decided and that it is time to reconsider the *Basic* presumption entirely. *Basic* indeed has been a durable part of the conservative anti-canon. To his credit, Justice Samuel Alito, who joined the majority, specially concurred to note that the decision turned on an assumption about the rightness of *Basic* that the Court ought to reconsider in a more appropriate case. 133 S. Ct. at 1204 (Alito, J., concurring) (“I join the opinion of the Court with the understanding that the petitioners did not ask us to revisit *Basic*'s fraud-on-the-market presumption.”).

⁶⁶ See also Langevoort, *Frozen in Time*, *supra* note 63, at 16 (noting that separation-of-powers concerns relating to Congress's control over securities litigation reform “seem[] crucial to assembling the majority”).

But if that was the concern driving some justices in the majority, that concern tends to underscore the *strength* of Justice Thomas's call for some assessment of the price distortion issue—albeit one limited to the legal theory that explains how it is relevant, and not its factual merits—in advance of certification. By deferring that issue until *after* the invariably case-ending certification decision, the majority has done something equal to Amgen's gambit, but with opposite effect: it has “in operation, if not in doctrine” *pruned* price distortion from the elements of proof relating to the *Basic* presumption.⁶⁷ That this pruning might be desirable is the position that Langevoort thoughtfully presented.⁶⁸ But it is one that the majority effectively made through a procedural ruling, rather than through the kind of forthright interpretation of the substantive law illustrated by Langevoort's parsing of *Basic*.

Reasonable minds can differ about whether Langevoort's theory of *Basic* is right, or whether it is time to reconsider the *Basic* presumption altogether. But the impulse to fend off what many justices surely viewed as a transparent attempt to manipulate the procedure-substance interface cuts both ways. If you don't like what Amgen was trying to do, then it ought to be hard to feel sanguine about what the majority did in *Amgen*: manipulating the procedure-substance interface to avoid taking the time to justify a desired substantive outcome with reference to the usual substantive sources.⁶⁹

The procedural tail should not wag the substantive dog, even if you happen to think the tail is, in fact, wagging the dog in the right direction. This was one of Nagareda's principal themes.⁷⁰ This larger

⁶⁷ Cf. *id.* (discussing hints in the majority's opinion that it thinks “[p]rice distortion is not a predicate to . . . reliance”).

⁶⁸ See Langevoort, *Basic* at Twenty?, *supra* note 65, at 198.

⁶⁹ See also Langevoort, *Frozen in Time?*, *supra* note 63, at 24–25 (agreeing that “the majority . . . responds to the defense-side request to allow them an early shot at materiality . . . by invoking old school procedure,” rather than substantive sources that might have supported the same conclusion).

⁷⁰ Nagareda, *Aggregate Proof*, *supra* note 3, at 164 (emphasizing that the certification process should not serve as a vehicle for “development of the law” “*sub silentio*”). Admittedly, *Amgen* presents a case where the legal issue was not necessary to assess the propriety of certification, and so is different from the cases that were Nagareda's focus. *Id.* at 171 (noting his focus was on “[l]aw declaration . . . necessary to assess the propriety of class certification”). The concern in *Amgen* is more general: by relying on procedural rules to resolve the case, when the result also could have been justified by reference to the substantive law, the Court impoverishes the public's understanding of important legal principles in play. That is not merely a theoretical concern in this

transparency and accountability concern with *Amgen*, in turn, underscores the wisdom of Nagareda's advice: Courts ought to resolve threshold questions of law bearing on how the class claims can be proven first, and "only then" turn to apply the common answers test.⁷¹ Doing so helps check the temptation, to which the Court succumbed here, to shove substantive questions with larger importance beyond the case at hand under the procedural rug.

B. *Lawmaking via Procedure in Comcast*

If *Amgen* saw a coalition of liberal justices (plus Chief Justice John Roberts and Justice Samuel Alito) engaged in what amounted to lawmaking via procedure, in *Comcast* it was the conservative justices' turn—suggesting a tendency around which the entire Court is, if on nothing else, united.

