

CLASS CERTIFICATION IN THE AGE OF AGGREGATE PROOF

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Few pretrial motions in our civil justice system elicit as much controversy as those for the certification of class actions. This Article offers the first account of the challenges courts face today in light of an important series of federal appellate decisions that direct the district courts to resolve competing expert submissions on the class certification question during the pretrial stage, even when the dispute overlaps with the merits of the litigation.

Across broad swaths of class action litigation today, plaintiffs rely on aggregate proof—evidence, typically of an economic or statistical nature, that presupposes the cohesiveness of the aggregate unit for litigation and, from that perspective, seeks to reveal quantitatively a common wrong attributable to the defendant. Debates over the proper role of aggregate proof arise in what otherwise might seem disparate disputes over class certification across securities, antitrust, Racketeer Influenced and Corrupt Organizations Act (RICO), and employment discrimination litigation. Too often, however, courts have taken at face value the evidentiary form that aggregate proof assumes in motions for class certification.

This Article urges a new conceptualization of the challenges in class certification facing courts today. The real question about aggregate proof in class certification is not one that speaks to the relationship between the court and the factfinder in the (usually hypothetical) event of a class-wide trial. Rather, the institutional relationship that really matters is the one between the court and the legislature as expositors of governing law. Properly understood, aggregate proof frequently offers not so much a contested view of the facts but, more fundamentally, a contested account of governing law—one eminently suited for judicial resolution and appellate correction de novo, without concern about possible intrusion into the role of the factfinder.

This Article exposes how renewed attention to the judicial duty to “say what the law is” can lend coherence to the law of class certification, offering the first extended assessment of such controversial recent litigation as the civil RICO class action against the tobacco industry in connection with its marketing of light cigarettes and the employment discrimination class action—the largest certified class in history—against Wal-Mart concerning the pay and promotion of its hourly female employees. The Article concludes by relating the analysis of class certification to

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larger changes in the civil justice system that seek in various ways to address the reality of settlement, rather than trial, as the endgame of litigation.

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INTRODUCTION

Since the emergence of the modern class action in the 1966 amendments to the Federal Rules of Civil Procedure, controversy has attended the certification of litigation to proceed on a class-wide basis. The addition to the Rules, in 1998, of express authorization for appeals of class certification determinations short of final judgments stands as recognition that certification is no mere preliminary, proce-

dural ruling.¹ The paradigmatic application of the modern class action—“the policy at [its] very core,”² in the words of the Supreme Court—is to make civil claims marketable that otherwise would not be brought on an individual basis. For plaintiffs in such circumstances, class certification effectively determines whether the aggregate unit will be something considerably more valuable than the individual claims that form the constituent parts of the class.³

For the defendant, the class certification determination can be equally momentous. With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs’ case by trial. In terms of their real-world impact, class settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restructuring of the defendant’s operations.⁴

With so much riding on the class certification determination, one would think that procedural law would have arrived quickly at a clear and broadly shared understanding of the nature of that determination and the permissible parameters for inquiry by the court. That, however, has not been so. For decades after the adoption of the modern Rule 23, procedural law found itself occupied with what one might describe as a “first generation” of questions concerning class certification. These first-generation questions centered on the meaning of the Supreme Court’s cryptic 1974 statement in *Eisen v. Carlisle & Jacquelin* that “nothing” in Rule 23 “gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”⁵

In a series of decisions in recent years,⁶ the federal appellate courts largely resolved the first-generation questions about what had

¹ FED. R. CIV. P. 23(f); see also *infra* note 25 (discussing impact of Rule 23(f)).

² *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

³ See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 919 (1998) (urging conception of class as distinct “entity”).

⁴ See, e.g., *In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 441 (D.N.J. 2004) (presenting table of illustrative class settlements involving recoveries of more than \$100 million); William S. Lerach, Keynote Address at the Council of Institutional Investors Spring Meeting: Achieving Corporate Governance Enhancements Through Litigation (Mar. 27, 2001), in 24 T. JEFFERSON L. REV. 1, 8–9 (2001) (highlighting class settlements that have achieved changes in corporate governance).

⁵ 417 U.S. 156, 177 (1974).

⁶ The leading decision is *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006) [hereinafter *IPO*]. *Accord* *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268–69 (5th Cir. 2007) (holding that loss causation must be established by preponderance of evidence at certification stage); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676–77 (7th Cir. 2001) (noting that judge can delve into merits to ensure that certification requirements are met).

come to be known as the *Eisen* rule. True enough, Rule 23 does not require proponents of class certification to satisfy a preliminary injunction–like standard cast in terms of the likelihood of success on the merits.⁷ Still, the court may not accept a bare assertion in the class complaint as to the appropriateness of class treatment—unlike, say, the posture that a court must assume when ruling on a motion to dismiss on the pleadings.⁸ Class certification is not a matter of mere pleading⁹ but, rather, of affirmative proof that the requirements stated in Rule 23 have been satisfied. The court must make a “definitive assessment” that these requirements have been met, even if that assessment entails the resolution of conflicting proof and happens to overlap with an issue—even a critical one—on the merits.¹⁰

These first-generation answers constitute a helpful step forward,¹¹ but they have yielded still harder and, as yet, underexplored second-generation questions. Casting class certification in terms of proof of compliance with Rule 23, rather than as a matter of pleading, puts pressure on both the nature of that proof and the conceptual vagaries of the stated certification requirements. The purpose of this Article is twofold: to expose the nature of these second-generation questions surrounding class certification and to offer a normative account of the proper allocation of institutional authority to resolve them.

Questions of institutional allocation operate on two levels. The first speaks to the relationship between the court in class certification and the ultimate trier of fact (often, a jury)¹² in the event of a class-

⁷ For commentary urging the inclusion of a preliminary injunction–like standard in Rule 23, see generally Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002), and Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1 (2001).

An effort by the Advisory Committee on the Civil Rules to insert into Rule 23 something modestly approaching such a standard ultimately went nowhere in the late 1990s. See Proposed Rules: Amendments to Federal Rules, 167 F.R.D. 523, 559 (1996) (proposing to condition certification of opt-out class actions upon determination that “probable relief to individual class members justifies the costs and burdens of class litigation”). On the controversy over this proposal, see DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 31–33 (2000).

⁸ See *Szabo*, 249 F.3d at 676–77 (overturning class certification when district court had misread *Eisen* to require acceptance of factual allegations in complaint pertinent to satisfaction of Rule 23 requirements).

⁹ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008) (“[T]he requirements set out in Rule 23 are not mere pleading rules.”).

¹⁰ *IPO*, 471 F.3d at 41.

¹¹ The approach prevailing today brings the law of class certification largely into accord with the view in a prescient earlier article, by Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51 (2004).

¹² In many areas of class action litigation, either the Seventh Amendment or an applicable statute confers a right to jury trial. See, e.g., U.S. CONST. amend. VII (“preserv[ing]” right to jury trial in “Suits at common law, where the value in controversy shall exceed

wide trial. But, more subtly and importantly, questions of institutional allocation in the class certification context also implicate the relationship between the court and other institutions with law-declaring power—principally, the legislature. A deep and increasingly important trend in contemporary class certification disputes concerns the degree to which ostensible battles over conflicting proof on the certification question are the stalking horse for something else: underlying disputes that often have little to do with the proof or the facts and everything to do with the proper meaning of governing law.

All of this may sound new. There are, however, deeper roots for what has emerged today at the forefront of class certification. Writing in the gendered language commonplace in 1897, Oliver Wendell Holmes famously ventured that, in legal studies, “the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”¹³ So it is, more than a century later, that the major unanswered questions surrounding class certification center upon its interaction with areas of what one might call “Holmesian law”—bodies of substantive law in which statistical or economic analysis is invoked to play a significant role in legal doctrine.¹⁴ Specifically, in keeping with Holmes’s prediction, the flashpoints today over class certification concern the role of aggregate proof of a statistical or economic nature.

By “aggregate proof,” I refer to evidence—characteristically, in the form of expert submissions involving sophisticated statistical or economic analysis—that presumes a view of the proposed class in the aggregate. From that vantage point, aggregate proof then seeks to trigger the application of substantive doctrine in such a way as to suggest a common, class-wide wrong attributable to the defendant. The hard question concerns the propriety of this use of aggregate proof to

twenty dollars”); 42 U.S.C. § 1981a(c) (2000) (providing right to jury trial in employment discrimination actions seeking compensatory or punitive damages); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (interpreting Seventh Amendment right to jury trial to extend to statutory claims that involve “legal rights and remedies, enforceable in an action for damages in the ordinary courts of law”).

¹³ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). On the related significance of probabilistic thinking for Holmes’s conception of negligence in tort, see LOUIS MENAND, *THE METAPHYSICAL CLUB* 346 (2001).

¹⁴ Commentary on the role of social science in law advances a similar observation, though not with reference to class actions. In an important 1986 article, John Monahan and Laurens Walker ventured that “social science research, when used to create a legal rule, is more analogous to ‘law’ than to ‘fact,’ and hence should be treated much as courts treat legal precedent.” John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986). The present Article works out the institutional implications of this observation about the nature of modern law in the context of the contemporary debate over class certification.

conceptualize all members of the proposed class as a cohesive unit—as the victims of the same wrong under governing law, rather than a series of individualized wrongs ill-suited for class treatment.

Faced with motions for class certification in two of the most closely watched, high-stakes class actions in recent decades, the Second and Ninth Circuits diverged over the treatment of aggregate proof. In *McLaughlin v. American Tobacco Co.*, the Second Circuit decertified a multibillion-dollar class action under the Racketeer Influenced and Corrupt Organizations Act (RICO) against the tobacco industry concerning fraud in the marketing of “light” cigarettes, even in the face of aggregate economic analysis said to show that the fraud elevated the prices paid for light cigarettes by all smokers nationwide.¹⁵ By contrast, in *Dukes v. Wal-Mart, Inc.*,¹⁶ a three-judge panel of the Ninth Circuit upheld the certification of the largest class action in history¹⁷ under Title VII of the Civil Rights Act of 1964, emphasizing the existence of aggregate proof said to reveal statistically significant differences in pay and promotion along male-female lines across Wal-Mart’s 3400 stores nationwide. As this Article was going to press, the Ninth Circuit granted Wal-Mart’s petition for rehearing en banc.¹⁸

The proper role of aggregate proof in class certification determinations is far from a mere technicality. The desired effect of aggregate proof is considerable—indeed, well-nigh decisive—on the class certification question. If everyone in the proposed class is, in some sense, the victim of the same wrong (though, perhaps, to varying degrees), then it would seem straightforward for the court to recognize that cohesiveness by way of class certification. The impulse is for the scope of the lawsuit to conform to the scope of the aggregate proof—for the proposed RICO class to encompass all smokers of light cigarettes across the country and for the proposed class against Wal-Mart to encompass all of the company’s domestic operations.

The usual move for the defendant opposing class certification is to respond in kind: to present its own well-credentialed experts, both to criticize the analysis of the plaintiffs’ experts and, typically, to offer their own competing analysis. On this competing account, the wrongs, if any, committed vis-à-vis class members are not the same; rather, they exhibit individualized features that cannot plausibly comprise a cohesive unit. At its extreme, this jousting over class certification con-

¹⁵ 522 F.3d 215, 229 (2d Cir. 2008).

¹⁶ 509 F.3d 1168, 1174–75, 1180–82 (9th Cir. 2007), *reh’g en banc granted*, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009).

¹⁷ *Id.* at 1190.

¹⁸ *See supra* note 16.

veys two radically different pictures of the world. According to class counsel's aggregate proof, everything is all the same. Under defense counsel's aggregate proof, the world is so full of microscopic individual differences that it is a wonder that any class action ever can be certified.

The implication invited by class counsel is that only by taking an aggregate, class-wide perspective does the wrong allegedly committed by the defendant come into focus. The ultimate factfinder would be entitled to disbelieve the plaintiffs' aggregate proof, just as it might disbelieve any other form of evidence. But that recognition—so certification proponents contend—is all the more reason for a court not to abort consideration from a class-wide perspective by withholding class treatment in the first place.¹⁹ In the parlance of Rule 23, aggregate proof inherently frames “questions” that are “common” across the posited aggregate unit,²⁰ because such proof takes that unit as its starting point and then seeks to trigger substantive doctrine that characterizes all class members as the victims of a common wrong.

At the same time, arguments for class certification premised on aggregate proof exhibit a deeply troubling circularity.²¹ On a more skeptical view, such arguments amount to the justification of aggregation by reference to evidence that presupposes—at least as a matter of economic or statistical methodology—the aggregate unit whose legitimacy the court is to determine. If a cohesive class can be created through such savvy crafting of the evidence, then there would seem to be little limit to class certification in our modern world of increasingly sophisticated aggregate proof. The law would run a considerable risk of unleashing the settlement-inducing capacity of class certification based simply upon the say-so of one side. Yet, the status of class treatment as the exception,²² not the norm, for civil litigation strongly sug-

¹⁹ The most forceful statement of this view appears in *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1020–21 (E.D.N.Y. 2006), *rev'd sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008).

²⁰ See FED. R. CIV. P. 23(b)(3) (“A class action may be maintained if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members . . .”).

²¹ As Part I.B.3, *infra*, shall elaborate, the concern over circularity goes beyond mere logical fastidiousness to the role of the class action within the array of institutions for law-making. At bottom, the two leading Supreme Court decisions on the class action device in recent decades—*Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)—rest on a well-taken skepticism about circularity in class certification, precisely due to its potential to displace other avenues for law reform such as public legislation.

²² See *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940) (characterizing class action as “recognized exception” to “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process”). The

gests that one side's procedural preference alone cannot be determinative.

At this early second-generation stage, then, the law of class certification finds itself seemingly confronted with an all-or-nothing choice: Either the scope of aggregate procedure must follow more or less automatically from the framing of admissible proof along the lines of the proposed aggregate unit, or class certification must fail routinely on account of the circularity problem. This Article resists this choice by explaining how the seemingly stark alternatives posited for class certification today in cases of aggregate proof stem from an understandable but mistaken premise.

The hard questions surrounding class certification today are—contrary to conventional wisdom—only superficially questions of fact, conflicting evidence, and dueling expert witnesses. This Article exposes a significant, but underconceptualized, development in class certification analysis in recent years: Aggregate proof frequently offers not so much a contested account of the facts that bear on class certification but, more fundamentally, an implicit demand for a new and often controversial conception of the substantive law that governs the litigation. Rightly understood, the real concern about aggregate proof in class certification lies in its threat “to conform the law to the proof.”²³ The leap from aggregate proof to legal doctrine is precisely the point on which courts should focus today in the posture of class certification.

Three related points emerge from this fresh conceptualization of class certification:

- (1) This Article argues for courts to be more transparent about the precise nature of the dispute in contested class certifications. As I shall elaborate, a major part of the problem today is that, oftentimes, courts seemingly do not even realize that contested class certifications center upon contested accounts of governing law—accounts that only superficially take the form of dueling expert submissions;
- (2) Recognition of the interplay between aggregate proof and governing law informs the standard of review for class certification rulings. The analysis here highlights considerable room for appellate oversight of class certification determinations, with the appellate courts cast in their familiar role of *de novo* reviewers to ascertain the proper account of governing

Supreme Court recently reiterated the stringency of the general rule against nonparty preclusion in *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172 (2008), again characterizing “properly conducted class actions” as one of the rare and narrowly defined exceptions to the rule.

²³ *McLaughlin*, 522 F.3d at 220.

law, and not in a deferential role to review discretionary, trial-level determinations as to factual or evidentiary matters.²⁴ One can understand this second point as an elaboration of the recent move to subject class certification rulings to the possibility of interlocutory appellate review under Rule 23(f);²⁵ and

- (3) The analysis here reorients the class certification determination in institutional terms. This third point is the logical corollary of the first, which clarifies the legal character of many class certification disputes today. The institutional relationship that usually matters in contested class certifications, I argue, is not so much the one between court and jury but, rather, that between court and legislature. When aggregate proof offers not merely a contested account of the facts but, at bottom, a contested account of governing law, the court should be concerned not with intrusion upon the jury's role in the event of trial but, instead, with the degree of lawmaking power that the court properly may wield relative to the legislature in the particular area of law at issue. This is not to suggest that class actions—any more or less than conventional, individual lawsuits—cannot serve as vehicles for change in legal doctrine.²⁶ It is simply to say that the pro-

²⁴ This Article thus fits within existing scholarship that sees the discretionary latitude available today to trial-level judges in many aspects of civil litigation as the unanticipated byproduct of the 1938 revamping of the Federal Rules and that urges enhanced appellate oversight as a response. See generally Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 77–94 (2003); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 646–66.

²⁵ I am grateful to Michael Solimine for highlighting the connection between the prescriptions offered here and the adoption of Rule 23(f) in 1998. By expressly providing for interlocutory appellate review, Rule 23(f) dramatically increased the sheer number of occasions for appellate scrutiny of class certification rulings. See Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 288 (2008) (noting that “but for the promulgation of Rule 23(f), review likely would not have occurred in [169 class certification] cases” reviewed by appellate courts during eight-year period after rule adoption); see also Michael E. Solimine & Christine Oliver Hines, *Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1562 (2000) (describing pre-Rule 23(f) vehicles for interlocutory review of class certification determinations as “at best extremely difficult” to invoke successfully). One can understand this Article, in part, as specifying what appellate courts should do upon such review, now that Rule 23(f) is in effect.

On the variation in adoption of state counterparts to Rule 23(f), see Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 22–23 (2007).

²⁶ The transformation of the Equal Protection Clause in no less than *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), stemmed from litigation in the form of a class action. I accordingly part company with those who contend that class actions should labor under a

posed class-wide nature of the litigation should exert no independent weight in arguments for such change.

Two further, clarifying points bear emphasis about the claims advanced in this Article: First, the primacy posited here for legal interpretation in contested class certifications does not rest on some essentialist exercise of characterization along the law-fact continuum. Literature on administrative law, for example, rightly regards legal and factual determinations not in terms of Platonic categories of “law” and “fact” but, instead, as matters informed by the relative institutional capabilities of agencies and courts.²⁷ So, too, for class actions, the prospective certifying court operates not only vis-à-vis the jury as factfinder in many areas of litigation but also vis-à-vis the legislature as an expositor of governing law. As in constitutional adjudication, one might say 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 the proposed class is cohesive.²⁸

Second, recognition of the law-declaring dimension of the judicial inquiry does not point uniformly for or against class certification when aggregate proof is in play. Rather, class certification appropriately admits of differences informed by the proper conceptualization of applicable law in a given case. When social science has assumed the mantle of legal doctrine, the resolution of competing expert submissions cast in social-science terms will tend—quite properly—to gravitate in the direction of judge over jury and of law over fact.²⁹ This, again, is not because of any essentialist characterization but, rather, because of the integration of social science into the very doctrinal fabric of law in such bread-and-butter areas for class actions as anti-trust and securities. When economics is one with legal doctrine, it is relatively straightforward to see how dueling expert submissions at the

special disadvantage as vehicles by which to change preexisting doctrine. See Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 857 (2005) (“[T]he Due Process Clause limits courts’ authority to unsettle the rules governing proof of claims in the class context.”).

²⁷ See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233–37 (1985) (“[L]aw and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience.”); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 349 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting criticism that “law” and “fact” are “at best . . . nothing more than labels to describe a conclusion about division of function”). Writing outside the class action setting, John Monahan and Laurens Walker likewise speak in functional rather than essentialist terms, noting that “[t]he principal similarity between social science [research] and law is that both are *general*—both produce principles applicable beyond particular instances. Facts, in contrast, are specific to particular instances.” Monahan & Walker, *supra* note 14, at 490.

²⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁹ See *supra* notes 14, 27 (discussing Monahan and Walker’s conception of social science in law).

class certification stage, cast nominally in economic terms, ultimately convey competing accounts of law—matters for the court, not the jury, to evaluate as an exercise in statutory interpretation.

Areas of law already infused with social science, however, are not the only terrain for class actions. What the courts are now seeing in such contexts as RICO and employment discrimination amounts to an effort to invite a similar kind of infusion: one sometimes reliant not on economics alone but on statistical analysis informed by such disciplines as sociology. Here, courts are likely to encounter more difficulty in discerning when dueling expert submissions on class certification are really dueling over the meaning of governing law precisely because the integration of legal doctrine and social science is still a tentative, contested enterprise in these areas.³⁰

The approach offered here does not authorize courts to reach out to decide legal questions unrelated to the application of Rule 23 requirements. A question concerning the proper meaning of governing law matters in the class certification context only insofar as the answer has the potential to reveal fatal dissimilarities within the proposed class.³¹ When the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—a failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a matter of summary judgment, not class certification. Here, too, second-generation case law exhibits confusion, with some courts overreaching in the class certification inquiry into the domain of summary judgment³²—the motion that rightly polices the institutional relationship between the court and the factfinder at trial.

Law in a given area, moreover, certainly is not stuck forever with its present-day content. But, as law reform efforts proceed apace, spurred by new insights from social science, courts in the posture of class certification must remain attentive to their institutional role—to the line between judicial interpretation and doctrinal changes appropriately left for legislative determination. Interpretation of governing law should not occur in a manner oblivious to its implications for aggregate procedure. But it should occur both transparently and self-

³⁰ For an insightful account of the difficulties that continue to be presented by statistical analysis in civil rights litigation generally, see D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533 (2008).

³¹ See *infra* Part I.C (framing concept of dissimilarity as main focus of class certification inquiry, as undertaken by courts today under Rule 23).

³² See *infra* text accompanying notes 150–53, 193–95 (offering illustrations of judicial overreach resulting in displacement of summary judgment in securities fraud and RICO class actions, respectively).

consciously. On this view, the interpretation of broadly phrased, open-ended statutes like the Sherman Act—an enterprise long pursued by courts in a manner akin to common-law decisionmaking³³—might appropriately proceed differently as compared to the interpretation of a statute long construed according to more textually focused approaches. Or, at least, if the mode of statutory interpretation is to change in a given area, it should do so for reasons canvassed in the now-extensive case law and scholarship on that topic, not because the case at hand happens to take a proposed aggregate form.

