Comcast Corp v Behrend and Chaos on the Ground

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INTRODUCTION

Comcast Corp v Behrend[1] stands as merely one of the latest battlegrounds on which critical class action issues have been fought.[2] The case is unique, however, insofar as it is the most prominent battleground on which critical class-certification issues will *continue to be fought*, owing to its ambiguity.[3] To wit, interpreting precisely what *Comcast* stands for has proven a vexatious task—stumping nearly two hundred lower courts thus far.[4]

The class action mechanism plays a vital role in the American adversarial legal system—it gets litigants into the courtroom. Against this backdrop, Federal Rule of Civil Procedure 23 casts a shadow—it limits the use of the class action mechanism to ensure that judicial economies are preserved. Rule 23(b)(3)—especially its predominance requirement—is a crucial component of this limiting framework. Proposed "damages classes" filed under Rule 23(b)(3) must demonstrate that questions common to all members of a proffered class will "predominate" over individual questions. As a general rule, this inquiry has focused

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1 133 S Ct 1426 (2013).

2 See, for example, *Butler v Sears, Roebuck and Co*, 727 F3d 796, 799–800 (7th Cir 2013). For previous class action battlegrounds, see, for example, *Amgen Inc v Connecticut Retirement Plans and Trust Funds*, 133 S Ct 1184, 1191 (2013) (Ginsburg) (holding that FRCP 23(b)(3) "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class"); *Wal-Mart Stores, Inc v Dukes*, 131 S Ct 2541, 2551 (2011) (Scalia) (holding that the commonality requirement in FRCP 23(a)(2) requires that the class-wide proceeding generate "common answers") (emphasis omitted).

3 See, for example, *In re Nexium (Esomeprazole) Antitrust Litigation*, 297 FRD 168, 180 (D Mass 2013) ("Now—into the wild. What is one to make of the 5–4 decision of the Supreme Court in *Comcast*?"); *In re Skelaxin (Metaxalone) Antitrust Litigation*, 2014 WL 340903, *18 (ED Tenn) ("The exact reach of *Comcast*, including the extent to which *Comcast* requires that a damages model calculate damages on a classwide basis, is a matter of some controversy.").

4 See Part II.B.

on issues of liability, while damages have been merely a factor to consider.[5]

Comcast, however, has cast the validity of this general rule into doubt. In denying certification of the proffered Rule 23(b)(3) class, the Supreme Court, per Justice Antonin Scalia, appeared to suggest that general class action rules governed the Court's holding *and* that individualized damages presented by the class members doomed certification.[6] Anticipating the potential sea change that this opinion could precipitate in class action jurisprudence, Justices Ruth Bader Ginsburg and Stephen Breyer jointly filed a dissent suggesting that the status quo regarding individualized damages remains unchanged.[7] The result of the majority's potentially novel reimagining of the general rule, and the dissent's mitigation of that opinion, has been nothing short of interpretive chaos. Circuit splits are building on circuit splits, and district courts are even disregarding guidance set forth by their respective courts of appeals. The question that hundreds of judges, practitioners, and clerks face—What does *Comcast* stand for?—remains decidedly unanswered.

This Comment begins with a brief background on class actions generally, and the role of individualized damages in the Rule 23(b)(3) predominance inquiry in particular. It then addresses the post-*Comcast* chaos with several goals in mind. First, it aims to sort lower court interpretations of *Comcast* into one of four interpretive "bins." Second, it seeks to critique each of these interpretive moves as descriptively and normatively flawed, ultimately concluding that each bin should be cast into the water. Finally, it suggests that an antitrust-centric approach to *Comcast* provides the most accurate and desirable reading of the opinion. In so doing, this Comment introduces a new treatment of antitrust class actions more broadly that simultaneously advances the goals of both class action and antitrust law, while preserving the general individualized-damages rule in all other contexts. Specifically, this Comment contends that, in the antitrust context, only a showing of common antitrust injury across the class satisfies the Rule 23(b)(3) predominance inquiry.

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[5] See *Messner v Northshore University HealthSystem*, 669 F3d 802, 814–15 (7th Cir 2012) (discussing cases in which class certification proceeded despite concerns over individualized-damages claims).

[6] See *Comcast*, 133 S Ct at 1432–34.

[7] See id at 1436 (Ginsburg and Breyer dissenting).

I. CLASS ACTIONS AND "WELL NIGH UNIVERSAL" RULES

Two forces—the class action mechanism and the body of regulations that govern that mechanism—are broadly encompassed in Rule 23. Class actions allow a collection of plaintiffs to jointly seek relief against one or more defendants, ensuring that litigants have a chance to get into the courtroom.[8] Rule 23 requires courts to engage in a rigorous multistep analysis prior to certifying a class action for continued proceedings,[9] ensuring that judicial economies are achieved.[10] Within this framework, a historically prevailing rule is that individualized damages claimed by the members of a proffered class are not dispositive of the certification question; rather, individualized damages are merely one factor for courts to consider during certification.

A. Class Actions and Baseline Rule 23 Requirements

The class action mechanism allows a collection of plaintiffs to combine what would otherwise be many individual claims into a single aggregate claim. Regulating this mechanism, Rule 23 embodies two countervailing priorities: getting plaintiffs into the courtroom and preserving judicial economies.[11]

Most fundamentally, Rule 23 permits representative plaintiffs to bring a single action on behalf of a class of similarly situated individuals. This serves the critical plaintiff-centric goal of class actions generally—ensuring that claimants, particularly those with comparatively small claims, have their day in court.[12]

However, Rule 23 also strives to ensure that judicial economies are preserved.[13] Importantly, it requires courts to engage in

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8 See Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 7AA *Federal Practice and Procedure* § 1777 at 115 (West 3d ed 2013).

9 See FRCP 23(a)–(b).

10 See note 13 and accompanying text.

11 For an illustration of these dual goals, see *Zahn v International Paper Co*, 414 US 291, 307 (1973) (Brennan dissenting) ("Class actions were born of necessity. The alternatives were joinder of the entire class, or redundant litigation of the common issues. The cost to the litigants and the drain on the resources of the judiciary resulting from either alternative would have been intolerable.") (citation omitted).

12 See *Amchem Products, Inc v Windsor*, 521 US 591, 617 (1997) (noting that the Advisory Committee wrote Rule 23 with small claimants in mind, irrespective of the absence of a textual bar to large claims); *Thorogood v Sears, Roebuck and Co*, 547 F3d 742, 744 (7th Cir 2008). See also Joseph M. McLaughlin, 1 *McLaughlin on Class Actions: Law and Practice* § 1:1 at 10–11 (West 10th ed 2013).

13 See FRCP 23, Advisory Committee Notes to the 1966 Amendments (noting that Rule 23(b)(3) "encompasses those cases in which a class action would achieve economies of time, effort, and expense").

a rigorous review of a proffered class prior to certifying the class.[14] To attain certification, a class must both satisfy the prerequisites set forth in Rule 23(a) and fit within at least one of the class action categories enumerated in Rule 23(b).[15] These requirements impose an affirmative, and at times heavy, burden on the proffered class.[16]

Rule 23(a) establishes four certification prerequisites, each of which serves to ensure that the proffered class action would in fact achieve gains in judicial economies.[17] Namely, the class must: be so numerous in size as to render alternatives (such as joinder[18]) impracticable, present questions common to the entire class, demonstrate that the claims of the named plaintiffs are typical of the entire class, and show that the named plaintiffs and class counsel will adequately represent the interests of the entire class.[19] These prerequisites are necessary, though not sufficient, requirements for certification.[20] In addition, classes must fit within one of three class action categories outlined in Rule 23(b). Particularly important for this Comment is Rule 23(b)(3).

B. General Rules Governing the Rule 23(b)(3) Predominance Inquiry

Rule 23(b)(3) provides for certification of "damages classes." This form of class action is unique because the only bond among the class members tends to be a common grievance.[21] As a point of contrast, Rule 23(b)(1) provides for certification of classes when individual adjudications would risk conflicting rulings, while Rule 23(b)(2) is concerned with classes seeking common injunctive relief. Note that this scheme assumes the provision of uniform relief for 23(b)(2) class actions—a vision explicitly omitted from Rule 23(b)(3). In order to obtain certification under Rule

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14 See FRCP 23(a)–(b). This threshold inquiry takes place prior to certification, which, if issued, allows the class action to proceed. See text accompanying notes 17–19.

15 See *Wal-Mart Stores, Inc v Dukes*, 131 S Ct 2541, 2548 (2011).

16 See id at 2551 ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate . . . that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.").

17 See FRCP 23, Advisory Committee Notes to the 1966 Amendments.

18 See FRCP 20(a)(1) (noting that plaintiffs may join a proceeding if they were harmed in the same transaction or series of transactions, as long as there are common questions of law applicable to all of the plaintiffs).

19 FRCP 23(a).

20 See FRCP 23, Advisory Committee Notes to the 1966 Amendments.

21 See Wright, Miller, and Kane, 7AA *Federal Practice and Procedure* § 1777 at 116 (cited in note 8).

23(b)(3), questions of law or fact common to the entire class must "predominate" over individual questions, and a class action must be "superior" to other available methods of adjudication.

This Comment focuses on the predominance requirement, the goal of which is to ensure that judicial economies are preserved.[22] The proffered class must establish that common questions are shared by the entire class, that these questions can be addressed with generalized proof, and that any residual differences among the class members are minor.[23] Operationalized, this requires the court in any certification proceeding to first determine the substantive elements of the class's cause of action and then to determine which of those elements are likely to command a prospective trial court's time, attention, and resources.[24] To illustrate the burden that this imposes on the class, one court has described the predominance inquiry as requiring the class to demonstrate that there would not be a substantial difference in the nature of the proof offered whether the claim involved one or twenty thousand plaintiffs.[25] Traditionally this analysis has turned on two possible dimensions along which commonality might be measured—liability and damages.[26]

Prior to *Comcast*, a general rule emerged as to what was sufficient to satisfy the Rule 23(b)(3) predominance inquiry: common questions with regard to a defendant's liability.[27] This prevailing approach rests on the presumption that, when the defendant's liability as to every proposed class member can be addressed in a single trial, the class action device will achieve

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[22] See *Amchem Products*, 521 US at 623 (noting that the legal issues in the case must be "sufficiently cohesive to warrant adjudication by representation"). See also Wright, Miller, and Kane, 7AA *Federal Practice and Procedure* § 1780 at 174 (cited in note 8).

[23] See Stacy L. Davis, et al, 6A *Federal Procedure, Lawyers Edition* § 12:210 at 286–88 (West 2012).

[24] See, for example, *Simer v Rios*, 661 F2d 655, 672 (7th Cir 1981).

[25] See *Windham v American Brands, Inc*, 539 F2d 1016, 1018–19 (4th Cir 1976).

[26] See generally William B. Rubenstein, *Newberg on Class Actions* § 4:54 (West 5th ed 2014) (identifying "[i]ndividual damages vs. common liability" as the main battleground in the predominance inquiry).

[27] See, for example, *Beattie v CenturyTel, Inc*, 511 F3d 554, 564 (6th Cir 2007), quoting *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F3d 124, 139 (2d Cir 2001) (holding that Rule 23(b)(3) predominance is satisfied "when liability can be determined on a class-wide basis, even when there are some individualized damage issues"). See also McLaughlin, 1 *McLaughlin on Class Actions* § 5:23 at 1270 (cited in note 12) (defining liability as the "core" of the predominance inquiry).

judicial economies.[28] For example, consider a class of plaintiffs seeking varying levels of relief for damages arising from an allegedly negligent toxin release. This class will likely obtain certification given most courts' determination that the fact-intensive inquiry into whether the release was negligent will generally predominate, even in cases in which plaintiffs' damages differ.[29] That is, the proof offered by any one class member to establish the defendant's alleged negligence will be nearly, if not exactly, identical to the evidence that any other class member would present. While each may have sustained different damages, the majority of the court's (and litigants') focus will be on the liability question—a question common to each member of the proffered class.

The pre-*Comcast* predominance inquiry's focus on liability necessarily relegated individualized-damages questions to a secondary position. Indeed, the notion that individualized damages are merely a factor in the predominance inquiry has become an ingrained feature of Rule 23(b)(3) jurisprudence.[30] Returning to the toxin example, this general rule means that courts would not be terribly concerned about the fact that each individual member of the proffered class experienced unique harm as a result of the alleged negligence. That is, until now.

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[28] See *Mejdrech v Met-Coil Systems Corp*, 319 F3d 910, 911 (7th Cir 2003) ("If there are genuinely common issues, issues identical across all the claimants, . . . the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense . . . to resolve those issues in one fell swoop."); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 241 FRD 435, 448 (SDNY 2007) ("When liability can be resolved by a jury with a single decision that applies to the whole class, and the only individual question left to resolve relates to damages, class certification is warranted.").

[29] See, for example, *In re MTBE*, 241 FRD at 448.

[30] See, for example, *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F3d 6, 28 (1st Cir 2008) ("Predominance is not defeated by individual damages questions as long as liability is still subject to common proof."); *Arreola v Godinez*, 546 F3d 788, 801 (7th Cir 2008) (stating that the "need for individual damages determinations does not, in and of itself, require denial of . . . certification"); *Thorogood*, 547 F3d at 748; *Chiang v Veneman*, 385 F3d 256, 273 (3d Cir 2004), quoting *Bogosian v Gulf Oil Corp*, 561 F2d 434, 456 (3d Cir 1977) (stating that it "has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"). See also William B. Rubenstein, 2 *Newberg on Class Actions* § 4:54 at 204–05 (West 5th ed 2012), citing FRCP 23, Advisory Committee Notes to the 1966 Amendments (proclaiming that "individual damage calculations should not scuttle class certification under Rule 23(b)(3)").

