HEART OF DARKNESS: A SATIRICAL COMMENTARY

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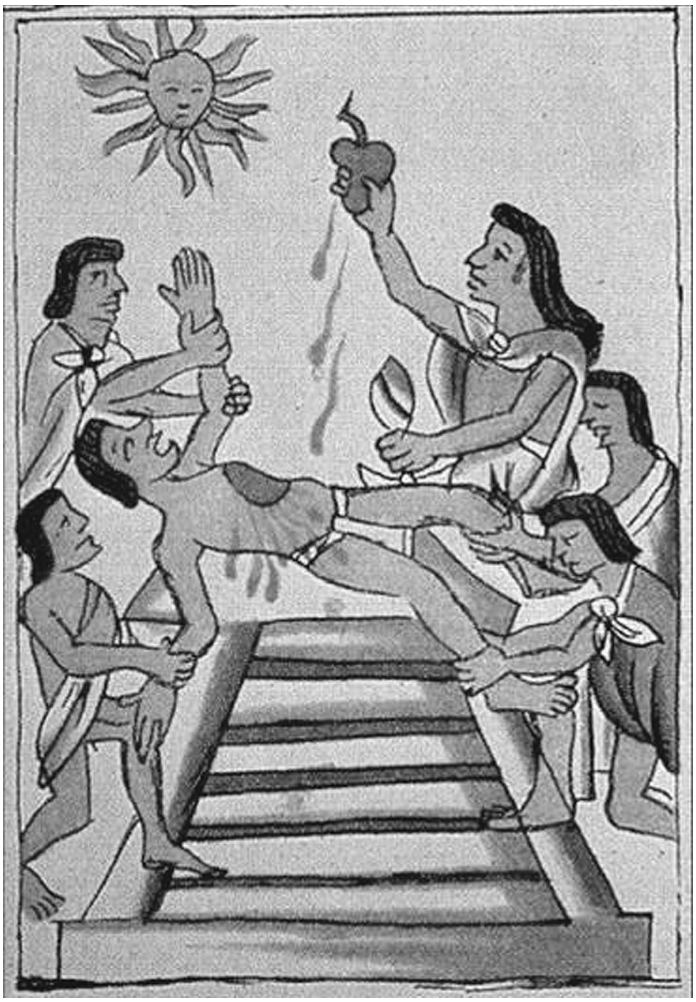

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Even the most enlightened mind will occasionally fall into a dark pattern of thought. Jonathan Jacobson is an exceptionally enlightened commentator on issues of antitrust law and policy. However, even Jacobson may fall into a dark pattern of thought from time to time. Indeed, Jacobson's strong attachment to the goals and ideals of antitrust could engender an emotional engagement on his part that may bring more primal impulses to the fore when, as in today's courts, powers that be are acting in unfortunate and sometimes irrational ways to curtail and stifle antitrust enforcement. I believe that to be what has happened in Jacobson's article.

Jacobson's core thesis, succinctly stated, is that in view of his perception that the conservative judiciary has been curtailing substantive antitrust law due to concerns about class actions, the courts should erect a new procedural requirement that, in order to have a class certified, the court must first make a finding that the plaintiff class has at least a forty-percent probability of success. The underlying notion is that to constrain class actions in that manner would cause the courts to cease unwarranted curtailments in substantive antitrust law.[1]

The darker pattern of thought into which I suggest Jacobson has fallen is the spirit of ritual sacrifice. That spirit has been with us forever. It has affected many cultures, at one time or another, and has been a core human institution in many. It has a natural, if largely irrational, grasp on our thinking. As Katherine Hepburn famously observed to Humphrey Bogart in *The African Queen*, however, "Nature, Mr. Allnut, is what we are put in this world to rise above."[2]

Accompanying this Article is a drawing on which one might profitably meditate when attempting to disentangle the various aspects of ritual sacrifice as a social phenomenon. What is it exactly that is wrong and irrational in the depicted way of ordering human affairs?

I suggest that there are four essential elements to its particular wrongness and irrationality. First, the "gods" to which it is addressed will not be appeased. As a method of protecting the broader community from misfortune, it just does not work. Second, the chosen victim has done nothing to deserve it. Third, it channels the energies of the community in an unconstructive direction. Fourth, it is politically unwise.

1. *See generally* Jonathan M. Jacobson & Joyce Choi, *Curtailing the Impact of Class Actions on Antitrust Policy*, 66 ANN. SURV. AM. L. 549 (2010).

2. THE AFRICAN QUEEN (Horizon Pictures & Romulus Films Ltd. 1951).

To test my perception that this pattern inheres in Jacobson's thesis, I analyze his thesis below against the framework of those four key elements. I leave it to the reader to judge whether, as to each element, Jacobson's thesis fairly meets the four proposed criteria for classification as an expression of ritual sacrifice, and what that signifies about the desirability of the procedural reform in class actions that Jacobson suggests in his article.

I.
THE GODS WILL NOT BE APPEASED

Jacobson rightly points out that the Supreme Court in recent years has unjustifiably curtailed the scope of antitrust—often without persuasively reasoned consideration of traditional rationales and policies of antitrust law. Examples that Jacobson offers are the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*,[3] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[4] and *Credit Suisse Securities (USA) LLC v. Billing*.[5] However, similar observations about several of the Court's other most recent decisions in the field of antitrust would be appropriate.[6]

The suggestion at the core of Jacobson's article is that the Supreme Court's recent decisions have drawn their impetus from an antipathy toward class actions, and not a broader antipathy toward antitrust law as such.[7] By erecting new hurdles to be surmounted in any successful antitrust class action, Jacobson suggests that the Court's iconoclastic impulses would be channeled away from deci-

3. 550 U.S. 544 (2007).

4. 540 U.S. 398 (2004).

5. 551 U.S. 264 (2007).

6. *E.g.*, Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010) (holding that contractual arbitration clause that was concededly "silent" as to class arbitration proceedings cannot be interpreted by arbitration panel to permit class arbitration); Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009) (rejecting "price squeeze" antitrust theory because absent predatory pricing, AT&T had no obligation to provide DSL service to competing internet service providers at rates profitable for them); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (overturning longstanding per se rule prohibiting resale price maintenance); Weyerhaeuser Co. v. Ross-Simmons Lumber Co., 549 U.S. 312 (2007) (applying same legal test to both predatory pricing and predatory bidding); Illinois Tool Works v. Indep. Ink, Inc., 547 U.S. 28 (2006) (rejecting presumption of market power arising from a patent); Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (finding it was not per se unlawful for joint venture of competitors to set single price for gasoline produced by joint venture and sold separately by both); F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (curtailing application of U.S. antitrust law to transactions involving international commerce).

