
ARTICLE

THE SUPREME COURT'S "NON-TRANSSUBSTANTIVE"
CLASS ACTION

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This year marks the fiftieth anniversary of the adoption of Federal Rule of Civil Procedure Rule 23, and with it, the advent of the modern class action. As the fiftieth anniversary approached, many scholars, including myself, said that class actions were dead, dying, or headed for a zombie state.¹ Many of

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¹ See, e.g., Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 163 (2015) (seeing "every reason to believe that businesses will eventually be able to eliminate virtually all class actions

the Supreme Court's recent class action cases all but confirmed that view.² In just the last six years, the Supreme Court ratcheted up the requirements for class certification under Rule 23 in *Wal-Mart Stores v. Dukes* and *Comcast v. Behrend*, increasing the cost and difficulty of obtaining certification. And, in a series of cases, the Court permitted the use of class action prohibitions in arbitration contracts, thus eliminating a swath of class actions and, often, the underlying claims themselves. The Court's language in these cases also tracked stock arguments against the class action,³ leaving the distinct impression that the Roberts Court was on a mission to diminish or destroy the class action procedure.

But a funny thing happened on the way to the funeral: just as the obituaries for the class action were being written, the Supreme Court issued a series of decisions that breathed new life into it. In *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*⁴ and *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,⁵ the Court reaffirmed the fraud-on-the-market theory, a critical tool in securities class actions.⁶ In *Tyson Foods v. Bouaphakeo*,⁷ the Court vindicated the use of statistical proof to satisfy Rule 23 requirements, distancing itself from strong suggestions in prior cases that individualized

that are brought against them"); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (predicting that, "with a handful of exceptions, class actions will soon be virtually extinct"); Charles Silver & Maria Glover, *Zombie Class Actions*, SCOTUSBLOG (Sept. 8, 2011, 10:16 AM), <http://www.scotusblog.com/2011/09/zombie-class-actions/> [<https://perma.cc/W7RU-6LC6>] (describing the class action's "zombie potential" to survive, but stripped of its capacity to give value to claimants).

² See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (upholding the validity of a contractual waiver of class arbitration); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (holding that "[r]espondents' class action was improperly certified under Rule 23(b)(3)"); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357 (2011) (concluding that plaintiffs' statistical proof of pay disparity flunked Rule 23(a)(2)'s commonality requirement); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336, 352 (2011) (holding that the Federal Arbitration Act preempted a state rule that "condition[ed] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures").

³ See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686-87 (2010) (describing the consequences of class action arbitration and litigation).

⁴ 134 S. Ct. 2398 (2014).

⁵ 133 S. Ct. 1184 (2013).

⁶ See *Halliburton II*, 134 S. Ct. at 2407 (declining to set aside the rebuttable presumption of reliance that permits securities-fraud plaintiffs to proceed as a class (citing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)); *Amgen*, 133 S. Ct. at 1193 (reaffirming *Basic*'s fraud-on-the-market theory and noting that, while fraud on the market "can be invoked by any Rule 10b-5 plaintiff, the doctrine has particular significance in securities-fraud class actions" since it "facilitates class certification by recognizing a rebuttable presumption of classwide reliance" (citations omitted)).

⁷ 136 S. Ct. 1036, 1049 (2016).

proof requirements would doom class certification.⁸ And the language in these cases tracked stock arguments in *favor* of class actions.⁹

To paraphrase Mark Twain, the rumors of the class action's death now seem greatly exaggerated. But the Court's class action decisions raise a new and perhaps more vexing question. If the Court is not fully intent on destroying the class action, what drives its seemingly disparate decisions? Do they reflect an anti-class action agenda losing steam, as Professor Coffee has suggested?¹⁰ Was the unbridled anti-class action agenda an illusion to begin with? Or is there a deeper explanation for these decisions? Part I of this Article demonstrates that the Court's "pro-class action" decisions cannot be easily reconciled with their "anti-class action" counterparts through traditional means—neither through straightforward applications of Rule 23, nor precedent, nor particular case facts. But Part II posits that the Court's seemingly disparate class action cases can still be rationalized. To do so, however, one must look past the procedural veneer and consider the underlying substantive rules and remedial regimes at stake. Indeed, a key question presented in each case—notwithstanding what appears in the petitions for writs of certiorari—is whether the Court will embrace an interpretation of a substantive rule that has the effect of facilitating the availability of the class action. The Court's ultimate answer reflects a composite judgment about the substantive rule at issue and its implications for the availability of the class action device. Accordingly, to the extent one insists that procedural rules are, or ought to be, transsubstantive—that, "in form and manner of application, [they do] not vary from one substantive context to the next"¹¹—the Court's class action jurisprudence might actually be deemed "non-transsubstantive."

⁸ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2016) (finding that, "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 'to abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims" (citations omitted) (quoting 28 U.S.C. § 2072(b) (2012)).

⁹ See, e.g., *Halliburton II*, 134 S. Ct. at 2407-08 (noting that "requiring proof of individualized reliance from every securities fraud plaintiff effectively would prevent plaintiffs from proceeding with a class action in Rule 10b-5 suits" (internal quotation marks omitted)); *Amgen*, 133 S. Ct. at 1199-1201 (dismissing Amgen's policy objections to certification).

¹⁰ See John C. Coffee, Jr., *The Supreme Court "Saves" the Class Action: Complex Litigation After Scalia*, CLS BLUE SKY BLOG (Apr. 4, 2016), <http://clsbluesky.law.columbia.edu/2016/04/04/the-supreme-court-saves-the-class-action-complex-litigation-after-scalia/> [<https://perma.cc/ZR3L-HEHL>] (noting that "*Tyson Foods* suggests that the Scalia Revolution, which arguably sought to do to the class action what the French Revolution did to the French aristocracy, is now over and has fallen well short of its original goals").

¹¹ David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1191 (2013). For further discussion of transsubstantivity and the Federal Rules of Civil Procedure, see generally Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

This Article's thesis has numerous implications—for separation of powers, judicial lawmaking power, federalism, the role of precedent, notions of transsubstantive procedure, procedural theory, and the nature and legitimacy of the judicial role, among others. The limitations of the Article format permit consideration in Part III of just two: First, the implications for the nature and scope of the federal courts' procedural and substantive lawmaking powers under the Rules Enabling Act [hereinafter Enabling Act].¹² And second, related implications for the nature and legitimacy of the judicial role in "procedural" opinions.

I. THE ROBERTS COURT'S COMPETING CLASS ACTION CASES

A side-by-side analysis of the Roberts Court's "anti-class action" and "pro-class action" cases reveals stark tensions between them and leaves the impression that the Court is lost at sea in its class action jurisprudence. Start with the Court's anti-class action decision in *Dukes*. Authored by Justice Scalia, *Dukes* made class certification under Rule 23 more difficult across the entire substantive landscape. First, in holding that a proposed class of female Wal-Mart employees failed to satisfy the commonality requirement of Rule 23(a)(2), the Court issued a new, heightened commonality standard.¹³ A putative class must now demonstrate the existence of a common question that "is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."¹⁴ In evaluating whether plaintiffs have satisfied that Rule 23 standard, courts must now perform a "rigorous evaluation" of whether certification requirements are met, including an evaluation of any overlapping merits questions.¹⁵

Second, the Court rejected plaintiffs' proposed use of statistical sampling to estimate damages and resolve defendant's affirmative defenses to plaintiffs' claims of discrimination.¹⁶ Invoking the Enabling Act, the Court stated that "Trial by Formula" would impermissibly "abridge" defendant's substantive

¹² 28 U.S.C. § 2072 (2012).

¹³ See *Dukes*, 564 U.S. at 368 (Ginsburg, J., dissenting) (describing the majority opinion as "import[ing] into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment"); see also A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 463-75 (2013) (describing the heightened commonality requirement of *Dukes*).

¹⁴ *Dukes*, 564 U.S. at 350.

¹⁵ See *id.* at 351-52 (noting that the "rigorous analysis" needed to ensure compliance with Rule 23(a)(2) "will entail some overlap with the merits of the plaintiff's underlying claim" (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982))).

¹⁶ See *id.* at 367 (disapproving that "novel project").

right to "litigate its statutory defenses to individual claims."¹⁷ Whether this holding was meant to entirely reject statistical sampling as a means of satisfying Rule 23 in general was unclear.¹⁸ But the overall signal was strong: statistical evidence, particularly in aggregate proceedings, was suspect.¹⁹

The Court's holdings in *Dukes* are in considerable tension with two contemporaneous, "pro-class action" cases, *Amgen* and *Halliburton II*. Both cases involved securities fraud claims arising under section 10b of the Securities Exchange Act of 1934²⁰ and SEC Rule 10b-5.²¹ To make out a prima facie case for securities fraud under Rule 10b-5, plaintiffs must establish that they relied upon defendants' alleged misrepresentations.²² However, in 1988, the Supreme Court held in *Basic v. Levinson* that investors are presumed to have relied on the defendant's misrepresentation when they purchased stock because of additional presumptions regarding the integrity of the market price itself.²³ That "fraud-on-the-market" presumption is critical to class certification—without it, individual issues of reliance would predominate under Rule 23(b)(3).²⁴ Both *Amgen* and *Halliburton II* involved questions regarding what plaintiffs needed to prove, at the class certification stage, to invoke the *Basic* presumption.

In *Amgen*, defendants argued that investors needed to prove the materiality of Amgen's statements at the certification stage to invoke the *Basic* presumption and survive the Rule 23(b)(3) predominance inquiry.²⁵ Somewhat surprisingly,²⁶ the majority opinion, notably joined by Chief Justice Roberts,²⁷ rejected defendants' predominance argument. The majority

¹⁷ *Id.*

¹⁸ See Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1028-29 (2013) (noting that the Court's Rule 23(b)(2) holding in *Dukes* specifically "implicate[d] questions of Title VII policy").

¹⁹ See Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 133 (2009) ("The battleground today for aggregate proof in class certification centers on the use of economic or statistical analysis . . .").

²⁰ 15 U.S.C. § 78j (2006).

²¹ 17 C.F.R. § 240.10b-5 (2017).

²² See *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988) ("We agree that reliance is an element of a Rule 10b-5 cause of action.")

²³ *Id.* at 241-42.

²⁴ See, e.g., *Halliburton II*, 134 S. Ct. 2398, 2416 (2014) (explaining that "without the presumption of reliance, a Rule 10b-5 suit cannot proceed as a class action").

²⁵ *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1188, 1198-99 (2013).

²⁶ See, e.g., Jonathan Stempel et al., *Amgen Loses as Top U.S. Court Backs Class Actions*, REUTERS (Feb. 27, 2013, 2:18 PM), <http://www.reuters.com/article/us-usa-amgen-ruling-idUSBRE91QoRL20130227> [<https://perma.cc/UW9Z-DMXV>] (observing that the Court's decision in *Amgen* "breaks a recent trend . . . to narrow class-action litigation").

²⁷ Chief Justice Roberts joined the majority opinions in *Dukes*, *Comcast*, *Italian Colors*, and *Concepcion*. It is likely that Roberts queued up the materiality holding in *Amgen* by conspicuously omitting materiality as a prerequisite in *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*), 563 U.S. 804 (2011). See Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness*,

reasoned that, because the common question of materiality is both a prerequisite for invoking the *Basic* presumption and a stand-alone element of securities fraud, the threat of individual issues predominating over common ones was functionally fictive.²⁸

That holding, and its reasoning, is in tension with both the certification holdings and the reasoning of *Dukes*. While the 10b-5 element of materiality is a common question, it is also an *antecedent* question to whether the separate 10b-5 element of reliance can be established through common proof.²⁹ Materiality is, therefore, a common question about whether there is a common question. This state of affairs seems impermissible under *Dukes*. Plaintiffs in *Dukes* argued that they could answer the question of whether Wal-Mart had a particular sort of discriminatory policy—whereby regional managers were conduits for the discriminatory culture at the national level—through common proof.³⁰ But that approach would not reveal whether the question apt to drive the resolution of the litigation—“*why was I disfavored*”—could be established through common proof.³¹ *Amgen* tracks this set-up. Investors argued that materiality was a question they could answer through common proof.³² Whether plaintiffs can answer *that* question through common proof, however, does not tell us whether individualized questions of reliance can be answered through common proof.

Moreover, as Justice Thomas admonished in his *Amgen* dissent, both Rule 23(b)(3) and *Basic* insist that certification requirements be met *at the time of certification*.³³ If plaintiffs fail to prove materiality at the merits stage, the case ends there—but that means that the case should never have been certified to begin with. This is no mere formalistic point: certification itself imposes

and Securities Class Actions, 93 WASH. U. L. REV. 487, 518 (2015) (pointing out that unlike in *Amgen*, the Court did not address materiality in *Halliburton I*). Yet *Halliburton I* commanded a unanimous court, while *Amgen* did not. The likelier explanation, then, is that the materiality issue was splitting the lower courts, and its omission in *Halliburton I* helped Roberts obtain a unanimous opinion.

²⁸ *Amgen*, 133 S. Ct. at 1191 (holding that proof of materiality is not a prerequisite to certification because, as an essential element of the securities fraud claim, failure of proof simply ends the case).

²⁹ See *Amgen*, 133 S. Ct. at 1211 (Thomas, J., dissenting) (arguing that, under the majority’s reasoning, “plaintiffs will [either] prove materiality on the merits, thus demonstrating *ex post* that common questions predominated at certification, or . . . they will fail to prove materiality, at which point we learn *ex post* that certification was inappropriate because reliance was not, in fact, a common question”).

³⁰ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 344-45 (2011) (describing plaintiffs’ allegations against Wal-Mart that discrimination is common to all female employees).

³¹ See *id.* at 352.

³² See *Conn. Ret. Plans & Tr. Funds v. Amgen Inc.*, No. CV 07-2536 PSG (PLAx), 2009 WL 2633743, at *4, *8-13 (C.D. Cal. Aug. 12, 2009) (evaluating plaintiffs’ arguments in support of their motion for certification and finding that all prerequisites for Rule 23(a) were satisfied).

