

The Nomos and Narrative of Matsushita

Nickolai G. Levin

Abstract

Twenty-one years ago, Robert Cover left an indelible mark on legal scholarship with his epic tale of world formation and development, *Nomos and Narrative*. He posited the idea that our culture consists of a multitude of insular communities (nomoi), each of whose experiences is guided by those texts and events (narratives) that give its legal precepts normative meaning, thereby connecting the communities' vision of reality to its ideal. Occasions arose, however, where different community's visions of the ideal could not be contained within each community alone and thus came into conflict. Resolution required reconciliation of those narratives that provided each nomos with normative meaning. This entailed respecting the insularity of each nomos as much as possible but, where need be, recognizing that one vision was normatively better than another and redeeming the lesser from its fall from grace.

Cover's work specifically concerned the battle between civil rights norms and religious liberty ones in the early 1980s. But Cover's central idea (the relationship between nomos and narrative) need not be limited to the specific struggle that confronted him. In fact, his work aids understanding of one of the most important (and confusing) issues in antitrust: when to limit the range of permissible inferences from circumstantial evidence at the summary judgment stage. Studying the history of how the antitrust summary judgment standard developed, this Article discusses how antitrust has its own nomoi (substantive sub-worlds) and redemptive narrative (consumer welfare) interacting with one another and how, in one nomos — oligopoly parallel pricing cases — some circuit courts have erred by overapplying deterrence concerns that originated as part of the consumer welfare narrative.

The Nomos and Narrative of *Matsushita*
By Nickolai G. Levin^{*}

Introduction	3
I. Background Antitrust Summary Judgment Elements	11
A. Circumstantial Evidence in § 1 Cases	12
B. The Five Major Antitrust Summary Judgment Cases (and <i>Monsanto</i>)	14
II. Interpreting <i>Matsushita</i>	22
A. The Three Readings of <i>Matsushita</i>	23
1. Universal Applicability	23
2. Implausibility	24
3. Deterring Procompetitive Conduct	25
B. The Three Considerations of <i>Matsushita</i>	27
III. The Substantive Law Nomos and the Consumer Welfare Narrative	32
A. The Original <i>Nomos and Narrative</i>	32
B. The Conscious Parallelism Nomos	38
1. <i>Theatre Enterprises</i> and its Antecedents	39
2. The Change in <i>Theatre Enterprises</i> ' Generally Accepted Meaning	43
a. The Two Decades Before <i>Theatre Enterprises</i> The Inevitable Perniciousness of Oligopolies	43
b. The Two Decades After <i>Theatre Enterprises</i> : The Expansion of Structuralism and Increased Inevitability Concerns Within the Mainstream; Some Challenges from Chicago Scholars	51
c. The Mid 1970s to Today: The Increasing Acceptance of the Plus Factor Requirement	55
1. <i>Venzie</i> and its Immediate Postcursors	56
2. <i>Monsanto</i> and <i>Matsushita</i> 's Influence on Conscious Parallelism Cases	60
C. The Consumer Welfare Narrative	63
1. The Narrowing of Liability Rules Due to Consumer Welfare Concerns	63
2. The Consequent Ramifications for Evidentiary Rules, Particularly Summary Judgment	67
D. The Interaction of the Conscious Parallelism Nomos and the Consumer Welfare Narrative	71

^{*} Associate, Mayer, Brown, Rowe & Maw LLP, Washington, DC. J.D., Yale University, 2002. B.A., Dartmouth College, 1999. This Article was primarily composed during my tenure as an Adjunct Professor at George Mason University School of Law teaching antitrust in the 2003 fall term. It represents my own view and not necessarily that of Mayer, Brown, Rowe & Maw LLP. I am very much indebted to the helpful comments of Bruce Ackerman, Morris Sheppard Arnold, Michael Carrier, Brad Daniels, David Fontana, Adam Hickey, Chetan Gulati, Emil Kleinhaus, Alvin Klevorick, Robert Kry, Michael Yaeger and all the participants at the Levy Faculty Workshop at George Mason University. All mistakes are my own.

IV.	The Three Considerations of <i>Matsushita</i>	74
A.	Implausibility	74
1.	Within the Doctrine	74
2.	The Legitimacy of Its Consideration	76
B.	Deterrence	77
1.	Within the Doctrine	77
2.	The Legitimacy of Its Consideration	78
C.	Substantive Law	81
1.	Within the Doctrine	81
2.	The Legitimacy of Its Consideration	82
V.	Oligopoly Parallel Pricing	82
VI.	Comparison with Posner	86
VII.	Conclusion	89

Introduction

Twenty-one years ago, Robert Cover left an indelible mark on legal scholarship with his epic tale of world formation and development, *Nomos and Narrative*.¹ He posited the idea that our culture consists of a multitude of insular communities (nomoi), each of whose experiences is guided by those texts and events (narratives) that give its legal precepts normative meaning, thereby connecting the communities' vision of reality to its ideal. Occasions arose, however, where different community's visions of the ideal could not be contained within each community alone and thus came into conflict.² Resolution required reconciliation of those narratives that provided each nomos with normative meaning. This entailed respecting the insularity of each nomos as much as possible but, where need be, recognizing that one vision was normatively better than another and redeeming the lesser from its fall from grace.³

Cover was specifically concerned with the civil rights movement's attempt to redeem the various religious nomoi throughout the United States through their narrative of racial equality (*Brown v. Bd. of Education*, the Civil Rights Act of 1964, etc.). He questioned the imposition of mainstream norms of equality on individuals whose conscience, guided by particular religious convictions, indicated otherwise.⁴ Unlike the Supreme Court in *Bob Jones*,⁵ Cover did not believe there was an easy answer to this battle of nomos and narrative, because both mainstream equality norms and the ideals of religious liberty had great worth.⁶

¹ Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

² See, e.g., *id.* at 34.

³ E.g., *id.* at 13 n.35 (“The problem of ‘world maintenance’ is a problem of the coexistence of different worlds and a problem of regulating the splitting of worlds.”); *id.* at 13 & n.36 (describing the “coercive constraints imposed on the autonomous realization of normative meanings”).

⁴ E.g., *id.* at 28 (“The principle that troubled these amici [in *Bob Jones*] was the broad assertion that a mere ‘public policy,’ however admirable, could triumph in the race of a claim to the first amendment’s special shelter against the crisis of conscience.”).

⁵ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

⁶ See, e.g., Cover, *supra* note 1, at 66-68 & n. 195.

But Cover's central idea (the relationship between nomos and narrative) need not be limited to the specific struggle that confronted him. In fact, his work aids understanding of one of the most important (and confusing) issues in antitrust: when to limit the range of permissible inferences from circumstantial evidence at the summary judgment stage. As this Article attempts to demonstrate, antitrust has its own nomoi (substantive sub-worlds) and redemptive narrative (consumer welfare) interacting with one another.

Summary judgment is particularly important in antitrust cases due to their potential length and complexity. The U.S. government's case against IBM, for instance, took thirteen years to complete, and the trial itself consumed six years).⁷ The defendant's motion for summary judgment has become a principal opportunity for the court to dispense with clearly unmeritorious cases and conserve judicial resources. Hence, a critical issues in antitrust cases is the level of evidence necessary for the plaintiff to defeat the defendant's motion for summary judgment.⁸

In the 1960s and 1970s, the antitrust summary judgment standard was relatively unambiguous. Summary procedures were to be used "sparingly in complex antitrust litigation," as "the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."⁹ As a result, many cases went to the jury — even those relying primarily on circumstantial evidence to prove conspiracy — because judges disallowed the inference of conspiracy only in the rare instance that the defendant had "conclusively disproved [it] by pretrial discovery,"¹⁰ as

⁷ The seventeen-month median total length of private antitrust cases, from complaint to termination, exceeds the nine-month median for federal litigation generally. Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1009 (1986).

⁸ Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 91-92 (1990) (describing how in the first quarter of 1988, 122 of 140 summary judgment motions in federal district courts were filed by defendants).

⁹ *Poller Broad. Co. v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962).

¹⁰ *Norfolk Monument Co. v. Woodlawn Mem'l Gardens*, 394 U.S. 700, 702-03 (1969) (denying summary judgment when the inference of conspiracy was not conclusively disproved).

in *First National Bank v. Cities Service Co.*,¹¹ or when the specific antitrust claim faced substantive limitations.

By the late 1970s and early 1980s, “Chicago School” scholarship¹² had taken hold. A group of scholars, viewing antitrust laws through advancements in industrial organization scholarship, attributed increasing importance to setting legal rules and policies that maximized consumer welfare (otherwise known as “economic efficiency”). In response to this scholarship, the courts became more attuned to the *ex ante* inefficiencies caused by the antitrust laws,¹³ particularly antitrust’s treble damages remedy,¹⁴ and sought to relax various prohibitions and thus make the laws more efficient — in Cover’s terms, “redemption” of the antitrust laws through economics. For example, in *Monsanto Co. v. Spray-Rite Service Corp.*, the Court held that a single piece of circumstantial evidence that could have resulted from either a conspiracy or independent behavior was insufficient for a plaintiff to survive a motion for judgment notwithstanding the verdict.¹⁵ *Monsanto* stated that for a plaintiff to defeat a motion for a directed verdict, he needs to present evidence, direct or circumstantial, “that tends to exclude the possibility” that the alleged conspirators acted independently.¹⁶ The “tends to exclude” standard was necessary when the circumstantial evidence might have been caused by procompetitive

¹¹ 391 U.S. 253 (1968).