1. *The Majority's Analysis*

Comcast v. Behrend involved a proposed class action against the cable television provider Comcast. The complaint, brought on behalf of more than two million present and former Comcast cable television subscribers in the Philadelphia area, attacked the cable company's use of a so-called "clustering" strategy in the Philadelphia cable market.⁷² "Clustering" is antitrust lingo for a company's efforts to concentrate its operations in a particular market, and Comcast pursued such a strategy in the Philadelphia area through a series of acquisitions approved by antitrust regulators.⁷³ Plaintiffs, however, alleged that the strategy violated federal antitrust law by monopolizing the Philadelphia cable market.⁷⁴

case. As Langevoort notes, the majority, by avoiding addressing how price distortion matters to proof of securities fraud, missed an opportunity to address a larger, related question with far-reaching implications: whether the 1995 Private Securities Litigation Reform Act "froze" the "balance between plaintiffs and defendants" in the mid-1990s into place, leaving further adjustments to Congress. See Langevoort, *Frozen in Time?*, *supra* note 63, at 24–35 (noting the Court's view of this "frozen in time" concept of securities fraud "will determine much about the future of private securities class actions").

⁷¹ Nagareda, *Aggregate Proof*, *supra* note 3, at 164.

⁷² 133 S. Ct. at 1429–30.

⁷³ *Id.* (describing Comcast's clustering strategy).

⁷⁴ Plaintiffs, specifically, alleged Comcast entered into illegal swap agreements in violation of § 1 of the Sherman Act and had monopolized or attempted to monopolize services in the Philadelphia area in violation of § 2. See, e.g., *id.* at 1430.

Proving an antitrust claim requires not simply showing the defendant engaged in anti-competitive conduct, but proving that this conduct injured class members by inflating the prices of goods they bought, resulting in measurable damages.⁷⁵ And plaintiffs' complaint, of course, alleged this was so: Comcast's clustering strategy, the complaint contended, allowed the cable company to obtain a dominant market position, eliminating competition and allowing the company to charge the entire class of Philadelphia-area consumers inflated prices for inferior cable subscriptions and service.⁷⁶

In a 5–4 decision, the Court, in an opinion by Justice Antonin Scalia and joined by the other four conservatives, sided with Comcast. For the majority, the question concerning how Comcast's monopoly affected the prices paid by class members doomed the plaintiffs' class-action theory. The trouble stemmed from the plaintiffs' efforts to prove how Comcast's clustering strategy affected the entire class. Plaintiffs had proposed four scenarios that explained how Comcast's clustering strategy affected prices in the Philadelphia area. To quote Justice Scalia:

First, Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from "overbuilders," companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of "benchmark" competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers. Each of these forms of impact, respondents alleged, increased cable subscription rates throughout the Philadelphia [Designated Market Area].⁷⁷

The district court held that based on the evidence only one of these scenarios—the so-called "overbuilding theory"—could possibly

⁷⁵ See, e.g., *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 311 (3d Cir. 2008).

⁷⁶ 133 S. Ct. at 1430 ("Petitioners' clustering scheme, respondents contended, harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services above competitive levels").

⁷⁷ *Id.* at 1430–31.

support an award of damages on a class-wide basis.⁷⁸ Even if the scenarios described in the other theories may have had some price effects in some parts of the Philadelphia market (which the trial court doubted), they also did not plausibly affect the entire market and so could not support an award of class-wide damages.⁷⁹

To connect the one surviving theory to measurable damages incurred by the class, the plaintiffs retained a statistician, Dr. James McClave. McClave attempted to quantify the damages to the class using a multiple regression that “compar[ed] actual cable prices in the Philadelphia [area] with hypothetical prices that would have prevailed but for petitioners’ allegedly anticompetitive activities.”⁸⁰ Although his model’s calculations yielded an estimate of over \$875 million in damages “for the entire class,”⁸¹ the model did not attempt to isolate damages attributable solely to Comcast’s deterrence of overbuilding. In effect, his \$875 million damages figure reflected damages attributable to the cumulative impact of Comcast’s anticompetitive conduct “as a whole” across the class, including *but not limited to* deterrence of overbuilding.⁸²

It was this point on which the majority seized. “If respondents prevail on their claims,” said the Court, “they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court.”⁸³ It follows that “the model . . . must

⁷⁸ *Id.* at 1431 (“The District Court accepted the overbuilder theory of antitrust impact as capable of classwide proof and rejected the rest.”).

⁷⁹ This seems, anyway, to be the majority’s understanding of the district court’s reasoning. See *id.* at 1434–35 (speculating that “[f]or all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners’ alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners’ increased bargaining power vis-à-vis content providers (another theory that is not capable of classwide proof); while yet others . . . may have paid rates produced by the combined effects of multiple forms of alleged antitrust harm”). It bears noting, however, that the district court largely dismissed the other three theories as implausible sources of *any* price effects. See *Behrend v. Comcast*, 264 F.R.D. 150, 162–81 (E.D. Pa. 2010).

