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ANTITRUST, CLASS CERTIFICATION, AND THE POLITICS OF PROCEDURE

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INTRODUCTION

In deciding whether to certify classes, courts traditionally refuse to resolve factual issues pertaining to the merits.[1] This approach governs in general and in antitrust cases in particular.[2] However, some courts have recently indicated that a change in the certification standard may be appropriate.[3] They seem to suggest that judges may—perhaps should or even must—find some facts relevant to the merits in ruling on certification.[4]

We have raised concerns elsewhere about this potential procedural innovation.[5] One concern is that its rationale—that it is necessary to prevent corporations from being coerced into settling frivolous actions[6]—lacks an adequate basis in theory or evidence.[7] Another concern is that it could wreak havoc with the orderly administration of litigation, either requiring a premature resolution of merits issues or a belated ruling on certification.[8] Yet another concern is that it effects a change in Federal Rule of Civil Procedure 23 through an improper process; that is, it does not follow the pro-

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1 The origin of this approach lies in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

2 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002) (requiring not that plaintiffs prove, but only that they "have shown that they *plan to prove* common impact by introducing generalized evidence which will not vary among individual class members" (emphasis added) (quoting *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 220 (E.D. Pa. 2001))).

3 *See* cases cited *infra* note 4.

4 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008); *In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 17 (1st Cir. 2008); Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005).

5 Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists?: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. (forthcoming 2010) (manuscript at 1), *available at* http://ssrn.com/abstract=1542143.

6 *Hydrogen Peroxide*, 552 F.3d at 310; *Canadian Cars*, 522 F.3d at 26.

7 Davis & Cramer, *supra* note 5 (manuscript at 1).

8 *Id.*

cedures required by the Rules Enabling Act for modifying the Federal Rules, nor does it abide by the protocols for enacting legislation.[9]

After a cursory review of these points, this Article develops two additional criticisms of the potential new class certification standard, ones we have addressed briefly before but not yet fully explored. The first is that resolution of merits facts—particularly in antitrust cases—is apt to exacerbate a judicial tendency to impose requirements at class certification that serve no legitimate purpose.[10] The second is that the potential new standard risks violating the Seventh Amendment.[11]

The first point is predicated on recognition that the decision whether to certify a class in an antitrust case tends to turn on whether plaintiffs have proposed a method of proving class-wide injury, or "common impact," at the class certification stage.[12] The concept of common impact is the subject of considerable confusion among courts and commentators.[13] A source of that confusion is that common impact embodies two related issues: (1) whether the challenged conduct would be expected to have caused harm as a general matter;[14] and (2) whether the challenged conduct would have caused widespread harm to class members or, in its more extreme articulation, whether it would have harmed *all* (or *virtually all*) of them.[15]

The latter issue tends to be the focus of recent class decisions. While the great bulk of courts hold that proof of widespread harm among class members is sufficient to establish common impact, some courts suggest—usually in dicta and without analysis or explication—that for a class to be certified, plaintiffs must propose a way to use common evidence at trial to show that all (or nearly all) of the class members suffered harm.[16]

The combination of requiring a showing that all or nearly all class members were injured with a new emphasis on resolving facts—even facts relevant to the merits—at the class certification stage could be read as creating a wholly new and artificial standard, a standard insufficiently connected to any issue appropriate for consideration at either the class certification

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9 *Id.*

10 *See infra* Part I.

11 *See infra* Part III.

12 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 151 (3d Cir. 2002); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310-11 (3d Cir. 2008); Blades v. Monsanto Co., 400 F.3d 562, 572 (8th Cir. 2005); *see generally* Davis & Cramer, *supra* note 5 (manuscript at 5).

13 *Compare* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974), *with Hydrogen Peroxide*, 552 F.3d at 311.

14 *Hydrogen Peroxide*, 552 F.3d at 313-14.

15 *Id.*

16 *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311-12; *In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 28 (1st Cir. 2008) (appearing to say that common proof is necessary to show that "each member of the class was in fact injured").

stage or at trial.[17] The class certification decision is supposed to focus on the practicality and fairness of litigation and, ultimately, the trial of a case on a class-wide basis. More specifically, to prevail on class certification under Federal Rule of Civil Procedure 23(b)(3), plaintiffs are required to demonstrate, in relevant part, that issues common to the class will predominate over issues specific to individual class members in the litigation and trial of the case.[18] The possible new class certification standard misinterprets this requirement in two ways.

First, the new standard imposes a requirement for class certification that is strangely unmoored to the showing plaintiffs will be asked to make on the merits. A straightforward approach to predominance is to focus on what plaintiffs will need to prove at trial and then to ask whether they can attempt to offer that proof through predominantly common evidence. Yet at trial—and on motions to dismiss or for summary judgment—plaintiffs are not ordinarily required to show that all or some specific percentage of the class members suffered harm. The jury trial instructions adopted by courts generally require plaintiffs to prove only: (1) a violation of the law; (2) that the violation caused harm to plaintiffs, the class in general, or both (but not that it caused harm to all or some set percentage of class members); and (3) the aggregate damages the conduct at issue caused to the class as a whole.[19] At trial, judges, plaintiffs, and defendants show little interest in determining which members of the class were—and which were not—damaged by defendants' anticompetitive conduct.[20] The same is true of much of the case law: it requires a showing that any harm would be widespread among class members, not that all (or virtually all) class members suffered injury.[21] At the class certification stage, then, evidence predominantly common to the class consistent with widespread injury should suffice for class certification.

There is a possible objection to this view that we must consider. Federal Rule of Civil Procedure 23 can alter the process for adjudicating substantive legal rights, but it cannot alter those substantive rights.[22] The objection is that allowing plaintiffs to show only a violation, widespread harm from that violation, and aggregate damages—and not requiring them to

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17 Notably, while the recent willingness of courts to resolve factual issues at class certification has drawn substantial commentary, little attention has been paid to the suggestion that "common impact" may require proof of injury to all or virtually all class members—perhaps because courts making this suggestion do not seem to realize that they could be altering the legal standard and offer no justification for any change that may take place.

18 FED. R. CIV. P. 23(b)(3).

19 *See* Special Verdict Form at 1-7, *In re* Scrap Metal Antitrust Litig., No. 1:02cv0844 (N.D. Ohio Feb. 9, 2006) [hereinafter *In re Scrap Metal* Special Verdict Form]; Davis & Cramer, *supra* note 5 (manuscript at 5).

20 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 145 (3d Cir. 2002).

21 *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155, 157-59 (1982).

22 The Rules Enabling Act does not permit the adoption of Federal Rules of Civil Procedure that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006).

show harm to each and every class member—would relax the substantive requirements of an antitrust claim. There are two potential responses to this argument. The first is that allowing an aggregate recovery without showing injury to every class member does not deprive defendants of any substantive rights. As long as plaintiffs demonstrate that their method for proving class-wide damages would not hold a defendant liable for any more harm than it caused to the class as a whole, then plaintiffs carry their burden regarding every element of an antitrust claim for every dollar the class recovers. Put another way, the damages computation will not include any damages for any class member who does not satisfy every element of an antitrust claim. In antitrust cases, standard economic methods can provide an accurate calculation of damages to the class as a whole such that the presence of uninjured members in the class does not affect the total recovery. As a result of the availability of such methods, requiring only widespread injury to the class—and not evidence that all class members were harmed—does not affect defendants' substantive rights. Given these circumstances, plaintiffs' inability to produce evidence capable of proving that all class members suffered antitrust injury should not bar class certification or a class recovery at trial. If any uninjured class members can be identified, they can be carved out of the class. If they cannot be identified, the presence of uninjured members in the class generally will neither expand the class's substantive rights nor expose the defendant to a single dollar of excessive damages.

The second response to this objection is that while Rule 23 cannot alter substantive rights, federal courts are free to adapt substantive antitrust law to procedural realities. The Supreme Court has done so, for example, by generally limiting damages actions brought by purchasers under federal antitrust law only to entities that buy directly from defendant[23] and allowing these direct purchasers to recover the full overcharge they paid, even if they were able to mitigate the harm they suffered.[24] The Court justified both rules as ways to address the pragmatic difficulties of calculating damages in antitrust cases, thereby fostering the policy goal of punishing and deterring antitrust violations.[25] Similarly, the Supreme Court has held that the filing of a class action complaint tolls the statute of limitations for absent class members—even for those that had no actual notice of the filing.[26] According to the Court, this rule is intended to promote "the efficiency and economy of litigation" that is the principal purpose of the class action device.[27] Arguably, each of these rules alters defendants' substantive rights. But, of course, federal courts have the authority to interpret federal antitrust law,

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23 Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977).

24 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

25 *Illinois Brick*, 431 U.S. at 731-32, 732 n.12.

26 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-53, 561 (1974).

27 *Id.* at 553.

and, as these examples show, they may do so in light of the procedural context in which that substantive law applies. Moreover, as we argue below, defendants suffer no meaningful prejudice from allowing a class to recover without a showing of injury to each and every class member.[28]

The possible new class certification standard interprets the predominance requirement in a second way that is inappropriate. Focus on so-called "common impact" has led some courts to imply that Rule 23(b)(3) requires that common issues must predominate over individual issues as to *each element* of plaintiffs' claim.[29] But this is an odd interpretation of Rule 23. Properly understood, the rule requires that common issues predominate in the litigation *as a whole*, not in regard to each element. And the reality is that if trial addresses common impact at all (and it rarely, if ever, does), it is a minor issue. Class antitrust trials focus almost entirely on whether defendants violated the antitrust laws and, if so, what the total damages are—not whether some small portion of the class did not suffer harm.[30] As a result, a preoccupation with common impact at the class certification stage can lead courts to deny class certification for a supposed lack of predominance even in cases where common issues in fact would predominate at trial.

The exacting attention to common impact recently undertaken by some courts, then, is a distortion of class certification doctrine, an issue that is expensive and time-consuming to litigate and that impedes the certification of some classes for no good reason. And the combination of this potential new focus on common impact with allowing—or requiring—judges to find facts on the merits at class certification compounds the problem. The potential new class certification would dramatically increase the cost in both time and money of resolving the class certification issue without serving any legitimate purpose.

Moreover, the rationale for ratcheting up the class certification standard is troubling. It reflects a heightened concern for the welfare of the very large corporations that are typically defendants in antitrust class actions—again, a concern not adequately grounded in theory or evidence[31]—without a corresponding concern for the welfare of the victims of corporate abuse, victims that tend to be smaller businesses and consumers. The risk is that class certification doctrine is being skewed to serve the interests of a particular class of litigants. In other words, the potential new standard for class certification may in effect be political or ideological in the pejorative sense.

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28 *See infra* Part II.C.4.

29 *See, e.g.*, *In re* Hydrogen Peroxide, 552 F.3d 305, 313 (3d Cir. 2008) (discussing defendants' expert testimony at class certification addressing whether "Plaintiffs will be able to show, through common proof, that all or virtually all of the members of the proposed class suffered economic injury caused by the alleged conspiracy" (internal quotation marks omitted)).

30 *Id.*; *see also In re Scrap Metal* Special Verdict Form, *supra* note 19, at 1-7.

31 *See* sources cited *supra* notes 5-6.

A similar point holds true in regard to the Seventh Amendment. Courts to date have not adequately considered the implications of judges finding facts at the class certification stage that will ultimately be resolved by a jury—findings of fact that the parties possess a *constitutional right* to have resolved by a jury. Outside of the politically charged context of class actions, the Supreme Court held in *Beacon Theatres, Inc. v. Westover*[32] and *Dairy Queen, Inc. v. Wood*[33] that judges should await and abide by jury findings in addressing equitable relief that will turn on the same facts as relief at law.[34] We argue that this rule applies to class certification, which is equitable in nature. As a result, if judges are going to interpret Rule 23 to allow or even require them to make findings of fact relevant to the merits, the parties should have the right to postpone the class certification decision until after trial. Judges should then be bound by the findings of the jury in deciding whether to certify a class.

Of course, there are strong reasons not to postpone the class certification decision until after trial. Doing so can give rise to various practical and procedural problems, such as how a class can be bound by a jury trial about which it had no advance notice. But the solution to those problems is to leave the traditional standard for class certification intact. Distorting class certification doctrine—and then delaying the class certification decision to avoid violating the Seventh Amendment—makes little sense.

Indeed, judicial inattention to the constitutional right to a jury in modifying the class certification standard is symptomatic of problems that beset interpretation of the Seventh Amendment in the class action context. In this regard, courts have engaged in what might be called selective formalism. As they modify procedure to the detriment of plaintiffs and to the benefit of large corporate defendants, they show scant concern for the constitutional rights at play.[35] In other words, courts make no rigorous effort to assess whether increasing the burden on plaintiffs at the pleading stage, at summary judgment, and now at class certification is consistent with the Seventh Amendment. Judges who traditionally espouse a rigid, formalist approach to constitutional interpretation—generally of an originalist sort—suddenly are quite pragmatic about procedural changes. As the writings of Professor Suja Thomas reveal, this approach is difficult to explain; under a disciplined originalist interpretation of the Seventh Amendment, the procedural obstacles courts impose on plaintiffs give rise to serious constitutional concerns.[36] Thus, the historian and legal scholar William Nelson has con-

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32 359 U.S. 500 (1959).

33 369 U.S. 469 (1962).

34 *Beacon Theatres*, 359 U.S. at 510-11; *Dairy Queen*, 369 U.S. at 479.

35 *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 744-51 (5th Cir. 1996).

36 *See, e.g.*, Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1856-73 (2008) [hereinafter Thomas, *Motion to Dismiss*]; Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 158 (2007) [hereinafter Thomas, *Summary Judg-*

cluded—and he considers it a good thing—that the Seventh Amendment has been read not in light of what originalism requires, but instead to promote overall economic vitality, particularly by shielding corporations from what he perceives to be excessive litigation.[37]

On the other hand, the Seventh Amendment has at times been interpreted as a bar to plaintiffs pursuing legal actions on a class basis. When plaintiffs seek to break litigation into phases so as to permit class certification of undoubtedly common issues (such as whether a defendant engaged in a course of conduct that violated the relevant legal standard), some judges become quite rigid regarding the Reexamination Clause of the Seventh Amendment.[38] They hold that the Constitution prevents practical procedural measures that would make partial class certification feasible.[39] As we argue below, this formalist approach is premised on an implausible reading of a key Supreme Court precedent, *Gasoline Products Co. v. Champlin Refining Co.*,[40] and risks a political or ideological attitude toward the Seventh Amendment, one that may ultimately skew its interpretation, once again to the benefit of large corporate defendants.

We conclude that we should guard against developing the law in a way that benefits large corporate defendants without adequate justification. Judges should remain disciplined in applying the class certification standard and the Seventh Amendment. Any proposed change in the certification standard should be based on solid empirical evidence and theoretical analysis, implemented as a result of an appropriate process (a formal change to the rules or new legislation) and crafted in a way that survives scrutiny under the Constitution.

Part I of this Article describes the somewhat confusing standard that some courts have adopted at the class certification stage in antitrust cases and briefly reviews some of the concerns we have raised in the past about this potential innovation. Part II argues that any new class certification

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ment]; Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 689, 751-53 (2004) [hereinafter Thomas, *Seventh Amendment*]; Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 734 (2003) [hereinafter Thomas, *Constitutionality of Remittitur*].

37 William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1664-66 (2008).

38 *See, e.g.*, *Castano*, 84 F.3d at 751 & n.31 (holding that Seventh Amendment Reexamination Clause would be violated by bifurcating trial between class and non-class issues); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995) (same); *cf.* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 424-25 (5th Cir. 1998) (relying on interpretation of Reexamination Clause in light of *Gasoline Products* to affirm denial of class certification in employment discrimination action). *But see* Allison v. Citgo Petroleum Corp., No. 96-30489, 1998 U.S. App. LEXIS 24651, at *1-2 (5th Cir. Oct. 2, 1998) (denying panel rehearing and rehearing en banc, but appearing not to rely on the panel's original reasoning regarding the Seventh Amendment for affirming the denial of class certification).

39 *See* cases cited *supra* note 38.

40 283 U.S. 494 (1931).

standard that the courts impose is likely to exacerbate the inappropriate emphasis some courts place on "common impact" in adjudicating class certification motions in antitrust cases. Finally, Part III addresses the selective formalism that some courts demonstrate in applying the Seventh Amendment to various procedural innovations, including the potential new antitrust class certification standard.

I. CONCERNS ABOUT INNOVATION IN THE CERTIFICATION STANDARD

A. *The Old Standard: It Ain't Broke*

Before the recent spate of federal appellate court decisions suggesting a possible change in the class certification standard, the requirements under Rule 23 were reasonably well settled. The Supreme Court in *Eisen v. Carlisle & Jacquelin*[41] had held that a trial court should not undertake a "preliminary inquiry into the merits" in deciding whether to certify a class.[42] Taken literally, this holding precludes a court from considering any material other than the complaint—with the allegations taken as true—in addressing class certification. But courts have not taken *Eisen* literally. Most notably, in *General Telephone Co. of the Southwest v. Falcon*,[43] the Supreme Court authorized trial courts to "probe behind the pleadings"[44] in undertaking a "rigorous analysis"[45] of the issues relevant to certification. Notwithstanding *Falcon*, courts understood that *Eisen* barred them from deciding ultimate merits facts in addressing class certification.[46] Courts could assess the evidence available in a case, but only, for example, to determine whether plaintiffs had *proposed* a plausible or colorable method of proving their case using predominantly common evidence.[47]

B. *A Possibly Confusing New Standard?*

A significant flaw with the possible new class certification standard is that it displaces a workable and well-understood legal standard with one that is very difficult to interpret or apply. For example, *In re Hydrogen*

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41 417 U.S. 156 (1974).

42 *Id.* at 177.

43 457 U.S. 147 (1982).

44 *Id.* at 160.

45 *Id.* at 161.

46 *See, e.g.*, *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1, 17 (1st Cir. 2005) ("Exercising its broad discretion . . . the district court must evaluate the plaintiff's evidence . . . critically without allowing the defendant to turn the class-certification proceeding into an unwieldy trial on the merits." (emphasis omitted)).

47 *In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002).

Peroxide Antitrust Litigation[48] suggested courts must assess the evidence—even evidence pertaining to the merits—in deciding whether plaintiffs have satisfied each prong of Rule 23 by a preponderance of the evidence.[49] Yet the court failed to articulate precisely what this standard entails, even in regard to the requirement of predominance that was the focus of its attention.

The *Hydrodgen Peroxide* court's reticence is understandable given the difficulty of framing the standard it adopted. One plausible reading of the predominance requirement under *Hydrogen Peroxide* is something along the following lines: plaintiffs must show by a preponderance of the evidence that they will be able to prove the elements of their claims predominantly through common evidence by a preponderance of the evidence.[50] This articulation is clumsy—it verges on incoherence—but it is hard to avoid such awkwardness given the reasoning of *Hydrogen Peroxide*. The repeated use of the phrase "preponderance of the evidence," for example, may seem redundant, but it is not. This class certification standard derives from plaintiffs' ultimate burden at trial, and each separately involves a preponderance of the evidence standard.