This Article proceeds in three Parts. Part I provides conceptual background. At its outset, Part I discusses the transition from what I have described as first-generation answers concerning the *Eisen* rule to more difficult second-generation questions concerning aggregate proof in class certification. Part I then clarifies the concept of “aggregate proof” and explains its invocation as a way to trigger legal doctrine such that the members of the proposed class can be characterized as victims of the same wrong. Part I closes by noting how the difficulties seen today highlight the frailties of the crucial language used in the class certification requirements of Rule 23. Clear identification of these frailties serves, in turn, to demarcate the proper line between class certification and summary judgment—the main pretrial ruling that polices the line of authority between the court and the jury.

Part II presents a normative analysis of aggregate proof in class certification as a problem of institutional allocation. This Part starts by situating together efforts across securities, antitrust, and RICO class actions to treat the involvement of claimants in some economic market as the basis, in itself, for the assertion that all are the victims of the same wrong. One can see these efforts, broadly speaking, as attempts to extend the fraud-on-the-market doctrine from securities law to other market-centered areas of doctrine. Part II then applies the learning from the market-based cases to pinpoint the crucial conceptual misstep behind the class certification in the Wal-Mart litigation, the most prominent in a series of bold efforts to deploy Title VII class actions to combat what scholars denote as “structural discrimination.”³⁴

³³ See Daniel A. Farber & Brett H. McDonnell, “Is There a Text in This Class?": *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 624 (2005) (“Antitrust law today is widely understood to be a variant of the common law . . .”).

³⁴ Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing for adaptation of Title

Part III sketches three broader implications of the analysis. The first is that aggregate proof is naturally treated in a manner in keeping with the analysis of the Supreme Court in *Phillips Petroleum Co. v. Shutts*³⁵ for the other major stumbling block for the certification of nationwide class actions: choice of law when state, rather than federal, law applies. The choice between two competing accounts of governing law should be treated no differently than the choice between two competing bodies of law from different sovereigns—a determination clearly within the judicial bailiwick in class certification today. The second implication speaks to related concerns surrounding appellate oversight of the trial-level judge who rules on the certification question.

The third implication harks back to the history of procedural reform. The analysis here of aggregate proof in class certification offers a cautionary rejoinder to aspirations for the creation of a genuinely transsubstantive body of procedural rules. What we are witnessing today, not merely in class certification but across the spectrum of major pretrial procedural rulings, is an emerging effort to bring the system of notice pleading embraced in the 1938 overhaul of the Federal Rules into line with the on-the-ground reality of civil litigation today—a world dominated by settlement, in which the pretrial phase effectively *is* the trial. This reality underscores the practical desirability of law clarification—and, if necessary, law correction via *de novo* appeal—before class certification precipitates settlement. Before that occurs, it is incumbent on the courts to pinpoint and to resolve forthrightly open questions of law that bear upon the cohesiveness of the proposed class.

I

FRAMING THE PROBLEM

The language of Rule 23(b)(3) governing the most frequently invoked type of class action—the opt-out class—calls for a judicial determination that, among other things, “the questions of law or fact common to class members predominate over any questions affecting only individual members.”³⁶ Though not in so many words,

VII jurisprudence to address unconscious discrimination); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (proposing proactive regulatory regime to combat structural discrimination). For criticism of proposals to address structural discrimination through antidiscrimination law, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006).

³⁵ 472 U.S. 797 (1985).

³⁶ FED. R. CIV. P. 23(b)(3).

Rule 23(b)(2) for mandatory classes also calls, in practice, for a decisive degree of similarity among the members of the proposed class.³⁷ Rule 23(b)(2) requires a judicial determination that the defendant “has acted . . . on grounds that apply generally to the class,” such as to make appropriate the provision of injunctive or declaratory relief “respecting the class as a whole.”³⁸ As Part II shall elaborate, efforts to garner class certification on the basis of aggregate proof have spanned both Rule 23(b)(2) and (b)(3). The certification of the Wal-Mart employment discrimination class took place under the former subsection,³⁹ whereas the ill-fated certification of the light cigarettes RICO class occurred under the latter.⁴⁰

As a purely linguistic matter, Rule 23(b)(3) invites two kinds of confusion. The first concerns the relationship between the class certification determination (ostensibly a preliminary, pretrial ruling) and the merits of the litigation (a matter for trial, absent a settlement or dispositive pretrial ruling). Yet the “questions” in any lawsuit—whether common or individual in character—exist only by reference to the dispute on the merits, as structured by substantive law.

The second, related confusion concerns the permissible bounds for judicial inquiry in the application of the stated certification requirements. Any civil complaint raises legal or factual “questions” in the most literal sense of the word. Absent inept class counsel, any class action complaint will at least plead the worthiness of the “questions” therein for certification. Yet the insistence of Rule 23 upon a judicial determination of class certification⁴¹ makes it hard to think that the mere say-so of the class complaint should dictate certification.

As Section A discusses, clarification of these two initial kinds of confusion occupied the law of class certification for a surprisingly long time—roughly four decades after the inception of Rule 23 in its modern form. In a series of significant decisions in recent years, however, a working consensus has emerged in the lower courts concerning

³⁷ The prototype here was the desegregation class action familiar to the rule drafters in the 1960s. See FED. R. CIV. P. 23(b)(2) advisory committee’s note to 1966 amendments (citing “[i]llustrative” school desegregation cases).

³⁸ FED. R. CIV. P. 23(b)(2). Rule 23(b)(1)(A) also authorizes mandatory class treatment when individual actions by class members “would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct” for the defendant. On the convergence in real-world practice between Rules 23(b)(1)(A) and 23(b)(2), see 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4:8, at 31–32 (4th ed. 2002).

³⁹ *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1185 (9th Cir. 2007), *reh’g en banc granted*, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009).

⁴⁰ *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 222 (2d Cir. 2008).

⁴¹ See FED. R. CIV. P. 23(c)(1)(A) (requiring court to “determine by order whether to certify the action as a class action”).

the first-generation questions about class certification. The first-generation answers embraced by courts today are a welcome step forward, but they have given rise to a more difficult set of second-generation questions concerning the treatment of aggregate proof. Section B discusses the nature of such proof, its promise and its pitfalls, all by reference to its deployment by class counsel to trigger some manner of doctrine in governing law that would conceptualize the class as presenting predominant common “questions.” Section C then explains how the difficulties presented by aggregate proof highlight frailties in the Rule 23 language for class certification in a way that illuminates the relationship between aggregate proof and summary judgment.

A. *First-Generation Answers, Second-Generation Questions*

Until recent years, much of the ferment over class certification consisted of an extended—in retrospect, rather overwrought—effort to parse the Supreme Court’s 1974 admonition in *Eisen* against “a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”⁴² I say “overwrought” because the occasion for the *Eisen* Court’s remark consisted of a ruling not on class certification but on the allocation of the cost associated with individualized notice to class members.⁴³ In *Eisen*, the district court became concerned that the sheer cost of the notice campaign would stymie a class action in which it was “more than likely” that the plaintiff class would prevail.⁴⁴ The Supreme Court’s admonition against “a preliminary inquiry into the merits” thus appears in the *Eisen* opinion as part of a reversal of the district court’s order that would have shifted most of the notice cost to the defendant. Less than a decade later, in *General Telephone Co. v. Falcon*—a case, unlike *Eisen*, centered on the propriety of class certification—the Court noted, in a dictum, that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.”⁴⁵

⁴² *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

⁴³ See FED. R. CIV. P. 23(c)(2) (requiring individualized notice in opt-out class action to all class members “who can be identified through reasonable effort”). Such notice would have been expensive in *Eisen*, amounting to several hundreds of thousands of dollars at the then-current postage rate of six cents per mailing. 417 U.S. at 167.

⁴⁴ 417 U.S. at 168 (quoting district court’s ruling).

⁴⁵ 457 U.S. 147, 160 (1982). The *Falcon* Court’s notion of “prob[ing] behind the pleadings” operated in some tension with the then-existing rule language, which directed the court to make its class certification determination “[a]s soon as practicable.” FED. R. CIV. P. 23(c)(1) (1966 amendments). Rule amendments in 2003 eased this tension by calling for the class certification determination to be made “[a]t an early practicable time.” FED. R.

For many years, the line between a permissible “probe behind the pleadings” and an impermissible inquiry into the likelihood of success on the merits proved difficult for lower courts to discern. The *Falcon* dictum notwithstanding, the most extravagant overreadings of *Eisen* effectively characterized class certification as warranting a posture like that then required for rulings on Rule 12(b)(6) motions to dismiss: The court must take the pleadings on their face.⁴⁶ Under this standard, class certification would be well-nigh automatic, for all but the most inept class complaints manage to plead their suitability for certification. If mere pleading really could suffice for class certification, then there would seem little bite left to the bedrock notion that aggregation is the deviation, not the norm, in civil litigation and, as such, must be affirmatively justified.⁴⁷

Other overreadings of *Eisen* took a more subtle form. These emphasized that the class certification determination is a preliminary procedural ruling (not a decision on the merits) and that the merits remain for the factfinder to decide in the event of a trial. These less extravagant overreadings posited that the court had no authority to weigh competing expert submissions on the class certification question, even—indeed, especially—when the disagreement between the experts overlapped with the merits.⁴⁸

On this view, even the usual standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁹ for the admissibility of expert testimony at trial would be too intrusive. *Daubert* and its progeny call for the court to ask such questions as whether “there is simply too great an analytical gap between the data [considered] and the opinion proffered”⁵⁰ by the expert and whether the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an

Civ. P. 23(c)(1)(A). The advisory committee noted that “[t]ime may be needed to gather information necessary to make the certification decision,” including by way of “controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis.” FED. R. CIV. P. 23(c)(1)(A) advisory committee’s note to 2003 amendments.

⁴⁶ See *Szabo v. Bridgeport Machs., Inc.*, 199 F.R.D. 280, 284 (N.D. Ind. 2001) (“[S]ince the class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion.”), *rev’d*, 249 F.3d 672 (7th Cir. 2001). The purported assimilation of motions for class certification to motions for dismissal took place prior to the additional guidance on the latter subject in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007), which called for judicial inquiry into whether the complaint states “a claim to relief that is plausible on its face.”

⁴⁷ See *supra* note 22 (noting that Supreme Court has repeatedly characterized class action as exception to general rule against preclusion of nonparties).

⁴⁸ *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001); *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999).

⁴⁹ 509 U.S. 579 (1993).

⁵⁰ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

expert in the relevant field.”⁵¹ Some first-generation courts nonetheless believed that, in the context of class certification, they could ask only whether the expert submissions offered by class counsel were “so flawed” as to be “inadmissible as a matter of law.”⁵² Put less delicately, any expert submission that was not completely kooky would suffice.

The past several years have witnessed a welcome and essentially uniform move on the part of the lower federal courts toward a more defensible set of answers to the first-generation questions initiated by *Eisen*. A 2006 decision by the Second Circuit, *In re Initial Public Offerings Securities Litigation (IPO)*,⁵³ illustrates this move most dramatically, as the court went out of its way to disavow its own precedents counseling against the weighing of competing expert submissions. This change of direction is all the more striking given that two of the judges on the three-member *IPO* panel had authored the earlier circuit decisions now disavowed.⁵⁴ With *IPO*, the Second Circuit brought its law of class certification into line with the emerging view of other circuits.⁵⁵ After *IPO*, additional circuits chimed their agreement, with the Ninth Circuit going so far as to amend its opinion upholding certification of the Wal-Mart class action in order to excise passages that had cited favorably the Second Circuit’s pre-*IPO* decisions.⁵⁶

The specific setting of *IPO* bears closer attention later, as the case involved an effort to use aggregate proof to trigger the fraud-on-

⁵¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

⁵² *Visa Check*, 280 F.3d at 135.

⁵³ 471 F.3d 24 (2d Cir. 2006).

⁵⁴ The *IPO* opinion was authored by Judge Newman, who earlier had written *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 286 (2d Cir. 1999). The *IPO* panel also included Judge Sotomayor, the author of *Visa Check*, 280 F.3d at 129. The three-judge panel sought to explain its disavowal of circuit precedent without en banc review by reference to the intervening 2003 amendments to Rule 23, which call for the class certification determination to be made “at an early practicable time.” *IPO*, 471 F.3d at 39. This explanation is a considerable stretch, for the 2003 amendments did not so much make new law for class certification as they confirmed practices extant at the time of *Caridad* and *Visa Check*. FED. R. CIV. P. 23(c)(1) advisory committee’s note to 2003 amendments.

⁵⁵ *E.g.*, *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).

⁵⁶ *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008) (adopting framework for class certification analysis substantially similar to that in *IPO*); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) (relying heavily on *IPO*). *Compare Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1229 (9th Cir. 2007) (citing *Caridad* and *Visa Check*), *with Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1181 (9th Cir. 2007) (superseding previous opinion and omitting citations to *Caridad* and *Visa Check*), *reh’g en banc granted*, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009).

the-market doctrine in securities law.⁵⁷ For now, the important observation is that the law of class certification largely has coalesced around two propositions. First, nothing in Rule 23 authorizes a preliminary injunction-like inquiry into the likelihood of success on the merits when that inquiry is unrelated to the satisfaction of class certification requirements.⁵⁸ Second, the court must make a “definitive assessment” that the pertinent Rule 23 requirements are indeed satisfied, a process that presents the court with “a mixed question of fact and law.”⁵⁹ The existence of a genuine dispute over whether a certification requirement has been met will not suffice to certify a class,⁶⁰ even when cast in terms of divergent expert submissions from the two sides regarding issues that overlap with a merits dispute. Rather, the court must resolve the dispute, if only for purposes of making the class certification determination, with no issue-preclusive effect in the event of trial.⁶¹

These points of now-settled law represent an advance over the previous cacophony, but they raise as many new questions as they set to rest. The crux of *IPO* consists of the court’s distinction between unwarranted displacement of trial and necessary application of Rule 23 requirements. The concept that does the work in this distinction consists of what one might dub a “tethering” doctrine. The court must inquire into the merits—even into the very crux of the dispute framed by aggregate proof—if that inquiry pertains to the satisfaction of a Rule 23 requirement. But the court oversteps its proper bounds if it conducts the sort of free-floating merits inquiry erroneously undertaken by the district court in *Eisen*—one untethered to a Rule 23 requirement.

As in all kinds of tethering, however, the capacity of the tether to work as desired turns crucially on the things at its two ends—here, the merits and the coherence of the Rule 23 requirements for class certification. The sections that follow discuss each end—the role of “aggregate proof” in class actions and the way in which courts today actually apply the crucial Rule 23 language for class certification.

⁵⁷ See *infra* text accompanying notes 128–32 (discussing *IPO* court’s refusal to extend fraud-on-the-market doctrine to market for initial public offerings of securities).

⁵⁸ For a similar reading of *Eisen*, see Miller, *supra* note 11, at 65, arguing that courts nonetheless may “inquire into the merits whenever doing so is convenient or useful to resolve a certification question.”

⁵⁹ *IPO*, 471 F.3d at 40–41.

⁶⁰ See *id.* at 42 (disavowing earlier decisions whereby class counsel need only make “some showing” to satisfy class certification requirements).

⁶¹ See *id.* at 41 (“[T]he determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge.”).

B. *Aggregate Proof Explained*

In speaking of “aggregate proof,” precision is warranted. Subsection 1 pins down the meaning of the term, both on its own and as distinct from another, less problematic form of proof that may bear upon class certification: what I describe as “replicated proof.” Subsections 2 and 3 then discuss, respectively, the considerable attraction of aggregate proof as a basis for class certification and the circularity problem to which it can give rise.

1. *Defining Aggregate Proof*

As used here, the term “aggregate proof” refers to evidence that presupposes the proposed class as a unit and, from that vantage point, seeks to trigger an inference concerning the situation of each class member individually under applicable law. The notion that an aggregate perspective reveals something about each class member on her own suggests that common “questions” predominate under Rule 23(b)(3) or that a course of conduct “on grounds that apply generally to the class” exists under Rule 23(b)(2). Three illustrations lend real-world flavor to this definition.

In litigation over securities fraud or over a “pattern or practice” of employment discrimination, aggregate proof plays a central role for a class certification that overlaps with the merits of the dispute. Securities fraud and employment discrimination clearly are not the same thing. My suggestion, nonetheless, is that the structure of aggregate proof and its bearing on class certification proceed in analogous ways in the two settings. In both, the argument for class certification turns on the triggering of doctrine that raises an inference about the situation of each member of the proposed class. A third illustration involving the certification of class actions for medical monitoring in toxic tort or product liability litigation underscores even more strongly the centrality of the connection between aggregate proof and the content of governing law.

a. *Illustrations*

In the securities fraud setting, aggregate proof consists of the economics behind the efficient capital markets hypothesis—in nontechnical terms, the notion that the price at which securities trade in an efficient capital market embodies all publicly available information concerning the issuing firm and its business prospects.⁶² If anything, the application of the efficient capital markets hypothesis in class liti-

⁶² See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988) (“Recent empirical studies have tended to confirm Congress’ premise that the market price of shares traded on well-

gation has become so routine as to be largely uncontested. It is unnecessary to speak of much securities fraud litigation as involving any real dispute over aggregate proof, because substantive law incorporates the economics of the efficient capital markets hypothesis into legal doctrine.

Again with technicalities suppressed, the fraud-on-the-market doctrine—embraced as an interpretation of the securities laws by the Supreme Court in *Basic Inc. v. Levinson*—posits that a fraudulent statement or omission concerning a firm publicly traded on an efficient market for securities has an effect on all trading in the firm's shares during the time period in which the fraud remains uncorrected.⁶³ The market price serves as the mechanism for this effect. The notion is that the fraud artificially elevated the price of the shares during the relevant time period, such that all traders during that period can be said to have relied upon the fraud merely by trading on an efficient capital market.⁶⁴

The fraud-on-the-market doctrine has considerable consequences for class certification. All those who purchased or sold shares in the market during the relevant period necessarily did so at the prevailing market price at the time—a price that remains uncorrected as long as the fraud remains afoot. When the fraud is embedded in the market price, in other words, all those who traded during the relevant period can be said to have relied upon the fraud—hence, the notion of fraud “on the market” as a whole. Like other presumptions in law, this presumption of reliance remains rebuttable, but its procedural consequence is well-nigh uniform. The fraud-on-the-market doctrine, in effect, sweeps away opposition to class certification when that opposition rests upon the concern that the reliance element presents individualized questions unsuitable for aggregate treatment.⁶⁵ The market itself provides the decisive commonality that ties together the plaintiff investors, and the class accordingly encompasses the entire market.

developed markets reflects all publicly available information, and, hence, any material misrepresentations.”).

⁶³ See *id.* at 246–47 (citing widespread judicial and scholarly acceptance of fraud-on-the-market doctrine).

⁶⁴ In this regard, the concept of reliance encompassed in the fraud-on-the-market doctrine differs from reliance in common law fraud, whereby reliance lies in the inducement of the transaction itself, not just its execution at an elevated price. For a cogent explanation of how the fraud-on-the-market doctrine and common law fraud conceptualize differently the reliance element, see Merritt B. Fox, *After Dura: Causation in Fraud-on-the-Market Actions*, 31 J. CORP. L. 829, 831–32 (2006).

⁶⁵ On the stumbling block to class certification often presented by reliance elements in consumer litigation, see generally Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633 (2000).

As Part II shall discuss, several of the disputes surfacing today over aggregate proof in class certification concern either the applicability of the fraud-on-the-market doctrine to unconventional securities markets or efforts to import that doctrine to other areas of law, like RICO, that seek to address some other form of fraud.⁶⁶ For now, it is enough to recognize that aggregate proof is not confined to economic analysis that seeks to show that a given securities market conforms with the premises of the efficient capital markets hypothesis.

For example, litigation over a pattern or practice of disparate treatment by a defendant employer as to a Title VII-protected group also entails the use of aggregate proof, but of a statistical kind. Here, the idea is that the whole of the employer's actions vis-à-vis persons in the protected group—say, African Americans or women—amounts to more than the sum of its parts. Whereas individual instances of adverse employment actions might be explained otherwise, a pattern as to persons in a Title VII-protected group may shed considerable light on the central question on the merits of a disparate treatment action: whether the adverse actions were undertaken with discriminatory intent.⁶⁷ In the classic sorts of pattern-or-practice cases involving stark, pronounced patterns of adverse employment actions along some Title VII-prohibited dimension, identification of the pattern—looking at those actions in the aggregate, in other words—triggers an inference under Title VII doctrine that each of those employment actions was the product of intentional discrimination.⁶⁸ Here, too, the inference is in the nature of a presumption, rebuttable by the employer with respect to individual employees.⁶⁹ But, again, the idea is to turn what otherwise would appear to be discrete, individualized employment decisions into a situation in which all members of the protected group are the victims of the same wrong: company-wide discrimination. The procedural contention then is that the scope of the litigation should conform to the scope of the alleged common wrong.

It bears emphasis that the identification of the common wrong in both securities fraud class actions and pattern-or-practice employment discrimination class actions turns upon the triggering of a doctrine—

⁶⁶ See *infra* Part II.A (discussing difficulties encountered by efforts to extend fraud-on-the-market doctrine to initial public offerings and market for light cigarettes).

⁶⁷ See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (noting that “[p]roof of discriminatory motive is critical” for Title VII actions under “disparate treatment” theory).

⁶⁸ See *id.* at 340 n.20 (“Statistics show[ing] racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination . . .”).

⁶⁹ See *id.* at 360 (discussing illustrative rebuttal arguments for employers).

respectively, fraud-on-the-market and an inference of discriminatory intent—that then situates class members as the victims of the same wrong. A third illustration drawn from tort litigation helps to nail down this point. Epidemiological evidence might reveal, for example, an elevated risk of a particular form of cancer among persons exposed to a given product or toxic substance, by comparison to a control group comprised of persons similar in all relevant respects except for the fact of exposure.⁷⁰ Epidemiological studies examine actual human populations⁷¹ and, as such, inherently take an aggregate perspective. An epidemiological study might find that exposed persons develop a particular form of cancer at a rate twenty percent higher than that of unexposed persons. Nevertheless, such a finding does not indicate whether the exposure caused any given individual's case of cancer.