⁸⁰ 133 S. Ct. at 1431.

⁸¹ *Id.*

⁸² *Id.* at 1434.

⁸³ *Id.* at 1433.

measure only those damages attributable to that theory.”⁸⁴ Because the model did not attempt to do so, the Court concluded, “it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).”⁸⁵

The defense bar is already vigorously trying to cement the perception that *Comcast* broadly holds that damages must be susceptible of “common” calculation, and the claim finds support in the language of the opinion.⁸⁶ If that is right, *Comcast* is quite a significant case that pushes the common answers test deep into the damages phase of class litigation. Courts must now closely scrutinize admissibility of expert evidence bearing on calculation of damages during the certification stage to determine its reliability as a method of common damages measurement, and the decision would seem to doom certification in a host of different cases where modeling cannot reliably capture significant variation in damages within the class.⁸⁷ Understood this way, the case would significantly restrict damages class actions in ways that, arguably, may go beyond even what Nagareda envisioned.⁸⁸

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ This broader interpretation draws some support from the Court’s framing of its inquiry as, variously, “[w]hether individual damage calculations” defeat predominance (*id.*); and whether plaintiffs satisfy “commonality of damages” (*id.* at 1435 n.6); and from its suggestion (seemingly added to the opinion at the last minute, complete with typos) that “even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly shows that the extent of overbuilding . . . would have been the *same* in all counties, or that the extent is irrelevant to effect upon ability [sic] to charge supra-competitive prices.” See, e.g., *id.* (emphasis added). The last point, in particular, connects to the concern articulated by the dissent in the Third Circuit that “no model can calculate class-wide damages because any damages—such as they may be—are not distributed on anything like a similar basis throughout the [Philadelphia area],” but rather exhibit “wide variations” owing to significant differences in conditions across segments of the market. See *Behrend v. Comcast*, 655 F.3d 152, 224 & n.35 (3d. Cir. 2011) (Jordan, J., dissenting).

⁸⁷ See, e.g., 133 S. Ct. at 1435 n.6 (suggesting that where damages may be based on a single source but vary widely in impacts across the class, “commonality of damages” is defeated).

⁸⁸ One common solution to problems of individualized damages, which Nagareda did not question, is bifurcating trial into separate liability and damages phases and then certifying the common liability issues on a class-wide basis, while leaving damages calculation issues to more individualized proceedings. See, e.g., *Behrend*, 655 F.3d at

It is doubtful, though, that the lower courts will all read the decision so broadly. First, the plaintiff never challenged the idea that damages must be “susceptible of classwide measurement.”⁸⁹ Many of the broadest pronouncements in the decision therefore reflect what amount to statements of stipulated law.⁹⁰ Second, the result can be rationalized without reference to this broader principle, since, at several junctures, the Court seemed particularly concerned that the expert evidence simply failed to prove that the theory of liability in the case actually applied to the class as a unit. Accordingly, *Comcast* can be viewed, like *Wal-Mart*, as one more case in which plaintiffs simply have not shown they can prove the existence of a single class-wide wrong that holds the class together.⁹¹

Both features provide reasons to suspect that lower courts, particularly those in circuits hewing to the traditional view that

209 & 224 n.35 (Jordan, J., dissenting) (proposing a variation on this solution, and suggesting the damages phase could be practically managed through the certification of damages subclasses encompassing different segments of the market). *Comcast*’s broadest language (e.g., stating that failure of “commonality of damages” defeats certification of a “single class,” 133 S. Ct. at 1435), coupled with its pointed refusal to recommend bifurcation, may cast doubt on this practice, although it perhaps may alternatively reflect the Court’s implicit agreement with Comcast that the number of subclasses needed to deal with variations in damages at the remedial stage would raise separate problems under Rule 23(b)(3)’s manageability requirement. See Oral Arg. Tr. at 9–10, *Comcast v. Behrend*, 133 S. Ct. 1426 (2013) (No. 11-864) (“MR. ESTRADA: There are cases, indeed, in which . . . the variances of the classes can be dealt with, with subclasses . . . [T]here is considerable basis for skepticism in thinking that could ever be accomplished [here] because we are talking about 649 franchise areas with different competitive conditions.”).

⁸⁹ See, e.g., 133 S. Ct. at 1437 (Ginsburg, J., dissenting) (noting “[t]he oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents”).

⁹⁰ See Gary Lawson, *Stipulating the Law*, 109 Mich. L. Rev. 1191 (2011).