Indeed, if we were to eliminate the apparent redundancy, one might read the court to require plaintiffs to prove the elements of their claims by a preponderance of the evidence predominantly through common evidence at the class certification stage. In other words, plaintiffs would have to prove their claims on a class-wide basis to a judge in order to have the opportunity to prove their claims on a class-wide basis to a jury. That courts might impose such a standard is conceivable. For that reason, we discuss in Part III why doing so would likely violate the Seventh Amendment.[51] However, the *Hydrogen Peroxide* court denied that it was requiring plaintiffs to prove their case on the merits to the judge in order to get a class certified.[52] But while the court took pains to say what plaintiffs need not show, it did not give meaningful guidance as to what plaintiffs must show.

The resulting standard is likely to be confusing and costly. Judges and litigants will be unsure about the burden plaintiffs must satisfy to prevail under Rule 23. Plaintiffs' attorneys will be tempted to prove the merits—or come very close to doing so—to avoid the danger that courts will conclude they have not gone far enough. As in *Hydrogen Peroxide*, judges may deny that Rule 23 imposes such a heavy burden. But if they cannot define in a

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48 552 F.3d 305 (3d Cir. 2008).

49 *Id.* at 307.

50 *See id.*

51 *See infra* Part III.

52 *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311-12 ("Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to determine that the element of antitrust impact is capable of proof at trial through evidence that is common to the class . . . .").

useful way what the class certification burden actually is, that denial will not help clarify the standard.

C. *Inadequate Basis in Theory and Evidence*

Hydrogen Peroxide and similar cases, then, appear to increase the burden on plaintiffs at the class certification stage, even if it is unclear by how much. The imposition of a new, confusing standard is all the more troubling because it attempts to solve a problem that probably does not exist. In *Hydrogen Peroxide*, the Third Circuit offered only one policy justification for its new approach: class certification forces defendants to settle cases that lack merit.[53] For this proposition, it relied on the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.[54] Neither court, however, provided a persuasive basis for this proposition. This is understandable, as there is no such basis.[55]

1. No Evidence of "Blackmail"

The supposed pressure to settle even meritless cases that class certification places on defendants is characterized as "legal blackmail."[56] One problem with the legal blackmail theory is that it lacks any empirical basis, at least in the antitrust setting.[57] The only evidence of defendants settling meritless lawsuits comes from the securities and stockholder contexts,[58] and this evidence is inapposite (and of questionable strength which we will not discuss here). Thus, courts and scholars offer no empirical evidence that defendants settle frivolous antitrust lawsuits with any regularity.[59]

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53 *Id*. at 310; *see also In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 26 (1st Cir. 2008) (reasoning that rigor in the class certification analysis is especially important "when a case implicates the sort of factors that we have deemed important in the Rule 23(f) calculus, namely, when the granting of class status 'raises the stakes of litigation so substantially that the defendant likely will feel irresistible pressure to settle'" (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293 (1st Cir. 2000))).

54 550 U.S. 544 (2007); *Hydrogen Peroxide*, 552 F.3d at 310.

55 For a careful critique rejecting the argument about legal blackmail, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1389-90 (2003).

56 *See, e.g.*, *id.* at 1357-58; Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 843 (1974).

57 *See* Silver, *supra* note 55, at 1359-60.

58 *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1293-94, 1294 nn.157-58 (2002) (discussing the very thin empirical record, all of it involving securities and stockholder litigation).

59 For a discussion of successful private antitrust cases with strong indicia of success, see Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008). The underlying data for the study is summarized in Robert Lande &

Even if this were not the case, courts already have taken a series of actions in response to the perceived problem of legal blackmail. They have imposed a more stringent summary judgment standard on plaintiffs,[60] as well as a heightened pleading standard.[61] Some study of whether these measures suffice to cure the problem of legal blackmail—if in fact there is a problem—is appropriate before introducing yet another obstacle to plaintiffs pursuing an antitrust class action.

2. Theory: Legalized Theft Is More Likely than Legalized Blackmail

An understanding of the dynamics of class litigation confirms that a heightened class certification standard is a solution to a problem that likely does not exist. Indeed, in addition to a lack of evidence that class certification in antitrust suits places pressure on defendants to settle, the dynamics of class litigation explain why it is far more likely that large corporate defendants will pay too little—rather than too much—when they do settle antitrust class action lawsuits.

First, defendants in antitrust cases tend to be powerful financial institutions. After all, plaintiffs bring antitrust claims against entities with market power—entities capable of distorting market forces for their own gain. It is odd to think of entities with such market power as particularly vulnerable in litigation or settlement negotiations. They have the financial and other means to protect their interests.

Second, pre-judgment interest is generally not available in antitrust cases.[62] That means defendants are the beneficiaries, in effect, of interest-free loans. The longer litigation endures, the longer they will enjoy the benefits of a return on the money they have taken from plaintiffs in violation of their rights—and the longer plaintiffs will suffer from not having access to that capital. Indeed, that disparity places pressure on plaintiffs, rather than defendants, to agree to settle early and on less favorable terms and empowers defendants to delay settlement unless and until they receive an offer to their liking.

Joshua Davis, Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies (Mar. 1, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1105523. For a related argument that the deterrence effect of private antitrust litigation with strong indicia of merit is greater than the deterrence effect of criminal enforcement of the antitrust laws by the Department of Justice, see Robert H. Lande & Joshua P. Davis, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws (Mar. 5, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1565693.

60 Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

61 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

62 *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) (criticizing the failure to award pre-judgment interest in antitrust cases).

Third, moving beyond the interests of the parties themselves, the incentives of the *attorneys* in class litigation make excessive settlements unlikely. We do not mean to impugn anyone's ethics; no doubt many lawyers pursue the interests of their clients selflessly. But some counsel, at times, deliberately place their own welfare above that of their clients, and the perception of other attorneys is skewed at the margins. So, agency costs matter.

Plaintiffs' lawyers generally litigate on a contingency fee basis, paying the costs of litigation out of pocket and receiving compensation only if and when they prevail. These lawyers benefit from settling cases early, even if it is for an amount lower than the amount they could obtain through protracted litigation. This gives them the greatest compensation per hour with the least risk and expense. Defense lawyers, in contrast, are paid on an hourly basis. The longer litigation persists—and the more involved it is—the better they are likely to do financially. These dynamics redound to the detriment of plaintiff classes and to the benefit of class action defendants. Indeed, most of the criticism of class actions is directed at the concern that plaintiffs' lawyers settle for too small—not too large—a sum.[63]

The likely effect of a heightened class certification standard, then, is that large corporate defendants will pay too little to settle antitrust litigation. Antitrust violations will then become—or remain—financially worthwhile. Indeed, this dynamic tends to find confirmation in the fact that antitrust damages appear insufficient to deter large corporations from violating the antitrust laws,[64] despite the availability of nominal treble damages.[65] Therefore, the concern of the courts should be legalized theft perpetrated by defendants on plaintiffs, not, as previously discussed, legalized blackmail perpetrated by plaintiffs on defendants.

3. Asymmetry: Inadequate Concern for "False Negatives"

Even if courts do not recognize the general risk that class litigation will settle for too little, raising the class certification standard in all cases to protect defendants makes little sense. The dynamics of settlement vary from case to case. Perhaps in some cases, plaintiffs (or plaintiffs' lawyers) have a

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63 *See, e.g.*, Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470-72, 470 nn.51-53 (2000); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1111-12 (1996); Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1053-54 (1995). Failure to adequately deal with these fundamental dynamics by proponents of a merits inquiry—and the heightened standard—at class certification renders their analysis unpersuasive. *See, e.g.*, Bone & Evans, *supra* note 58, at 1285-86.

64 Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329, 329 (2004).

65 Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 140 (1993).

bargaining advantage over large corporate defendants. A heightened standard for class certification would at most make sense in those cases.

But in other cases—likely in most cases—defendants have a bargaining advantage over plaintiffs. In such cases, a heightened standard for class certification is inappropriate. To the contrary, a lower standard than that which ordinarily applies would be in order, at least under the logic of *Hydrogen Peroxide* (and *Twombly*).[66] Otherwise, plaintiffs will settle for an amount that is small compared to the strength of their position at trial.[67]

Without this sort of corrective, the danger is that litigation will produce too many of what might be called "false negatives"—cases in which an antitrust violation occurred, but whose outcome does not reflect that reality. Indeed, the danger lies not only in cases that are brought and obtain less relief for the class than they should. The greater consequence lies in the cases that plaintiffs will never bring at all.

Antitrust class actions require significant commitments from plaintiffs' law firms. These cases often involve millions of dollars in hard costs, additional millions of dollars in attorney time, and years of battle.[68] As a result, plaintiffs' lawyers often refuse to take meritorious cases for a host of reasons, many of them having little to do with the merits. If the potential recovery is too small—perhaps less than $20 million—or the difficulty of getting the class certified too great, the victims of an antitrust violation are unlikely to find a lawyer willing to file their case on a contingency fee basis (victims are rarely able to pay court costs and an hourly rate out of pocket). The consequence is that much illegal activity goes unpunished. A heightened class certification standard would only exacerbate this problem, especially if it were to result in a dramatic increase in the costs of getting a class certified.

D. *A Poor Procedural Fit*

Depending on how the new class certification standard is interpreted, it also fits poorly into ordinary litigation procedure. A judge is supposed to

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66 *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

67 This claim requires some elucidation. A plausible benchmark for a proper reflection of the merits is the expected value of trial. *See generally* Joshua Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 85-94, 106-16 (2004) (defending expected value as a measure of justice in settlement); Joshua P. Davis, *Applying Litigation Economics to Patent Settlements: Why Reverse Payments Should Be* Per Se *Illegal*, 41 RUTGERS L.J. (forthcoming 2010) (manuscript at 27-33), *available at* http://ssrn.com/abstract=1489090 (same). A defense of this standard, however, is beyond the scope of this Article.

68 Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1009-14 (2008).

rule on class certification "at an early practicable time."[69] That admonition is difficult to reconcile with any judicial effort to delve into the merits. The more a class certification hearing resembles a trial on the merits, the later in the proceeding it should occur—likely no earlier than a reasonable time after the close of discovery.[70] Indeed, as we discuss in Part III, if judges are going to resolve elements of plaintiffs' claims in the process of certifying the class, the Seventh Amendment may even require the judge to wait until after the jury trial before deciding whether to do so.

At a minimum, plaintiffs should have some formal protection from having to move for class certification before they have an opportunity for discovery, just as Rule 56(f) allows them to challenge a motion for summary judgment as premature.[71] Even with that protection in place, however, the result may be a class certification decision that occurs later in litigation than makes practical sense. But the solution to that problem is to return to the traditional class certification standard, not to force plaintiffs to make a motion before they have an adequate opportunity to prepare to do so.

E. *An Improper Means of Changing a Federal Rule*

A final preliminary point is that if a dramatic innovation is to be made in the class certification standard, the right approach is to follow the process for altering the Federal Rules of Civil Procedure under the Rules Enabling Act or for enacting legislation. The Advisory Committee of Civil Rules has initiated changes to Rule 23 on several occasions. Despite calls for change to the substantive class certification standard under Rule 23, the Rules Committee left that standard intact.[72] And courts should not circumvent the required means of amending the rules of federal procedure.

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69 FED. R. CIV. P. 23(c)(1)(A).

70 *See, e.g.*, *In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 26-27 (1st Cir. 2008) (imposing a heightened class certification standard and noting that "it is not uncommon to defer final decision on certifications pending completion of relevant discovery").

71 FED. R. CIV. P. 56(f).

72 The Third Circuit in *Hydrogen Peroxide* conceded this point. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008) (acknowledging that amendments to Rule 23 did "not alter the substantive standards for class certification"). Indeed, if *Hydrogen Peroxide* is read as altering the class certification standard in the Third Circuit, the decision would then have failed to abide by precedents by which it recognized it was bound. *See* Davis & Cramer, *supra* note 5 (manuscript at 12). As *Hydrogen Peroxide* itself acknowledged, one panel in the Third Circuit cannot reverse the holding of another. *Hydrogen Peroxide*, 552 F.3d at 318 n.18. For that reason, *Hydrogen Peroxide* can be read as setting a new class certification standard only to the extent that it was able to distinguish cases like *Linerboard* successfully, and it is questionable authority for the claim that there has been a significant change in the class certification standard in the Third Circuit.

II. POLITICS AND RULE 23: THE IMPORTANCE AND IRRELEVANCE OF CLASS-WIDE IMPACT

A. *Common Impact as the Crux of Certification in Antitrust Cases*

The crux of the decision whether to certify a class in an antitrust case under Federal Rule of Civil Procedure 23(b)(3) is usually the requirement of predominance of common issues.[73] Two background points are necessary to any understanding of this issue: one involves the elements of an antitrust claim, and the other involves the class certification standard.

To prevail on an antitrust claim at trial, a plaintiff must prove three elements: an antitrust violation, causation, and impact (or fact of damage).[74] For purposes of analyzing antitrust claims for class certification, however, courts often break up an antitrust claim into three different conceptual categories: (1) a violation of the antitrust laws; (2) injury (or impact) resulting from the violation;[75] and (3) computation of damages.[76] To certify a class seeking damages under Rule 23(b)(3), a plaintiff must show that a class-wide trial would be sensible and thus that, looking at the case as a whole, issues common to the class would predominate over issues specific to individual class members.[77]

The main issues at an antitrust trial—namely, whether plaintiffs can demonstrate the violation itself and prove a link between the violation and harm to competition generally through higher prices or reduced output—tend not to implicate individual issues at all.[78] This kind of analysis explains a key observation of the Supreme Court: "Predominance [of common issues] is a test readily met in certain cases alleging . . . violations of the antitrust laws."[79] And, not surprisingly, because the predominant issues in antitrust cases tend to be common to the class, for at least two decades courts have routinely certified classes in antitrust cases in which direct purchasers

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73 *See, e.g.*, *Canadian Cars*, 522 F.3d at 20.

74 Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 105 (2d Cir. 2007).

75 *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 87 (D. Conn. 2009) ("The injury and causation element has also been referred to as 'antitrust injury' and 'causation or impact.'" (quoting *Cordes*, 502 F.3d at 105)).

76 *See* Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 172 (E.D. Pa. 1997) ("First, Plaintiffs must prove that Defendants violated the antitrust laws. Second, Plaintiffs must prove the fact of damage, or the impact, of Defendants' unlawful activity. Third, Plaintiffs must prove the amount of damages sustained by said activity."); *see also Hydrogen Peroxide*, 552 F.3d at 311; *Cordes*, 502 F.3d at 104-05.

77 *See* FED. R. CIV. P. 23(b)(3).

78 *EPDM*, 256 F.R.D. at 87-95.

79 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

seek damages—perhaps more regularly than in any other field of substantive law.[80]

The "impact" category, which tends to be the focus of the class certification inquiry in the antitrust context, refers to a showing that a plaintiff or class member suffered at least some of the requisite type of injury due to the challenged conduct. As typically analyzed, antitrust impact incorporates "causation" as part of the analysis; thus, the issue is whether defendants' conduct caused class members the requisite type of harm.[81] In antitrust class actions brought by purchasers of a product directly from the entity charged with the violation, plaintiffs typically allege that they suffered damage in the form of payment of artificially inflated prices or overcharges.[82] Significantly, in federal antitrust cases brought by direct purchasers, courts allow plaintiffs to prove that they were injured simply by showing that they overpaid for a product or service due to an antitrust violation (i.e., that they were "overcharged").[83] As Judge Easterbrook has put it, "[t]he monopoly overcharge is the excess price at the initial sale . . . ."[84] Moreover, there is no requirement that the plaintiff or class member know about—or rely upon—any of defendants' anticompetitive conduct to suffer antitrust injury.

These rules greatly simplify the "common impact" showing because proving impact does not require any information about an individual plaintiff or class member other than that it overpaid for the product or service at issue.[85] Paying an overcharge caused by the alleged anticompetitive conduct

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80 *See In re* Mercedes-Benz Antitrust Litig., 213 F.R.D. 180, 187 (D.N.J. 2003) ("Antitrust defendants resisting class certification routinely argue that the complexity of their particular industry makes it impossible for common proofs to predominate on the issue of antitrust impact. . . . but the argument 'is usually rejected where the conspiracy issue is the overriding one.'" (citations omitted) (quoting *In re* Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302, 306 (E.D. Pa. 1980))); Bank v. Elec. Payment Servs., Inc., No. Civ.A. 95-614-SLR, 1997 WL 811552, at *21 (D. Del. Dec. 30, 1997) (proof of a course of conduct "to restrain trade is generally considered a common question that predominates over other issues"); 6 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 18:25 (4th ed. 2002) ("[C]ommon liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues.").

81 Impact incorporates two different issues. The first is whether the class member suffered harm, or injury-in-fact. The second is whether the conduct caused "legal injury"; that is, whether the injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Cordes*, 502 F.3d at 106 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)) (internal quotation marks omitted).

82 *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977) ("[T]he overcharged direct purchaser . . . is the party 'injured in his business or property' within the meaning of [the Clayton Act] . . . .").

83 *Id.*

84 Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 633 (7th Cir. 2002). Whether the plaintiff or class member "passed on" that overcharge down the chain of distribution, or was otherwise able to mitigate its effect, is irrelevant as a matter of law to the determination of fact of injury (or the amount of damages). Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

85 *See Illinois Brick*, 431 U.S. at 731-33 (discussing the so-called direct purchaser rule that is designed to simplify analysis). *See generally* Joshua P. Davis & David F. Sorensen, *Chimerical Class*

on a single purchase suffices to show—as a legal and factual matter—impact or "fact of damage."[86]

Critically important for our discussion, this concept is distinct from the *quantum* of damages suffered by an individual class member or by the class as a whole. The distinction between fact of damage and quantum of damages arose out of a body of law recognizing that showing the amount of damages suffered by an antitrust plaintiff can pose difficult and thorny problems of proof, including the modeling of a counter-factual world absent the challenged conduct.[87] As a result of those concerns, and so as not to allow an antitrust defendant to escape liability where it was the defendant that created the uncertainty associated with quantifying damages in the first place, once plaintiffs have satisfied the element of fact of damage and thereby established liability, courts have relaxed the burdens associated with *quantifying* damages.[88] Courts have traditionally held that even where the amount of damages "is not susceptible to classwide [sic] proof, that is not enough to defeat class certification."[89]

The price of admission, however, to the relaxed burden relating to quantum of damages, is that a plaintiff must show that it suffered "fact of damage" or some antitrust injury flowing from defendants' conduct.[90] Because of this relaxed burden on damages, and also because proof of the antitrust violation (e.g., an agreement to fix prices or unilateral efforts to monopolize markets) tends to be overwhelmingly common, defendants tend to emphasize the issue of impact on class members in challenging class certification.[91] It is no coincidence that the central focus of *Hydrogen Peroxide* is on plaintiffs' ability to prove impact on a predominantly class-wide basis.[92]

Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in Valley Drug, 39 U.S.F. L. REV. 141, 144-52 (2004).