³³ *Amgen*, 133 S. Ct. at 1213 (Thomas, J., dissenting) (noting that “[m]ateriality, at the time of certification, has been a driving force behind the [fraud-on-the-market] theory from the outset”).

settlement pressure before the merits stage. Empirically, it is the merits stage, not the certification stage, that tends to be functionally fictive.³⁴

These tensions between *Amgen* and *Dukes* cannot simply be explained away through traditional methods of case distinction. First, *Basic* stated that materiality was in fact a prerequisite for invoking the fraud-on-the-market presumption,³⁵ so the result in *Amgen* was not directed by stare decisis; if anything, prior precedent suggests the opposite. Second, Congress has taken no position on the issue, so the differing opinions are not a product of legislative directive.³⁶ Third, even if the majority in *Amgen* has the better of the Rule 23 interpretive arguments—after all, the fraud-on-the-market theory matters to predominance only instrumentally, and the text of Rule 23(b)(3) does not *prohibit* the majority's interpretation—the 23(b)(3) question was no slam dunk. A Court motivated to restrict the class action could have crafted an argument for requiring proof of materiality under Rule 23(b)(3) itself, as well as under *Basic* and *Dukes*. *Amgen* is puzzling not only given its tension with prior precedent, but also because it departed from the Roberts Court's trend toward resolving close calls *against* the class action.

The Court issued another confounding pro-class action opinion in *Halliburton II*. There, the Court first rejected defendants' argument to overrule *Basic*.³⁷ The Court then rejected defendants' contention that plaintiffs must directly prove "price impact" in order to invoke the *Basic* presumption at certification.³⁸ It also held that defendants' individualized right to rebut the presumption of reliance did not defeat predominance under Rule 23(b)(3).³⁹ In so doing, the Court dismissed various policy arguments

³⁴ See, e.g., J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1723 (2012) (noting that, as "trials have all but disappeared, settlement . . . has become the dominant mode of civil dispute resolution"); Nagareda, *supra* note 19, at 172 (observing that "settlement, rather than trial, [is] the endgame of civil litigation").

³⁵ 485 U.S. 224, 230, 248 n.27 (1988) (granting certiorari to determine "whether the courts below properly applied a presumption of reliance in certifying the class," and noting that, "in order to invoke the fraud on the market presumption, a plaintiff must allege and prove . . . that the misrepresentations were material").

³⁶ Congress has done nothing to overturn *Basic*, which listed materiality as a prerequisite for invoking the fraud-on-the-market theory. See Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 153 ("Though urged to do so by politicians and lobbyists pushing an aggressive reform package, Congress did not undo *Basic*'s presumption, and so the holding lives on today."). But see *Amgen*, 133 S. Ct. at 1204 (Scalia, J., dissenting) (arguing that support for the fraud-on-the-market theory "is to be found nowhere in the United States Code" but instead "was invented by the Court in *Basic*").

³⁷ *Halliburton II*, 134 S. Ct. 2398, 2407 (2014) (noting that, "[b]efore overturning a long-settled precedent" the Court "require[s] 'special justification,'" concluding that "Halliburton has failed to make that showing" (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000))).

³⁸ *Id.* at 2414.

³⁹ *Id.* at 2412.

against class actions themselves.⁴⁰ Indeed, the Court fully preserved *Basic*, not *in spite* of the class-facilitative effects of the fraud-on-the-market theory, but *because of them*.

As with *Amgen*, the result in *Halliburton II* is not easily explained. Juxtapose, for example, the Court's treatment in *Halliburton II* of defendants' right to rebut the presumption of reliance under 10b-5 with its Rule 23 analysis of defendants' right to rebut a presumption of discrimination under Title VII in *Dukes*.⁴¹ Under Title VII, defendants have a right to rebut evidence of a pattern or practice of discrimination with individualized proof that, for any individual employee, any such pattern or practice did not affect employment decisions.⁴² Plaintiffs' proposed "Trial by Formula" for answering questions of liability and backpay through common proof would violate the Enabling Act by abridging defendants' substantive right to individualized rebuttals.⁴³

Similarly, *Basic* states that defendants have a right to rebut reliance for each and every class member.⁴⁴ After *Dukes*, it would seem that such a right necessarily defeats predominance under Rule 23(b)(3). But despite the result in *Dukes*, where the defendants' right precluded certification of a proposed (b)(2) class in part because that right defeated commonality, the Court in *Halliburton II* brushed a conceptually similar right aside. Indeed, the majority in *Halliburton II* characterized defendants' right as simply one to "pick off" a few class members here or there.⁴⁵ And a right of that nature would not generate so significant a number of individualized issues as to defeat predominance (much less commonality). That analysis may well have been necessary to preserve *Basic*, but it is inconsistent with *Dukes*, which views the

⁴⁰ *Id.* at 2413 (noting that concerns over class actions' potentially negative policy consequences "are more appropriately addressed to Congress").

⁴¹ *Compare id.* at 2412 ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate."), *with* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (holding that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims").

⁴² *See* *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (holding that after the plaintiff has established a prima facie case of discrimination under Title VII, "[t]he burden that shifts to the defendant . . . is to rebut the presumption of discrimination . . . that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason"); *see also id.* at 254 n.8 ("This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law. The word "presumption" properly used refers only to a device for allocating the production burden." (quoting JAMES FLEMING JR. ET AL., CIVIL PROCEDURE §§ 7-9 (2d ed. 1977))).

⁴³ *Dukes*, 564 U.S. at 367.

⁴⁴ *Basic Inc. v. Levinson*, 485 U.S. 224, 249 (1987); *see also Halliburton II*, 134 S. Ct. at 2424 n.6 (Thomas, J., concurring) (describing *Basic* as "offer[ing] defendants a chance to rebut the presumption on individualized grounds").

⁴⁵ *Halliburton II*, 134 S. Ct. at 2412.

defendants' right formally and the question as to what is the appropriate scope of Rule 23 under the Enabling Act.⁴⁶

The securities fraud "pro-class action" trilogy is also out of step with the Court's view of the class action, given the Court's contemporaneous decisions cutting back at class certification and the class action device itself. First, in *Comcast*, the Court ratcheted up certification requirements by holding that to satisfy predominance under Rule 23(b)(3), plaintiffs must show, through "evidentiary proof," that they can "establish that damages are susceptible of measurement across the entire class."⁴⁷ This is a potentially remarkable swipe at class actions: a requirement that damages must be measurable "on a classwide basis"⁴⁸ flies in the face of longstanding recognition that individual damages calculations do not defeat predominance.⁴⁹

At roughly the same time, the Court cut back sharply on the class action device itself in a series of cases involving arbitration contracts that prohibited class actions. Lower courts had split on the permissibility of these so-called "class action waivers."⁵⁰ The Roberts Court, recounting stock anti-class action arguments—particularly that class actions generate *in terrorem* settlement pressure—resolved the division firmly in favor of the class action prohibitions.⁵¹

⁴⁶ Halliburton did achieve one small victory: the Court held that securities-fraud defendants could use price impact evidence to rebut plaintiffs' invocation of the fraud-on-the-market theory, leading some securities scholars to characterize *Halliburton II* as class action restrictive. See, e.g., John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 14 (2015) (commenting that, in the wake of *Halliburton II*, defendants "will have an additional ability to block class certification by showing that the alleged misrepresentations had no impact on the price of the stock at the time the misrepresentations were made"); Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 57 ARIZ. L. REV. 37, 47 (2015) (noting that *Halliburton II* permits defendants to raise the issue of price impact as a defense to certification). However, the impact on securities class actions is likely to be slight. See *Halliburton II*, 134 S. Ct. at 2424 (Thomas, J., concurring) ("[I]n practice, the so-called 'rebuttable presumption' is largely irrebuttable.").

⁴⁷ *Comcast Corp. v. Behrand*, 133 S. Ct. 1426, 1432-33 (2013).

⁴⁸ *Id.* at 1433 ("[U]nder the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis.").

⁴⁹ *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting) ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.").

⁵⁰ See, e.g., Gilles, *supra* note 1, at 402-04 (identifying a lower court split on the interpretation of class action waivers in contracts); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1752-54 (2006) (describing the majority and minority approaches to determining the validity of class action waivers in mandatory arbitration agreements).

⁵¹ The Court in *Stolt-Nielsen* declined to infer an "implicit agreement to authorize class-action arbitration," largely due to various policy concerns with the class action device. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685-86 (2010). Against that backdrop, the Court held in *Concepcion* that the Federal Arbitration Act preempted a California unconscionability rule calling for courts to strike down class action bans when they amounted to exculpatory clauses. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). In *Italian Colors*, presented with a factual record demonstrating that it would be uneconomical for claimants to assert their antitrust claims individually, the Court held that the FAA required the terms of arbitration contracts to be

Thus, in the context of the Roberts Court's class action opinions—indeed, in the context of the Roberts Court's so-called “procedural revolution” in favor of business⁵²—the securities fraud trilogy is an oddity. As of 2015, any “pro-class action” stance in the Court was largely viewed as securities-fraud specific. But then the Court issued its latest, and perhaps largest, victory for class actions: *Tyson Foods v. Bouaphakeo*.⁵³

Tyson is not only at odds with the holdings in *Dukes* and *Comcast* and the broad language condemning class actions in the class arbitration cases, but it is also in tension with the view that the Court limits its pro-class action opinions to the securities fraud context. *Tyson* involved a class of employees of Tyson Foods who, following a jury trial, had recovered \$2.9 million in compensatory damages arising from Tyson's violations of the Fair Labor Standards Act of 1938⁵⁴ (FLSA) and, by incorporation of the FLSA, the Iowa Wage Payment Collection Law⁵⁵ (IWPCL).⁵⁶ The crux of plaintiffs' claims was that Tyson had not paid statutorily mandated overtime for time employees spent donning and doffing protective equipment—time that Tyson had not recorded, as required by statute.⁵⁷ Because Tyson failed to record employee time, plaintiffs relied on a statistical time study to establish liability and damages through common proof.⁵⁸

On appeal, Tyson argued that plaintiffs' reliance on this time study was improper. First, Tyson asserted that time spent donning and doffing raised individualized questions of fact under Rule 23(b)(3), particularly as to uninjured plaintiffs who had not worked more than forty hours per week.⁵⁹ Second, Tyson contended that plaintiffs' time-study, offered as common proof under Rule 23 of liability and damages, violated its right under the FLSA to present individualized defenses.⁶⁰ Third, Tyson argued that since plaintiffs'

“rigorously enforce[d],” regardless of the consequences to dispute resolution or claiming. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); see J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3072-74 (2015) (describing *Italian Colors*'s eliminating effect on the “effective vindication” principle).

⁵² See Coates, *supra* note 46, at 3; see also *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 8 (2009) (statement of Stephen B. Burbank) (describing the Roberts Court's approach as leading to “the emasculation of private civil litigation as a means of enforcing public law”); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 328-29 (2012) (noting the successes of corporate parties in several of the major civil procedure decisions of the Roberts Court).

⁵³ 136 S. Ct. 1036 (2016).

⁵⁴ 29 U.S.C. §§ 201-219 (2012).

⁵⁵ IOWA CODE §§ 91A.1-14 (2016).

⁵⁶ *Tyson*, 136 S. Ct. at 1042-44.

⁵⁷ *Id.* at 1042.

⁵⁸ *Id.* at 1043.

⁵⁹ *Id.* at 1044.

⁶⁰ *Id.* at 1048.

model could not sort out members of the plaintiff class who were uninjured, damages could not be calculated on a class-wide basis under 23(b)(3), as required by *Comcast*.⁶¹

The fact that *Tyson* appealed a mere \$2.9 million judgment to the Supreme Court is noteworthy: it was no doubt a broad attempt by *Tyson* and members of the class action defense bar to capitalize on the anti-class action and anti-statistical evidence sentiment in the Roberts Court.⁶² The gambit: to cut back significantly on class actions by eliminating the use of statistical evidence at certification. Instead, the Court handed *Tyson* a sweeping defeat.

Like *Halliburton II* and *Amgen* before it, *Tyson* is difficult to reconcile with the Court's broader class action jurisprudence. In *Tyson*, the majority approved plaintiffs' use of statistical proof for liability and damages, with nary a whisper of its earlier disapproval in *Dukes* of that same approach. Instead, somewhat turning *Dukes* on its head, the Court held that *prohibiting* statistical sampling in class cases would violate the Enabling Act.⁶³ The Court also found—with no mention of *Comcast*—that any individualized liability or damages issues as they related to uninjured plaintiffs could be addressed prior to allocation of the class-wide judgment.⁶⁴

Some have attempted to contextualize *Tyson* as a quirky FLSA case,⁶⁵ or even as a quirky *Tyson* case⁶⁶—driven by the particular foibles of *Tyson* itself. Such theories seem more predictive than descriptive. Long before mentioning the FLSA, the Court spent over a page emphasizing the

⁶¹ *Id.* at 1049-50; see also Reply Brief of Petitioner at 14, *Tyson*, 136 S. Ct. 1036 (No. 14-1146) (“*Comcast's* reasoning controls here. Once *Tyson* showed that the Mericle time study [failed to prove] that any class members worked unpaid overtime . . . the class should have been decertified.”).

⁶² See, e.g., Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 1 (2011) (opining that class action plaintiffs suffered losses before the Court that could have been avoided but for their “overreach”).

⁶³ Compare *Tyson*, 136 S. Ct. at 1046 (holding that representative evidence may not be deemed improper merely because it is offered in support of a class action plaintiff's claim, since doing so “would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot abridge any substantive right” (internal quotation marks omitted)), with *Wal-Mart v. Dukes*, 564 U.S. 338, 367 (2011) (holding that, since the Enabling Act forbids abridging any substantive right, “a class cannot be certified on the premise that *Wal-Mart* will not be entitled to litigate its statutory defenses to individual claims”).

⁶⁴ Compare *Tyson*, 136 S. Ct. at 1050 (“Petitioner may raise a challenge to the proposed method of allocation when the case returns to the District Court for disbursal of the award.”), with *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (reversing the decision of the Third Circuit for “refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification”). On remand, the district court determined that there were no uninjured plaintiffs. *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ, 2016 WL 5868081, at *4 (N.D. Iowa Oct. 6, 2016).

⁶⁵ See, e.g., Andrew J. Trask, *Litigation Matters: The Curious Case of Tyson Foods v. Bouaphakeo*, 2016 CATO SUP. CT. REV. 279, 279 (15th ed. 2016) (suggesting that in *Tyson*, “the Court was not engaging in a particular project to expand or limit its previous holdings, but instead deciding the case on the unique facts in front of it”).