II. *COMCAST* AND CHAOS: SORTING AND PROBLEMATIZING LOWER COURT INTERPRETATIONS

In *Comcast*, the Court reviewed certification of a 23(b)(3) class consisting of more than two million cable television subscribers that alleged various violations of federal antitrust law.[31] Specifically, review was granted to assess whether the district court should have weighed evidence tending to establish that questions common to the class could be resolved on a class-wide basis.[32] In its opinion, however, the Court addressed the lower courts' certification orders with a substantially larger question in mind: What is necessary to satisfy the Rule 23(b)(3) predominance inquiry?[33]

In reviewing the Court's answer, Part II.A will provide a thorough analysis of the *Comcast* majority opinion and accompanying dissent, highlighting those aspects of each opinion that have resulted in considerable lower court disarray. Part II.B will then sort lower court interpretations of *Comcast* into four interpretive bins, a task increasingly necessitated by the rapid proliferation of diverse lower court interpretations of the case. In so doing, this Part will also critique each bin. In considering these critiques, note that courts in each bin frequently make two important assumptions: first, that *Comcast* was meant to apply to individualized damages writ large, and second, that it was meant to apply outside of the antitrust context.

A. *Comcast*: Two Ships Passing in the Night

This Section will begin with a thorough review of the procedural and factual posture of *Comcast*, focusing on the complex antitrust issues in the case. It will then turn to the Court's resolution of those issues in Justice Scalia's majority opinion and in the dissent filed jointly by Justices Ginsburg and Breyer.

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[31] Specifically, the class brought its claims under §§ 1–2 of the Sherman Act. See *Comcast*, 133 S Ct at 1430. The alleged § 1 violation arose from the defendant's "clustering" activities, described in Part II.A, which plaintiffs claimed constituted an "agreement[ ]" between competitors not to compete. Brief for Respondents, *Comcast Corp v Behrend*, No 11-864, *1, *3–4 (US filed Sept 25, 2012) (available on Westlaw at 2012 WL 4467618). The plaintiffs alleged that the defendant, through this practice, "monopolize[d]" the pertinent market, violating § 2. Id at *2.

[32] See *Comcast Corp v Behrend*, 133 S Ct 24, 24 (2012) (granting certiorari).

[33] See *Comcast*, 133 S Ct at 1432–33.

1. Procedural and factual background.

The immediate issue in *Comcast* was the certification of a Rule 23(b)(3) class of cable television customers alleging that Comcast had engaged in activities designed to suppress regional competition in violation of federal antitrust law.[34] Specifically, the proffered class asserted that a series of allegedly illicit activities constituted both an agreement between competitors in violation of § 1 of the Sherman Act[35] and an attempt to monopolize the pertinent market in violation of § 2 of the same.[36]

These allegations rested on the contention that Comcast had engaged in strategic "clustering," a procedure whereby an actor concentrates a regional or local base of consumer operations to exclude competitors.[37] The claimed violations were supported by evidence that Comcast had systematically purchased competitor cable television operations within the pertinent media market (Philadelphia and the surrounding area) by "swapping"—that is, by exchanging its television operations in different regions with those of its competitors in the consolidated region.[38] For example, Comcast obtained Adelphia's cable systems in the area by exchanging its own cable systems in the Palm Beach, Florida, and Los Angeles, California, markets.[39]

Having established the liability element of its claim, the plaintiff class attempted to demonstrate common antitrust injury and damages. To do so, the class presented four "impact theories" to the district court at the certification stage:[40] (1) clustering made it profitable for Comcast, also a content provider, to withhold sports programming from competitors; (2) clustering deterred "overbuilders," potential market entrants that build competitor cable assets in markets where an incumbent operates; (3) clustering eliminated benchmark prices in the region, making it impossible for consumers to comparison shop; and (4) clustering substantially and artificially inflated Comcast's bargaining power vis-à-vis other content providers.[41] Each of these

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34 Id at 1430.

35 15 USC § 1.

36 15 USC § 2.

37 *Comcast*, 133 S Ct at 1430.

38 Id.

39 Id.

40 Id (noting that the class presented four theories to demonstrate both "existence of individual injury resulting from the alleged antitrust violation" and "that the damages resulting from that injury were measurable" using a common methodology).

41 *Comcast*, 133 S Ct at 1430–31.

theories alleged that Comcast's antitrust violation had worked a unique anticompetitive harm on the market. These four theories were translated into an econometric impact model that purported to demonstrate the disparity in consumer prices between the allegedly anticompetitive status quo and a hypothetical world in which Comcast had not engaged in the alleged clustering.[42]

The district court granted class certification but accepted only the second impact theory (overbuilder deterrence).[43] The opinion made two moves that significantly impacted how the Supreme Court viewed the issues presented by the case. First, the district court repeatedly referred to "antitrust impact," never once using the term "antitrust injury."[44] Second, the district court did not attempt to disaggregate the accepted theory of antitrust impact—overbuilder deterrence—from the plaintiffs' all-encompassing impact model. Rather, the lower court embraced the plaintiffs' kitchen-sink impact model after facially rejecting three of its four components as corrupted by methodological error.[45]

A divided Third Circuit affirmed the certification order.[46] While the court considered Comcast's argument that the plaintiffs' impact model was infected by the three dismissed antitrust theories, it ultimately determined that this contention required an impermissible (at the certification stage) review of the merits of the case.[47] Dissenting in part, and foreshadowing the Supreme Court's majority opinion, Judge Kent Jordan protested that the plaintiff class had not demonstrated "class-wide proof of damages."[48] Comcast appealed, and the Supreme Court granted certiorari to review the extent to which courts are permitted to consider the merits of a claim at the certification stage of proceedings.[49]

Specifically, the Court granted certiorari on the ostensibly limited question: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show

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42 See id at 1431. For a general explanation of the importance of these econometric impact models, see *In re Linerboard Antitrust Litigation*, 305 F3d 145, 155 (3d Cir 2002).

43 *Behrend v Comcast Corp*, 264 FRD 150, 174, 191 (ED Pa 2010).

44 See generally id.

45 See *Comcast*, 133 S Ct at 1431.

46 See *Behrend v Comcast Corp*, 655 F3d 182, 197–98 (3d Cir 2011).

47 See id at 207 (stating that this "attack[ ] on the merits of the methodology [had] no place in the class certification inquiry").

48 Id at 214 (Jordan concurring in part and dissenting in part).

49 See text accompanying note 32.

that the case is susceptible to awarding damages on a class-wide basis."[50] In fact, the Court addressed a very different question on review.

2. The *Comcast* majority.

The Court reversed the certification order as erroneously granted under Rule 23(b)(3).[51] Scalia, writing for the Court, quickly dispensed with the question on which certiorari was granted.[52] He noted that the validity of considering the merits at the certification stage, when necessary to pass judgment on the predominance inquiry, is well established.[53]

Turning instead to more general class-action-predominance questions, Scalia argued that methodological flaws inherent in the plaintiffs' antitrust impact model rendered the Court unable to disaggregate the sole impact theory accepted by the district court from the unaccepted impact theories.[54] This raised a serious, and ultimately determinative, doubt for the Court as to whether the proffered class could satisfy the Rule 23(b)(3) predominance requirement. The Court noted that this disaggregation error resulted in a divergence of class members' damages to such a degree that individualized-damages questions would surely predominate.[55] For example, the Court noted that the "permutations" involving a class of two million plaintiffs, each with a unique "theory of liability" to establish their individual damages, "are nearly endless."[56] It is easy to imagine that a plaintiff residing in county A sustained relatively low damages in light of the fact that benchmark cable-subscription prices were publicized for her region, while a plaintiff in county B sustained particularly high damages in light of the fact that his region had previously drawn significant sports programming from Comcast. Meanwhile, an entirely separate plaintiff in county C

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50 *Comcast*, 133 S Ct at 24 (granting certiorari).

51 *Comcast*, 133 S Ct at 1435.

52 See id at 1432–33.

53 Id at 1433, citing *Wal-Mart Stores, Inc v Dukes*, 131 S Ct 2541, 2551–52 (2011).

54 *Comcast*, 133 S Ct at 1433–34 (stating that there was "no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability [was] premised").

55 See id at 1434 ("For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition . . . while subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining power.").

56 Id at 1434–35.

might have sustained moderate damages: her hypothetical cable-subscription fee was elevated in light of Comcast's enhanced bargaining power over her favorite specialty content providers, yet prices had already been elevated in her region as a result of surging demand. The combinations are endless. Therefore, despite the Court's acceptance of the class's contention that the liability claim was common among members of the class, the Court concluded that the class did not satisfy the Rule 23(b)(3) predominance requirement.[57]

This opinion raised two critical issues, each of which has contributed to the lower court confusion that has taken hold in *Comcast*'s wake. First, the Court framed its opinion as concerning the damages element of the plaintiffs' claim.[58] For example, the Court noted that the shortcomings of the plaintiffs' impact model were important insofar as they rendered the class unable to establish common damages.[59] Indeed, the Court was clear that "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."[60]

Second, the Court presented the opinion as one applying the basic principles of Rule 23(b)(3) jurisprudence.[61] The Court noted that, as a result of its finding that there would be substantial individualized damages, the case "turns on the straightforward" body of Rule 23(b)(3) case law,[62] which generally holds that there should be no class certification when individual issues predominate.[63] However, the Court implicitly rejected this substantial body of case law, which specifies that individualized damages are merely a factor in the Rule 23(b)(3) predominance inquiry.[64] Though the Court did not directly engage this well-established case law, it plainly reached a contradictory conclusion.

Rebutting the contention that individualized damages are permissible in the Rule 23(b)(3) predominance inquiry, the Court stressed its concern over the manifold damage permutations that a class consisting of two million members with unique damages would present for any court.[65] Casting its opinion as

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57 Id at 1435.

58 See *Comcast*, 133 S Ct at 1433.

59 See id.

60 Id.

61 See id.

62 *Comcast*, 133 S Ct at 1433.

63 See Part I.B.

64 See notes 27–30 and accompanying text.

65 See *Comcast*, 133 S Ct at 1434–35.

grounded in achieving judicial economies, the Court (potentially) ushered in a dramatically divergent view of Rule 23(b)(3) under the cloak of ordinary Rule 23(b)(3) jurisprudence.[66] It was, presumably, a concern with this maneuver that motivated the dissent.

The extent to which the majority opinion turned on specific antitrust principles is unclear. The Court confusingly chided the dissent for discussing antitrust law while simultaneously grounding its own opinion in antitrust principles. The Court stated that the case "provides no occasion for the dissent's extended discussion of substantive antitrust law."[67] However, the Court later observed that damages potentially caused by "factors unrelated to an accepted theory of antitrust harm are not 'anticompetitive' in any sense relevant here."[68]

3. The *Comcast* dissent.

The *Comcast* dissent recognized the possibility that the majority opinion would upturn the "well nigh universal" rule that individualized damages are only a factor in the predominance inquiry.[69] As such, Ginsburg and Breyer went to considerable lengths to mitigate the scope of the majority opinion.[70]

The dissent began by arguing that the majority got the case wrong as a matter of law. In light of traditional class action jurisprudence,[71] Ginsburg and Breyer objected to what they viewed as the majority's displacement of the lower court's findings of fact.[72] For the dissent, the district court's determination that the class's impact model would adequately demonstrate the damage sustained by each class member was both sufficient and substantively accurate.[73] That is, the dissent observed that, as a

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66 It has been suggested in other contexts that, in recent terms, the Court has engaged in the related practice of "stealth overruling." See generally Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 Georgetown L J 1 (2010).

67 *Comcast*, 133 S Ct at 1433 (citation omitted).

68 Id at 1435.

69 Id at 1437 (Ginsburg and Breyer dissenting). Note that Ginsburg and Breyer began their dissent by arguing that the case should have been dismissed as an improvident grant of certiorari, per the above description of the majority's treatment of the issue on which certiorari was initially granted. See id at 1435–36 (Ginsburg and Breyer dissenting).

70 See id at 1437 (Ginsburg and Breyer dissenting).

71 See Part I.B.

72 See *Comcast*, 133 S Ct at 1440 (Ginsburg and Breyer dissenting).

73 Id at 1437 (Ginsburg and Breyer dissenting) (stating that the majority's "mistaken view of antitrust law . . . relies on its own version of the facts, a version inconsistent with factual findings made by the District Court").

matter of substantive antitrust law, if three of the plaintiffs' four impact theories were discarded as methodologically flawed, the supracompetitive prices revealed by the impact model must be attributable solely to the remaining, accepted impact theory.[74] Therefore, rather than yielding a multitude of damage "permutations," per Scalia's concern, there was only *one* possible explanation for the observed price increase—the accepted antitrust impact theory of overbuilder deterrence.

More fundamentally, however, the dissent contended that, even if the majority was correct as to the antirust impact dispute, that dispute was of little lasting importance. The dissenting justices sought to mitigate the impact of what could be a sea change in Rule 23(b)(3) jurisprudence. Ginsburg and Breyer instructed lower courts to cabin the scope of the majority's opinion.[75] Moreover, the dissent contended that the general rule with respect to individualized damages in the Rule 23(b)(3) predominance inquiry remained broadly applicable.[76] For the dissent, liability questions were to remain at the core of the Rule 23(b)(3) predominance inquiry.[77] The dissent cited a legion of cases supporting this general rule.[78]

The dissent's instruction to lower courts to disregard the central tenet of the majority opinion is paradoxical.[79] Indeed, the dissent was clear that "the [majority] should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'"[80] One is left wondering what the *Comcast* majority *should* be read to require.

B. Lower Court Chaos

The result of these dueling opinions has been nothing short of lower court chaos. These courts are faced with a quandary: How

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74 See id at 1437–41 (Ginsburg and Breyer dissenting).

75 See id at 1436 (Ginsburg and Breyer dissenting) (stating that the opinion "breaks no new ground" and "should not be read" as a broad alteration of Rule 23(b)(3) jurisprudence).