Whether epidemiological evidence will drive the certification of a class to be comprised of all exposed persons turns on the content of governing law. Tort actions predicated on the actual manifestation of disease distinguish between questions of general causation (whether exposure elevates the risk of cancer in humans generally) and specific causation (whether exposure, as distinct from some background risk factor, was a cause of the particular individual's cancer).⁷² The usual route for proof of specific causation consists not of expert submissions in the nature of epidemiology⁷³ but, instead, of “differential diagnosis” evidence: testimony from a clinical physician (not an epidemiologist) to explain why her design of treatment for the individual patient proceeded upon an inference of a causal role played by the defendant.⁷⁴ When the injury asserted is the ultimate manifestation of disease, in short, epidemiology does not speak to the specific causa-

⁷⁰ See Michael D. Green, D. Michal Freedman & Leon Gordis, *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 335, 348–49 (2d ed. 2000) (discussing concept of “relative risk” in epidemiology).

⁷¹ See *id.* at 335 (“Epidemiology is the field of public health and medicine that studies the incidence, distribution, and etiology of disease in human populations.”).

⁷² For a straightforward explanation in toxic tort litigation, see *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988).

⁷³ See generally Green et al., *supra* note 70, at 381 (noting that specific causation “is beyond the domain of the science of epidemiology”).

⁷⁴ In nontechnical terms, differential diagnosis in clinical medicine proceeds by way of a process of elimination. For purposes of designing an appropriate course of treatment for the individual patient, the clinical physician eliminates other potential causes of the patient's condition, leaving only the exposure in question. See Michael B. Kent Jr., Daubert, *Doctors and Differential Diagnosis: Treating Medical Causation Testimony as Evidence*, 66 DEF. COUNS. J. 525, 526 (1999) (describing differential diagnosis as “a process of elimination”); Wendy Michelle Ertmer, Note, *Just What the Doctor Ordered: The Admissibility of Differential Diagnosis in Pharmaceutical Product Litigation*, 56 VAND. L. REV. 1227, 1240 (2003) (same).

tion question. That question remains individualized and, hence, a considerable barrier to class certification.

But now consider how epidemiology interacts with governing law in medical monitoring cases, when the injury asserted consists of the wrongful exposure itself and not the ultimate manifestation of disease. Here, aggregate proof in the form of epidemiological evidence operates in a manner much like the fraud-on-the-market doctrine in the securities setting. Appropriately enough, the source of the similarity lies in the content of governing law—specifically, whether the fact of exposure alone, not of disease manifestation, gives rise to a civil cause of action.

In toxic tort and product liability litigation, a frequent battleground for class certification⁷⁵ concerns class actions that seek the establishment of a court-supervised program to provide medical monitoring for all persons in the exposed group so as to facilitate early detection of disease and, in turn, to mitigate its ultimate severity.⁷⁶ Battles over the certification of medical monitoring classes remain high pitched, but their nature is such as to reinforce the content of governing law as the centerpiece of the certification dispute. The crux of the dispute concerns not the use of epidemiological evidence as part of the class certification determination but, instead, whether governing law authorizes medical monitoring as an injunction-like remedy for exposed persons.⁷⁷ Only when governing law does so will

⁷⁵ As one court has described the case law:

[T]here is no common set of factual circumstances predictive of whether a court will certify a medical monitoring class. It is easy to find cases, for example, where a court *granted* class certification to plaintiffs in a limited geographic region who sought medical monitoring after suffering single-source exposure to a toxin in their drinking water, and just as easy to find cases where a court *denied* certification under similar conditions—and there is no obvious or simple way to reconcile the two different results. Similarly, courts have ruled oppositely in different cases involving plaintiff classes seeking medical monitoring for illnesses allegedly caused by: (1) addiction to nicotine in the same brands of cigarette; and (2) adverse side effects of the same prescription drug.

In re Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 304 (N.D. Ohio 2007).

⁷⁶ See generally *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 138–40 (3d Cir. 1998) (discussing elements and objectives of medical monitoring).

⁷⁷ The gap in time between exposure and disease manifestation creates a window during which the defendant may be enjoined to take action to mitigate the effects of the tortious exposure. The analogy here is to the familiar notion that a motorist who negligently runs over a pedestrian is under an affirmative obligation to mitigate the resulting harm—say, to take the injured person to the hospital for proper treatment. See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1709–10 (2002) (discussing this analogy). The medical monitoring remedy operates injunctively to enforce this affirmative obligation on the defendant's part. When properly crafted, the remedy also operates injunctively vis-à-vis exposed persons, covering their medical expenses only

the fact of exposure, in itself, operate to make all exposed persons the victims of the same wrong.

One should not come away with the impression that aggregate proof can be invoked only by class action plaintiffs. As Part II shall elaborate in connection with the element of “loss causation” common to both securities fraud⁷⁸ and RICO doctrine,⁷⁹ a defendant might invoke aggregate proof to deny the existence of a causal connection between its alleged misconduct and the economic losses for which the plaintiffs seek to recover. To anticipate a procedural point that shall emerge later: The concern here is not that the class somehow is insufficiently cohesive; rather, the concern is precisely that the class is cohesive in a way that reflects a failure of proof as to *everyone* within the proposed class on an element of the cause of action—a matter properly engaged by the court as a question of summary judgment, not class certification.⁸⁰

b. Replicated Proof Distinguished

Another form of proof can bear on class certification, though in a manner distinct from aggregate proof. “Replicated proof” is a single item of proof that is relied upon by all class members on an element of the cause of action, so as to demonstrate that common questions of fact predominate. Replicated proof does not presuppose the aggregate unit; such proof is simply the same across all of the individuals said to compose the class. As this Part shall show, the treatment of replicated proof in the class certification context helps to reveal conceptual frailties in the language of Rule 23—frailties that have come to the fore in courts’ treatment of aggregate proof.

*Klay v. Humana, Inc.*⁸¹ illustrates the operation of replicated proof. *Klay* involved a sweeping RICO class action against the managed care industry based on allegations that its members had conspired to defraud health care providers nationwide by misrepresenting

as incurred via the court-supervised monitoring program rather than simply paying them damages to spend as they wish. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04 cmt. b, illus. 2 (Council Draft No. 2, 2008).

As a matter of current doctrine, nonetheless, it remains the case that the various states conceptualize medical monitoring quite differently. See *Welding Fume*, 245 F.R.D. at 291–92 (discussing how “[t]he law of medical monitoring varies from state to state”).

⁷⁸ See *infra* notes 133–37 and accompanying text.

⁷⁹ See *infra* notes 190–92 and accompanying text.

⁸⁰ This is to suggest not that a defendant is obligated to come forward with proof of its own in support of a motion for summary judgment, only that a defendant might choose to do so. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (“[W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim.”).

⁸¹ 382 F.3d 1241 (11th Cir. 2004).

the terms of reimbursement for their medical services.⁸² The governing precedents of the Eleventh Circuit at the time understood civil RICO to call for proof of reliance by each plaintiff upon the alleged fraudulent misrepresentations⁸³—with reliance here conceptualized in terms of inducement to participate in the relevant defendant’s managed care program. Class certification could not be withheld on grounds of individualized questions of reliance, held the Eleventh Circuit, when the class would rely on the same evidence—in *Klay*, the same standardized materials used to induce health care providers to sign up with a given managed care plan—to invite an inference of reliance on the part of each class member.⁸⁴ In effect, the class action would proceed as if each of the plaintiff health care providers had sued individually and had put forward identical evidence on the reliance element in their individual actions.

This is not to say that class counsel magically can convert individual issues into common ones for purposes of class certification merely through the strategic shaping of evidence. Both practical and procedural constraints operate. The practical constraint is that the evidence, if believed by the factfinder, must be sufficient to demonstrate the proposition for which it is offered. The proof proffered by the plaintiff class in *Klay* fit this description, the court reasoned, because financial considerations—the representation that the defendants would reimburse health care providers for all medically warranted charges—are essentially determinative in any individual care provider’s business decision to become part of a managed care network.⁸⁵

By contrast, the same more-or-less one-dimensional decision-making process does not characterize, say, the decisions of casino patrons to play video gambling machines. The Ninth Circuit thus cor-

⁸² For example, the health care providers alleged that the managed care industry had conspired to engage in “downcoding,” whereby the software used to process reimbursement claims systematically reduced the payment for certain service codes. *Id.* at 1248.

⁸³ *See id.* at 1257–58 (summarizing Eleventh Circuit precedent at that time on RICO reliance element). As I shall elaborate later in connection with other RICO class litigation, the Supreme Court subsequently rejected the existence of a reliance element as a matter of civil RICO doctrine. *See infra* note 189 and accompanying text (discussing *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008)). The point here, however, turns not on the niceties of RICO but on the formulation of the proof offered in *Klay* on the supposed reliance element.

⁸⁴ *See Klay*, 382 F.3d at 1259 (“The alleged misrepresentations in the instant case are simply that the defendants repeatedly claimed they would reimburse the plaintiffs for medically necessary services they provide to the defendants’ insureds, and sent the plaintiffs various . . . forms claiming that they had actually paid the plaintiffs the proper amounts.”).

⁸⁵ *See id.* (“It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants’ representations and assumed they would be paid the amounts they were due.”).

rectly rejected the certification of a RICO class predicated on alleged misrepresentations concerning the mathematical odds associated with the defendants' video poker and electronic slot machines, notwithstanding class counsel's attempted invocation of replicated proof.⁸⁶ The court underscored the commonsense notion that people gamble for a wide range of reasons,⁸⁷ only some of which involve the quantitative acumen of math doctorates.

Additionally, the separate Rule 23 requirement of adequate class representation poses a procedural constraint on the use of replicated proof to garner class certification.⁸⁸ The strategy of class counsel to rely on replicated proof is not without potential risk for class members. Reliance on replicated proof to yield class certification involves the foreswearing of any individualized proof that otherwise might make the claims of some class members stronger on the merits than those of others. Such an approach effectively sacrifices those potential individual advantages—if individual claims would be marketable at all—for the joint benefit that would accrue to everyone in the class from class certification. In situations of replicated proof, courts accordingly should ask both whether particular subgroups within the class would have such individualized proof and whether class treatment would displace an otherwise available market in which those claims might be brought individually. The existence of such a market would also bring into play the separate certification requirement that a Rule 23(b)(3) class must be “superior to other available methods for fairly and efficiently adjudicating the controversy.”⁸⁹

The concluding section of this Part shall explain how the treatment of replicated proof helps to pinpoint the backward formulation of the crucial Rule 23 language for class certification in a way that sheds light on the treatment of aggregate proof. The important point here is that the use of replicated proof as the basis for class certifica-

⁸⁶ *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004).

⁸⁷ As the court explained:

Gamblers do not share a common universe of knowledge and expectations—one motivation does not “fit all.” Some players may be unconcerned with the odds of winning, instead engaging in casual gambling as entertainment or a social activity. Others may have played with absolutely no knowledge or information regarding the odds of winning such that the appearance and labeling of the machines is irrelevant and did nothing to influence their perceptions. Still others, in the spirit of taking a calculated risk, may have played fully aware of how the machines operate.

Id. at 665–66.

⁸⁸ See FED. R. CIV. P. 23(a)(4) (“One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class.”).

⁸⁹ FED. R. CIV. P. 23(b)(3).

tion does not involve the triggering of a substantive legal doctrine that characterizes all class members as victims of the same wrong. Rather, the practical constraint on replicated proof asks simply whether such proof, if believed, is sufficient to demonstrate the proposition for which it is offered as to all class members—in *Klay*, reliance by all of the plaintiff health care providers.

Replicated proof, moreover, does not portend a displacement of the factfinder at trial. Rather, the practical constraint identified above links the use of such proof in class certification to the factfinder's role. Nor does replicated proof presuppose the aggregate unit, such as to raise concerns of circularity. The sameness of the proof supports class certification, to be sure, but that sameness is not brought into being by aggregate treatment. Rather, that sameness, if it exists at all, preexists the class.

With the concept of aggregate proof in mind, both on its own terms and in contrast to replicated proof, I now turn to the way in which the second-generation law of class certification exhibits a tendency toward an all-or-nothing view of aggregate proof—one that cuts uniformly for such certification or uniformly against it. As I shall explain, both of these views stem from understandable intuitions about class actions, but neither fully captures the proper judicial inquiry into aggregate proof at the class certification stage. By framing that inquiry in more precise terms, the discussion here sets up the treatment in Part II of the centrality of law-declaration in the class certification process as the proper mediating mechanism between all and nothing on the certification question.

2. Prospects: The Right-Remedy Connection

The aggregate perspective taken by aggregate proof comprises both its greatest promise and its greatest peril. As this subsection shall elaborate, the promise relates to the familiar notion that remedies generally should correspond to underlying rights. The peril, as the next subsection shall explain, consists of the circularity in reasoning that arises when aggregate proof is invoked to support a corresponding aggregation of claims as a procedural matter.

The considerable promise of aggregate proof harks back to Holmes's insight about the convergence of legal doctrine with disciplines such as statistics and economics.⁹⁰ Those disciplines have developed sophisticated tools with which to understand the world—tools that often involve analysis of large amounts of data by expert

⁹⁰ See *supra* notes 13–14 and accompanying text (discussing Holmes's prescient prediction about role of statistics in law).

“super crunchers.”⁹¹ In methodological terms, this crunching entails the aggregation of data. When the data then are used to support class certification, class counsel effectively invite the court to take the seemingly logical step of making the procedural dimensions of the litigation correspond with the aggregate perspective of the data.

If anything, one can frame the attraction of aggregate proof even more strongly. Cast in its best light, aggregate proof reveals not just the desirability of aggregate procedure but also its virtual necessity. If the wrong of the defendant comes into focus only when one looks at the situation in the aggregate, then it would seem odd for the procedural mode of the litigation to take anything other than a commensurately aggregate form. In this regard, the argument for class certification starts to resemble the “core” justification for class treatment—to make marketable as an aggregate unit claims that would not be marketable individually.⁹² With respect to situations of both aggregate proof and unmarketable claims—especially when those two features coincide—the very real fear is that, absent aggregate procedure, a wrong of considerable significance in the aggregate will go unremedied.

One can see the foregoing intuition at work in the debate over class certification in the light cigarettes RICO class action. In his opinion granting class certification, Judge Weinstein returned repeatedly to the proposition that “[e]very violation of a right should have a remedy in court, if that is possible.”⁹³ In its reversal, the Second Circuit went out of its way to underscore that “not every wrong can have a legal remedy, at least not without causing collateral damage to the fabric of our laws.”⁹⁴

As Part II shall elaborate, a proper understanding of aggregate proof in class certification need not dispute the posited right-remedy connection, but courts must remain vigilant about delineating precisely the nature of the relevant right in governing law. What one might call the law-declaring dimension of class certification—saying

⁹¹ See generally IAN AYRES, *SUPER CRUNCHERS* (2007) (discussing data analysts’ work with large data sets and their effect on commercial industries).

⁹² See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

⁹³ *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1020 (E.D.N.Y. 2006), *rev’d sub nom.* *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008). As Judge Weinstein observed, the right-remedy connection, too, traces its lineage to no less than the Supreme Court’s foundational decision on the power of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Schwab*, 449 F. Supp. 2d at 1020.

⁹⁴ *McLaughlin*, 522 F.3d at 219 (citation omitted).

what the “right” in question really is—represents an emerging theme in the second-generation law of class certification. The point, for the moment, is that the logic of Judge Weinstein’s right-remedy connection tends markedly in the direction of class certification in well-nigh every case of aggregate proof—at least when that proof passes the *Daubert* threshold of admissibility in the event of trial. On this flawed account, aggregate proof is just that—proof of a contested fact on the merits and, as such, something properly analyzed by the factfinder at trial. It therefore comes as no surprise that Judge Weinstein also hammered away at the notion that, when the ultimate factfinder would be a jury rather than the judge, a denial of class certification based upon a judicial assessment of aggregate proof in the pretrial phase could jeopardize the plaintiffs’ entitlement to a jury trial.⁹⁵

3. *Perils: The Circularity Problem*

If the promise of aggregate proof points in the direction of “all” on the class certification question, then one might say that the perils of such proof point just as starkly in the direction of “nothing.” With respect to trials, the law generally leaves the choice of proof to the strategic determination of each side. Counsel may choose to present or to forgo the use of a given item of proof at trial, albeit with preclusive consequences if an adverse judgment results. And counsel generally may shape the proof into the form thought most advantageous or persuasive to the factfinder. The latitude for the strategic shaping of proof at trial is not limitless. The law of evidence regulates the use at trial of expert testimony, hearsay, unduly prejudicial evidence, and the like.⁹⁶ But, within the wide berth afforded by evidence law, counsel may shape the proof as she wishes.

The strategic shaping of proof for purposes of class certification, as distinct from trial, carries different implications. The legitimacy of a proposed aggregate unit in the eyes of civil procedure is a matter not for determination by class counsel in the pursuit of strategic goals but rather, ultimately, for determination by the court alone. Seen in this light, suggestions that *Daubert*-worthy expert testimony supporting the proposed aggregate unit should suffice to elicit class certification⁹⁷

⁹⁵ *Schwab*, 449 F. Supp. 2d at 1020–21.

⁹⁶ See, e.g., FED. R. EVID. 702 (expert testimony); *id.* R. 802 (hearsay); *id.* R. 403 (unduly prejudicial evidence).

⁹⁷ One commentator contends:

Class certification is important, but it is not the merits, and thus some relaxation of *Daubert*, on both sides, seems advisable—call it *Daubert-Lite*. Testimony that plainly does not meet *Daubert* would be rejected, but in close cases the testimony should be allowed, with the judge exercising discretion to hear and evaluate it, a much less problematic matter than allowing a jury to do so.

seem only a half-step removed from the error in some of the first-generation case law: class certification based on allegations in the complaint that track the requirements of Rule 23. A proper complaint, after all, must stem from “an inquiry reasonable under the circumstances”⁹⁸ and must plead “enough facts to state a claim to relief that is plausible on its face”⁹⁹—both of which imply the existence of some manner of supportive proof, if not necessarily of the expert variety. Certification based simply on the assertions in the complaint or an admissible expert submission exhibits a troubling circularity. The legitimacy of aggregation as a procedural matter would stem from the shaping of proof that presupposes the very aggregate unit whose propriety the court is to assess.

Concern about circularity in class certification is no nitpicking matter. The concern constitutes a central theme that unites the Supreme Court’s two most recent decisions on class certification: *Amchem Products, Inc. v. Windsor*¹⁰⁰ and *Ortiz v. Fibreboard Corp.*¹⁰¹ To be sure, neither *Amchem* nor *Ortiz* involved an effort at class certification on the basis of aggregate proof. The two decisions nonetheless pinpoint the difficulty of circular reasoning in the class certification process in a way that sheds light on the use of aggregate proof in that setting.

The class certifications that the parties sought in *Amchem* and *Ortiz* were essential components of efforts to lend binding force to proposed class settlement agreements that would have made a grand substitution of legal rights. Thereafter, asbestos-exposed industrial workers no longer would have been able to sue the asbestos-industry defendants in tort but would have gained the right to obtain compensation through the privatized, administrative programs created by the class settlements. The Court’s treatment of the class certification

Alan B. Morrison, *Determining Class Certification: What Should the Courts Have To Decide?*, 8 *Class Action Litig. Rep.* (BNA) 541, 543 (July 27, 2007). The same source goes on to clarify how this judicial “evaluation” should proceed as to class certification:

It will generally be the plaintiff that is asking for the benefit of the doubt, and in close cases, given the stage at which the [class certification] determination must be made, it is preferable to err on the side of continuing the litigation than ending it for all practical purposes.

Id. For a contrary argument that *Daubert* analysis of expert submissions “is necessary, but not sufficient,” for class certification, see Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of Daubert and the Defendant’s Proof*, 28 *REV. LITIG.* 71, 111 (2008).

⁹⁸ FED. R. CIV. P. 11(b).

⁹⁹ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) (interpreting demand in FED. R. CIV. P. 8(a)(2) for “a short and plain statement of the claim showing that the pleader is entitled to relief”).

¹⁰⁰ 521 U.S. 591 (1997).

¹⁰¹ 527 U.S. 815 (1999).

question thus introduces a dimension of institutional allocation beyond the one between the court and the factfinder at trial. At bottom, both *Amchem* and *Ortiz* turn on the appropriate allocation of institutional authority between courts and legislatures to undertake this type of bold law reform.

In *Amchem*, the district court had regarded the fairness of the proposed class settlement as supplying the predominant common question that warranted certification of a Rule 23(b)(3) opt-out class.¹⁰² Overturning the certification, the Supreme Court rightly regarded such a view as both fatally circular in its logic and troubling in its institutional implications. Any proposed class settlement at least raises a “question” concerning its fairness under Rule 23(e).¹⁰³ Yet, if that question could form a predominant common question sufficient to warrant certification under Rule 23(b)(3), then any class action proposed simply for the purpose of settlement—as in *Amchem*—would be certifiable.¹⁰⁴

In institutional terms, certification of a settlement-only class action would not impinge upon the role of any factfinder, “for the proposal is that there be no trial.”¹⁰⁵ Rather, the intrusion—if any—would be upon the authority of the legislature to consider proposed law reform. The Court emphasized that the predominance requirement of Rule 23(b)(3) focuses on “legal or factual questions . . . that preexist any settlement,” not a question brought into being by such a settlement.¹⁰⁶ The latter sort of question—in *Amchem*, the merits of a grid-like asbestos compensation scheme as a substitute for the tort system—is “a matter fit for legislative consideration,” but not as part of a proper class certification inquiry.¹⁰⁷

The same themes of circularity and institutional allocation underlie *Ortiz*. There, the district court had certified a mandatory class under Rule 23(b)(1)(B) for settlement purposes based on the

¹⁰² See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 316 (E.D. Pa. 1994) (characterizing fairness, reasonableness, and adequacy of proposed class settlement as “a predominant issue for purposes of Rule 23(b)(3)”).