86 The terms "impact," "antitrust injury," and "fact of damage" are often used interchangeably in antitrust cases. *See In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 269 (3d Cir. 2009) ("the element of antitrust injury—that is, the fact of damages"); *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 214 (E.D. Pa. 2001) (equating "impact" and "fact of damage"); *In re* Plastic Cutlery Antitrust Litig., No. CIV. A. 96-CV-728, 1998 WL 135703, at *5 (E.D. Pa. Mar. 20, 1998) (also equating "impact" and "fact of damage").

87 *See In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 309 (E.D. Mich. 2001).

88 *See, e.g.*, Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 265-66 (1946).

89 *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 103 (D. Conn. 2009).

90 *Cardizem*, 200 F.R.D. at 307.

91 *See, e.g.*, *id.* at 308.

92 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008) ("[T]he task for plaintiffs at class certification 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. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial.").

Defendants generally argue that the evidence necessary to show this single element of plaintiffs' claims—impact—will vary by class member. The form that this argument usually takes is that individual issues predominate regarding whether the alleged antitrust violation caused the relevant kind of harm to class members; that is, whether the violation caused each (or most) of them to pay higher prices. Defendants may contend, for instance, that prices move in no particular pattern over time and across customers; that larger customers with more buying power get discounts or rebates unavailable to smaller customers; or that purchasers in certain regions, categories, or areas were unaffected by or even benefited from the challenged conduct. Defendants conclude that the variability in harm across the class will give rise to individual issues that could predominate at a class trial.

In addition to refuting defendants on the specifics of these kinds of arguments, plaintiffs typically counter with a form of the "rising tide lifts all boats" metaphor, making the argument that the baseline from which prices were set is higher due to the anticompetitive conduct as reflected in an observed "pric[ing] structure."[93] Plaintiffs tend to argue that because of this structure, variances in prices paid by class members are irrelevant to the question of common impact.[94] Class members may have differential bargaining power and pay different prices, but because the baseline is higher, all of them pay inflated prices due to the challenged conduct, and thus recourse to individualized proof that class members were impacted by the conduct is unnecessary.[95]

Under the prevailing class certification standard, plaintiffs tend to win this battle the vast majority of the time.[96] And it is unclear at this point

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93 *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 455 (3d Cir. 1977).

94 *Id.*

95 *Id.* ("If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage."); *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 89 (D. Conn. 2009) (noting that the variation in prices paid by, or bargaining power of, class members is not an impediment to a finding of common impact where there is a standardized pricing structure or the conspiracy affects the "base" price from which negotiations begin); *In re* Urethane Antitrust Litig., 251 F.R.D. 629, 638 (D. Kan. 2008) ("This evidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed, provides generalized proof of class-wide impact."); *see also In re* Potash Antitrust Litig., 159 F.R.D. 682, 695 (D. Minn. 1995) ("[B]ecause the gravamen of a price-fixing claim is that the price in a given market is artificially high, there is a presumption that an illegal price-fixing scheme impacts upon all purchasers of a price-fixed product . . . .").

96 *See, e.g.*, *Urethane*, 251 F.R.D. at 635 ("The appropriate analysis [of common impact] begins with a recognition that defendants seeking to defeat class certification in horizontal price-fixing cases such as this one face an uphill battle. . . . [I]t is widely recognized that the very nature of horizontal

whether *Hydrogen Peroxide* or other recent, similar opinions materially alter the common impact analysis. The Third Circuit in *Hydrogen Peroxide*, for instance, did "not question plaintiffs' general proposition, which the District Court accepted, that a conspiracy to maintain prices could, in theory, impact the entire class despite a decrease in prices for some customers in parts of the class period, and despite some divergence in the prices different plaintiffs paid."[97] Moreover, the Third Circuit explicitly reaffirmed its long-held view that plaintiffs can show common impact merely by demonstrating that an antitrust violation caused prices to be generally inflated and that class members made some purchases at the higher price, despite variance in prices paid.[98]

Further, *Hydrogen Peroxide* may simply be an instance of plaintiffs having an unusually difficult impact case to make because the record appeared to show very little impact to the class at all from the challenged conduct.[99] The court noted that "the price was lower, not higher, at the end of the class period than at the beginning. And the evidence, as interpreted by defendants' expert, shows that through much of the class period the production of hydrogen peroxide was increasing rather than decreasing."[100] Where prices may have been unaffected by the challenged conduct or affected only slightly, given the noise typically present in market-wide pricing data, it may be difficult to discern a pattern of widespread overcharges to the class.[101] And yet, even on these facts, the court noted that "[t]he current record suggests it may be possible to overcome some obstacles to class certification by shortening the class period or by fashioning sub-classes."[102] Accordingly, it remains to be seen what effect, if any, *Hydrogen Peroxide* will have on how courts analyze and apply the common impact requirement.[103]

To the extent that there is a new standard taking hold, it flows from the confluence of two factors: (1) a possible new impetus to resolve merits questions at the class certification stage; and (2) a possible new application,

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price-fixing claims are particularly well suited to class-wide treatment because of the predominance of common questions."); Cohen v. Chilcott, 522 F. Supp. 2d 105, 116 (D.D.C. 2007) ("Antitrust actions involving allegations of price-fixing have frequently been found to meet the predominance requirement in class certification analyses.").

97 *Hydrogen Peroxide*, 552 F.3d at 325.

98 *Id.* at 325-26.

99 *Id.* at 326.

100 *Id.*

101 *Id.*

102 *Id.* at 325 n.26.

103 Notably, the first two district courts to take up class certification in antitrust cases following *Hydrogen Peroxide* granted class certification (albeit only after holding hearings during which expert testimony was taken, and even then, only after the courts waded into the merits of the expert opinions). *See* Behrend v. Comcast Corp., 264 F.R.D. 150, 191 (E.D. Pa. 2010); McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461, 491 (E.D. Pa. 2009).

commonly urged by defendants, of a stringent requirement that plaintiffs must demonstrate with predominantly common evidence harm to all (or nearly all) class members. These departures from past practice, together, would have the potential to create a new world in which plaintiffs are required to prove "merits" facts at the class certification stage that, paradoxically, *would almost certainly never come up at trial*. How can it be that defendants hold out judicial decisions like *Hydrogen Peroxide*, which ask the district courts in considering class certification to focus on the conduct of *trial*, as imposing a stringent requirement that has nothing whatsoever to do with trial? We attempt below both to explain that apparent paradox and to suggest its fundamental flaw.

Part of the problem relates to imprecision in the language used to describe plaintiffs' burden at the class certification stage regarding the element of impact—language in dicta that does not appear to have been intended to alter the law.[104] The decisions effecting a possible change do not acknowledge that courts have traditionally held that plaintiffs at the class certification stage need show only that predominantly class-wide evidence is available to demonstrate that injury is "widespread" among class members—not that "all" class members were injured.[105] Even so, some of these recent decisions, including *Hydrogen Peroxide*, have been read broadly—and likely inaccurately—by defendants as articulating a sweeping requirement that plaintiffs must produce class-wide evidence capable of establishing that all—or, depending on the formulation, virtually all—class members suffered harm from the anti-competitive conduct at issue.[106] As we show below, the traditional statement of the law as requiring evidence of only widespread harm is entirely appropriate both as a characterization of the predominance test for class certification purposes, and as an implicit reflection of the requirements for proving impact on the class at trial. Indeed, if a stringent "all or nearly all" requirement were to take root, it would be inconsistent both with the underlying principles of class certification doctrine and the underlying substantive antitrust law.

B. *Predominance Should Depend on Plaintiffs' Burden at Trial*

The ordinary way to frame the predominance requirement for class certification is in terms of plaintiffs' burden at trial. The elements of the claim that plaintiffs will have to prove at trial provide the ultimate guidance

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104 *Hydrogen Peroxide*, 552 F.3d at 311; *see also In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 28 (1st Cir. 2008) (appearing to say that common proof showing "each member of the class was in fact injured" may be necessary).

105 *See, e.g.*, *Hydrogen Peroxide*, 522 F.3d at 311.

106 *See Comcast*, 264 F.R.D. at 183.

for the inquiry into whether a class should be certified.[107] Rule 23(b)(3) explicitly requires a showing that a class-wide trial would be superior to other methods of adjudication and that issues common to the class as a whole predominate over issues particular to individual class members.[108] The rule provides that the predominance and superiority inquiries relate mainly to questions of the efficiency and practicality of trying the case on a class-wide basis.[109] The focus of the predominance requirement, as the Third Circuit explained in *Hydrogen Peroxide*, is to "consider how a trial on the merits would be conducted if a class were certified."[110] The *Hydrogen Peroxide* court repeatedly makes the point that the predominance inquiry should turn on how plaintiffs will prove their case *at trial*.[111] So important was this proposition that the Third Circuit in *Hydrogen Peroxide* quoted the following 2003 advisory committee note to Rule 23 not once, but *twice*: "[a] critical need is to determine how the case will be tried."[112]

In short, the proper focus of the common impact analysis at the class certification stage is on the legal requirements on the merits and a prediction about the nature of the proof used to meet these substantive legal requirements at trial.

C. *Predominance Should Not Require Harm to All Class Members*

1. Antitrust Class Trials Do Not Address Harm to All Class Members

Because the predominance inquiry is supposed to focus on a prediction about issues that will be litigated on the merits at trial, requiring common proof that *all* class members were injured makes sense only if plaintiffs must satisfy that same test at trial. Oddly, *Hydrogen Peroxide* largely fails

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107 *See Hydrogen Peroxide*, 522 F.3d at 311.

108 FED. R. CIV. P. 23(b)(3).

109 Indeed, two of the four factors that Rule 23(b)(3) explicitly asks courts to consider in determining whether a class should be certified focus on whether a class action would be practical or efficient: "(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.*

110 *Hydrogen Peroxide*, 522 F.3d at 311 n.8 (quoting Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003)) (internal quotation marks omitted).

111 *Id.* ("Rule 23(b)(3) requires the court to 'consider how a trial on the merits would be conducted if a class were certified'" (quoting *Sandwich Chef*, 319 F.3d at 218)); *id.* at 317 (stating that the court may, at the class certification stage, "'consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take'" (quoting Eisen v. Carlysle & Jacquelin, 417 U.S. 156, 166 (1974))); *id.* at 319 (referring to the concept of a "trial plan" for class certification purposes in order to focus attention on "the likely shape of a trial on the issues" (quoting FED. R. CIV. P. 23 advisory committee's note) (first internal quotation marks omitted)).

112 *Id.* at 312, 319 (internal quotation marks omitted).

to heed its own direction to focus on the trial, never explicitly setting out precisely *how* the issues on which its decision turned would or could affect the ultimate outcome of the case.[113] In fact, antitrust class trials do not, in general, address the share of the class members harmed (or unharmed) by the challenged conduct.[114]

Rather, at the trials of the vast majority of antitrust conspiracy or monopolization cases, proof tends to focus on whether defendants engaged in conduct that violated the antitrust laws.[115] And those issues—"did the defendants conspire or monopolize; that is, did they do what plaintiffs said they did?" and "did that conduct harm competition generally?"—will invariably be the same for all members of the class.[116] Plaintiffs also typically present generalized causation evidence, showing that the challenged conduct caused harm to competition and higher prices generally.[117] And, finally, plaintiffs present evidence of aggregate damages to the class as a whole or a common formula from which damages could be computed.[118] Plaintiffs' counsel do not dwell at trial on the claims of class members for which they have no evidence of injury, but rather focus their impact and damages evidence on those in the class that they *can* prove were injured.[119] Thus, even where plaintiffs' evidence would fail to show impact for a material number of class members, it is by no means obvious that "individualized" evidence would predominate at trial.

Defendants, for their part, spend the bulk of trial denying that they engaged in the challenged conduct in the first place or contesting whether it was anticompetitive.[120] They then typically offer a categorical assertion that no plaintiff or class member paid any overcharge at all—either because prices never went up or because any increases in price resulted from factors other than the challenged conduct.[121]

Jury instructions that describe and summarize the positions of the parties in antitrust class trials reflect defendants' blanket denials.[122] Assuming

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113 *Id.* at 311.

114 *See, e.g.*, *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 90 (D. Conn. 2009).

115 *Id.*

116 *Id.*

117 *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 455 (3d Cir. 1977).

118 *See, e.g.*, *id.* at 456.

119 *See, e.g.*, *EPDM*, 256 F.R.D. at 89-90.

120 *See, e.g.*, *In re* High Pressure Laminates Antitrust Litig., No. 00 MDL 1368(CLB), 2006 WL 1317023, at *4 (S.D.N.Y. May 15, 2006).

121 *See, e.g.*, *id.*

122 *See, e.g.*, Transcript of Record at 2315, *In re* High Pressure Laminates Antitrust Litig., No. 00 MDL 1368(CLB) (S.D.N.Y. May 23, 2006) [hereinafter *In re High Pressure Laminates* Transcript] (instructing the jury that the defendant denies that it participated in the alleged conspiracy to fix prices and "also denies that the Class and the Subclass suffered any compensable damages"); Final Jury Instructions at 14, *In re* Tricor Direct Purchaser Antitrust Litig., No. 05-340-SLR (D. Del. Nov. 25, 2008) [hereinafter *In re Tricor* Final Jury Instructions] ("Defendants deny that they have a monopoly, and

that plaintiffs' damages analysis does not seek recovery for those who were not overcharged, it is not clear why defendants would dwell on the non-injured class members.[123] Defense counsel have little reason at trial to care about the claims of those class members whom plaintiffs concede *were not harmed* (or about whom plaintiffs have no proof of harm) where the presence of those class members is not adding to the aggregate damages plaintiffs seek.[124] Accordingly, there is no reason that individual issues pertaining to the non-injured minority—even if legally relevant—would predominate at a class trial.

Thus, as long as the non-injured class members do not affect the damages exposure of defendants, defendants would have no legitimate reason to bring up the fact that some small share of class members were not injured—and typically defendants do not do so.[125] Indeed, the presence of uninjured members in the class is actually *a benefit* to defendants because those class members' claims are typically extinguished through the entry of a final judgment in a class action brought under Rule 23(b)(3). By including class members in the case that do not increase overall damages, defendants expand the pool of extinguished claims without additional cost to them.[126]

2. Plaintiffs Generally Need Not Show Harm to Every Class Member

There is a very good reason that class antitrust trials do not dwell on issues pertaining to the precise share of class members harmed by the challenged conduct: the jury instructions and verdict forms do not require such proof. Indeed, a sampling of the jury instructions and verdict forms in some of the few antitrust class actions that have progressed sufficiently far to address the issue does not reveal a requirement that *all* class members were harmed. As to impact, they ordinarily ask only whether the antitrust viola-

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assert that any conduct they engaged in was reasonable and based upon independent, legitimate business and economic justifications, without the purpose or effect of injuring competition. They also contend that their actions have had pro-competitive effects that benefitted competition and patients."); Jury Instructions at 39, *In re* Vitamins Antitrust Litig., 236 F. Supp. 2d 67 (D.D.C. 2003) (No. 99-197 (TFH)) [hereinafter *In re Vitamins* Jury Instructions] (instructing the jury that one of the defendants "contends that the alleged agreements were repeatedly broken and hence were largely ineffective in limiting real competition between choline chloride producers. [Defendant] also contends that factors other than the alleged agreements—for example, changes in the cost of raw materials—had significant independent impact on the price").

123 *See infra* Part II.C.4.

124 *See id.*

125 *See In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 309 (E.D. Mich. 2001).

126 And, of course, the uninjured class members lose no meaningful rights, as, by hypothesis, they suffered no injury and are entitled to no damages. For a discussion of this issue see *infra* Part II.B.4.

tion caused harm to "the plaintiffs," "the class," or "class members."[127] One verdict form requires a finding of injury to the "named plaintiffs"[128] and asks whether "in addition to causing injury to the named plaintiffs, [defendants' conduct] caused the other members of the plaintiff class . . . to suffer injury to their business or property."[129] When it comes to trial, therefore, courts leave it up to juries to decide, presumably within some reasonable band, how "widespread" injury must be among the class in order to have a reasonable basis to find that the "the class" was injured by the challenged conduct. Courts have not, however, required plaintiffs to prove that *all* members of the class suffered harm at a class trial. A far more generalized showing is sufficient.

Further, if there were a legal requirement that all or virtually all class members were injured, one would expect defendants to file dispositive motions before trial, or motions for judgment as a matter of law during or after trial, asserting that the class action should be dismissed because plaintiffs failed to plead or produce evidence showing harm to every single class member. One will search in vain, however, for a court that has dismissed an antitrust class action at the pleadings stage for failure to plead that all class members were injured. One will similarly not find a court that has entered summary judgment for a defendant based on plaintiffs' failure to create a genuine issue of material fact on the "all or nearly all" issue or that has directed a verdict for defendants because plaintiffs were lacking in this regard. Indeed, questions regarding what share of the class was harmed or unharmed have not even come up as part of the litigation of the merits of antitrust class actions.

Given that the predominance question is about whether plaintiffs will be able to prove their case *at trial* with mainly common evidence, requiring plaintiffs to demonstrate at the class certification stage the availability of

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127 *See, e.g.*, *In re High Pressure Laminates* Transcript, *supra* note 122, at 2333 (reviewing verdict form, which states, in part, "[Question] Six asks you to determine whether the national Class members paid more for high pressure laminates as a result of the agreement or conspiracy, and you will answer that yes or no"); *In re Tricor* Final Jury Instructions, *supra* note 122, at 45-46 ("The Direct Purchaser Plaintiffs allege that due to defendants' anticompetitive conduct, prices for fenofibrate products were above what they would have been had defendants not impeded competition by generic fenofibrate products. Direct Purchaser Plaintiffs allege that, as a result, they have been overcharged for their Tricor purchases. Such overcharges, if proven to be the result of anticompetitive conduct, are an appropriate indicator that these plaintiffs have suffered antitrust injuries."); Verdict Sheet, *La. Wholesale Drug Co. v. Sanofi-Aventis U.S., L.L.C.*, 07 Civ. 7343 (HB) (S.D.N.Y. Nov. 21, 2008) [hereinafter *Sanofi-Aventis* Verdict Sheet] ("Do you find that the Plaintiffs have satisfied their burden of proving that they and the class they represent incurred damages by having to pay more for leflunomide due to the period of time, if any, that Defendant's Citizens Petition delayed the FDA's approval of generic leflunomide?"); *In re Vitamins* Jury Instructions, *supra* note 122, at 51 ("If you find that there was a violation of the antitrust laws that caused an overcharge to plaintiffs and class members, you must then consider the amount of that overcharge.").