76 See *Comcast*, 133 S Ct at 1437, 1440 (Ginsburg and Breyer dissenting) (stating that the majority's "ruling is good for this day and case only," given that the majority "could not mean to apply in other cases" this interpretation of the Rule 23(b)(3) predominance inquiry, and that the general rule will prevail in the "mine run of cases").

77 See id at 1437 (Ginsburg and Breyer dissenting) (stating that "the predominance standard is generally satisfied even if damages are not provable in the aggregate").

78 See id (Ginsburg and Breyer dissenting) (collecting cases).

79 See id at 1436 (Ginsburg and Breyer dissenting).

80 *Comcast*, 133 S Ct (Ginsburg and Breyer dissenting), quoting id at 1430, 1431 n 4 (majority).

should *Comcast* be read vis-à-vis the already well-established general rule, particularly in light of the dissenting opinion?

Lower courts attempting to navigate through the haze of ambiguity cast by *Comcast* can be broadly grouped into four categories. First, a handful of lower courts have applied *Comcast* as broadly as possible, holding that, in all class action contexts, individualized damages are a controlling factor in the 23(b)(3) predominance inquiry. Second, several courts have seized on the *Comcast* dissent's answer to the majority to largely disregard the latter's holding. Third, many courts interpreting *Comcast* have liberally applied Rule 23(c)(4)—which provides for certification of "issue classes"—to bifurcate liability from damages questions. Fourth, a substantial number of courts have sought to distinguish *Comcast* by explaining what *Comcast* does *not* stand for. The courts in the fourth group are unified in appreciating that *Comcast* must both mean *something* and operate within the confines of general class action rules. However, each court in the fourth bin has interpreted *Comcast* in the negative, finding that it cannot apply outside the complex antitrust context. Therefore, these courts are also unified in their reluctance to advance a positive theory of what *Comcast* stands for.

This Section will review and critique each approach in turn. The aim of this Comment is to challenge the various status quo interpretations of *Comcast* in order to ultimately synthesize a positive theory of the case. While at least one court has commented on the post-*Comcast* divergence,[81] no court has explained why its interpretation is superior.

1. The "literal" bin—broadly interpreting *Comcast*.

Several lower courts fall into a "literal" bin—those that interpret the *Comcast* majority's opinion as broadly applicable in all contexts. These courts have interpreted *Comcast* as an expansive countermand to the general rule governing individualized damages.[82] This interpretation has been notably adopted by the DC

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[81] See *Jacob v Duane Reade, Inc*, 293 FRD 578, 581–85 (SDNY 2013) (collecting cases).

[82] See, for example, *Smith v Family Video Movie Club, Inc*, 2013 WL 1628176, *10 (ND Ill) (denying certification of a Rule 23(b)(3) class by interpreting *Comcast* to hold that "damages must be susceptible to measurement across the entire class, and individual damage calculations cannot overwhelm questions common to the class"); *Phillips v Asset Acceptance, LLC*, 2013 WL 1568092, *3 (ND Ill) (noting in dicta that *Comcast* "may portend a tightening of class certification standards more generally, particularly as to the circumstances under which the task of measuring damages sustained by absent members destroys predominance under Rule 23(b)(3)").

Circuit,[83] in addition to a number of district courts.[84] This bin is significant for two reasons. First, the lesson it distills from *Comcast* is that any indicia of individualized damages in a Rule 23(b)(3) class action—which is a near certainty—dooms certification.[85] Second, this bin's expansive interpretation of *Comcast* applies to a vast array of class actions, far beyond the antitrust context.[86]

Prototypical in both regards is *Roach v T.L. Cannon Corp*,[87] in which the court considered whether a putative class of employees—alleging that they had been underpaid in violation of labor and wage laws—should be certified under Rule 23(b)(3).[88] In denying certification, the court held that *Comcast* dictated a damages-centric Rule 23(b)(3) predominance inquiry.[89] Of paramount importance to the court was the fact that members of the class had worked different hours and as such would each be due different damages were liability proven.[90] Anticipating this concern, the class's complaint provided a facile means of calculating

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83 See *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F3d 244, 253, 255 (DC Cir 2013) (noting that, before *Comcast*, "the case law was far more accommodating to class certification under Rule 23(b)(3)," whereas *Comcast* stands for the proposition, "[n]o damages model, no predominance, no class certification").

84 See, for example, *Wang v Hearst Corp*, 293 FRD 489, 497 (SDNY 2013); *Smith*, 2013 WL 1628176 at *10; *Phillips*, 2013 WL 1568092 at *3.

85 See *Cowden v Parker & Associates, Inc*, 2013 WL 2285163, *7 (ED Ky) (denying certification because "[p]laintiffs have offered no manageable way to calculate damages across the entire class"). For a striking application of this principle, see *Curtis v Extra Space Storage, Inc*, 2013 WL 6073448, *4 (ND Cal) (denying certification of the proffered class of storage-unit owners—who alleged that the defendant illegally sold their properties at auction—in light of *Comcast* because "[t]here could possibly be a dispute between each tenant and defendant as to the true value of each item auctioned").

86 See, for example, *Wheeler v United Services Automobile Association*, 2013 WL 4525312, *5 (D Alaska) (denying certification of a class of plaintiffs—who were seeking damages for alleged insurance fraud—given that, under "*Comcast*, certain categories of cases, such as those involving 'significant personal injury damages,' are inappropriate for class actions because of the extent of the individualized damage evaluations necessary, which prevents them from meeting the predominance requirement of Rule 23(b)(3)"); *Martin v Ford Motor Co*, 292 FRD 252, 264–65, 288 (ED Pa 2013) (denying certification of a class of vehicle owners presenting a mass products-liability claim); *In re Montano*, 493 Bankr 852, 860 (Bankr D NM 2013) (denying certification of a class of credit union customers alleging fraud); *Smith*, 2013 WL 1628176 at *10 (denying certification of a class alleging wage and labor law violations); *Cowden*, 2013 WL 2285163 at *1 (denying certification of a class alleging fraud, negligent misrepresentation, and breach of contract); *Phillips*, 2013 WL 1568092 at *1 (denying certification of a class alleging violations of fair debt collection laws).

87 2013 WL 1316452 (NDNY).

88 Id at *1.

89 Id at *3 ("Plaintiffs contend that damages need not be considered for Rule 23 certification even if such damages might be highly individualized. This position is in contravention of the holding of [*Comcast*].") (citations omitted).

90 See id at *2.

damages for each member of the class: simply multiply the due hourly wage by each class member's recorded hours worked, per the defendant's internal accounting, then subtract what had already been paid.[91] Nonetheless, the court was unconvinced by the argument that individualized damages are intrinsic to every wage claim brought as a class action and easily resolvable as such, holding instead that *Comcast* necessitated dismissal.[92]

This bin's literal application of some of *Comcast*'s most severe language suffers from two flaws. First, the literal interpretation of *Comcast* fails to operate within the confines of the general rule governing the role of individualized damages in the Rule 23(b)(3) inquiry. This is problematic because the *Comcast* Court proclaimed fidelity to general class action rules.[93] The Court itself (and Scalia in particular) recently acknowledged and embraced the rule maintaining that individualized damages are merely a factor in the Rule 23(b)(3) predominance inquiry.[94] Notably, several courts in the literal bin have applied their expansive interpretation of *Comcast* in contexts in which the general rule on individualized damages is exceptionally well recognized. For example, several courts have applied a literal interpretation of *Comcast* in labor and wage law cases,[95] despite near-universal application of the general rule in this context.[96] Similarly, a number of courts in this bin have applied the literal approach in

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91 Verified Complaint, *Roach v T.L. Cannon Corp*, Civil Action No 10-00591 (NDNY filed May 19, 2010) (available on Westlaw at 2010 WL 3350417).

92 See *Roach*, 2013 WL 1316452 at *3, quoting *Comcast*, 133 S Ct at 1433 (finding that individualized damages "inevitably overwhelm questions common to the class").

93 See notes 73–74 and accompanying text.

94 See *Wal-Mart Stores, Inc*, 131 S Ct at 2558 (Scalia) (stating that it is "clear that individualized monetary claims belong in Rule 23(b)(3)").

95 See, for example, *Roach*, 2013 WL 1316452 at *3; *Smith*, 2013 WL 1628176 at *10; *Wang*, 293 FRD at 497.

96 See, for example, *Shahriar v Smith & Wollensky Restaurant Group, Inc*, 659 F3d 234, 253 (2d Cir 2011), quoting *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F3d 124, 139 (2d Cir 2001) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues."); *Williams v Mohawk Industries, Inc*, 568 F3d 1350, 1357–58 (11th Cir 2009), quoting *Klay v Humana, Inc*, 382 F3d 1241, 1260 (11th Cir 2004) ("It is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude 23(b)(3) certification."); *Shabazz v Morgan Funding Corp*, 269 FRD 245, 250–51 (SDNY 2010) ("Any class action based on unpaid wages will necessarily involve calculations for determining individual class member damages, and the need for such calculations do [sic] not preclude class certification.").

fraudulent breach of contract cases,[97] despite the well-recognized application of the general rule in this instance as well.[98]

Second, the literal bin's strict interpretation of *Comcast*, if widely embraced, would toll the bell on Rule 23(b)(3) damages classes because very few putative classes can establish uniform damages. From an interpretive perspective, *Comcast*'s alleged uniform-damages requirement fails to account for the Advisory Committee's intent in fashioning Rule 23(b)(3). For example, the Advisory Committee Notes view that Rule as a means of achieving judicial economies by quickly dispensing of like cases en masse.[99] At various times, the Court has itself been careful to emphasize the importance of fidelity to the Advisory Committee's intent in interpreting Rule 23.[100]

From a practical perspective, it is nearly impossible to conceive of a damages class action involving perfectly uniform damages, short of the plaintiffs manipulating damages claims or identifying a statutory damages remedy. Constructing a perfectly uniform damages standard for Rule 23(b)(3) would thus spell the end of damages class actions for all intents and purposes. Theoretically, and *optimistically*, this regime could yield a calamitous legislative scramble to manufacture an ad hoc structure of all-encompassing statutory damages.[101] Even if such a legislative response were possible, there are plain public-choice dilemmas[102]—future victims will be less likely to identify themselves as such

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97 See, for example, *Cowden*, 2013 WL 2285163 at *6–7; *Wheeler*, 2013 WL 4525312 at *4–5; *In re Montano*, 493 Bankr at 860.

98 See, for example, *Yokoyama v Midland National Life Insurance Co*, 594 F3d 1087, 1094 (9th Cir 2010) (stating that "damage calculations alone cannot defeat certification"); *Allapattah Services, Inc v Exxon Corp*, 333 F3d 1248, 1261 (11th Cir 2003); *Gunnells v Healthplan Services, Inc*, 348 F3d 417, 427–28 (4th Cir 2003); *Alpern v UtiliCorp United, Inc*, 84 F3d 1525, 1540 (8th Cir 1996).

99 See FRCP 23, Advisory Committee Notes to the 1966 Amendments.

100 See, for example, *Amgen Inc v Connecticut Retirement Plans and Trust Funds*, 133 S Ct 1184, 1200 (2013).

101 Consider Judge Richard Posner's observation that a damages-centric predominance inquiry might increase the need for a statutory damages regime for all manner of cases, including, for example, commonplace products-liability claims. See *Thorogood v Sears, Roebuck and Co*, 547 F3d 742, 748 (7th Cir 2008) (stating that claims for statutory damages "might not require individual proof," but claims for actual damages leave courts with the difficult task of "determining the relief to which the individual class members are entitled").

102 In this context, "public choice" refers to the political economy of legislative enactments (though the field is far more expansive). See Maxwell L. Stearns and Todd J. Zywicki, *Public Choice Concepts and Applications in Law* 243–323 (West 2009).

than future wrongdoers, rendering the latter better able to organize and manipulate the legislative process.[103]

Moreover, the requirement that a class present perfectly uniform individual damages creates a perverse incentive for bad actors: injure more individuals. By increasing the size of the class, the wrongdoer increases its chances of creating a variance in damages. These are functionally "costless," or even net-beneficial, violations—no added victim is likely to pursue an individual remedy,[104] but their existence alone may suffice to destroy the perfect uniformity of a proffered class.

2. The "mitigation" bin—minimizing *Comcast*'s importance.

Conversely, a second interpretive bin—the "mitigation" bin—strives to minimize the importance of the *Comcast* majority's opinion. Courts in this bin have done so by seizing on the *Comcast* dissent while mitigating the majority opinion as carrying little precedential weight.[105] These courts have treated the *Comcast* majority's language on the Rule 23(b)(3) predominance inquiry

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[103] See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm & Mary L Rev 1137, 1155 (2012) (noting that "public regulatory bodies are potentially subject to capture by well-capitalized or politically influential interest groups").

[104] See *Carnegie v Household International, Inc*, 376 F3d 656, 661 (7th Cir 2004) (noting that, in light of expected payoffs and litigation costs, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits").