¹² I use the term “Chicago School” scholarship broadly to refer to industrial organization scholarship, much of it at the University of Chicago during the 1970s and early 1980s, which found its way into jurisprudence, particularly antitrust. The origin of the school is usually attributed to an antitrust course taught jointly by Aaron Director and Edward Levi in the early 1950s. See, e.g., James May, *Redirecting the Future: Law and the Future and the Seeds of Change in Modern Antitrust Law*, 17 MISS. C.L. REV. 43, 44 (1996).

¹³ See generally Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 26-29 (1984) (discussing the Court’s increasing cognizance of *ex ante* effects). The term “ex ante effects” refers to the predicted effects that a rule of liability will have on future behavior.

¹⁴ Section 4 of the Clayton Act, 38 Stat. 731, provides a treble-damages remedy to “[a]ny persons who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.” 15 U.S.C. § 15. It is a private enforcement mechanism. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

¹⁵ 465 U.S. 752, 764 (1984).

¹⁶ *Id.*

behavior, because fear of paying treble damages would deter firms from partaking in the procompetitive behavior in the first place.¹⁷

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, a 1986 predatory pricing case, the consumer trend continued, as the Court tried to extrapolate *Monsanto*'s principles into the summary judgment context. The Court set forth the current summary judgment standard:

Respondents correctly note that '[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' But antitrust law limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case. Thus, in [*Monsanto*], we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. [*Monsanto v. Cities Service*] To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. [*Monsanto*] Respondents . . . must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. [*Cities Service*]¹⁸

As the Court would explain later in the opinion, inferences should be limited in predatory pricing cases because cutting prices (the main evidence of the alleged conspiracy) was the very essence of competition, and such price-cutting conduct would be deterred if evidence of low prices sufficed to permit the inference of conspiracy.¹⁹

Sixteen years later, courts and commentators still struggle to decipher what the *Matsushita* standard requires and how to reconcile that with the Court's prior summary judgment jurisprudence, which was generally plaintiff-permissive.²⁰ *Matsushita*'s broad language created many questions: Should judges limit inferences at the summary judgment stage in *all* antitrust

¹⁷ *Id.* at 763.

¹⁸ 475 U.S. 574, 587-88 (1986) (citations omitted).

¹⁹ *Id.* at 594.

²⁰ *E.g.*, James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1576 (1996) ("[O]ur law governing summary judgment is in a state of profound disarray and incoherence."); *cf.* Milton Handler, *Where Do We Go from Here – An Overview*, 9 CARDOZO L. REV. 1305, 1316 (1988) (stating that *Matsushita* departs radically from previous antitrust doctrine).

cases or only a subset (and, if so, which subset)? When ascertaining whether the evidence “tends to exclude” the possibility of independent action, should the judge weigh the evidence? How are deterrence concerns related to that standard? Does *Matsushita* apply outside antitrust?²¹

In 1992, the Court tried to clarify the matter in *Eastman Kodak Co. v. Image Technical Services, Inc.*²² In that decision, the Court claimed that *Matsushita* “did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases . . . [as] *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.”²³ The Court then refused to limit the inferences drawn from ambiguous evidence when the observable behavior did not appear “always or almost always to enhance competition,” because the risk of deterring procompetitive conduct was absent.²⁴

Despite *Kodak*'s “clarification,” the various circuit courts have had difficulty reconciling *Kodak* and *Matsushita*. As a 1999 certiorari petition claimed, several circuits cite *Matsushita* when the conspiracy is implausible (usually affirming the defendant's motion for summary judgment) and *Kodak* when it is plausible (usually when permitting the inference to deny the motion for summary judgment).²⁵ The problem, with which *Kodak* only partially grappled, is that the very definition of reasonableness had been fundamentally altered by *Matsushita*, the

²¹ Compare Duane, *supra* note 20, at 1569 n.173 (arguing that *Matsushita* applies broadly), and Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291, 294 n.7 (5th Cir. 1987) (applying *Matsushita*), with Williams v. Borough of West Chester, 891 F.2d 458, 460 n.2 (3d Cir. 1989) (“*Matsushita*'s principles arguably apply only to motion for summary judgments in antitrust cases.”), and William W. Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 HASTINGS L.J. 1, 6 (1993) (claiming *Matsushita* “rests on a specific point of antitrust law . . .”).

²² 504 U.S. 451 (1992). For more on *Matsushita*'s application outside of antitrust, see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1068-69 (2003).

²³ *Id.* at 468.

²⁴ *Id.* at 479.

²⁵ Petition for certiorari, 7-Up Bottling Co. v. Archer Daniels Midland Co., 191 F.3d 1090 (9th Cir. 1999). In this light, Judge Posner's recent decision in *In re High Fructose Syrup Antitrust Litig.*, is quite an anomaly, as it states that *Matsushita* only limits inferences when the alleged conspiracy is implausible while it also lets the case proceed to the jury (without citing *Kodak*). 295 F.3d 651, 661 (7th Cir. 2002).

history that preceded it, and the Chicago School “narrative” of which it was part. Reasonable, as used in *Matsushita*, no longer referred simply to the case at hand. The term “reasonable” had incorporated what I call a “case-external” dimension, whereby the reasonableness of any specific inference in a case also depended on how permitting the inference might affect business competition more generally.

As this Article attempts to demonstrate, this alteration in the meaning of reasonableness occurred in two ways. First, pre-*Matsushita*, it occurred in the augmentation of the substantive requirements in one particular sub-area of antitrust law (a nomos): conscious parallelism cases. Conscious parallelism is when several firms knowingly behave alike — typically setting prices — and the question is whether this parallel behavior resulted due to a conspiracy (usually illegal)²⁶ or independent decisions (permissible).²⁷ Since 1954, when the Court said that evidence of consciously parallel behavior did not demand a directed verdict in favor of the plaintiff,²⁸ the Court has implicitly (and lower courts have explicitly) required that evidence of conscious parallelism be supplemented with “plus factors”²⁹ before allowing a case to be

²⁶ Some conspiracies are legal. *E.g.*, *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (applying the rule of reason to concerted refusals to deal if the defendants lack market power or exclusive access to an element essential to competition).

²⁷ *Theatre Enter. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

²⁸ *Id.* at 540.

²⁹ “Plus factor” is nothing more than an “inelegant” label for “the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy.” VI PHILLIP AREEDA, *ANTITRUST LAW* ¶ 1433(e) (1986). Sometimes courts use the term “plus factor” explicitly to describe this inquiry for the additional facts; other times, they merely look for the additional facts. “[T]he ‘plus factors’ test incorporates [economic principles] as a way to distinguish between innocent interdependence and illegal conspiracy.” *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1043 (8th Cir. 2000) (en banc) (Gibson, J., dissenting). The Supreme Court’s implicit search for plus factors occurs in *First Nat’l Bank v. Cities Service Co.*, 391 U.S. 253 (1968). Recent lower court examples are: *Blomkest Fertilizer*, 203 F.3d at 1033; *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 201 F.3d 436, at **9 (4th Cir. 1999) (unpublished); *In re Baby Food*, 166 F.3d at 122; and *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n. 30 (11th Cir. 1991). Pre-*Matsushita* examples include: *In re Japanese Elec. Prods.*, 723 F.2d at 304; *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978); *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953, 1042-43 (2^d Cir. 1978); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3^d Cir. 1977); *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1314 (3^d Cir. 1975); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202-07 (3^d Cir. 1961), and *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952). For more pre-*Matsushita* cases, see *supra* note 236.

submitted to the jury, for only when plus factors are present does the evidence “tend to exclude the possibility that the defendants acted independently.”³⁰ Due in large part to scholarship by Donald Turner and others, the plus-factor requirement really took hold in the circuit courts in the mid-1970’s, as a way both to differentiate plausible from implausible conspiracies and to deal with the impossibility of devising a judicially enforceable remedy for interdependent pricing. In fact, in the lower court proceedings of *Matsushita*, the Third Circuit had relied upon the conscious parallelism cases for the justification of limiting inferences at the summary judgment stage. Second, and more directly related to Chicago School concerns, the definition of reasonableness also changed to account for *Matsushita*’s explicit incorporation of *Monsanto*’s “tends to exclude” standard and its concerns with deterring procompetitive conduct.

Cover’s metaphor of “nomos” and “narrative” provides a useful orienting mechanism for understanding this transition in antitrust: “nomos,” because some of these sub-areas of antitrust law are partly insular — the Supreme Court, for instance, has never discussed the use of “plus factors” despite their existence in the circuit courts for 50 years; “narrative,” because the consumer welfare focus that developed from Chicago School scholarship had as much as a transformative and redemptive effect on the antitrust laws as the civil rights movement had more generally on public law norms of equality.