⁶⁶ Trask, *supra* note 65.

importance of statistical evidence to a wide range of substantive laws and to class actions generally.⁶⁷ *Tyson* cannot be read to simply permit statistical proof in a narrow set of circumstances. Further, the Court mentions *Tyson*'s missteps—particularly its opposition to bifurcation at the trial stage—as an afterthought.⁶⁸ Something else must be afoot.

* * *

The Supreme Court's dueling sets of class action cases cannot be fully reconciled by a straightforward application of Rule 23 or prior precedent. Nor can they be easily distinguished by the particular facts of those cases. While one or more of these interpretive methods are relevant to understanding the class action decisions, they do not sufficiently explain them. Accordingly, these cases cannot be accurately described as “pro-” or “anti-” class action, either in the abstract or relative to one another. The following part uncovers an alternative lens through which these cases may be viewed more clearly.

II. THE COURT'S “NON-TRANSSUBSTANTIVE” CLASS ACTION DECISIONS

A procedural view of the Supreme Court's recent class action decisions yields perplexing inconsistency. This Part suggests that to make sense of these cases, one must look beyond the “procedural” veneer and view the cases not only as decisions about Rule 23 and class actions, but, just as importantly, as decisions about whether the law should embrace *substantive* rules that facilitate class actions.

The term “substantive” eludes easy definition.⁶⁹ The rules and decisions to which this Article refers as “substantive” include interstitial lawmaking vis-à-vis the contours and interpretation of underlying liability policy, rights of redress and rebuttal, and federal statutes. Moreover, these judgments are informed by the desirability (or lack thereof) of their class-facilitative effects within the context of various substantive remedial schemes. And it is these substantive decisions that often drive the procedural outcomes in the class action cases. Thus, while largely viewed as procedural cases—and indeed, largely ignored by the media and the public as such⁷⁰—these class action cases, both under

⁶⁷ *Tyson*, 136 S. Ct. at 1045-47.

⁶⁸ *Id.* at 1050 (relegating the consideration of *Tyson*'s litigation conduct to the final four sentences of the majority opinion).

⁶⁹ See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974) (remarking that the terms “substance” and “procedure” lack any “monolithic meaning”).

⁷⁰ See Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293, 319 (2015) (demonstrating that “Supreme Court rulings on private enforcement of rights receive dramatically less press coverage than decisions concerning the rights themselves”).

Rule 23 (*infra* Section II.A.) and the Federal Arbitration Act (FAA)⁷¹ (*infra* Section II.B.), seem decidedly *non*-“trans-substantive.”⁷²

A. *The Court's "Non-Transsubstantive" Rule 23 Jurisprudence*

A closer look at the Court's Rule 23 decisions reveals that, though largely framed as procedural, they are driven in large part by the Court's substantive judgments. Specifically, subsection 1 examines the (largely implicit) substantive lawmaking driving these “procedural” holdings. Subsection 2 explores the Court's *composite* judgments about the interaction between the class action and the overall substantive remedial regime—judgments that ultimately inform the Court's willingness to adopt any particular class-facilitative substantive rule. Both sorts of judgments suggest a “non-transsubstantive” character to the Roberts Court's class action jurisprudence, and that character in turn alleviates procedural whiplash.

1. Substantive Lawmaking

A deeper analysis of the Roberts Court's Rule 23 cases reveals that its holdings often derive from the Court's lawmaking *vis-à-vis* the relevant substantive liability rules. Indeed, Rule 23 often—appropriately—takes its procedural marching orders from the dictates of the underlying substantive law. The Rule 23 cases are not so much *at odds* with one another as a matter of procedure—rather, they are perhaps not predominantly *about* procedure.

Reconsider, then, the securities class action opinions. Even with the clear interrelationship between the substantive evidentiary presumption from *Basic* and Rule 23, the parties' briefs—even in *Halliburton II*—framed the questions presented around the class action consequences of *Basic*, as did amicus briefs on both sides and scholarly commentary before and after the decision.⁷³ Defendants' ultimate gambit was not so much substantive—to destroy the fraud-on-the-market presumption—but instead procedural—to destroy

⁷¹ 9 U.S.C. §§ 1-16, 201-08, 301-07 (2006).

⁷² Marcus, *supra* note 11, at 1203-07 (describing transsubstantivity as existing on a spectrum in the context of procedural doctrine).

⁷³ See e.g., Brief for Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioners at 2-3, *Halliburton II*, 134 S. Ct. 2398 (2014) (No. 13-317) (describing “the significant burden imposed on their members by private securities class action litigation, which adversely affects access to capital markets and raises costs for American businesses of all sizes”); Brief of Legal Scholars as Amici Curiae With Respect to Stare Decisis in Support of Respondent at 18, *Halliburton II*, 134 S. Ct. 2398 (No. 13-317) (arguing that “[o]verruling *Basic* would pull the rug out from under Congress's feet”); Eric Alan Isaacson, *The Roberts Court and Securities Class Actions: Reaffirming Basic Principles*, 48 AKRON L. REV. 923, 948-49 (2015) (suggesting that *Halliburton II*'s “far-reaching consequences for securities-fraud litigation . . . are apt, on whole, to be quite favorable to class-action plaintiffs asserting fraud-on-the-market claims”).

securities class actions which typically cannot survive certification without that presumption.

Defendants' procedural gambit was met with defeat, but the defeat was not particularly "procedural." Though framed as Rule 23(b)(3) holdings, neither the materiality determination in *Amgen* nor the rebuttal right characterization in *Halliburton II* flowed from *Basic*.⁷⁴ Nor did they require rejection, narrowing, or distinction from the Rule 23 holdings in *Dukes*. Nonetheless, the Rule 23 holdings in *Amgen* and *Halliburton II* require something—something beyond Rule 23, *Basic*, and *Dukes*—that bridges the gap between individual and class proceedings. That something is the Court's substantive, interstitial lawmaking regarding the meaning of *Basic* and, to some degree, Rule 10b-5.

Start with *Amgen*. The majority in *Amgen* could not reach its conclusion that materiality need not be proved at certification without tip-toeing around *Basic*: in the view of the *Amgen* majority, *Basic* requires materiality as a prerequisite for invoking the fraud-on-the-market presumption, but it does not require *proof* of materiality for purposes of certification.⁷⁵ The majority in *Amgen* also could not reach its conclusion without tip-toeing around *Dukes*, which requires courts to perform a "rigorous analysis" of questions bearing upon class certification requirements—including those that overlap with the merits.⁷⁶

Consider *Halliburton II*. The Court's individual rebuttal rights holding from *Dukes* could have dictated a contrary Rule 23(b)(3) result—unless, of course, the Court in both cases in fact engaged in implicit lawmaking vis-à-vis the nature and scope of the respective rebuttal rights under 10b-5 and Title VII. The exercise of this interstitial lawmaking power in both cases provides the Court freedom—as a matter of Rule 23 precedent, and, to the extent *Basic* enjoys congressional support, the separation-of-powers values underlying the Enabling Act⁷⁷—to render its functionalist Rule 23(b)(3) holdings. In fact,

⁷⁴ See *Basic v. Levinson*, 485 U.S. 224, 230, 248 n.27 (granting certiorari to determine "whether the courts below properly applied a presumption of reliance in certifying the class," and noting that, "in order to invoke the presumption, a plaintiff must allege and prove . . . that the misrepresentations were material"); see also *id.* at 250 ("That presumption, however, is rebuttable."). Furthermore, the Court in *Basic* did not mention the Rules Enabling Act as it did in *Dukes*. See *Basic*, 485 U.S. 224; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.").

⁷⁵ See *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1188, 1195 (2013) (noting that, under *Basic*, materiality is "indisputably" an "essential predicate of the fraud-on-the-market theory" but holding that proof of materiality is not needed at the certification stage to satisfy the requirement of predominance under Rule 23(b)(3)).

⁷⁶ *Dukes*, 564 U.S. at 351.

⁷⁷ See *supra* note 36. If *Basic* does have congressional imprimatur, the Court is constrained by the separation of powers in procedural decisionmaking. See Stephen B. Burbank, *The Rules Enabling Act*

once those substantive judgments were rendered, contrary Rule 23 holdings that might have better aligned with *Dukes* were largely foreclosed. The procedural holdings in the securities fraud cases flowed, as they must, from the dictates of the substantive law.

As it turns out, so did the procedural holdings in *Dukes*. Recall that in *Dukes*, the principal question presented was whether this extraordinarily large class satisfied the commonality requirement of Rule 23(a). That question, however, obscures an embedded question of substantive liability policy in Title VII. Because Wal-Mart had no official company-wide policy of gender discrimination, plaintiffs argued instead that Wal-Mart's discrimination emanated from the national level, after which regional managers became conduits for discrimination by exercising discretion over pay and promotion decisions on "excessively subjective" terms.⁷⁸

The Ninth Circuit certified the class on the grounds that plaintiffs had raised a common question under Rule 23(a) as to whether such a discriminatory policy, under their conduit theory, existed.⁷⁹ But therein lies the rub. Without answering the antecedent question—is the conduit theory a viable method of creating a presumption of discrimination under Title VII—one cannot know whether there is a common question under Rule 23(a). Again, the common question cannot be whether there is a common question.

The foregoing analysis of the securities fraud cases reveals why that procedural Rule 23 problem—which securities fraud defendants attempted to create for plaintiffs by reintroducing to securities fraud certification the antecedent question of reliance under Rule 10b-5⁸⁰—was ameliorated by the Court's substantive interpretations of *Basic*. Just as with the fraud-on-the-market theory, the *Dukes* plaintiffs' proposed "conduit" theory of discrimination, if accepted, could "bridge the gap" between individual suits and a nationwide class suit.⁸¹ Unlike its decisions in the securities fraud context, however, the Court in *Dukes* was unwilling to provide the Title VII bridge the plaintiffs there needed.

Despite the host of procedural language, any "bridge" between individual and class suits in *Dukes* could not have come from Rule 23.⁸² Fundamentally,

of 1934, 130 U. PA. L. REV. 1015, 1106-07 (1982) (exploring the historical role separation-of-powers concerns played in explaining Congress's grant of rulemaking authority to the Supreme Court).

⁷⁸ *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 613 (9th Cir. 2010) (en banc).

⁷⁹ *Id.* at 596.

⁸⁰ See *supra* notes 29-32 and accompanying text.

⁸¹ *Dukes*, 603 F.3d at 632 (Ikuta, J., dissenting).

⁸² If Title VII does not permit recovery under a conduit theory of liability, Rule 23 cannot be used to render unlawful conduct that has not been deemed so by an appropriate lawmaking body. See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1189-98 (2012) (discussing the impermissibility of remedial expansion through procedure); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103

the gap exists within the substantive liability policy of Title VII. And the logic, not the language, of *Dukes* is revealing on this score: the Court's newly articulated Rule 23(a) standard is not what sunk the plaintiffs.⁸³ If plaintiffs' conduit theory of liability were valid as a matter of substantive Title VII liability policy, whether plaintiffs had satisfied the new commonality standard would have simply required an evaluation of whether the class had presented sufficient evidence, at the certification stage, to support that theory. Instead, plaintiffs could not satisfy the commonality requirement in *Dukes* because the Court—without nearly the level of substantive discussion present in *Halliburton II* or even *Amgen*—refused to interpret Title VII as encompassing plaintiffs' conduit theory.⁸⁴ Once the substantive choice was made, the procedural consequences under the new Rule 23(a) standard flowed naturally.

The same holds true for the Court's determination in *Dukes* that plaintiffs' proposed use of trial-by-formula to satisfy Rule 23 requirements would violate the Enabling Act. As Tobias Wolff has argued, that "procedural" holding flowed from the Court's (largely implicit) interstitial interpretation of defendants' substantive rebuttal right under Section 706 of Title VII as requiring individualized proceedings.⁸⁵ *Halliburton II* reinforces Wolff's argument: instead of conflicting (impermissibly) as a transsubstantive matter, the holdings in *Dukes* and *Halliburton II* vis-à-vis the Rule 23 consequences of defendants' individual rebuttal rights under Title VII and 10b-5, respectively, diverge based on the dictates of entirely different substantive rules.

The "non-transsubstantive" nature of *Dukes* is likewise reinforced by the "non-transsubstantive" nature of *Tyson*. If either the holding in *Tyson*—that prohibitions on statistical evidence in class cases run afoul of the Enabling Act—or the statement in *Dukes*—that rejects the use of statistical evidence to overcome Rule 23 hurdles—is transsubstantive, a bit of a Voldemort problem exists: "[N]either can live while the other survives."⁸⁶ Yet central to the debate in *Tyson* was, whether under the so-called *Mt. Clemens* rule, an individual plaintiff can use representative evidence to establish through common proof

COLUM. L. REV. 149, 223 (2003) (arguing that the rights of class members are the rights of "would-be class members absent the class").

⁸³ See, e.g., Wolff, *supra* note 18, at 1036 ("Questions of Rule 23 policy . . . must be coupled with questions of liability policy—what type of showing will establish liability in a Title VII disparate impact case, and what type of evidence is competent to make that showing?").

⁸⁴ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011) (pointing out that the plaintiffs' theory of discrimination could never answer the question of "*why was I disfavored*").

⁸⁵ Wolff, *supra* note 18, at 1046-47 (noting that "[s]ection 706(g)'s references to . . . an affirmative defense if adverse action toward 'such individual' was non-discriminatory might require individual hearings and foreclose a (b)(2) class action").

⁸⁶ J.K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* 841 (2003).

damages and, quite controversially, liability under the FLSA.⁸⁷ Inside that certification question is an embedded substantive law question about permissible forms of proof of liability under the FLSA.

Although the majority (unsurprisingly) expresses its holding in *Tyson* in the procedural language of Rule 23, its decision turns on the resolution of that embedded substantive law question. Providing only a cursory explanation, the majority described *Mt. Clemens* as making “representative” evidence a “permissible means” to show “individual injury”—without even addressing the language in *Mt. Clemens* itself that limited the rule to proof of individual damages.⁸⁸ Indeed, Justice Thomas addressed this squarely in dissent: *Mt. Clemens* expressly limited the use of such evidence to circumstances where liability had already been established, and the only outstanding issue was estimating damages.⁸⁹ The permissibility of statistical evidence to prove individual FLSA injury is thus a creation of *Tyson* itself. And *Tyson*’s Enabling Act holding follows directly from this substantive interpretation of *Mt. Clemens* and the FLSA. As in *Dukes*, there is no real Rule 23 issue.