128 *In re Scrap Metal* Special Verdict Form, *supra* note 19, at 5.

129 *Id.* at 6.

evidence that will not be pertinent to the merits at trial is illogical. If there is no substantive legal obligation for plaintiffs to show harm to each class member at trial, then there should be no similar requirement at the class certification stage. Nor is it satisfactory to suggest that this issue does not come up on the merits because the court that certified the class has already resolved it. After all, cases like *Hydrogen Peroxide* suggest that the court may consider merits issues in deciding whether to certify a class,[130] not that the judge may decide merits issues in a way that is binding on the case. As discussed below, any other approach would violate the Seventh Amendment right to a trial by jury.[131] Accordingly, the mere fact that a court has found, at the class certification stage, that plaintiffs will be able to produce common evidence at trial that nearly all class members were harmed by the challenged conduct does not absolve plaintiffs of actually making that showing at trial, *even if* such a showing were required to obtain a class judgment.

3. Courts Have Ruled Widespread Injury Suffices

Of course, the simple fact that common impact is rarely raised in adjudicating the merits of antitrust class actions does not necessarily mean that plaintiffs are not required to prove impact as to all class members to obtain a class judgment at trial. Jury instructions can be improperly or inartfully drafted.[132] Moreover, defendants and their highly skilled counsel may simply be making a strategic decision—or perhaps even a mistake—in failing to file dispositive motions seeking dismissal of antitrust class actions for failure to prove harm to all class members, or failing to otherwise press this issue at trial or on appeal. But it is hard to see why defendants would never perceive a strategic advantage in making a dispositive motion if they thought doing so had any merit. And, in our view, the major defense firms in this country need not put their malpractice carriers on notice for this oversight. In fact, the overwhelming majority of courts that have actually considered the question require only that plaintiffs use predominantly class-wide evidence to show *widespread* injury to the class, not that plaintiffs show that *all or virtually all* class members suffered harm.[133]

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130 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316-20 (3d Cir. 2008).

131 *See infra* Part III.

132 *See generally* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (describing the results of an empirical study of comprehension issues with jury instructions).

133 *See, e.g.*, *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 321 (E.D. Mich. 2001) ("[C]ourts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."); *In re* Urethane Antitrust Litig., 251 F.R.D. 629, 638 (D. Kan. 2008) (stating that generalized injury demonstrates class-wide impact); Meijer, Inc. v. Warner Chilcott Holdings, Co., 246 F.R.D. 293, 310 (D.D.C. 2007) (finding widespread

Because defendants rarely, if ever, raise the issue post-class certification, the judicial opinions directly addressing the issue of what plaintiffs are required to prove about the share of the class that suffered harm are rendered almost exclusively at the class certification stage.[134] Consider Judge Posner's recent observation in affirming a grant of class certification in a non-antitrust case that has relevance here:

> What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification . . . .[135]

Posner was simply reaffirming the overwhelming weight of authority supporting the proposition that common proof of widespread harm is sufficient for class certification purposes.[136]

One interpretation of the cases allowing plaintiffs to produce common evidence showing only "widespread harm" at the class certification stage is that these courts are assuming that, at trial, plaintiffs will be able either to identify and then remove the uninjured parties[137] or to prove harm to those outlier entities with a small amount of individualized evidence that would be unlikely to overwhelm the trial.[138] In other words, it is possible that these courts are implicitly assuming that plaintiffs must show harm to each class member at trial, but nonetheless finding that that will be possible with predominantly, but not exclusively, common evidence.

Yet some class certification opinions appear to go further than stating a mere class certification requirement, implying that even at trial plaintiffs would not need to prove impact as to each and every class member as long as they can establish widespread harm. For instance, the court in *In re Live Concert Antitrust Litigation*[139] observed that even where "*Defendants might ultimately demonstrate on the merits that some class members were not harmed* . . . this does not preclude class certification."[140] Fairly read, *Live Concert* and other similar decisions contemplate a certified class including

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injury sufficient for class certification purposes); *In re* Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 352 (N.D. Cal. 2005) (same); J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 225 F.R.D. 208, 219 (S.D. Ohio 2003) (same).

134 *See, e.g.*, *Cardizem*, 200 F.R.D. at 321.

135 Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009) (citations omitted).

136 *See* cases cited *supra* note 133.

137 *See, e.g.*, *Meijer*, 246 F.R.D. at 310 n.17 (stating that if the evidence ultimately suggests that some class members were not injured, "the Court can accommodate by amending the class definition to exclude such putative class members").

138 *See, e.g.*, *In re* NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 523-24 (S.D.N.Y. 1996).

139 247 F.R.D. 98 (C.D. Cal. 2007).

140 *Id.* at 141 (emphasis added).

members that defendants "ultimately demonstrate on the merits" were not injured.[141]

Furthermore, the courts that have invoked some version of the "common proof that all class members are harmed" formulation have historically not meant it literally. For instance, the Third Circuit in *Bogosian v. Gulf Oil Corp.*[142] stated that fact of damage could be established with common evidence "so long as the common proof adequately demonstrates some damage to each individual."[143] Yet *Bogosian* allowed that, even if as to some class members "the free market price would be no lower than the conspiratorially affected price," class certification would still be appropriate.[144] A similar contrast exists in the Third Circuit's decision in *In re Linerboard Antitrust Litigation*.[145] Upholding class certification in that case, the court at times appeared to accept that plaintiffs had to produce common evidence that all class members were injured,[146] but elsewhere in the opinion recognized the existence of unharmed class members constituting "limited exceptions relating to purchasers whose contracts were tied to a factor independent of the price of linerboard."[147] Notably, district courts in the Third Circuit have consistently rejected the idea that satisfying predominance requires common proof that all are harmed.[148]

To be clear, by rejecting the "all or nearly all" requirement, we are *not* suggesting that plaintiffs should be absolved of the need to show at class certification that common issues will predominate at trial. Plaintiffs must establish that individualized questions regarding proof of impact will not overwhelm the trial. Our point is that a defendant should not be able to de-

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141 *See, e.g.*, *In re* Wellbutrin SR Direct Purchaser Antitrust Litig., No. 04-5525, 2008 WL 1946848, at *10 (E.D. Pa. May 2, 2008) ("If, at some later stage in the proceedings, it becomes apparent that certain [plaintiffs] were not injured . . . , the Court retains the authority to remove those members from the class."); *In re* Nw. Airlines Corp. Antitrust Litig., 208 F.R.D. 174, 223 (E.D. Mich. 2002) ("[T]he 'impact' element of an antitrust claim need not be established as to each and every class member; rather, it is enough if the plaintiffs' proposed method of proof promises to establish 'widespread injury to the class' as a result of the defendant's antitrust violation."); *NASDAQ Mkt.-Makers*, 169 F.R.D. at 523 ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class."); *In re* Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 347 (E.D. Pa. 1976) ("The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones." (quoting Blackie v. Barrack, 524 F.2d 891, 907 n.22 (9th Cir. 1975)) (internal quotation marks omitted)).

142 561 F.2d 434 (3d Cir. 1977).

143 *Id.* at 454.

144 *Id.* at 455.

145 305 F.3d 145 (3d Cir. 2002).

146 *Id.* at 155 ("[W]e reject the contention that plaintiffs did not demonstrate that sufficient proof was available, for use at trial, to prove antitrust impact common to all the members of the class.").

147 *Id.* at 158.

148 *See, e.g.*, *In re* Wellbutrin SR Direct Purchaser Antitrust Litig., No. 04-5525, 2008 WL 1946848, at *10 (E.D. Pa. May 2, 2008).

feat class certification simply by asserting that plaintiffs' impact evidence is either inapplicable to some class members or indeed reveals that a few class members were unaffected by the challenged conduct. Nonetheless, where a defendant can show that proving impact at trial would be *entirely or mainly* individualized and that such proof would overwhelm the trial, a class trial—or at least one that did not bifurcate proof of the violation from other aspects of plaintiffs' claims—might very well be inefficient.

If plaintiffs in an antitrust case, for example, were pursuing damages in the form of "lost profits" and thus were potentially required to engage in a class member-by-class member analysis to assess both harm to individual class members and to the class in the aggregate, it becomes harder to see how predominance could be satisfied. In *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[149] the Third Circuit rejected class certification in a securities class action, but not because some individual issues existed or a handful of class members were not injured.[150] Instead, the court in *Newton* found class certification inappropriate because the court would be required to examine, on a "trade by trade basis,"[151] "millions of trades to ascertain whether or not there was injury,"[152] which was "a mind-boggling undertaking."[153] This is very different from imposing a requirement that courts deny class certification where plaintiffs are able to show widespread harm with common evidence but cannot show harm to each and every class member.

In sum, at the class certification stage, courts typically refuse to impose a requirement that plaintiffs produce class-wide evidence capable of showing injury to all class members. Common proof of widespread harm is sufficient.

4. Aggregate Damages Do Not Compromise Defendants' Substantive Rights

A possible defense of the more stringent reading of the predominance requirement is that it is necessary to avoid altering substantive rights as part of the class procedure. The Federal Rules of Civil Procedure cannot do this under the Rules Enabling Act.[154] And there is some superficial appeal to this argument. After all, in the absence of the "all" requirement at trial, the class could recover even though some of its members do not have a valid claim. However, this objection to our argument does not withstand scrutiny.

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149 259 F.3d 154 (3d Cir. 2001).

150 *Id.* at 192-93.

151 *Id.* at 187 (quoting *In re* Merrill Lynch Sec. Litig., 191 F.R.D. 391, 396 (D.N.J. 1999) (the *Newton v. Merrill Lynch* district court opinion)) (internal quotation marks omitted).

152 *Id.*

153 *Id.* at 191 (quoting *Merrill Lynch*, 191 F.R.D. at 398) (internal quotation marks omitted).

154 The Rules Enabling Act provides that rules of civil procedure may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006).

First, allowing an aggregate recovery to a class that includes some uninjured members can be understood as procedural rather than substantive. This is so because defendants' substantive rights are not compromised as long as the calculation of aggregate damages to the class is not affected by the presence of uninjured class members. More specifically, where defendants' exposure to damages would not be increased by class members that fail to satisfy all of the necessary elements of an antitrust claim, defendants' substantive rights would not be changed by certifying classes that include some minority of members for which there is no common proof of harm or for which the available proof actually shows no harm. Consider in this regard the Supreme Court's holding that, for policy reasons, the filing of a class action complaint tolls the statute of limitations for absent class members until there is a ruling on class certification.[155] The tolling of the statute of limitations might be considered procedural, and the Supreme Court in *American Pipe & Construction Co. v. Utah*[156] implied as much.[157] Yet tolling the statute of limitations can allow thousands—even millions—of plaintiffs to recover in an action who otherwise would not be able to do so. Given that, allowing an aggregate recovery by the class without proof that each member was harmed is not necessarily substantive.

Alternatively, one might treat the rule from *American Pipe* tolling the statute of limitations as substantive[158] and argue that the same is true for allowing a class to recover without proof of harm to every class member. Even if so, federal courts have not exceeded their legitimate powers by adapting federal antitrust law to the class context. True, Rule 23 cannot alter substantive rights.[159] But federal courts can and often do.[160] And in interpreting and developing federal antitrust law, courts can take procedural realities into account. Thus, for example, the Supreme Court took a pragmatic view of the challenges of proving damages from an antitrust claim when it held that the purchasers who may seek damages under federal antitrust law are generally those that purchase directly from the defendants[161] and that direct purchasers may recover the full overcharge that they pay as a result of an antitrust violation even if they are able to pass some of that

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155 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-53, 561 (1974).

156 414 U.S. 538 (1974).

157 *See id.* at 558 n.29 (noting that "judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts").

158 Rules pertaining to the statute of limitations are often treated as substantive, particularly for *Erie* purposes. *See, e.g.*, Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949) (holding that state law governed whether filing or service of complaint tolled statute of limitations in federal court diversity action); *cf.* Chardon v. Fumero Soto, 462 U.S. 650, 661-62 (1983) (applying state law to decide effect of filing of class action on tolling of statute of limitations).

159 28 U.S.C. § 2072(b) (2006) (stating that the Federal Rules of Civil Procedure may not change substantive rights).

160 *See, e.g.*, cases cited *supra* note 158.

161 Ill. Brick Co. v. Illinois, 431 U.S. 720, 728-29 (1977).

overcharge along to their customers.[162] The rule in *American Pipe* can be understood similarly—as adjusting substantive federal antitrust law to serve the efficiency and economy that Rule 23 is designed to achieve.[163] So federal courts have the power to alter federal antitrust law to make it work well in the class context.

Thus, little depends on whether, as a technical matter, the interpretation of federal antitrust law that we are championing is labeled substantive or procedural. And that is as it should be. The reality is that Rule 23 changes how courts adjudicate cases in a host of ways. Courts generally have been practical in addressing this reality.[164] An overly refined and theoretical discussion of the permissibility of including uninjured parties in a class is therefore inappropriate. The key question should be more practical: would defendants suffer meaningful prejudice if plaintiffs in a class action need not prove harm to each and every class member to support an aggregate recovery? The answer is that defendants would not.

The reason for this is that plaintiffs in antitrust cases can often accurately prove aggregate damages to the class as a whole without resorting to individualized evidence that might allow identification of which specific class members suffered harm and by how much. Courts in antitrust class actions have repeatedly found that "the use of an aggregate approach to measure class-wide damage is appropriate."[165] *In re NASDAQ Market-Makers Antitrust Litigation*,[166] for instance, approved use of an aggregate damages calculation in a highly complicated horizontal price-fixing conspiracy, which involved a class of more than one million members.[167] The court stated that such collective damages analyses "have been widely used in antitrust, securities and other class actions."[168] In its extended discussion of aggregate damages,[169] the *NASDAQ* court explained that such an approach is not only permissible, but it has "obvious case management advantages," including eliminating the need for proof of individual damages at trial.[170] Further, in the antitrust class action *Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis*,[171] as to damages, the jury was simply instructed to "[s]tate the dollar amount that the Plaintiffs class was overcharged."[172]

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162 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

163 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561 (1974).

164 *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1447-48 (2010) (holding that federal court may certify class in a case involving a state claim that would not be subject to class certification in state court).

165 *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 324 (E.D. Mich. 2001).

166 169 F.R.D. 493 (S.D.N.Y. 1996).

167 *Id.* at 523.

168 *Id.* at 525.

169 *Id.* at 524-26.

170 *Id.* at 525.

171 No. 07 Civ. 7343(HB), 2009 WL 2708110 (S.D.N.Y. Aug. 28, 2009).

172 *Sanofi-Aventis* Verdict Sheet, *supra* note 127.

Economists can use straightforward, standard methodologies to compute damages to an entire class accurately—without first assessing the potentially unique circumstances of individual class members. For instance, an economist can employ a "before and after" damages model to compute the aggregate damages to the entire class without examining data from individual class members. The first step would be to draw upon market-wide data (or, typically, transactional data from defendants' own files) to compute average actual prices that the class as a whole paid during the period in which the challenged conduct was occurring. To assess the "but for" prices (i.e., the prices that would have been paid absent the challenged conduct), an expert could use, for instance, average prices paid by the class during the period before the challenged conduct began. Computing the average overcharge to the class, then, would involve subtracting the average "but for" price from the average actual price. Thus, damages to the class as a whole would simply be the total volume of purchases multiplied by the average overcharge.[173] Using average prices in a "before and after" model such as this is standard practice in antitrust cases.[174] Economists' use of statistical techniques, such as multivariate regression analysis, to determine whether the challenged conduct can be linked to price increases is simply a sophisticated means of determining what the prices would have been absent the challenged conduct.[175]

Two points are important regarding this standard approach to proving aggregate damages with class-wide evidence in antitrust class actions. First, the total damages are unaffected by the possible presence of individual class members that the model finds did not pay overcharges. Assume, for instance, that a comparison of the actual and "but for" prices under plaintiffs' model for five out of one hundred class members reveals that these class members would have paid the same amount for the product without the antitrust violation (i.e., they were not overcharged). The presence of these entities in the class will not affect the total class damages. They would cause the total average overcharge to the class to go down exactly enough to offset the inclusion of their additional purchase volumes in the computation.

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173 *See generally* AM. BAR ASS'N, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 171-208 (William H. Page ed., 1996).

174 *See, e.g.*, *In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 145 (C.D. Cal. 2007) (noting that "before-and-after methodology has been accepted by numerous courts" and that the "yardstick" approach is also "widely upheld by courts" in computing class-wide damages in antitrust cases); *In re* Dynamic Random Access Memory Antitrust Litig., No. M 02-1486 PJH, 2006 WL 1530166, at *9 (N.D. Cal. June 5, 2006) (noting that the yardstick methodology has been "upheld by numerous courts"); Nichols v. SmithKline Beecham Corp., No. CIV.A. 00-6222, 2003 WL 302352, at *8 (E.D. Pa. Jan. 29, 2003) (holding that before-and-after methodology is generally accepted for computing impact and damages on a class-wide basis in antitrust cases).

175 *See, e.g.*, *Live Concert*, 247 F.R.D. at 145 ("Regression analysis is a well-recognized tool in determining antitrust damages.").

A second key point regarding aggregate damages computations in the antitrust field is that, assuming they accurately reflect the market effects of the challenged conduct, they necessarily include damages *only for those entities that have satisfied all elements of their antitrust claims*. This is so because in direct purchaser antitrust actions, the mere payment of artificially high prices is sufficient to establish injury in fact.[176] Those entities that do not pay any overcharges, by definition, are not injured and do not add to the overall damages. Accordingly, where a damages analysis accurately computes the aggregate overcharge to the class, it necessarily reflects only injuries suffered by class members that have satisfied all elements of their antitrust claims. Individualized analysis could potentially eliminate uninjured class members, but it would not reduce the total liability of defendants.

Defendants' tendency to focus at the class certification stage on the ability of plaintiffs' evidence to show harm to all class members sometimes leads to bizarre arguments. In a recent case, defendants criticized one of plaintiffs' expert economists at the class certification stage "because his economic analysis only models how much the *average* price of sharps containers from all supplies in the industry would have fallen, rather than showing that *all* class members would have paid lower prices in the but-for world."[177] In effect, defendants in this case were criticizing plaintiffs' damages analysis *not* for inaccurately assessing aggregate damages to the class, but rather simply because the aggregate damages analysis—even if correct as to the class as a whole—would not, by itself, establish that all class members were injured. But defendants should have no reason to care about the presence of uninjured members in the class as long as their presence does not augment defendants' total liability. The only apparent reason that defendants would raise this issue is not because it has any relevance to a class trial but rather in the hope of obtaining a denial of class certification as an end in itself, a decision that would drastically reduce their exposure to any damages at all.