Nevertheless, the application of Cover’s metaphor to antitrust summary judgment comes with a twist. In Cover’s work, the question was whether equality norms should be applied to the religious insular communities *at all*. That was because the insular communities truly were separate from the mainstream. In the world of antitrust, such separateness does not exist, as Chicago School concerns were, at the very least, partly responsible for *both* the rise of the plus-

³⁰ *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993) (citing *In re Japanese Elec. Prods.*, 723 F.2d at 304). It is important to note that *Petruzzi*’s attributed this quote to the 1983 lower court decision (pre-*Monsanto*) and not *Matsushita* itself.

factor requirement within the conscious parallelism nomos *and* for the progression of antitrust law more generally. This difference, however, between Cover's subject and antitrust does not mean his metaphor is inapplicable but simply that it applies differently. As the Article attempts to explain, conscious parallelism cases had already compensated for the relevant Chicago School concerns through requiring certain kinds of plus factors to be set forth at the summary judgment stage. Since *Matsushita*, several circuit courts have attempted to limit inferences in conscious parallelism cases at the summary judgment stage not only through requiring the existence of these certain plus factors *but also* requiring that they meet a higher burden of proof (applying the "tends to exclude" language of *Matsushita* and *Monsanto*). This Article argues that the latter requirement improperly extends the deterrence concerns from *Monsanto* and *Monsanto* into a sub-area of law in which they really serve no role, thus *overapplying* *Matsushita* in the conscious parallelism nomos. As the Article attempts to demonstrate, this overapplication of the Chicago School narrative to the conscious parallelism nomos is just as incorrect as (potentially) was the application of mainstream equality narrative to the insular religious nomos at all.

This Article has seven parts. Part I provides the background, briefly describing the role of circumstantial evidence in summary judgment disputes and the five major antitrust summary judgment precedents. Part II discusses the various ways that courts and commentators have interpreted *Matsushita* and the strengths and weaknesses of various approaches. It then introduces my proposed understanding of *Matsushita*, which integrates several aspects of the various approaches. Part III describes the development of the conscious parallelism nomos and the consumer welfare narrative, further explaining their interrelation as part of the transformation of the antitrust laws in the 1970s and 1980s. Part IV then draws on this understanding of the nomos and the narrative to describe the relationship between the various considerations of

Matsushita and “reasonableness.” Part V then explains the application within a subset of conscious parallelism cases — parallel pricing among oligopolists — and how several circuit courts, including the Eleventh Circuit in its recent conspiracy case involving several large tobacco companies,³¹ have erroneously applied *Matsushita* in this context as potentially to create a de facto blockade against plaintiff’s use of circumstantial evidence to prove a conspiracy. It explains in particular how *Matsushita* does not augment the substantive summary judgment requirements in this subset of cases. Part VI describes how my critique of several circuit court decisions in the oligopoly parallel pricing cases dovetails with Richard Posner’s similar critique of the same cases in his recent second version of *Antitrust Law*,³² and how they complement each other: We both argue that lower courts have inappropriately extended the “tends to exclude” requirement from *Monsanto* and *Matsushita* to the oligopoly pricing context,³³ but we reach this result in a different manner. Posner relies primarily on economic and other basic logic and argues that the result is not inconsistent with the caselaw,³⁴ whereas I attempt to demonstrate that this result is the most faithful parsing of existing antitrust jurisprudence. Part VII briefly concludes.

I. Background Antitrust Summary Judgment Elements

Federal Rule of Civil Procedure 56(c) establishes that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.³⁵

³¹ *Williamson Oil Co., Inv. v. Philip Morris USA*, 346 F.2d 1287 (11th Cir. 2003).

³² RICHARD POSNER, *ANTITRUST LAW* (2d ed. 2001).

³³ *Id.* at 99-100.

³⁴ *Id.* at 69-100.

³⁵ Fed. R. Civ. Proc. 56(c).

This rule authorizes summary judgment “only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial”³⁶ It has been interpreted to require that “[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.”³⁷ The judge, however, “is free to take the case from the jury if the non-movant’s interpretation of the indirect evidence is ‘unreasonable.’”³⁸

This Part will examine the meaning of those general principles in the § 1 antitrust context. Section A discusses why the range of permissible inferences from circumstantial evidence is a significant issue in § 1 cases. Section B describes six important Supreme Court cases on the matter: the five main antitrust summary judgment precedents³⁹ and *Monsanto* (because of its incorporation in *Matsushita*).

A. Circumstantial Evidence in § 1 Cases

Section 1 of the Sherman Act states: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade [is] illegal.”⁴⁰ It requires concerted action among multiple firms.⁴¹ This action is “horizontal” if it occurs among multiple firms with different products, “vertical” if it occurs among manufacturers, distributors, and retailers of the same product. To perhaps oversimplify, questions on summary judgment are of two sorts: (1) Given the observable behavior, what other facts can one infer, or (2) does § 1 restrict that observed and

³⁶ *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

³⁷ *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

³⁸ Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN L. REV. 491, 494 (1988) (citing *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 115-16 (3d Cir. 1980), and *Tyler v. Vickery*, 517 F.2d 1089, 1094 (5th Cir. 1975)).

³⁹ Many antitrust cases discuss when a directed verdict is appropriate, such as the *Theatre Enterprises* case, see *infra* Section III.A.

⁴⁰ 15 U.S.C. § 1 (1890).

⁴¹ *E.g.*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

inferred behavior? For example, a summary judgment motion might turn on (1) whether the judge may infer that several firms charged a common price because of a conspiracy, or (2) whether that conspiracy is illegal.

Inference limitation only applies to the first sort of question. These questions are factual, even though the precise facts that are inferred can have legal consequences;⁴² they result from the use of circumstantial evidence.⁴³ (No inferences are required from direct evidence to establish a fact.)⁴⁴ Examples of circumstantial evidence (which is sometimes called indirect evidence) often include firm pricing. Circumstantial evidence “is, by definition, consistent with both competing theories [of conspiratorial and independent behavior]. Inferences can be drawn from the evidence that would support either the movant or the non-movant, although the inferences may not be equally plausible.”⁴⁵

This dual plausibility often makes § 1 summary judgment determinations difficult, because judges want to punish illegal behavior but also generally prefer not to intervene in the normal course of business affairs.⁴⁶ Moreover, And, it is a significant area of contention in § 1 summary judgment disputes, for while many conspiracies are *per se* illegal (automatically illegal once the jury infers that a conspiracy exists),⁴⁷ strong direct evidence (such as secret memos and

⁴² First Nat’l Bank v. Cities Serv. Co., 391 U.S. 253, 289 (1968).

⁴³ See, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (describing how plaintiffs may establish a conspiracy through either direct or circumstantial evidence).

⁴⁴ Petruzzi’s IGA Supermarkets v. Darling-Delaware, 998 F.2d 1224, 1233 (3d Cir. 1993). Direct evidence is either documentary or the first-hand testimony of a witness who perceived the events. Its primary issues are genuineness and credibility, and it is exclusively the province of a jury. Collins, *supra* note 38, at 494. But see Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 173 (2000) (explaining how “[c]ourts have begun gingerly to approach credibility issues on summary judgment”).

⁴⁵ Collins, *supra* note 38, at 494.

⁴⁶ In the corporate law context, this is witnessed through the business judgment rule. In antitrust cases, this nonintervention preference can be seen in the last couple decades through the rise of rule of reason analysis as well as the requirement of certain predicate facts before attaching *per se* liability, see *infra* Subsection III.C.1.

⁴⁷ See *infra* Subsection III.C.1 (discussing the *per se* categorization of most conspiracies).

tapes of discussions) is rare.⁴⁸ Hence, the central question in a § 1 case is whether the judge should permit the jury to infer conspiracy from circumstantial evidence?⁴⁹

Section B describes the five major antitrust summary judgment precedents, as well as *Monsanto* (because of the large role it plays in *Matsushita*). Section B is intended to be a purely neutral description of the relevant cases, laying out the basic issue of each case and how the Court chose to resolve it. Analysis of the reasons underlying the Court's resolution of the cases begins later in Part II.

B. The Five Major Antitrust Summary Judgment Cases (and Monsanto)

*Poller v. Columbia Broadcasting System, Inc.*⁵⁰ asserted the basic principle that antitrust cases were not well suited to summary judgment disposition. *Poller* involved a cancelled affiliation contract between CBS and one of its UHF based outlets allegedly pursuant to a conspiracy by CBS (and the other respondents) to destroy UHF broadcasting as to protect CBS's "vast interest in VHF stations throughout the United States."⁵¹ The District Court granted summary judgment in favor of CBS, considering the cancellation "the normal right of a producer to select the outlet for its product."⁵² The Supreme Court reversed, claiming that it was a genuine issue of fact whether the cancellation was independently motivated by CBS:

It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that "it is quite clear what the truth is." Certainly there is no conclusive evidence supporting the respondents' theory. We look at

⁴⁸ *In re Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990) [hereinafter, *Petroleum Products*].

⁴⁹ VI PHILIP E. AREEDA & HERBERT HOVENKAMP ¶ 1410(c) ("The practical issue in actual litigation will often be the propriety of allowing a jury to infer the existence of an agreement from indirect evidence."). The range of permissible, or perhaps even mandated, inferences can play a large role in non-conspiracy cases too, such as in *Kodak*, described *infra* text accompanying notes 89-96, in terms of whether certain facts can be presumed true without proof of actual market conditions.