⁹¹ Compare *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (articulating the need for class members’ to identify the “same injury,” meaning a legal wrong capable of being remedied “at once”) with *Comcast*, 131 S. Ct. at 1435 (noting that “[f]or all we know,” some class members in different counties had incurred damages resulting exclusively from separate “wrong[s]” associated with the Comcast monopoly that had not been certified for class treatment—and holding that given the failure to demonstrate damages resulting from a single classwide wrong, “Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class”).

individualized damages calculations do not defeat predominance, may not feel bound to follow *Comcast's* broadest pronouncements.⁹²

2. *Conservatives Do It Too: Comcast's Lawmaking Problem*

While the exact import of *Comcast's* procedural holding remains to be seen, the case does seem to mark a significant *substantive* shift in the way the Court understands some key points of antitrust law. This point, which hasn't received much attention, also suggests an overlooked point of comparison between *Amgen* and *Comcast*.

In a post about *Comcast* on the *Point of Law* blog, Richard Epstein articulates the conventional view of plaintiffs' substantive rights: To demonstrate a right to damages, class members need only prove that monopolization caused some price impact affecting each member of the class, but do not need to prove the specific mechanisms for the impact.⁹³ The remedy in antitrust cases can then take the form of an average of the damage caused consumers as a group.⁹⁴

On that view of the substantive law, Epstein notes, plaintiffs met their burden of proof in *Comcast*. The fact of a classwide price increase attributable to *Comcast's* monopoly could be proven through the type of multiple regression submitted by Dr. McClave.⁹⁵ And once a classwide impact was proven, the amount of damages at the

⁹² For one early example of what is likely to be a broader phenomenon, see *Glazer v. Whirlpool Corp.*, 2013 U.S. App. LEXIS 14519 (6th Cir. July 18, 2013) (upholding certification limited to common liability issues and distinguishing *Comcast*).

⁹³ Richard A. Epstein, *The Precarious Status of Class Action Antitrust Litigation after Comcast v. Behrend*, *Point of Law*, Apr. 8, 2013, <http://pointoflaw.com/columns/2013/04/the-precious-status-of-class-action-antitrust-litigation-after-comcast-v-behrend.php>.

⁹⁴ *Id.*

⁹⁵ *Id.* (“[T]he information on the four possible sources of the increase should not be looked at in the alternative; if examined at all, the theories should be treated at most as cumulative descriptive evidence that is weaker in kind than the quantitative evidence in the regression itself. It is therefore a *plus* that the regression is not tied to the overbuilding theory [T]he numbers tell the key story, as each of the four theories mentioned could offer a partial explanation as to . . . how the antitrust injury came to pass.”). See also Sergio Campos, *Comcast Puzzles*, *Mass Tort Litigation Blog*, http://lawprofessors.typepad.com/mass_tort_litigation/2013/04/comcast-puzzles.html (April 8, 2013) (noting that the McClave model reflected “a standard method of determining an overcharge in an antitrust case” and wondering whether “it makes sense to isolate one antitrust violation [i.e., the overbuilding theory] to determine the ‘but for’ price”).

individual level could be established using the class-friendly imprecision of econometrics and averaging.⁹⁶

The majority in *Comcast* implicitly adopted a different understanding of antitrust law's contours. The tip-off is the Court's assumption that plaintiffs must prove a specific impact theory detailing a particular chain of events set in motion by the monopoly (here, deterrence of overbuilding) that led to *their* price increase.⁹⁷ That makes sense only if antitrust law adopts an individualized form of damages liability. If so, class members can't just offer blunt proof of a group impact to prove their entitlement to damages. That impact is the sum of a number of discrete *impact scenarios*, each of which may cause damages that are not evenly distributed across the class.⁹⁸ To isolate the individualized damages to which she, specifically, is entitled, a class member must accordingly isolate the specific impacts that affected *her*.⁹⁹ Put simply, an individualized conception of the remedy leads to an individualized conception of liability.

By treating class members' rights in this individualized way, the certification problem in *Comcast* follows as a matter of course, and the decision links up with Nagareda's concern that the class procedure ought to follow the contours of the substantive law. If each class member may recover only those damages attributable to specific harmful events affecting her, then showing class members' claims are resolvable on a class basis requires demonstrating that class members' claims flow from a single harmful impact that affected the class as a unit. McClave's study, which fails to isolate class damages attributable to any specific harmful chain of events, doesn't make this showing.¹⁰⁰ Finding plaintiffs are entitled to damages based on his study, would, indeed, *alter* class members' substantive rights

⁹⁶ Epstein, Precarious Status, *supra* note 93.