[105] See, for example, *In re Deepwater Horizon*, 739 F3d 790, 815 (5th Cir 2014) ("Even after *Comcast*, [ ] this holding has no impact on cases such as the present one, in which predominance was based not on common issues of damages but on the numerous common issues of liability."); *Wallace B. Roderick Revocable Living Trust v XTO Energy, Inc*, 725 F3d 1213, 1220 (10th Cir 2013); *Reyes v Zions First National Bank*, 2013 WL 5332107, *6 n 5 (ED Pa), citing *Comcast*, 133 S Ct at 1436 (Ginsburg and Breyer dissenting) ("Therefore, this Court interprets the holding [in *Comcast*] as placing an emphasis on a court's ability to delve into the merits of a case to ensure compliance with Rule 23(b)(3) and not on the necessity of proving damages on a classwide basis."); *Munoz v PHH Corp*, 2013 WL 2146925, *24 (ED Cal), citing *Comcast*, 133 S Ct at 1436 (Ginsburg and Breyer dissenting) (certifying a class in spite of individualized damages, noting that "[o]ther courts concur that the *Comcast* ruling does not break any new grounds under the Rule 23 analysis"); *Gaudin v Saxon Mortgage Services, Inc*, 297 FRD 417, 429 (ND Cal 2013), quoting Rubenstein, 2 *Newberg on Class Actions* § 4:54 at 206 (cited in note 30) (granting certification despite *Comcast* and noting that "[c]ourts in every circuit have . . . uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations"); *Shady Grove Orthopedic Associates, PA v Allstate Insurance Co*, 293 FRD 287, 305 (EDNY 2013); *In re Nexium (Esomeprazole) Antitrust Litigation*, 297 FRD 168, 181 (D Mass 2013) (stating that *Comcast*'s treatment of Rule 23(b)(3) was "dicta"); *Kurgan v Chiro One Wellness Centers LLC*, 2014 WL 642092, *7 (ND Ill); *Haskins v First American Title Insurance Co*, 2014 WL 294654, *15 (D NJ) (noting that it is an open question whether the Court's treatment of individualized damages in *Comcast* is "merely dicta or binding precedent").

as "merely dicta," effectively reading the *Comcast* dissent as part of the Court's *holding*.[106] Moreover, these courts have begun to rely on one another, citing a network of lower court disagreement with the *Comcast* majority to support their shared position.[107]

The most frequently cited case in this bin is *Harris v comScore, Inc*,[108] in which the Northern District of Illinois considered the certification of a damages class alleging that the defendant had collected Internet user data in violation of several data-storage and privacy-protection laws.[109] Critically, the court treated the case as a run-of-the-mine class action: each plaintiff had been allegedly wronged in an identical manner—presenting identical liability questions—but sustained slightly unique and individualized damages.[110] Thus, the court relied on what it considered to be standard Rule 23(b)(3) predominance analysis, concluding that judicial economies would be best served by certification despite individualized-damages questions.[111]

The *Harris* court rebutted the contention that *Comcast* upset the Rule 23(b)(3) predominance analysis by utilizing the dissent's language to mitigate the majority's holding as "merely dicta."[112] For example, the court favorably quoted Ginsburg and Breyer's assertion that *Comcast* "should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable on a class-wide basis."[113] Other courts in this bin have justified their conclusions by quoting the *Comcast* dissent's observation that "[r]ecognition that individual damages

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[106] See, for example, *Harris v comScore, Inc*, 292 FRD 579, 589 n 9 (ND Ill 2013) ("The Supreme Court's [*Comcast*] holding came from its assumption . . . that Rule 23(b)(3) requires that damages must be measurable based on a common methodology applicable to the entire class . . . . That assumption . . . is merely dicta.").

[107] See, for example, *Rosales v El Rancho Farms*, 2014 WL 321159, *6 (ED Cal) ("Since *Comcast* . . . district courts throughout California have [ ] determined that *Comcast* does not defeat class certification where damages are to be calculated based on the wages each employee lost due to the defendant's unlawful practices."); *Quezada v Con-Way Freight, Inc*, 2014 WL 186224, *2 (ND Cal).

[108] 292 FRD 579 (ND Ill 2013).

[109] Id at 581.

[110] See id at 589.

[111] Id, citing *Butler v Sears, Roebuck and Co*, 702 F3d 359, 362 (7th Cir 2012) (noting that, prior to *Comcast*, "individual factual damages issues do not provide a reason to deny class certification when the harm to each plaintiff is too small to justify resolving the suits individually").

[112] *Harris*, 292 FRD at 589 n 9, quoting *Comcast*, 133 S Ct at 1436 (Ginsburg and Breyer dissenting).

[113] *Harris*, 292 FRD at 589 n 9, quoting *Comcast*, 133 S Ct at 1436 (Ginsburg and Breyer dissenting).

calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal."[114]

The mitigation bin suffers from two methodological critiques. First, courts in this bin are incorrect in asserting that the *Comcast* majority's treatment of the Rule 23(b)(3) predominance inquiry was no more than dicta.[115] Note that the concluding paragraph in the *Comcast* majority is firmly grounded in the context of Rule 23(b)(3) and the important role of damages in the predominance analysis.[116] Courts in this bin selectively cull favorable portions of the *Comcast* opinion as constituting the Court's holding and disregard contrary language, thereby providing an inaccurate and incomplete interpretation of the case.[117] For example, one court within this bin reached its conclusion via a Frankenstein-like combination of the *Comcast* majority and dissenting opinions, perplexingly attributing the holding to the latter.[118]

Second, and dovetailing with the first point, this bin is itself paradoxically grounded in an approach that it necessarily critiques. Courts in this bin broadly rest their approach on language in the *Comcast* dissent arguing that the majority could not possibly have intended to undertake such a radical break from existing precedent.[119] As such, this bin's critique of *Comcast* is guided by fidelity to precedent.[120] However, courts taking this view of the case disregard the fact that *Comcast* is also precedent. While this avoids the literal bin's overreading of *Comcast*, it constitutes the equal but opposite sin of underreading the majority opinion.

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114 See, for example, *Reyes*, 2013 WL 5332107 at *6 n 5, quoting *Comcast*, 133 S Ct at 1437 (Ginsburg and Breyer dissenting).

115 See note 106 and accompanying text.

116 See *Comcast*, 133 S Ct at 1435 (holding that "Rule 23(b)(3) cannot authorize treating [plaintiffs] as members of a single class").

117 See, for example, *Shady Grove Orthopedic Associates, PA*, 293 FRD at 305, quoting *Comcast*, 133 S Ct at 1433 (relying on the *Comcast* dissent to argue that the case "does not create a heightened standard for satisfaction of Rule 23(b)(3) predominance, but rather 'turns on the straightforward application of class-certification principles'").

118 See *Driver v AppleIllinois, LLC*, 2013 WL 5818899, *11 (ND Ill).

119 See notes 72–80 and accompanying text.

120 One of the passages in *Comcast* that is most cited by courts within this bin is the dissent's collection of cases forming the bedrock of this precedent. See, for example, *Reyes*, 2013 WL 5332107 at *6 n 5; *Munoz*, 2013 WL 2146925 at *24; *Driver*, 2013 WL 5818899 at *11.

3. The "bifurcation" bin—utilizing Rule 23(c)(4).

Unwilling to embrace either extreme, a third interpretive bin—the "bifurcation" bin—has sought to forge an alternative means of bypassing *Comcast* via liberal use of Rule 23(c)(4). Courts in this bin have certified Rule 23(b)(3) classes with individualized damages solely for the purpose of determining the defendant's liability per Rule 23(c)(4).[121] These courts represent a hybrid approach—they generally accept that the *Comcast* majority opinion carries precedential weight but find the *Comcast* dissent more persuasive. Therefore, each court in this bin forges an alternative that attempts to accommodate both of the dueling *Comcast* opinions.

Rule 23(c)(4) invites courts to bifurcate liability from individualized-damages questions, tabling the damages issue for resolution at a later time.[122] The goal of this "issue class" provision is to aid the judicial economies function of class actions.[123] That is, in allowing for certification as to some but not all issues, particularly complex class actions can be molded into a more manageable form. For example, Rule 23(c)(4) has been used to allow class-wide resolution of whether a defendant engaged in practices having a disparate impact on the proffered class members in violation of federal antidiscrimination law, despite the fact that determining whether there had been intentional discrimination—a requisite finding for a damages award—necessitates individual treatment.[124]

The application of this provision allows courts to functionally bypass *Comcast* through bifurcation. The Southern District of

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[121] See, for example, *Healy v International Brotherhood of Electrical Workers, Local Union No. 134*, 296 FRD 587, 594–96 (ND Ill 2013), citing *Comcast*, 133 S Ct at 1437 (Ginsburg and Breyer dissenting) (certifying a damages and liability class but stating that "*Comcast* does not come close to saying . . . that a class cannot be certified whenever there are variations among class members' damages," and noting that, even if it did, "the Court would have certified a liability-only class, as Rule 23 expressly permits"); *Miri v Dillon*, 292 FRD 454, 464 (ED Mich 2013), quoting *Comcast*, 133 S Ct at 1437 (Ginsburg and Breyer dissenting); *In re Motor Fuel Temperature Sales Practices Litigation*, 292 FRD 652, 667 (D Kan 2013).

[122] See 54 Am Jur 2d *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 442 at 496 (2009) ("Bifurcation enables a court to certify a class action on the issue of liability only.").

[123] See William B. Rubenstein, 3 *Newberg on Class Actions* § 10:6 at 642 (West 5th ed 2013); Steven S. Gensler, *Bifurcation Unbound*, 75 Wash L Rev 705, 772 (2000) (noting that the "efficiency of bifurcation in multi-plaintiff, complex litigation is unquestioned").

[124] See *McReynolds v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 672 F3d 482, 491 (7th Cir 2012).

New York embraced this position in *Jacob v Duane Reade, Inc*.[125] In that case, the court considered whether to certify a Rule 23(b)(3) class of employees alleging that they had been systematically denied due overtime pay.[126] The defendant's principal rebuttal was that *Comcast* required dismissal at the certification stage given that each member of the class had worked a distinct number of overtime hours and was therefore claiming individualized damages.[127] In considering this argument, the court remained keenly aware of both opinions in *Comcast*, assigning equal weight to the majority and the dissent.[128] Ultimately, the court resolved the issue by reading the majority opinion through the lens of the dissenting opinion—a task that in this case was best achieved through the application of Rule 23(c)(4).[129]

This bin is susceptible to two critiques. First, courts in this bin impliedly rest their approach on what is arguably a misreading of a footnote in the *Comcast* dissent. Specifically, the dissent's sole footnote indicated that, in some circumstances, Rule 23(c)(4) provides an avenue of relief for classes saddled with individualized-damages issues.[130] This ostensible endorsement of Rule 23(c)(4) has been the focal point of courts within the bifurcation bin. However, the dissent's endorsement came with a crucial caveat—classes employing Rule 23(c)(4) must take advantage of the provision "at the outset" of the certification proceedings.[131] This precondition reflects acceptance of Rule 23(c)(4) as an initial maneuver, rather than a saving clause.[132]

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125 293 FRD 578 (SDNY 2013). See also *Johnson v Nextel Communications, Inc*, 293 FRD 660, 675 (SDNY 2013) (declining to apply *Comcast* to a Rule 23(c)(4) liability class because the class did not "run afoul of *Comcast* because individual compensatory damages have not been certified"). But see *Wang*, 293 FRD at 497 (applying the literal interpretive approach and creating an intradistrict split in the Southern District of New York). See also note 84 and accompanying text.

126 *Jacob*, 293 FRD at 587–88.

127 Id at 580 (noting that, "in light of *Comcast*, [defendant] contends that it is axiomatic now that individual monetary damages claims of the class members may not predominate") (quotation marks omitted).

128 See id at 588 ("The dissent in *Comcast* seems to suggest that the presence of such individualized proof with respect to damages does not act as a bar to certification.").

129 See id ("While *Comcast* surely requires some inquiry into the relationship between injury and damages at the class certification stage, this Court understands *Comcast* to require a linkage between those two, rather than forbidding bifurcation.").

130 See *Comcast*, 133 S Ct at 1437 n * (Ginsburg and Breyer dissenting).

131 Id (Ginsburg and Breyer dissenting).

132 See McLaughlin, 2 *McLaughlin on Class Actions* § 8:2 at 391 (cited in note 12) (noting that there is "general agreement that separate trials should not be granted as a routine matter").

Second, and relatedly, this interpretive response to *Comcast* eviscerates the Rule 23(b)(3) predominance inquiry as a relevant component of Rule 23.[133] If courts are able to artificially manufacture predominance for Rule 23(b)(3) purposes via Rule 23(c)(4), it is difficult to conceive of an instance in which certification as to at least one issue common to the class would not be achieved.[134] It is worth noting that a circuit split exists on this sequencing issue—that is, whether Rule 23(c)(4) must be deployed in the initial stages of the certification proceedings or if it can save doomed classes from the jaws of defeat.[135] Nonetheless, the "at the outset" view that the dissent endorsed in *Comcast* constitutes the overwhelmingly majority position.[136] It is at best unwise, and at worst unsustainable, to base an interpretive approach to a circuit split on a secondary circuit split. Finally, it seems exceedingly doubtful that the *Comcast* dissent intended to resolve this split, on which certiorari was not granted, in the most expansive manner.[137] It surely cannot be the case that the *Comcast* dissent stands for the proposition that every class action presenting individualized damages could simply be certified by use of Rule 23(c)(4).

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[133] See Michael J. Wylie, Comment, *In the Ongoing Debate between the Expansive and Limited Interpretations of Fed. R. Civ. P. 23(C)(4)(A), Advantage Expansivists!*, 76 U Cin L Rev 349, 357, 371–72 (2007), quoting *Castano v American Tobacco Co*, 84 F3d 734, 745 n 21 (5th Cir 1996) (noting one scholar and one court's concern that this treatment of 23(c)(4) may "eviscerate the predominance requirement of rule 23(b)(3)," but ultimately concluding that, in practice, the evisceration concern is not manifest). See also J. Douglas Richards and Benjamin D. Brown, *Predominance of Common Questions—Common Mistakes in Applying the Class Action Standard*, 41 Rutgers L J 163, 184 n 87 (2009), quoting *Castano*, 84 F3d at 745 n 21 (noting that this use of Rule 23(c)(4) assures "automatic certification in every case in which there is a common issue," a near certainty in any well-fashioned class action complaint).

[134] See *Castano*, 84 F3d at 745 (noting that this liberal use of Rule 23(c)(4) "would write the predominance requirement out of the rule").