As long as all of the aggregate damages computed are associated with class members that can satisfy all elements of their antitrust claims and the total damages caused by defendants are not inflated by the presence of class members who cannot prove injury, defendants' substantive rights are not compromised by the inclusion of uninjured members in the class. This proposition remains true even if some of the total damages were allocated, in a post-verdict claims process, to class members who suffered no injury. What should be essential—and sufficient—from a defendant's perspective

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176 *See supra* notes 74-77 and accompanying text.

177 Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l., Ltd., 262 F.R.D. 58, 69 (D. Mass. 2008) (second emphasis added).

is that it is liable only for the harm that it has caused to class members that can satisfy all elements of their antitrust claims.[178]

To see this, let us consider a hypothetical (albeit typical) fact pattern in an antitrust class action and what plaintiffs are able to prove by a preponderance of the evidence on a common basis. Assume that plaintiffs can show that defendants' conduct violated the antitrust laws, that the conduct generally caused prices to be higher than they otherwise would have been, that those who were harmed are contained within the class, and that defendants are liable for a calculable amount of damages in the aggregate. Moreover, because merely paying an overcharge satisfies a class member's burden of proving fact of damage,[179] each dollar of damages included in the aggregate overcharge computation is associated with class members that meet all elements of their claims. In sum, plaintiffs can use class-wide evidence to prove a violation, causation, and fact of damage for every dollar that is part of the aggregate damages analysis. In this situation, what precisely is the nature of the right, if any, of which defendants are deprived by the presence of uninjured members in the class?

One possibility is that defendants might be found liable for a larger award than is appropriate. But that contention ignores a crucial fact. By hypothesis, plaintiffs are able to prove by a preponderance of the evidence the aggregate damages that the class suffered. Indeed, defendants are not paying a single dollar due to the presence of any entity in the class that has not satisfied all elements of its antitrust claim. As a result, there is no exaggeration of damages.

Another possibility is that defendants would be deprived of the opportunity to challenge any recovery that could flow to unharmed class members in a claims process. But it is hard to see why that should matter. Assuming that the aggregate damages accurately reflect the collective harm to those members of the class who satisfy all elements of their claims, the method by which the class ultimately splits up the damages award should be of little moment to defendants. In an antitrust class action adjudicated nearly forty years ago, *In re Coordinated Pretrial Proceedings in Antibiotic*

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178 If for some reason there were an impediment to presenting damages to the class in the aggregate, plaintiffs could prove damages by determining the percentage of the total overcharge on the products at issue or absolute amount of the overcharge per product sold in dollars. For instance, in *In re High Pressure Laminates Antitrust Litigation*, the jury was asked to determine "whether the national Class members paid more for high pressure laminates as a result of the agreement or conspiracy," and if so, by how many "cents per square foot." *In re High Pressure Laminates* Transcript, *supra* note 122, at 2333-34. Here, too, there is no a priori reason why this means of assessing damages would be affected by the presence in the class of non-injured plaintiffs. A key issue at trial under this method would be the total volume of purchases on which to assess the overcharge damages. But that issue would not be affected by the presence in the class of uninjured class members—if, for instance, some class members did not buy any of the product on which there was an overcharge.

179 *See supra* text accompanying notes 81-83.

Antitrust Actions,[180] the court grappled with a similar issue.[181] Defendants objected to the court's proposal to allow plaintiffs to present damages to the class at issue in an aggregate fashion. The court contemplated that

> if and when the defendants' liability and the damages suffered by the class had been established and judgment in an appropriate amount entered, a second round of notice might be used to alert class members to the existence of the damage fund and to elicit claims against the fund from the members of the class.[182]

Defendants objected to this process on various grounds, including that it wrongly created "a 'pot of gold' which the plaintiffs and their counsel are somehow not entitled to receive."[183] The court rejected this argument and noted, "If we assume that a price-fixing conspiracy is proven at trial . . . the defendants will certainly have no right to the 'pot of gold' created by their illegal activities."[184] If the aggregate damages assessment is correct, then defendants have no legitimate interests in the distribution of the aggregate award among class members.[185]

For the same reasons, courts typically do not permit defendants to intervene in post-verdict claims processes where the damages amount reflects the aggregate harm to the class as a whole and the only remaining issue is how to allocate funds between class members. For instance, in *Six (6) Mexican Workers v. Arizona Citrus Growers*,[186] the Ninth Circuit held that "[w]here the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members."[187]

The ability to compute aggregate damages to only those entities in a class that satisfy all elements of their claims solely with class-wide evi-

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180 333 F. Supp. 278 (S.D.N.Y. 1971).

181 *Id.* at 287.

182 *Id.*

183 *Id.*

184 *Id.*

185 Indeed, allowing plaintiffs to recover for the aggregate damages of the whole class and only for the aggregate damages of the whole class could limit a defendant's liability. It might be, for example, that a small percentage (say 10 percent) of the class was uninjured, but it is unclear which members were harmed. Each member may be able to satisfy the preponderance of the evidence in showing its injury. The defendant might then be found liable to the whole class for some estimated overcharge when it should be liable only for 90 percent of the class purchases. More generally, the preponderance of the evidence standard does not always minimize error costs when there are recurring wrongs. For an excellent discussion of this point, see Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691 (1990). A discussion of the implications of this insight for aggregate recoveries in class actions is beyond the scope of this Article.

186 904 F.2d 1301 (9th Cir. 1990).

187 *Id.* at 1307; *see also, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 481 (1980) (stating that defendant has no legitimate interest in how lump sum damages award is distributed among class members).

dence sets antitrust—and in particular antitrust class actions brought by direct purchasers—apart from other sorts of claims. Consider the issue of individual reliance in fraud. A defendant makes a materially misleading statement—that, for example, a drink contains saccharin and has no calories, when it really contains sugar and is a high-calorie drink—and it is unclear which purchasers relied to their detriment on the statement. Assume many—but not all—buyers would have preferred to avoid the calories. It may be difficult to ascertain not only which plaintiffs were harmed, but also what the aggregate harm is. The failure of one buyer to rely to its detriment on the misstatement—if a sale would have occurred in any event, for instance, because the purchaser preferred sugar over the promised saccharin—does not imply increased harm to another. In contrast, in our antitrust case, by assumption an individualized inquiry will not alter the amount of aggregate damages. An analysis of the total overcharges paid for a product, for example, will not vary depending on the identity of the entities that bought the product.[188] The antitrust setting, then, is unlike many others.

An issue along these lines arose in *McLaughlin v. American Tobacco Co.*,[189] where plaintiffs proposed to compute aggregate damages to a class they knew would include members who were uninjured or who otherwise could not satisfy all of the elements of their RICO claims.[190] The case involved "light" cigarettes that were asserted to be, but were not, really healthier than "full-flavored" cigarettes.[191] Plaintiffs claimed that as a result of the misleading statements, increased demand caused the "light" cigarettes to be more expensive than they otherwise would have been.[192] Plaintiffs sought to avoid the problem of including people in the class who did not have valid claims because, for example, they did not rely on the misstatement.[193] They did so by estimating the share of the class that had valid claims and then computing the aggregate damages based on that estimate.[194] The Second Circuit rejected that approach, stating that "it offends both the Rules Enabling Act and the Due Process Clause."[195]

Important for present purposes are *the reasons* that the Second Circuit offered for rejecting the use of aggregate damages in a case involving a proposed class that would contain multiple uninjured members. The central problem, according to the court, was that plaintiffs' aggregate damages approach was "likely to result in an astronomical damages figure that *does*

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188 Our point is not that class certification would necessarily be inappropriate in fraud cases involving issues of individual reliance. It is instead that difficulties that arise in that and other settings are not implicated in the antitrust context.

189 522 F.3d 215 (2d Cir. 2008).

190 *Id.* at 230.

191 *Id.* at 220 (internal quotation marks omitted).

192 *Id.* (internal quotation marks omitted).

193 *Id.* at 222-26.

194 *Id.* at 231.

195 *McLaughlin*, 522 F.3d at 231.

not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants."[196] *McLaughlin* concluded that the "disconnect" between the aggregate damages figure and the "harm actually caused by defendants" would effectively alter the underlying substantive rights in contravention of the Rules Enabling Act.[197]

Antitrust is different. A class member need not know about the challenged anticompetitive conduct—let alone rely upon such conduct to its detriment—to satisfy an antitrust claim.[198] Instead, merely buying a product at an artificially inflated price is sufficient to prove impact.[199] As a result, as explained above, it is possible to use class-wide data reflecting averages of actual and estimated "but for" prices—oftentimes drawn from defendants' own records—to arrive at an accurate account of total damages to the class as a whole, entirely unaffected by the presence of multiple uninjured class members.[200] In antitrust, unharmed class members do not create a "disconnect" between defendants' liability and the harm actually caused. In short, there is no legitimate substantive objection to entering judgment for a class in an antitrust case for an aggregate sum—even if the class includes multiple members for whom there is either no proof of their having been injured, or for whom the evidence shows a lack of injury.

A final possible objection worth considering here is that taken to its logical extreme, our argument could imply that even a class composed mainly of uninjured class members could be properly certified and sustained at trial. We think that our argument does not require that conclusion. Absent common proof of widespread harm to the class, problems could arise with various prongs of the Rule 23 analysis other than predominance. The named plaintiffs, for example, might not be typical of the class they seek to represent and thus fail to satisfy the "typicality" prong of Rule 23(a)(3). An expression of this limitation can be found in the jury instructions from *In re Scrap Metal Antitrust Litigation*.[201] In that case, the court instructed the jury that if they found that one of the named plaintiffs was harmed, then it "must consider whether the class members also suffered the

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196 *Id.* (emphasis added).

197 *Id.* Note that we are not accepting that *McLaughlin* was rightly decided, just that its reasoning confirms our argument.

198 *See* Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa., 815 F.2d 270, 276 (3d Cir. 1987) (finding that payment of an unfair price alone satisfies an antitrust claim).

199 *See id.* ("[T]he payment of overcharges . . . is unquestionably an antitrust injury . . . ."); Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 633 (7th Cir. 2002) ("The monopoly overcharge is the excess price at the initial sale . . . .").

200 *Cf. In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 140-41 (noting that demonstrating certain class members are uninjured does not preclude class certification); *supra* Part II.C.1-4.

201 No. 1:02 CV 0844, 2006 WL 2850453 (N.D. Ohio Sept. 30, 2006).

same type of injury from the same conduct."[202] The court continued: "All plaintiffs must prove is that the named plaintiffs were injured and that the injury they suffered is representative of injury suffered by the other members of the class."[203] Accordingly, in *Scrap Metal*, while the court did not require the jury to find that "all" class members were injured, it nonetheless asked the jury to determine whether "class members" generally suffered the same type of harm as the class representatives.[204] The element of typicality—and perhaps other Rule 23 elements as well—may require that harm to an antitrust class is at least widespread among its members.

In sum, a requirement at class certification that plaintiffs show they are capable of using common evidence to show that the conduct at issue harmed all (or virtually all) class members is artificial. It imposes an obstacle to class certification that lacks the requisite relationship to plaintiffs' burden at trial. In that way, it is inconsistent with the logic of class certification doctrine—a logic recognized by the very opinions, including *Hydrogen Peroxide*, that could be construed as ratcheting up the class certification standard.

5. The Rights of Class Members Are Not Harmed

A final potential objection to permitting classes to be certified with substantial numbers of non-injured entities is that it could violate the rights of the class members themselves. Either the uninjured members could have their claims unfairly extinguished, or if non-injured members are allocated some of the class award, the share belonging to the injured members could be diluted. To the extent that there is a real problem here, it can be solved by ensuring that the class award is accurately and efficiently allocated to members of the class. If the evidence reveals that certain class members suffered no harm, they either would not be allowed to recover or would be permitted only a nominal recovery.

To be sure, this proposal raises a question about whether it is fair to include the non-injured entities in the class. After all, by virtue of being in the class, their claims would be litigated and extinguished even though they would not recover (or would recover only a nominal amount) under plaintiffs' theory. There are, however, three reasons to be skeptical of this objection.

The first reason for skepticism is that these are entities for which plaintiffs have no evidence of any injury and thus it is unlikely that the entities would be giving up claims with any value. The second reason to ques-

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202 Jury Instructions at 40, *In re* Scrap Metal Antitrust Litig., No. 1:02cv0844 (N.D. Ohio Feb. 8, 2006).

203 *Id.*

204 *Id.* at 40-41.

tion an objection on behalf of presumably non-injured class members is that they can preserve their rights by opting out. Before including any entities in a damages class, class members must receive notice of the action—notice that must describe plaintiffs' allegations and theories, defendants' defenses, and other particulars about the action.[205] If there is a settlement, the notice must describe, among other things, plaintiffs' plan of allocation.[206] Importantly, the notice must also provide each member of a damages class with the opportunity to exclude itself from the class should that class member not wish to be bound by any class settlement or judgment.[207] Thus, non-injured class members would have an opportunity to opt out of the class before they are bound by any resulting judgment.

Finally, the practical reality of a denial of class certification in most cases is that the uninjured and injured class members alike will not recover at all. Most antitrust claims are simply too expensive and complicated to prosecute as individual actions. Thus, it would be perverse to refuse to certify a class out of a professed concern for the rights of those uninjured members of the class who choose not to opt out or of those injured members whose claims might be somewhat diluted. Acting on that concern would likely deprive both groups of any recompense and allow the defendant to keep its ill-gotten gains.[208] Recognizing this very phenomenon, the district court judge in *In re New Motor Vehicles Canadian Export Antitrust Litigation*[209] wryly observed that "[i]f the plaintiffs have an adequate model to award aggregate damages, the defendants' concern that some class members may be over-compensated at the expense of other class members seems a little suspect. Under the guise of fairness, the defendants' real objective is to avoid recovery by anyone."[210]

D. *Common Issues May Predominate at Trial, Even If They Do Not Predominate Regarding Impact*

Another point is important in regard to a possible new, heightened class certification standard. Even if plaintiffs did have to show that all class members were harmed for common evidence to predominate regarding impact or fact of damage, this would not preclude the possibility that common issues would predominate at trial. Courts—including the Third Circuit in *Hydrogen Peroxide*—have mistakenly implied that common issues need

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205 *See* FED. R. CIV. P. 23(c)(2).

206 *See* FED. R. CIV. P. 23(c)(2)(B).

207 *See* FED. R. CIV. P. 23(c)(2)(B)(v).

208 For a discussion of a similar misuse of concerns about class conflicts to deny class certification to the detriment of all class members, see Davis & Sorensen, *supra* note 85.

209 235 F.R.D. 127 (D. Me. 2006), *vacated in part*, 522 F.3d 6 (1st Cir. 2008).

210 *Id.* at 143 n.55.

to predominate in regard to each element of a claim.[211] But that is not what Rule 23 requires. The proper question is whether common issues predominate in the trial as a whole. And impact, or fact of damage, tends to play only a minor role in class action trials.

Rule 23(b)(3) asks whether "questions of law or fact common to class members predominate over any questions affecting only individual members . . . ."[212] It does *not* require a finding that individual issues are nonexistent, or even that common issues must predominate as to *each element* of plaintiffs' claim.[213] Fairly read, the Rule requires only that common issues of law or fact would predominate *with respect to the case as a whole*.[214] Following this very reasoning, the Second Circuit in *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.*[215] reversed a denial of class certification.[216] The *Cordes* court instructed the district court to determine whether there were individual issues pertaining to proof of impact, *and even if so*, whether those issues would defeat predominance: "Even if the district court concludes that the issue of injury-in-fact presents individual questions, however, it does not necessarily follow that they predominate over common ones and that class action treatment is therefore unwarranted."[217] Thus, plaintiffs' burden is not to attempt to prove *impact* with predominantly common evidence; it is to attempt to prove their case *as a whole* with predominantly common evidence.

The difference between these two propositions is subtle but important—especially in antitrust cases where proving impact is unlikely to be the focus of trial. Take the following example. Plaintiffs demonstrate that proving an antitrust violation (including all of the elements of that violation) would be entirely common to the class. Plaintiffs further show that at any trial of the case, proof of the violation is likely to consume three-quarters of the time of trial and similarly comprise three-quarters of the evidence shown to the jury. In such circumstances, even if plaintiffs would not be able to show through common proof that all or virtually all of the

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211 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) ("Issues common to the class must predominate over individual issues . . . ." (quoting *In re* Prudential Ins. Co. Am. Sales Practice Litig., 148 F.3d 283, 313-14 (3d Cir. 1998)) (internal quotation marks omitted)).

212 FED. R. CIV. P. 23(b)(3).

213 *See id.*

214 *Cf. Hydrogen Peroxide*, 552 F.3d at 309 n.6 ("Class relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class." (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982)) (internal quotation marks omitted)).

215 502 F.3d 91 (2d Cir. 2007).

216 *Id.* at 108-09.

217 *Id.* at 108.

members of the proposed class suffered economic injury caused by the alleged conspiracy, common issues still might predominate at trial.[218]

In the antitrust context, the nature of direct purchaser monopolization and conspiracy cases is such that the bulk of the trial is likely to be spent on common issues regardless of the evidence relating to impact. This is so because antitrust trials generally focus on proof of the underlying violation—for example, on the questions, "Did defendants conspire to fix prices?" or "Did defendant foreclose competition and, if so, how?" Moreover, even questions relating to the effects of the challenged conduct tend to turn on whether the conduct as a whole had anticompetitive effects such as, for example, "Did prices generally rise (or output generally fall) due to the challenged conduct?" It would therefore be highly unusual if proving impact on class members from allegedly artificially inflated prices would play a substantial role at an antitrust trial. After canvassing the relevant cases, *Newberg on Class Actions* notes that in antitrust actions, "common liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues."[219]

Accordingly, courts should take care to put the inquiry into common impact in its proper context. Determining that individual issues would predominate with regard to proof of impact at trial is an insufficient basis to find a lack of predominance under Rule 23(b)(3). A court should deny class certification only if individual issues regarding impact predominate not only over common issues regarding impact, but also over all of the common issues at trial.

E. *Judicial Finding of Merits Facts Exacerbates the Harm of Imposing the Wrong Class Certification Standard*

Allowing judges to make findings of fact on the merits at the class certification stage exacerbates the harm of the misreading of Rule 23 discussed above. Not only do plaintiffs then bear a burden that should not be required of them, they are also forced to carry that burden over a higher standard than the one traditionally applied at the class certification stage.