Indeed, one of the only *real* Rule 23 issues in the Court’s Rule 23 cases appears in *Comcast*. And that “real” (meaning purely transsubstantive) Rule 23 issue exists less because of an absence of an embedded substantive law question, and more because of the majority’s explicit refusal to engage it.⁹⁰ The transsubstantive Rule 23(b)(3) predominance holding in *Comcast* purported to rest on the self-evident proposition that a damages model which does not “fit” with the substantive theory of liability at the time of certification can never be sufficient proof of damages as a matter of law.⁹¹ The majority explicitly disavows consideration of the interaction between Rule 23 and the underlying substantive law, even though the question of whether plaintiffs’ damages model (which calculated y) can *also* calculate x is less a

⁸⁷ See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (holding that “the representative evidence here was a permissible means of making” the substantive showings necessary to establish liability and that reliance on the representative evidence “did not deprive petitioner of its ability to litigate individual defenses” (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 685-88 (1946))).

⁸⁸ See *Mt. Clemens*, 328 U.S. at 688 (“But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer.”).

⁸⁹ *Tyson*, 136 U.S. at 1058 (Thomas, J., dissenting) (noting that “*Mt. Clemens* does not hold that employees can use representative evidence in FLSA cases to prove an otherwise uncertain element of liability”).

⁹⁰ See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (“This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent’s extended discussion of substantive antitrust law.” (citations omitted)).

⁹¹ See *id.* at 1433-34 (finding “no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners’ liability in this action is premised”).

question of predominance and more a question of substantive antitrust law, as Justices Ginsburg and Breyer argue in dissent.⁹²

On its face, then, *Comcast* would seem to preclude the predominance holding in *Tyson*—that individualized damages need not be determined with such precision at the certification stage. *Tyson* was not obviously free to depart from *Comcast*'s Rule 23 holding without distinguishing it, or (depending on *Comcast*'s precedential value), overruling it.⁹³ The Court in *Tyson* did neither.

To be sure, there is a reasonable transsubstantive distinction between the predominance problems in *Tyson* and *Comcast*. In *Comcast*, the Rule 23(b)(3) problem could be described as plaintiffs' inability to prove damages in a common way, because individualized damages calculations could not be derived from their proffered damages theory.⁹⁴ In *Tyson*, there arguably was no such problem, since plaintiffs' damages model *did* adequately calculate individualized damages using common statistical evidence.⁹⁵

However, that transsubstantive distinction obscures the fact that, in both *Comcast* and *Tyson*, the Rule 23(b)(3) problem is conceptually the same: substantive law allows plaintiffs to recover x ; plaintiffs' damages model is common, but it actually calculates y . In *Comcast*, substantive antitrust law entitled plaintiffs to recover damages flowing from an overbuilder theory of liability— x ; but plaintiffs' damages model was based on four theories of antitrust liability— y .⁹⁶ In *Tyson*, plaintiffs were entitled under the FLSA to recover pay for overtime hours— x ; but plaintiffs' damages theory calculated

⁹² See *id.* at 1437-41 (discussing the damages model in the context of substantive antitrust law).

⁹³ Some—including the dissenting Justices in *Comcast*—have argued that *Comcast* was merely a “case for the day,” particularly given the *Comcast* parties' stipulation that antitrust damages under Rule 23 need be provable through common evidence. *Id.* at 1437 (“The Court's ruling is good for this day and case only.”). History may well characterize *Comcast* as such. However, while the stipulation was no doubt relevant to the majority's analysis, assertions that *Comcast* was a “case for the day” tend to obscure and ultimately revise its historical context. The relevant Justices went to great lengths not only to hear *Comcast*, but also to effectuate revision of the question presented from one about admissibility of expert data to one subjecting that expert data to a predominance analysis. In their petition for a writ of certiorari, petitioners originally presented the court with the question of “whether a district court may certify a class action without resolving ‘merits arguments’ that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(2).” Petition for a Writ of Certiorari at i, *Comcast*, 133 S. Ct. 1426 (No. 11-864). However, the Justices intervened and requested the advocates instead argue “[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” See *Comcast*, 133 S. Ct. at 1435. Such effort seems unlikely had those Justices simply wished to validate a party stipulation.

⁹⁴ 133 S. Ct. at 1433 (noting that “respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis”).

⁹⁵ *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1051 (2016) (Roberts, C.J., concurring) (supporting the majority's conclusion that “respondents could adequately prove the amount of time for each individual through generalized, class-wide proof”).

⁹⁶ 133 S. Ct. at 1433-34.

the average time worked by a sample of plaintiffs, some of whom may not have worked overtime—*y*.⁹⁷

A purely transsubstantive lens misses this conceptual similarity and the tension it reveals in the jurisprudence. *Tyson* and *Comcast* provide very different answers under Rule 23(b)(3)—not because the predominance issues are conceptually different, but in spite of the fact that they are conceptually the same. Why?

The answer here begins on familiar terrain, with “non-transsubstantivity.” Specifically, the majority’s predominance analysis in *Tyson* necessarily rests upon interpreting the FLSA as not requiring a perfect “fit” between a damages model and the underlying theory of FLSA liability, at least for certification purposes.⁹⁸ In *Tyson*, *y* is an acceptable approximation of *x* under the FLSA, and a common model that calculates *y* thus satisfies the Rule 23 predominance standard. The procedural consequences flow from the interstitial lawmaking vis-à-vis the FLSA, not from any procedural holding in *Comcast*.

Indeed, the rigidly transsubstantive nature of the holding in *Comcast* further reconciles the predominance holdings. The *Comcast* analysis is pitched so formalistically that the resulting procedural holding exists almost abstractly. Indeed, the analyses in *Tyson* and *Comcast* operate at completely different levels—the latter disavows substantive law altogether.⁹⁹ That disavowal is no trifling matter. Given the *Comcast* majority’s unwillingness to consider the effect substantive antitrust law might have on its Rule 23 analysis, it almost certainly did not consider other substantive statutes—like the FLSA—that might be “abridge[d], modif[ied], or enlarge[d]” by its explicitly transsubstantive procedural holding.¹⁰⁰ That does not necessarily mean *Tyson* implicitly overruled *Comcast*—it simply makes clear that the transsubstantive *Comcast* holding, like any transsubstantive holding, must yield when substantive rules would dictate a contrary result.

* * *

The foregoing discussion reveals that the divergent Rule 23 holdings in the Roberts Court’s class action jurisprudence derive not so much from impermissibly divergent transsubstantive interpretations of Rule 23, but rather from permissible judgments about underlying substantive law and rules. Thus, the “non-transsubstantive” character of these cases is largely

⁹⁷ 136 S. Ct. at 1043.

⁹⁸ *Id.* at 1047 (observing that “the ‘remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making’ the burden of proving uncompensated work ‘an impossible hurdle for the employee’” (alterations in original) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946))).

⁹⁹ See *supra* note 90 and accompanying text.

¹⁰⁰ See *infra* Section III.A.

sufficient to resolve the tension between them as a matter of Rule 23 interpretation. However, because the Court could have come out differently on all of its class-facilitative substantive judgments, the “non-transsubstantive” nature of these cases is not wholly sufficient to resolve the tension among these cases as a matter of class action policy—a puzzle explored in the next subsection.

2. Composite Judgments: Substantive Policy and Procedural Consequences

While substantive lawmaking in the class action cases can explain the divergent Rule 23 results, the same cannot be said for the divergent class action consequences. A court with a monolithic antipathy for the class action could have come to contrary results in all of the pro-class action cases. But the Roberts Court did not. The question is: why?

One possible answer is that, although the language of *Basic*, the FLSA, and *Mt. Clemens* was insufficient to dictate any pro-class action holding, that language does not exist in an interpretive vacuum. Rather, it exists alongside interpretive principles such as stare decisis and congressional deference. A combination of those principles ultimately dictated the adoption of class-facilitative substantive rules. But that answer can only explain so much.

There is no doubt that the holdings in *Amgen* and *Halliburton II* reflect adherence to stare decisis principles. But this begs more questions than it answers. While the Court pays special heed to stare decisis in the context of statutory interpretation,¹⁰¹ *Basic* is no such case. And both Chief Justice Roberts and Justice Kennedy have exhibited a willingness to depart from stare decisis.¹⁰² So why do they adhere to it so rigidly following *Basic* when doing so *facilitates* class actions?

Of course, the language in *Amgen* and *Halliburton II* suggests that adherence to stare decisis was commended, if not commanded, by separation-of-powers principles, given Congress’s refusal to set aside *Basic* when it enacted the otherwise class-restrictive Private Securities Litigation Reform Act (PSLRA) and Securities Litigation Uniform Standards Act (SLUSA).¹⁰³ But there is

¹⁰¹ See, e.g., *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (noting that stare decisis has “special force” in the context of statutory interpretation).

¹⁰² See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (Kennedy, J., joined by Roberts, C.J.) (“*Stare decisis*, we conclude, does not compel our continued adherence . . .”). Chief Justice Roberts and Justice Kennedy have also departed from stare decisis in constitutional cases. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting) (criticizing the majority for ignoring stare decisis and rejecting stare decisis “with nary an explanation” for why it does so).

¹⁰³ See Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 16, 112 Stat. 3227, 3227–33 (limiting shareholders’ ability to bring securities class actions); Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 27(a)(1), 109 Stat. 737, 737 (applying the provisions of the law to “each private action . . . that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure”).

more to this puzzle. As Justices Scalia and Thomas have argued, it is not obvious as an initial matter that *Basic* has received legislative support.¹⁰⁴ Even if those Justices have the weaker argument, why do Chief Justice Roberts and Justice Kennedy interpret Congress's silence on *Basic*—in the midst of an overall agenda to restrict securities fraud litigation—as commending litigation-facilitative results in *Amgen* and *Halliburton II*? This, from two Justices who have *ignored* more explicit legislative statements regarding the appropriate interpretation of substantive law in other class action cases.

For instance, a unanimous Court in *Dukes* barely mentioned Congress when it held that Rule 23(b)(2) was an inappropriate vehicle for plaintiffs' claims for backpay under Title VII.¹⁰⁵ That omission is surprising. For starters, in the 1991 Amendments to Title VII, Congress expressed a clear desire for more private enforcement of Title VII, not less. In the Amendments, Congress added compensatory and punitive damages to the remedial menu.¹⁰⁶ Congress explicitly stated that, in doing so, it did not intend to "scuttle any of the statute's existing remedial or conciliation procedures."¹⁰⁷ That distinction—which the Court in *Dukes* waved off—has important implications for Rule 23: Congress was legislating against the backdrop of long-standing practice in the district courts and courts of appeals¹⁰⁸ that treated backpay as an equitable remedy that fit within the ambit of Rule 23(b)(2),¹⁰⁹ along with the long-accepted notion that a district

¹⁰⁴ See *Halliburton II*, 134 S. Ct. 2398, 2425 (2014) (Thomas, J., concurring) (noting that *Basic* "has nothing to do with statutory interpretation" and instead "concerned a judge-made evidentiary presumption for a judge-made element of the implied 10b-5 private cause of action, itself a judicial construct that Congress did not enact" (internal quotation marks omitted)); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1204 (2013) (Scalia, J., dissenting) (noting that support for *Basic*'s fraud-on-the-market theory "is to be found nowhere in the United States Code").

¹⁰⁵ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

¹⁰⁶ Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A, 105 Stat. 1071, 1072–74 (1991).

¹⁰⁷ H.R. REP. NO. 102-40(I), at 73 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 611 (internal quotation marks omitted). See also Civil Rights Act of 1991 § 1977A(a)(1) (stating that a complaining party under Title VII "may recover compensatory and punitive damages . . . in addition to [equitable] relief" (emphasis added)); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (noting that repeals of statutes by implication "are not favored and will not be found unless an intent to repeal is clear and manifest" (citations omitted)).

¹⁰⁸ The Supreme Court has suggested that Congress may be said to have endorsed the uniform views of appellate court decisions. See, e.g., *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 299 (1995) (indicating the Court's frequent reliance on congressional "reenact[ment of] statutory language that has been given a consistent judicial construction" (alteration in original) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994))).

¹⁰⁹ See Edward F. Sherman, *Complex Litigation: Plagued by Concerns Over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 602 (2004) ("Employment discrimination cases were especially appropriate for (b)(2) because Congress, in passing Title VII of the Civil Rights Act of 1964, had only authorized recovery of money in the form of 'back pay,' which was considered equitable and did not entitle the parties to a right to jury trial . . ."). Indeed, in 1991, Congress legislated against a long-standing backdrop of the inclusion of backpay in (b)(2) Title VII class actions. See 7AA

court could conduct additional, “Stage II” proceedings to determine the amount of backpay recovery due to each class member.¹¹⁰ Just as it did following *Basic*, Congress preserved the procedural landscape with respect to claims for backpay brought under Title VII and through Rule 23(b)(2). And this time, it did so explicitly.¹¹¹

Thus, absent unequivocal command from prior precedent or Congress, neither stare decisis principles nor deference to congressional prerogatives seem to dictate the Court’s judgments about whether to adopt substantive rules that facilitate class actions. Instead, stare decisis and congressional deference are invoked selectively, only when they align with the Court’s own independent judgments about whether to adopt a class-facilitative substantive rule. The divergence in the class action cases alone reveals that these independent judgments do not stem from the Court’s views on Rule 23 or the class action itself—and at least not for Chief Justice Roberts and Justice Kennedy.¹¹²

CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1775 n.34 (3d ed. 2017) (listing cases in support of the proposition that backpay claims are appropriately brought under 23(b)(2)); see also *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (discussing the equitable nature of backpay relief and its propriety as a remedy sought under Title VII in (b)(2) class actions).

¹¹⁰ See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977) (noting that, in order to determine individual relief for victims of discrimination, “a district court must usually conduct additional proceedings after the liability phase of the trial”); *Shipes v. Trinity Indus.*, 987 F.2d 311, 318 (5th Cir. 1993) (observing that, once a Title VII class action plaintiff has established liability, the district court should determine “what method [it] should utilize to formulate a back pay award”); *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1172-75 (5th Cir. 1978) (remanding but confirming that backpay could be determined during Stage II proceedings of a (b)(2) class).

¹¹¹ See Jason P. Pogorelec, Note, *Under What Circumstances Did Congress Intend to Award Punitive Damages for Victims of Unlawful Intentional Discrimination Under Title VII?*, 40 B.C. L. REV. 1269, 1304-1305 (1999) (arguing that the addition of punitive damages to Title VII was not intended to change existing Title VII practice).