[135] Compare id at 745 n 21 (explaining that "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)," as "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement . . . and that (c)(4) is a housekeeping rule"), with *In re Nassau County Strip Search Cases*, 461 F3d 219, 225 (2d Cir 2006) (holding that a district court may, sua sponte, "employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement").

[136] See McLaughlin, 1 *McLaughlin on Class Actions* § 4:43 at 1053 (cited in note 12).

[137] For an explanation of this "expansivist" approach to the Rule 23(c)(4) circuit split, see Wylie, Comment, 76 U Cin L Rev at 358–63 (cited in note 133).

4. The "distinguish" bin—clarifying what *Comcast* is *not*.

Finally, a number of courts have sought to avoid *Comcast* altogether by explaining what it is not and why, by negative inference, it does not apply to particular cases. The Second,[138] Seventh,[139] and Ninth Circuits,[140] in addition to a litany of district courts,[141] have embraced a version of this approach. Note that no two courts in this (functionally) catchall bin treat *Comcast* in an identical manner. Insofar as there is a common theme in this varied case law, it is that these courts have sought to avoid the application of *Comcast* altogether, typically by drawing on one of the case's many complexities.[142]

For example, in *Butler v Sears, Roebuck and Co*,[143] Judge Richard Posner explained that *Comcast* was inapplicable to the claims at bar—breach of warranty claims aggregated in a class action filed under Rule 23(b)(3)—because *Comcast* principally concerned the proffered class's ability to tie each class member's damages to a common theory of liability.[144] Unlike the four theories of antitrust impact in *Comcast*, the *Butler* class presented a uniform theory of liability tied to a common harm—defective washing machines.[145] The defining feature of *Comcast* for the *Butler* court was the plaintiffs' complicated impact model, which

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138 See *In re U.S. Foodservice Inc Pricing Litigation*, 729 F3d 108, 123 & n 8 (2d Cir 2013) (noting that *Comcast* pertains only to those cases with byzantine damages measurements).

139 See *Butler*, 727 F3d at 799–800.

140 See *Leyva v Medline Industries, Inc*, 716 F3d 510, 514 (9th Cir 2013).

141 See, for example, *Vaccarino v Midland National Life Insurance Co*, 2014 WL 572365, *12 (CD Cal); *Martins v 3PD, Inc*, 2013 WL 1320454, *3 n 3 (D Mass) (opting to "interpret [*Comcast*] not to foreclose the possibility of class certification where some individual . . . determinations will neither be particularly complicated nor overwhelmingly numerous"); *Parra v Bashas', Inc*, 291 FRD 360, 393 (D Ariz 2013), quoting *Comcast*, 133 S Ct at 1433 ("In the present case, unlike *Comcast*, plaintiffs' methodology . . . for calculating back pay demonstrates that such damages are 'capable of measurement on a classwide basis.'") (citation omitted); *Neale v Volvo Cars of North America, LLC*, 2013 WL 5674355, *2 (D NJ) ("In *Comcast*, the damages theory was based on a model designed by an expert. . . . Here, the damages issue is much more straightforward—all class members who purchased Defendants' product were allegedly damaged by a design defect."); *Altamura v L'Oréal, USA, Inc*, 2013 WL 4537175, *2 (CD Cal) (noting that the uncertainties created by *Comcast* merit granting a motion to stay).

142 See, for example, *In re Heckmann Corp Securities Litigation*, 2013 WL 2456104, *14 (D Del) (concluding that *Comcast* is inapplicable in the securities-fraud context).

143 727 F3d 796 (7th Cir 2013).

144 Id at 800 (distinguishing the case by noting that, "[u]nlike the situation in *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis").

145 Id at 798–99.

muddied the damages question.[146] By contrast, determining the equivalent of an impact theory in a products-liability claim is remarkably uncomplicated.[147] For the *Butler* court, *Comcast* was simply inapposite to such cases regardless of how one interprets the Court's holding.[148] It was clear to the *Butler* court that *Comcast* does not prohibit 23(b)(3) class certification in all instances in which individualized damages are present.[149]

The Ninth Circuit in *Leyva v Medline Industries Inc*[150] found *Comcast* similarly inapposite. The court, in reviewing certification of a Rule 23(b)(3) class seeking lost wages, determined that *Comcast* had little to say about those cases in which the proffered class presents a common means of demonstrating that the class members' damages flowed from a defendant's actions.[151] Unlike courts in the mitigation bin, which largely recognize the pertinence of *Comcast* but rely on the dissent to mitigate its importance, the *Leyva* court simply determined that *Comcast* did not apply to the case at bar.[152] Other courts, in a related vein, have suggested that *Comcast* does not speak to cases involving small class sizes[153] or comparatively simple issues.[154]

This final interpretive bin is unique insofar as the courts within it avoid reading *Comcast* as applying to all categories of class actions (and either ardently apply it, as in the first bin, or mitigate it, as in the second bin). However, courts in this bin do not set forth a positive theory of what *Comcast* ought to stand for going forward. This is particularly important given the well-noted ambiguity inherent in *Comcast*.[155] This bin suffers from a

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146 See id at 799 (beginning the *Comcast* analysis by noting that "*Comcast* was an *antitrust* suit") (emphasis added).

147 See *Butler*, 727 F3d at 799, quoting *Comcast*, 133 S Ct at 1434.

148 See *Butler*, 727 F3d at 800.

149 See id at 801 (noting that an individualized-damages-centric reading of *Comcast* would "drive a stake through the heart of the class action device," while emphasizing that "the fact that damages are not identical across all class members should not preclude class certification").

150 716 F3d 510 (9th Cir 2013).

151 Id at 514.

152 See id ("*Here, unlike in Comcast*, if putative class members prove Medline's liability, damages will be calculated based on the wages each employee lost due to Medline's unlawful practices.") (emphasis added).

153 See, for example, *Martins*, 2013 WL 1320454 at *3 n 3 (allowing class certification because the claims involved were neither "particularly complicated nor overwhelmingly numerous").

154 See, for example, *Neale*, 2013 WL 5674355 at *2 (distinguishing *Comcast* because the damages issue in the case at bar was "much more straightforward").

155 See Part II.A. See also *In re High-Tech Employee Antitrust Litigation*, 289 FRD 555, 567 (ND Cal 2013), citing *Comcast*, 133 S Ct at 1431 (commenting on the importance

self-inflicted wound: its dependence on negative inference hampers its portability.

It is difficult to distill any bright-line rule from courts in this bin. While one could draw on these courts' opinions by negative inference, this would yield a disaggregated collection of unhelpful conclusions. For example, one court within this bin has suggested that *Comcast* does not apply when the proffered class is sufficiently small.[156] Drawing on the obvious uncertainty over what is or is not sufficiently small, one should ask whether *Comcast* would have been decided differently had the class presented an identical case, but with two thousand plaintiffs rather than two million. Does *Comcast* really turn on the size of the class in that case? The substance of the Court's opinion suggests that the answer is *no*.[157] The Court paid scant attention to, and indeed seemed unfazed by, the size of the class. Basing one's interpretation of *Comcast* on a distinction that the *Comcast* opinion itself sheds no light on should occasion considerable pause.

Likewise, the *Butler* court's suggestion that *Comcast* is inapplicable when a class is able to tie its members' damages to a single theory of injury may encounter considerable difficulties when the circumstances are slightly modified.[158] If, for example, the proffered class in *Comcast* had presented only a single theory of antitrust injury—such as overbuilder deterrence—it remains doubtful that the Court would have granted certification. The defendant would have been able to argue that its clustering (the antitrust violation) affected the class members in unique ways. Indeed, it might have contended that its clustering injured certain members of the class by means other than overbuilder deterrence, positing additional theories of antitrust injury as defenses capable of fracturing the predominance of questions common to the class. This would raise the very questions that concerned the *Comcast* majority.[159] This line of inquiry highlights the necessity of advancing a positive interpretation of *Comcast*.

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of culling an affirmative "requirement" out of *Comcast* "to ensure that the predominance requirement is met").

156 See *Martins*, 2013 WL 1320454 at *3 n 3.

157 See *Comcast*, 133 S Ct at 1432–33.

158 See *Butler*, 727 F3d at 800.

159 See *Comcast*, 133 S Ct at 1434 (noting that "Glouchester County *may have been* overcharged because of petitioners' alleged elimination of satellite competition . . . while subscribers in Camden County *may have* paid elevated prices because of petitioners' increased bargaining power") (emphasis added).

III. THE PREDOMINANCE OF ANTITRUST INJURY: A POSITIVE INTERPRETATION OF *COMCAST*

As the preceding critiques emphasize, no extant interpretation of *Comcast* is particularly attractive. Thus, a new conceptualization is needed. This Comment contends that *Comcast* can and should be understood as a case turning on a unique feature of class actions in the antitrust context—antitrust injury. Specifically, the Rule 23(b)(3) predominance inquiry should principally turn on the antitrust-injury element of the proffered class's claim. This solution, derived from *Comcast*, necessarily raises the threshold for class certification in the antitrust context. It is far more demanding to require proffered antitrust classes seeking certification under Rule 23(b)(3) to demonstrate that common questions of antitrust injury—rather than merely of antitrust violations—predominate. However, this heightened threshold applies solely to antitrust class actions. This interpretation gives *Comcast* meaning in the antitrust context but cabins its scope, such that the general predominance-inquiry rule is not displaced in other contexts.

In advancing this contention, which displaces the accepted hegemony of antitrust-violation questions in the predominance inquiry,[160] this Part will begin by returning to a general discussion of Rule 23(b)(3), explaining how it was applied in the antitrust context prior to *Comcast*. Next, it will turn toward antitrust injury and the concept's inherent plasticity. Drawing on this analysis, it will then revisit *Comcast* to demonstrate that, descriptively, the case is best read as one concerning antitrust injury rather than individualized damages. This Part concludes by arguing that *Comcast* should, normatively, be interpreted as a case concerning antitrust injury.

A. Rule 23(b)(3) in Antitrust Class Actions

Antitrust actions are frequently brought as Rule 23(b)(3) damages classes.[161] This frequency is attributable to two factors: First, allegedly anticompetitive behavior often does a small amount of harm (as measured by individual damages) to an

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[160] See notes 27–30 and accompanying text. See also *Britt Green Trucking, Inc v FedEx National, LTL, Inc*, 2013 WL 6051752, *11 (MD Fla), citing *Comcast*, 133 S Ct at 1433.

[161] See Wright, Miller, and Kane, 7AA *Federal Practice and Procedure* § 1781 at 227 & n 2 (cited in note 8).

enormous number of consumers.[162] Second, classes of consumers can claim with relative ease that they are all victims of a common antitrust violation, given that antitrust violations typically harm an entire market.[163] To sustain a private antitrust action, three elements must be established: (1) a violation of antitrust law; (2) damages; and (3) injury to the plaintiff as a result of the alleged violation, otherwise known as "antitrust injury."[164] When an antitrust claim is brought as a class action, these three elements are the focus of the Rule 23(b)(3) predominance inquiry.

Prior to *Comcast*, the general rule that individualized damages did not necessarily defeat Rule 23(b)(3) predominance applied to antitrust class actions. The majority of Rule 23(b)(3) antitrust class actions were able to satisfy the predominance inquiry when the question of a defendant's liability was common to the entire class.[165] Against this backdrop, the general rule that individualized damages are merely a factor in the predominance inquiry was maintained in the antitrust context.[166]

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[162] See Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 Ariz L Rev 413, 438 (1997) (noting the "large numbers of small claimants in some antitrust classes").

[163] See Wright, Miller, and Kane, 7AA *Federal Practice and Procedure* § 1781 at 233–35 (cited in note 8).

[164] See *In re Publication Paper Antitrust Litigation*, 690 F3d 51, 61–62, 66 (2d Cir 2012); *Windham v American Brands, Inc*, 565 F2d 59, 65 & n 11 (4th Cir 1977), citing *Zenith Radio Corp v Hazeltine Research, Inc*, 395 US 100 (1969). For an application of these elements, see *In re Blood Reagents Antitrust Litigation*, 283 FRD 222, 234–47 (ED Pa 2012) (reviewing each of these three "essential elements of [an] antitrust claim" to determine whether common questions predominate).

[165] See, for example, *In re Currency Conversion Fee Antitrust Litigation*, 264 FRD 100, 114 (SDNY 2010). See also Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 7AA *Federal Practice and Procedure* § 1781 at 105 (West 2014 Supp) (noting that *Comcast* undercuts the traditional rule).

[166] See, for example, *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F3d 6, 28 (1st Cir 2008) ("Predominance is not defeated by individual damages questions so long as liability is still subject to common proof."); *Klay v Humana, Inc*, 382 F3d 1241, 1260 (11th Cir 2004) ("It is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude 23(b)(3) certification."); *Smilow v Southwestern Bell Mobile Systems, Inc*, 323 F3d 32, 40 (1st Cir 2003) ("Where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain."); *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F3d 124, 139 (2d Cir 2001) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues."); *Bogosian v Gulf Oil Corp*, 561 F2d 434, 456 (3d Cir 1977) ("[I]t has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate.").

It is worth noting, however, that the third element of an antitrust claim—antitrust injury[167]—often translates into a requirement that the class present an antitrust impact model.[168] An impact model is an evidentiary means of demonstrating that the alleged antitrust violation was the reason for the plaintiffs' injury. That is, impact models demonstrate that a plaintiff's damages were the result of an injury "intended to be prevented by the statute or rule the plaintiff has invoked to establish liability."[169] For example, an antitrust class alleging illicit cartelization may present a model showing that the actual price of the product in question is inflated over what the price *would be* in a hypothetical world of perfect competition.[170] In the class action context, impact models further serve to establish the possibility of a common assessment of the harm that a defendant's alleged antitrust violation caused to class members.