Consider the possible showing that a court might require of plaintiffs. It might obligate plaintiffs to establish through common evidence that all class members suffered some injury as a result of an antitrust violation. Plaintiffs might then argue—with support from an expert economist—that

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218 *See id.* at 108 ("The question of injury-in-fact, which in this case is equivalent to whether a particular plaintiff would have paid more in the but-for world, may not be common. We do not discount the possibility that the individual questions raised by injury-in-fact might then predominate over the several common questions. Perhaps a trial would focus largely on what particular plaintiffs would have paid in the but-for world. But that is not necessarily so." (footnote omitted)).

219 *See* CONTE & NEWBERG, *supra* note 80, § 18:25 & n.4.

defendants engaged in a price-fixing conspiracy that increased the amount that all purchasers paid for a good or service. Assume that plausible statistical analysis and economic argument support plaintiffs' position. Further assume that plaintiffs suggest how they can attempt to prove their case at trial using evidence common to the class. But defendants offer their own expert who contests some of the reasoning of plaintiffs' expert. If defendants are right, some class members may not have been harmed by any illegal conspiracy.

Under past case law, it would seem clear that plaintiffs have met their relevant burden.[220] Plaintiffs have made a plausible case that they can attempt to prove impact at trial using common evidence. Historically, this would be enough.[221] But, depending on how loose language in some recent cases is read, a court could deny that common issues predominate. As noted above, the precise new standard—if there is one—is quite vague, maybe even incoherent.[222] Attempting to apply it, a court could potentially consider plaintiffs' evidence and defendants' evidence, and conclude that plaintiffs have not shown by a preponderance of the evidence that they will be able to prove common impact at trial by a preponderance of the evidence (or that plaintiffs have not met whatever standard the court puts in place, once they clarify the mess they seem to have created).

If a court so rules, that would compound the error of requiring plaintiffs to show impact on all class members. It would ratchet up the standard at the class certification stage and require a showing that we argue plaintiffs should not have to make at all. The result is a corresponding increase in the odds of a court denying certification of a class that meets all of the requirements of Rule 23, properly understood.

F. *The Ideological Spin of Errors Regarding the Class Certification Standard*

The result under the new possible standard is that classes will be difficult to certify in a way that makes little sense under the principles of Rule 23. Moreover, the catalyst for this possible change is troubling. It derives from a concern—as noted above, an unjustified concern—about the vulnerability of large corporate defendants. Little, then, is left to support the potential new class certification standard. Whatever the motivations or intentions of the courts suggesting the change, we are left with only a naked preference for large corporate defendants over the individual consumers and small businesses that bring antitrust claims. The risk is that, in effect, a potential heightened class certification standard will introduce an ideologi-

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220 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002).

221 *Id.*

222 *See supra* Part I.B.

cal consideration foreign to the procedural context. It may cause, in short, a political distortion of procedure.

III. POLITICS AND THE SEVENTH AMENDMENT: NEGLECT AND MISUSE

As discussed above, under some interpretations of the class certification standard, judges may or must find facts relevant to the merits in deciding whether to certify a class.[223] In an extreme version of this view, to conclude that plaintiffs have shown by a preponderance of the evidence that impact is capable of proof on a class-wide basis, the judge should decide whether plaintiffs have in fact shown impact on a class-wide basis.

To be sure, that is not how courts generally frame the issue. The Third Circuit in *Hydrogen Peroxide* took pains to disavow that possibility.[224] But, then again, courts have failed to explain with any clarity what standard they are applying at the class certification stage in antitrust suits. And it is very challenging—it approaches the proverbial difficulty of counting how many angels can fit on the head of a pin—to understand what it means to show by a preponderance of the evidence that plaintiffs will be able to prove impact by a preponderance of the evidence. Legal standards can be sliced only so thin before they collapse. So there is a risk that judges will actually force plaintiffs to prove impact by a preponderance of the evidence to get a class certified, and, if they do, there is a corresponding risk that the class certification standard will violate the Seventh Amendment.

A. *Applying* Beacon Theatres *and* Dairy Queen *to Class Certification*

The Supreme Court has set forth the proper procedure for when the same facts are relevant to rights at law—to be determined by a jury—and rights in equity—to be determined by a judge. As the Supreme Court held

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223 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) ("[T]he court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action."); *In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 17 (1st Cir. 2008) ("[W]eighing whether to certify a plaintiff class may inevitably overlap with some critical assessment regarding the merits of the case.").

224 *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311-12 ("Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class . . . ."); *see also* Blades v. Monsanto, 400 F.3d 562, 567 (8th Cir. 2005) ("The closer any [Rule 23] dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require.").

in *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood*, the jury is to make its findings first.[225] The judge should address the equitable issues afterward, abiding by the jury's factual determinations.[226]

There are two obvious alternatives to the procedure prescribed by *Beacon Theatres* and *Dairy Queen*. The Supreme Court in *Beacon Theatres* contemplated one of these possibilities. The judge could resolve the equitable issues first, and the jury could then be bound by the judge's factual findings.[227] But that would violate the right to a trial by jury.[228] The judge, rather than the jury, would be resolving key factual issues.

Another possibility—one rejected at least implicitly by the Court in *Beacon Theatres* and *Dairy Queen*—would be for the judge to make any necessary factual findings in deciding the equitable claims first but for those findings not to bind the jury.[229] This is the approach that the district court adopted in *McDonough v. Toys "R" Us, Inc.*,[230] the first lower court to decide a class action motion that was bound by *Hydrogen Peroxide*.[231] In an attempt to be faithful to its reading of Third Circuit law, it found facts in deciding to certify the class and then held that the jury would resolve the same factual issues to the extent that they were relevant to a trial on the merits.[232] Unfortunately, such an approach deprives the parties of the ordinary benefits of facts found by a jury, causing just the kind of harm that the Seventh Amendment was designed to prevent.[233]

Permitting a judge to find facts that later will be addressed again by a jury in effect requires plaintiffs to prevail on the same facts twice. This places plaintiffs at a terrible strategic disadvantage. A victory at the class certification stage forces plaintiffs to prove the same facts again to a different fact-finder. But an unfavorable decision at the class certification stage will generally be fatal to plaintiffs' case—it would sound the proverbial

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225 Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).

226 Courts have taken *Beacon Theatres* and *Dairy Queen* quite seriously, at least outside of the class certification context. *See, e.g.*, Shum v. Intel Corp., 499 F.3d 1272, 1276-79 (Fed. Cir. 2007) (holding that claims at law must be tried to a jury before court hears equitable claim); Attrezzi, LLC v. Maytag Corp., 436 F.3d 32, 36, 43 n.5 (1st Cir. 2006) (same).

227 *Beacon Theatres*, 359 U.S. at 510-11.

228 *See id.* (noting a need to preserve a constitutional right to a jury when exercising judicial discretion).

229 *See, e.g.*, *id.* (finding that the right to a jury trial cannot be lost through prior judicial decisions on equitable claims).

230 638 F. Supp. 2d 461 (E.D. Pa. 2009).

231 McDonough v. Toys "R" Us, Inc., No. 06-0242 (E.D. Pa. Oct. 15, 2009) (ruling that judge's findings of fact and conclusions of law at class certification would have no precedential or collateral estoppel effect at trial).

232 *Id.*

233 *See* U.S. CONST. amend. VII ("[T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States . . . .").

"death knell"[234]—because few proposed antitrust class actions involve large enough claims to warrant individual prosecution.[235] This means that at the very least, most named plaintiffs and potential absent class members are deprived of any meaningful opportunity for legal recourse, even if a few class members have enough at stake to pursue their claims individually. In effect, the judge would be pre-screening the merits in deciding whether to allow a jury to decide the merits on a class-wide basis. A right to have a jury hear a case rather than a judge, but only after winning before a judge, is not much of a right at all. It is unsurprising, then, that this approach is not permissible under *Beacon Theatres* and *Dairy Queen*.

Indeed, the rule against a judge finding facts on the merits for equitable purposes that a jury will ultimately decide at law finds a corollary in the Reexamination Clause of the Seventh Amendment. The Reexamination Clause prevents a second judge or jury from revisiting the findings of an earlier jury.[236] It thus bars courts from depriving parties of the right to a jury trial by forcing them to succeed in litigating the same issue twice. The holdings from *Beacon Theatres* and *Dairy Queen* perform essentially the same function. One might say that they recognize, implicit in the right to a trial by jury, a ban on *preexamination*—preventing, in particular, a judge from deciding merits issues before a jury has the opportunity to do so. The need for such a rule is particularly acute in class actions, where the judge's finding as a practical matter will prove dispositive for most or all class members.

Federal Rule of Civil Procedure 23 is essentially equitable.[237] Its origins lie in equity.[238] The fact that the equitable standard has been codified—and modified—in the Federal Rules does not transform its equitable nature, just as interlocutory injunctive relief remains equitable despite its codification in Federal Rule of Civil Procedure 65.[239] As a result, the holdings of *Beacon Theatres* and *Dairy Queen* apply to class certification. The Seventh Amendment thus requires judges to await findings on the merits by the jury before deciding on class certification if the standard for making that equitable determination is going to be transformed so that it requires a resolution of merits facts.

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234 *See, e.g.*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001) (recognizing that denying class certification "may sound the 'death knell' of the litigation on the part of plaintiffs").

235 *See id.* (discussing the "extraordinary nature" of class actions and how many suits cannot overcome a failed class certification).

236 *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) ("[A] judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries.").

237 *See* FED. R. CIV. P. 23 advisory committee's note.

238 *See, e.g.*, *id.*; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 392 n.318 (2003).

239 *See* FED. R. CIV. P. 65 advisory committee's note.

True, the Court in *Beacon Theatres* suggested that it was conceivably permissible for judges to find facts in deciding equitable relief, but "only under the most imperative circumstances."[240] As discussed above, there is no compelling reason to allow the judge to make factual findings on the merits at class certification.[241]

Nor is the argument persuasive that judges are permitted to find facts relevant to the merits in other settings. This is so for at least two reasons. First, in most contexts, courts are scrupulous about *not* deciding merits facts in contending with issues that arise before trial. When they take the merits into account, they either accept plaintiff's allegations as true, or they undertake a very limited inquiry, asking only if the claims are obviously without merit[242] or, at most, have a likelihood or substantial probability of succeeding.[243] Second, even if courts in rare instances do decide merits facts before trial, their inattention to the Seventh Amendment in those contexts does not provide an adequate basis for ignoring its significance in general.[244] Constitutional rights do not generally disappear simply because judges and parties at times overlook them.

As to the first point, when courts address the facts before trial—including regarding subject matter jurisdiction, personal jurisdiction, or interlocutory injunctive relief—they generally do not resolve factual issues on the merits. In resolving subject matter jurisdiction, for example, courts do not decide whether there is federal question jurisdiction by actually deciding whether plaintiff should win on the merits of a claim arising under federal law.[245] They ask, in one formulation, only whether the federal claim is "obviously without merit."[246] Indeed, a claim can be so weak that it falls prey to a motion to dismiss for failure to state a claim and still have sufficient merit—that is, not be so "plainly unsubstantial"—to allow for federal question jurisdiction.[247]

Likewise, in deciding personal jurisdiction—and more specifically, specific jurisdiction—the merits sometimes matter.[248] The kind of analysis

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240 Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).

241 *See supra* Part I.

242 *See* Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933).

243 *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375 (2008); DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 187 (2d ed. 1993). *See generally* Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L.J. 363 (2003).

244 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 448-49 (1996) (Scalia, J., dissenting) (rejecting the view that judicial inattention to the right to a jury trial under the Seventh Amendment in a particular context provides a reason to ignore the issue when it is raised).

245 *See Levering*, 289 U.S. at 105-06.

246 *Id.* at 105.

247 *Id.*

248 *See, e.g.*, Nissim Corp. v. ClearPlay, Inc., 351 F. Supp. 2d 1343, 1351 n.5 (S.D. Fla. 2004) (noting that "[a] determination on the merits . . . will also establish whether the Court has personal jurisdiction").

that courts apply depends in part on the kind of claim that a plaintiff brings, a phenomenon that Professor Geoffrey Hazard has aptly labeled "arbitrary particularization."[249] Yet courts do not decide claims on the merits to determine the issue of personal jurisdiction.[250] They ask only about the nature of the claim that plaintiff has alleged.[251]

A similar point holds true for interlocutory injunctive relief. The merits affect whether a judge will grant an injunction before trial.[252] But the judge does not decide the facts relevant to the merits.[253] The judge assesses instead the odds of plaintiff prevailing at trial, as well as the irreparable harm both plaintiff and defendant will suffer if the court errs in its decision to grant a preliminary injunction.[254] That inquiry delves deeper into the merits than that which courts generally undertake regarding subject matter jurisdiction or personal jurisdiction, but it still stops well shy of the kind of determination that is reserved for the jury.[255]

And, of course, at the pleading stage, a judge must take all nonconclusory allegations as true in deciding whether to dismiss a claim.[256] Similarly, at summary judgment, the court asks only whether plaintiff has raised genuine issues of material fact warranting a trial, not whether plaintiff should win by a preponderance of the evidence[257] (or whatever burden of proof that applies in the case).[258]

Finally, even if there are a handful of counterexamples—situations in which courts at times decide facts relevant to the merits before a jury

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249 Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 283.

250 *See* ISI Brands, Inc. v. KCC Int'l, Inc., 458 F. Supp. 2d 81, 84 (E.D.N.Y. 2006) (examining personal jurisdiction through the nature of the claim arising from the complaint and supporting documents).

251 *See id.*

252 *See* Acoolla v. Angelone, 186 F. Supp. 2d 670, 671 (W.D. Va. 2002) (stating one factor that courts look at in granting preliminary injunctions is "the likelihood that plaintiff will eventually succeed on the merits").

253 *Id.*

254 *See generally* Davis, *supra* note 243, at 378-81. There is some controversy over whether the standard that plaintiff must meet constitutes a fixed threshold or whether it varies depending on the relative irreparable harm that plaintiff and defendant would suffer from an erroneous decision. At one point, the sliding scale approach seemed predominant. *See id.* at 367-68. But the Supreme Court has recently indicated that a more rigid approach with an irreducible threshold may be the appropriate standard. *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375 (2008).

255 *See Natural Resources*, 129 S. Ct. at 375 (requiring a showing of "likely" irreparable harm, but not mandating a complete determination of the merits).

256 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009).

257 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

258 *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-53 (1986) (discussing varying standards of proof).

trial[259]—that does not necessarily provide a basis for ignoring the Seventh Amendment when it comes to the class certification standard.[260] The fact that courts—and perhaps parties—have overlooked a potential Seventh Amendment issue in the past provides a weak basis for doing so in the future. We may be unwilling to upset well-settled doctrines, but that does not mean we should casually dismiss a constitutional challenge to new ones.[261]

Nonetheless, there is a meaningful risk that courts will not take the Seventh Amendment issue seriously in the class certification context. There is a troubling trend not to inquire into the entailments of the Seventh Amendment in any rigorous way, but merely to accept past practice—even if it may well be unconstitutional—as a sufficient basis for paying little heed to the Seventh Amendment when litigants raise the issue.[262] Indeed, the Supreme Court has upheld one procedure after another that allows a

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259 Richard Marcus offers the example of the co-conspirator exception to the hearsay rule. *See* Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification* 78 GEO. WASH. L. REV. (forthcoming 2010) (manuscript at 59) (on file with the George Mason Law Review). A judge assesses whether there is a conspiracy under the preponderance of the evidence standard to determine if the statement of a co-conspirator can be admitted into evidence to prove the conspiracy to a jury. *Id.* He suggests that this example establishes that there is not a Seventh Amendment problem. *Id.* But the example is not that persuasive. The life of the Seventh Amendment has been experience, not logic. If Seventh Amendment law were subject to general principles—as Marcus's argument assumes—then it would make no sense, for example, for the Supreme Court to conclude—as it has—that remittitur is constitutional but additur is not. Dimick v. Schiedt, 293 U.S. 474, 487 (1935). The fact that Marcus has identified one, rare, longstanding practice of courts finding facts that a jury may later address on the merits does not prove that courts may always take that measure without violating the Seventh Amendment (this is true even if the co-conspirator exception did not exist in the common law in 1791 and is not permitted for that reason under the Seventh Amendment). Indeed, it is difficult to reconcile Marcus's position with *Beacon Theatres* and *Dairy Queen*. After all, if a judge may decide issues properly before her as long as her decision does not preclude a jury's resolution of factual issues on claims at law—a possible reading of Marcus's co-conspirator example—then *Beacon Theatres* and *Dairy Queen* were wrongly decided.

260 The doctrine of desuetude applies only to statutes and, apparently, is the law only in West Virginia. *See* Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006).

261 As Justice Scalia put the matter in his dissent in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996):

> Today the Court overrules a longstanding and well-reasoned line of precedent that has for years prohibited federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence. One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights—the Seventh Amendment's prohibition on appellate reexamination of civil jury awards—is wrong. It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness.

Id. at 448-49 (Scalia, J., dissenting).

262 *See, e.g.*, *id.* (discussing a trend of courts of appeals ignoring important Seventh Amendment protections).

judge to remove cases from the jury, often with little consideration of the Seventh Amendment.[263]

This pattern is disturbing, even more so when one considers the few instances in which judges *have* read the Seventh Amendment as constraining practice. Federal appellate courts, for example, have shown an uncharacteristically acute concern about the Seventh Amendment—and have even used it in a somewhat tortured way—as a basis for denying class certification.[264] But when it comes to plaintiffs' argument that the Seventh Amendment limits the burden that courts may place on plaintiffs before they can get to trial—on a motion to dismiss, at summary judgment, and now, perhaps, at the class certification stage—courts generally brush the issue aside. The specter is that the federal judiciary—perhaps subconsciously—is taking a political approach to the right to a jury trial.[265]

If so, the new class certification standard would take such politics to a new apogee—for in other settings the courts have not yet said that judges may actually *find facts* before a jury does, but merely that they may come ever closer to doing so. To understand this point, it is useful to examine the broader context of academic analysis and recent federal court decisions implicating the Seventh Amendment.

B. *Neglect: Pleading and Summary Judgment*

The recent trend in the history of procedure—particularly in class actions—is a ratcheting up of standards that plaintiffs must meet to get their case before a jury. Notable movements along these lines are the apparently heightened standards that the Supreme Court imposed, at least in certain

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263 Thomas, *Motion to Dismiss*, *supra* note 36, at 139, 142 (citing Thomas, *Seventh Amendment*, *supra* note 36, at 695-702). Thomas claims that the Supreme Court has upheld "every new procedure that it has considered by which a court removes cases from the determination of a jury before, during, or after trial." *Id.* at 142.

264 Castano v. Am. Tobacco Co., 84 F.3d 734, 750-52 (5th Cir. 1996) (holding that the Seventh Amendment's Reexamination Clause would be violated by bifurcating trial between class and non-class issues); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995) (same); *cf.* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 424 (5th Cir. 1998) (relying on interpretation of the Reexamination Clause in light of *Gasoline Products* to affirm denial of class certification in employment discrimination action).