¹¹² Though more uniform in their class action jurisprudence than Justices Roberts and Kennedy, other Justices do not have completely firm class action views either. For instance, Justice Breyer is often in favor of class actions. See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1041-50 (2016) (joining the majority in favor of allowing the use of representative samples for a showing of predominance in class certification); *Halliburton II*, 134 S. Ct. 2398, 2417 (2014) (joining the concurrence in favor of providing defendants an opportunity prior to certification to rebut the materiality presumption given that this judgment “should impose no heavy toll on securities-fraud plaintiffs with tenable claims”); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1190-1204 (2013) (joining the majority in holding materiality is “not a prerequisite to class certification” for a securities fraud action based on a fraud-on-the-market theory”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 357-67 (2011) (dissenting from the holding that FAA preempts a state law regarding unconscionability of class arbitration waivers and pointing out the benefits of class proceedings where “general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate”). However, in *Italian Colors*, Justice Breyer’s questions during oral arguments addressing the efficiencies of arbitration suggest he is not always as favorable to class actions. See Transcript of Oral Argument at 15-16, 29, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133) (discussing the relatively straightforward tasks of an arbitrator, without the need of an expert report, in an antitrust action). One sees a similar pattern with Justice Ginsburg, who voted in favor of class actions in *Tyson*, *Halliburton II*, *Dukes*, *Amgen*,

Instead, these independent judgments about whether to adopt a class-facilitative rule appear to lie in a second layer of “non-transsubstantivity.” The first layer of “non-transsubstantivity” explored in Section I.A.—namely, the Court’s interstitial substantive lawmaking—keeps procedure and substance in relatively separate spheres. The substantive lawmaking dictates the procedural results. Deeper analysis, however, reveals that these spheres are not so separate. Baked into the substantive lawmaking and ultimate procedural results are composite judgments: substantive policy judgments about the overall remedial scheme¹¹³ and judgments about the interaction of that scheme with the class action device.

Some composite judgments are easier to identify than others. Take the Court’s characterization of defendants’ rebuttal right in *Halliburton II* as one to “pick off” a plaintiff here or there.¹¹⁴ That is not lawmaking about the contours of a substantive right in the abstract. Instead, it is lawmaking all but explicitly informed by procedural consequences, as evidenced by the alignment between the description of the substantive right and the strictures of Rule 23(b)(3).¹¹⁵

More broadly, the class-facilitative results in the securities fraud cases seem to reflect substantive policy judgments about the nature of the remedial regime for securities fraud and its interaction with the class action device. Indeed, the remedial landscape for securities fraud litigation is not neutral vis-à-vis the Court’s views on class actions. Indeed, it is uniquely responsive to many of its class action concerns. Consider the following: First, Congress engineered the securities fraud landscape so as to prevent unfettered litigation.¹¹⁶ Second, plaintiffs in securities fraud class actions are often institutional investors.¹¹⁷ Sophisticated claimants add a level of credibility to securities fraud claims in

Concepcion, *Comcast*, and *Italian Colors*, but against them in *Shady Grove*. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 458-59 (2010) (Ginsburg, J., dissenting). As a final example, Justice Scalia frequently voted against class actions, but voted for them in *Shady Grove*. *Id.* at 416.

¹¹³ These judgments include considerations of the scheme’s prohibited conduct, enforcement apparatus, regulatory role, typical parties, scope of coverage, and its burden on lower courts.

¹¹⁴ 134 S. Ct. at 2412.

¹¹⁵ The majority’s description of the right of rebuttal as one simply of “pick[ing] off” individual plaintiffs suggests that, as a functional matter, the defendants could disprove reliance only for a few individual plaintiffs. This language in *Amgen*, which presupposes that there were scant, or non-predominant, individualized issues of reliance, aligns directly with the language in Rule 23(b)(3), which states that a class may be maintained only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3).

¹¹⁶ See, e.g., *Halliburton II*, 134 S. Ct. at 2413 (“Congress has, for example, enacted the [PSLRA], which sought to combat perceived abuses in securities litigation . . .”).

¹¹⁷ See John C. Coffee, Jr., *How Not to Write a Class Action “Reform” Bill*, CLS BLUE SKY BLOG (Feb. 21, 2017), <http://clsbluesky.law.columbia.edu/2017/02/21/how-not-to-write-a-class-action-reform-bill/> [https://perma.cc/SEL3-L4HD] (“[T]he Private Securities Litigation Reform Act deemed the largest investor to be the optimal (and presumptive) lead plaintiff.”).

general, which matters to a Court suspicious of meritless suits.¹¹⁸ Third, the presence of institutional investors suggests that the alternative to securities fraud class actions may not be zero securities fraud litigation but rather multifarious individual suits that would clog federal courts' dockets and require extensive resort to the Multidistrict Litigation process.¹¹⁹ Fourth, the Roberts Court's general ideological commitment to a well-functioning free market suggests that even a conservative Court with pro-market proclivities may be loath to gut private securities enforcement.¹²⁰ After all, private litigation helps vindicate the free market's interest in avoiding fraud's corrosive effects.¹²¹ This interest may well render small-investor class actions tolerable, and *Basic* necessary, since neither institutional investors nor the SEC are likely to fill regulatory gaps.¹²²

Similar composite judgments underlie *Tyson*. *Tyson's* Enabling Act holding clearly reflects more than a judgment about statistical evidence in a single substantive context. Rather, the Court first made the substantive policy determination that statistical proof will be necessary to the enforcement of substantive remedial schemes in general.¹²³ Broadly speaking, remedial regimes that require statistical evidence for enforcement might be typified by harm that tends to be widespread and similar among individuals; harm that must be demonstrated through economic or other complex models; harm that is concealed from litigants and the public; or harm that occurs at a market level, to list just a few. *Tyson*, for example, featured relatively uniform harm

¹¹⁸ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring that plaintiffs provide more than “threadbare recitals of the elements of a cause of action” to survive a motion to dismiss); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (expressing a desire for plaintiffs to plead facts suggesting that theirs are plausible causes of action).

¹¹⁹ There is already evidence of this phenomenon. See AMIR ROZEN, BRENDAN RUDOLPH & CHRISTOPHER HARRIS, OPT-OUT CASES IN SECURITIES CLASS ACTION SETTLEMENTS: 2012–2014 UPDATE 3 (2016), <https://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements-2012-2014> [<https://perma.cc/2XQG-L9Q7>] (noting first that, as class actions get larger, the number of plaintiffs who opt out and bring their own claims increases; and second, that the “most common plaintiffs in opt-out cases are pension funds”).

¹²⁰ See LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 8-15 (2014) (describing the trend in the Roberts Court toward deregulation).

¹²¹ See Glover, *supra* note 82, at 1142 (suggesting that private enforcement plays a role in market correction that public enforcement cannot).

¹²² See Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 321 (2009) (noting that “the SEC will never have enough resources to adequately protect investors against fraud”).

¹²³ The majority cited the amicus brief filed by Complex Litigation Professors, which lists “antitrust, securities fraud, and employment discrimination litigation” as examples of remedial schemes requiring statistical proof. See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (citing Brief of Amicus Curiae Complex Litigation Law Professors in Support of Respondents at 4-5, *Tyson*, 136 S. Ct. 1036 (No. 14-1146)).

that was concealed from the litigants—indeed, harm for which direct proof could not be retrieved.¹²⁴

Baked into any determination that a particular remedial scheme requires statistical evidence for its regulatory function—as with the FLSA in *Tyson*—also appears to be a consideration of the scheme’s class-facilitative consequences. Prohibiting statistical proof in *Tyson*—despite its class-limiting consequences—would have cut at the heart of the Court’s substantive policy judgments about the function of the FLSA remedial regime. The majority did not make these composite judgments fully explicit, but its more generalized language preceding its FLSA conclusion—namely, that representative evidence is often “the only practicable means”¹²⁵ for establishing defendants’ liability—connects the dots. The class-facilitative conclusion is not just tolerable, but *required* as a matter of the Court’s judgments about the substantive remedial regime.

Opposite composite judgments—judgments that generate a class-impeding result—seem to underlie *Dukes*. In finding that the plaintiffs had not raised a common question under Rule 23(a), the Court spilled a not insignificant amount of ink recounting the question’s Rule 23 deficiencies.¹²⁶ These deficiencies reveal little about Rule 23(a) itself, but much about how certain Justices believe that Title VII harm actually occurs—in relatively overt, individualized ways.¹²⁷ Given that substantive policy judgment about Title VII, none of the class-facilitative substantive rules at issue in *Dukes* seem especially appropriate as a matter of the substantive remedial regime. Indeed, facilitating class actions in that context would, if anything, appear ill-advised—class actions would promote “meritless” Title VII claims, *in terrorem* settlement pressure, and remedial expansion of Title VII.¹²⁸

¹²⁴ *See id.*

¹²⁵ *Id.* at 1046 (quoting MANUAL FOR COMPLEX LITIGATION § 11.493 (4th ed. 2004)).

¹²⁶ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352-60 (2011).

¹²⁷ Though the Court in *Dukes* never made such views explicit, the notion that they conceptualized Title VII injury as highly individualized is rather apparent from the opinion. *See, e.g., id.* at 350 (“Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.”); *id.* at 352 (“Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer . . .” (emphasis omitted)); *id.* at 356-67 (“As Judge Ikuta observed in her dissent [in the Ninth Circuit below], ‘[i]nformation about disparities at the regional and national level does not . . . raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.’”); *id.* at 358 (“Respondents’ anecdotal evidence . . . is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory.”).

¹²⁸ *See Glover, supra* note 82, at 1149-50 (observing that facilitating class actions expands remedial options in the employment litigation context).

* * *

This second level of “non-transsubstantivity” provides a fuller explanation for the divergences in the Rule 23 cases. It is also this second level of “non-transsubstantivity” that helps reconcile tensions in class action results between the Rule 23 cases and the class arbitration cases. The next section extends the transsubstantivity analysis to these cases.

B. *The Court’s “Non-Transsubstantive” Class Arbitration Jurisprudence*

The class arbitration cases have so far gone undiscussed, for two reasons. First, unlike in the Rule 23 cases, some of the Court’s substantive lawmaking in the class arbitration cases—namely, its interpretation of the FAA—is on the surface of the opinions.¹²⁹ Indeed, the anti-class action results in the class arbitration cases purportedly rest upon the Court’s substantive interpretation of the FAA that class actions are inconsistent with the “nature” of arbitration.¹³⁰ And the Court has struck down both state doctrine (*Concepcion*) and federal judge-made doctrine (*Italian Colors*) aimed at regulating unfair procedural terms of arbitration contracts on the grounds that they disfavored arbitration or otherwise interfered with the “nature” of arbitration under the FAA.

Second, although this substantive lawmaking vis-à-vis the FAA appears on the surface of the class arbitration opinions, the substantive lawmaking in the class arbitration cases both fails to explain their anti-class action procedural results and fails to reconcile them with the pro-class action decisions. For example, the Court states that its holding in *Concepcion* derives from the “nature” of arbitration under the FAA.¹³¹ So it seems a rather large interpretive step to say that class procedures are so inconsistent with the nature of arbitration that the FAA would call, functionally, for no arbitration. Indeed, a Court intent on preventing the “disfavor[ing]” of arbitration should bristle at an FAA holding, like in *Italian Colors*, that permits—even

¹²⁹ See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013) (interpreting the FAA in the context of contractual waiver of class arbitration); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013) (interpreting section 10(a)(4) of the FAA where the parties’ contract provided for class arbitration); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 666 (2010) (interpreting the FAA in the context of arbitration clauses that are “silent” on the issue of arbitration).

¹³⁰ See *Stolt-Nielsen*, 559 U.S. at 687 (holding an arbitration agreement that was “silent” on the matter of class arbitration insufficient to show that parties had consented to class arbitration proceedings, which the Court held were at odds with the “basis of arbitration”); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (stating that class arbitration proceedings change the nature of arbitration).

¹³¹ See, e.g., *Concepcion*, 563 U.S. at 344-48 (stating that the purpose of arbitration is to “facilitate streamlined proceedings,” that its “principal advantage [is] its informality,” and that the requirement of class-wide arbitration “interferes with [these] fundamental attributes”).

incentivizes—a host of contractual terms whose *purpose* is to eliminate claims, whether pursued in court or in arbitration.¹³² All the more so since neither the text nor the legislative history of the FAA dictated the procedural results in the class arbitration cases. If anything, the text of the FAA suggests otherwise.¹³³

As I have discussed in prior work, the critical, though largely obscured, analytical move underpinning the Court's arbitration decisions is its fundamental shift from interpreting the FAA as favoring arbitration contracts so as to facilitate efficient dispute resolution to interpreting it as requiring unfettered freedom of contract—even if arbitration agreements prevent dispute resolution altogether.¹³⁴ Given the swath of arbitration-restrictive procedural provisions now permitted by the Court, the consequences of this analytical shift are not just anti-class action or anti-arbitration. They are more than that: they are anti-claiming and anti-private enforcement of substantive law.

Third, and this time like the Rule 23 cases, there were embedded substantive law issues—issues arising from the substantive laws giving rise to the claims themselves—that could have informed the Court's FAA interpretations as well as the class action consequences those interpretations dictated. Yet the Court ignored those deeper questions. The Court's interpretations of the FAA were not informed by the substantive law under which claims actually arose—even when that substantive law would have supported the Court's ultimate anti-class arbitration holding. In *Italian Colors*, for instance, plaintiffs' claims arose under the Sherman Act, yet the Court ignored legislative history—which was briefed—indicating that Congress had rejected a proposed class action provision.¹³⁵

This refusal to engage underlying questions of substantive law interpretation derives from the fact that, although the Court's class arbitration decisions are one part substantive FAA interpretation, they are also another part procedural formalism. The FAA governs "procedure"¹³⁶—namely, the

¹³² Glover, *supra* note 51, at 3076.

¹³³ See 9 U.S.C. § 2; Glover, *supra* note 51, at 3062 n.42 (noting the word "settle" in the FAA "suggests that contracts for arbitration are contracts for *resolving* disputes; the effect of an arbitration agreement is thus simply to change the forum in which a dispute is settled or resolved. To the extent a contract for arbitration frustrates or inhibits the resolving or settling of a dispute, that contract arguably falls outside the scope of FAA.").