7. *See generally* Jacobson & Choi, *supra* note 1.

sions that undermine substantive antitrust law and instead toward a procedural direction that would trammel antitrust law to a lesser degree. Conservative judges would be satisfied by such procedural hindrances to class actions, Jacobson suggests, and would then stop doing unjustified damage to substantive antitrust law.[8] In short, the gods (i.e., Supreme Court justices and other conservative jurists) would be placated.

Importantly, however, pertinent opinions of the Supreme Court contain nothing substantial to support Jacobson's view. In *Trinko, Credit Suisse* and *Twombly*, the words "class action" make no appearance at all in the Court's reasoning, appearing only once or twice, at the most in each opinion in the course of mere descriptions of prior procedure in the cases.[9] Surely, if there were merit in Jacobson's core assertion that concerns about class actions are the driving force behind these opinions, the fact that many of the recent cases were class actions would have played some role in the Court's stated reasoning. To suggest otherwise would seem to require a belief that the Supreme Court has essentially "repressed" its true motivations, concealing a special animus against class actions in reasoning that expresses no special criticism of class actions at all.

Nor can any inference of a special desire to curtail class actions be drawn from the fact that some of the recent decisions have been class actions rather than other private cases or government cases. *Linkline, Leegin, Weyerhaeuser, Illinois Tool* and *Dagher* were not class actions, yet that did not stop the Supreme Court from revealing on apparent antipathy toward strong antitrust enforcement in those cases. Moreover, the vast majority of antitrust cases are private actions rather than government cases. As observed in *Reiter v. Sonotone Corp.*,[10] in the late 1970s "nearly 20 times as many private antitrust actions [were] pending in the federal courts as [were] actions filed by the Department of Justice." Since 1978 the number of private actions has declined significantly in percentage terms, but the num-

8. *See id.* Part VI.B.

9. In *Trinko* the phrase "class action" does not appear at all except in the Syllabus, which does not constitute part of the opinion. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 398 (2004). Likewise in *Twombly* the words "class action" appear only once, in the opinion's second sentence, where the Court merely states that the question presented had arisen "in this putative class action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548 (2007). In *Credit Suisse*, similarly, the phrase "class-action [sic]" appears only once, in a first sentence of mere procedural history. 551 U.S. at 269.

10. 442 U.S. 330, 344 (1979)

ber of government actions has fallen, on average, even more.[11] That none of the recent Supreme Court decisions curtailing antitrust law have been government cases likely reflects only the relative scarcity of Court of Appeals decisions in government antitrust cases.

In two recent cases the Supreme Court has squarely addressed class action issues. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[12] it addressed whether restrictions on class action enforcement that exist in New York procedural law should apply to actions in federal court based on New York substantive law. Similarly, in *Stolt-Nielsen*,[13] it addressed whether an arbitration clause that was considered "silent" on the issue of class proceedings could fairly be construed by the arbitrator to permit class arbitration. Even though both cases explicitly involved class action issues, nothing critical of class actions appears in the majority opinion in either case. The only commentary in either case that appears colorably critical of class actions is Justice Ginsberg's dissenting opinion in *Shady Grove*, which expresses a view that class actions can result in "ruinous liability" and create extraordinary "pressures to settle."[14] However, that statement cannot reflect a negative view of antitrust class actions on the part of the Court's conservatives who have issued opinions curtailing substantive antitrust law, both because *Shady Grove* was not an antitrust case and because Justice Ginsberg is not part of the conservative majority that has endorsed the curtailment of substantive antitrust law upon which Jacobson rests his argument.[15] Moreover, the majority opinion in *Shady Grove*, which was authored by Justice Scalia and joined by both the Chief Justice and Justice Thomas, says things arguably favorable toward class actions, for example, that "Rule 23 unambiguously authorizes *any* plaintiff, in *any* proceeding, to maintain a class action if the Rules prerequisites are met," and that aggregation of claims through a class action "alter[s] only how the claims are processed."[16] Thus, the few recent Supreme Court decisions that have squarely ad-

11. *See* SOURCEBOOK FOR CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 5.41.2009, http://www.albany.edu/sourcebook/pdf/t5412009.pdf (2009).

12. 130 S. Ct. 1431 (2010).

13. Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S. Ct. 1758, 1768 (2010).

14. 130 S.Ct. at 1465 n.3 (internal quotation marks omitted).

15. Justice Ginsburg dissented or joined in vigorous dissents in some of the recent cases curtailing antitrust law, including *Twombly, Leegin* and *Stolt-Nielsen*.

16. 130 S. Ct. at 1442–43. This statement is arguably in tension with the majority's observation, in *Stolt* that there are "fundamental" and "crucial" differences between individual disputes and class actions. *Stolt-Nielsen*, 130 S. Ct. at 1776. The latter is so neutral in tone, however, that it can scarcely even be characterized as criticism.

dressed class action issues tend further to rebut Jacobson's premise that animus toward class actions, and not toward antitrust as such, is behind the conservative majority's recent thinking.[17]

In sharp contrast, ample language in the opinions on which Jacobson focuses supports an alternative interpretation that the Supreme Court's concern in these cases involved issues with broad application to most aspects of antitrust enforcement, such as treble damages, a risk of false positives, and jury verdicts. The reasoning in *Twombly* rests heavily on a risk of conspiracy inferences from ambiguous evidence,[18] and on expressed goals of "checking discovery abuse" and "the threat of discovery expense,"[19] none of which are unique in any way to class actions. The reasoning in *Credit Suisse* rests on "line-drawing problems," dangers of false positives, "nonexpert judges" and "nonexpert juries," and the danger that misguided antitrust penalties "could seriously alter" affirmatively desirable conduct, which likewise have no special bearing on class actions.[20] Similarly, the reasoning in *Trinko* rests fundamentally on a perceived danger of "[m]istaken inferences and the resulting false condemnations," (i.e., false positives), and institutional limitations of "a generalist antitrust court,"[21] which have no unique applicability in the class action context. An inference that such concerns about judicial "line drawing," false positives, and the like lie at the core of the Supreme Court's antitrust concerns is further bolstered by statements in other relatively recent Supreme Court decisions such as *Linkline*,[22] which observed that "mistaken inferences are 'especially costly' [in] . . . predatory pricing" cases and *Brooke Group Ltd. v.*

17. A new case argued in November, 2010 before the Supreme Court, *Laster v. AT&T Mobility LLC*, 584 F.3d 840 (2d Cir. 2009), *cert. granted sub. nom. AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-893), may well elicit interesting information about the Supreme Court's attitudes concerning class actions, given the core contention of the Chamber of Commerce and other conservative amici in the case that class actions do little for class members. Brief of The Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner at 3–4, AT&T Mobility LLC v. Concepcion, No. 09-893 (Aug. 9, 2010). That contention is unfounded, at least in antitrust cases. *See infra* note 62. It is also unsupported in the amicus brief with any sort of empirical support or analysis.

18. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007).

19. *Id.* at 559.

20. Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 279-85 (2007).

21. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004).

22. Pacific Bell Tel. Co. v Linkline Commc'ns, Inc., 129 S.Ct 1109, 1120 (2009).

Brown & Williamson Tobacco Corp., which stated that the "costs of an erroneous finding of liability are high" in predatory pricing cases.[23]

Commentary by other astute antitrust commentators has not attributed recent changes in substantive antitrust law solely or primarily to class actions, as Jacobson strains to do. William E. Kovacic, former Chairman of the Federal Trade Commission (FTC), has attributed the "dramatic retrenchment" of antitrust liability standards to numerous aspects of antitrust litigation of which class actions are only a tertiary one, and has identified as the primary motivation a perceived danger of deterring legitimate conduct.[24] Similarly, The FTC has recently argued that "the Court's decisions in *Credit Suisse* and *Trinko*" were motivated by "heightened concerns about the high costs and questionable benefits of antitrust enforcement in regulated industries."[25] A similar interpretation that the Supreme Court's core motivations relate to regulated industry issues could also be applied to *Twombly*.[26] It is noteworthy that even when opining explicitly on what motivated the Supreme Court in both *Credit Suisse* and *Trinko*, the FTC says nothing substantial about class actions.

If fears of chilling pro-competitive conduct in regulated industries were legitimate, they would be equally applicable in private antitrust litigation other than class actions, and most of them would apply to many government proceedings as well. Since concerns equally applicable to non-class private antitrust litigation seem to be the true driving force behind the Supreme Court's recent curtail-

23. 509 U.S. 209, 226 (1993).

24. William E. Kovacic, Chairman, FTC, Speech at the Bates White Fifth Annual Antitrust Conference Competition Policy in the European Union and the United States: Convergence or Divergence? 14 (June 2, 2008), *available at* http://www.ftc.gov/speeches/kovacic/08060bateswhite.pdf ("[J]udicial fears that the U.S. style of private rights of action—with mandatory treble damages, asymmetric shifting of costs, broad rights of discovery, class actions, and jury trials—excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards.").

25. Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary (statement of Howard Shelanski, Deputy Director of Antitrust, FTC), 111th Cong. 1 (2010), *available at* http://www.ftc.gov/os/testimony/100615antitrusttestimony.pdf.

26. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567–68 (2007) (stating that "[i]n a traditionally unregulated industry" circumstances such as those alleged "could very well signify illegal agreement, but here . . . monopoly was the norm in telecommunications, not the exception"); *see also* J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN'S L. REV. 849, 854–59 (2008) (discussing regulatory context of *Twombly* as significant element of Court's decision).

ments of antitrust, there is no reason to suppose that to burden class actions with additional hindrances, as Jacobson proposes, would lead to any of the hypothesized positive consequences that Jacobson posits as his primary justifying rationale. Like strategies of ritual sacrifice generally, Jacobson's proposal would do nothing to advance the objectives that he offers to attempt to justify them.

II.
THE VICTIM HAS DONE NOTHING TO DESERVE IT

Another defining characteristic of ritual sacrifice strategies is that the victims have done little or nothing to justify their unfortunate treatment. That is likewise true here. For decades, the Chamber of Commerce and others have worked openly and aggressively to popularize rhetoric regarding so-called class action "nuisance suits," "frivolous litigation," "hydraulic pressure to settle," and the like, as a basis for curtailing class actions.[27] However, thoughtful scholarly commentary has correctly pointed out that precious little statistical study, or even orderly analysis, has ever been offered to support any of these characterizations.[28] Even when a thorough re-

27. *See, e.g.*, Jeffrey Rosen, *Supreme Court Inc.,* N.Y. TIMES MAG., Mar. 16, 2008, at 38. (arguing that the Supreme Court's recent conservative jurisprudence favoring corporate interests represents the "culmination of a carefully planned, behind-the-scenes campaign over several decades"); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 115–84 (2010) (providing details about behind-the-scenes political campaigns campaign to advance coordinated political interests of corporations, beginning with 1971 memorandum authored by Lewis Powell when he was chair of Education Committee of the Chamber of Commerce). One example of the type of campaign recently pursued by the Chamber of Commerce was its nationwide "Faces of Lawsuit Abuse" campaign, in May 2009. The Chamber of Commerce released four movie trailers, for exhibition in connection with feature films, which presented one-sided propaganda concerning allegedly "costly and frivolous" lawsuits. Kimberly Atkins, *Now Playing at Your Local Theater: Tort Reform Videos!*, D.C. DICTA (Apr. 29, 2009), http://lawyersusaonline.com/dcdicta/2009/04/.

28. *See, e.g.*, *Open Access to Courts Act of 2009: Hearing on H.R. 5115 Before the Subcomm. on Courts and Competition Policy, H. Comm. on the Judiciary,* 111th Cong. (2009) (written testimony of Joshua P. Davis, Professor, Univ. of San Francisco Sch. of Law) ("As far as I know—and I have spent a considerable amount of time and effort researching the issue—there is no empirical evidence that plaintiffs often file and defendants often settle antitrust claims that have no significant merit."); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 53 (2010) ("[T]he picture generally portrayed is incomplete and is distorted by a lack of definition and empirical data regarding the alleged negative aspects of federal litigation. This generates rhetoric that often reflects ideology or economic self-interest, rather than reality."); *id.* at 83 ("[T]he alleged phenomena that have driven pretrial policy decisions over the past few

view of nearly every aspect of antitrust law and policy was conducted in recent years by the Antitrust Modernization Commission (AMC), of which Jacobson was a member, the Commission ultimately acknowledged that not one of the many witnesses before the Commission or groups that had presented it with data and information had identified any "actual cases or evidence of systematic overdeterrence" in antitrust enforcement.[29]

An anecdote from my own experience illustrates the point. I was the plaintiffs' attorney in *Twombly*. Much of the defendants' briefing in *Twombly* in the district court, the Second Circuit, and the Supreme Court was focused heavily on asserted widespread problems with antitrust "nuisance suits." In our briefing for the plaintiffs in all three courts, we emphasized that the defendants had offered nothing to substantiate the existence of any such problem in the antitrust context. In the district court and the Second Circuit, however, the defendants essentially ignored that point, evidently hoping that the courts would merely take it for granted that a widespread problem of this sort actually exists, in light of the empty rhetoric that has been popularized for so long by the Chamber of Commerce and others. In the Second Circuit's opinion there is evidence that defendants' rhetoric gained some traction with the court, notwithstanding that the Second Circuit ruled for the plaintiffs and that the defendants had offered no study of any kind to support their unsubstantiated rhetoric.[30]

Finally, on reply in the Supreme Court, we had raised such a fuss in our brief about the lack of any data or even examples to

decades remain largely subjective, unquantified, and anecdotal."); Letter regarding Hearing on H.R. 415, Open Access to Courts Act of 2009 from David Shapiro, Professor of Law, Harvard Law School, to Matthew Weiner, Senate Judicary Committee (Nov. 23, 2009) (on file with the N.Y.U. Annual Survey of American Law) (stating that Twombly and Iqbal rest "in my view, on untested and unwarranted empirical assumptions about the need to block access to the federal courts at the gate in order to stem the tide of meritless lawsuits"); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) (noting that "[r]eliable empirical data is extremely limited").

29. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 247 (2007).

30. *See* Twombly v. Bell Atl. Corp., 425 F.3d 99 (2d Cir. 2005) ("We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted."), *rev'd*, 550 U.S. 544 (2007).

substantiate defendants' professed concerns about "nuisance suits" and the like,[31] that the defendants evidently felt that they could no longer simply ignore our plea for evidence and rationality. What defendants then tellingly wrote, in their reply brief to the Supreme Court, was that the supposed problems with antitrust nuisance suits "are too well documented to require or to allow great elaboration here."[32]

In its opinion, the Supreme Court clearly was heavily influenced by defendants' mere rhetoric about supposed antitrust conspiracy "nuisance suits," writing that summary judgment was not adequate protection against frivolous suits because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by [erecting a 'plausibility' pleading standard] that we can hope to avoid the potentially enormous expense of discovery in" frivolous cases.[33] Elsewhere in *Twombly*, the Court likewise makes clear that concerns about "nuisance suits" were a primary motivation for its decision, emphasizing that a plaintiff with a largely groundless claim should not be "allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'"[34] To support the existence of such problems with "nuisance suits" and "*in terrorem* settlements," however, all the Supreme Court offered was a quotation from a nearly twenty-year-old law review article by Judge Easterbrook,[35] which in turn contained no empirical data or analysis.[36] The Supreme Court evidently simply took petitioners at their word, that supposed problems with antitrust nuisance suits that were the

31. Part II of the four-part Brief for Respondents in *Twombly* was a seven-page showing that the Petitioners and their numerous amici had not offered even minimal evidence that "nuisance suits" for antitrust conspiracy are common, or that various supposed widespread problems that Respondents offered as their basic rationale for a change in the law existed at all in the antitrust context. *See* Brief for Respondents at 11–17, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 3089915, at *11–17.

32. Reply Brief for Petitioners at 13, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 3265610, at *13.

33. Bell Atl. Corp. v. Twombly, 550 U.S. at 559 (2007).

34. *Id.* at 558 (internal quotation marks omitted).

35. *Id.* at 560 n.6.

36. Judge Easterbrook's article is instead a theoretical examination of the supposed incentives plaintiffs have, and the means by which they hypothetically might "abuse" discovery. Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 637–38 (1989).

ostensible basis for its decision "required or allowed" no empirical evaluation whatsoever.[37]

Since the date of the *Twombly* decision, I have spoken publicly about it several times. On several of those occasions, I have challenged defense lawyers who were present to identify even one example of an antitrust "nuisance suit" along the lines posited by the Second Circuit and the Supreme Court in *Twombly*—i.e., an antitrust case that settled early, and before any ruling denying a defendant's motion for summary judgment, for a sum that could plausibly be suggested to have been paid for the purpose of avoiding attorneys' fees. No defense lawyer present on such occasions has yet offered even one good example of such a case, much less any sort of reputable study showing such cases to be a substantial or systemic problem. Instead, the few cases that defense counsel have identified to me on those occasions have tended to be cases that settled for very large sums of money, often after a summary judgment motion by the defendants had been denied by a court.[38] In-

37. *See* Stephen B. Burbank, *Back to the Future: Pleading Again in the Age of Dickens?* 17 (2010) (paper presented to Pound Civil Justice Institute, 2010 Forum for State Appellate Court Judges) (characterizing *Twombly* and *Iqbal* as "decisions in two cases by nine justices who lacked relevant personal experience, reliable empirical data (as opposed to cosmic anecdotes and economic theory undisciplined by facts) and adequately diverse perspectives on litigation and its roles in American society").

38. Cases cited by defense counsel (other than Jacobson) to date, as their best examples of supposed antitrust "nuisance suits," include the cases reported in part at *In re Ins. Brokerage Antitrust Litig.*, No. 07-4046, Nos. 08-1455 & 08-1777, 2010 U.S. App. LEXIS 17107 (3d Cir. 2010) (reversing summary judgment in part and remanding to district court), *Hyland v. Homeservices of America, Inc.*, No. 3:05-CV-612-R. 2008 U.S. Dist. LEXIS 90892 (W.D. Ky. Nov. 6, 2008) (granting class certification) and *Hyland*, 2008 U.S. Dist. LEXIS 65250 (W.D. Ky. Aug. 25, 2008) (denying motion to dismiss), and *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) (Posner, J.) (finding enough evidence of unlawful conduct to withstand summary judgment). None of these cases can reasonably qualify as an antitrust nuisance suit, because courts found some merit in all of them, and none of them were settled early or for small, colorably "nuisance suit" amounts. On the contrary, the first and last of these three involved settlements of hundreds of millions of dollars and $121 million, respectively. *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 2000 WL 204112, at *1 (N.D. Ill. 2000) (noting settling defendants agreed to pay out more than $700 million in cash award); *In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241 (3d Cir. 2009) (noting that settling defendants agreed to $121 million in settlements). All three cases involved extremely protracted proceedings and not early settlements. Indeed, the *Insurance Brokererage* and *Hyland* cases are still proceeding, many years after they were begun. The only seeming common denominator in the citations to these cases by defense counsel is that in each case the citing attorney had been among the defense counsel in the case in question—tending to bear out Arthur Miller's observation, with

deed, when this point was made in the presentations at New York University School of Law that led to these papers, Jacobson conceded that he "only has [his] own personal experience"[39] and nothing in the way of any statistical study or quantitative analysis that could establish the actual existence of any problem with antitrust conspiracy or class action "nuisance suits."[40]

As in most ritual sacrifice contexts, no objective basis exists on which to conclude that antitrust class actions in any sense "deserve" the special hindrances that Jacobson's proposal would impose upon them. Instead, like most victims of ritual sacrifice, class actions would be singled out for uniquely burdensome procedures under Jacobson's proposal based, not on any sort of objective empirical analysis or study, but instead on rhetorically generated and largely irrational fears and biases.[41] Jacobson's failure to acknowledge the threadbare nature of theories about antitrust "nuisance suits" and

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regard to his unsuccessful efforts to identify consistent principles in laments about "abusive" or "frivolous" litigation, that the only consistently applicable principles were "[f]irst, frivolous litigation is the lawsuit the other side brings against one's client; second, abuse is whatever the opposing counsel does." Miller, *supra* note 28, at 82.