⁵⁰ 368 U.S. 464 (1962).

⁵¹ *Id.* at 466.

⁵² *Id.* at 468.

the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.⁵³

*Norfolk Monument Co. v. Woodlawn Memorial Gardens*⁵⁴ bolstered *Polle*’s proposition that summary judgment should be used sparingly. In *Norfolk Monument*, the plaintiff alleged that the defendants had conspired to engage in various activities aimed at decreasing the plaintiff’s sales in order to monopolize the manufacture and sale of bronze grave markers in violation of § 1 and § 2. The case was based almost entirely on circumstantial evidence of restrictive rules the defendants had adopted that operated to the plaintiff’s detriment (such as “[d]espite the unskilled nature of the work, all of the memorial parks refuse to permit the plaintiff to install markers sold by it; all of them insist that the work be done by the cemeteries themselves.”).⁵⁵ The Supreme Court, in a per curiam opinion, reversed the district court’s grant of the defendants’ motion for summary judgment, citing how

[the justification] for these restrictive rules was disputed by the petitioner The reasonableness of the rules was a material question of fact whose resolution was the function of the jury and not of the court on a motion for summary judgment.⁵⁶

It was irrelevant that that the key evidence was circumstantial;⁵⁷ the Court, heeding *Polle* claimed that summary judgment was inappropriate as the plaintiff’s case had not been “conclusively disproved by pretrial discovery.”⁵⁸

⁵³ *Id.* at 471-72 (footnote and citations omitted).

⁵⁴ 394 U.S. 700 (1969) (per curiam).

⁵⁵ *Id.* at 701.

⁵⁶ *Id.* at 702-03.

⁵⁷ *Id.* at 704 (quoting *Theatre Enter., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954) (“[B]usiness behavior is admissible circumstantial evidence from which the fact finder may infer agreement.”)).

⁵⁸ *Id.*

Even in this plaintiff-permissive era, the Court granted summary judgment in the rare case when pretrial discovery had conclusively disproved the plaintiff's case, as in *Cities Service*.⁵⁹ The *Cities Service*'s plaintiffs alleged that seven oil companies maintained a worldwide oil cartel and a conspiracy to boycott Iranian Oil in all markets.⁶⁰ The plaintiff offered evidence (*only*) of Cities Service's refusal to deal with him (which consciously paralleled the other companies' refusal to deal) as evidence that Cities Service was part of the alleged conspiracy.⁶¹ The Supreme Court affirmed the grant of Cities Service's motion for summary judgment. It noted that in the absence of contradictory evidence, the inference of conspiracy from the parallel-refusal-to-deal evidence would be reasonable.⁶² However, in light of the "overwhelming" evidence to the contrary concerning Cities Service's divergent business interests from the other oil companies and its lack of economic motive to partake in the conspiracy (Cities Service had no interests in foreign oil, whereas the other alleged conspirators did),⁶³ the "competing" inference of independent action was "much more" plausible.⁶⁴ The Court thus held the inference of conspiracy unreasonable.⁶⁵

Such was the situation before *Monsanto* which involved a defendant's motion for judgment notwithstanding the verdict.⁶⁶ At issue in *Monsanto* was whether one could reasonably infer a vertical price-fixing conspiracy from the sole fact that a manufacturer had terminated a

⁵⁹ First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 289-90 (1968).

⁶⁰ *Id.* at 259-60.

⁶¹ *Id.* at 286.

⁶² *Id.* at 277.

⁶³ *Id.* at 278-84 (discussing Cities Service's substantial fear of nationalization); *id.* at 279 ("Petitioner himself consistently argues that Cities' interests in this entire situation were directly opposed to those of the other defendants. The others had large supplies of foreign oil; Cities did not. The others allegedly were members of an international cartel to control foreign oil; Cities was not.").

⁶⁴ *Id.* at 277, 285 (differentiating *Poller*).

⁶⁵ *Id.* at 287-88 ("Here [the plaintiff] is unable to point to any benefits to be obtained by Cities from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from Cities' 'parallel refusal to deal' does not logically follow.") (footnote omitted).

⁶⁶ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). Substantive antitrust law changed greatly between 1969 (and *Norfolk Monument*) and 1984 (and *Monsanto*). See *infra* Section III.C.

distributor after other distributors had complained about price-cutting. The question was difficult because, under *United States v. Colgate & Co.*,⁶⁷ a manufacturer could legally set retail prices in advance and terminate noncompliant distributors, but, under *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,⁶⁸ it was illegal for a manufacturer and distributor to set prices together in advance. As the Court noted in *Monsanto* a problem ensued because a manufacturer could terminate distributors whether acting permissibly or impermissibly, and thus to permit the inference of conspiracy solely from the fact of a termination after complaints would deter the behavior permitted by *Colgate*.⁶⁹ (The *Monsanto* Court considered the *Colgate* conduct procompetitive, because manufacturers' ability to terminate noncompliant distributors aided their adoption of nonprice restraints that protect against "freeriders" — restraints the Court allowed in *Continental T.V., Inc. v. GTE Sylvania Inc.*⁷⁰ when reasonable.)⁷¹ To protect this procompetitive conduct, the Court set forth the "tends to exclude" requirement:

Something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."⁷²

The Court considered the "tends to exclude" standard necessary, because "[i]f an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded," and the

⁶⁷ 250 U.S. 300, 306-07 (1919).

⁶⁸ 220 U.S. 373, 404-409 (1911).

⁶⁹ *Monsanto*, 465 U.S. at 763 (stating how complaints about price-cutters are "natural" and "unavoidable" reactions by distributors to the activities of their rivals).

⁷⁰ 433 U.S. 36, 55 (1977).

⁷¹ *Monsanto*, 465 U.S. at 762-63 ("The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'freeriders' do not interfere.").

⁷² *Id.* at 764.

possibility of treble damages would cause an “irrational dislocation” in the market.⁷³ (The *Monsanto* Court nevertheless held the plaintiff’s verdict was proper based on “unambiguous” evidence of conspiracy in the form of a newsletter relating to price-level enforcement policies.⁷⁴)

Matsushita came two years later, building on *Monsanto*’s foundation.⁷⁵ *Matsushita* involved an alleged predatory pricing conspiracy among twenty-four Japanese electronics manufacturers, whereby the Japanese manufacturers were selling their products at high prices in Japan but pricing their American products low to drive certain American electronics manufacturers out of the market.⁷⁶ Zenith, the plaintiff, had presented evidence of parallel actions by these firms, from which it claimed that a jury could infer the existence of a conspiracy.⁷⁷ The district court granted the defendants’ motion for summary judgment.⁷⁸ The Third Circuit reversed as to twenty-one defendants, holding that Zenith had presented sufficient evidence of conspiracy.⁷⁹ The Supreme Court reversed, mostly because it disagreed with the Third Circuit’s application of the summary judgment standard to the facts.⁸⁰

The majority opinion is worth parsing in sequence, starting with *its* Part III. After first discussing general principles concerning what qualifies as a “genuine issue for trial,” the Court immediately cited *Cities Service* for the proposition “that if the factual context renders respondents’ claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”⁸¹ Very shortly thereafter is the passage quoted in the Introduction of

⁷³ *Id.* at 763. *Monsanto* did not cite *Cities Service*.

⁷⁴ *Id.* at 765-66.

⁷⁵ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

⁷⁶ *Id.* at 577.

⁷⁷ *Id.* at 581; *see also* Collins, *supra* note 38, at 496 n.20 (describing the evidence of parallel behavior).

⁷⁸ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp 1100 (E.D. Pa. 1981).

⁷⁹ *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983).

⁸⁰ *Id.*

⁸¹ *Id.* at 587.

this Article, recasting *Monsanto*'s holding in terms of the relative plausibility of inferences and citing *Cities Service* for additional support:

Respondents correctly note that '[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in [*Monsanto*], we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. [*Monsanto*; *Cities Service*]. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. [*Monsanto*] Respondents . . . must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. [*Cities Service*].⁸²

Section IV.A of the opinion discussed why predatory pricing schemes are economically implausible given economic theories as to how markets work, citing economic arguments that predatory pricing is unlikely to work, especially costly when failed, and therefore self-detering.⁸³ In Section IV.B, the opinion returned to *Monsanto* this time emphasizing its deterrence concerns:

In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. [Respondents] seek to establish this conspiracy indirectly, through evidence . . . of rebates and other price-cutting activities But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. "[We] must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."⁸⁴

⁸² *Id.* at 587-88; see also Collins, *supra* note 38, at 508 (discussing how *Monsanto* "never even mentioned the relative plausibility or consistency of the inferences").

⁸³ *Id.* at 588-93; see also *id.* at 594-95 ("As we explained earlier, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed."). Matsushita cites, e.g., ROBERT BORK, THE ANTITRUST PARADOX 149-155 (1978); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981); and Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 699 (1975).

⁸⁴ *Id.* at 594 (citations and footnotes omitted).