Several courts have determined that the failure to present an impact model demonstrating a common antitrust injury across the class is fatal to the Rule 23(b)(3) predominance inquiry.[171] Nonetheless, this typically did not conflict with the pre-*Comcast* general role of individualized damages. Even in the context of antitrust class actions, it has been "uniformly" held that individualized-damages questions do not predominate.[172] In other words, as long as common antitrust injury is present, individualized damages are not dispositive of certification.

B. Antitrust Injury: Liability, Damages, Standing, or All of the Above?

Theoretically, antitrust injury is a critical element of an antitrust cause of action.[173] However, it has proven a remarkably

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167 See Part III.B.

168 See, for example, *Alabama v Blue Bird Body Co*, 573 F2d 309, 320 (5th Cir 1978).

169 Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L J 697, 744 (2003).

170 See *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, 256 FRD 82, 85 (D Conn 2009).

171 See, for example, *In re New Motor Vehicles Canadian Export*, 522 F3d at 20 ("In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof."); *Blades v Monsanto Co*, 400 F3d 562, 569 (8th Cir 2005); *Bell Atlantic Corp v AT&T Corp*, 339 F3d 294, 303–04 (5th Cir 2003).

172 Wright, Miller, and Kane, 7AA *Federal Practice & Procedure* § 1781 at 235 (cited in note 8).

173 See text accompanying note 164. See also Phillip E. Areeda and Herbert Hovenkamp, 1 *Fundamentals of Antitrust Law* § 3.03 at 24–25 (Wolters Kluwer 4th ed 2013).

ambiguous concept in practice. Antitrust injury traces its origins to *Brunswick Corp v Pueblo Bowl-O-Mat, Inc*,[174] in which the Supreme Court required the plaintiff to demonstrate "antitrust injury" in addition to establishing liability and damages.[175] The defendant, a bowling-alley operator, acquired three decrepit bowling alleys in markets where the plaintiffs, also bowling-alley operators, competed.[176] The plaintiffs objected to the acquisitions as an instance of monopolization, which is a violation of antitrust laws prohibiting mergers that tend to dangerously increase the acquiring firm's market share.[177]

The *Brunswick* Court assumed arguendo that the defendant had violated antitrust laws.[178] Nonetheless, the Court dismissed the claims. The Court first noted that every successful merger is likely to have *some* negative impact on *some* competitor.[179] Such is the nature of competition. However, antitrust laws, for the Court, were designed to prevent only those negative impacts that flow from anticompetitive behavior.[180] That is, antitrust laws are concerned with preventing market entry only when it would harm competition. Here, not only were the plaintiffs' injuries not encapsulated within this competition-centric framework, but the injuries sustained by the plaintiffs were the result of procompetitive behavior.[181] Indeed, the plaintiffs' injuries were simply caused by a successful bowling alley breathing new competitive life into three decrepit competitors that otherwise would have gone out of business, thereby decreasing the plaintiffs' market position. Were the Court to punish this behavior, antitrust law would be a vehicle for suppressing procompetitive activity, which axiomatically and definitionally harms competitors.

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174 429 US 477 (1977).

175 Id at 489 (emphasis omitted).

176 Id at 480.

177 Id (noting that the plaintiffs asserted that "these acquisitions might substantially lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act").

178 See *Brunswick*, 429 US at 477 (observing that the plaintiffs' claims "are well illustrated by the facts of this case").

179 Id at 487 ("Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons.").

180 Id (stating that "Congress has not condemned mergers" because they harm competitors, but rather it "has condemned them only when they may produce anticompetitive effects").

181 See id at 488 (stating that it would be "inimical to the purposes of [antitrust] laws to award damages for the type of injury claimed here").

The *Brunswick* Court captured this idea—of showing not only that an antitrust violation led to an injury, but also showing *why* that injury occurred—in the concept of "antitrust injury."[182] The Court defined antitrust injury as the "type [of injury that] the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[183] This, in practice, requires the plaintiff to demonstrate that her injury was the result not merely of an antitrust violation, but more specifically of an antitrust violation that resulted in explicitly anticompetitive effects. Not included in antitrust injury are antitrust violations that cause "an economic effect as to which antitrust law is indifferent, or, even worse, an economic effect that antitrust promotes, such as aggressive non-predatory competition."[184] For example, in *Brunswick* the plaintiffs' injuries were caused by procompetitive behavior. Even though this procompetitive behavior may itself have constituted a *violation* of antitrust law—as a dangerous merger—the *injury* was not of the type that antitrust law was designed or intended to prevent.

To illustrate, consider antitrust law as it applies to mergers. Large mergers—those between two or more competitors with a significant market share in a given industry—are frequently found to violate antitrust law's prohibition on monopolization.[185] However, as the *Brunswick* Court made clear, establishing such a violation is not enough to sustain an antitrust cause of action. The injuries that a merger—even one that is an admitted violation of antitrust law—exacts on competitors by lowering prices, providing superior products, or simply outcompeting rivals are not recoverable in antitrust law.[186] Antitrust injury does not merely ask *whether* there was an antitrust violation, but also *why* there was an antitrust violation.[187]

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[182] *Brunswick*, 429 US at 489 (emphasis omitted) (holding that plaintiffs "must prove *antitrust* injury" to sustain an antitrust claim).

[183] Id. See also Phillip E. Areeda, et al, IIA *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 335f at 74 (Wolters Kluwer 3d ed 2007) (clarifying that antitrust injury "demands that the plaintiff's alleged injury result from the threat to competition that underlies the alleged violation").

[184] Davis, 70 Antitrust L J at 698 (cited in note 169).

[185] See Louis Altman and Malla Pollack, 1 *Callmann on Unfair Competition, Trademarks and Monopolies* § 4:42 at 443 (West 4th ed 2003).

[186] See Davis, 70 Antitrust L J at 718 (cited in note 169), quoting *Cargill, Inc v Monfort of Colorado, Inc*, 479 US 104, 116–17 (1986) ("The logic of *Brunswick* compels the conclusion that the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.").

[187] Davis, 70 Antitrust L J at 723 (cited in note 169):

Given this tenuous operationalization, defining the precise nature of antitrust injury is a complicated task. Critically, antitrust injury draws on multiple independent elements of an antitrust cause of action; antitrust injury requires a bad act (violation) precipitating (causation) an anticompetitive result (liability) that injured a plaintiff (damages). As such, the antitrust-injury element has been varyingly labeled as a question of damages,[188] liability,[189] and causation.[190] In fact, antitrust injury contains shades of each textured element of a cause of action. The complications that this inquiry can create illustrate the vital importance of antitrust impact models—they are the means by which plaintiffs attempt to demonstrate the *why*, in addition to the *whether*, of an antitrust claim.[191]

Antitrust injury as a concept is perhaps best understood by contrasting the inner workings of a hypothetical tort action with those of *Comcast*, an antitrust action. Critically, a tort plaintiff will recover for any injury caused by a defendant's negligence, even if that injury was not the sort that the rule was meant to guard against.[192] Again consider an action alleging that the defendant negligently released a toxin into the surrounding environment.[193] The plaintiff will be compensated for any injury

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> Very simply, the doctrine of antitrust injury requires a court to examine not only *whether* the acts the defendant allegedly committed violate the law but also *why* they violate the law. The doctrine, in other words, directs a court to examine, in a proper case, what economic effects the case law rule or statute in question seeks to prevent.

188 See id at 724 (noting that the "unwary" have simply taken antitrust injury to refer to "injury in fact").

189 See *In re New Motor Vehicles Canadian Export*, 522 F3d at 28 ("Establishing liability, however, still requires showing that class members were injured at the consumer level."). See also McLaughlin, 1 *McLaughlin on Class Actions* § 5:36 at 1416 (cited in note 12) ("The fact of individual injury, in other words, is a liability issue, not simply a damages issue.").

190 See Rogers, et al, *Antitrust Law* at 840 (cited in note 183), quoting Daniel Berger and Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L J 809, 811 (1977) (stating that antitrust injury is "like the proximate cause requirement in the law of torts").

191 See Davis, 70 Antitrust L J at 703 (cited in note 169) ("To learn whether there is antitrust injury, we must first fill in the blank in the sentence, 'The merger [or the agreement in restraint of trade, or the unilateral business practice, or whatever] was illegal because . . . '") (brackets in original).

192 See Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, *The Law of Torts* § 206 (West 2d ed 2011) ("The foreseeability or risk rule holds the defendant subject to liability if he could reasonably foresee the nature of the harm done, even if the total amount of harm turned out to be quite unforeseeably large.").

193 See notes 29–30 and accompanying text.

sufficiently established.[194] For example, even if the release of toxins is thought to be tortious only because it creates a negligent risk of destroying area flora, an individual who happens to come into contact with the toxin and who has an extremely rare allergic reaction will also be compensated.[195] Tort law does not ask what the background negligence rule was meant to guard against, only whether the defendant in fact caused an injury.

Antitrust law is different. Consider, for example, a modification of *Comcast* in which the firms that were deterred from entering the market due to Comcast's dominance—overbuilder firms—themselves sought redress for Comcast's behavior.[196] These hypothetical plaintiffs would be able to establish that Comcast had *violated* the antitrust law through its clustering activities and thereby inflicted an *injury* on potential new entrants who were deterred from the market. However, a more piercing analysis of the claim would reveal that the overbuilders were injured as a result of facing a more robust competitor. That is, Comcast's clustering had effectively raised the cost of entry by allowing the firm to cut its own costs through consolidating its equipment, thereby freeing resources to more effectively compete with new entrants.[197] While this modification of *Comcast* is only loosely based on the district court's findings of fact—injuries sustained by competitor firms were not at issue in the case, precisely because those firms could not satisfy the antitrust-injury requirement—the example illustrates the *Brunswick* concept. The injury sustained by these firms is not the "type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[198] Rather, the "injury" sustained by the deterred potential entrants is precisely the type that antitrust law attempts to encourage—greater competition.[199]

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194 See J.D. Lee and Barry A. Lindahl, 1 *Modern Tort Law: Liability and Litigation* § 6.01 at 171 (Callaghan rev ed 1988).

195 See Jacob A. Stein, 2 *Stein on Personal Injury Damages* § 11:1 at 11-7 (West 3d ed 1997) ("When the plaintiff suffers from a latent condition that is brought to light by the injury, the defendant may be held responsible for all of the damages resulting from the defendant's triggering of the condition.").

196 See Part II.A.1.

197 See *Behrend v Comcast Corp*, 264 FRD 150, 167 (ED Pa 2010) ("Clustering also deters overbuilding by enhancing the clustering incumbent's ability to increase the cost and reduce the benefits of overbuilding.").

198 *Brunswick*, 429 US at 489.

199 See generally Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1993) (arguing that aspects of antitrust law overprotect inefficient small businesses at the expense of greater competition, thereby harming consumers).

Within this framework, antitrust injury has expanded to a *threshold* question of justiciability—one that is evaluated before ever reaching the merits of a claim. In short, antitrust injury is pertinent to and a component of standing. This was explicitly acknowledged by the *Brunswick* Court.[200] This construction of antitrust injury as a question of standing has since gained near-universal acceptance.[201] That said, the Court has made clear that "antitrust standing," derived through "antitrust injury," is distinct from the typical Article III standing requirement.[202] Antitrust standing involves identifying the *best*, rather than a *possible*, plaintiff to bring the antitrust claim.[203] That is, it ensures that claims brought before a court are grounded in injuries that were the result of anticompetitive rather than procompetitive behavior. While antitrust law is clearly concerned with market injuries, it explicitly endorses competition, knowing that competitive forces will enact some injury on some party (namely, a competitor).

The parallels between this a priori question of standing and the predominance inquiry that Rule 23(b)(3) imposes are striking. While both plainly relate to the merits of a plaintiff's claim and require the court to tangentially evaluate the merits of that claim,[204] they each operate as *threshold* questions designed to screen out improper plaintiffs.

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[200] See *Brunswick*, 429 US at 489 (discussing the plaintiff's burden of proof required to demonstrate an antitrust injury).

[201] See *Bell v Dow Chemical Co*, 847 F2d 1179, 1182 (5th Cir 1988) ("Antitrust injury is a component of the standing inquiry, not a separate qualification."). See also 54 Am Jur 2d *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 381 at 427 (cited in note 122) (noting that "[a]ntitrust injury and antitrust standing are overlapping concepts"); Edward K. Esping, John R. Kennel, and Thomas Muskus, Monopolies, 58 *Corpus Juris Secundum* § 227 at 849–50 (West 2009).

[202] See *Associated General Contractors of California, Inc v California State Council of Carpenters*, 459 US 519, 535 & n 31 (1983):

> [T]he focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

[203] See Thomas V. Vakerics, *Antitrust Basics* § 3.03[2] at 3–24 (Law Journal 2013) ("The concept of antitrust injury is designed to screen out complaints by competitors and others who were not hurt by anticompetitive practices. Instead, they were impacted by productive efficiencies, higher output and lower prices, factors the antitrust laws are intended to encourage.").

[204] Compare Davis, 70 Antitrust L J at 704–05 (cited in note 169) (noting that to establish "standing" through antitrust injury, the antitrust plaintiff must establish a plausible merits-based nexus between the alleged violation and her injury), with *Wal-Mart*

C. Reading Antitrust Injury into *Comcast*

This Section's first contention is that *Comcast* is, descriptively, best read as a case prioritizing antitrust injury over individualized damages. It is worth emphasizing that this is an interpretation of *Comcast*, not an attempt to discern the Court's genuine meaning (if there can be one) in the case. As this Comment's review of lower court interpretations of *Comcast* makes clear, this has become a common exercise. This Comment attempts to succeed where others have failed, advancing an interpretation that meets the following criteria: first, giving due meaning to the *Comcast* majority; second, making sense of the *Comcast* dissent's argument that the majority opinion does not alter the general predominance-inquiry rule; and third, formulating a normatively desirable reading. This Section illustrates that the antitrust-injury-centric interpretation of *Comcast*, independent of any normative gains to be discussed later, is desirable because it gives meaning to the *Comcast* majority's opinion without upsetting the general rule governing individualized damages, thereby also making sense of the dissent's argument.