39. Jonathan Jacobson, Remarks at the Annual Survey of American Law Symposium: Critical Directions in Antitrust, (Mar. 2, 2010), *available at* http://www.youtube.com/watch?v=a0T-rtsCTNs .

40. The only example Jacobson offered at the symposium of a supposedly "abusive" antitrust class action from his own experience was the case reported in part at *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, M 21-95, 04 Civ. 5723 (WHP), 264 F.R.D. 100 (S.D.N.Y. 2010) and 2005 U.S. Dist. LEXIS 21084 (S.D.N.Y. 2005), *rev'd in part sub. nom. Ross v. v. Am. Express Co.*, 547 F.3d 137 (2d Cir. 2008). Jacobson, Remarks, Annual Survey of American Law: Critical Directions in Antitrust, *supra* note 39. However, that case has been in litigation for over five years, and the district court in the case has relied in part on apparently extensive evidence that "[i]ndustry collaboration is a recurring item on Coalition agendas." *In re* Currency Conversion Fee, 2005 U.S. Dist. LEXIS 21084, at *27. Not only does the case continue to be actively litigated rather than settled, but it appears to rest on substantial evidence of unlawful collusion.

41. Some commentators, even while recognizing the dearth of concrete information to substantiate concerns that the Chamber of Commerce has worked so industriously to popularize, have nonetheless sought to credit them on the basis of perception rather than reality, and concerns of international competitiveness. *E.g.*, Michael R. Bloomberg & Charles E. Schumer, *Foreword* to SUSTAINING NEW YORK'S AND THE US'S GLOBAL FINANCIAL SERVICES LEADERSHIP i, ii (2008) (stating that although perceptions that U.S. civil justice system is "arbitrary and unfair . . . may be overblown," U.S. courts nonetheless should "consider legal reforms [to] reduce spurious and meritless litigation" because even if incorrect, that perception "diminishes our attractiveness to international companies"). To the extent that untrue perceptions may have been propagated with sufficient effectiveness to influence opinions abroad, such developments would warrant clarification of the facts, not the adoption of unjustified national policies based on irrational fears.

the like in his article is especially disappointing when contrasted with his prior acknowledgment of a closely analogous dearth of facts and data to support similar overheated rhetoric in the substantive antitrust law context about "false positives."[42]

In making those observations, Jacobson rightly observes the want of any objective information, to support a broader *laissez faire* attack on substantive antitrust law, that is equally lacking to support his narrower thesis of defects in class actions. Ever since Judge Posner's opinion in *In re Rhone-Poulenc Rorer, Inc.*,[43] conservative jurists and defense interests have occasionally asserted, with little orderly analysis or effort at substantiation, that some sort of systemic but only vaguely expressed "blackmail settlement" problem inheres in class actions. That notion has been reinforced through frequent repetition, including in prominent recent case law.[44] Thorough and thoughtful commentary has explained in painstaking detail that those claims are baseless, vague and rhetorical and not logical.[45] Jacobson's thesis seems to rest in substantial part on recycling of those unfounded and rhetorical assertions, yet he writes as though major policy decisions should be based on them without any need even to articulate the supposed problems clearly, much

42. *See* Jonathan M. Jacobson, *Towards a Consistent Antitrust Policy for Unilateral Conduct,* ANTITRUST SOURCE, Feb. 2009, at 1, *available at* http://www.abanet.org/antitrust/at-source/09/02/Feb09-Jacobson2-26f.pdf (observing that "[t]he risk of false positives is ephemeral. The DOJ [Single Firm Conduct] Report cites no example of a harmful false positive over the entire 118-year history of Section 2, and none comes to mind. Reasonable observers can differ over the correctness of the outcomes in particular cases, but there is simply no reason to believe that false positives are any more prevalent than false negatives").

43. 51 F.3d 1293, 1299–1300 (7th Cir. 1995).

44. *E.g.*, Sheet Metal Workers Local 441 Health & Welfare Plan v. Glaxosmithkline, PLC, No. 04-5898, slip op. at 12 (E.D. Pa. Sept. 30, 2010) (declining to grant class certification based in part on observations that class certification can "create unwarranted pressure to settle nonmeritorous claims on the part of the defendants") (citing Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001)).

45. See Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003), where the author rightly explains why none of the "blackmail settlements" attacks on class actions "survives scrutiny" and that "judges should stop making blackmail claims." *Id.* at 1357, 1360. The "blackmail settlement" has been very effective in rallying political and judicial opposition to class actions, yet it seems never to have been thoughtfully defined, much less substantiated with supporting evidence beyond posterchildren such as the famous McDonald's coffee case and similar isolated anecdotes. *See also* A. Kanner & T. Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681 (2005).

less to substantiate any connection between those assertions and real world events.

If, as Jacobson recognizes elsewhere, antitrust institutions have been able to resolve the innumerable antitrust controversies raised in "the entire 118-year history of Section 2" of the Sherman Act without any convincing "false positives," then the underpinnings of Jacobson's criticisms of class actions cannot reasonably include any notion that class action defendants are somehow compelled to settle claims that have no merit.[46] Otherwise, instead of settling them, defendants would take their cases to trial, confident that "false positives" are very unlikely. At least absent any evidence that cases in fact tend to settle early enough and for sums small enough to be plausibly based on a desire to avoid attorneys' fees—and no such evidence exists—the decisions of class action defendants to settle must be based on risks that defendants might lose the cases against them on the merits. As commentators have rightly pointed out, however, "Nothing is self-evidently wrong with a settlement that occurs because a defendant fears losing at trial."[47] Just as in ritual sacrifice generally, nothing that actually occurs in class actions, or that Jacobson even attempts to identify in his article, justifies the burdensome procedures that Jacboson advocates inflicting on the class action process.

III.
JACOBSON'S PROPOSAL WOULD CHANNEL COMMUNITY ENERGIES IN UNCONSTRUCTIVE DIRECTIONS

Jacobson's analysis does not attempt to show that the burdensome new procedure he recommends for class actions would improve the class action process make class actions more fair and effective. On the contrary, implicit in Jacobson's thesis that class actions should be burdened in order to relieve perceived pressures on substantive antitrust law is a view that class actions should be hindered rather than made to work better. In this respect, Jacobson's thesis mirrors emblematic aspects of traditional ritual sacrifice strategies. In ritual sacrifice, little pretense is generally made that the victims are helped or benefited by their treatment. Similarly,

46. As was appropriate to its context of commentary on the Bush Administration's single firm conduct report, Jacobson's observation is limited to cases involving violations of Section 2 of the Sherman Act. It is impossible to posit any reason, however, why "false positives" could be more probable or frequent in cases involving violations of Section 1. Jacobson & Choi, *supra* note 1, at Part V.