In Part V, the Court revisited the issue of economic implausibility, basing its decision not to permit the inference of conspiracy on lack of motive.⁸⁵ Yet, in footnote 21, the Court claimed that the “tends to exclude” standard applied to plausible allegations too: “We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. [*Monsanto*] establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.”⁸⁶

Justice White’s dissent critiqued this “confused” holding:

In a similar vein, the Court summarizes [*Monsanto*], as holding that “courts should not permit factfinders to infer conspiracies when such inferences are implausible” Such language suggests that a judge hearing a defendant’s motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.⁸⁷

He then discussed how the predatory pricing conspiracy might have been plausible if the Japanese companies favored growth over profit maximization.⁸⁸

Perhaps heeding Justice White’s concerns, *Kodak*⁸⁹ tried to clarify the situation; but *Kodak* was not a conspiracy case, so its effect was limited. *Kodak* involved eighteen independent

⁸⁵ *Id.* at 596-97 (“Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.”).

⁸⁶ *Id.* at 597 n.21.

⁸⁷ *Id.* at 600-01 (White, J., dissenting) (footnotes omitted).

⁸⁸ *Id.* at 604.

⁸⁹ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

service organizations (ISOs) alleging that Eastman Kodak had adopted policies to limit the availability of parts used to service its equipment. The ISOs alleged that through these policies, Kodak tied the sale of service for its equipment to the sale of parts, violating § 1.⁹⁰ The principle issue involved a tying law prerequisite: “whether a defendant's lack of market power in the primary equipment market precludes — as a matter of law — the possibility of market power in derivative aftermarkets.”⁹¹ The district court held yes, granting *Kodak*’s motion for summary judgment. The Ninth Circuit reversed; the Court affirmed the Ninth Circuit’s decision.

In doing so, the *Kodak* Court addressed *Matsushita*:

Because the defendants had every incentive not to engage in the alleged conduct . . . the Court found an “absence of any rational motive to conspire.” In that context, the Court determined that the plaintiffs’ theory of predatory pricing . . . was “speculative,” and was not “reasonable.” Accordingly, the Court held that summary judgment would be appropriate [unless the plaintiffs] came forward with more persuasive evidence to support their theory. The Court's requirement in *Matsushita* that the plaintiffs’ claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party’s inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.⁹²

The Court later rejected Kodak’s argument that it was entitled to a presumption that it lacked aftermarket market power as a matter of law, because the plaintiffs claims made “economic sense” considering actual market conditions (such as the presence of switching costs that might have locked consumers into using *Kodak* equipment and to thus require Kodak service);⁹³ and the Court rejected *Kodak*’s argument that it was entitled to a conclusive presumption on the lack of aftermarket power in order to prevent the risk of procompetitive conduct being deterred:

⁹⁰ *Id.* at 459. There also was a § 2 (monopolization) claim (not discussed in the Article).

⁹¹ *Id.* at 455.

⁹² *Id.* at 468-69.

⁹³ *Id.* at 477-78.

[T]he facts in this case are just the opposite [of *Matsushita*]. The alleged conduct — higher service prices and market foreclosure — is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.⁹⁴

Kodak claimed that there were procompetitive effects to its behavior, but the Court refused to decide whether the procompetitive effects outweighed the anticompetitive effects:

We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment.⁹⁵

Justice Scalia dissented, arguing not with the majority's interpretation of *Matsushita* but with the holding that tying arrangements were *per se* illegal. He claimed that the rule of reason should apply to aftermarket ties, because they might serve various procompetitive functions.⁹⁶

Kodak's attempted clarification still left several questions open, such as: Where a competing inference of independent action exists, does a judge have to weigh that inference against the inference of conspiracy? How is implausibility related to deterring procompetitive conduct, and how are both concerns related to reasonableness? Part II analyzes how post-*Matsushita* courts and commentators have responded.

II. Interpreting *Matsushita*

⁹⁴ *Id.* at 478.

⁹⁵ *Id.* at 479.

⁹⁶ *Id.* at 502 (Scalia, J., dissenting).

A. The Three Readings of Matsushita

1. Universal Applicability

The broadest reading of *Matsushita* would apply the “tends to exclude” requirement to all antitrust situations. It would commit judges to weighing⁹⁷ the plausibility (or consistency) of inferences against one another at the summary judgment stage. Only if the judge ascertains the inference of conspiracy to be more likely does the case go to the jury.⁹⁸

A literal reading of *Matsushita* supports this broad reading. *Matsushita* claims that “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case,”⁹⁹ without qualifying the “a” to describe a particular subset of § 1 cases. *Matsushita* also plainly cites *Monsanto* for the proposition that equal inferential consistency does not suffice to defeat a motion for summary judgment.¹⁰⁰ And, this reading makes sense of footnote 21’s claim that inferences should be limited when the conspiratorial motive is plausible.¹⁰¹

Some lower courts have adopted this reading;¹⁰² it clearly is Justice White’s fear in his *Matsushita* dissent.¹⁰³ Several commentators, even the esteemed Phillip Areeda, have suggested the viability of this approach to *Matsushita*.¹⁰⁴ Other times, however, it serves as the strawman against which commentators support “alternative” readings.¹⁰⁵ This broad reading is often considered a strawman because of its obvious problems. For instance, it seems inconsistent with

⁹⁷ But see Duane, *supra* note 20, at 1557 (discussing two different models of weighing).

⁹⁸ *Riverview Inv., Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 483 (6th Cir. 1990).

⁹⁹ *Supra* text accompanying note 18 (emphasis added).

¹⁰⁰ But see *supra* note 82 (discussing how *Monsanto* does not really claim this).

¹⁰¹ *Supra* note 86

¹⁰² E.g., *The Corner Pocket v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1112 (8th Cir. 1997); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1167-68 (6th Cir. 1995). My standard for adoption is citing *Matsushita*’s “tends to exclude” language without any qualifications on its applicability.

¹⁰³ See *supra* text accompanying note 87.

¹⁰⁴ VI AREEDA & HOVENKAMP, *supra* note 29, at ¶ 1405’ (2001 Supp.) (claiming, without qualification, that “a conspiracy may not be found unless the evidence reasonably suggests that it is more likely than not”); see also Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1125-26 (1986) (discussing how *Matsushita* may mean this broad reading).

¹⁰⁵ Collins, *supra* note 38, at 501-07.

Kodak, which refused to presume the lack of aftermarket market power, because it said that *Matsushita* did not dictate any inference limitation in the *Kodak* context. It also is probably inconsistent with *Cities Service* as well, as many lower courts refused to interpret *Cities Service* to require a judge to grant summary judgment “solely on the grounds that he thought the defendant’s inference was the more probable one.”¹⁰⁶ And, this reading contradicts clear pronouncements outside the antitrust context that the jury should be responsible for weighing the evidence.¹⁰⁷

2. Implausibility

This reading applies the “tends to exclude” requirement when the inference sought is implausible, either because of the case’s specific facts (as in *Cities Service*) or theoretical implausibility (as with predatory pricing).¹⁰⁸ It recognizes that although the circumstantial evidence may have been produced by both permissible and impermissible behavior, the overall implausibility makes the inference of illegal concerted action less likely to be true. The judge therefore requires stronger evidence than normally necessary to permit the inference of conspiracy.

This implausibility reading coheres with *Cities Service*’s focus on lack of motive. Perhaps more importantly, it is consistent with how both *Matsushita* and *Kodak* state the “tends

¹⁰⁶ *Id.* at 502 (citing *Serv. Merch. Co. v. Boyd Corp.*, 722 F.2d 945, 949 (1st Cir. 1983), and *AT&T v. Delta Communications Corp.*, 590 F.2d 100, 101 (5th Cir. 1978)). But see *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977) (citing *Cities Service* as establishing the proposition that a conspiracy may not be inferred unless “the circumstances . . . make the inference of rational, independent choice less attractive than that of concerted action.”). *Bogosian* is different because it is a conscious parallelism case.

¹⁰⁷ *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (White, J.); *Lavender v. Kurn*, 327 U.S. 645 (1946).

¹⁰⁸ Scholars debate whether theoretical implausibility should suffice, and some claim *Kodak* “tames” that aspect of *Matsushita*. *E.g.*, Lisa Meckfessel Judson, Note, *The Taming of Matsushita and the Chicago School*, 1993 Wis. L. REV. 1633 (1993).

to exclude” requirement after discussing implausibility concerns.¹⁰⁹ And, this reading accords with the Court’s contemporaneous non-antitrust summary judgment pronouncements in *Anderson v. Liberty Lobby, Inc.* in which the Court applied a heightened level of scrutiny at summary judgment to a substantively implausible defamation case.¹¹⁰

Lower courts have applied this reading both inside antitrust¹¹¹ and outside,¹¹² the most famous application being Judge Posner’s opinion in *In re High Fructose Syrup Antitrust Litigation*.¹¹³ Several commentators have embraced it as well.¹¹⁴ This reading, however, is incomplete. *Matsushita*’s footnote 21 claims that the “tends to exclude” standard applies even when a plausible motive to conspire exists,¹¹⁵ which at least means that *more* than implausibility can trigger this search.

3. Deterring Procompetitive Conduct

This reading interprets the “tends to exclude” requirement as a precautionary measure. It focuses on how “any company engaged in the *innocent* conduct could not help but do the very

¹⁰⁹ *Supra* text accompanying notes 81-82, 92.