In giving meaning to the *Comcast* majority, any interpretation must resonate with the Court's incantations of regularity in that case.[205] Although the *Comcast* majority focused on whether there was a means of calculating damages common to the class,[206] that is not, in fact, a question of individualized damages in the antitrust context, but rather a question of antitrust injury.[207] The *Comcast* Court was likely not discussing individualized damages in the ordinary sense, but rather antitrust injury. To wit, the opinion clearly and directly highlights antitrust injury.[208] It

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Stores, Inc v Dukes, 131 S Ct 2541, 2551 (2011) (stating that the Rule 23(b)(3) predominance inquiry will frequently "entail overlap with the merits of the plaintiff's underlying claim").

[205] Specifically, the Court stated that the case "turns on the straightforward application of class-certification principles." *Comcast*, 133 S Ct at 1433.

[206] See id at 1434 (stating that "assurance is not provided by a methodology that identifies damages that are not the result of the wrong").

[207] See *In re Currency Conversion Fee*, 264 FRD at 115 (concluding that, "because the parties essentially agree on a common methodology for proving injury-in-fact on a class-wide basis, common questions also predominate on the injury-in-fact prong of antitrust injury"). See also Areeda and Hovenkamp, 1 *Fundamentals of Antitrust Law* § 3:03 at 35 (cited in note 173) (noting that "the antitrust injury doctrine depends less on the plaintiff's proof than on . . . its theory of injury," and that "[t]heories that do not depend on proof are well suited to pre-discovery disposition").

[208] See *Comcast*, 133 S Ct at 1433 ("There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised.").

is worth noting that at least one court in the distinguish bin has recognized as much.[209] In clarifying that *Comcast* simply could not weigh on all class actions, the *Butler* court carefully noted that the Supreme Court's opinion should not be read as a commentary on individualized damages writ large.[210] This Comment takes that clarification one step further—the *Comcast* opinion was affirmatively erecting antitrust injury as the centerpiece of the Rule 23(b)(3) predominance inquiry in the antitrust context.

This interpretation of *Comcast* explains the core puzzle driving the lower court chaos—why the opinion was couched in terms of ordinary Rule 23(b)(3) jurisprudence.[211] A damages-centric interpretation of *Comcast* would be far from ordinary—rather, it would upset the prevailing Rule 23(b)(3) interpretation, which provides that the predominance inquiry is satisfied in the face of individualized damages.[212] By contrast, an antitrust-injury-centric approach does not require the displacement of the preexisting general rule, but still gives weight to the *Comcast* majority's opinion.

As noted earlier, the general rule on the role of liability as opposed to individualized damages held true in the antitrust-class-action context prior to *Comcast*.[213] Even commonality as to the antitrust-violation element of the claim regularly satisfied Rule 23(b)(3) predominance in the face of individualized damages.[214] That said, an existing body of case law predating *Comcast* holds that, in antitrust class actions, antitrust injury is more than simply a factor in the Rule 23(b)(3) predominance inquiry.[215]

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209 See *Butler*, 727 F3d at 801.

210 See id.

211 See note 61 and accompanying text.

212 See Part I.B.

213 See notes 165–66 and accompanying text.

214 See, for example, *Eisen v Carlisle and Jacquelin*, 391 F2d 555, 565–66 (2d Cir 1968) (determining that, while damage computations may vary among class members, the alleged unlawful conspiracy sufficed as a common element); *In re Visa Check/MasterMoney*, 280 F3d at 139.

215 See, for example, *In re Insurance Brokerage Antitrust Litigation*, 579 F3d 241, 268 (3d Cir 2009), quoting *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305, 311–12 (3d Cir 2008) ("Accordingly, for purposes of class certification pursuant to Rule 23(b)(3), the task for plaintiffs . . . is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.") (quotation marks omitted); *In re Hydrogen Peroxide*, 552 F3d at 311 ("In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof."); *In re New Motor Vehicles Canadian Export*, 522 F3d at 20 ("In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through

Specifically, a number of lower courts have held that predominance was satisfied in the antitrust-class-action context only when the antitrust-injury element of the claim was common across the entire class.[216] This Comment's reading of *Comcast* elevates the importance of this body of case law. That is, prior to *Comcast*, an antitrust class action may have been certified under Rule 23(b)(3) when the plaintiffs were able to show that common questions regarding a defendant's alleged antitrust violation predominated. After *Comcast*, according to this Comment's reading of that case, an antitrust class action may be certified only when the class demonstrates that common questions as to its antitrust injury predominate across the entire class.

This antitrust-injury-centric interpretation also makes sense of the *Comcast* dissent's argument that the majority opinion in that case did not upset the general predominance-inquiry rule. Antitrust injury is unique to antitrust class actions. The dissent's view—that the *Comcast* majority should not be read to say that, when individualized damages are present, Rule 23(b)(3) certification must axiomatically fail[217]—is also embraced by this Comment's interpretation of the case. Note, for example, that the dissent went to considerable lengths to highlight the unique importance of antitrust law to the case.[218] The naturally ensuing question is: Why dissent at all if both opinions agreed that antitrust injury should predominate? The answer lies in the dissent's view of the merits of the plaintiffs' antitrust-injury claim. Namely, the dissent believed that the majority's rebuke of the plaintiffs' antitrust-injury claim was an impermissible upheaval of the district court's findings of fact, which it argued should dictate the matter.[219]

Having established a plausible descriptive reading of *Comcast*—one that both gives due weight to the majority opinion and makes sense of the dissent's argument that the majority's opinion cannot be read to upset the general predominance-inquiry

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common proof."); *Bell Atlantic*, 339 F3d at 307. See also Areeda and Hovenkamp, 1 *Fundamentals of Antitrust Law* § 3:03 at 28 (cited in note 173).

216 See text accompanying note 171.

217 *Comcast*, 133 S Ct at 1437 (Ginsburg and Breyer dissenting) ("In the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.").

218 See id at 1439 (Ginsburg and Breyer dissenting) ("The special antitrust-related difficulty present here stems from the manner in which respondents attempted to prove their antitrust injuries.").

219 See id (Ginsburg and Breyer dissenting).

rule—it is worth turning to the normative implications of this reading.

D. Establishing the Predominance of Antitrust Injury

Comcast ought to be read as a case ushering in a new approach to the Rule 23(b)(3) predominance inquiry *exclusively* in the antitrust context. Critically, the fusion of Rule 23(b)(3) and antitrust injury will yield a symbiotic relationship between the two. Each can ultimately buttress the other's goals.

First, prioritizing antitrust injury will best serve the goals of Rule 23(b)(3). As noted earlier, Rule 23(b)(3) aims to achieve judicial economies.[220] The reason that liability questions are ordinarily prioritized in the predominance inquiry is that they are generally thought to be more complex and resource-consuming than individualized-damages questions.[221] This focus on judicial economies is particularly important in the antitrust context, given the inherently complex nature of antitrust-injury theories, which are often scaled over many thousands of plaintiffs.[222]

The potential judicial-economies concern this raises is magnified in light of the means by which antitrust injury is typically asserted and rebutted—dueling econometric models.[223] The failure to determine ex ante that antitrust injury predominates will result in thousands of incredibly complex and expensive minitrials over these already complex and expensive models. By contrast, resolving the antitrust-injury question at the outset will often dispense with liability and damages questions as well, which both naturally flow from antitrust injury.[224] That is, having established that the proffered class sustained an anticompetitive injury flowing from a violation of antitrust law, a plaintiff will have definitionally established the liability and damages elements of its claim.

This view of the Rule 23(b)(3) predominance inquiry, which is centered on judicial economies, helps to clarify why antitrust injury should be the centerpiece of antitrust class actions, whereas liability should be the centerpiece of other types of class

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220 See note 13 and accompanying text.

221 See notes 27–30 and accompanying text.

222 See Rogers, et al, *Antitrust Law* at 882 (cited in note 183).

223 See note 42 and accompanying text.

224 See Esping and Kennel, Monopolies, 58 *Corpus Juris Secundum* § 227 at 850 (cited in note 201) (noting that, in establishing antitrust injury, the private plaintiff must demonstrate an "antitrust violation and that the violation was at least a material cause of the plaintiff's injury").

actions. Consider, as an example, a class action comprised of workers seeking wages withheld in violation of various labor laws.[225] Reduced to its core elements, the predominance inquiry could possibly turn on one of two issues—liability or damages. Each plaintiff would, in an individual trial, advance strikingly similar (if not identical) evidence to demonstrate that the employer withheld wages. By contrast, it would be surprising if any two employees were due an identical withheld wage. Nonetheless, most courts (at least prior to *Comcast*[226]) would certify the class, recognizing the ease with which individual damages could be calculated—simply multiply the number of hours worked by the applicable hourly wage.

In the antitrust context, individualized antitrust injury cannot be so simply determined. While individualized damages and common questions as to liability could be addressed with similar ease in both a wage and an antitrust class action, there is no analogue for antitrust injury in the wage context. Antitrust injury is necessarily complex, as is the time- and resource-consuming process of determining whether the proffered antitrust class has established that it can be commonly addressed across the class.[227] Determining individualized antitrust injury would require compiling hundreds, if not thousands (depending on the size of the class), of multivariate impact models to demonstrate that individual class members had suffered an injury as a result of anticompetitive behavior, as opposed to the comparatively simple task of assessing whether there has been any injury in the more general sense.[228]

Second, Rule 23(b)(3) can itself buttress the central goal of antitrust injury—identifying the *best* antitrust plaintiff.[229]

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[225] See, for example, *Smith v Family Video Movie Club, Inc*, 2013 WL 1628176, *10 (ND Ill).

[226] For an example of courts that would not follow this predictable mold, see Part II.B.1.

[227] For a discussion of antitrust impact models, see text accompanying note 166.

[228] See text accompanying notes 242–44.

[229] See, for example, *Greater Rockford Energy & Technology Corp v Shell Oil Co*, 998 F2d 391, 395 (7th Cir 1993) (noting that antitrust standing "examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction"); *Todorov v DCH Healthcare Authority*, 921 F2d 1438, 1448 (11th Cir 1991) ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws."). See also David Gregory Mayhan, Note, *More Trouble with Treble: The Effects of* McCready *and* Associated General Contractors *on the Antitrust Standing Opinions of the Federal Courts of Appeals*, 10 J Corp L 463, 488 n 220 (1985) (noting that antitrust standing limits claims to "those plaintiffs in the best position to

Antitrust injury, as noted earlier, constitutes the backbone of antitrust standing.[230] Antitrust standing, to a greater extent than constitutional standing, aims to identify the *ideal* party to bring suit against the alleged wrongdoer.[231] This is uniquely necessary in an antitrust lawsuit, in which there may be thousands of private parties and a number of independent regulatory actors with constitutional standing.[232] Unlike other class action contexts, in which nearly any injured plaintiff will do, in the antitrust context a number of plaintiffs will have suffered injury—and therefore will likely meet Article III's standing requirements—but will not have suffered an *antitrust injury*.

As such, antitrust standing—determined by antitrust injury—operates as a costly screen. In establishing a high threshold of justiciability by importing antitrust injury into the analysis, antitrust standing requires plaintiffs to establish their antitrust injury up front or abandon the claim. That is, it compels potential litigants to fully internalize their utility (or lack thereof) to antitrust law by demonstrating not only that they are *potential* plaintiffs, but also that they are *ideal* plaintiffs. Compelling potential litigants to internalize the full spectrum of costs and benefits, rather than merely considering the benefits of antitrust law's promised treble damages,[233] is the costly screen. Only those antitrust plaintiffs with a sufficient probability of successfully attaining treble damages, discounted against the astronomical costs associated with establishing antitrust injury,[234] will bring suit. The Court recognized this screening function in *Atlantic Richfield Co v USA Petroleum Co*,[235] noting that, in the complex antitrust arena, it is necessary to identify the ideal plaintiff, lest a plaintiff negatively impacted by net-procompetitive activity bring suit.[236]

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litigate the antitrust claim" by, for example, ensuring that plaintiffs have sustained antitrust injury and thereby are "in the best evidentiary position to fully pursue the violation").

230 See text accompanying notes 200–03.

231 See note 203 and accompanying text.

232 See John Bourdeau, et al, 23 *Federal Procedure, Lawyers Edition* § 54:1 at 498 (West 2012).

233 See 15 USC § 15(a).

234 See *In re American Express Merchants' Litigation*, 634 F3d 187, 198 (2d Cir 2011) (accepting expert testimony that "even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million"). See also text accompanying notes 220–24.

235 495 US 328 (1990).

236 See id at 342 (stating that antitrust injury "ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in

However, within this framework, the class action mechanism operates as a subsidy that offsets antitrust standing's costly screen effect. By substantially magnifying the potential gain, the class action device may compel suboptimal litigants and their counsel to bring suit.[237] This not only raises administrative costs—by allowing poorly conceived antitrust class actions that require complex antitrust-injury minitrials into the judicial system—but also risks overdeterring procompetitive activity. That is, many harmed by net-procompetitive activities, unable to satisfy antitrust injury on their own, may sneak into the courtroom via the class action mechanism. Plaintiffs harmed by the procompetitive effects of a defendant's antitrust violation, such as the overbuilder firms in *Comcast*,[238] would be able to join plaintiffs injured by the anticompetitive effects of the *same* antitrust violation. In a nonantitrust class action, the class must establish liability and damages—both simple elements of any claim that courts are experienced with. By contrast, antitrust class actions require the proffered class to establish liability, damages, *and* antitrust injury. The third requirement can be easy to sneak under the radar if the court is not exceedingly careful. Standing requirements alone will be insufficient to screen out this overdeterrence risk given that individual class members are not per se required to establish individual standing up front.[239]

Fortunately, the Rule 23(b)(3) predominance inquiry can be deployed as a countervailing "tax" on the class action "subsidy" (which, recall, sidesteps the antitrust-injury costly screen). By requiring classes to establish common antitrust injury at the outset, the overdeterrence risk can be allayed. By contrast, the first element in an antitrust action—establishing violation of an antitrust law—serves as a poor costly screen. The thrust of the proffered class's claim is frequently encapsulated in the antitrust-injury element owing to its noted hybridity.[240] That is, antitrust injury is often inclusive of liability and damages. For example,

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the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for [ ] damages").