265 This pattern seems to find further confirmation in that the only procedures that courts seem to strike down under the Seventh Amendment are ones that could benefit plaintiffs: additur, a doctrine that appears to benefit plaintiffs (by forcing a defendant to accept a higher verdict or face a new jury trial) and was held unconstitutional in *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935); and the phasing of trials to allow for class certification. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 738 (1996) (discussing plaintiffs' phasing of trials); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995). The Supreme Court's requirement in *Beacon Theatres* and *Dairy Queen* that a judge await and abide by a jury's factual findings regarding legal claims before resolving equitable claims based on the same facts does not appear to provide any systematic benefit to plaintiffs or defendants.

kinds of antitrust cases, on pleading in *Twombly*[266] and on summary judgment in *Matsushita Electric Industrial Co. v. Zenith Radio Corp*.[267]

Making it more difficult for plaintiffs to reach a jury naturally implicates the Seventh Amendment.[268] At some point, this difficulty allows judges to arrogate to themselves the power to assess the merits of the parties' positions. The right to a trial by jury is not meaningful unless there is a check on when judges may restrict access to a jury.[269]

Concerns about the constitutionality of recent procedural changes find support in the scholarship of Professor Suja Thomas. Thomas has undertaken a thorough analysis of the common law at the time of the Seventh Amendment's adoption and has reached startling results.[270] She concludes that various procedural mechanisms in their current form—including the pleading standard under *Twombly*,[271] summary judgment,[272] and remittitur[273]—are unconstitutional. Thomas contends that none of these mechanisms has a counterpart in what she deems the relevant practice in the relevant period—the English common law of 1791.[274]

Thomas's work is unlikely to prove influential among judges for at least two reasons. First, at a practical level, it would require them to upset established practices. Regardless of the merit of her positions, courts will resist revisiting the constitutionality of procedures they employ every day, even if any assessment they have made of whether the procedures violate the Seventh Amendment was only implicit. Second, at a more theoretical level, not all judges subscribe to Thomas's interpretive methodology. While the Supreme Court has taken an originalist approach to identifying the requirements of the Seventh Amendment in some instances,[275] it has looked instead to the underlying purposes of the right to a trial by jury in others.[276]

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266 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-55 (2007).

267 475 U.S. 574, 585-86 (1986).

268 *See* U.S. CONST. amend. VII (providing a right of trial by jury that shall not be bifurcated).

269 *See supra* Part III.A (discussing judicial discretion and potential adverse effects on one's constitutional right to a jury).

270 *See, e.g.*, Thomas, *Motion to Dismiss*, *supra* note 36, at 1855 (finding that recent procedural changes in motions to dismiss are unconstitutional).

271 *Id.*

272 Thomas, *Summary Judgment*, *supra* note 36, at 144.

273 Thomas, *Constitutionality of Remittitur*, *supra* note 36, at 735-36.

274 Although Thomas takes a predominantly originalist approach to the Seventh Amendment, she considers not only corresponding historical procedures, but also the principles underlying the English common law. *See, e.g.*, Thomas, *Summary Judgment*, *supra* note 36, at 139-40 (discussing both the procedures under English common law and its "core principles or 'substance'").

275 *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 487 (1935).

276 *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 434-36 (1996) (taking a practical approach to whether the Seventh Amendment is violated when an appellate court reviews a federal court's denial of a motion to set aside a jury's verdict as excessive). *But see id.* at 443-46 (Stevens, J., dissenting) (adopting an originalist approach to interpretation of the Seventh Amendment); *id.* at 451-58 (Scalia, J., dissenting) (taking an originalist approach to interpreting the Seventh Amendment).

Nevertheless, it is noteworthy that the Court's treatment of the possibility of the Seventh Amendment conflicting with modern procedural innovations is threadbare. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[277] is representative in this regard. *Tellabs* involved an interpretation of the Private Securities Litigation Reform Act of 1995 ("PSLRA").[278] At issue was how high a burden the PSLRA had placed on plaintiffs at the pleading stage of litigation.[279] In formulating the standard, the Seventh Circuit took into account the risk of improperly usurping the role of the jury—and the requirements of the Seventh Amendment.[280] On appeal, the Supreme Court casually dismissed these issues.[281] It suggested that Congress might establish any pleading requirements it wants for federal statutory claims,[282] a view that suggests no limiting principle.

The reasoning of the Court seemed, in part, to be that the greater power includes the lesser—that Congress need not create substantive rights and therefore that it can set the terms for pleading the substantive rights it creates.[283] For the Seventh Amendment to have any meaning, that sort of reasoning cannot suffice. Legislatures have the power to change most substantive legal rights. Yet the Seventh Amendment imposes restrictions on how those rights may be adjudicated in federal court. The power to eliminate a right therefore cannot be tantamount to authority to control the role of the jury in assessing those rights. Otherwise, little, if anything, is left of the Seventh Amendment.

The *Tellabs* Court also noted that it had allowed heightened pleading standards in the past, just as it had allowed courts to assess the reliability of expert testimony, to grant judgment as a matter of law, and to rule on summary judgment.[284] But uncritical deference to prevailing practice is no substitute for constitutional analysis. As Justice Scalia noted regarding the Seventh Amendment in a different context, the fact that the courts have ignored the requirements of the Constitution in the past does not support "unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights."[285]

Yet the originalists did not come to plaintiffs' rescue regarding the pleading standard under the PSLRA. They did not undertake the sort of rigorous analysis that Professor Thomas's work suggests is appropriate in

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277 551 U.S. 308 (2007).

278 *Id.* at 312.

279 *Id.*

280 *Id.* at 326.

281 *Id.* at 326-29.

282 *Id.* at 327.

283 *Tellabs*, 551 U.S. at 327 ("Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits.").

284 *Id.* at 327 n.8.

285 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 448-49 (1996) (Scalia, J., dissenting).

this context—and that she concludes can render a heightened pleading standard unconstitutional. Justice Thomas merely joined the majority opinion,[286] and Justice Scalia, in concurring, called for a *higher* pleading standard than the majority imposed without discussing the Seventh Amendment at all.[287]

C. *Misuse: Phased Litigation and the Reexamination Clause*

The short shrift that courts generally give to the Seventh Amendment in the context of procedural innovation has a notable exception. Some federal appellate courts read the Reexamination Clause as barring phased jury trials and, consequently, as preventing certification of particular issues for class treatment when that would otherwise be possible.[288]

This invocation of the Seventh Amendment is striking for numerous reasons. First, it reflects a particularly rigid application of the Reexamination Clause. As noted above, courts are rarely so inflexible about the constitutionality of procedural innovation.[289] Second, plaintiffs are the only parties apparently prejudiced by the supposed violation of the Reexamination Clause in this context, as they might be required to prove the same facts twice. Thus, courts have precluded plaintiffs from trading the benefits of a class action against giving defendants a strategic advantage. In this way, courts act on an argument that defendants arguably do not have any standing to raise. Third, issue preclusion (collateral estoppel) would seem sufficient to address any concerns about the Reexamination Clause. Finally, the federal courts' application of the Seventh Amendment is founded on a misreading of a key precedent, *Gasoline Products.*[290] This Supreme Court decision actually addressed the Jury Trial Clause, not the Reexamination Clause.[291]

The upshot is that some federal courts read the Seventh Amendment in a very aggressive way to limit the options available to plaintiffs pursuing class certification. But what is sauce for the goose is sauce for the gander. If courts are going to read the Reexamination Clause as in some cases preventing bifurcation and class certification, they should not casually dismiss the argument that a novel class certification standard violates the Seventh Amendment right to a trial by jury.

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286 *Tellabs*, 551 U.S. at 312.

287 *Id.* at 329-33 (Scalia, J., dissenting).

288 *See* cases cited *supra* note 38.

289 *See supra* Part III.B.

290 Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931).

291 *Id.* at 498.

1. Reading the Reexamination Clause as Limiting Phased Trials

a. Rhone-Poulenc

The Seventh Circuit invoked the Reexamination Clause of the Seventh Amendment in reversing a grant of class certification in *In re Rhone-Poulenc Rorer Inc.*[292] The case involved claims by hemophiliacs that they had been infected by AIDS as a result of receiving tainted blood.[293] The trial court judge certified a class for purposes of determining common issues—in particular, whether defendants were negligent in exposing hemophiliacs to AIDS—and then planned to have additional issues tried to separate juries.[294]

In reversing the certification decision, Judge Posner made several relevant points. First, he relied on the Reexamination Clause of the Seventh Amendment, reasoning that in bifurcating litigation a court "must carve at the joint."[295] He worried, for example, that the first jury might determine that a defendant was negligent—say, by failing to screen for donors likely to be infected by AIDS—and that a second jury might revisit that determination in assessing comparative negligence or proximate causation.[296] Specifically, Judge Posner pointed out that the first jury's finding of negligence might conflict with a later jury's conclusion that defendant's failure to take precautions was not a proximate cause of plaintiffs' injuries.[297] Similarly, although he did not put a fine point on the issue, presumably the first jury might find the defendant negligent, but a later jury—in assessing comparative negligence—might conclude that the defendant was not negligent.[298] For the view that the Reexamination Clause of the Seventh Amendment bars this kind of overlap between the responsibilities of juries, Judge Posner relied on *Gasoline Products* and other cases interpreting that Supreme Court decision.[299]

The Seventh Amendment was particularly important to Judge Posner's opinion. After all, at the time Rule 23 did not allow for interlocutory appeals.[300] The threat of a constitutional violation provided the basis for an extraordinary measure—granting a writ of mandamus regarding the class certification decision before a final judgment on the merits.[301] Indeed, for

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292 51 F.3d 1293 (7th Cir. 1995).
293 *Id.* at 1294.
294 *Id.* at 1296-97.
295 *Id.* at 1302.
296 *Id.* at 1303.
297 *Id.*
298 *Rhone-Poulenc*, 51 F.3d at 1303.
299 *Id.*
300 *Id.* at 1294.
301 *Id.* at 1294-95.

the proposition that a violation of the Seventh Amendment supports granting a writ of mandamus, he cited, *inter alia*, *Beacon Theatres* and *Dairy Queen*,[302] the very cases that otherwise tend to be ignored in the class certification context.[303]

Finally, Judge Posner based his decision in part on the theoretical possibility that class certification would otherwise force a settlement and result in a form of blackmail.[304] Judge Posner did not pay similar attention to the risk that hemophiliacs with AIDS—some of whom were likely uninsured—might feel similar pressure to settle for funds they desperately needed to pay their medical bills.

b. Castano

Castano v. American Tobacco Co.[305] is similar in various regards to *Rhone-Poulenc*. In *Castano*, the trial court certified a national class of plaintiffs who had purchased and smoked cigarettes, claiming that tobacco companies had "fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature."[306] According to the trial court's order, the issues that would be tried on a class basis included defendants' "core liability," including defendants' course of conduct and whether defendants acted negligently and fraudulently.[307] Individual issues would then be addressed in a later phase.[308]

The Fifth Circuit, much like the Seventh Circuit in *Rhone-Poulenc*, reversed the class certification order.[309] In so doing, it too relied in part on the Seventh Amendment Reexamination Clause, citing a line of precedent deriving ultimately from *Gasoline Products* for the proposition that a case cannot be bifurcated and tried before separate juries unless the issues in the separate phases are "distinct and separable."[310] The Fifth Circuit noted that a second jury might revisit the findings of the class jury—for example, rejecting an initial finding of defendants' negligence in addressing the individualized issue of comparative fault.[311]

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302 *Id.* at 1303.

303 *See supra* Part III.A.

304 *Rhone-Poulenc*, 51 F.3d at 1298.

305 84 F.3d 734 (5th Cir. 1996).

306 *Id.* at 737.

307 *Id.* at 738 (internal quotation marks omitted).

308 *Id.*

309 *Id.* at 737.

310 *Id.* at 750-51 (quoting Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978) (relying on *Gasoline Products*)).

311 *Castano*, 84 F.3d at 751.

Further, the Fifth Circuit in *Castano* cited to *Rhone-Poulenc*, among other sources, for the proposition that class certification "creates insurmountable pressure on defendants to settle . . . ."[312] In other words, the *Castano* court's reasoning was affected by its concern about so-called legalized blackmail.[313] And, again, like Judge Posner, the Fifth Circuit paid relatively little attention to the risk that plaintiffs might be at a terrible strategic disadvantage without class certification—potentially unable to seek legal redress.

2. Harming Plaintiffs to Protect Them

The reading of the Reexamination Clause in *Rhone-Poulenc* and *Castano* is dubious in part because, in effect, it harmed plaintiffs to protect them. Consider the specter the Fifth Circuit raised in *Castano*—that

> a second jury will rehear evidence of the defendant's conduct. There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury.[314]

In other words, the Fifth Circuit feared that a plaintiff might have to prevail twice in a bifurcated trial—once in establishing defendant's liability and a second time in evaluating the relative fault of plaintiff and defendant. The second jury might not abide by the first jury's determination that defendant was at fault. Similarly, as noted above, the concern that the *Rhone-Poulenc* court raised was that a first jury might find defendants liable for the infected blood and a second jury might take that result away by finding a lack of proximate cause.[315]

Accepting the analysis of the Fifth and Seventh Circuits at face value,[316] it is strange to use the potential harm to plaintiffs in *denying* them the relief they seek. After all, plaintiffs may waive the right to a trial by jury.[317] Why, then, should they be unable to make a partial waiver, accepting that they will have to establish part of their claim on a class basis and then face the prospect of possibly having to prove the same facts again when a later jury assesses overlapping issues? And why should defendants be able to raise the potential harm to *plaintiffs* in seeking to resist class cer-

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312 *Id.* at 746.

313 *See supra* Part I.C.1.

314 *Castano*, 84 F.3d at 751.

315 *In re* Rhone-Poulenc Rohrer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

316 As discussed below, these concerns seem overstated. A second jury could be instructed to accept the findings of this first jury.

317 JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 508 (4th ed. 2005).

tification—and, in many instances, to deprive plaintiffs of *any* meaningful opportunity to recover at all?

Courts have shown appropriate skepticism about defendants' arguments of this sort in a different context. The issue arises when defendants claim that class certification should be denied to protect the interests of some class members.[318] Judges have scrutinized defendants' contentions along these lines. Indeed, one court aptly compared defendants to foxes guarding a chicken house.[319] The danger is that an effort to protect class members may actually harm them.

The same point applies to the argument about the Reexamination Clause in *Rhone-Poulenc* and *Castano*. Plaintiffs are the ones taking on the risk of having to prevail on the same factual issue twice, and defendants appear to suffer no meaningful harm. Thus, plaintiffs should be able accept this burden if they feel that certification of a class—even on only a limited number of issues—is worth the cost.

3. Issue Preclusion Protects Against Reexamination

An alternative solution to denying class certification based on the Reexamination Clause would simply be to instruct the second jury to accept the facts found by the first jury. Our court system uses this mechanism regularly. The doctrine of issue preclusion (or collateral estoppel) binds one court to follow the findings of another.[320] Often that means a later jury must be instructed to accept the factual findings of an earlier jury. Courts have not found a violation of the Reexamination Clause of the Seventh Amendment in that context.[321] There is, therefore, little reason why such a problem should arise when a court bifurcates litigation to allow some issues to be tried on a class-wide basis.

Of course, the life of the law has not just been logic, but experience. However much sense it makes to allow courts to empanel juries that might address overlapping issues, if a Supreme Court precedent bars them from doing so, they have no choice. Lower courts must abide Supreme Court precedents. The crucial issue, then, is whether the courts in *Rhone-Poulenc*, *Castano*, and other cases[322] were bound by *Gasoline Products* to deny class

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318 Davis & Sorensen, *supra* note 85, at 142.

319 *See id.* at 141 (quoting Eggleston v. Chi. Journeymen Plumbers' Local 130, 657 F.2d 890, 895 (7th Cir. 1981)).

320 *See generally* DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 46-60 (2001).

321 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333-37 (1979) (holding that non-mutual issue preclusion does not violate the Seventh Amendment).

322 *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 424 (5th Cir. 1998) (relying on interpretation of Reexamination Clause in light of *Gasoline Products* to affirm denial of class certification in employment discrimination action). *But see* Allison v. Citgo Petroleum Corp., No. 96-30489, 1998 U.S.

certification. It turns out they were not. Indeed, contrary to conventional wisdom, *Gasoline Products* did not involve the Reexamination Clause of the Seventh Amendment at all.

4. The Misreading of *Gasoline Products*

This point raises the final flaw in the interpretation of the Reexamination Clause in *Rhone-Poulenc*, *Castano*, and similar cases: it traces back to a misreading of an old Supreme Court decision, *Gasoline Products*.[323] That case is best read not as turning on the Reexamination Clause, but as depending on the first clause of the Seventh Amendment, the Jury Trial Clause. The risk in *Gasoline Products* was that there would be a *gap* between jury findings—not an *overlap*—requiring the judge to supply findings that the Constitution reserves for the jury.[324] And the remedy was another trial of a claim as a whole, not merely of the measure of damages, resulting in a second jury revisiting the issues resolved by the first jury.[325] This outcome is the opposite of what one would expect if the Reexamination Clause were the Supreme Court's concern. In the end, then, the argument that dividing trials into phases to allow partial class certification would violate the Reexamination Clause has much weaker footing in Supreme Court precedent than the argument that a heightened class certification standard violates the Jury Trial Clause.

To see this, a careful reading of *Gasoline Products* is necessary. The plaintiff in that case sued to recover royalties under a licensing agreement.[326] The defendant counterclaimed, alleging that the plaintiff had failed to perform the contract that gave rise to the royalties.[327] After trial, a jury awarded recovery to the plaintiff, set off by an award to the defendant on the counterclaim.[328] On appeal, the First Circuit affirmed the rulings of the trial court on all issues except the jury instruction on the measure of damages on the counterclaim.[329] The First Circuit remanded for a further hearing only as to the defendant's damages.[330] The plaintiff petitioned to the Su-

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App. LEXIS 24651, at *1-2 (5th Cir. Oct. 2, 1998) (denying panel rehearing and rehearing en banc, but appearing not to rely on the panel's original reasoning for affirming the denial of class certification).

323 Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931).

324 *Id.* at 499-500.

325 *Id.* at 501.

326 *Id.* at 495.

327 *Id.*

328 *Id.* at 496.

329 *Gasoline Products*, 283 U.S. at 496.