47. Silver, *supra* note 45, at 1359.

little in Jacobson's article even attempts to conceal his fundamental goal of burdening the pretrial process.

Federal procedure already contains sequential hurdles that often work in practice like sequential trials on the merits, including "plausibility" motions under *Twombly*,[48] summary judgment motions under *Matsushita*,[49] expert exclusion motions under *Daubert*,[50] and hearings into the predominance of "common questions" under recent cases such as *Hydrogen Peroxide*.[51] How many sequential merits evaluations can one impose on complex antitrust cases before they become hopeless quagmires of expense and energy both for counsel and for the courts? Thoughtful commentators have rightly observed that such expansions of pretrial process involve vast increases in cost, which can overwhelm any savings to the process as a whole that may have been an original objective.[52] Class certification hearings under *Hydrogen Peroxide* have become particularly byzantine, often requiring many months or even years for briefing and argument and a multiple-day hearing, which governing case law has made clear must be carried out "rigorously."[53] In the course of the class certification hearing, all of the critical evidence is frequently reviewed in nearly as much detail as it would be in a trial on the merits. Nonetheless, this resolves nothing on the merits, because all the proceedings are designed to determine in the first place is whether the case is "susceptible" or "capable" of proof through common evidence.[54] Thus, after going through an entire trial process once with only a limited objective, the parties are then obliged to repeat everything again in the context of trial on the merits. Jacobson evidently proposes to add his "forty-percent probability"[55] trial as yet another mini-trial on top of all the others, so that class action plaintiffs would be required essentially to try their cases and win them several times over before they could get a judgment. The

48. 550 U.S. 544 (2007).

49. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 792 (1986).

50. Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).

51. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

52. *See* Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 103 (1990); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875 (2006).

53. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982); *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 29 (2d Cir. 2006).

54. *See* J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions—Common Mistakes in Applying the Class Action Standard*, 41 RUTGERS L.J. 161 (2010).

55. *See* Jacobson & Choi, *supra* note 1, at Part VI ("[A]t a minimum there should be some showing of at least a 40 percent likelihood of success . . . .").

burdens that Jacobson's proposal would impose on judicial process boggle the mind, yet Jacobson's article seems to give no recognition or consideration at all to the monumental added burdens, costs, and repetitive processes that his proposal would entail.

The longstanding line of separation between merits evaluations and class certification analysis that is enshrined in *General Telephone Company of Southwest v. Falcon*,[56] which Jacobson recognizes would have to be overturned in order to effectuate his proposal, has been firmly in place for many decades and makes eminent sense. Federal procedure already includes tools for evaluating merits questions prior to any trial, traditionally at summary judgment, and now also on motions to dismiss under *Twombly* and its progeny. Jacobson makes no compelling showing as to why those two tests are insufficient to perform whatever screening role for cases that lack merit may be necessary. Class certification is not designed to serve that purpose at all. Instead, it is meant to collect sufficiently aligned claims in one forum, so that they can be most efficiently resolved, whether positively or negatively—"thumbs up" or "thumbs down" as it were. With either outcome, it is procedurally desirable—assuming due class notice, adequate representation, and the like—that the result on the merits would be binding on the certified class so that it finally resolves the pertinent dispute as broadly as possible. Jacobson's proposal would turn those orderly and sensible procedures upside down, by eliminating the valuable function of binding the class to negative resolutions of ultimately unmeritorious claims. Even if there were some defect or insufficiency in standards for summary judgment—which *Jacobson* does not show to be true—the sensible remedy would be to study and revise summary judgment standards if and as necessary. It would not be to confuse and conflate two different procedural devices that have entirely different purposes, as Jacobson does.

It is ironic that those who advocate erection of ever more complex and numerous procedural hindrances to antitrust class actions so often profess to justify them based on litigation expense. Defense firms, who bill by the hour, routinely argue that increasingly burdensome litigation processes should be employed for the purpose of controlling assertedly out-of-control litigation costs.[57] But in real-

56. 457 U.S. 147 (1982).

57. *See, e.g.*, INST. FOR ADVANCEMENT OF AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009). (describing "task force" consisting mainly of defense attorneys proposing "radical" changes to rules of procedure, including numerous complex new proce-

ity, what such added procedures create is merely more opportunity for defense lawyers to dedicate countless billable hours to wasteful and largely duplicative stages of litigation, which do not end the case even when a plaintiff prevails because the defendants then receive yet another hearing on largely the same merits issues, sometimes with a different factfinder. Such redundant and cumbersome procedures do not generally benefit litigants, whose disputes become ever more interminable and expensive. They do not benefit courts, which are required to hold repetitive and burdensome preliminary hearings on the merits solely for the purpose of determining whether the plaintiff will be permitted to progress to yet another hearing on another stage of the case involving duplicative issues. It seems that the principal beneficiaries of the resulting interminable proceedings are defense lawyers, who bill endlessly for repetitious controversy over the same basic issues without ever having to confront the responsibility for a day of judgment until after the entire system has been procedurally taxed into exhaustion.[58]

Others have made arguments that are analogous in some ways to Jacobson's, but have been significantly more constructive. For example, Howard Shelanski presented a speech for the Federal Trade Commission on June 15, 2010, in which he argued persuasively that restrictive views of the scope of antitrust law in regulated industries, as reflected in *Trinko* and *Credit Suisse*, are less appropriately applied to public enforcement actions by government agencies than to private litigants.[59] Like Jacobson's article, Shelanski's speech attempts to distinguish between public enforcement proceedings and all private antitrust litigation—importantly not identi-

dures, ostensibly to address concerns that the American court system "costs too much"); *see also* J. Douglas Richards & John Vail, *A Misguided Mission to Revamp the Rules*, TRIAL MAG., Nov. 2009, at 52 (criticizing IAALS Report and showing that its proposals are not genuinely supported by survey results offered to justify them). IAALS has refused, including in response to inquiries made by this Author, to identify the source of half of its funding, which it has stated only is "anonymous."

58. A recent amicus brief to the Supreme Court by the Center for Class Action Fairness, represented by defense firm O'Melveny & Myers, argues that class actions "frequently do not provide consumers with meaningful relief" on the basis that "even when the class action results in a recovery for class members, obtaining relief may require navigating byzantine procedures that impose significant transaction costs." Brief of the Center for Class Action Fairness as Amicus Curiae in Support of Petitioner at 5–6, AT&T Mobility LLC v. Concepcion, No. 09-893, (Aug. 9, 2010). Thus, even defense interests are beginning to acknowledge that procedural hindrances to class actions, such as those advocated in Jacobson's article, have begun seriously to compromise the effectiveness and fairness of class actions.