¹³⁴ See Glover, *supra* note 51, at 3065 (observing that the Court's analytical "shift has meant establishing procedural rules that do not streamline arbitration, but, if anything, have made it more burdensome and difficult for parties to resolve their claims").

¹³⁵ Brief for Petitioners at 6, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133).

¹³⁶ Here, I refer to the distinction between matters governing litigation conduct ("procedure") and matters governing primary conduct ("substance"). See Ely, *supra* note 69, at 724-26 (identifying a procedural rule as one "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes" (footnotes omitted) and contrasting that with rules of substance, or

forum for resolving substantive claims. In formalistic analysis reminiscent of *Comcast*, the Court declines to consider any interaction between its interpretations of the “procedural” FAA and the substantive statutes giving rise to the claims at issue. So what explains the ultimate results here?

On this score, the first level of “non-transsubstantivity” identified in the Rule 23 cases—underlying substantive lawmaking—falls short. It simply fails to account for the results in the class arbitration cases. However, that distinction between the class arbitration cases and the Rule 23 cases nonetheless reveals the “non-transsubstantive” judgments at work deep beneath the surface in the class arbitration cases: namely, substantive judgments regarding freedom-of-contract values and judgments about interaction of those values with the Roberts Court’s views about the value of private enforcement of remedial regimes in arbitration.

As to the former, untethered from the FAA or the underlying substantive liability rules, the freedom of contract interpretation of the FAA reflects the Court’s independent substantive policy judgment about the value of freedom of contract for its own sake. Indeed, such a judgment aligns with the Roberts Court’s overall trend, across various substantive areas of the law, towards unfettered freedom of contract.¹³⁷

Second, the Court appears to have made an additional substantive judgment that, on balance, freedom of contract values outweigh whatever values the Court ascribes to private enforcement through arbitration, or perhaps more forcefully, freedom-of-contract values serve the broader anti-litigation values evinced by the Roberts Court.¹³⁸ To demonstrate, consider what typifies would-be class claims in arbitration: claims affected by arbitration contracts of adhesion are characteristically low-value, consumer-type claims.¹³⁹ Even when these claims are “valuable,” as in *Italian Colors*, they are unmarketable on an individual basis.¹⁴⁰ The cases are often lawyer-driven; a typical unsophisticated claimant

“those rules of law which characteristically and reasonably affect people’s conduct at the stage of primary activity” (footnote omitted)).

¹³⁷ See generally TRIBE & MATZ, *supra* note 120; Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY J. (2012), democracyjournal.org/magazine/23/the-roberts-court-v-america/ [<https://perma.cc/GK6U-5LGM>] (explaining that the Roberts Court uses the First Amendment to craft free-market jurisprudence).

¹³⁸ See, e.g., STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 137-38, 142-43, 151, 173-81 (Cambridge Univ. Press 2017) (presenting an account of the Roberts Court’s tendency toward restricting litigation and private enforcement as well as tracking the Supreme Court’s increased tendency toward litigation restriction since 1960); TRIBE & MATZ, *supra* note 120 (describing the Roberts Court’s procedural jurisprudence as pro-corporate and anti-private enforcement).

¹³⁹ See, e.g., Gilles, *supra* note 1, at 375 (predicting that the class action waiver provisions will doom the remaining class actions, which are contract-based and “virtually all consumer class actions”).

¹⁴⁰ See, e.g., *In re Am. Express Merchants’ Litig.*, 667 F. 3d 300, 303, 317 (2d Cir. 2009) (noting that the “small individual damages award is not going to pay for the expert fees . . . necessary to make

may not even know she has a claim.¹⁴¹ Further, the Court's references to *in terrorem* effects belie a judgment that the sorts of cases in arbitration lack merit.¹⁴² Indeed, the interaction between the operation of the substantive remedial regimes in arbitration on the one hand and class procedures on the other would, to some members of the Roberts Court, be a negative one. So beneath the formalism in language, it is the Court's composite judgment regarding the interaction of class action procedures with low-value claims, unsophisticated parties, and lawyer-driven suits, and not the interaction of class procedures with the "nature" of arbitration under the FAA, that produces the deleterious effects of the class action the Court seems so determined to eliminate.

* * *

In short, the Court's recent class action jurisprudence is lacking in class action coherence. Instead, it is rife with the selective invocation of stock arguments against the class action, deployed when the Court has concluded, often implicitly, that the interaction of underlying substantive rules with the class action would interfere with separate, substantive policy judgments the Court wishes to advance. The reality of the Court's analysis in class action cases is therefore in tension with its methodological tendency toward procedural formalism.¹⁴³ The next Part addresses two implications of that reality.

an individual plaintiff's case" and that claims are not pursuable "where the expected recovery is dwarfed by the cost of litigating or arbitrating the claim" (citing Glover, *supra* note 50, at 1746-47)).

¹⁴¹ See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2046-47 (2010) (arguing class action lawyers are undercompensated, particularly in small-stakes class actions which are about deterrence, not about compensation to plaintiffs with small-value claims they typically do not even become aware of until notice of class settlement); *see also* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) at 110-11 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/ZQ5A-U32J>] (reporting results of a study of credit card contracts with pre-dispute arbitration clauses showing that fewer than 20% of respondents recognize that the clause impacts their right to a jury trial and only "13% understood that the contract they had just been shown prohibited them from participating in a class action lawsuit.").

¹⁴² See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (stating that "class arbitration would be no different" in presenting "the risk of 'in terrorem' settlements that class actions entail").

¹⁴³ See Wolff, *supra* note 18, at 1069 (noting that, in general, the "success of the Federal Rules has produced an ever-greater alienation from substantive values in procedural analysis").

III. IMPLICATIONS OF THE COURT'S "NON-TRANSSUBSTANTIVE" CLASS ACTION JURISPRUDENCE FOR JUDICIAL LAWMAKING POWER AND THE JUDICIAL ROLE

The Supreme Court's recent class action jurisprudence involves a series of substantive law and policy choices that drive the procedural outcomes. This dynamic presents a number of implications: for separation of powers; federalism; public and private values of judicial precedent; class action advocacy; notions of transsubstantive procedure; and the nature and legitimacy of the judicial role. This Part will focus on two—judicial lawmaking power and the judicial role.

A. *Implications for Judicial Lawmaking Power*

The Federal Rules of Civil Procedure are often described as "transsubstantive," a term classically defined to mean that the same procedural rules should apply, in the same way, across different substantive contexts.¹⁴⁴ This transsubstantivity principle is said to reflect the dictate of the Enabling Act, which requires that procedural rules "not abridge, enlarge or modify any substantive right."¹⁴⁵ The precise definition, commands, and normative valence of the transsubstantivity principle have long been debated.¹⁴⁶ Descriptively, though, a fulsome conception of the transsubstantivity principle undergirds much of the Supreme Court's "procedural" and Enabling Act jurisprudence.

In this jurisprudence, comprised largely of diversity cases involving the *Erie* doctrine,¹⁴⁷ the Court erects a wall between "procedure" and "substance."¹⁴⁸ The

¹⁴⁴ See, e.g., Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 617-18 (2010) (noting that the "structure of the rulemaking process was designed to encourage the making of transsubstantive rules"); Marcus, *supra* note 11, at 1191 ("The term 'trans-substantive' refers to doctrine that, in form and manner of application, does not vary from one substantive context to the next."). Transsubstantive procedural rules do not preclude consideration of substantive law; rather, they tend to lead analysis in that direction. See Cover, *supra* note 11, at 721 (conceding that "procedure, broadly conceived, will inevitably shape substance").

¹⁴⁵ 28 U.S.C. § 2072(b) (2012).

¹⁴⁶ See generally David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371 (2010).

¹⁴⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Enabling Act is usually invoked as a safeguard of federalism in diversity cases, and not as a restraint in federal question cases. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965) (noting *Erie*'s admonition that "neither Congress nor the federal courts can . . . fashion rules which are not supported by a grant of federal authority" since, absent such authority, "state law must govern because there can be no other law"); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 705 (1988) (commenting on "the possibility that the Court regards the Rules Enabling Act as irrelevant in federal question cases"). *But see* Wolff, *supra* note 18, at 1043 n.42 (noting that the "*Dukes* decision offers an implicit corrective" to this construction of the Enabling Act).

¹⁴⁸ See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406-07 (2010) ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure

Court's characterization of Rule 23 in *Shady Grove* is illustrative: There, the Court described Rule 23 as a mere joinder device with negligible impact on substantive remedial schemes.¹⁴⁹ And the treatment of federal substantive rights in *Italian Colors*—namely, as merely formal rights—completes this picture.¹⁵⁰

The Court has strongly suggested that such formalism and rigid adherence to transsubstantivity is commended, if not required, by the Enabling Act.¹⁵¹ Under the Court's formalistic conceptual construct, procedure may easily operate both transsubstantively and within the confines of the Enabling Act.

As Part II reveals, the formalistic notion of transsubstantivity the Court so frequently invokes is an illusion. Let me be clear: Scholars have long argued that the line between substance and procedure is not, functionally or conceptually, as rigid as the Court maintains.¹⁵² What the analysis in Part II demonstrates, instead, is that the Court's invocation of these fictive conceptual silos is itself fictive. To the extent the Court's class action jurisprudence is driven by substantive judgments, however, has the Court run afoul of its judicial lawmaking power under the Enabling Act?

. . . but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right[.]'" (quoting 28 U.S.C. § 2072(b)); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (noting that "Congress has undoubted power to regulate the practice and procedure of federal courts . . . but it has never essayed to declare the substantive state law").

¹⁴⁹ 559 U.S. at 408 (deeming it "obvious that [r]ules allowing multiple claims . . . to be litigated together . . . alter only how the claims are processed"); see Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 20 (2010) (criticizing the rigid transsubstantivity of *Shady Grove* as "ignor[ing] the practical realities of the modern class action").

¹⁵⁰ In finding that the class action prohibition at issue "merely limits arbitration to two contracting parties" and by describing statutory rights as merely a right to pursue that statutory right, even though that right may lack a procedural path to vindication, the Court drew a formalistic distinction between substantive rights on the one hand, and procedure on the other. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013). In doing so, the Court jettisoned language, expressed in prior opinions, that it would strike down arbitration contract provisions that impaired parties' ability to bring federal statutory claims. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985) ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate." (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967))).

¹⁵¹ See *supra* note 147; see also *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 462 (1996) (Scalia, J., dissenting) (lamenting the Court's mere "acknowledg[ment] that state procedural rules cannot . . . be permitted to interfere with . . . the federal court system").

¹⁵² See, e.g., Wolff, *supra* note 18, at 1028 (explaining that judges often engage in procedural decision-making, like *Erie*, with regard for "applicable liability policies"); Burbank & Wolff, *supra* note 149, at 51 ("Even Congress has learned the power of procedure and knows how to pursue or mask substantive aims in procedural dress."); Marcus, *supra* note 146, at 401 (describing the "shadowy divide" between substance and procedure); Cover, *supra* note 11, at 721 (discussing the "substance-oriented manipulation of procedural components" often mentioned in *Erie* literature).

Not likely. At least not in federal question cases; perhaps not in diversity cases either (though this Article defers that latter question given the jurisdictional nature of the majority of class action cases).¹⁵³ Further, in diversity cases, a strict divide between substance and procedure theoretically guards against the risk of federal court usurpation of states' lawmaking power. In federal question cases, though, federal courts are constrained by the separation of powers between the federal judiciary and Congress,¹⁵⁴ not federalism. Thus, in promulgating, interpreting, and applying federal rules of procedure, the Court may not "abridge, enlarge or modify" a substantive right Congress has created.¹⁵⁵ Yet, in contradistinction to *state* substantive rights, federal courts are very much in the business of making, interpreting, and providing content to *federal* rights. It is arguably their duty to do so.¹⁵⁶ The Enabling Act does not command a conception of transsubstantivity that precludes interpretation of federal substantive law. Instead, it commands the reverse: the Court cannot promulgate, interpret, or apply *procedural* law in ways that contravene congressional pronouncements.

The contexts of *Halliburton I*, *Amgen*, and *Halliburton II* illustrate these separation-of-powers constraints. Congress addressed securities class actions in the PSLRA and SLUSA, and though that legislation largely restricted securities class actions, Congress compromised and left the *Basic* presumption untouched.¹⁵⁷ Thus, had the Court overruled *Basic* in *Halliburton II*, or interpreted Rule 23 as requiring proof of loss-causation in *Halliburton I*, it

¹⁵³ See Burbank, *supra* note 147, at 705 (arguing that the Supreme Court has erred in suggesting that the Enabling Act is grounded only in federalism); Cover, *supra* note 11, at 718 (arguing that analysis of the Federal Rules must take into account their interaction with underlying substantive law).

¹⁵⁴ See Burbank & Wolff, *supra* note 149, at 43 (arguing that, for the Enabling Act to work as a meaningful proscription on the Court's lawmaking power in federal question cases, it must work to protect the "allocat[ion of] federal lawmaking between the Supreme Court and Congress"). See generally Burbank, *supra* note 77.

¹⁵⁵ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (holding that certification was impermissible because it would transgress the Enabling Act's requirement that Federal Rules not "abridge, enlarge or modify any substantive right" (quoting 28 U.S.C. § 2072(b)(2012))); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (noting that the application of a federal rule of procedure must not violate the terms of the Enabling Act).

¹⁵⁶ See Nagareda, *supra* note 19, at 106 (suggesting "that it is 'emphatically the province and duty' of the court 'to say what the law is' when the answer to that question will determine whether" to certify a putative class (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))); Wolff, *supra* note 18, at 1047 (arguing that, where ambiguities in, or outdated interpretations of, a federal statute bear on procedural questions, the Court should reexamine the underlying liability policy). This Article does not enter the long-standing, but orthogonal, debate about the appropriate constraints, constitutional or otherwise, on judicial lawmaking. For a thorough treatment of that debate, see generally Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545 (2004).