¹¹⁰ *Anderson*, 477 U.S. at 249-52 (describing how defamation suits were substantively disfavored due to First Amendment protections provided to the investigative media under *New York Times v. Sullivan*). *Anderson* involved a libel suit (concerning limited-purpose public figures) subject to *New York Times v. Sullivan*, 376 U.S. 254 (1964). The main question of the case was whether the clear-and-convincing-evidence requirement of *New York Times* must be considered by a court ruling on a motion for summary judgment. The Court held that a heightened evidentiary standard did apply at the summary judgment stage. *Anderson*, 477 U.S. at 242-52.

¹¹¹ *E.g.*, *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 568 n.29 (11th Cir. 1998); *Ezzo’s Invs., Inc. v. Royal Beauty Supply, Inc.*, 94 F.3d 1032, 1036 (6th Cir. 1996); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987).

¹¹² *E.g.*, *Adams v. Mehta*, 31 F.3d 375, 382 (6th Cir. 1994); *McLaughlin v. Liu*, 849 F.2d 1205, 1207-09 (9th Cir. 1988); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 293 (5th Cir. 1987).

¹¹³ 295 F.3d 651, 661 (7th Cir. 2002). Extra-judicially, Judge Posner has set out thorough criteria for when a plaintiff’s allegation of conspiracy does and does not make economic sense. *See, e.g.*, POSNER, *supra* note 32 at 69 - 100. I discuss this approach more thoroughly *infra* Part VI.

¹¹⁴ Duane, *supra* note 20, at 1568; David F. Shores, *Narrowing the Sherman Act Through an Extension of Colgate: The Matsushita Case* 55 TENN. L. REV. 261, 314 (1988).

¹¹⁵ *See supra* note 86. *But see* Shores, *supra* note 114, at 302 (explaining how *Matsushita*’s footnote 21 contradicts *Cities Service*’s statement that it would have permitted the inference if the defendant had not introduced contrary evidence of lack of motive).

thing which plaintiff suggested should be proof of illegal conduct.”¹¹⁶ If the court allows an inference of conspiracy from the observed behavior, companies will forego the innocent conduct out of fear of antitrust’s treble damages remedy, hence deterring the innocent conduct. This reading limits the range of permissible inferences when the innocent conduct is procompetitive because the deterrence of that conduct causes overall societal loss, defeating the purposes of the Sherman Act. Stronger evidence is required to minimize these external effects.

This reading justifies the holdings in *Monsanto*, *Matsushita*, and *Kodak*. The Court limited inferences in *Monsanto* and *Matsushita* (involving procompetitive conduct) and did not in *Kodak* (where the behavior was facially anticompetitive). It also explains why inferences may be limited when the conspiratorial motive is plausible, as in *Monsanto* as procompetitive conduct may produce the same circumstantial evidence as a plausible conspiracy. Further, it is consistent with *Anderson*’s concern with chilling the media’s First Amendment rights.¹¹⁷

This reading has surfaced in a Ninth Circuit opinion¹¹⁸ and in scholarship.¹¹⁹ Despite its strengths, it has technical, historical, and substantive problems: The technical problem is that neither *Matsushita* nor *Kodak* mention deterring procompetitive conduct when introducing the “tends to exclude” requirement; both decisions only declare deterrence concerns later in the opinion.¹²⁰ The historical problem is that previous summary judgment cases, such as *Cities Service*, did not discuss deterrence issues, even though inferences were limited there too. The

¹¹⁶ Collins, *supra* note 38, at 508.

¹¹⁷ Issacharoff & Lowenstein, *supra* note 8, at 85.

¹¹⁸ *Petroleum Products*, 906 F.2d 432, 439 (9th Cir. 1990) (“We think that the key to the proper interpretation of *Matsushita* lies in the Court’s emphasis on the dangers of permitting inferences from certain types of ambiguous evidence [and the] inference’s possible anticompetitive side-effects.”). *Petroleum Products* also requires that the defendant’s conduct be consistent with other plausible motivations before inquiring into the deterrent effects. *Id.* at 440.

¹¹⁹ Collins, *supra* note 38, at 507-12. Collins, however, thinks that “the issues of deterrence and reasonableness are logically distinct,” and therefore “a rule to avoid deterrent effects supplements . . . the basic test that all inferences be reasonable.” *Id.* at 509. I disagree, as I believe the amount of external deterrence affects reasonableness. See *infra* Subsection III.B.2.

¹²⁰ *Supra* text accompanying notes 81-82, 92.

substantive problem is that there are many situations in which inferences should be limited even though the behavior is not procompetitive in the sense that *Monsanto* and *Matsushita* use the term — as I explain to be the case in conscious parallelism cases.

These three interrelated problems arise from reducing *Matsushita* to a unitary focus. For that reason, some courts and commentators have adopted an approach that integrated these elements. The Third Circuit limits inferences based on implausibility, deterrence concerns, and substantive law.¹²¹ So do William Schwarzer and Alan Hirsch.¹²² The problem, however, is that none of these sources (the opinions or scholarship) explain why all these prongs are related to reasonableness.¹²³ It is probably why adherents to the other three readings still exist.

I too believe an integrated approach best captures the history underlying the development of the summary judgment standard. The next Section briefly introduces my proposed understanding of *Matsushita*, which Parts III and IV attempt to justify, and Part V applies.

B. The Three Considerations of Matsushita¹²⁴

¹²¹ *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (“As just indicated, two important circumstances underlying the Court’s decision in *Matsushita* were (1) that the plaintiffs’ theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances “would have the effect of deterring significant procompetitive conduct.”) (quoting *Petroleum Products*, 906 F.2d at 439); see also *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 161-62 (3d Cir. 2003) (same); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999) (same). *Petruzzi*’s discusses substantive law limitations directly after discussing what *Matsushita* requires; *Baby Food* discusses substantive law limitations in an entirely different part of the opinion. In an unpublished opinion, the Fourth Circuit also appears to take this position. See *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 201 F.3d 436, at **6 (4th Cir. 1999) (unpublished).

¹²² Schwarzer & Hirsch, *supra* note 21, at 7 (“It is reasonable to conclude from *Kodak* that, once an antitrust defendant moves beyond established substantive law principles that limit the range of permissible inferences and seeks summary judgment based on economic theory, the defendant “bears a substantial burden in showing that . . . despite evidence of increased prices and excluded competition, [plaintiff’s inference] of market power [drawn from defendant’s conduct] is unreasonable [because of the risk of deterring procompetitive conduct].”) (footnotes omitted). Implausibility concerns are part of these “established substantive law principles.”

¹²³ Schwarzer and Hirsch primarily attempt to reconcile *Kodak* and *Matsushita* with nonantitrust summary judgment jurisprudence.

¹²⁴ I fully expect this Part to be a bit confusing at this point. But I think it will make sense after the history underlying it has been explained.

In my view, the most accurate reading of existing case law¹²⁵ is that a judge should limit the ability for a jury to infer a conspiracy from circumstantial evidence when:

- (1) (Implausibility) the specific claim is factually implausible;
- (2) (Deterrence) the observable business behavior under question appears “always or almost always to enhance competition”;
- (3) (Substantive Law) the substantive antitrust law governing this type of claim traditionally requires inferences to be limited.

The implausibility prong is directed at situations where some circumstantial evidence might cohere with either conspiratorial or independent (or interdependent) conduct if considered by itself, but the facts, when taken as a whole, make the inference of conspiracy implausible. *Cities Service* is one example. The deterrence prong addresses situations where the defendants’ behavior in a particular case would have occurred whether a conspiracy existed or not, but inferences of conspiracy are limited because of concerns about how allowing such influences in the particular case would affect the economy as a whole. As I explain in more detail below, the deterrence prong looks to the *frequency* of how often the business behavior under question appears to be procompetitive: Inferences are only limited when the observable business behavior appears “always or almost always to enhance competition” — a threshold level of competitiveness. It encompasses what is generally referred to as “theoretical implausibility” because it is those very situations when the behavior appears always or almost always to enhance competition that theorists tend to posit that the alleged conspiracy is implausible. Finally, the substantive law prong limits inferences *through* the substantive requirements governing the relevant sub-area of antitrust law involved. For instance, in conscious parallelism cases,

¹²⁵ As I describe *infra*, this reading of the case law may or *may not* be normatively desirable. This Article attempts to avoid the normative debate on the optimal summary judgment standard as much as possible. Rather, it attempts merely to explain why and how the case law developed as it did and how a judge whose sole goal is fidelity to the case law would interpret it. Some normative discussion is thus of course required because part of the reason the case law developed as it did was certain normative beliefs. But, I have tried to restrict my efforts in this Article to being descriptive of these normative elements and not independently weighing in on the matter. I leave it to the reader to judge how well this is accomplished.

plaintiffs must produce evidence of certain plus-factors (in addition to evidence of parallel behavior) to defeat a defendant's motion for summary judgment. The substantive law prong addresses all such substantive requirements.