[237] See Terry Calvani and John Siegfried, *Economic Analysis and Antitrust Law* 388 (Little, Brown 2d ed 1988).

[238] See Part II.A.1.

[239] See Wright, Miller, and Kane, 7AA *Federal Practice and Procedure* § 1785.1 at 387–90 (cited in note 8). Though a court may review individual class members' standing after certification, as a practical matter, the certification order frequently marks the end of a class proceeding given settlement pressures. See *Szabo v Bridgeport Machines, Inc*, 249 F3d 672, 675 (7th Cir 2001).

[240] See Part III.B.

the *Comcast* dissent observed that the plaintiffs appropriately attempted to use their theories of antitrust injury to establish the antitrust-violation element of their class claim.[241] On this score, it has been stated that when antitrust injury is present, the antitrust-violation element of the claim is necessarily established as well.[242] Indeed, Justices Ginsburg and Breyer noted that establishing commonality as to an antitrust "violation may not be arduous,"[243] a claim that withstands empirical scrutiny.[244] By contrast, establishing commonality as to antitrust injury is a rigorous and complex process that often entails probing many different elements of the class claim.

It is important to emphasize that this Comment's interpretation of *Comcast* is just that—an interpretation. It is admittedly forced to grapple with what is at best unclear, and at worst unsupportive, language in the case's dueling opinions. What is clear, however, is that an antitrust-injury-centric interpretation of *Comcast* provides meaning and texture to the many intricacies of the case. It is superior to the literal bin because it gives meaning to the Court's confusing language concerning the general principles governing the Rule 23(b)(3) predominance inquiry. It is superior to the mitigation bin because it assigns due precedential weight to the majority opinion. It is superior to the bifurcation bin because it synchronizes the Court's opinion with long-standing case law. It is superior to the distinguish bin because it advances a positive and portable interpretation of *Comcast*. Most importantly, it constitutes a new interpretation synthesized from existing case law; one in which lower courts navigating the post-*Comcast* chaos on the ground can seek shelter.

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241 *Comcast*, 133 S Ct at 1438 (Ginsburg and Breyer dissenting).

242 See John J. Miles, 1 *Health Care and Antitrust Law: Principles and Practice* § 9:6 at 9-55 (West 2011).

243 *Comcast*, 133 S Ct at 1438 (Ginsburg and Breyer dissenting).

244 Substantially the same evidence is required to show that a defendant engaged in alleged price fixing, for example, whether one or one million plaintiffs bring a claim. Consider that in every antitrust class action that has cited *Comcast*, the antitrust-violation component of the class claim was either not challenged or found to be sufficiently common across the class. See, for example, *In re Cox Enterprises, Inc Set-Top Cable Television Box Antitrust Litigation*, 2014 WL 104964, *5 (WD Okla) ("It is [ ] clear that Plaintiff faced the same alleged illegal tie as that faced by other members of the proposed class."); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2013 WL 5391159, *3 (ND Cal) (relying on an expert's impact model and testimony to conclude that "the cartel was successful at increasing prices," while interrogating whether "the cartel's price increases impacted all, or nearly all, direct purchasers in a common way"). Interested readers are encouraged to contact the author for an explanation of the selection and cataloguing of all relevant cases that have cited *Comcast*.

To be sure, one may problematize this interpretation of *Comcast* with several potent critiques. First, even if this Comment provides an optimal reading of *Comcast*, this reading may not reflect the Court's actual intent. While the literal bin's interpretation of *Comcast* may prove harsh in practice, it is not beyond the realm of possibility that the Court intended this result.[245] However, one should regard this possibility with considerable skepticism given language in the *Comcast* opinion suggesting that the majority saw itself as applying ordinary class action principles.[246] Moreover, even if some members of the Court desired *Comcast* to "drive a stake through the . . . class action device," that is far from what the Court's opinion *does*.[247] This has been widely observed by courts interpreting *Comcast*, which explains, in part, why the literal bin occupies a minority position. Finally, and assuming arguendo that an expansive reading of *Comcast* is descriptively accurate (which rests on murky language at best), lower courts frequently temper potentially explosive Supreme Court opinions by reading them on the narrowest possible grounds.[248] There is nothing stopping the most expansive reading of *Comcast* from receiving the same treatment.

More troublingly for the antitrust-injury-centric interpretation is the Court's statement that *Comcast* did not invite "discussion . . . of substantive antitrust law."[249] There are, however, several reasons to read this contextually opaque statement as permitting an antitrust-injury-centric interpretation of *Comcast*. First, the Court's admonition of discussing "substantive antitrust law" was directly targeted at the dissent's attempt to revive the district court's substantive findings of fact pertaining to the alleged

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[245] See generally Allan Dinkoff, *"*Comcast v. Behrend*": Bigger Than We Thought at First Blush?*, NY L J (Apr 25, 2013), online at http://www.weil.com/~/media/files/pdfs/Newsletter_Employer_Update_May_2013.pdf (visited Aug 12, 2014).

[246] See text accompanying note 61.

[247] *Butler*, 727 F3d at 801.

[248] For an example in the antitrust context, compare *Bell Atlantic Corp v Twombly*, 550 US 544, 556 (2007) (holding that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to state a Sherman Act claim), with *In re Text Messaging Antitrust Litigation*, 630 F3d 622, 628 (7th Cir 2010) (interpreting *Twombly* narrowly by finding its requirement satisfied when the plaintiff class alleged parallel conduct and conspiracy, coupled with evidence that the defendants had the mere *opportunity* to collude in violation of the Sherman Act). See also *Swanson v Citibank, NA*, 614 F3d 400, 405 (7th Cir 2010) (rebuking *Twombly* by holding that the plaintiff had satisfied the FRCP 8(a)(2) pleading standard when she merely alleged "the type of discrimination that she *thinks* occurr[ed]," "by whom" it was done, and "when" it occurred) (emphasis added).

[249] *Comcast*, 133 S Ct at 1433.

antitrust violation.[250] Specifically, the Court's apprehension of "substantive antitrust law" refers to the dissent's extensive discussion of whether the plaintiffs' particular impact model in fact singled out the "overbuilder deterrence" theory of antitrust injury. Justice Scalia, writing for the majority, may have been simply reminding Justices Ginsburg and Breyer that the Court is entitled to probe behind the merits of the claim, but only up to a point.[251] The Court, in line with ordinary Rule 23 jurisprudence, emphatically does not allow its suspicions on whether the merits of the claim will prevail to impact the predominance inquiry unless there is unavoidable overlap.[252]

Second, the Court's statement that the case calls for no "discussion . . . of substantive antitrust law"[253] surely cannot mean that raising any issues pertinent to antitrust law is per se taboo. The *Comcast* majority repeatedly refers to complex questions of antitrust law in general, and "antitrust impact" in particular, in its opinion.[254] Third, it is well recognized that discussions concerning the merits of an expert's multivariate regression model—precisely the discussions that the Court desired to avoid—are substantive questions distinct from more general questions concerning the elements of an antitrust claim.[255]

The antitrust-injury-centric interpretation of *Comcast* comports with the Court's paradoxical orientation toward antitrust law—engaging in a discussion of broad antitrust concepts while simultaneously rebuking the dissent for discussing "substantive antitrust law"—by relying on a threshold question of justiciability. Antitrust injury, as noted earlier, serves as an additional, antitrust-specific standing requirement.[256] The *Comcast* dissent's antitrust protestations, by contrast, centered on substantive and merits-based questions of fact.[257] In contrasting

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250 Id, citing id at 1437–41 (Ginsburg and Breyer dissenting) (stating that the record supports the district court's findings of fact).

251 Id at 1431, quoting *Wal-Mart Stores, Inc*, 131 S Ct at 2551 (noting that the lower court had appropriately not yet reached the "merits" of the impact model's propriety, but that some "overlap" with the merits may be necessary at the certification stage).

252 See, for example, *Wal-Mart Stores, Inc*, 131 S Ct at 2551; *General Telephone Co of the Southwest v Falcon*, 457 US 147, 160 (1982).

253 *Comcast*, 133 S Ct at 1433.

254 Id at 1433–34.

255 See Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 8–9 (Harvard 2005) (noting that "technical expert testimony," including "an expert's multiple regression analysis," addresses questions of fact).

256 See notes 200–03 and accompanying text.

257 See note 218 and accompanying text.

these two antitrust-centric approaches, this Comment's antitrust-injury interpretation of *Comcast* does not at all depend on substantive discussions of antitrust law, but rather relies on settling threshold justiciability questions. The majority opinion is clearly willing to entertain discussions concerning "the particular antitrust injury on which petitioners' liability in this action is premised."[258]

It might also be argued that this Comment's interpretation of *Comcast* would severely hamper the ability of private litigants to deploy the class action mechanism in the antitrust context. There are three reasons why this critique should not concern the reader. First, while this Comment's interpretation of *Comcast* and Rule 23(b)(3) will substantially heighten the threshold for antitrust-class-action certification, some antitrust classes will still be able to satisfy the predominance inquiry by establishing common antitrust injury.[259] The feasibility of establishing common antitrust injury is a matter of empirical certainty.[260] Second, this interpretation of *Comcast* is certainly no more problematic than prominent alternative interpretations, at least one of which effectively eviscerates Rule 23(b)(3) class actions.[261]

Third, even if this Comment's interpretation of *Comcast* erects an insurmountable barrier to antitrust class actions, the magnitude of this problem is not immediately obvious.[262] Critically, antitrust law is unique insofar as a battery of government agencies has an equal, if not greater, ability to litigate to enforce the law.[263] While these agencies face resource constraints, one should expect that those cases most likely to otherwise generate private class claims to attract the most greatest-enforcement attention. The fact that these agencies will not funnel damage awards in the form of fines to private litigants is of little moment

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[258] *Comcast*, 133 S Ct at 1433.

[259] See, for example, *In re Cox Enterprises, Inc Set-Top Cable Television Box*, 2014 WL 104964 at *13 (certifying a class based on evidence of harm "common to the class").

[260] See, for example, *In re Cathode Ray Tube*, 2013 WL 5391159 at *7 (certifying an antitrust class action after *Comcast* in which the proffered class presented a sufficiently common antitrust-injury claim); *In re Nexium (Esomeprazole) Antitrust Litigation*, 297 FRD 168, 181 (D Mass 2013) (certifying an antitrust class action in light of *Comcast* by "first address[ing]" the "antitrust impact" question in the Rule 23(b)(3) predominance inquiry and finding sufficient commonality).

[261] See Part II.B.1.

[262] For a discussion of the "serious drawbacks" of class actions as a means of private antitrust enforcement, see Richard A. Posner, *Antitrust Law* 274–75 (Chicago 2d ed 2001).

[263] See, for example, *Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 412 (2004). See also Theodore L. Banks, 1 *Distribution Law: Antitrust Principles and Practice* § 1.11 at 1-198 to -200 (Wolters Kluwer 2d ed 2013).

in ensuring antitrust law's enforcement.[264] Indeed, this may buttress enforcement of the antitrust laws by removing the private litigant's incentive to settle out of court.[265] It is worth noting that this point counsels against an expansive reading of *Comcast* outside of the antitrust context. Erecting an insurmountable barrier to class actions outside of the antitrust context, where government agencies are less able to seek public enforcement, is far more troubling.

CONCLUSION

Comcast Corp v Behrend presents lower courts with nothing less than an interpretive mystery. Nearly all that is certain about the case are the stakes; how *Comcast* is interpreted will dictate the course of Rule 23(b)(3) jurisprudence for years to come. It would be an understatement to describe the resultant lower court terrain as a mere circuit split.

However, in all of its ambiguity, *Comcast* presents an opportunity. This Comment challenges liability's hegemony in the predominance inquiry and therefore allows that inquiry to better serve its role as a costly screen. Query the extent to which this account of the Rule 23(b)(3) predominance inquiry can or should be transplanted to other class action contexts.[266] Regardless, in the run-of-the-mine class action, the predominance inquiry is best served by focusing on liability, setting aside considerations of individualized damages. In the antitrust-class-action context, however, things are different—the crux of the claim turns on the plaintiffs' antitrust injuries. *Comcast* is rightly interpreted as a

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[264] So long as the antitrust violator is required to internalize the cost that its actions impose on society, it matters not for purposes of deterrence whether money is distributed to antitrust victims, given to charities, or even burned. See Posner, *Antitrust Law* at 266 (cited in note 262).

[265] See id at 275.

[266] For example, in the securities-fraud context it may be that predominance should be established via the economic-loss element of a securities-fraud claim. Such a claim requires a complex measure of the economic impact that the alleged securities fraud had on the plaintiff, designed to ensure that imposing liability deters only that behavior directly resulting in damage, rather than establishing a violation of securities laws. See *Dura Pharmaceuticals, Inc v Broudo*, 544 US 336, 343 (2005) (noting that economic loss is a critical element of a securities-fraud action because when the plaintiff simply demonstrates a securities law violation and a deflated price, "that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances . . . or other events, which taken separately or together account for some or all of that lower price"). See also *Newton v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 259 F3d 154, 188 (3d Cir 2001) (noting that, in the securities-fraud–class-action context, "analogy to antitrust class actions is well-taken").

case that finally recognizes this important difference, establishing the centrality of antitrust injury in the Rule 23(b)(3) predominance inquiry.