¹⁵⁷ See Victor E. Schwartz & Christopher E. Appel, *Rebutting the Fraud on the Market Presumption in Securities Fraud Class Actions: Halliburton II Opens the Door*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 33, 40-41 (2015) (noting that PSLRA and SLUSA "have had little impact on curbing the filing of questionable securities fraud class actions").

would have offended the separation-of-powers constraints of the Enabling Act. It is less likely that contrary Rule 23 holdings in either *Amgen* or *Halliburton II* would have led the Court adrift of the Enabling Act, though the Court was sensitive to the possibility.¹⁵⁸

From this formal separation-of-powers limitation on the Court's procedural decisionmaking power emerges a theory of the scope of judicial procedural lawmaking power in federal question cases, embodied in a principle I term the principle of procedural symmetry. This principle not only helps capture the methodology at work in many of the class action cases, thereby reconciling the divergent results, but it also operationalizes the Enabling Act in federal question cases more broadly.¹⁵⁹ The principle of procedural symmetry says that the Court cannot interpret or apply *substantive* law differently from one procedural context to the next. This is the inverse of the oft-cited transsubstantivity principle: that the same procedural rules should apply to all areas of substantive law.¹⁶⁰

In contrast with the commands of the transsubstantivity principle, it is perfectly acceptable under the symmetry principle—and the Enabling Act—for the same procedural rule to apply differently in different substantive contexts. Thus, the Court's interpretation of Title VII in *Dukes* could permissibly impact the function of Rule 23(a) differently than would its interpretation of Rule 10b-5. Indeed, the new, transsubstantive "commonality" standard in *Dukes* will almost certainly apply differently in different substantive contexts—not as a matter of procedural *form*, but as a matter of procedural *function*. The Court in *Dukes* found that plaintiffs could not answer the question "apt to drive the resolution of the litigation"—"why was I disfavored"—through

¹⁵⁸ For instance, in rejecting defendants' policy arguments as to why plaintiffs ought to be required to prove materiality at the class-certification stage to invoke the *Basic* presumption, the Court in *Amgen* made frequent references to Congress's actions, inactions, and considerations in the passage of the PSLRA as they pertained to *Basic*. 133 S. Ct. 1134, 1200 (2013) ("Congress, we count it significant, has addressed the settlement pressures associated with securities-fraud class actions through means other than requiring proof of materiality at the class-certification stage."). In enacting PSLRA, Congress recognized that although private securities fraud litigation furthers important public-policy interests, prime among them, deterring wrongdoing and providing restitution to defrauded investors, such lawsuits have also been subject to abuse, including the "extract[ion]" of "extortionate 'settlements'" of frivolous claims. H.R. REP. NO. 104-369, at 31-32 (1995) (Conf. Rep.). The PSLRA's response to the perceived abuses was, inter alia, to "impos[e] heightened pleading requirements" for securities-fraud actions, "limit recoverable damages and attorney's fees, provide a 'safe harbor' for forward-looking statements, impose new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, and authorize a stay of discovery pending resolution of any motion to dismiss." See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U. S. 71, 81-82 (2006); see also 15 U.S.C. § 78u-4 (2006 ed. and Supp. V). Notably absent was any alteration of the *Basic* presumption.

¹⁵⁹ I save for future work the operationalizing of this principle across the Roberts Court's procedural landscape and exploring its applicability and limitations in diversity cases.

¹⁶⁰ See Marcus, *supra* note 11, at 1191.

common proof.¹⁶¹ That formulation of its holding obscured the Court's substantive judgment. Plaintiffs in *Dukes* had presented a common method for answering the very question the Court deemed critical to the case. The Court simply rejected it under 23(a). That rejection, however, presupposed a particular substantive judgment about how discrimination must be proved under Title VII. It is *that* substantive judgment that impeded class certification in *Dukes*, but perhaps not certification in other substantive contexts. And that substantive judgment likewise conforms to the dictates of the symmetry principle and the Enabling Act.

Similarly, recall the Enabling Act analysis in *Dukes*. The Court rejected plaintiffs' proposed "Trial by Formula" under Rule 23, because it would "abridge" defendants' right to present individualized defenses.¹⁶² Yet this holding rests upon the Court's implicit, substantive interpretation of section 706(g) of Title VII: that the defendants' right to show that an adverse employment action was non-discriminatory is the right to do so *on an individual basis*.¹⁶³ The procedural consequences followed naturally from that substantive judgment—indeed, given the Court's substantive judgment, a contrary result would have violated the Enabling Act. It likewise would have violated the symmetry principle: if defendants were entitled to present affirmative defenses to plaintiffs' claims of employment discrimination in individual proceedings as a matter of Title VII law, then the change from an individual to a class proceeding could not change that substantive right. The limitations on the function of Rule 23 in *Dukes* thus stem from the dictates of the substantive law of Title VII, leaving open the possibility that the Court could affirm a Rule 23 "Trial by Formula" in a different substantive context—as it did in *Tyson*.

Indeed, here *Tyson* is illuminating. If, as a matter of substantive law, plaintiffs in individual FLSA actions are entitled to the *Mt. Clemens* inference to establish liability, it would violate the Enabling Act to apply that substantive law differently just because the procedural context had changed to that of a class action.

Of course, when the symmetry principle and the transsubstantivity principle collide, one must give. To illustrate, compare *Tyson* and *Comcast*. Recall that in *Comcast*, the Court held that, under Rule 23, a party's damages

¹⁶¹ Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-52 (2011) (citing Nagareda, *supra* note 19, at 132).

¹⁶² *Id.* at 367.

¹⁶³ See Wolff, *supra* note 18, at 1046 (noting that the Court's chosen interpretation of section 706(g) may have foreclosed nationwide certification, but that "there is room for disagreement" as to how heavy a burden on certification the text of section 706(g) necessarily imposes).

theory must align with its theory of liability.¹⁶⁴ Taking the *Comcast* majority's holding at face value—as a purely procedural, transsubstantive, holding—the Court in *Tyson* runs afoul of *Comcast* by holding that Rule 23(b)(3) does *not* require such alignment, at least in some substantive circumstances.¹⁶⁵ Thus, either *Comcast* (which appears inconsistent with the symmetry principle) or *Tyson* (which appears inconsistent with the transsubstantivity principle) raises Enabling Act difficulties. Again: one principle must give.

At least in federal question cases, the symmetry principle better safeguards both the separation-of-powers constraints and judicial federal lawmaking power than does rigid application of the transsubstantivity principle. Indeed, formalistic separation between procedure and substance in federal question cases tends to interfere with the Court's substantive lawmaking power. More than that, and perhaps ironically, it is likelier to generate Enabling Act problems.

Indeed, it is the holding in *Comcast*, not *Tyson*, that is potentially in tension with both the Court's substantive lawmaking power and with the Enabling Act. Under the Enabling Act—and under the symmetry principle this Article offers to operationalize it—the Court may appropriately exercise its power to interpret federal substantive law,¹⁶⁶ and, as in *Tyson*, derive its procedural holdings from the dictates of its substantive judgment about the FLSA. However, if Justice Breyer's analysis of substantive antitrust law in *Comcast* is accurate—that it provides a bridge between plaintiffs' theory of liability and their damages model—then the majority's explicitly procedural holding in *Comcast* operates to “abridge” that right. Even if Justice Breyer's analysis is ultimately deemed incorrect, the majority's holding raises Enabling Act concerns as soon as it confronts a substantive judgment like the one rendered in *Tyson*.

If that analysis is correct, what should become of the strength and scope of the transsubstantivity principle? Or of the rigid separation between substantive and procedural analysis deployed in service of it, at least in federal question cases? On the one hand, the Enabling Act demands adherence to one half of the transsubstantivity principle: namely, that procedural rules must be identical in *form* across substantive contexts. So the Court could not

¹⁶⁴ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (“There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised.”).

¹⁶⁵ See *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045-47 (2016) (upholding the use of representative evidence).

¹⁶⁶ To be clear, *Tyson* involved federal law—the FLSA—and Iowa state substantive law. Because Iowa law incorporated the FLSA, the Court's interpretation of federal law did not risk offending the Enabling Act. See Brief of Amici Curiae Civil Procedure Professors in Support of Respondents at 5, *Tyson*, 136 S. Ct. 1036 (No. 14-1146) (arguing that “Tyson's Rules Enabling Act argument fails even to engage with Iowa substantive law or the federal law it incorporates”).

declare that, for securities cases, Rule 23(a)'s "commonality" standard requires nothing more than the generation of, say, "questions of law or fact that relate to the same transaction or occurrence"—at least without overruling *Dukes*.

Under the separation-of-powers limitations of the Enabling Act, however, the Court in federal question cases still has significant room to render judgments about the meaning and content of substantive law. And any one of these substantive judgments may affect the *function* of a procedural rule in that particular substantive context, but not in others. Therefore, while the Court could not issue a different interpretation of Rule 23(a) for securities cases without overruling *Dukes*, it could—and did—interpret the securities laws and the FLSA in ways that make the application of Rule 23's identical-in-form commonality and predominance standards much less onerous as a functional matter. The Enabling Act limitation here does not derive from the principle of transsubstantivity, but from the principle of procedural symmetry: Variances in the application of procedural rules are perfectly appropriate, so long as they stem from the dictates of substantive rules. Variances in application of substantive law in different procedural contexts are not.

Though this discussion has necessarily been abbreviated, even this brief exploration reveals two key insights: First, despite the Court's invocation of language to the contrary, rigid separation of substance and procedure, and strict adherence to the transsubstantivity principle, is not shorthand for "Enabling Act compliant," at least in federal question cases. Second, such formalism is, in fact, a potential recipe for bad procedural holdings—holdings that, at least in later cases, must be re-interpreted or otherwise manipulated to avoid "abridg[ing], modify[ing], or enlarg[ing]" a federal substantive right; holdings that obscure, rather than clarify, the dictates of substantive law; holdings that threaten judicial legitimacy by generating doctrinal and jurisprudential incoherence. To the extent the Court might be criticized for being "non-transsubstantive," it should take it as a compliment.

* * *

Absent from the foregoing analysis is an exploration of the possible valence of the symmetry principle in class arbitration decisions. That omission was purposeful. The arbitration cases do not directly raise Enabling Act questions: at least in federal question cases, any conflicts are largely between one federal statute (the FAA) and another (say, the Sherman Act).

However, that arbitration jurisprudence bears brief mention here, for two reasons. One, like the Rule 23 cases, the arbitration cases implicate separation-of-powers limitations on the Court's lawmaking authority. Two, the Court in the arbitration cases deploys the procedural formalism and transsubstantivity found throughout the Court's procedural jurisprudence.

Indeed, the Court's approach to conflicts between the FAA and other substantive federal statutes has its intellectual foundation in—and striking conceptual similarity to—its formalistic approach to substance and procedure in its *Erie* jurisprudence. Start with Justice Kagan's dissent in *Italian Colors*. She notes that, when two federal statutes collide, the substantive statute (the Sherman Antitrust Act) should trump the statute governing procedural matters (the FAA).¹⁶⁷ This interpretive principle is rooted in the same separation-of-powers concerns that guide procedural interpretation under the Enabling Act. The majority does not deny the principle's existence; it denies its relevance.¹⁶⁸ As in *Shady Grove* and *Comcast*, the majority in *Italian Colors* avoids the principle's limitation by avoiding the conflict.¹⁶⁹

In *Italian Colors*, the majority silos off the procedural statute (the FAA) from the substantive one, defining the latter *only* as a formal right.¹⁷⁰ This formalistic definition of a substantive right explicitly rejects any consideration of the interaction between substantive rights and procedures.¹⁷¹ So conceptualized, arbitration procedures do not, and likely cannot as a conceptual matter, interfere with a substantive right.¹⁷² This move should sound familiar: it is the same one the Court made in *Shady Grove* and *Comcast*.¹⁷³

The rigid formalism used in *Italian Colors*, however, did more than obscure substantive judgments. It also provided the majority with an end-run around

¹⁶⁷ 133 S. Ct. 2304, 2313-20 (2013) (Kagan, J., dissenting).

¹⁶⁸ See *id.* at 2320 (noting that the "effective-vindication rule comes into play . . . when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here").

¹⁶⁹ *Id.* at 2317, 2320 (stating that "[t]he majority is quite sure that the effective-vindication rule does not apply here, but has precious little to say about why. It starts by disparaging the rule as having 'originated as dictum.'" (quoting *id.* at 2310)); accord *Comcast*, 569 U.S. at 1433 ("This case . . . turns on the straightforward application of class-certification principles; it provides no occasion for . . . discussion of substantive antitrust law."); *Shady Grove*, 559 U.S. 393, 401-04 (2010) ("We need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23; that is not what § 901(b) does.").

¹⁷⁰ See *Glover*, *supra* note 51, at 3077 (explaining the Court's "effective reduction of substantive legal obligations to purely formal rights").

¹⁷¹ Indeed, the Supreme Court overturned the Second Circuit's decision striking down the class action prohibition on the grounds that the interaction of the class action, the class action provision, and plaintiffs' substantive rights under federal statute was one of effectively eliminating those statutory rights. See, e.g., *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 304, 312 (finding that plaintiffs demonstrated that the class-waiver provision "would effectively preclude any action seeking to vindicate the statutory rights asserted by" them while noting the Supreme Court's recognition of "utility of the class action as a vehicle for vindicating statutory rights [particularly since] the class action device is the only economically rational alternative").

¹⁷² See *Glover*, *supra* note 51, at 3073 (noting that, after *Italian Colors*, the only impermissible contract provision is one expressly banning suits under a particular federal statute).

¹⁷³ See *Comcast*, 133 S. Ct. at 1433 (finding that the case "provides no occasion for the dissent's extended discussion . . . of substantive antitrust law" where Rule 23 law consideration was separate from interaction with it); *Shady Grove*, 559 U.S. at 401-04 (finding that Rule 23 did not conflict with a New York state law and thus that the Court "need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23").

a collision between its procedural holding and federal substantive law. Perhaps that explains the absence of explicit exploration of substantive judgments in the Court's class arbitration opinions. That is troubling on its own terms. The takeaway for judicial lawmaking power, and the insight that provides a conceptual bridge between the class arbitration and Rule 23 cases, is that rigid transsubstantivity can threaten, rather than safeguard, separation-of-powers values.

Indeed, that threat manifests itself concretely at the intersection of the pro-class action cases and the class arbitration cases. The theoretical underpinnings of the symmetry principle would seem to require the Court to strike down provisions in an arbitration contract that prohibited the use of statistical evidence, the *Basic* presumption, and—at least under the FLSA—a collective action procedure. But would the Court's deeper substantive judgments about adopting class-facilitative rules in those remedial schemes carry any weight? More fundamentally, given the Court's formalism in the class arbitration cases, would *anything* about the underlying substantive laws in *Tyson* or *Amgen* or *Halliburton II* matter at all? And if not, how damning—or not—is that for rigid transsubstantivity?