There is, of course, some pairwise overlap between the prongs: Deterrence concerns implicate factual implausibility — when behavior appears “always or almost always to enhance competition,” the alleged anticompetitive conspiracy is unlikely to have occurred (2-1 overlap) — and vice-versa — “courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct”¹²⁶ (1-2 overlap). And, implausibility concerns bespeak substantive law limitations. Motive, for example, is a plus-factor in conscious parallelism cases. Hence, limiting the range of permissible inferences because of the lack of motive can be interpreted either as applying the implausibility prong or applying the substantive law prong (1-3 overlap). Even deterrence concerns necessarily implicate substantive law concerns, because the whole foundation of having a deterrence prong is to prevent the inference of conspiracy in those sub-areas of antitrust law where judges want to encourage the underlying, facially-procompetitive behavior (2-3 overlap). In fact, virtually every application of the first two prongs could be viewed as a substantive requirement of that sub-area of antitrust law (although not necessarily vice-versa).

Nevertheless, there are three advantages to keeping the three considerations separate. First, although significant overlap exists, there are some situations where only one consideration applies. As I display with oligopoly parallel pricing cases (a subset of conscious parallelism cases), the range of permissible inferences is substantively limited even though the underlying business behavior is not particularly desirable. As such, inferences are limited because of the substantive law prong (3) but not the deterrence prong (2). This may be so even if the alleged

¹²⁶ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (referencing *Monsanto*).

conspiracy is plausible in light of all the facts. Second, and less intuitive, this three-pronged formulation provides greater analytical clarity by differentiating between situations in which inferences are limited because of “the Chicago School narrative” and those that are not. As I have defined each prong, the implausibility prong tracks traditional summary judgment concerns; the deterrence prong tracks those concerns that have arisen anew due to advances in industrial organization scholarship; and the substantive law prong tracks those limitations of each nomos, regardless of whether the nomos incorporates Chicago School concerns or not. Third, this three-pronged formulation is more adaptive in light of scholarly developments than a more conflated analysis. Many current scholars, for instance, dispute *Matsushita*’s conclusion that predatory pricing conspiracies actually are implausible.¹²⁷ Nonetheless, these same critics seem to agree that cutting prices is the very essence of competition and thus might be comfortable limiting inferences because of deterrence concerns, even when the alleged conspiracy is plausible in the case at hand.

Outlining the application of this three-pronged formulation to *Cities Service*, *Monsanto*, *Matsushita*, and *Kodak* will perhaps make its contours clearer. *Cities Service* is the paradigmatic example of when inferences should be limited because of implausibility concerns. There, one piece of evidence was consistent with both independent and conspiratorial behavior but the rest of the evidence did not support *Cities Service*’s participation in the acknowledged conspiracy because it lacked motive. In *Monsanto*, inferences were limited because of deterrence concerns.

¹²⁷ E.g., William J. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2241 (2000); Aaron S. Edlin, *Above-Cost Predatory Pricing*, 111 YALE L.J. 941 (2002); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977); see also Alvin Klevorick, *The Current State of the Law and Economics of Predatory Pricing*, 83 AM. ECON. REV. NOTES & PROC. 162 (1993) (describing the lack of influence of modern economics on the courts because of the difficulty keeping up with the relevant industrial organization scholarship). But see Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory — And the Implications For Defining Costs and Market Power*, 112 YALE L.J. 681 (2003).

As the *Monsanto* Court admitted, the alleged conspiracy was plausible, but the range of permissible inferences was limited nonetheless because of the risk of deterring *Colgate*-permitted, *Sylvania*-encouraged conduct. In *Matsushita*, inferences were certainly limited because of the deterrence prong; application of the implausibility prong was more defendant-specific. As the Third Circuit explained, it appeared to be plausible from the facts that twenty-one of the defendants had engaged in a predatory pricing conspiracy. The Supreme Court did reverse the Third Circuit's determination, but that was primarily because it believed predatory pricing conspiracies to be theoretically implausible. According to my three-pronged formulation, theoretical implausibility is treated differently from factual implausibility. The implausibility prong only applies when defendants can point to specific facts that make the existence of a conspiracy implausible. Theoretical implausibility — the notion that the conduct is inherently beneficial for the economy such that it is unlikely to be part of a conspiracy — is addressed under the deterrence prong. In *Kodak*, the range of permissible inferences would not be limited, as none of the prongs would apply. Tying law has no inherent limitations; the allegation was plausible; and the deterrence concerns did not apply.

Admittedly, even this explanation is confusion, especially for those not familiar with this area of antitrust law beforehand. While I hope its meaning is clear by the end of the Article, it probably is not yet. Ideally, however, this background and foreshadowing of where my analysis is going will facilitate my explication of antitrust's "nomos" and "narrative" and aid the discussion that follows. The next Part describes Cover's original use of the nomos and narrative metaphor in more depth. It then extrapolates that metaphor, hopefully doing justice to Cover's masterful work. It is to that task I now turn.

III. The Substantive Law Nomos and the Consumer Welfare Narrative

In *Nomos and Narrative*, Robert Cover set forth a model, that of nomos and narrative, in order to describe the ways in which individuals with different beliefs separate themselves from, yet still cohabitate with, others within a society.¹²⁸ Through this model, Cover thoughtfully described how various pedigreed American beliefs had reached a perilous crossroads of liberty, morality, and adjudication — each of which the Court in *Bob Jones University vs. United States* had failed to address properly. Section A describes this model in more detail. Section B describes how the group of conscious parallelism cases could be seen as their own nomos. Section C explains how, following the onset of “Chicago School scholarship,” consumer welfare became the primary part of the narrative through which certain antitrust scholars and judges viewed, and attempted to redeem, antitrust law.

A. The Original *Nomos and Narrative*

To Cover, our society consists of many coexisting sub-groups, or nomoi, each possessing alternative views of the past and visions of the future and each interacting with one another as part of our normative universe.¹²⁹ The understandings of normative texts and the historical experiences that the individuals within the nomos share, and look to for moral guidance, is narrative.¹³⁰ And, “[l]aw may be viewed as a system of tension or a bridge linking a concept of a

¹²⁸ Cover’s work built on a rich tradition of other scholarship, such as W.J.T. MITCHELL, ON NARRATIVE (1981); James White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982); and Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

¹²⁹ Cover, *supra* note 1, at 9 (“A nomos, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A nomos is a present world constituted by a system of tension between reality and vision.”); *id.* at 10 (“[T]he fact that we can locate [our behavior] in a common ‘script’ renders it ‘sane’ — a warrant that we share a nomos.”).

¹³⁰ See *id.* at 9 (“A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos — narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic.”); *id.* at 10

reality to an imagined alternative — that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.”¹³¹

In Cover’s model, there are “two corresponding ideal-typical patterns for combining corpus, discourse, and interpersonal commitment to form a nomos.”¹³² First, there is a “world-creating” pattern that he calls the “paideic” because the individuals share “(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.”¹³³ Within the paideic nomos, individuals possess a strong, “shared sense of a revealed, transparent normative order.”¹³⁴ Its creation is a form of “judicial mitosis.”¹³⁵ Second, there is a “world-maintaining” pattern that he calls the “imperial,” in which “norms are universal and enforced by institutions,” and interpersonal commitments are weak.¹³⁶

(“The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. . . . To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires to one integrate not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be.’ Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state affairs is made to pass through the force field of a similarly simplified set of norms.”).

For instance, Cover describes how different Americans may view the Reconstruction Amendments differently: “All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance. And even were we to share some single authoritative account of the framing of the text—even if we had a national history declared by law to be authoritative — we could not share the same account relating each of us as an individual to that history. Some of use would claim Frederick Douglass as a father, some Abraham Lincoln, and some Jefferson Davis. Choosing ancestry is a serious business with major implications.” *Id.* at 17-18.

¹³¹ *Id.* at 9.

¹³² *Id.* at 12.

¹³³ *Id.*

¹³⁴ *Id.* at 14, 16 (“The paideic is an etude on the theme of unity. Its primary psychological motif is attachment.”).

¹³⁵ *Id.* at 15.

¹³⁶ *Id.* at 13, 16 (“The imperial is an etude on the theme of diversity. Its primary psychological motif is separation.”).

This pattern takes hold when the unity of the paideic nomos begins to collapse, and discord begins to develop, as a way to maintain coherence.¹³⁷

Within a nomos, legal meaning has both “insular” and “redemptive” aspects.¹³⁸ “Insular” considerations pertain to the recognition that every nomos, with its shared referents and narrative, contains its own sub-nomoi whose members possess even greater normative agreement. Each of these sub-nomoi constitute a “separated community” in their own right. Constructed legal meaning must take account of this “insular autonomy,” and respect the various sub-nomoi’s separateness.¹³⁹ “Redemptive” considerations refer to the occasion when multiple sub-nomoi within a nomos, potentially of different size and strength, possess “sharply different visions of the social order [and thus] require a transformational politics that cannot be contained within the autonomous insularity of the [sub-nomos] itself.”¹⁴⁰ The point of struggle between the sub-nomos over legal precept has reached a point that one group’s vision must give way to the other’s. Cover calls this sort of transformation “redemptive” to connote “(1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other.”¹⁴¹ One example is the civil rights

¹³⁷ See *id.* at 15, 16 (“The diversity of every such world is being consumed from its onset by domination. Thus, as a meaning in a nomos disintegrates, we seek to rescue it — to maintain some coherence in the awesome proliferation of meaning lost as it is created — by unleashing upon the fertile but weakly organized jurisgenerative cells an organizing principle itself incapable of producing the normative meaning that is life and growth.”); see also *id.* (describing how, in the United States, “the social organization of legal precept has approximated the imperial ideal type . . . , while the social organization of the narratives that imbue those precepts with rich significance has approximated the paideic”).