59. *Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries*, *supra* note 25, at 1.

fying concerns about class actions as the courts' hypothesized motivation, but instead attributing the Court's motivation to the regulated industry contexts that cases such as those of *Trinko* and *Credit Suisse*. A vital distinction between Shelanski's speech and Jacobson's article, however, is that Shelanski's constructive goal is to make public enforcement actions work more effectively. Jacobson's goal, by contrast, appears to be to make private class actions work less effectively. Like other ritual sacrifice strategies, the root impulse of Jacobson's proposal is a destructive one.

IV.
POLITICALLY UNWISE

A last aspect of ritual sacrifice strategies is that they can be politically unwise. Although scapegoating strategies can be effective in the short term, they introduce long-term tensions between groups within a community that can damage the group cohesion needed to facilitate work toward common goals.

As the Supreme Court has long recognized, antitrust class actions are an indispensable component of effective antitrust enforcement.[60] Indeed, the bipartisan AMC, of which Jacobson was a member, recently identified "the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs" as one of two factors (along with "treble damages plus costs and attorneys' fees") to which "the vitality of private antitrust enforcement . . . is largely attributable."[61] The AMC rightly recognized that class actions, like other antitrust enforcement mechanisms, play a positive and beneficial role in advancing the cause of effective antitrust enforcement, and accordingly suggested no substantial modification of class action procedures of the type that Jacobson now advocates in his article.

Surely, antitrust class actions do not work perfectly. But it is easy enough to identify serious shortcomings in other methods of antitrust enforcement as well. For example, Professors Lande and

60. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972) ("[C]lass actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); Reiter v. Sonotone Corp., 442 U.S. 330, 343 n.6 (1979) (noting that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed.Rule Civ.Proc. 23"); *In re* Lorazepam & Clorazepoate Antitrust Litig., 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions.").

61. ANTITRUST MODERNIZATION COMM'N, *supra* note 29, at 241.

Davis have rightly pointed out that "government cannot be expected to do all or even most of the necessary enforcement" due to such considerations as "the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated."[62] Even when federal government antitrust enforcers do take action, they virtually never seek substantial restitution for injured victims, despite largely theoretical authority to do so, generally confining their objectives instead to criminal fines that are modest in relation to damages suffered, and to other criminal penalties.[63] State attorneys general likewise have very limited resources and limited effectiveness in obtaining compensation for antitrust injuries.[64] Even a superficial familiarity with antitrust law immediately suggests serious structural and motivational concerns with private enforcement through competitor cases, which are almost never brought as class actions.[65]

62. Robert H. Lande & Joshua P. Davis, *Benefits from Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 906 (2008). Other factors identified by Lande and Davis that often prevent effective government antitrust enforcement include budgetary constraints, undue fear of losing cases, high turnover rates among government attorneys and lack of awareness of specific industry conditions. *Id.* Even Professor Baxter, who was the DOJ antitrust chief in the Reagan administration, noted that private litigants with specialized knowledge "may have a comparative advantage over the Division in the cost of and efficiency in prosecuting a given case." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 690 (1982). On the other end of the spectrum, a recent, detailed study by Lande and Davis indicates that "private antitrust enforcement probably deters more anticompetitive conduct than the U.S. Department of Justice's anti-cartel program." Robert H. Lande & Joshua P. Davis, *Comparative Deterrence From Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws* 2 (Univ. of San Francisco Law Research Paper No. 2010-17, 2010), *available at* http://ssrn.com/abstract=1565693.

63. The Department of Justice generally declines to seek restitution. *See, e.g.*, Plea Agreement at 9, United States v. Embraco N. Am. Inc. No. 20–577 (E.D. Mich. Sept. 30, 2010) ("In light of the availability of civil causes of actions, which potentially provide for recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offense . . . ."). Whether the Federal Trade Commission even has authority to seek restitution is in doubt. *See* F.T.C. v. Mylan Labs. Inc., 62 F. Supp. 2d 25, 40–42 (D.D.C. 1999). But at all events, it very seldom does so. *See* Federal Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003).

64. RICHARD A. POSNER, ANTITRUST LAW 281 (2nd ed. 2001) (proposing that state attorneys general be largely "stripped of their authority to bring antitrust suits, federal or state" due to their asserted lack of genuine resources for antitrust enforcement and because they are often "excessively influenced by interest groups that may represent a potential antitrust defendant's competitors").

65. Since first expressing the point in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court has repeatedly emphasized that the purpose of antitrust law is "the protection of *competition*, not *competitors.*" *Id.* at 324. *E.g.*,

For those who believe the goals of antitrust enforcement to be important, the better political strategy is not to denigrate or hinder one method of enforcement in the hope of advancing another, but rather to make each aspect of mutually complementary antitrust enforcement regimes work together more efficiently and effectively.[66] Cohesion among those who participate in antitrust enforcement is particularly important in light of the recent expansion of *laissez faire* ideologies that would curtail antitrust enforcement across the board, in order further to advance the interests of concentrated and unaccountable corporate power.[67] Given Jacobson's evident general support of traditional antitrust policies, it seems unlikely that his purpose is primarily to advance such *laissez faire* ideologies. It seems more likely, instead, that his views may stem from so-called "cognitive illiberalism," arising from his extensive personal experience representing defendants in prominent antitrust class actions.[68] Whatever Jacobson's reasons, however, solidarity among

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993). The Department of Justice and FTC recognize in the class action context that "buyers have usually been preferred plaintiffs in private antitrust litigation" and that "[t]he recovery by direct purchasers would not duplicate the recovery by competitors because each group suffers direct, but distinct injuries with non-overlapping measures of damages." Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellants at 6, 10, *In re* DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677 (2d Cir. 2009) (No. 06-5525). Moreover, in many antitrust cases—including most horizontal price-fixing cases—competitors have no injury and instead benefit from the unlawful conduct. Competitor cases therefore clearly cannot replicate the compensatory and deterrent functions of antitrust class actions by overpriced purchasers.

66. *See, e.g.*, Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003) ("[I]t is important and beneficial that there be a number of flexible tools, as well as a number of potential enforcers, available to address competitive problems in a particular case.").

67. *See In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 915–16 (6th Cir. 2009) (Merritt, J., dissenting) ("There are many, including my colleagues, whose preference for an unregulated *laissez faire* marketplace is so strong that they would eliminate market regulation through private antitrust enforcement . . . . Over time, the antitrust laws fall further into desuetude as the legal system and the market place are manipulated to benefit economic power, cartels, and oligopolies capable of setting prices."); Burbank, *supra* note 37, at 3 (characterizing *Twombly* as being "at root concerned with power and its distribution"—more specifically the distribution of power "as between plaintiff and defendants" and "between haves and have-nots").