* * *

The Court's rigid transsubstantive formalism tends to obscure judgments about the interaction between substantive and procedural law. It also obscures the cases themselves: by emphasizing the "procedural" features of those cases, the opinions tend to repel public interest and media scrutiny.¹⁷⁴ The next Section briefly explores some possible implications of this lack of transparency for the judicial role and judicial legitimacy.

B. *Transparency, the Judicial Role, and Judicial Legitimacy*

If the Court can exercise substantive lawmaking power in a way that expressly acknowledges the interrelationship between substance and procedure without offending the Enabling Act, why does it largely avoid doing so? On one level, a question like this cannot be fully answered. The Court is not a unitary or monolithic entity, much less a static one—nor should it be. However, exploring possible explanations for this phenomenon is revealing, less as a matter of attempting to achieve the impossible task of accurate judicial mind-reading, but more as a means for considering the normative valence of this non-transparency for the judicial role and judicial legitimacy.

¹⁷⁴ See Burbank & Farhang, *supra* note 70, at 299 (hypothesizing that, when "the Court is engaged in apparently technical and legalistic decision making," the public pays little attention to its work).

One possible, and partial, explanation is path dependency: the formalism already pervasive in the Court's procedural jurisprudence colors and constrains the Court's approach to the questions presented, petitions for writs of certiorari, and briefs in "procedural" cases. Those questions, petitions, and briefs are then colored and constrained by the Court's formalistic opinions. The history of *Halliburton II* supports this hypothesis. Defendants had already tried and failed to rearrange the litigation landscape of securities fraud through largely procedural arguments in *Halliburton I* and *Amgen*. But in *Halliburton II*, defendants launched an offensive against the fraud-on-the-market theory itself, leaving the Court no choice but to confront the substantive question head on.¹⁷⁵ And it was not until *Tyson* that one side's briefs' lead arguments urged the Court to make substantive law determinations to drive the procedural outcome.¹⁷⁶ Such arguments departed markedly not only from those in prior class action cases, but also from those in the petition for writ of certiorari in *Tyson* itself.¹⁷⁷ Indeed, these arguments took *Tyson* itself by surprise.¹⁷⁸

A second set of less provable, but still rather plausible, hypotheses posit that the Court maintains its rigid substance/procedure dichotomy for more strategic reasons related to preserving its institutional power. For starters,

¹⁷⁵ In both *Halliburton I* and *Amgen*, the Court was presented with arguments aimed at ratcheting up the requirements for plaintiffs seeking to invoke the fraud-on-the-market presumption of reliance in order to satisfy Rule 23(b)(3). See *Amgen*, 133 S. Ct. 1184, 1191 (2013) (focusing on whether materiality needed to be proved to satisfy Rule 23(b)(3)); see also *Halliburton I*, 563 U.S. 807, 807 (2011) (focusing on whether loss causation needed to be proved to satisfy Rule 23(b)(3)). In both of these cases, arguments assumed the continued viability of the substantive *Basic* presumption and focused within the procedural parameters of Rule 23(b)(3). After those procedural arguments failed, securities-fraud defendants were left with arguments—urged by the dissent in *Amgen*—that attacked the substantive *Basic* presumption itself. Thus, in *Halliburton II*, the questions presented directly challenged the continued viability of the *Basic* presumption, forcing the Court to take that substantive question head-on. See *Halliburton II*, 134 S. Ct. 2398, 2405 (2014) (“The questions presented are whether we should overrule or modify *Basic*'s presumption of reliance . . .”).

¹⁷⁶ The pre-*Tyson* class action briefs largely focused on Rule 23 and the class action. See, e.g., Reply Brief for Petitioners at 21, *Comcast*, 133 S. Ct. 1426 (No. 11-864) (arguing that Rule 23 precluded plaintiffs' damages model); Reply Brief for Petitioner, *Dukes*, 564 U.S. 338 (No. 10-277) (focusing in its entirety on certification's impermissibility under Rule 23).

¹⁷⁷ In *Tyson*, plaintiffs changed argument strategy between the time of filing their opposition to the petition for writ of certiorari and the filing of their merits brief, shifting from Rule 23-centric arguments to arguments centered on *Mt. Clemens*. Compare Respondents' Brief in Opposition, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (No. 14-1146) (arguing that petitioner's objection to the use of representative proof was waived and thus did not warrant review), with Brief for Respondents, *Tyson*, 136 S. Ct. 1036 (No. 14-1146) (focusing on the permissibility of the use of representative proof, in the form of class-wide approximations of employee compensable time, under *Mt. Clemens*'s inferential proof standard).

¹⁷⁸ See Reply Brief of Petitioner at 3, 5, *Tyson*, 136 S. Ct. 1036 (No. 14-1146) (characterizing respondents' *Mt. Clemens* arguments as “smokescreens [that] lack merit” and contending that, in any event, respondents waived the point “by not raising it when opposing certiorari”).

transsubstantivity—or at least the illusion thereof—can obviate (as in *Italian Colors* and *Comcast*) or obscure (as in *Dukes*, *Amgen*, and *Tyson*) otherwise permissible substantive lawmaking.¹⁷⁹ This is lawmaking the Court may well not wish to draw significant attention to for any number of reasons, including a protectionist attitude toward its own institutional power.¹⁸⁰ Relatedly, the illusion of transsubstantivity may prevent substantive judgments from extending beyond a single “procedural” opinion. For instance, perhaps the Court in *Dukes* did not want to issue a precedential statement on Title VII law. On both of these scores, and particularly if the Court is engaged in some form of “revolution” in favor of business,¹⁸¹ blatant substantive law decisionmaking might draw too much unwanted public attention.

The path dependency hypothesis, whatever its ultimate accuracy, seems insufficient to provide normative justification for nontransparency. To be sure, the Court ought not issue opinions on matters that are insufficiently briefed.¹⁸² But the Court could request briefing on underlying substantive issues in “procedural” cases—putting future advocates on notice about argument structure and content. Moreover, and particularly given the success of parties who wrote less transsubstantive briefs in cases like *Tyson* and *Halliburton II*, the Court may be forced into greater transparency in its procedural cases by way of advocacy.

The normative valence of the institutional power hypothesis for the maintenance of transsubstantivity illusions is more difficult to gauge and warrants a more thorough exploration than can be provided here. Nevertheless, here are three initial considerations. First, and fundamentally, the judiciary has a role to “say what the law is” in matters of substantive

¹⁷⁹ See, e.g., Wolff, *supra* note 18, at 1046-47 (arguing that the Court in *Dukes* should not have obscured its analysis of the substantive law of Title VII).

¹⁸⁰ Unlike “procedural” opinions, the Court’s decisions on substantive matters are subject to higher levels of scrutiny by the public, the media, and Congress. In the wake of *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), for example—in which the Court explicitly interpreted the equal pay provision of the Civil Rights Act of 1964—public outcry was so great that Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 to provide that the statute of limitations for filing equal pay claims resets with each new paycheck affected by the employer’s discriminatory action. Pub. L. No. 111-2, § 2, 123 Stat. 5; see also Editorial, *Injustice 5, Justice 4*, N.Y. TIMES (May 31, 2007), <http://www.nytimes.com/2007/05/31/opinion/31thu1.html> [<https://perma.cc/LZG9-4VAM>] (noting that “[f]ortunately, Congress can amend the law to undo this damaging decision” but “[i]t should do so without delay”).

¹⁸¹ See Coates, *supra* note 46, at 28-31 (discussing the Roberts Court’s use of civil procedure to “cut back on civil litigation against business defendants”); Burbank & Farhang, *supra* note 70, at 299 (arguing that the Court has focused on “procedural” decisions so as to avoid public notice and “erode[] the enforcement of federal rights”).

¹⁸² See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013) (Ginsburg & Breyer, JJ., dissenting) (criticizing the majority opinion as “infected by our misguided reformulation of the question presented”).

liability policy, even in “procedural” cases.¹⁸³ The Court’s substantive lawmaking role involves a mode of judicial reasoning that looks to the relevant statute’s text and legislative history and then balances various policy considerations, including: the rule’s regulatory goals and purposes; the effects the decision will have on plaintiffs, on defendants, and on the judicial system; and its interaction with various enforcement mechanisms. Resolving these substantive issues procedurally—with a measure of indifference to substantive law—raises concerns that the substantive issues will not be given the careful consideration they deserve. That lawmaking role—to provide careful and thorough reasons for its substantive judgments—is critical to notions of judicial legitimacy.¹⁸⁴

Second, the exercise of this lawmaking power is quite important in a world of litigation increasingly characterized by an absence of substantive content.¹⁸⁵ The vast majority of cases are resolved before trial.¹⁸⁶ To the extent cases generate precedent or substantive guidance, they frequently must do so through pretrial procedural decisionmaking.

Third, the lack of explicit exercise of this lawmaking power produces confusion about the contours of substantive *and* procedural law. For example, we know (but only after *Tyson*) that *Comcast* likely cannot be interpreted as prohibiting any substantive rule that bridges the gap between liability and damages. But what sorts of factors should courts take into account in interpreting the scope of the proposed substantive “bridge” between liability and damages? Does it matter whether that bridge facilitates or frustrates the class action device? Can FLSA plaintiffs subject to an arbitration agreement banning class actions successfully invoke *Tyson* in their Opposition to Defendant’s Motion to Compel Arbitration? For that matter, can securities plaintiffs successfully invoke *Halliburton II*? And if so, must *Italian Colors* be overruled, or can it be limited—a *la Comcast*—as an abstract procedural case?¹⁸⁷

¹⁸³ See *supra* note 156.

¹⁸⁴ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 864-65 (1992) (“The Court’s power lies, rather, in its legitimacy The underlying substance of this legitimacy is expressed in the Court’s opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all.”); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 496-500 (2015) (identifying the critical role judicial reasoning plays in supporting the legitimacy of democratic institutions).

¹⁸⁵ See generally Glover, *supra* note 34; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165.

¹⁸⁶ Glover, *supra* note 34 at 1720 (explaining that “trials . . . are now a rarity” and citing numerous empirical studies that trace the decline in trial rates since the Federal Rules of Civil Procedure were enacted); Nagareda, *supra* note 19, at 130 (arguing settlement is the dominant endgame in litigation, and after class certification, there will likely be no trial).

¹⁸⁷ The drafters of the Sherman Antitrust Act specifically considered and rejected “an amendment that would have permitted a type of plaintiff class action in which liability would be determined as to a large group of plaintiffs but damages would be assessed to each individually.”

As a normative matter—and at least given Congress’s history of obfuscation and power-claiming through procedure—it is not entirely clear which way the balance cuts as between preserving the institutional power of the judiciary and compelling values of transparency. As a descriptive matter, it is rather unlikely that the Roberts Court would find these three normative concerns about the judicial role and judicial legitimacy compelling enough to abandon all future uses of the transsubstantivity curtain—though increased “non-transsubstantive” advocacy might well drag the Court’s substantive judgments into the light. That said, it might not be wholly unreasonable to suggest they not go out of their way to trample over these normative concerns as they arguably did by granting certiorari in *Comcast*. Indeed, whatever the right balance, ultimately, it is the Court itself that possesses the ultimate power to strike it.

* * *

The Supreme Court’s recent class action opinions, taken at face value, might suggest that the Court is either lost at sea or irredeemably political in its class action jurisprudence. Though these cases can be better understood by the substantive judgments this Article reveals, the lack of transparency about those judgments lends credence to the most cynical views of judicial lawmaking. It reinforces the notion that procedural lawmaking is nothing more than a battleground in the waging of a different war: over the value of certain substantive laws, certain claimants, and private enforcement itself. Though swinging the transparency pendulum in the precise opposite direction may be a step too far given the need for the judiciary to preserve institutional power, the important concerns regarding the judicial role and

Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 25 (1989) (describing efforts by members of Congress to amend the Sherman Antitrust Act to provide a class action mechanism); see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (noting that Congress rejected proposals to include a class action or collective action provision in the Sherman Antitrust Act).

This is an argument American Express raised in its petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, see *Petition for a Writ of Certiorari*, *Am. Express Co. v. Italian Colors Rest.* 133 S. Ct. 2304 (2013) (No. 12-133), and in even more detail in its opening brief. See Brief for Petitioners at 6, *Italian Colors*, 133 S. Ct. 2304 (No. 12-133).

In particular, American Express pointed out that, when the Sherman Antitrust Act was being debated, Senator James Z. George of Mississippi proposed an amendment that would allow a class action in which liability is determined in regard to a “large group of plaintiffs,” but damages are assessed to each plaintiff individually. Hovenkamp, *supra* note 187, at 25. In support of his amendment, Senator George argued that such an amendment was needed for the vindication of small claims—claims so small as not to justify the expense and trouble of a suit in a distant court. *Id.* at 24-25. Other such comments abounded. *Id.* at 25-26. Congress ultimately rejected Senator George’s amendment. *Id.* at 25; *Reiter*, 442 U.S. at 343.

the legitimacy of judicial lawmaking call for a better balance to be struck in the Court's procedural decisionmaking.

IV. CONCLUSION

This Article began with an inquiry that has dominated class action discussions for the past six years: does the Roberts Court's class action jurisprudence evince an intent to destroy the class action? The answer, to some degree, is yes. But the jurisprudence cannot be fully explained by a monolithic theory about the Court's view of class actions. The Court's holdings in this area are better seen as reflecting the Court's implicit, substantive lawmaking and its willingness, or not, to adopt substantive rules and policies that facilitate class actions.

As a theoretical matter, the class action jurisprudence under the Roberts Court may actually have opened a window of promise for Rule 23, the class action, and procedural lawmaking more generally. Despite its shortcomings, the Court's class action jurisprudence portends a welcome shift: A shift from procedural analysis, wholly divorced from substantive considerations, to analysis interwoven with and driven by judgments regarding substantive law, rules, and policy. A shift to what perhaps "procedural" analysis was always meant to be: (transparently) "non-transsubstantive."¹⁸⁸

¹⁸⁸ See, e.g., Burbank & Wolff, *supra* note 149, at 48 (identifying the Federal Rules as only "superficially transsubstantive"); Cover, *supra* note 11, at 732-33 (questioning the utility of transsubstantivity and asking in what sense the Federal Rules work, not "because of its trans-substantive aspiration," but "in spite of it").

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