⁹⁷ *Id.* (damages could be calculated "by taking the total amount of antitrust injury that [defendants'] actions caused across the market and dividing it among the plaintiffs in a form that is certain *not* to reflect the exact injuries that each member of the class sustained") (emphasis in original).

⁹⁸ See, e.g., 131 S. Ct. at 1435 (noting the effects of the four different theories of "antitrust harms" may be confined to different parts of the class; "[t]he permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless").

⁹⁹ *Id.* at 1434 (raising concern that the model will identify damages that are "not the result of reduced overbuilding").

¹⁰⁰ *Id.*

by allowing some class members to recover damages that have no proven relation to any events that actually affected them.¹⁰¹

The cleavage between these two views of antitrust might be roughly described as one between public and private rights. The conventional modern view treats antitrust law as creating a quasi-public *group* remedy that can be proven easily on a class basis.¹⁰² The majority, by contrast, views the antitrust civil damages remedy in the narrow terms of the traditional private rights: as a remedy anchored by the real-world scope of each class member's individual injuries. Because, on this view, the focus of antitrust is the real-world experience of each individual, there is little doubt that private antitrust actions will qualify for class treatment less frequently (even if the details of the exact difficulties after *Comcast* remain to be worked out). The dissent characterized this latter conception as a "remarkable" shift in antitrust law's perspective.¹⁰³

This article takes no view about which conception of the substantive law is right (and, indeed, I confess some initial sympathy for the individualized view). The problem that I want to highlight here is a variant on the procedural problem in *Amgen*. *Amgen* reflected an old-fashioned use of procedure to engage in lawmaking "in operation, if not in doctrine." At first glance, *Comcast* might not seem to be comparable—as just suggested, Justice Scalia's opinion seems to reflect a shift in the way the Court understands antitrust law. And, indeed, his opinion even explicitly acknowledges the ruling flows from a determination of "law" about how antitrust claims are proven.¹⁰⁴

Yet the essence of the problem in cases like *Amgen* is that procedure enables substantive transformation without the usual accountable process of substantive *justification*. On a closer, second look, something similar in kind, if subtly different in operation, seems to

¹⁰¹ See, e.g., Brief of Petitioners, *Comcast v. Behrend*, 133 S. Ct. 1426 (2013) (No. 11-864) ("allowing gross damages by treating unsubstantiated claims of class members collectively" would "significantly alte[r] substantive rights").

¹⁰² See Epstein, *Precarious Status*, *supra* note 93.

¹⁰³ 133 S. Ct. at 1440 (Ginsburg, J., dissenting) (noting the Court's premise, that plaintiffs are entitled only to damages attributable to reduced overbuilder competition, as a "remarkable" interpretation of antitrust law that "it could not mean to apply in other cases").

¹⁰⁴ See *id.* at 1433 n.5 (noting that "while the data contained within an econometric model may well be 'questions of act' in the relevant sense, what those data prove" is a question of law).

be happening in the antitrust arena. As the procedural search for dissimilarities dictated by a search for common answers has taken hold, so lower courts have increasingly shifted in the direction of articulating a more individualized burden of proof in antitrust, but without any frank assessment of the usual substantive sources (text, legislative history, purpose and the like) that justify that shift.¹⁰⁵

The majority seemed to follow this trend. It pivots from fear that class members' inflated prices have their source in several different scenarios to the conclusion that the named plaintiff must dispel this fear by showing damages can be traced to a single scenario affecting the class as a whole. Yet that conclusion depends on the premise that the feared dissimilarities would actually impede class-wide resolution of class members' claims. That premise, in turn, properly depends on a substantive theory of antitrust that no court in the course of this litigation has squarely tried to justify.¹⁰⁶

The pattern, indeed, is the mirror image of one identified by Nagareda in the pre-*Wal-Mart* case law. Before *Wal-Mart*, he noted, some lower courts were led by plaintiffs' proffer of aggregate proof to assume the legal materiality of that proof—a phenomenon that he termed “conforming the law to the proof.”¹⁰⁷ This practice obviously predetermines the conclusion that certification is appropriate. The antitrust cases seem to exhibit the same pattern but from a different starting point and cutting in the opposite direction: presuming, based on defendants' proffer of proof showing various dissimilarities within the class, that this individualized proof is material to plaintiffs' recovery, leading to the predestined conclusion that the claims cannot be grouped together. Here, again, the law is being conformed to proof—but this time, to proof of dissimilarities rather than of sim-

¹⁰⁵ See Nagareda, *Aggregate Proof*, *supra* note 3, at 103.