¹⁰³ The district court effectively had used a class certification standard nowhere stated in Rule 23—one positing that, “if a settlement is ‘fair,’ then certification is proper.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997). At the time, Rule 23(e) merely required judicial approval for class settlements. FED. R. CIV. P. 23(e) (1966 amendments). The rule now includes the yardstick of whether the proposed settlement is “fair, reasonable, and adequate”—incorporating the approval standard that had emerged in case law under the original rule. FED. R. CIV. P. 23(e) advisory committee’s note to 2003 amendments.

¹⁰⁴ *Amchem*, 521 U.S. at 623 (“[I]t is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place.”).

¹⁰⁵ *Id.* at 620.

¹⁰⁶ *Id.* at 623.

¹⁰⁷ *Id.* at 622.

purported existence of a limited fund available to satisfy future tort claims against Fibreboard Corporation. This reasoning, too, exhibited a fatal circularity with troubling institutional implications.

The purported limited fund consisted not of Fibreboard's preexisting net worth¹⁰⁸ but, essentially, of the funds that the firm had obtained by way of a contemporaneous settlement of separate litigation concerning the extent of its insurers' coverage obligations with respect to asbestos claims.¹⁰⁹ The limit of the purported limited fund did not preexist class treatment but, instead, came into being merely as the result of the class settlement—an arrangement that basically would have capped the future liability of Fibreboard at the limits of its insurance coverage and left the firm's equity untouched. Congress might choose to cap liability in a given industry at its insurance limits; indeed, it did just that in the 2001 reform legislation that provided financial relief to the airline industry and established a federal compensation fund in connection with the September 11 terrorist attacks.¹¹⁰ But the existence of such legislation only highlights the institutional overreach involved in the faux limited-fund class action in *Ortiz*. In overturning the class certification there, the Supreme Court rightly underscored that the logic of a proper limited-fund class does not proceed in a circle; instead, "it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action."¹¹¹

In short, a class settlement that presupposes the aggregate unit—even a deal for the class that might well represent enlightened public policy¹¹²—cannot supply the basis for class certification in the first place. The circularity problem posed by aggregate proof is only a half-step removed from that in *Amchem* and *Ortiz*, and it is hardly clear that the half-step lessens the problem. The proposed class settlements in *Amchem* and *Ortiz* at least proceeded from the collaborative efforts of class counsel and their defense counterparts—experienced, repeat-player lawyers on both sides. Aggregate proof in a contested motion for class certification, by contrast, proceeds only upon the say-so of one side.

¹⁰⁸ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 859 (1999) ("Fibreboard was allowed to retain virtually its entire net worth.").

¹⁰⁹ *Id.* at 824–25.

¹¹⁰ See Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (Supp. V 2005).

¹¹¹ *Ortiz*, 527 U.S. at 864.

¹¹² The *Ortiz* Court went even further than the *Amchem* Court in inviting federal asbestos reform legislation. See 527 U.S. at 821 ("[T]his litigation defies customary judicial administration and calls for national legislation.").

To accord determinative weight to the mere invocation of aggregate proof would be to extend a misstep found in some of the first-generation case law on class certification. Recall that some courts wary of the *Eisen* rule mistakenly sought to assimilate the class certification determination to the familiar model of a motion to dismiss on the pleadings, such that those courts believed themselves bound to accept the allegations of the class complaint on their face.¹¹³ A view today that would regard the proffer of admissible aggregate proof as triggering class treatment would perpetuate the mistaken inclination to assimilate the certification determination to familiar models—this time, to that of summary judgment. A central insight from the second-generation case law, however, is that the class certification determination is *sui generis*, something that cannot be shoehorned completely into the framework for some other pretrial ruling. What is needed, in other words, is a distinctive law of class certification, not a kind of rote borrowing from elsewhere.

The second-generation law of class certification seeks to solve the problem of circularity by inserting the court as the first-order evaluator of aggregate proof said to trigger some doctrine in governing law that unites all class members as victims of the same wrong. But the court's role consists of making a "definitive assessment" of whether aggregate proof demonstrates satisfaction of Rule 23 requirements.¹¹⁴ This assessment proceeds under the usual preponderance standard,¹¹⁵ not the standard for a motion to dismiss, for admissibility under *Daubert*, or for trial-worthiness as a matter of summary judgment.

The two options—aggregate proof virtually dictating aggregate procedure or courts trying the merits under the guise of a pretrial class certification ruling—present something akin to an all-or-nothing choice. The posited connection between right and remedy implies that class treatment is always appropriate upon admissible proof that presupposes the disputed aggregate unit. By contrast, a "definitive assessment" by the court has the potential to yield no certification, even for non-summary-judgment-worthy disputes over aggregate proof that overlap completely with the merits.

This all-or-nothing quality, however, stems from conceptualization of the problem strictly as one of proof, such as to implicate mat-

¹¹³ See *supra* notes 46–47 and accompanying text (discussing this approach as among "the most extravagant overreadings" of *Eisen*).

¹¹⁴ *IPO*, 471 F.3d 24, 41 (2d Cir. 2006).

¹¹⁵ See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008) ("Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence."); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) (same).

ters of admissibility and summary judgment, both of which regulate the relationship between the court and the factfinder at trial. Such a view has a considerable fairy-tale air about it when one considers the class certification ruling in real-world, functional terms as the signal event in the pricing of mass claims for purposes of settlement. Getting all wrapped up with things like admissibility standards and the sanctity of the jury risks missing the point when the likely endgame, under either a yes-certification ruling or a no-certification ruling, is that there will be no trial at all.

Part II suggests that the second-generation law of class certification is groping toward a reconceptualization of the problems posed by aggregate proof in institutional terms—one that seeks to discern when aggregate proof does not merely reflect a contested account of the facts but, more fundamentally, serves as a stalking horse for a contested account of governing law. On this view, the institutional relationship of real concern often is not the one between court and factfinder at trial but, instead, the one between court and legislature as law-reforming institutions. This is not to suggest that aggregate proof can never present a problem of proof appropriately suited for analysis as a matter of summary judgment. *IPO*, after all, posits that the court must resolve disputes over aggregate proof—even when they overlap with the merits—but only when those disputes bear upon the application of a Rule 23 requirement. The second-generation case law affords no warrant for a free-ranging inquiry into the likelihood of success at trial—what the actual holding in *Eisen* rightly disallows.¹¹⁶ To get a better fix on the line between necessary inquiry into the merits to ascertain compliance with Rule 23 and judicial overreach that would displace summary judgment, one must turn to Rule 23 itself.

C. *The Backward Formulation of Rule 23*

The language in Rule 23 contributes to the confusion about class certification. To put the point bluntly: In real-world, operational terms today, Rule 23 asks questions precisely the opposite of what one would expect based upon a reading of the rule text itself. This Section pinpoints the source of confusion in the Rule 23 language that focuses attention upon similarities within the proposed aggregate unit, not dissimilarities within it. As Part II shall elaborate, this analysis of Rule 23 can help courts considerably by enabling them to discern more readily when aggregate proof presents a question of compliance with class certification requirements (what *IPO* directs the courts

¹¹⁶ See *supra* notes 42–44 and accompanying text (discussing context of *Eisen*).

alone to decide) and when such proof instead presents a question on the merits unrelated to the demands of Rule 23 (a matter that the court should engage as a question of summary judgment, with due regard for the role of the jury). It should not surprise us, in other words, that courts in the aftermath of *IPO* have had trouble distinguishing the respective domains of class certification and summary judgment when the text of Rule 23 itself obscures the nature of the class certification requirements.

By its terms, Rule 23 speaks of common “questions” that “predominate” over individual ones¹¹⁷ and of action by the defendant on grounds that “apply generally to the class” so as to warrant relief “respecting the class as a whole.”¹¹⁸ The overarching picture is one of some decisive degree of similarity across the proposed class.¹¹⁹ But if the discussion so far in this Article reveals anything, it is that what really matters to class certification—what courts are actually attempting to discern with regard to replicated proof, for instance—is primarily the opposite: not similarity at some unspecified level of generality but, rather, dissimilarity that has the capacity to undercut the prospects for joint resolution of class members’ claims through a unified proceeding.¹²⁰ As Part II shall show by way of specific cases, the question of whether a proposed class exhibits some fatal dissimilarity is the proper inquiry for class certification. By contrast, the question of whether the class exhibits some fatal similarity—a failure of proof as to all class members on an element of their cause of action—is properly engaged as a matter of summary judgment.

The formulation of Rule 23 in terms of predominant common “questions” and generally applicable misconduct obscures the crucial line between dissimilarity and similarity within the class. The existence of common “questions” does not form the crux of the class certification inquiry, at least not literally, or else the first-generation case law would have been correct to regard the bare allegations of the class complaint as dispositive on the certification question. Any compe-

¹¹⁷ FED. R. CIV. P. 23(b)(3).

¹¹⁸ *Id.* R. 23(b)(2); see *supra* text accompanying notes 38–40 (noting that some disputes concerning aggregate proof in contested class certifications have arisen with respect to Rule 23(b)(2) rather than Rule 23(b)(3)).

¹¹⁹ See, e.g., *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (“[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members.”). By contrast, the Rule 23(b)(3) class is cohesive due to the predominance requirement.

¹²⁰ This observation builds on the extensive analysis of the predominance requirement in Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1005–06 (2005).

tently crafted class complaint literally raises common “questions.” What matters to class certification, however, is not the raising of common “questions”—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Recognition of this point in operational terms, if not explicitly in the text of Rule 23, explains why certification of a RICO fraud class based on alleged misrepresentations of the mathematical odds for the defendant’s electronic gambling machines—even misrepresentations said to be common across the class—does precious little to advance the resolution of the dispute when questions of reliance implicate the wide range of individualized or even idiosyncratic reasons for gambling.¹²¹ In other words, the dissimilarities in the class members’ reasons for gambling properly impeded class certification notwithstanding the common evidentiary character of the misrepresentations at issue. The language in Rule 23(b)(3) tends to obscure this point, however, by asking whether “questions of law or fact common to class members predominate over any questions affecting only individual [class] members.”¹²² Heaps of similarities do not overcome dissimilarities that would prevent common resolution.

The language of Rule 23(b)(2) tends toward similar confusion. The insight of the rule is not simply that class treatment is appropriate when the defendant has engaged in a course of conduct that is similar at some unspecified level of generality. Rather, the crux of the rule in actual operation today consists of the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.¹²³ Here, again, what matters is not similarity arising from the defendant’s conduct but rather dissimilarity that has the capacity to undercut the indivisible character of an appropriate remedy.

All of this is not to say that the law of class actions must run screaming from rule language cast in the terms of such things as predominant common questions and generally applicable conduct. The point is that on-the-ground applications, over time, understandably have served to refine the inquiries described in the rule text. Not even

¹²¹ Poulos v. Caesars World, Inc., 379 F.3d 654, 665–66 (9th Cir. 2004).

¹²² FED. R. CIV. P. 23(b)(3).

¹²³ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04 cmt. a, at 112 (Council Draft No. 2, 2008). The rule text does at least allude to this attribute of indivisibility in its reference to relief “respecting the class as a whole.” FED. R. CIV. P. 23(b)(2).

the most prescient designer of Rule 23 in 1966 could have seen around corners, after all. Still, recognition of the backward formulation of Rule 23—the critical importance of dissimilarity, not similarity at some undefined level—buttresses the intuition that aggregate proof cannot carry decisive weight in class certification.

The next Part elaborates the law-declaring dimension of class certification and its centrality for institutional allocation in that setting. For now, the key points from this Part are twofold: Courts today properly engage aggregate proof as a question of class certification, per *IPO*, when disputes concerning that proof pertain to whether there exist disabling dissimilarities within the proposed class—dissimilarities that would prevent a class-wide proceeding from yielding common answers. By contrast, disputes over aggregate proof present a question of summary judgment when the asserted problem is not that the class exhibits some disabling dissimilarity but, instead, that there exists a fatal similarity across the proposed class: the absence of a triable issue concerning an element of the plaintiffs' cause of action.

II

CLASS CERTIFICATION AS INSTITUTIONAL ALLOCATION

The battleground today for aggregate proof in class certification centers on the use of economic or statistical analysis to suggest that all persons within the proposed class are victims of the same wrong—not of dissimilar, individualized wrongs. Holmes's prediction notwithstanding, economics and statistics have not yet become one with blackletter law across the board but, rather, have done so to varying degrees in different subject areas. In some areas of law—antitrust or securities, for instance—economics infuses much of legal doctrine. Here, the market itself serves as the mechanism for the suggestion that class members are all victims of the same wrong—specifically, through some manner of overcharge said to result from the defendant's misconduct.

Section A situates together the difficulties that aggregate proof has posed for analysis of class certification in areas that involve the invocation of markets as the source of some common wrong. In these areas wherein economics guides law, it is relatively straightforward to see how dueling expert submissions cast in economic terms are ultimately battling over the proper meaning of governing law. The grouping together of situations involving alleged market-wide wrongs also reveals how missteps in class certification analysis actually have replicated themselves across subject areas—securities fraud and civil

RICO class actions, specifically—in a way that courts and commentators have yet to pinpoint.

Section B extends the analysis to a controversial series of employment discrimination class actions—most prominently, *Dukes v. Wal-Mart, Inc.*¹²⁴ Here, the legal character of disputes over aggregate proof in the class certification setting is much less well understood. At bottom, these class actions involve contested efforts to alter the meaning of discrimination under Title VII to accord with an emerging body of research that draws on statistical analysis informed by sociology. The crucial point is that the legal meaning of discrimination in a case like *Dukes* bears decisively on the existence of fatal dissimilarities within the class and, as such, is properly the focus of the class certification inquiry. Yet, it is precisely this point that eluded the three-judge panel in *Dukes*.

Two broader themes emerge from this Part as a whole. First, courts have begun to frame the central question of institutional allocation in class certification less as one that pits the court against the factfinder in the hypothesized event of a class-wide trial and more as one between the court and the legislature as law-declaring institutions. Across a wide spectrum of contexts in which the market itself is said to unite the members of the proposed class as victims of the same wrong, courts have cast the treatment of aggregate proof not as an evidentiary question but, instead, as the manifestation of an underlying dispute over the proper account of governing law. This process, however, has proceeded spasmodically and without systematic perception of the ways in which the law of class certification has redefined the question of institutional allocation. This Part supplies the necessary big-picture perspective.

Second, in terms of bottom-line results, recognition of law declaration as a proper task for the prospective certifying court does not cut for or against class certification across the board. Rather, in

¹²⁴ 509 F.3d 1168 (9th Cir. 2007), *reh'g en banc granted*, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009). Another, similar employment discrimination class action against Costco has garnered class certification in the Ninth Circuit. *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627 (N.D. Cal. 2007).

The Wal-Mart and Costco class actions carry forward to the context of sex discrimination the basic litigation strategy—broadly speaking—in other class actions that involved aggregate statistical analysis offered to show a pattern or practice of racial discrimination. *E.g.*, *Satchell v. FedEx Corp.*, [2005] 86 Empl. Prac. Dec. (CCH) ¶ 42,116 (N.D. Cal. Sept. 28, 2005) (certifying class); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, No. Civ.A.4:99-CV-217-H, 2002 WL 32058462 (N.D. Ga. Dec. 31, 2002) (declining to certify class).

For an account of this genre of employment discrimination class actions in the general-interest press, see Roger Parloff, *The War over Unconscious Bias*, *FORTUNE*, Oct. 15, 2007, at 90.

keeping with the skepticism in Part I about reasoning of an all-or-nothing nature, this Part highlights judicial errors in both directions: judicial overreach in class certification to the displacement of summary judgment, as well as judicial underreach through the miscasting of aggregate proof as simply an evidentiary question, without recognition of the contested account of governing law advanced thereby. Proper delineation of the law-declaring component of class certification, in short, does not uniformly favor either plaintiffs or defendants.

Such a view is nonetheless decidedly pro-law. The latitude for judicially initiated change in the meaning of governing law presents a nuanced question that can vary across subject areas. The areas of greatest flux and ferment today over aggregate proof in class certification exhibit a recurring feature: They tend to involve subjects nominally governed by statutes but as to which the courts have pursued something more akin to common-law decisionmaking. This observation suggests that efforts to use aggregate proof in the class certification context to advance a contested account of governing law need not necessarily fail. The law of class certification, however, must confront those efforts candidly and resolve them squarely for what they are: occasions for law declaration that then will inform the certification determination, not certification that effectively alters the real-world impact of governing law *sub silentio*, through the precipitation of class settlements.

A. *Markets as Class-Wide Wrongs*

As Part I observed, the most straightforward form of aggregate proof today leads to class certification so readily and without fuss that its operation occurs largely unnoticed. The fraud-on-the-market doctrine embraced for securities traded on efficient capital markets has made class certification routine in run-of-the-mill securities fraud class actions, effectively sweeping aside arguments that fatal dissimilarities exist within the class due to individualized questions of reliance. The market price, instead, serves as the mechanism that unites everyone who bought or sold shares during the relevant time period, as all such investors relied on the integrity of the market.¹²⁵

The dramatic effect of the fraud-on-the-market doctrine upon the certification question has invited efforts to extend its domain beyond securities fraud on efficient capital markets. Within securities litigation itself, an important battleground today concerns the applicability of the doctrine to unconventional securities markets.¹²⁶ Related

¹²⁵ See *supra* Part I.B.1.a (summarizing theory behind fraud-on-the-market doctrine).

¹²⁶ See *infra* note 132 (citing illustrative cases).

issues also have arisen with respect to an additional element of securities fraud—not the reliance element, to which the doctrine directly speaks, but the element denoted in securities law as “loss causation.”¹²⁷

Subsection 1 speaks to class actions under the securities and anti-trust laws—two areas that fit most readily within what this Article has described as the influx of economics into legal doctrine. As Subsection 1 explains, recent decisions exhibit both judicial overreach and underreach in class certification. Subsection 2 extends the analysis to other areas that involve the invocation of the market price in one form or another as the mechanism said to unite class members. Civil RICO class actions are the main focus here. In areas in which the integration of economics into legal doctrine is less prevalent, it is not surprising that courts have encountered greater difficulty in discerning the proper parameters for judicial inquiry. If anything, class certification analysis in the RICO context has come to replicate missteps seen in securities fraud class actions.

I. Overreach and Underreach When Economics Is Law

a. Securities

For all its welcome analysis of the first-generation questions surrounding the *Eisen* rule,¹²⁸ *IPO* itself presented a straightforward question as to class certification. Everything turned on the applicability of the fraud-on-the-market doctrine to the market for initial public offerings of securities (IPOs), as distinct from ordinary trading on the New York Stock Exchange. Even class counsel recognized that, absent application of the doctrine to the market for IPOs, the reliance element would give rise to individualized questions that would make for fatal dissimilarities within the proposed class.¹²⁹

In *IPO*, the Second Circuit ultimately held the fraud-on-the-market doctrine inapplicable to the market for IPOs, pointing out that undisputed features of that market—for instance, regulatory constraints on real-time analyst reports concerning the securities involved in an IPO—undercut the economic premises behind the doctrine.¹³⁰ “[T]he Plaintiffs’ own allegations and evidence,” in short, demon-

¹²⁷ The term “loss causation” is a shorthand rendering of statutory language that places on the plaintiff “the burden of proving” that the defendant’s fraud “caused the loss for which the plaintiff seeks to recover.” 15 U.S.C. § 78u-4(b)(4) (2006).

¹²⁸ See *supra* notes 53–61 and accompanying text (discussing *IPO* court’s answers to first-generation questions concerning class certification).

¹²⁹ *IPO*, 471 F.3d 24, 42 (2d Cir. 2006).

¹³⁰ *Id.* at 42–43.

strated that “the market for IPO shares is not efficient” within the meaning of the efficient capital markets hypothesis.¹³¹

Though not squarely stated by the court, the important point here is this: When legal doctrine embeds a particular economic account, questions concerning the applicability of that doctrine to a new setting present not evidentiary questions about competing expert submissions on economics but, ultimately, questions about the proper meaning of governing law. The central question in *IPO* concerned whether the premises of the efficient capital markets hypothesis apply to the market for initial public offerings. To be sure, the answer to that question turned upon such matters as the rapidity with which the market for IPOs incorporates information about the issuing firm. But those matters ultimately speak to the applicability of the presumption of reliance found in the fraud-on-the-market doctrine in securities law.

Seen as an occasion for law declaration, the dispute over class certification in *IPO* presented the court with the need to apply a familiar adage: When the rationale for a given legal rule is inapplicable, so too must be the rule. And the rationale for the fraud-on-the-market doctrine is based in economics. The law-like character of the treatment accorded to aggregate proof in *IPO* bears emphasis. The upshot of *IPO* is to make the fraud-on-the-market doctrine unavailable for actions involving IPOs generally, not just in the particular actions consolidated before the Second Circuit in the litigation at hand. Other second-generation decisions on class certification similarly treat efforts to extend the fraud-on-the-market doctrine to other kinds of securities markets that deviate from the premises of the efficient capital markets hypothesis.¹³²

Even within the securities area, however, the line between necessary law declaration, on the one hand, and judicial overreach, on the other, has not remained clear in the class certification context. In addition to the reliance element to which the fraud-on-the-market doctrine speaks, a further element of the cause of action for securities fraud is known, in shorthand, as “loss causation”—what the Supreme

¹³¹ *Id.* at 42.

¹³² See, e.g., *Unger v. Amedisys Inc.*, 401 F.3d 316, 322–25 (5th Cir. 2005) (overturning class certification for lack of sufficient inquiry into applicability of fraud-on-the-market doctrine to “small-cap stocks traded in less-organized markets”); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (holding fraud-on-the-market doctrine inapplicable when alleged fraud involves non-public information); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 198–99 (6th Cir. 1990) (holding fraud-on-the-market doctrine inapplicable to market for newly issued tax-exempt municipal bonds). But see *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 482 (2d Cir. 2008) (declining to adopt “bright-line rule” that would prohibit application of fraud-on-the-market doctrine to secondary actors, such as research analysts).