330 *Id.*

preme Court, which granted certiorari to decide whether remand of only the issue of damages on the counterclaim violated the Seventh Amendment.[331]

The plaintiff argued that "the rules of the common law in force when the Amendment was adopted" mandated that "there could be no new trial of a part only of the issues of fact"; thus, "a resubmission to the jury of the issue of damages alone is a denial of the *trial by jury* which the Amendment guarantees."[332] In other words, the plaintiff sought application of the common law rule that remand of any portion of a jury verdict required remand of the entire jury verdict. The defendant's counterclaim, according to the plaintiff, had to be tried again.[333]

The Court framed the relevant point in dispute as "whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried."[334] The jury's verdict, the Court recognized, established the existence of a contract and its breach by the plaintiff.[335] The Court worried, however, that it was "impossible from an inspection of the present record to say precisely what were the dates of formation and breach of the contract found by the jury, or its terms."[336] The problem was that the trial court judge, in providing this necessary information to a second jury, could not be certain what the first jury had concluded.[337] As the Supreme Court explained at length, conflicting evidence existed on the dates of formation and breach of the contract, as well as its terms.[338] And the form of the initial verdict did not reveal the jury's findings on these issues.[339] For this reason, the Court concluded:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is *so distinct and separable* from the others that a trial of it alone may be had without injustice. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial.[340]

The Court therefore required a new trial of all issues on the counterclaim.[341]

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331 Gasoline Prods. Co., v. Champlin Ref. Co., 282 U.S. 824, 824 (1930) ("The petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, limited to the question whether the United States Circuit Court of Appeals erred in limiting the new trial to the question of damages.").

332 *Gasoline Products*, 283 U.S. at 497 (emphasis added).

333 *Id.*

334 *Id.* at 499.

335 *Id.* at 500.

336 *Id.* at 499.

337 *Id.* at 499-500.

338 *Gasoline Products*, 283 U.S. at 499-500.

339 *Id.*

340 *Id.* at 500-01 (emphasis added) (citations omitted).

341 *Id.* at 501.

It is the Court's use of the phrase "distinct and separable" that has made mischief, causing lower federal courts to misinterpret *Gasoline Products*.[342] Judges and scholars have interpreted the case to mean that the Reexamination Clause allows for separate juries in a single case to decide only those factual issues that are "distinct and separable."[343] Careful consideration of *Gasoline Products*, however, reveals that it is best interpreted as not involving application of the Reexamination Clause of the Seventh Amendment at all. Rather, it implicated only the plaintiff's right to a jury's findings on all issues of fact.

The first important point in support of this argument is that the Court never referred specifically to the Reexamination Clause of the Seventh Amendment. To be sure, the Court, at the outset of its opinion, quoted the Seventh Amendment in full.[344] But this is equally consistent with a view of the case as involving the Jury Trial Clause as it is with an understanding of the opinion as addressing the Reexamination Clause.

Similarly revealing is how the Court characterized the issue raised by the plaintiff: "Petitioner contends that the withdrawal from consideration of the jury, upon the new trial, of the issue of liability on the contract set up in the counterclaim, is *a denial of its constitutional right to a trial by jury*."[345] The Court framed the issue as involving the right to a jury trial, not the proscription on reexamination of a jury's findings.[346] The Court's focus, then, was on the right to a trial by jury. Of course, it could be that the Court was alluding obliquely to the right to a jury's findings free from reexamination. If so, the Court was being very coy. It could easily have referred to the Reexamination Clause specifically.

Moreover, there was no question that a second jury would reexamine the findings of the first jury in *Gasoline Products*. The choices before the Court were holding a new trial regarding the whole case, holding a new trial regarding the entirety of the defendant's counterclaim, or holding a new trial regarding only the defendant's damages on its counterclaim.[347] The First Circuit remanded only the issue of the damages suffered by the defen-

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342 *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 424 (5th Cir. 1998) (quoting *Gasoline Products*, 283 U.S. at 500) (internal quotation marks omitted) (citing *Gasoline Products* for "distinct and separable" standard under Reexamination Clause of Seventh Amendment); Castano v. Am. Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

343 *See, e.g.*, *Allison*, 151 F.3d at 424.

344 *Gasoline Products*, 283 U.S. at 497.

345 *Id.* (emphasis added).

346 Again, later in the same paragraph, the Court framed petitioner's argument similarly: "It is argued that as, by the rules of the common law in force when the Amendment was adopted, there could be no new trial of a part only of the issues of fact, a resubmission to the jury of the issue of damages alone is *a denial of the trial by jury* which the Amendment guarantees." *Id.* (emphasis added).

347 *Id.* at 496.

dant.[348] The Supreme Court's reversal meant that the plaintiff's liability had to be tried again as well. The Court acknowledged that this issue had been properly decided.[349] In remanding the entirety of the defendant's counterclaim for a new trial, then, the Court *required* one jury to reexamine the proper factual findings of another jury; it did not *bar* one jury from reexamining another jury's proper factual findings. The Reexamination Clause proscribes—it does not require—reexamination of facts tried by a jury. It is odd, then, to infer that the Court relied on the Reexamination Clause. In short, reexamination of the first jury's findings was not at issue because it was inevitable.

The real problem, as the Court explained, was that to award damages, the new jury would have to be "advised" of the terms of the contract and the dates of its formation and breach.[350] After all, without that direction, the second jury would just have to hazard a guess about crucial facts in assessing the defendant's damages.

Thus, the First Circuit's remand of only damages would have required the judge to make the factual findings necessary to instruct the second jury about the terms of the contract and the nature of the breach. Doing so, however, would be inconsistent with the Court's observation that "of vital significance in trial by jury is that issues of fact be submitted for determination . . . by the jury . . . ."[351] Remanding only the defendant's damages would have deprived the plaintiff of any meaningful jury findings on the nature of its liability. The judge, in essence, would be usurping the fact-finding role of the jury.[352] The "confusion and uncertainty," to which the Court referred, would have resulted from the vagueness of the initial jury's findings on the plaintiff's liability.[353] The denial of a fair trial would have followed from depriving the plaintiff of findings of fact from *any* jury on the precise nature of its liability.

To state the same point differently, the Reexamination Clause prevents a second decision-maker, whether a judge or jury, from making findings of fact that *overlap* with and displace the findings of an initial jury. This, however, could not be prevented in *Gasoline Products*. The nature of the plaintiff's liability had to be decided again. The Court, then, did not resolve

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348 *Id.* at 497.

349 *Id.* at 498-99.

350 *Gasoline Products*, 283 U.S. at 499.

351 *Id.* at 498.

352 True, the court would have been reexamining issues addressed by the first jury. But, as noted above, once the first jury returned a general verdict on the plaintiff's liability and assessed the resulting damages based on an erroneous jury instruction, reexamination of the first jury's findings by either the judge or jury was inevitable. The requirement that a second jury, rather than the judge, reexamine the issues pertaining to liability results from the right to a trial by jury guaranteed by the first clause of the Seventh Amendment, not from its Reexamination Clause. Of course, the court was constrained in that it could not find the plaintiff not liable at all and claim to be abiding by the initial verdict.

353 *Gasoline Products*, 283 U.S. at 499.

when this sort of overlap is impermissible. Thus, *Gasoline Products* was not about an impermissible overlap, the concern of the Reexamination Clause.

What could be avoided in *Gasoline Products* was having a trial judge fill in the *gap* in the first jury's findings of fact. If the judge were to do so, he would have deprived the parties of the right under the Seventh Amendment to a jury determination of all factual issues.[354] The Jury Trial Clause prevents a judge from filling such a gap by making his own findings—in *Gasoline Products*, about the terms of the contract and the dates of its formation and breach.

The invocation of the Reexamination Clause in cases like *Rhone-Poulenc* and *Castano*, then, is inappropriate. It reflects a strained reading of the Seventh Amendment and *Gasoline Products* as a basis for denying class certification. Also significant is that the courts that engaged in that strained reading acknowledged that they were motivated, at least in part, by their concern that certification of a class might harm corporate defendants by putting undue pressure on them to settle litigation.[355]

D. *Political Judging*

1. The Problem of Selective Formalism

The bottom line, then, is that at least some judges appear to interpret the Seventh Amendment with a slant. When it comes to increasing the burden for plaintiffs—at the pleading stage, at summary judgment, and now, perhaps, at class certification—courts undertake no careful effort to determine the requirements of the Seventh Amendment.[356] If they address that constitutional issue at all, they imply that their neglect of it in the past provides a sufficient basis to continue to ignore it.[357] That is a shabby way to deal with a constitutional right.

Yet some federal courts at times take the Seventh Amendment quite seriously. And when they do so, they adopt an uncharacteristically formalist attitude—uncharacteristic in regard to the Seventh Amendment in general

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354 Note that reexamination of the first jury's findings could have been prevented had the trial court used special interrogatories rather than a general jury verdict. The trial court then could have advised a second jury of the terms of the contract and the date of its formation and breach without any guesswork. The findings of the first jury on plaintiff's liability would have been preserved, without a violation of plaintiff's right to a trial by jury on all issues of fact.

355 *See supra* Part II.F.

356 *See supra* Part III.B.

357 *Id.*

and, in the case of Judge Posner, in regard to his overall jurisprudence[358]—in invoking the Reexamination Clause to deny class certification.[359] This is deeply concerning as it suggests an instrumental use of the Seventh Amendment.

And there is a deeper inconsistency. Some of the Justices who have shown the most solicitude for placing ever greater burdens on plaintiffs have an avowed commitment to formalism and, particularly, to originalism.[360] There are various reasons why originalism may attract adherents. The most commonly offered justification is that it may impose discipline on judges who, according to originalists, lack the democratic pedigree to make the kind of value judgments that would otherwise be necessary in interpreting the Constitution.[361]

Whatever the strength of this argument in general, it has particular force in the context of constitutional provisions like the Seventh Amendment that do not speak in broad moral terms,[362] but rather seem to enact the "common law."[363] The Court at times commits to an originalist approach to the Seventh Amendment—in terms of when parties have the right to a trial by jury[364] and, to a lesser extent, in terms of the nature of that right.[365] At least for those Justices with an originalist bent, departure from that commitment in applying the Seventh Amendment involves selective formalism.

Consider in this light Professor William Nelson's article, *Summary Judgment and the Progressive Constitution*.[366] Nelson is a first rate historian. It therefore carries particular weight when he concludes "that a modern judge who is committed to interpreting the Seventh Amendment as its drafters and ratifiers would have applied it should deem summary judgment

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358 Judge Posner's commitment to pragmatism is a theme of many of his works, including RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

359 *See supra* Part III.C.1-2.

360 *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 39-40 (Amy Gutmann ed., 1997).

361 *Id.*; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1-2 (1991).

362 *See, e.g.*, Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 360, at 115, 119.

363 U.S. CONST. amend. VII. Note that there is an ambiguity as to whether the understanding of the "common law" should be fixed at the time of the enactment of the Bill of Rights or should be understood as changing as the common law develops. A problem with the latter approach—allowing the meaning of the "common law" to develop over time—is that it is not clear how the Seventh Amendment would have any meaning. If judges were to eliminate juries entirely through the "common law" process, would that then be constitutional?

364 Thomas, *Summary Judgment*, *supra* note 36, at 146 n.25.

365 *Compare* Dimick v. Schiedt, 293 U.S. 474, 487 (1935) (adopting originalist approach to meaning of Seventh Amendment), *with* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438-39 (1996) (taking non-originalist approach to requirements of Seventh Amendment).

366 Nelson, *supra* note 37.

and the *Twombly* motion to dismiss unconstitutional."[367] This conclusion gains even more force from the fact that he nonetheless believes that summary judgment and *Twombly are constitutional*.[368] His historical point is a concession to Thomas that *if* one takes an originalist approach, the current summary judgment and pleading standards would be unconstitutional.[369]

Yet the originalists have not rallied to Thomas's cause. Nor have they offered any explanation for why they have not done so. The risk is that they are engaging in selective formalism, which is not really formalism at all. Putting aside formalist practice—and originalism in particular—without an adequate explanation undermines any force behind its traditional defense. Originalism then becomes not a constraint on judicial decision making, but a tool that empowers judges to set aside laws whenever a Justice—or a majority of Justices—prefers the values that people held in the eighteenth century to the values that people hold today.

Recent federal court decisions interpreting the Seventh Amendment smack of selective formalism. Justices who rely on originalism in some circumstances casually dismiss or ignore it when it would protect the rights of plaintiffs.[370] Conversely, judges who generally take a very pragmatic view adopt a formalist attitude when the Reexamination Clause impedes class certification.[371] A pattern emerges that looks a lot like political judging in the pejorative sense of that term—adjusting the law depending on a judge's sympathies for a party or class of parties.

2. A Non-Originalist Reading of the Seventh Amendment

But not all Justices or judges are originalists. Indeed, there are good reasons to question originalism.[372] Even so, some principled theory of the Seventh Amendment is necessary to render it meaningful. The Seventh Amendment has little force if we simply say that times change, and so do values, such that the Federal Rules Advisory Committee, the Supreme Court, and judges may impose and develop any procedures they want. Why, then, have the Seventh Amendment at all?

Under a non-originalist approach, matters become a bit messier in regard to the heightened pleading and summary judgment standards the Court

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367 *Id.* at 1658.

368 *Id.* at 1664.

369 *Id.* at 1665-66.

370 As discussed above, *Tellabs* epitomizes this tendency. *See supra* notes 277-87 and accompanying text.

371 Judge Posner's opinion in *Rhone-Poulenc* is representative.

372 The literature on this topic is massive. For some of the most compelling arguments against originalism, see RONALD DWORKIN, JUSTICE IN ROBES 117-39 (2006); RONALD DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 109-35 (2001).

has imposed in recent decades. Consider again the views of Professor Nelson. He suggests that the jury trial right is fundamentally about "ensur[ing] that central authorities in a state, provincial, or national capital could not impose their will on local communities."[373] This value, according to Nelson, is antiquated.[374] As he puts the matter,

> [m]ost of us have no unique local culture to preserve, and even when we do (think, for example, of New Yorkers wishing to preserve their theater district or residents of Dallas committed to their megachurch), it does not occur to us that the jury is the appropriate instrument for preserving it.[375]

To summarize Nelson's view, since the Seventh Amendment is about localism, and localism, especially as protected by the jury, is outdated, a heightened standard at pleading or summary judgment is not unconstitutional.

Nelson's position gives rise to at least two problems. First, he has essentially read the Seventh Amendment out of the Constitution. He seems comfortable with that. As he notes, the protection the Constitution provides against impairment of contracts has been reduced to all but naught.[376] But eliminating a constitutional right should be a measure of last resort. The Court has not yet been willing to go so far in regard to the Seventh Amendment.

The second problem with Nelson's interpretation is that there are other values that the right to a trial by jury can be understood to embody. Even Nelson's own point is compound. Juries not only allowed the local to trump the regional or the national, but they also empowered ordinary citizens to trump government officials in general and judges in particular.[377]

The populism that animates the Seventh Amendment is very much alive and relevant today. Many Americans—if given the opportunity to be fully informed and to reflect[378]—might conclude that the jury trial's protec-

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373 Nelson, *supra* note 37, at 1656.

374 *Id.* at 1658.

375 *Id.* at 1663-64.

376 *Id.* at 1662.

377 *Id.* at 1655-56 (noting that Seventh Amendment authorized citizens as the ultimate source of law and not officials—"not Parliament, not the Privy Council, not the provincial legislature, and surely not the judiciary").

378 This point is important. If judges should serve in part as democratic representatives—as Nelson's argument essentially implies—a key question is why they are better situated than other democratic representatives in this regard. In other words, the issue becomes one of institutional competence and legitimacy. The best analysis along these lines is Christopher Eisgruber's Constitutional Self-Government. *See* EISGRUBER, *supra* note 372. As Eisgruber points out, part of the reason that judges—and, for that matter, juries—are appropriate decision-makers on behalf of the polity is that they have the time and opportunity to consider matters with care and in context. *Id.* at 50-51, 109-35 (also justifying the Supreme Court as a democratically representative institution). The literature on judges playing a role as democratic representatives in constitutional interpretation is large and growing. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993) (arguing that courts integrate the will of the People

tion of populism should be preserved, as the Seventh Amendment requires. It is not at all clear that we have "progressed" beyond the requirements of the Seventh Amendment. Thus, the large corporate defendants that are the primary beneficiaries of—and catalysts for—erecting ever higher procedural barriers between plaintiffs and juries may find themselves directly at odds with a constitutionally enshrined value that retains its vitality.

This is not the context for developing a non-originalist interpretation of the Seventh Amendment. Nor is it our argument that the pleading or summary judgment standards the Supreme Court has recently imposed are unconstitutional. As a practical matter, unless and until there is a significant shift in the membership of the Court, that issue is resolved. The conclusion is simply too surprising—and judges and commentators are too settled in their commitments and expectations—for a shift in case law to occur of that significance.

But the same is not true for the nebulous and potentially radical new class certification standard that may find some purchase in the language of some recent federal appellate court opinions. Whatever the new class certification standard is—if there is a new standard—it has not yet become entrenched. It also goes much further than heightened standards for pleading or summary judgment, allowing a judge to find merits facts that the jury would then have to address again. In other words, under some interpretations of recent case law, at class certification courts may not merely scrutinize allegations or evidence for plausibility, but they may apply the burden of proof themselves to facts on the merits.[379] And the policy basis for the new class certification standard—again, if there is one—is unusually weak: it distorts a device designed to promote procedural efficiency to undertake substantive analysis; it addresses a problem that probably does not exist (and, if it does, that may well be remedied by the aforementioned heightened pleading and summary judgment standards); and it creates all sorts of procedural difficulties. Given these circumstances, the courts should be open to performing a rigorous analysis under the Seventh Amendment. The

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into constitutional interpretation at key moments); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (same); RONALD DWORKIN, LAW'S EMPIRE (1986) (recognizing constitutional law as ultimately an interpretation of society's deep commitments); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (arguing that the Supreme Court largely follows public opinion in rendering its decisions); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (addressing the historical role played by citizens in interpreting the Constitution).

379 Some of the language from *Hydrogen Peroxide* and *Canadian Cars* can be read in this way. *Hydrogen Peroxide*, for example, indicated both that the preponderance of the evidence standard applies to all required showings for class certification and that "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits." *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008).

most extreme reading of the recent class certification decisions, we submit, would not survive that scrutiny.

CONCLUSION

Courts fiddling with and appearing to raise the class certification standard in antitrust cases have generally offered one policy justification for doing so: certification of a class puts undue pressure on defendants to settle. But those same courts have failed to offer any satisfying empirical or theoretical basis for that claim. And they have not balanced their concern for the potential vulnerability of large corporations with similar attention to the possible vulnerability of victims of antitrust violations. What is left, then, as the catalyst for potential change in the class certification standard is a naked preference for large market players over the less powerful market participants they may exploit. At the same time, possible changes to the class certification standard are difficult to reconcile with the internal logic of Rule 23 and the Seventh Amendment. For these reasons, what we may be seeing playing out is a form of politics that has no proper place in the development of class action procedure.