68. For a thought-provoking recent discussion of current tendencies in the Supreme Court toward "cognitive illiberalism," see Dan M. Kahan et al., *Whose Eyes Are Your Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009).

those who work in complementary aspects of antitrust enforcement does not seem to be among the goals of his article. Even more disappointingly, he seems to be unintentionally advancing a broader agenda of *laissez faire* ideology that one might have expected him to find common cause in opposing, given his evident core belief in the value of substantive antitrust law and effective antitrust enforcement.

EPILOGUE

If any one river were a best metaphor for the American experience, perhaps it would have been, at one time, the Mississippi. Despite rough and sometimes ugly social surroundings lampooned so well in *Huckleberry Finn*, its more fundamental cultural penumbras, I would submit, include innocence, openness, freedom, greatness, confidence in the future, and the glory of American political institutions. It would have been a fitting metaphor for the postwar era vividly described by Judge William Young of the District of Massachusetts, in which "Americans turned to law as never before to solve society's ills. This faith in law drove the great expansion of constitutional criminal procedure, the courageous dismantling of our 'separate but equal' doctrines, and our largely peaceful civil rights revolution."[69] As Judge Young has pointed out, class actions were born in that era from "the genius of Benjamin Kaplan," and were "hailed as perhaps the consumer's most potent procedural tool to check corporate misconduct."[70] I came of age in that era, and it was those cultural values surrounding class actions that drew me into class action practice, and that remain a core motivation for those of us who devote our careers to class action representation.

Today, however, we live in an oddly changed era, in which Judge Young notes that there has been "a general turning away from the law."[71] As to class actions, Judge Young has observed that "[t]oday, society sees Rule 23 primarily as a[n] unwarranted obstacle to private capital formation."[72] Since Judge Young's comments

69. *In re* Relafen Antitrust Litig., 231 F.R.D. 52, 89 (D. Mass. 2005). Notably, Professor Arthur Miller's magnificent, recent article is dedicated to Benjamin Kaplan. *See* Miller, *supra* note 28, at 1.

70. *In re Relafen Antitrust Litig.*, 231 F.R.D. at 84. *See also* Miller, *supra* note 28, at 5 ("The Rules were intended to support a central philosophical principle: the procedural system of the federal courts should be premised on equality of treatment of all parties and claims in the civil adjudication process. . . .The simple but ambitious notion was that the legal rights of citizens should be enforced.").

71. *In re Relafen Antitrust Litig.*, 231 F.R.D. at 89.

72. *Id.* at 84.

were written, the view that class actions are an obstacle to capital formation, and to American "competitiveness," has had unceasingly prominent spokespersons.[73] Troublingly, these changes in "perceptions" have developed, as to class actions, in an absence of virtually any rationally considered analysis or study to support the accompanying rhetoric about supposed but ill-defined "abuse," "blackmail settlements," "nuisance suits," and the like. These developments have stemmed instead, I submit, principally from self-interested and unsubstantiated propaganda initially disseminated by wealthy corporate interests such as the Chamber of Commerce, secondarily by those catering to those interests such as the editorial page of the *Wall Street Journal*[74] along with defense lawyers who serve such interests, and ultimately percolating through American culture to the extent that scurrilous rhetoric now appears occasionally even in law review commentary.[75] The coarsening and irrationality of the sheer propaganda often used about supposed lawsuit and class action "abuse" and the like is not unique to adjudicatory life, but mirrors strident and inflammatory rhetoric increasingly found in America's polarized political controversies. The more fitting fluvial metaphors for American life would increasingly seem to be the Congo River, as

73. SUSTAINING NEW YORK'S AND THE US'S GLOBAL FINANCIAL SERVICES LEADERSHIP, *supra* note 41, at 75 (basing analysis of capital markets challenges on surveys of "corporate executives" and stating that "[w]hen asked which aspect of the legal system most significantly affected the business environment, senior executives surveyed indicated that propensity toward legal action was the predominant problem"). As referenced above, however, this report acknowledges that "perceptions" that the American legal system is arbitrary and unfair "may be overblown." Michael R. Bloomberg & Charles E. Schumer, *Foreword* to SUSTAINING NEW YORK'S AND THE US'S GLOBAL FINANCIAL SERVICES LEADERSHIP, *supra* note 41, at ii.

74. An illustrative example of the lack of editorial objectivity of the *Wall Street Journal* on such matters would be its quote of my argument in *Twombly*, in which it claimed I had argued that under established rules "proving the facts alleged is not a plaintiff's burden." Editorial, *A Tort Conspiracy Theory*, WALL STREET J., Dec. 11, 2006, at A18. The actual statement at argument was that "proving the facts alleged is not a plaintiff's burden in the complaint." Transcript of Oral Argument at 30, Bell Atl. Corp. v Twombly, 550 U.S. 544 (2007) (No. 05–1126).

75. *See, e.g.*, Christopher R. Leslie, *The Role of Consumers in* Walker Process *Litigation,* 13 SW. J. L. & TRADE AM. 281, 300 (2007) (seeking to justify restricting standing of purchasers to assert claims under *Walker Process* to state attorneys general only, on basis that to permit private suits would create risk that it could induce "nefarious class counsel" to "target every patentee who has some degree of market power with *Walker Process* lawsuits"). *Cf.* Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellants at 16, *In re* DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677 (2d Cir. 2009) (No. 06-5525 (clarifying that the "factual reliability" of hyperbolic rhetoric about a flood of purchaser *Walker Process* cases was "open to serious question" because legal standards for such cases are high, and such cases "are rare").

depicted in *Heart of Darkness*, or perhaps even the Nung in *Apocalypse Now*.

As to procedural innovations such as that suggested in Jacobson's article, I submit that the road out of darkness is best found by heeding Professor Miller's appeal, in his recent article, that "[i]f assumptions about litigation costs, judicial management, and abusive use of the system are driving pretrial process changes, the policymakers must strive to understand these matters fully and appraise what is real and what is illusion before the procedure is altered any further."[76] If an actual, defined and existing problem can be shown to exist in judicial procedure, and a plan to improve the procedure can be developed to address it rationally and constructively, that would be an endeavor worthy of the American adjudicatory inheritance. To propose radical changes like those Jacobson proposes, without first carefully defining the supposed problem in question and showing that actually exists, is not worthy of that great legacy. I suggest that Jacobson has not well defined the supposed problem of "abuse" on which he premises his paper, nor has he shown that such a problem actually exists. As a society—to paraphrase Katherine Hepburn again in connection with her own cinematic river journey—that is a style of policymaking that we should strive to rise above.

76. Miller, *supra* note 28, at 54.