Court has described as a “causal connection” between the fraud and the economic loss for which the plaintiffs seek to recover.¹³³ The Court has characterized this loss causation element as calling for proof that the fraud “proximately caused the plaintiff’s economic loss.”¹³⁴ In *Dura Pharmaceuticals, Inc. v. Broudo*, the Court specifically held that the mere purchase of shares at an artificially inflated price—the point to which the fraud-on-the-market doctrine speaks—“is not itself a relevant economic loss.”¹³⁵ To quote the Court: “[T]he inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value.”¹³⁶ A relevant economic loss occurs, if at all, when the purchaser sells her shares; and even then, a lower price at that time “may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price.”¹³⁷

The *Dura* Court’s treatment of the loss causation element has generated much debate.¹³⁸ For present purposes, the notable point is that disputes concerning this element tend to arise in situations of multiple negatives—when the correction of the fraud takes place contemporaneously with the revelation of other negative information apt to move the share price dramatically downward. A much-discussed decision from the Fifth Circuit in the wake of *IPO—Oscar Private Equity Investments v. Allegiance Telecom, Inc.*¹³⁹—involved such a situation. There, the correction of misstatements by Allegiance Telecom concerning the amount of telecommunications lines it had installed took place at the same time at which the firm released other bad news concerning its business prospects.¹⁴⁰ As the court summarized,

¹³³ *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005).

¹³⁴ *Id.* at 346.

¹³⁵ *Id.* at 347.

¹³⁶ *Id.* at 342.

¹³⁷ *Id.* at 342–43.

¹³⁸ See generally Allen Ferrell & Atanu Saha, *The Loss Causation Requirement for Rule 10b-5 Causes of Action: The Implications of Dura Pharmaceuticals, Inc. v. Broudo*, 63 Bus. Law. 163 (2007) (discussing numerous loss causation issues in light of *Dura*); Fox, *supra* note 64 (discussing *Dura* and issues that remain unanswered); James C. Spindler, *Why Shareholders Want Their CEOs To Lie More After Dura Pharmaceuticals*, 95 GEO. L.J. 653 (2007) (discussing problems with “*ex post* market decline” rule that *Dura* adopts to satisfy loss causation element).

¹³⁹ 487 F.3d 261 (5th Cir. 2007).

¹⁴⁰ See *id.* at 263 (observing that decline in Allegiance Telecom’s share price took place amidst news that firm had missed analysts’ expectations concerning its earnings, had suffered greater financial losses than some analysts had anticipated, and had “a very thin margin of error for meeting revenue covenants” for year at hand—all in addition to correction of allegedly fraudulent misstatement at issue).

“Allegiance’s stock, like that of the rest of the telecom industry, was plunging . . . , losing nearly 90% of its value.”¹⁴¹ The case raised a significant question as to whether the alleged fraudulent misstatement of Allegiance Telecom’s line count was merely “present at the scene” of the broader collapse in telecommunications shares and not a proximate cause of that loss, in whole or in part.¹⁴² Class counsel, of course, argued that the requisite causal link existed, proffering expert submissions that suggested the possibility of later quantifying the portion of the price drop that was proximately caused by the misstated line count.¹⁴³ These submissions took the form of aggregate proof, as described here, for they predictably looked at the market for Allegiance Telecom shares as a whole during the relevant time period.

In *Oscar*, the Fifth Circuit embraced the second-generation principles for class certification from *IPO*¹⁴⁴ but stumbled in their application. As a precondition for the fraud-on-the-market doctrine and its presumption of reliance, the court at the class certification stage also insisted upon satisfaction of the loss causation element by a preponderance of the admissible evidence.¹⁴⁵ In fairness to the court, the precise relationship between the reliance and loss causation elements of securities fraud remains far from clear, both generally and in Fifth Circuit precedent.¹⁴⁶ The court’s concern that corrective disclosure of Allegiance Telecom’s line count did not appear to have moved the price of the firm’s shares plainly relates to the premise of market efficiency on which the fraud-on-the-market doctrine rests.¹⁴⁷ For its part, however, the Supreme Court has steadfastly set forth reliance and loss causation as separate elements of securities fraud.¹⁴⁸ In prac-

¹⁴¹ *Id.*

¹⁴² *Id.* at 271.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 268 (citing *IPO*, 471 F.3d 24, 27 (2d Cir. 2006)).

¹⁴⁵ *Id.* at 269. Since *Dura*, district courts outside of the Fifth Circuit have rejected the notion in *Oscar* that a plaintiff class must make a showing of loss causation as a precondition to class certification. See, e.g., *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 186 (S.D.N.Y. 2008) (holding that plaintiff class is not required to prove loss causation by preponderance of evidence in order to satisfy Rule 23 requirements); *In re Micron Techs., Inc. Sec. Litig.*, 247 F.R.D. 627, 633–34 (D. Idaho 2007) (holding that loss causation relates to merits but not to Rule 23 inquiry); *Roth v. Aon Corp.*, 238 F.R.D. 603, 609 (N.D. Ill. 2006) (explaining that loss causation is “factual question[]” that should not be addressed at class certification stage).

¹⁴⁶ Much of the dispute between the *Oscar* majority and Judge Dennis in dissent concerned the interpretation of Fifth Circuit precedent on whether a showing of loss causation is necessary to invoke the fraud-on-the-market presumption. Compare *Oscar*, 487 F.3d at 268–69, with *id.* at 275–76 (Dennis, J., dissenting).

¹⁴⁷ *Id.* at 269 (“The assumption that every material misrepresentation will move a stock in an efficient market is unfounded, at least as market efficiency is presently measured.”).

¹⁴⁸ *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005).

tical terms, moreover, insistence upon proof of loss causation to trigger the fraud-on-the-market doctrine and its presumption of reliance would have the peculiar consequence of “requiring the plaintiffs to prove . . . the very facts that are to be presumed . . . (*i.e.*, that the defendant’s material misrepresentation was reflected in the stock price).”¹⁴⁹

An understanding of class certification as an inquiry into the existence of dissimilarities within the proposed class helps to pinpoint the misstep in *Oscar*. Sometimes a cigar is just a cigar.¹⁵⁰ Likewise, in class certification, sometimes aggregate proof is just a matter of proof. Whether a lack of loss causation should derail a case like *Oscar* presents not a question of class certification but, rather, one about the existence of a triable issue concerning an element of the plaintiffs’ case—in short, a question properly engaged as a matter of summary judgment, not class certification.

This line between necessary law declaration in the class certification context and unwarranted swallowing-up of summary judgment turns upon whether the matter to which aggregate proof speaks actually concerns the existence of dissimilarity within the class. As the preceding Part has noted, the crucial significance of dissimilarity to the class certification determination is obscured by the locution of Rule 23(b)(3) in terms of “common questions” that “predominate” over individual ones.¹⁵¹ The problem in *Oscar* is not that the proposed class exhibited some fatal dissimilarity but, rather, that the class might have suffered from a fatal similarity: a lack of loss causation, not on the part of only some investors in the class, but with respect to all.¹⁵² The distinction between a class certification question and a summary judgment question is far from trivial. A requirement of a genuine issue of material fact remains much easier for plaintiffs to

¹⁴⁹ *Oscar*, 487 F.3d at 274 (Dennis, J., dissenting).

¹⁵⁰ JOHN BARTLETT, *BARTLETT’S FAMILIAR QUOTATIONS* 608 (Justin Kaplan ed., 17th ed., Little, Brown and Co. 2002) (1882) (attributing quote to Sigmund Freud).

¹⁵¹ FED. R. CIV. P. 23(b)(3); *see supra* Part I.C (explaining how on-the-ground application of Rule 23(b)(3) operates differently from what one might expect based solely upon rule text).

¹⁵² By contrast, when the dispute between the experts pertains to whether the class is relevantly similar or fatally dissimilar, the framework of *IPO* properly governs. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322–24 (3d Cir. 2008) (overturning certification of antitrust class action on ground that district court had erroneously declined to weigh competing expert submissions on whether all, or only some, members of proposed class had suffered injury from alleged price-fixing conspiracy).

satisfy than the preponderance standard used to assess compliance with Rule 23 requirements under *IPO* and its progeny.¹⁵³

b. Antitrust

Securities law, however, is not the only subject area that has seen an integration of economics into legal doctrine. Whereas invocation of market pricing as the unifying mechanism for class certification has elicited judicial overreach in securities litigation, analogous invocations of market pricing in the antitrust setting have occasioned judicial underreach. Class litigation that precipitated one of the largest antitrust class settlements in history¹⁵⁴ provides a striking illustration.

*In re Visa Check/MasterMoney Antitrust Litigation*¹⁵⁵ involved an antitrust class action centered on an alleged tying arrangement, whereby the defendant issuers of credit and debit cards required retail merchants to honor both types of cards if retailers wished to honor either for consumer purchases.¹⁵⁶ The proposed class encompassed all retailers nationwide—spearheaded by Wal-Mart as one of the class representatives¹⁵⁷—even though different kinds of retailers experience different mixtures of credit- and debit-card transactions. Not surprisingly, given their linkage to card-holders' checking accounts, debit cards tend to be used more prevalently for small, everyday purchases, whereas credit cards are used more for big-ticket transactions.¹⁵⁸ The result is that different mixtures of credit- and debit-card transactions prevail across different kinds of retailers¹⁵⁹—say, as between Wal-Mart and a high-end jewelry store.

On the class certification question, the parties predictably offered submissions from competing expert economists concerning the market consequences they expected to flow from elimination of the tie—specifically, whether the effect would be merely to decrease the price of the tied product (the fees charged by the defendants for debit-card

¹⁵³ See *Oscar*, 487 F.3d at 269 (insisting upon proof of loss causation “at the class certification stage by a preponderance of all admissible evidence”); see also *supra* note 115 (citing other circuits' adoption of preponderance standard for Rule 23 requirements).

¹⁵⁴ See Jathon Sapsford, *Lawyers Profit by Challenging Colleagues' Fees*, WALL ST. J., May 7, 2004, at B1 (noting that class settlement in suit against Visa and MasterCard involved “one of the largest antitrust awards in U.S. history”).

¹⁵⁵ 280 F.3d 124 (2d Cir. 2001), *disavowed by IPO*, 471 F.3d 24 (2d Cir. 2006).

¹⁵⁶ *Id.* at 131. Tying arrangements are illegal per se under antitrust law if the seller has appreciable market power. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17–18 (1984).

¹⁵⁷ *Visa Check*, 280 F.3d at 124.

¹⁵⁸ See *id.* at 153 (Jacobs, J., dissenting) (“[F]ine jewelers, for example, would rarely be presented with an off-line debit card.”).

¹⁵⁹ See *id.* (“[T]hese plaintiffs have used the credit cards (the tying product) and off-line debit cards (the tied product) in *different proportions* . . .”).

transactions) or, in addition, to increase the price of the tying product (the fees charged for credit-card transactions).¹⁶⁰ According to plaintiffs' expert, the market was such as to make all retailers within the proposed class the victims of the tie (albeit to varying degrees) by way of supracompetitive fees for debit-card transactions.¹⁶¹ But according to defendants' expert,¹⁶² there existed fatal dissimilarities within the class at the most basic level: Removal of the tie could harm those retailers (like the high-end jewelry store) with a disproportionately high ratio of credit- to debit-card transactions.¹⁶³

Ruling prior to its change of course in *IPO*, the Second Circuit upheld the class certification in *Visa Check*, concluding that the opinion of plaintiffs' expert on the economics of the alleged tie was "not so flawed that it would be inadmissible as a matter of law."¹⁶⁴ *IPO*, of course, sweeps away this approach. The important point for current law is not simply that the court must weigh competing expert submissions that bear upon satisfaction of Rule 23 requirements but, more specifically, that the dispute in *Visa Check* is only superficially one of a factual or evidentiary nature.

The economic question to which the competing experts speak in *Visa Check* goes to a question of antitrust doctrine—to whether the proper measure of damages in a tying case turns on the price of the tied product alone (here, the debit-card fees) or on the price of the "package" of the tied and tying products together.¹⁶⁵ The reason for the valence of economics and law in *Visa Check* lies in the extensive influence of economic analysis on antitrust doctrine. When class litigation occurs in an area in which economics substantially guides law, as in much of antitrust and securities doctrine today, law declaration appropriately proceeds as part of the class certification ruling to sort out the competing economic accounts. The necessary law declaration may—indeed, must—occur without any fear of intrusion on the domain of the factfinder at trial.

¹⁶⁰ See *id.* at 133–34 (majority opinion) (summarizing disagreement in parties' expert submissions).

¹⁶¹ *Id.*

¹⁶² See *id.* at 134 (discussing defendants' expert's assertion regarding consequences of breaking tie).

¹⁶³ See *id.* at 154, 156–58 (Jacobs, J., dissenting) (explaining how, on defendants' expert's view, alleged price-fixing conspiracy would have dramatically different effects on different retailers, depending upon their respective mixes of credit- and debit-card transactions).

¹⁶⁴ *Id.* at 135 (majority opinion).

¹⁶⁵ See *id.* at 155–58 (Jacobs, J., dissenting) (urging adoption of "package" measure of damages as matter of law and explaining how it would give rise to fatal dissimilarities in proposed class).

So understood, the filing of the *Visa Check* litigation in the Second Circuit was no accident. By that time, in keeping with the leading antitrust treatise, several other circuits had resolved the damage calculation for tying cases, adopting the package approach that would underscore fatal dissimilarities within the undifferentiated, nationwide class of retailers.¹⁶⁶

For all its veneer of dueling expert evidence, the effort at class certification in *Visa Check* consisted, at bottom, of nothing less than an effort to elicit and then to project across the country, by way of the resulting nationwide class settlement, an outlier conception of federal law. The upshot of *Visa Check* was that the court set the class settlement process into motion—to the eventual tune of some \$3 billion for the defendants—without ever deciding the crucial damage calculation question at all.¹⁶⁷ As this Part shall elaborate, this kind of misstep is by no means confined to the particulars of antitrust. One can see a similar strategy—and a similar judicial misstep—at work in recent employment discrimination class litigation.

2. *Replication in RICO*

Areas such as securities and antitrust law are not the only ones in which proponents of class certification invoke the market price as the mechanism that lends cohesiveness to a proposed class. A major development in the second-generation case law involves efforts to import the fraud-on-the-market doctrine from securities law into other areas that share a focus on fraudulent misconduct. Here, the contested terrain consists chiefly of civil RICO class actions, though consumer fraud class actions under state law also exhibit similar fea-

¹⁶⁶ See *id.* at 154 (noting that damage calculation question remained “open” in Second Circuit at time of *Visa Check*); see also *id.* at 155–56 (citing cases in other circuits that had resolved damage-calculation question in favor of “package” approach for tying cases); 10 PHILLIP E. AREEDA, HERBERT HOVENKAMP & EINER ELHAUGE, ANTITRUST LAW ¶ 1769c (2d ed. 2004) (“[I]n most cases a premium price on the tied product must be accompanied by a reduction in the price of the tying product.”).

¹⁶⁷ See Sapsford, *supra* note 154, at B1 (estimating dollar value of class settlement). The Second Circuit’s disavowal of *Visa Check* years later in *IPO* notably did not come with a rebate check for the settling defendants in the former case.

tures.¹⁶⁸ The treble-damage remedy available under RICO provides a particular invitation for efforts to garner class status.¹⁶⁹

¹⁶⁸ A class action under the Washington Consumer Protection Act provides a striking example of such state-law claims. See *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 549 (W.D. Wash. 2008), *class decertified*, No. C07-0475 MJP, 2009 WL 413509, at *1 (W.D. Wash. Feb. 18, 2009). The plaintiff consumers alleged inflation in the retail prices of computers designated by Microsoft as “Windows Vista Capable.” The consumers characterized this designation as misleading, arguing that the computers in question actually were able to run only a stripped-down version of the Vista operating system and not other, premium versions of Vista with enhanced functions. *Id.* at 548.

The district court initially certified the class on the plaintiffs’ “price inflation” theory, pointing to the absence of Washington case law thereon and the resulting inability to say with certainty that “such a theory would be rejected by Washington courts.” *Id.* at 559 & n.3. This is a considerable dereliction, for the court shied away from construing the Washington statute in the same breath in which the court noted the contrary legal constructions of similar statutes in other states. See *id.* at 558–59 (citing similar class actions elsewhere). The court instead should have engaged fully the question of whether the Washington consumer statute, properly read, embraces the price-inflation theory. Only upon so concluding affirmatively—not merely noting the absence of guidance either way from Washington courts—should the court have proceeded to certify the class.

Later in the same case, the court adhered to its mistaken view that the uncertainty over whether the Washington consumer statute embraces the plaintiffs’ “price inflation” theory did not endanger the class certification. *Kelley*, 2009 WL 413509, at *5. The court nonetheless reversed course, decertifying the class on other grounds. The court noted that plaintiffs’ expert, by his own admission, could not pin down “a specific shift in the demand” or “any single price effect” in the market for computers designated as Vista capable. *Id.* at *6, 7. As a result, in the court’s view, the plaintiffs could not establish a class-wide causal connection between the alleged misrepresentation and retail computer prices. See *id.* at *8 (“Absent evidence of class-wide price inflation, Plaintiffs cannot demonstrate that common questions predominate over individual considerations.”). Even while decertifying the class, however, the court denied Microsoft’s motion for summary judgment, leaving open the possibility that some individual consumers might be able to “demonstrate causation through evidence of individual deception,” *id.*—that is, not based simply on the prevailing market price for their computers. On the proper approach to disputes over causation elements in proposed class actions involving alleged market-wide distortions in pricing, see the discussion of a similar dispute, the *McLaughlin* light cigarettes class action under RICO, *infra* notes 193–96 and accompanying text.

¹⁶⁹ See 18 U.S.C. § 1964(c) (2006). Invocation of federal law also avoids potential barriers to certification of a nationwide class that stem from the need to apply dissimilar state laws. See Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 663 (2006) (“Where the claims of class members across the country arise under state law rather than federal law, significant doubt often will attend the suggestion that common questions ‘predominate’ over individual ones.”). If anything, the recent Class Action Fairness Act (CAFA) of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), makes a civil RICO claim even more attractive for plaintiffs. Prior to CAFA, class counsel intent upon keeping a nationwide class action in state court would have wanted to avoid the inclusion of a federal-law claim, for fear that it would facilitate removal based upon the existence of a federal question. See 28 U.S.C. § 1367(a) (2006) (authorizing assertion of supplemental jurisdiction over state-law claims upon proper subject-matter jurisdiction over federal claims that are part of “same case or controversy”). Now that CAFA greatly facilitates the removal of proposed nationwide class actions for state-law claims, see *id.* § 1332(d)(2) (granting federal courts original jurisdiction over class actions with minimal diversity and more than \$5 million in

By its terms, RICO provides a private right of action to “[a]ny person injured in his . . . property by reason of a violation of” specified criminal prohibitions¹⁷⁰—for instance, mail fraud, which federal law criminalizes in its own right¹⁷¹—if certain other criteria are met.¹⁷² In *McLaughlin v. American Tobacco Co.*,¹⁷³ the Second Circuit overturned the certification of a nationwide class against the tobacco industry concerning its massive misinformation campaign for light cigarettes.¹⁷⁴ Seeking to avoid the kinds of individualized issues that had derailed the certification of a nationwide class of smokers who had sued in tort based on nicotine addiction,¹⁷⁵ the plaintiff class of light cigarette smokers in *McLaughlin* cast their injury in strictly economic terms said to flow from the market for cigarettes itself. As the Second Circuit observed, “[t]he gravamen of plaintiffs’ complaint is that defendants’ implicit representation that Lights were healthier [than regular cigarettes] led them to buy Lights in greater quantity than they otherwise would have and at an artificially high price, resulting in plaintiffs’ overpayment for cigarettes.”¹⁷⁶ One hardly can gainsay the significance of the desired class certification here, given that the plaintiff class sought \$800 billion in trebled economic damages.¹⁷⁷

As I shall explain momentarily, guidance from the Supreme Court since *McLaughlin* has altered the legal landscape of RICO in a way that sharpens its connection to the securities fraud setting.¹⁷⁸ At the time of *McLaughlin*, however, Second Circuit precedent construed the statutory phrase “by reason of” to demand proof by a RICO plaintiff of both “reliance” upon the underlying mail fraud and

controversy), there is no longer a jurisdictional deterrent to the inclusion of an additional, federal-law claim.

¹⁷⁰ 18 U.S.C. § 1964(c) (2006).

¹⁷¹ See *id.* § 1961(1)(B) (listing mail fraud criminalized by *id.* § 1341 as among possible predicate acts for civil RICO liability).

¹⁷² The criminal prohibition section of RICO, *id.* § 1962(b), prohibits the defendant from “acquir[ing] or maintain[ing]” an “interest” in an enterprise “through a pattern of racketeering activity.” The civil right of action under RICO, in turn, cross-references § 1962. *Id.* § 1964(c).

¹⁷³ 522 F.3d 215 (2d Cir. 2008), *rev’g* Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006).

¹⁷⁴ Evidence of the industry’s misinformation campaign is now legion, to the point where it is hardly accurate to describe the claims on that topic in *McLaughlin* as merely “alleged.” See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 41 (D.D.C. 2006) (noting that Tobacco Industry Research Committee served as “sophisticated public relations vehicle” to “deny the harms of smoking and reassure the public”).

¹⁷⁵ See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying nationwide smoker class in tort).

¹⁷⁶ *McLaughlin*, 522 F.3d at 220.

¹⁷⁷ *Id.* at 221.

¹⁷⁸ See *infra* notes 189–90 and accompanying text (discussing *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008)).