¹⁰⁶ One good starting point for a broader justification would be the Court's subsequent observation, this term, in *American Express Co. v. Italian Colors Restaurant*, that “[t]he Sherman and Clayton Acts . . . were enacted decades before the advent of [Rule 23]” and so did not originally presuppose a group litigation unit. 133 S. Ct. 2304, 2309 (2013). The point in this article is not that the substantive theory on which certification analysis is implicitly premised is wrong or incapable of meaningful support from the usual legal sources, but that the courts in the case seemed, improperly, to rely on the dissimilarities framework of procedural doctrine to do much of the above-board work justifying a conclusion that depended, in significant part, on a missing substantive analysis.

¹⁰⁷ Nagareda, *Aggregate Proof*, *supra* note 3, at 104.

ilarities. Both miss the necessary step—a “definitive assessment” of the “precise delineation of the right at stake,”¹⁰⁸ which determines how the claims can be proven and so identifies “at the outset” of the certification inquiry which dissimilarities are legally relevant.¹⁰⁹

One can only speculate on the reason why the case law exhibits this pattern. Perhaps part of the story is an anchoring effect, in which a procedural analysis framed around a search for a certain type of proof (proof of similarities pre-*Wal-Mart*, or of dissimilarities post-*Wal-Mart*) biases courts toward attributing substantive importance willy-nilly to proof of that type identified in the record.¹¹⁰ Whatever the cause, *Comcast* is suggestive of an ironic turn. A reformulation of the class-action test, designed to promote accountability and transparency, may be replicating the same old bad tendency: conforming the law to procedure, rather than the other way around.

Conclusion

Because of the intense interest in class-action law, and the huge practical import of class-action cases for some of the country’s largest corporations, popular coverage of class-action law tends to treat class-action cases as a horse race between plaintiffs’ lawyers and corporate defendants. That focus, though, misses some less practical, but important, questions lurking behind the scenes.

Behind the immense “who’s up, who’s down” tactical commentary that surrounds *Amgen* and *Comcast*, this term’s two key class-action cases both squarely presented examples of a larger problem—the implication of the class device in disguised acts of judicial lawmaking. It’s tempting to dismiss this problem as one relating to middling process values not worth getting exercised over. Conforming to those values would have simply required putting the lawmaking taking place in both cases up-front. That would not necessarily have changed the outcomes in either case.

¹⁰⁸ *Id.* at 151.

¹⁰⁹ *Id.* at 129, 164.

¹¹⁰ “Anchoring” is the term for a common form of cognitive bias in which the starting point for a chain of reasoning colors subsequent analysis. For discussion, see Amos Tversky & Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, 185 *Science* 1124, 1128 (1974).

Why, then, make a fuss? Some fuss is warranted because transparency and accountability are important. These process values restrain and discipline federal courts and empower more appropriate law-makers. The stakes in the long run are significant, especially in the class-action field.¹¹¹

Hence the room for some concerns this term. Both *Amgen* and *Comcast* illustrate that together the conservative and liberal wings of the Court are, when the opportunity arises, susceptible to the kind of lawmaking-without-accountability that class procedure enables. Of course, perhaps both cases are just bumps in a long road toward a larger realignment of class-action procedure in a “pro law” direction. One can hope. For now, this term illustrates that such a realignment remains very much a work in progress.

¹¹¹ Indeed, it is no exaggeration to say that class procedure has been an engine for reshaping the role of courts and litigation in the business of regulation. One commentator argues it has created the “litigation state,” a judicial rival to the executive “administrative state.” See Sean Farhang, *The Litigation State: Public Regulation and Private Litigation in the U.S.* (2010). The point helps link the rule-of-law concerns explored in this article to those that have long been a part of the administrative-law conversation. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 406 (noting, with a focus on the administrative field, that “procedural elaboration . . . [is] a means of adjusting [agencies’] power,” and advocating a “truly stable framework of administrative procedure” subject to Congress’s control). In this regard, it is worth noting Justice Scalia’s comment, from a term ago, disparaging the “judge-empowering” image of administrative procedure as part of “a partnership between legislators and judges,” who “working [together would] produce better law than legislators alone could possibly produce.” See *United States v. Home Concrete & Supply*, 132 S. Ct. 1836, 1848 (2012) (Scalia, J., concurring). The same image, this term suggests, still casts a long shadow over the separate field of class-action analysis.