“proximate causation” between the fraud and the economic loss for which the plaintiff seeks to recover.¹⁷⁹ On both points, class counsel invoked aggregate proof in the form of expert economic analysis of the market for light cigarettes, said to yield an estimate of “the amount by which defendants would have had to reduce their prices to account for the . . . reduced demand” that would have resulted from candor about the product.¹⁸⁰ The defendants predictably responded in kind, proffering their own starry lineup of economists to critique the plaintiffs’ experts.¹⁸¹

Judge Weinstein certified the class, underscoring two central ideas. First, absent aggregation, the industry’s sweeping misconduct in connection with the marketing of light cigarettes would go unremedied, because the alleged price overcharge was not of such a magnitude as to make individual claims marketable.¹⁸² If anything, the inability of the federal government to seek backward-looking remedies—say, disgorgement of ill-gotten profits¹⁸³—as part of its criminal prosecution of the tobacco industry under RICO added to the urgency of aggregation on the civil side. Second, when the plaintiffs’ expert economic evidence would be admissible at trial—as Judge Weinstein concluded would have been so¹⁸⁴—a withholding of aggregate treatment effectively would deny the plaintiffs their right to a jury determination of the merits.¹⁸⁵

In the course of reversing, the Second Circuit opinion marked a step forward in the second-generation law of class certification, even while it also replicated missteps seen previously in the securities setting. The welcome step forward lies in the court’s recognition of the centrality of law declaration to the class certification question. On this view, “Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof.”¹⁸⁶ The specifics of the *McLaughlin* court’s analysis of reliance and proximate causation under RICO illustrate the on-the-ground operation of law declaration—and its potential pitfalls—in the class certification context.

¹⁷⁹ *McLaughlin*, 522 F.3d at 222 (citing Second Circuit precedents).

¹⁸⁰ *Id.* at 229.

¹⁸¹ See *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1230, 1234 (E.D.N.Y. 2006) (discussing defendants’ economic experts), *rev’d sub nom. McLaughlin*, 522 F.3d 215.

¹⁸² *Id.* at 1020.

¹⁸³ See *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005) (holding that criminal RICO prosecution may obtain only “forward-looking” remedies “aimed at future violations,” not “backward-looking” remedies, such as disgorgement, “focused on remedying the effects of past conduct”).

¹⁸⁴ *Schwab*, 449 F. Supp. 2d at 1138–50, 1163–70.

¹⁸⁵ *Id.* at 1020–21.

¹⁸⁶ *McLaughlin*, 522 F.3d at 220.

Turning to what its precedents had formulated as the reliance element of civil RICO, the Second Circuit sniffed out class counsel's effort to import the equivalent of the fraud-on-the-market doctrine in securities law. Here, the court exhibited a praiseworthy attentiveness to the actual content of plaintiffs' argument—which posited class-wide reliance by way of purchases at a market price artificially inflated by the defendants' fraud—rather than to class counsel's purported disavowal of an effort to import the fraud-on-the-market doctrine.¹⁸⁷ At this point, the analysis of the supposed reliance element followed much the same logic as the *IPO* court's rejection of the fraud-on-the-market doctrine for IPOs. Neither the market for IPOs nor the market for light cigarettes exhibits features of an efficient market, such as to make plausible the inference that “the market at large internalized the misrepresentation [concerning light cigarettes] to such an extent that all plaintiffs can be said to have relied on it” simply by purchasing at the market price.¹⁸⁸

There is just one problem with the Second Circuit's analysis of reliance as a barrier to class certification, at least when seen with the benefit of hindsight. In its 2008 decision in *Bridge v. Phoenix Bond & Indemnity Co.*, the Supreme Court clarified that “a plaintiff asserting a [civil] RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations.”¹⁸⁹ Though not itself a class action, *Bridge* sweeps away reliance as a potential basis for dissimilarities within proposed RICO classes just as effectively as the fraud-on-the-market doctrine does for run-of-the-mill securities classes. This is far from objectionable, as far as class certification law is concerned. Recognition of the law-declaring dimension of class certification naturally makes a trial-level court's legal interpretation subject to correction by a higher court. An appellate court's decision not to extend the fraud-on-the-market doc-

¹⁸⁷ See *id.* at 224 & n.5 (characterizing class as “invok[ing] the fraud-on-the-market presumption set forth in *Basic Inc. v. Levinson*,” notwithstanding “plaintiffs' contention that they ‘are not advocating the same “fraud-on-the-market” presumption applicable in a securities case’”).

¹⁸⁸ *Id.* at 224.

¹⁸⁹ 128 S. Ct. 2131, 2145 (2008). Writing for a unanimous Court, Justice Thomas squarely grounded the *Bridge* holding in the text of RICO, which nowhere states a reliance element. To the contrary, the relevant language lists mail fraud among the possible predicate acts of racketeering under RICO, “even if no one relied on any misrepresentation,” and the statute goes on to confer a private right of action to all persons injured “by reason of” such acts. *Id.* at 2138. The Court noted that “a person can be injured ‘by reason of’ a pattern of mail fraud even if he has not relied on any misrepresentations.” *Id.* at 2139.

trine to a given market likewise could be met with reversal by the Supreme Court.

In fact, the replication of the securities setting runs deeper in civil RICO cases in ways that the scholarly literature has not yet highlighted. Even while rejecting the existence of a reliance element in *Bridge*, the Supreme Court reaffirmed its earlier holdings that the statutory reference to injury “by reason of” a RICO criminal violation does embrace an element of proximate causation.¹⁹⁰ This now should start to sound curiously familiar. With the would-be reliance element no longer a potential tripping point for class certification, all the more pressure is likely to build on the proximate causation element.¹⁹¹ Indeed, RICO case law sometimes denotes this element in precisely the same terms—“loss causation”—as its counterpart in securities law.¹⁹²

As to loss causation under RICO, the *McLaughlin* court concluded that the plaintiff smokers’ argument for class certification “fails as a matter of law,” pointing to “the lack of an appreciable drop in the demand or price of light cigarettes” upon publication in 2001 of a major study by the National Cancer Institute that set the record straight concerning the health risks of the product.¹⁹³ The lack of price movement for light cigarettes in the aftermath of the National Cancer Institute study is the analog to the lack of price movement in the shares of Allegiance Telecom attributable to the revelation of the company’s accurate telecommunications line count in *Oscar*.¹⁹⁴ The similarity between *McLaughlin* and *Oscar* goes further, however, and in ways that are troubling for class certification analysis.

The treatment in *McLaughlin* of the proximate causation element of RICO replicates the misstep made by the Fifth Circuit in *Oscar* with regard to the loss causation element of securities fraud. The problem with respect to the RICO proximate causation element is one not of class certification but, rather, of possible worthiness for sum-

¹⁹⁰ *Id.* at 2141 (discussing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992)).

¹⁹¹ Interestingly enough, after the Second Circuit’s reversal of the class certification in *McLaughlin*, Judge Weinstein proceeded to certify another RICO class—this time, of third-party payors with respect to alleged manufacturer overcharges for the prescription drug Zyprexa. *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69, 81–82 (E.D.N.Y. 2008). On the proximate causation element, Judge Weinstein sought to distinguish *McLaughlin*, opining that “[p]roof in the instant case is not generalized.” *Id.* at 195. As this Article was going to press, the Second Circuit granted, pursuant to Rule 23(f), leave to appeal Judge Weinstein’s class certification order. *Eli Lilly & Co. v. UFCW Local 1776*, No. 08-4685-CV (2d Cir. Jan. 15, 2009) (order granting said appeal).

¹⁹² *E.g.*, *McLaughlin*, 522 F.3d at 226.

¹⁹³ *Id.* at 227.

¹⁹⁴ See *supra* notes 141–42 and accompanying text (discussing evidence suggesting lack of loss causation in *Oscar*).

mary judgment. Put differently, the problem is not that the light cigarette consumer class suffered from some fatal dissimilarity but instead, as in *Oscar*, that the proposed class might have exhibited a fatal similarity: the inability of *anyone* within the class to establish loss causation simply by reference to light cigarette purchases at the prevailing market price, given that the price did not change upon the National Cancer Institute's correction of the fraud.¹⁹⁵

In short, *McLaughlin* displays both the promise and the perils of a focus on law declaration in class certification. Law declaration rightly polices the tendency "to conform the law to the proof" in class certification¹⁹⁶ and rightly remains susceptible to correction from a higher court. But law declaration is warranted in class certification only insofar as it has the potential to reveal dissimilarity within the class, not as a substitute for the proper evaluation of evidence said to reveal a fatal similarity on an element of the plaintiffs' case on the merits. The latter inquiry remains the proper domain of summary judgment, such as to implicate the role of the court vis-à-vis the factfinder at trial. In the context of summary judgment, proof proffered by class counsel in any form—aggregate or otherwise—might be so insubstantial as to warrant rejection as a matter of law. The problem is that the overreach in the class certification analysis in *McLaughlin* prevented the Second Circuit from asking the right question: whether the plaintiffs' expert submissions—even if not ultimately persuasive, for the reasons noted by the court—at least made it over the comparatively low bar of summary judgment.

B. *Employment Markets and "Structural Discrimination"*

The notion of market prices embedding some manner of aggregate wrong has not remained confined to the kinds of consumer products sold today. As this Section reveals, the use of aggregate proof in an effort to discern the market effects of civil wrongdoing also extends to the market for labor. Here, if anything, courts have yet to pinpoint

¹⁹⁵ Inability to show proximate causation on a class-wide basis simply by reference to the market price does not necessarily mean that individual smokers would be unable to show a proximately causal connection between the tobacco industry's misdeeds and some manner of RICO-covered loss. But the loss on such an account would not consist of some portion of the market price said to embed the fraud but, rather, the entire purchase price—at least for those light-cigarette smokers who could show that they would have quit smoking had the industry come clean about the risks of the product. Much of the public-health critique of light cigarettes holds precisely that the industry created them to keep relatively health-conscious smokers in the market who otherwise might have quit. See *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1064 (E.D.N.Y. 2006), *rev'd sub nom.* *McLaughlin*, 522 F.3d 215.

¹⁹⁶ *McLaughlin*, 522 F.3d at 220.

the law-declaring dimension of class certification. The tendency, instead, has been toward the kind of judicial underreach seen previously in *Visa Check*.

1. Title VII Terminology

As Part I observed, the terminology of Rule 23 tends to obscure the critical importance of dissimilarity for class certification.¹⁹⁷ Long-standing terminology in Title VII doctrine adds to the confusion in the sorts of employment discrimination class actions of concern here, which focus on a “pattern” or “practice” of “disparate treatment.”

At the outset, some doctrinal basics are in order. The gist of a Title VII claim for “disparate treatment” is that the adverse employment action suffered by the plaintiff resulted from intentional discrimination, not from a facially neutral employment practice that nonetheless happened to fall more harshly on a Title VII-protected group.¹⁹⁸ The latter scenario is actionable under the distinct rubric of a “disparate impact” claim.¹⁹⁹ In keeping with the distinction between intentional and unintentional discrimination, moreover, Title VII authorizes punitive damages only for extreme instances of the former.²⁰⁰

The notion of a pattern or practice of disparate treatment builds on the commonsense recognition that intentional discrimination might not reveal itself overtly. Observation of a pattern of differences in treatment along a prohibited metric—say, race or sex—nonetheless can suggest that the pattern is not the result of random variation but, instead, of intentional discrimination.²⁰¹ The principal means for identification of such a pattern takes the form of statistical analysis of the defendant employer’s workforce in the aggregate, with the use of

¹⁹⁷ See *supra* Part I.C (discussing language of Rule 23(b)(2) and (b)(3)).

¹⁹⁸ See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (describing difference between disparate treatment and disparate impact claims).

¹⁹⁹ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (holding that “absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability”).

²⁰⁰ See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 534 (1999) (discussing 42 U.S.C. § 1981a(b)(1) (2000)).

²⁰¹ *Teamsters*, 431 U.S. at 340 n.20. In statistical terms, courts often seek to distinguish between a random result and one that raises an inference of discrimination by asking whether the result observed is more than two or three standard deviations from the mean distribution. *E.g.*, *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977) (“[A] fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race . . .”); *Lopez v. Laborers Int’l Union Local # 18*, 987 F.2d 1210, 1214 (5th Cir. 1993) (using benchmark of three standard deviations). Any touchstone cast in terms of standard deviations works only if one has an aggregation of data.

regression techniques to isolate the effect of the Title VII–prohibited variable within the array of nonprohibited variables that might influence such matters as pay and promotion.²⁰² Such a statistical analysis consists of aggregate proof, as understood in this Article. It looks over the aggregate group as a whole and then seeks to trigger a feature of legal doctrine that tells us something about each of the adverse employment actions involved—what the Supreme Court in *International Brotherhood of Teamsters v. United States* describes as a presumption that all of those adverse actions resulted from the same underlying wrong of intentional discrimination.²⁰³

This inference of intentional discrimination—like that of reliance in the fraud-on-the-market doctrine—remains rebuttable.²⁰⁴ The raising of the inference nonetheless figures crucially in the argument for class certification. The inference is what links together, into a single, common wrong, what otherwise would be individual adverse employment actions. In Rule 23 parlance, the inference of intentional discrimination across all employees in the proposed class is what positions class counsel to contend that the defendant has “acted . . . on grounds that apply generally to the class,”²⁰⁵ not just vis-à-vis particular employees.

The terms “pattern” and “practice” themselves imply an aggregate perspective. A pattern emerges, after all, only upon examination of what otherwise might seem to be discrete, independent actions. Picking up this notion, some courts have gone so far as to require that pattern-or-practice claims be brought on a class-wide basis, not as individual lawsuits, at least in some situations.²⁰⁶ One might see such a view—not merely permitting aggregation but requiring it—as a version of the right-remedy connection on steroids. Such a view would accord determinative weight to the mere pleading of the action in terms of a pattern or practice of discrimination. As I shall discuss shortly, precise delineation of the right at stake forms the critical challenge in contemporary employment discrimination class actions, but in ways that do not automatically lead to class certification.

Equal Employment Opportunity Commission (EEOC) enforcement actions on a pattern-or-practice theory, too, can prompt fierce

²⁰² See, e.g., *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1180 n.6 (9th Cir. 2007) (discussing purpose of regression analyses).

²⁰³ *Teamsters*, 431 U.S. at 360.

²⁰⁴ *Basic Inc. v. Levinson*, 485 U.S. 224, 250 (1988); *Teamsters*, 431 U.S. at 359–60.

²⁰⁵ FED. R. CIV. P. 23(b)(2). The class certification in *Dukes* proceeded under Rule 23(b)(2). 509 F.3d at 1185.

²⁰⁶ See, e.g., *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 968–69 (11th Cir. 2008) (requiring class treatment for pattern-or-practice cases seeking declaratory or injunctive relief); *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004) (same).

disputes over statistical proof. Still, those disputes bear only on the merits, not on the permissible procedural format for the litigation. The insistence upon a class certification determination as a precondition for aggregation of private litigation, by contrast to public enforcement,²⁰⁷ puts statistical proof in the position of doing double-duty—of buttressing the plaintiffs' case on the merits but, first, of supporting their demand for class treatment. This double-duty is what makes for the overlap between the class certification inquiry and the merits.²⁰⁸

The patterns challenged in the early landmark cases concerning race discrimination, such as *Teamsters*, so closely approached outright segregation that the inference of discriminatory intent was virtually inescapable.²⁰⁹ For that matter, the patterns at issue in early class-action challenges to sex discrimination took a similar form—for example, what one observer accurately described as the “near total gender segregation” at a defendant supermarket chain during the late 1980s, whereby “[a]lmost all the cashiers were women, . . . while almost all the managerial-track jobs were held by men.”²¹⁰ This is not to suggest that such stark patterns have vanished entirely from the workplace. Still, regimes of public law that seek to change private behavior often tend to move from a first to a second generation,²¹¹

²⁰⁷ *Cf.* *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 331 (1980) (“[U]nlike the Rule 23 class representative, the EEOC is authorized to proceed in a unified action . . . even though competing interests are involved and particular groups may appear to be disadvantaged.”).

²⁰⁸ One of the pre-*IPO* decisions disavowed by the Second Circuit shied away from the weighing of competing expert submissions in a pattern-or-practice class action precisely due to overlap with the merits. *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999).

²⁰⁹ *See Teamsters*, 431 U.S. at 337 & n.17 (noting locations of defendant's trucking terminals in communities with substantial African American populations but absence of African Americans among defendant's line drivers).

²¹⁰ Parloff, *supra* note 124, at 96 (discussing *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992)).

²¹¹ One prominent article on Title VII highlights this notion of generational shift in its title. Sturm, *supra* note 34 (referring to “second generation employment discrimination”).

One sees the need for a similar kind of generational shift identified by commentary in another area of public law that enjoys similarly widespread societal support: environmental regulation. Regulatory action dating from the 1970s to address the low-hanging fruit of air pollution from industrial factories is now a well-established feature of the legal landscape. What remain are harder-to-reach emissions by private individuals—in plain English, suburbanites' SUVs and the like—as the available targets for efforts to prompt major additional reductions of air pollution. Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 *VAND. L. REV.* 515, 517–18 (2004). Attention to the latter sorts of emissions would involve reconceptualizing environmental law itself to focus as much on the alteration of individual behavior as on the regulation of corporate behavior. *Id.* at 521; *see also generally* Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 *Nw. U. L. REV.* 1101 (2005) (analyzing legal options to induce private

with the latter tending to involve less of the flagrant, in-your-face kinds of violations as compared to the former. Yet in making that move, the underlying conceptualization of wrongful conduct may have a tendency to change. As I now discuss, the debate over class certification in cutting-edge pattern-or-practice cases today—exemplified most strikingly by *Dukes v. Wal-Mart, Inc.*²¹²—is, at bottom, a debate over an implicit reconceptualization of discrimination under Title VII.

2. Aggregate Proof as Stalking Horse

On the merits, the plaintiff class in *Dukes* alleged a pattern or practice of disparate treatment on the basis of sex—specifically, a company-wide policy of discrimination against hourly female employees across Wal-Mart’s 3400 stores nationwide with regard to pay and promotion to management positions.²¹³ No fool, Wal-Mart had set forth no such policy in so many words. Rather, the “policy” of Wal-Mart at the national level consisted—on the plaintiffs’ account—of delegating excessively subjective discretion to local managers to make pay and promotion decisions.²¹⁴ Wal-Mart at the national level, in other words, had not directed its local managers to discriminate against women but had created the nationwide framework that enabled such discrimination. In summarizing the plaintiffs’ stance on the merits, the district court in *Dukes* returned repeatedly to this notion of enabling discrimination, honing in on the allegation that Wal-Mart’s delegation of subjective decisionmaking authority had provided a “conduit”²¹⁵ for sex-based bias or a “nexus”²¹⁶ between Wal-Mart at the national level and prohibited discrimination by local managers.

As I shall elaborate momentarily, the notion of Title VII liability for enabling discrimination—not battles over dueling expert submissions—forms the crux of the class certification dispute in *Dukes* and similar pattern-or-practice cases today. The nature of the proof offered in such litigation nonetheless bears attention. The proof in *Dukes* included anecdotal evidence of sex discrimination, consisting of

individuals to alter their pollution-generating behavior). Such a move has the potential to endanger the social consensus built up for the latter enterprise.

²¹² 509 F.3d 1168 (9th Cir. 2007), *reh’g en banc granted*, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009). For examples of similar employment discrimination class actions, see *supra* note 124.

²¹³ *Dukes*, 509 F.3d at 1174.

²¹⁴ *Id.* at 1183.

²¹⁵ *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145, 148 (N.D. Cal. 2004), *aff’d*, 509 F.3d 1168, *reh’g en banc granted*, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009).

²¹⁶ *Id.* at 150.

the experiences of particular women within the proposed class—the sorts of real-life evidence that the *Teamsters* framework permits as a way to bring “the cold numbers convincingly to life” in a pattern-or-practice case.²¹⁷ In addition, the plaintiffs offered an expert sociological analysis of Wal-Mart’s “corporate culture”—said to show that the company was “vulnerable” to sex discrimination.²¹⁸ The evidentiary centerpiece of the motion for class certification, nonetheless, consisted of aggregate proof: an analysis of Wal-Mart’s workforce said to reveal statistically significant differences in pay and promotion along the dimension of sex on a nationwide basis.²¹⁹ Wal-Mart predictably responded with its own statistical analysis that, of course, showed no statistically significant discrepancies.²²⁰

Details are illuminating here. Taken simply on its face and without consideration of Wal-Mart’s responsive critiques, the aggregate statistical proof in *Dukes* stops short of the “near total gender segregation”²²¹ readily amenable to an inference of intentional discrimination in the first-generation pattern-or-practice cases. As to pay, “total earnings paid to women ranged between 5 and 15 percent less than total earnings paid to similarly situated men in each year of the class period.”²²² As to promotion, “[i]n general, roughly 65 percent of hourly employees [at Wal-Mart] are women, while roughly 33 percent of management employees are women.”²²³

²¹⁷ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

²¹⁸ *Dukes*, 222 F.R.D. at 151, 154. The report of plaintiffs’ expert sociologist, Dr. William T. Bielby, is available at <http://www.walmartclass.com/staticdata/reports/r3.html>. On the role of Dr. Bielby as a repeat-player expert in pattern-or-practice class actions, see Parloff, *supra* note 124, at 102. Commentators raise serious questions about the proper scope of admissibility for this kind of sociological analysis. See John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks,”* 94 VA. L. REV. 1715, 1748–49 (2008) (distinguishing between admissible sociological research on susceptibility to discrimination generally and inadmissible “subjective, unscientific extrapolation” to defendant company “from general research conducted outside the case”).

²¹⁹ *Dukes*, 222 F.R.D. at 155–56, 160–61. The report of plaintiffs’ expert labor statistician, Dr. Richard Drogan, is available at <http://www.walmartclass.com/staticdata/reports/r2.pdf>.

²²⁰ *Dukes*, 222 F.R.D. at 156.

²²¹ Parloff, *supra* note 124, at 96.

²²² *Dukes*, 222 F.R.D. at 156.

²²³ *Id.* at 146. As to promotion, the plaintiffs also relied on comparisons between Wal-Mart and its competitors, though the methodological soundness of those comparisons is disputed. See Parloff, *supra* note 124, at 98 (noting plaintiffs’ expert’s conclusion that women comprise 56.5 percent of store managers at Wal-Mart’s top twenty competitors but also noting Wal-Mart’s contention that if it “had counted its highest-level hourly-wage supervisors as ‘managers’ . . . , the way it believes several of [the] comparator firms do, the entire purported disparity [vis-à-vis those firms] vanishes”).

Dukes, nevertheless, is not an old-school pattern-or-practice case in which the pattern represents such a deviation as to raise an inference of discrimination in the conventional, intentional sense. It is here that the district court's summary of the plaintiffs' allegations in terms of a "conduit" or "nexus" for discrimination is most revealing.²²⁴ If one looks not at Wal-Mart specifically but across the United States economy as a whole, it is not as if statistically significant differences in pay and promotion to management as between women and men somehow disappear or even lessen markedly. Quite the opposite. The General Accounting Office found that, when one accounts for differences in work patterns and other factors that may lead to differences in pay, men earned, on average, twenty-five percent more than women in 2000.²²⁵ As for promotion to management, moreover, the term "glass ceiling" has become commonplace.²²⁶ In 2004, the EEOC reported that, "although women represent 48 percent of all EEO-1 employment, they only represent 36.4 percent of officials and managers" in the private sector.²²⁷

One might say that if Wal-Mart were indeed discriminating in the old-school, intentional sense, then its execution of that enterprise was startlingly inept. If a highly organized, national employer really intended to keep down its female hourly employees, then one would think that it could manage to become more than just a "conduit" for broader labor-market characteristics.²²⁸ The point here, nonetheless, is not to debate the niceties of labor statistics, for one can speak in less

²²⁴ See *supra* notes 215–16 and accompanying text.

²²⁵ See U.S. GEN. ACCOUNTING OFFICE, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS 2 (2003), available at <http://www.gao.gov/new.items/d0435.pdf> (reporting that "[w]hen we account for differences between male and female work patterns as well as other key factors, women earned, on average, 80 percent of what men earned in 2000," or equivalently, men earned twenty-five percent more). The *Dukes* class encompasses women who have worked in hourly jobs at Wal-Mart since 1998. 509 F.3d at 1175.

²²⁶ See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR 1 (2004), available at <http://www.eeoc.gov/stats/reports/glassceiling/index.pdf> ("The term 'glass ceiling' is generally used to refer to instances where women and minorities have progressed within a firm but, despite their ambitions and qualifications, find it difficult to make the movement into key higher level management positions, or management positions at all.").

²²⁷ *Id.* at 5–6. "EEO-1" refers to the form on which private employers beyond the size of small businesses must report information to the EEOC concerning their workforce.

²²⁸ The cause of these disparities in pay and promotion across the economy is the subject of arguments for change in Title VII doctrine. See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1756 (1990) (criticizing tendency of courts in existing Title VII cases to "assume[] that women's aspirations and identities as workers are shaped exclusively in private realms that are independent of and prior to the workworld").

technical terms.²²⁹ *Dukes* is a pattern-or-practice case nominally under the disparate-treatment theory, but one that proceeds on a fundamentally new account of discrimination.

Here, again, the point is not that a lawsuit—a proposed class action no more or less than an individual action—somehow cannot serve as a vehicle to seek change in the meaning of governing law. The point, instead, is that the class certification question in *Dukes* turns on whether the members of the proposed plaintiff class are the victims of a common wrong rather than many individualized wrongs, if any. The inference of a common wrong depends crucially on whether prohibited discrimination under Title VII encompasses the “conduit” and “nexus” notions of discrimination advanced in *Dukes*. Examination of the scholarly literature on employment discrimination in recent years helps to pinpoint the true nature of the dispute over class certification in *Dukes* and similar cases. That dispute has little to do with labor statistics and everything to do with the proper meaning of discrimination under Title VII.

3. *The Meaning of Discrimination*

A considerable literature has emerged in recent years to urge a bold, new conception of prohibited discrimination under Title VII—a notion that the scholarly literature encapsulates in the term “structural discrimination.”²³⁰ Class counsel in *Dukes* have not uttered the words “structural discrimination,” just as class counsel in *McLaughlin* shied away from calling for importation of the fraud-on-the-market doctrine from the market for securities to that for light cigarettes.²³¹ The law, however, should look functionally, not rhetorically, at the argument for class certification in *Dukes* and its progeny.

Structural discrimination focuses the law as much on unconscious discrimination—specifically, structural features of employment that enable or facilitate unconscious discrimination on the part of frontline decisionmakers—as Title VII conventionally has focused on the established categories of disparate treatment in the old-school, intentional

²²⁹ In technical terms, one way of looking at the statistical proof in *Dukes* is by comparison to epidemiological evidence in a toxic tort or product liability case. See *supra* Part I.B.1.a (discussing nature of epidemiological research). By analogy, the statistical proof proffered by the *Dukes* plaintiffs seeks to support an inference of specific causation (intentional discrimination) with respect to each female employee within the proposed class based on evidence of general causation that, even on its own terms, shows only a quite modest—if any—elevated risk in the exposed population by comparison to the background risk of differences in pay and promotion across male-female lines in the United States as a whole.

²³⁰ See *supra* note 34 (citing illustrative articles).

²³¹ *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 224 & n.5 (2d Cir. 2008).

sense and facially neutral practices that have a disparate impact. Indeed, a pathbreaking, early article in the structural discrimination literature conveys in its title the ambition to question “the content of our categories” in Title VII doctrine,²³² arguing that those categories do not adequately account for an emerging body of experimental research in social psychology that suggests that much discrimination today takes place at an unconscious level.²³³ Here is the Holmesian trajectory at work once more, albeit with blackletter law to be infused not with economics but with social psychology and sociology.

This is not to say that structural discrimination stands as current law. To the contrary, one broadly shared starting point in the literature is that it does not.²³⁴ Nor is this to suggest that structural discrimination necessarily should be targeted through interpretation of Title VII to cover such conduct. One prominent critic in the academy contends that such a view in effect seeks to hold private employers liable for broader societal phenomena that otherwise would not be attributed to them.²³⁵ Responding to this criticism, a significant recent addition to the structural-discrimination literature seeks to locate the wrong of the employer in the notion of facilitating unconscious discrimination—of providing the vehicle through which it can operate.²³⁶ On this view, the structural-discrimination theory differs from simple imposition on private employers of the costs associated with broader, unconscious, societal discrimination, for it is the employer that “facilitates” the on-the-ground impact of such discrimination.²³⁷

²³² Krieger, *supra* note 34.

²³³ *Id.* For extensive discussions of the social psychology of unconscious discrimination, see Symposium, *Unconscious Discrimination Twenty Years Later: Application and Evolution*, 40 CONN. L. REV. 927 (2008), and Symposium, *Behavioral Realism*, 94 CAL. L. REV. 945 (2006).

²³⁴ See, e.g., Bagenstos, *supra* note 34, at 3 (“[S]tructural employment inequalities cannot be solved without going beyond the generally accepted normative underpinnings of antidiscrimination law.”); Green, *supra* note 34, at 850 (recognizing that Title VII “falls short of addressing the problem” of structural discrimination); Krieger, *supra* note 34, at 1217 (“The overwhelming conclusion is that there now exists a fundamental ‘lack of fit’ between the jurisprudential construction of discrimination and the actual phenomenon it purports to represent.”).

²³⁵ See Bagenstos, *supra* note 34, at 43 (“[B]ecause implicit biases draw on widely shared cultural understandings, any effort to eliminate those biases requires a massive, society-wide effort to change the significance of race and gender in our culture.”). On this critical view, structural discrimination entails a problematic importation into the areas of sex, race, and the like of a discrimination concept more closely akin to that in disability law, with its central directive to private employers to accommodate the disabled in the workplace. See *id.* at 3–4 (analyzing structural discrimination in light of disability discrimination concepts).

²³⁶ Green, *supra* note 34, at 852–53.

²³⁷ The word choice here is neither fleeting nor accidental. Green repeatedly uses the word “facilitate” or a variant when seeking to rebut the contention that structural discrimi-

The structural-discrimination theory is the rough analogue in the world of Title VII to efforts in tort doctrine to garner recognition for “enabling torts”—that is, for the imposition of liability on a given defendant for facilitating the wrongful injuring of the plaintiff by someone else.²³⁸ Enabling torts seek to pinpoint the defendant as the Judge Calabresi-inspired least cost avoider²³⁹—in less formal terms, an actor especially well positioned to reduce the social harm of wrongful activity undertaken in the first instance by someone else, rather than to serve as a conduit therefor. Think here of holding firearms manufacturers liable for negligent marketing practices that elevate the risk of gun-related violent crime. The notion of enabling torts has enjoyed a run in academic discourse out of line with its meager acceptance as a matter of actual doctrine.²⁴⁰ Much of the reason, critics suggest, lies precisely in the contested attribution that enabling torts attempt to make to the defendant.²⁴¹ The point here is not to resolve the ongoing debate over enabling torts but, rather, to highlight that a proposed class action along such lines surely ought not to be certified without a judicial determination of whether that theory is the correct account of governing tort law—at least when the answer will determine whether the proposed class exhibits fatal dissimilarities.

The same should hold true in a Title VII case like *Dukes*. Once again, the point is not for the court to reach out to decide the merits in the posture of a ruling on class certification but, rather, for the court to look out for situations in which the cohesiveness of the proposed

nation would foist onto employers the cost of something that is not otherwise their responsibility. See *id.* at 851 (“An employer that facilitates discriminatory workplace decisionmaking engages in the wrong of treating individuals differently on the basis of protected group status or characteristics and, perhaps more importantly, is worthy of fault for its role in that wrong.”); *id.* at 853 (“[E]mployer facilitation of discriminatory bias in workplace decisionmaking violates the longstanding norm against different treatment in employment on the basis of protected characteristics”); *id.* at 889 (“Employers as organizational actors are active, causal participants in the wrong of structural discrimination, and prevailing norms concerning organizational facilitation of individual acts of wrongdoing suggest that employers should be held responsible for their role in that wrong.”); *id.* at 899 (“Under a structural approach to discrimination, one can accept that implicit biases have been ‘programmed into our brains by overarching societal influences’ and at the same time expect employers to refrain from creating work environments that facilitate the operation of those biases in workplace decisionmaking”).

²³⁸ My use of the term stems from the title of Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

²³⁹ GUIDO CALABRESI, *THE COST OF ACCIDENTS* 135–40 (1970).

²⁴⁰ See John C.P. Goldberg & Benjamin C. Zipursky, *Responsibility in Tort for Injuries Inflicted by Another: How To Explain Remote Actor Liability Without Enabling Tort Reform* 29–37 (unpublished manuscript, on file with the *New York University Law Review*) (contending that courts overwhelmingly have rejected “enabling torts” doctrine).

²⁴¹ See *id.* at 5 (noting that liability hinges on either attributing plaintiff’s injury to defendant or defendant breaching affirmative duty to plaintiff).

class turns on the proper meaning of governing law. This is precisely where the Ninth Circuit panel majority misconceived its enterprise. Affirming the district court's grant of class certification, the panel majority understood itself simply as undertaking deferential review of an essentially factual or evidentiary determination. For the panel majority, its job was "not to re-examine the relative probativeness of the commonality evidence" itself but, instead, merely to "determine whether the district court *abused its discretion* in finding that, based on all the evidence presented, there existed common questions of fact sufficient to justify class certification."²⁴²

The crux of the contested class certification in *Dukes*, however, has very little to do with dueling expert statisticians, ambiguous facts properly for the jury, or factual aspects of class certification requirements to be reviewed on appeal only for abuse of discretion. Rather, the conflict over class certification is, at bottom, one over the meaning of governing law eminently suited for de novo appellate review—over whether Title VII, properly read, embraces the discrimination-by-conduit notion advanced by the *Dukes* plaintiffs and elaborated by scholars under the rubric of structural discrimination. Viewed in that light, the pairing in *Dukes* of aggregate statistical proof with sociological proof is far from accidental.

The gist of the plaintiffs' expert sociological analysis is that the high degree of uniformity on which Wal-Mart insists in its business operations makes the company at a national level "vulnerable" to discrimination in the facilitation sense.²⁴³ The aggregate statistical proof then seeks to measure that facilitation or pass-through effect. On such an account, it is of no moment that the disparities in pay or promotion at Wal-Mart roughly track those across the economy more broadly, for the whole notion of discrimination in the facilitation or pass-through sense is precisely that the employer is functioning as a "conduit." It is this generalization—the proposition that pass-through scenarios generally indicate a kind of discrimination attributable to the defendant employer—that forms the centerpiece of the argument for the cohesiveness of the *Dukes* class.

Dissenting from the panel majority's opinion, Judge Kleinfeld noted that "[v]ulnerability' to sex discrimination is not sex discrimination."²⁴⁴ If discrimination is properly understood exclusively in its old-school, conscious sense, then Judge Kleinfeld is correct. But if discrimination is reconceptualized in terms of the facilitation of uncon-

²⁴² *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1181 (9th Cir. 2007).

²⁴³ *Id.* at 1179.

²⁴⁴ *Id.* at 1194 (Kleinfeld, J., dissenting).

scious discrimination—in terms of the “conduit” and “nexus” notions urged by the *Dukes* plaintiffs²⁴⁵—then vulnerability *is* discrimination. Deciding whether that is so under a proper reading of Title VII is essential in *Dukes* to the determination of whether the proposed class members were all victims of the same wrong. Yet it is precisely that question of law that the Ninth Circuit panel majority failed to identify through its notion of deferential review of what it saw simply as an evidentiary matter. As this Article was going to press, the Ninth Circuit granted Wal-Mart’s petition for rehearing en banc.²⁴⁶ Through this vehicle, the court has a clear-cut opportunity to pinpoint and correct the fundamental error of the panel majority.

The interpretive question is essential to the class certification in *Dukes*, not a mere sidelight or matter separate from the certification question.²⁴⁷ True enough, it is indisputably the employer’s action (by way of its managers) that determines the pay or promotion of all its employees. And if discrimination means conscious discrimination, then an adverse employment action in those regards is quite sufficient for the law to make an attribution of responsibility. It is the employer, not anyone else, who has committed the wrong. But if the pattern, even on plaintiffs’ own terms, simply replicates the broader labor market, the question of discrimination increasingly will not be one of degree but, rather, one of kind—one that goes to the very meaning of discrimination, rather than to its extent. The structural discrimination account, like notions of enabling torts, aspires to supply the contested attribution. Only by deciding as a matter of sound Title VII interpretation whether that attribution is proper can one say that the fact of employer action as to pay or promotion amounts to a basis for attribution in the eyes of the law. It is that attribution on a nationwide basis that forms the crucial unifying feature said to lend cohesiveness to the plaintiff class.

At bottom, the error of the panel majority in *Dukes* is the same as that in *Visa Check*: to cast a matter suited exclusively for judicial resolution and, if necessary, de novo correction on appeal as a matter that implicates the role of the jury and the trial judge’s discretion in the evaluation of proof. One cannot help but note the irony in the

²⁴⁵ See *supra* notes 215–16 and accompanying text (citing pertinent language from district court’s class certification opinion).

²⁴⁶ *Dukes v. Wal-Mart, Inc.*, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009).

²⁴⁷ Resort to the authority for issue class certification in FED. R. CIV. P. 23(c)(4) would not alter the analysis here, for class certification of any sort turns on whether all of the members of the plaintiff class can be understood to be the victims of the same wrong. If so, then class certification flows easily. If not, then there is no other common thread to tie together the would-be class members.

juxtaposition of *Dukes* and *Visa Check*. In *Dukes*, Wal-Mart rails against precisely the disregard for the centrality of law declaration that benefited it handsomely in *Visa Check*, as one of the antitrust class representatives there.²⁴⁸ If upheld, the Ninth Circuit panel's affirmance of class certification in *Dukes* effectively would set into motion pressure on the defendant to embrace by way of settlement²⁴⁹ precisely the kinds of remedies to which scholarship in the vein of structural discrimination points—say, to have Wal-Mart engage in ongoing consultation with human resource professionals, plaintiffs' lawyers, employee groups, and insurers to redesign its employment structure.²⁵⁰

This is not to say that class actions cannot serve as vehicles to upend preexisting law. No less a case than *Brown v. Board of Education* tells us otherwise.²⁵¹ So, too, does *Basic*, with its embrace of the fraud-on-the-market doctrine as a matter of securities law. The class certification granted by the district court in *Dukes*, by contrast, advances the structural discrimination account in functional terms, but potentially without a court ever determining its correctness as an interpretation of Title VII. Here is the tendency to conform the law to the proof writ large: conformity accomplished in real-world, opera-

²⁴⁸ See *supra* note 157 and accompanying text (noting Wal-Mart's role as class representative in *Visa Check*).

²⁴⁹ The *Dukes* class complaint pleaded a disparate impact claim in addition to one of disparate treatment. Plaintiffs' Third Amended Complaint ¶¶ 102–03, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ), 2002 WL 33645690. Given that punitive damages are not a remedy available for a disparate impact claim, see *supra* text accompanying note 200, and given that the *Dukes* class certification nonetheless encompassed the plaintiffs' demand for punitive damages, see 509 F.3d at 1188, the certification could have stemmed only from the disparate treatment theory. The potential for punitive damages adds to the settlement pressure exerted by the class certification in *Dukes* by increasing the unpredictability of the result in the event of a class-wide trial. Cf. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008) (noting, upon detailed examination of empirical literature, “the stark unpredictability of punitive awards”).

²⁵⁰ See Sturm, *supra* note 34, at 524–37 (discussing these and other potential employer responses to problem of structural discrimination). But see Bagenstos, *supra* note 34, at 29 (contending that these kinds of prescriptions would “serve the interest of the intermediaries themselves, by promoting a market for their own services”).

A lazier response on the part of employers might be simply to make the numbers come out “right.” But see 42 U.S.C. § 2000e-2(j) (2000) (providing that “[n]othing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment” to any Title VII-protected group “on account of an imbalance” of such persons in the employer's workforce by comparison to those “in the available work force”); Bagenstos, *supra* note 34, at 38–39 (“[T]he notion that a good employment policy results in proportional racial and gender representation in all workplace positions is extraordinarily controversial.”). For their part, structural discrimination proponents disavow an objective to precipitate the use of such an approach, effective though it might be to insulate would-be defendants from litigation. E.g., Sturm, *supra* note 34, at 541–42.

²⁵¹ See 347 U.S. 483, 495 (1954) (noting class-action nature of *Brown*).

tional terms, if not explicitly in doctrine, and, in any event, without judicial awareness of the conformity being wrought. This the law of class certification should not brook.

The right approach in *Dukes* would be for the Ninth Circuit en banc to do three things: to recognize that the cohesiveness of the proposed class turns on the proper meaning of prohibited discrimination under Title VII, to resolve the meaning of the statute squarely and forthrightly, and then to turn to the specifics of compliance with Rule 23 requirements in the fashion prescribed by *IPO*. The analysis actually undertaken by the panel majority in *Dukes* reversed this analytical sequence and then left off its most important step: that of declaring “what the law is.” In this regard, the class certification affirmed by the panel majority in *Dukes* exhibits the same kind of literal lawlessness as in *Visa Check*.

4. *Institutional Allocation and Law Reform*

It is no accident that concern over the tendency to conform the law to the proof should arise in contexts such as Title VII and RICO. For run-of-the-mill securities fraud on an efficient market, class certification encounters comparatively little controversy. Flashpoints instead tend to arise in doctrinal areas—or, at least, corners within those areas—such as Title VII and RICO in which underlying substantive law is in a state of flux. Here, the tendency is one of law transformation: the use of class certification and the well-nigh inevitable denouement of class settlement to achieve in practical effect what the legislative process has not yet delivered and, indeed, may be disinclined to provide. Seeing class certification in judge-versus-jury terms rather than court-versus-legislature terms obscures this institutional dimension.

Cast properly in separation-of-powers terms, the debate over aggregate proof in class certification today connects with the concerns behind the Supreme Court’s encounters in the late 1990s with class certification for settlement implementation. The core lesson of *Amchem* and *Ortiz* is that the legitimacy of the class action cannot rest simply upon all the practical good that a class settlement conceivably might accomplish.²⁵² In the asbestos class settlement cases, a substantial swath of corporate America lost the tantalizing prospect of achieving by way of class settlements the kind of ambitious privatized workers’ compensation plan for asbestos litigation that Congress con-

²⁵² See *supra* Part I.B.3 (discussing circularity problem with class certifications, highlighting both *Amchem* and *Ortiz*).

sidered but ultimately did not enact.²⁵³ The analysis of class certification in this Article suggests an elaboration of this logic—this time, to discipline the enterprise of law reform at the behest not of corporate America but of its critics, in cases like *Dukes*.

It bears emphasis, nevertheless, that recognition of the centrality of law declaration in *Dukes* is far from a death knell for class certification. If Title VII really does prohibit an employer from serving as a “conduit” for broader disparities in the labor market along the dimension of sex, then class certification in a situation like *Dukes* would be permissible just as class treatment has become routine in run-of-the-mill securities fraud class actions. But if Title VII does not properly bear such a meaning, then class certification should fail. The important point is that in no event should the court proceed in the same manner as the Ninth Circuit panel majority in *Dukes*—to certify the class without ever pinning down the proper meaning of governing law.

Here, context admits of nuance in the way in which the law should think about the institutional dimension of class certification. Unlike national asbestos-litigation reform,²⁵⁴ matters of institutional allocation with respect to the interpretation of Title VII cannot be stated in terms of a clear-cut, categorical contrast between judicial and legislative roles. Established features of Title VII doctrine today—the disparate impact theory and sexual harassment as sex-based discrimination, to take just two examples—are the products not of legislation but, in the first instance, of judicial decisionmaking on more or less a common-law model.²⁵⁵ As a matter of historical description, the kind of tight mooring to statutory text evident in, say, the Supreme Court’s recent rejection of a reliance element in civil RICO²⁵⁶ has held less sway in the Title VII context and, for that matter, in the interpretation of the Sherman Act for antitrust law as well.²⁵⁷ In short, simply as a descriptive matter, courts have exerted substantial interpretive crea-

²⁵³ For proposed asbestos reform legislation, see, for example, Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005).

²⁵⁴ See RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 80–84 (2007) (situating in separation-of-powers terms efforts at asbestos-litigation reform in *Amchem* and *Ortiz* class settlements).

²⁵⁵ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (holding that “a claim of ‘hostile environment’ sex discrimination is actionable under Title VII”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (accepting disparate impact theory). The disparate impact theory remains the subject of debate. See, e.g., Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 768–82 (2006) (arguing that adoption of disparate impact theory inhibited development of more expansive theory of intentional discrimination).

²⁵⁶ See *supra* note 189 (discussing said rejection).

²⁵⁷ See *supra* note 33 and accompanying text (noting common law–like approach to interpretation of antitrust laws).

tivity with regard to statutes like Title VII, and the proposed class-wide nature of a given lawsuit—no more or less than an individual action—neither adds to nor takes away from that judicial latitude. The court must determine the proper meaning of Title VII straight up.

Whether differences in interpretive latitude make sense across the full landscape of public law is a question to which scholars of statutory interpretation have devoted considerable attention.²⁵⁸ The point here is a more narrow one: The existence of a demand for class certification should not alter the prevailing mode of interpretation in governing law. If that mode should change, it should do so for reasons other than the proposed aggregate nature of the lawsuit—say, due to the adoption of what one commentator urges as a set of uniform, transsubstantive rules for statutory interpretation, à la the Federal Rules of Evidence.²⁵⁹

The common law–like nature of Title VII interpretation admits of greater latitude for judicial elaboration than more text-based statutory regimes. Whether the kind of reconceptualization urged by structural discrimination theorists exceeds even the wide bounds of interpretive latitude in the extant jurisprudence of Title VII is a serious question well worth courts' attention. The point is that such a question—rather than the question of whether the treatment of aggregate proof amounts to an abuse of discretion—would have been the right one for a court to address de novo in a situation like *Dukes*.

III IMPLICATIONS

Courts should stand ready to “say what the law is” when its content will determine whether dissimilarities exist within a proposed class. This notion sounds simple enough. As the preceding Part reflects, however, it is just this familiar and eminently judicial role that often has eluded courts faced with aggregate proof in class certification. This Part sketches three implications of this recognition. As Section A explains, the notion of declaring the governing law and, only then, ascertaining compliance with Rule 23 requirements in cases of aggregate proof would lend coherence to the law of class certification. Specifically, such an approach would bring decisionmaking in cases of aggregate proof into accord with the prevailing approach for

²⁵⁸ See generally, e.g., Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (contending that adoption of uniform rules for interpretation of federal statutes is constitutional and that Congress should adopt such rules).

²⁵⁹ *Id.*

the other main source of fatal dissimilarities for class certification: choice of law, when proposed class actions advance state-law claims.

Section B adds that recognition of the need for law declaration to inform class certification would afford greater latitude for appellate oversight of trial-level certification determinations. This is no mere technical point of procedure. The upshot would be to lessen the impact of what one might delicately describe as trial-level courts inclined to cast difficult calls on class certification as evidentiary or factual matters, precisely to avoid appellate oversight of embedded legal questions. Section B relates this notion back to the debate over choice of law with respect to state-law claims and the concerns underlying the Class Action Fairness Act.

Section C pushes further the centrality of law declaration to class certification, fitting this nascent idea within a larger historical context. A world of civil litigation dominated by settlement is a world in which the pretrial phase effectively dominates over the rare event of trial as the vehicle for the resolution of civil claims. When the pretrial phase is the trial, in functional terms, it is all the more crucial for courts to ensure that major pretrial events like class certification accord with governing law, properly understood. The observation from Part II that different interpretive approaches fit with different bodies of governing law injects a welcome dimension of context to this process, though one that pushes against the aspiration of the 1938 designers of the modern Federal Rules to create a transsubstantive regime of civil procedure.

A. *Symmetry with Choice of Law*

The analysis of aggregate proof in the previous Parts has proceeded without much discussion of disputes over which body of law governs the plaintiffs' claims. This is unsurprising, given the dominance of uniform federal law—securities law, antitrust law, RICO, Title VII, and the like—in the subject areas in which certification proponents have tended to invoke aggregate proof in recent years.²⁶⁰ In areas in which state law continues to hold sway, however—say, tort and contract law—the major stumbling block for class certification consists not of something that anyone could mistake as a factual or evidentiary matter but, instead, of a need for courts to perform a choice-of-law analysis. Here, too, the usual gamesmanship obtains, with class counsel inclined to characterize fifty nominally different

²⁶⁰ This is not to say that aggregate proof cannot also be invoked as part of an effort to garner certification of state-law claims, as in the consumer fraud context. *See, e.g., supra* note 168 (discussing illustrative consumer fraud class action).

bodies of state law as all the same in functional terms and defense counsel inclined to catalogue every microscopic jot and tittle of difference.²⁶¹ As one commentator wryly observes, this process leads to “gridlaw,”²⁶² whereby the court must sort through the parties’ lengthy, competing, grid-like charts that purport to lay out the laws of the various states.

My suggestion here is not to hold up choice-of-law analysis in the class-action setting as the height of intellectual achievement. As I shall note momentarily, considerable difficulties remain. The centrality of law declaration prescribed here for cases of aggregate proof nonetheless accords comfortably with some very basic and uncontroversial principles developed for choice of law in class actions. Simply put, current thinking rightly rejects the notion of certifying first and only later—if ever—asking questions about the content of governing law in the choice-of-law sense.²⁶³ Rather, when the answer to the choice-of-law question will determine whether there exist fatal dissimilarities within the class—here, the need to apply dissimilar laws of multiple states to different subgroups of class members—the court must ask and answer that question as part of its class certification determination.

This is not to suggest that choice-of-law analysis to ascertain which body of state law applies to which class members is entirely the same as the choice between competing accounts of uniform federal law. The latter presents a question of legal interpretation, usually as to some specific statute, whereas the former addresses the interrelationship—characteristically, an unanticipated one—between multiple sources of law. The point is simply that both choice-of-law problems and competing interpretations of a single governing statute have the potential to expose fatal dissimilarities within the class for certification purposes.

In *Phillips Petroleum Co. v. Shutts*,²⁶⁴ the Supreme Court emphasized that the choice of law does not flow automatically from the

²⁶¹ See, e.g., *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 725 (5th Cir. 2007) (“Plaintiffs assert that they have analyzed the applicable laws of the fifty-one jurisdictions and they are ‘virtually the same.’ . . . [The defendant], on the other hand, provided the district court with extensive charts . . . showing . . . variations among the states [on several elements of the plaintiffs’ claims].”).

²⁶² Linda S. Mullenix, *Gridlaw: The Enduring Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 651, 653 (2006).

²⁶³ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.05(a) (Council Draft No. 2, 2008) (“To determine whether multiple claims involve common issues [appropriate for aggregate treatment], the court must ascertain the substantive law governing those issues.”); *id.* § 2.05(a) cmt. a, at 125 (emphasizing court’s “obligation” to make a “threshold determination” as to choice of law).

²⁶⁴ 472 U.S. 797 (1985).

choice of forum for a proposed nationwide class. To put the point differently, just because the class action is filed in a given jurisdiction—in *Shutts*, a Kansas state court—does not mean that the substantive law of that jurisdiction can govern the entire proposed class. Rather, the essential first step for the court is to conduct a choice-of-law analysis to ascertain which body or bodies of substantive law govern the claims of those within the proposed class.²⁶⁵ Today, under Rule 23, a court would not certify a nationwide class when there are differing bodies of state law potentially in play without first undertaking a “thoroughgoing” analysis of the choice-of-law question.²⁶⁶

To be sure, once one gets beyond this bedrock point, much harder questions quickly surface—for instance, over the latitude available for the court to characterize (or even mischaracterize) the competing bodies of state law as all the same, so as to support class certification,²⁶⁷ and over the wisdom (or even permissibility) of making a different choice of law for a proposed nationwide class action than the court would make in a hypothetical series of actions brought individually by class members in the forum.²⁶⁸ These questions continue to

²⁶⁵ See *id.* at 816 (“We must first determine whether Kansas law conflicts in any material way with any other law which could apply.”).

²⁶⁶ *Id.* at 818. Even here, there remains an outlier. Construing its own class action rule, rather than Rule 23, the Arkansas Supreme Court has embraced the jaw-dropping notion of first certifying a nationwide class and only later asking hard questions about differences in applicable state law. See *Gen. Motors Corp. v. Bryant*, 374 Ark. 38 (2008) (“[I]t is possible that other states’ laws might be applicable to the class members’ claims. However, we cannot say that our class-action jurisprudence requires an Arkansas circuit court to engage in a choice-of-law analysis prior to certifying a class . . .”). The *Bryant* court sought to offer solace by “recognizing the caveat that a class can always be decertified at a later date if necessary.” *Id.*

One is reminded here of the character Emily Litella, played in the 1970s by comedienne Gilda Radner on the television show *Saturday Night Live*. Under the approach to class actions in the Arkansas system described in *Bryant*, a court is to proceed merrily forward in the face of a bona fide argument that disabling dissimilarities exist within the class due to material differences in the law applicable to different class members’ claims. But thereafter, upon belatedly realizing its error, the court simply can tell all those whose time it has wasted, “Never mind.” See generally *Emily Litella*, in WIKIPEDIA, http://en.wikipedia.org/wiki/Emily_Litella (last visited Feb. 4, 2009) (describing Litella character).

²⁶⁷ Considerable latitude exists, at least as a matter of constitutional due process and full faith and credit under current doctrine, as “it is not enough” for the forum state to “misconstrue the law of another State.” *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730–31 (1988). A constitutional violation occurs only when the court’s construction “contradict[s]” the law of the other state “that is clearly established and that has been brought to the court’s attention,” *id.* at 731—in essence, only if the certifying court effectively raises its middle finger to a coequal sovereign’s law that has been thrust before the court’s eyes.

²⁶⁸ For arguments that the proposed class-wide format of litigation should not alter the choice-of-law analysis, see Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 572–79 (1996), and Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872,

elicit lively debate. But again, the need for a choice-of-law analysis when competing bodies of state law are potentially in play remains the broadly shared starting point. The reason for this level of agreement rests upon the simple recognition that competing bodies of state law that are materially different in content would make for precisely the sorts of dissimilarities that concern the certification requirements of Rule 23.

The law of class actions should treat a situation of multiple competing accounts of governing federal law no differently than a case involving multiple sources of state law that are different in content. Either the fraud-on-the-market doctrine applies to the market for IPOs, or it does not. Either the proper calculation of damages in an antitrust tying case looks only to the tied product, or it looks to the package of the tied and tying products together. And either Title VII embraces “conduit” notions of discrimination, or it does not. Two competing accounts of the meaning of governing law—one that points toward certification and one that points away—should be treated no differently than two or twenty or fifty different state laws. An approach to class certification in cases of aggregate proof that underscores the centrality of law declaration would bring the law on that subject into accord with these shared basics of choice-of-law analysis—appropriately so, given that both ultimately concern differences in the content of governing law. On this view, one may see the analysis here for aggregate proof as a logical extension of the insistence in *Shutts* upon a thoroughgoing choice-of-law analysis for class actions that involve state-law claims.

B. Transparency and Appellate Oversight

The connection to choice of law runs even deeper. Choice of law matters in class action litigation when some source of state law—whether one or many—governs the dispute on the merits. Until recently, class counsel seeking certification of a nationwide class involving state-law claims had considerable latitude in the selection of the trial-level court in which to file such an action. With class members dispersed across the nation, the game for class counsel became one of finding what commentators delicately describe as the “anomalous” court—stereotypically, a state court inclined to certify the class when the vast majority of federal courts, other states’ courts, and per-

1914–15 (2006). For an argument in favor of selecting the law of the defendant’s principal place of business for nationwide class litigation of state-law claims, see Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1867–71 (2006).

haps even other courts within the same state would not.²⁶⁹ This strategy played on the practical recognition that, as to rulings on the certification of a proposed nationwide class action, “[a] single positive trumps all the negatives.”²⁷⁰ Cast in its best light, the Class Action Fairness Act (CAFA) represents an indirect and partial response to this strategy, empowering defendants to remove proposed nationwide class actions involving state-law claims to the federal court system,²⁷¹ where variance in the exercise of discretion on the certification question was thought to be less, at least in relative terms.²⁷² In this way, CAFA seeks to ensure that the many negatives on the class certification question effectively trump the sought-after, anomalous positive.

The approach to class certification sketched in this Article elaborates the same insight but does so in a way that avoids the kind of pro-defendant partisanship that some commentary sees as the animating impulse of CAFA.²⁷³ The present regime for class certification—one that obscures necessary inquiries into the meaning of governing law by confusing them with discretionary rulings on evidentiary or factual matters—has an effect within the judiciary as an institution. Such a regime insulates trial-level judges from appellate oversight to a fair degree. One need not attribute some grand plan of obfuscation or disingenuousness to judges. The cacophony on class certification and aggregate proof seen today in case law may well reflect good-faith struggles with matters that are genuinely hard and prone to confusion. Still, the practical effect of the current confusion is to privilege the selection of the trial-level judge who will be in a position to make the initial certification determination.

Even in our post-CAFA world, proposed nationwide class actions—whether for federal- or state-law claims—can be brought in

²⁶⁹ Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1655–56, 1660–66 (2008) (noting how CAFA addresses problem of anomalous court).

²⁷⁰ *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766–67 (7th Cir. 2003) (Easterbrook, J.).

²⁷¹ Issacharoff & Nagareda, *supra* note 269, at 1663.

²⁷² See generally S. REP. NO. 109-14, at 4 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 5 (“[M]ost class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements.”).

²⁷³ See, e.g., Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1876–77 (2008) (characterizing CAFA as having “tilted the playing field even more sharply in favor of corporate defendants”).

most any federal district court in the country.²⁷⁴ In strategic terms, one would expect recognition of this point to drive class counsel, quite understandably, toward the selection of districts thought to be marginally more inclined toward certification, whether generally or for reasons germane to the particular litigation.²⁷⁵ By the same token, the usual process within each district for random assignment of judges to new cases,²⁷⁶ coupled with the usual mix of both Democratic and Republican appointees in larger districts, means that—class counsel’s efforts notwithstanding—the case conceivably might end up not before the anomalous pro-certification judge but, rather, the anomalous anti-certification judge.²⁷⁷ A jurisprudence of class actions that includes precedents for both underreach and overreach in the certification inquiry unwittingly adds to the potential for judicial sleight of hand in either direction.

The appropriate role of forum shopping in civil procedure as a whole comprises a long-running topic of debate.²⁷⁸ My point here is a much more specific one: Recognition of the need for law declaration to inform the inquiry into dissimilarity affords greater latitude for appellate oversight of certification determinations. The upshot, in practical terms, is to circumscribe the potential effect of the anomalous district judge, whatever the direction in which her inclinations might run, and to do so both more directly and—the key point—more evenhandedly than CAFA’s expansion of the removal power at the behest of defendants. Unlike the removal power, which, under

²⁷⁴ This latitude stems from the combination of general jurisdiction, *e.g.*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and the liberal venue rule for corporations, 28 U.S.C. § 1391(c) (2006).

²⁷⁵ At this early stage of the post-CAFA period, empirical research has yet to pursue the question of variations in filings across federal districts. At the circuit level, early empirical research does document variations in filings of class actions involving state-law claims. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1762 (2008) (“[T]he Second, Third, and Ninth Circuits all experienced large percentage increases in diversity original proceedings between the [pre- and post-CAFA] periods, which suggests that circuit law with respect to class certification does, indeed, factor into a plaintiffs’ attorney’s decision about which federal forum to choose.”).

²⁷⁶ See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 17–18 (2008) (“Within judicial districts, trial judges are randomly assigned to cases”).

²⁷⁷ Insofar as multiple class actions concerning the same subject are filed within the federal system, transfer of all such actions to a single federal district court by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407 (2006) can function as an additional constraint on anomalous judges.

²⁷⁸ For a revisionist view in favor of forum shopping, see Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 395 (2006), arguing that “[t]he availability of more than one legally-authorized forum results in legitimate choice, and lawyers ethically are compelled to seek the most favorable forum to further their clients’ interests.”

CAFA, remains exclusively at the discretion of defendants,²⁷⁹ Rule 23(f) for interlocutory appellate review of class certification rulings remains available in an evenhanded fashion to whichever side is dissatisfied with the district court's class certification ruling.²⁸⁰ Here, one might say, greater transparency about the true nature of class certification rulings can facilitate greater evenhandedness in class action practice.

C. Law Declaration in a World of Settlement

Law declaration as necessary to assess the propriety of class certification is consonant not just with other features of class-action doctrine. More broadly, it is consonant with a larger rethinking of pretrial motions practice as a whole. This rethinking stems from what is now a widely shared recognition of the unexpected consequences that have flowed from the 1938 revamping of the Federal Rules, which put into place our present-day system of notice pleading.²⁸¹ The stark operational fact today is that civil procedure is not about the preparation of cases for trial. In descriptive terms, trial is exceedingly rare, not only in class actions but in civil litigation generally.²⁸² What the 1938 reformers cast as the Federal Rules of Civil Procedure effectively operate now, in the age of “the vanishing trial,”²⁸³ as rules of civil settlement procedure. They define the process by which the civil justice system sends signals about the valuation of claims—signals that, in turn, inform claim resolution by private settlement, not by jury verdict.

Seen from a historical perspective, the emergence of more or less uniform answers to the first-generation questions about class certification fits with developments for other salient checkpoints in the pretrial stage that define claim value: the pre-discovery motion to dismiss on the pleadings (into which the Supreme Court seemingly has breathed new life in its 2007 decision in *Bell Atlantic Corp. v.*

²⁷⁹ For criticism of this feature of CAFA, see Purcell, *supra* note 273, at 1874–75, condemning the lack of removal power for absent class members under CAFA.

²⁸⁰ See FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk . . .”).

²⁸¹ See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (describing historical background of Federal Rules); Yeazell, *supra* note 24 (describing unintended consequences of Federal Rules).

²⁸² For empirical data on the decline of trials in civil litigation generally, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460–76 (2004).

²⁸³ The term served as the focal point for Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD., at v (2004).

*Twombly*²⁸⁴), motions to exclude expert scientific testimony crucial to the merits (invigorated by the Court's 1993 decision in *Daubert* and its progeny²⁸⁵), and motions for summary judgment (the subject of the famous "trilogy" of Court decisions in 1986²⁸⁶). Each of these developments has spawned a dizzyingly vast literature of its own, and controversy attends each. The important point here is that an invigoration of the class certification determination—one focused on the primacy of law declaration by courts—carries forward this larger ethos. When class certification is not a mere judicial way station on the path to trial but, in operational terms, something like the last judicial checkpoint before the switch from litigation to serious settlement negotiation, it is all the more crucial for courts to "say what the law is" when a dispute over its meaning will determine whether disabling dissimilarities exist within the proposed class.

The challenge of all this to the ethos of the 1938 proceduralists cannot be gainsaid. The challenge does not arise merely from the observed reality of settlement, rather than trial, as the endgame of civil litigation. The challenge ultimately speaks to the aspiration of the 1938 reform enterprise to create a genuinely transsubstantive regime of procedural rules. No one is advocating a return to the hypertechnical formalism attributed to the nineteenth-century regime of pleading under the forms of action. But what we are seeing in the emerging notion of law declaration as necessary to inform class certification is nonetheless an attempt to reconnect procedure and substance—just one informed by our contemporary sensibilities.

A securities fraud claim is different from an employment discrimination claim. Each, in turn, differs from an antitrust or RICO claim. The nascent recognition in the law today of the centrality of law over fact in class certification exhibits a healthy respect for these differences of context. This also accords with the attentiveness to matters of institutional allocation counseled in this Article. Law declaration by courts to guide the class certification process offers a more flexible, adaptable way to reconnect procedure to substance than do rules of procedure that somehow might be differentiated expressly by subject area. What is likely to emerge is a kind of transsubstantive veneer for the Federal Rules, but with their on-the-ground operation calibrated

²⁸⁴ 127 S. Ct. 1955, 1974 (2007) (interpreting Rule 8(a) to require pleading of "enough facts to state a claim to relief that is plausible on its face," at least in context of claim under § 1 of Sherman Act).

²⁸⁵ See *supra* notes 49–51 and accompanying text (summarizing admissibility standard of *Daubert* and its progeny).

²⁸⁶ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

depending upon substantive area, subject to legislative revision, and open to the adaptation of legal doctrine to account for the kinds of interdisciplinary insights that Holmes anticipated.

CONCLUSION

Across broad swaths of class action litigation today, proponents of class certification invoke aggregate proof—evidence, typically of an economic or statistical nature, that presupposes the cohesiveness of the aggregate unit for litigation and, from that perspective, seeks to reveal quantitatively the impact of a common wrong on the defendant's part. Debates over the proper role of aggregate proof unite what otherwise might seem to be disparate disputes over class certification across securities, antitrust, RICO, and employment discrimination litigation. Courts, however, should not take at face value the evidentiary form that aggregate proof assumes in class certification.

The real question about aggregate proof in class certification is not one that speaks to the relationship between the court and the factfinder in the (usually hypothetical) event of a class-wide trial. Rather, the institutional relationship that really matters is the one between the court and the legislature as expositors of governing law. Properly understood, aggregate proof frequently offers not so much a contested view of the facts but often, more fundamentally, a contested account of governing law—one eminently suited for judicial resolution and appellate correction *de novo*, without concern about possible intrusion into the role of the factfinder.

In some areas in which aggregate proof arises today, governing law has long integrated the insights of modern social science to such an extent that economics has significantly influenced law, and vice versa. As a result, in such fields as securities and antitrust law, the tendency of aggregate proof to advance a contested account of governing law will be relatively easy to discern—though, even here, courts have a checkered record in recent case law. The emerging battlegrounds today—chiefly, RICO and Title VII class litigation—constitute contested terrain precisely because the integration of modern interdisciplinary insights remains at a more nascent and contested stage. But these areas of flux warrant more, not less, judicial attentiveness to the centrality of law declaration in the class certification process. Such an approach affords ample room for development of the law to account for new interdisciplinary insights. But it insists that this be done within the usual institutional framework for law reform in a given area, not *sub silentio* through the precipitation of settlement, accurately seen on all sides as the endgame of class certification in a world without trials.