¹³⁸ *Id.* at 10.

¹³⁹ See, e.g., *id.* at 26-34; *id.* at 28 (“The principle that troubled these amici was the broad assertion that a mere ‘public policy,’ however admirable, could triumph in the face of a claim to the first amendment’s special shelter against the crisis of conscience.”); *id.* at 29 (describing how these subgroups “live within the complex encodings of commitments — their sacred narratives — that ground the understanding of the law that they offer”); *id.* at 30 (“The principle of separateness is constitutive and jurisgenerative. It is not only a principle limiting the state, but also one constitutive of a distinct nomos within the domain left open.”); *id.* at 31 (describing “normative mitosis”).

¹⁴⁰ See *id.* at 34.

¹⁴¹ *Id.*

movement, which attempted “to liberate persons and the law and to raise them from a fallen state.”¹⁴²

To illustrate “the [c]ompetition [b]etween [i]nsular and [r]edemptive [m]odels,” Cover contrasted two antislavery variants before the Civil War. On one hand, the “Garrison abolitionists” recognized the normative abhorrence of slavery, but also the constitutional protection of it, and “therefore sought disengagement from participation in the state. This disengagement did not entail physical or social insularity, but a radical insularity of the normative world alone.”¹⁴³ They sought not to “fit[] the Constitution into the definition of a perfectionist community,” but to resist and repudiate the Constitution.¹⁴⁴ On the other hand, the “radical constitutionalists” such as Frederick Douglass sought to transform the interpretation of the Constitution such that no amendment was necessary. They “embrac[ed] a vision — a vision of an alternative world in which the entire order of American slavery would be without foundation in law,” and through narrative — particularly the Declaration of Independence, the Preamble’s guarantees to “form a more perfect union, establish justice, ... and secure the blessings of liberty” and constitutional structure — attempted to alter the existing interpretations of various constitutional provisions as to hold slavery unconstitutional.¹⁴⁵

These various notions culminated in his criticism of *Bob Jones*, which involved the question whether schools that racially discriminate on the basis of religious doctrine qualified as tax-exempt under § 501 (c)(3) of the Internal Revenue Code of 1954. Section 501(c)(3) stated that organizations would be tax-exempt if they were “*organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.*”¹⁴⁶ Until 1970, the IRS

¹⁴² *Id.* at 35.

¹⁴³ *Id.* at 36.

¹⁴⁴ *See id.* at 36-7.

¹⁴⁵ *See id.* at 37-40.

¹⁴⁶ *Id.* at 578 n.1 (quoting 26 U.S.C. § 501(c)(3)).

granted tax-exempt status to private schools, without regard to their racial admissions policies, under 501(c)(3), and granted charitable deductions for contributions to such schools under § 170 of the Code.¹⁴⁷

In 1971, the IRS introduced Revenue Ruling 71-447, which stated that both the courts and the IRS have long recognized that:

[T]he statutory requirement of being ‘organized and operated exclusively for the religious, charitable, . . . or educational purposes’ was intended to express the basic common law concept [of ‘charity’]. . . . All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.¹⁴⁸

Based on the “national policy to discourage racial discrimination in education,” the IRS ruled that “a [private] school not having a racially nondiscriminatory policy as to students is not ‘charitable’ within the common law concepts reflected in sections 170 and 501(c)(3) of the Code.”¹⁴⁹ The IRS’s interpretation of the Code disqualified Bob Jones University from tax-exempt status because of the University’s discriminatory policies, particularly its disciplinary rule prohibiting interracial dating and marriage.¹⁵⁰

Bob Jones approved the Ruling as a valid interpretation of 501(c)(3), despite 501(c)(3)’s plain meaning and original intent (its predecessors were enacted in 1894 when segregation was required by law), by looking to the statute’s overall purpose — holding that its framers generally intended that tax-exempt entities meet “certain common-law standards of charity — namely, that [a tax exempt] institution . . . must . . . not be contrary to established public policy.”¹⁵¹ The Court contended that racial discrimination in education violated “established public policy,” citing *Brown*, civil rights statutes (such as the Civil Rights Act of 1964), and Executive Orders.¹⁵²

¹⁴⁷ *Id.* at 577-78 & n.2. Section 170(a) allows deductions for certain “charitable contributions.” Section 170(c) defines charitable contribution as a gift “to or for the use of” an organization “operated exclusively for religious, charitable, . . . or educational purposes,” effectively tracking § 501(c)(3).

¹⁴⁸ Revenue Ruling 71-447, 1971-2 Cum. Bull. 230.

¹⁴⁹ *Bob Jones*, 461 U.S. at 579 (quoting Revenue Ruling 71-447, 1971-2 Cum. Bull., 231).

¹⁵⁰ *Id.* at 580.

¹⁵¹ *Id.* at 587. To support this statement, the Court looked to nineteenth century cases involving the charitable law of trusts, such as *Perin v. Carey*, 24 How. 465, 501 (1861), which stated that a public charitable use must be “consistent with local laws and public policy.”

¹⁵² *Bob Jones*, 461 U.S. at 593-96 (citing Titles IV and VI of the Civil Rights Act of 1964, the Voting Rights Act of 1965, Title VIII of the Civil Rights Act of 1968, and the Emergency School Aid Act of 1972)

In Cover's view, the civil rights movement had a redemptive vision of the social order that required transforming other nomoi — here, religious ones. Akin to the radical constitutionalists before the Civil War, they sought to modify the meaning of the tax-exemption statute to achieve their vision — to achieve “imperial virtues.”¹⁵³ On the other side of the case, Cover viewed all the religious communities supporting Bob Jones University's ability to discriminate racially on religious grounds as insular, paideic nomoi that sought to live within our society while retaining religious freedom.

Cover lambasted the utter absence of constitutional adjudication. By reinterpreting the statute, the Court was able to avoid the question of whether Congress *could* constitutionally grant tax exemption to a school that discriminates on the basis of race. Cover viewed this aspect of the decision as wrong because each side had very real and very different beliefs about the social order, which the Court's opinion gave no indication as of how to solve:

The Court assumes a position that places nothing at risk and from which the Court makes no interpretive gesture at all The grand national travail against discrimination is given no normative status in the Court's opinion, save that it means that the IRS was not wrong. The insular communities, the Mennonites and Amish, are rightly left to question the scope of the Court's decision: are we at the mercy of each public policy decision that is not wrong? If the public policy here has a special status, what is it? ...

... The insular communities deserved better — they deserved a constitutional hedge against mere administration. And the minority community deserved more — it deserved a constitutional commitment to avoiding public subsidization of racism.¹⁵⁴

As did Cover, I do not know how to solve the struggle of civil rights versus religious freedom. I do, however, have an idea for how a similar struggle in antitrust should be resolved. For antitrust too has its nomoi and its narratives. As I explain in the next Subsection, conscious parallelism cases are similar to the insular religious communities, occupying their own paideic

¹⁵³ Cover, *supra* note 1, at 61-68.

¹⁵⁴ *Id.* at 66-67.

nomos within antitrust. In the Subsection thereafter, I compare the Chicago School of Antitrust to the civil rights movement in its attempt to transform the antitrust laws in order to redeem their vision of maximizing consumer welfare. The rest of the Article then describes how these components came together in *Matsushita*, and the implications thereof.

B. The Conscious Parallelism Nomos

“Conscious parallelism” has no set definition. Most typically, individuals use the term “conscious parallelism” to describe oligopolistic price interdependence, which is the process “not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests.”¹⁵⁵ The situation is “interdependent” because each firm’s price is based on the expectation that others will price their product equivalently.¹⁵⁶ The industry’s concentrated nature permits a firm to monitor and react to its competitors’ prices.¹⁵⁷ Parallel pricing is thus equally consistent with both interdependent and conspiratorial behavior and therefore tends to lack probative significance.¹⁵⁸

But conscious parallelism can also describe other situations, such as when an oligopolist claims his refusal to deal with a firm was made consciously parallel with other oligopolists’

¹⁵⁵ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

¹⁵⁶ There is disagreement in the literature over whether interdependent pricing is an inherent feature of certain types of concentrated markets. Compare VI AREEDA & HOVENKAMP, *supra* note 29 at ¶ 1430 -32 (inherent); Louis Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CAL. L. REV. 835, 858-59 (1987); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 665-66 (1962), with RICHARD POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 42-47 (1976) (not inherent); Richard Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1566-75 (1969).

¹⁵⁷ Prices may remain supracompetitive as an effect because, if one firm cuts price, the other firms can decrease their price to meet this price cut, thus making everyone worse off overall (and thus diminishing the incentive to reduce price initially). PETER ASCH, *INDUSTRIAL ORGANIZATION AND ANTITRUST POLICY* 41-70 (rev. ed. 1983).

¹⁵⁸ See Turner, *supra* note 156, at 672. Many factors affect the probativity of parallel pricing, such as whether the product is fungible. *E.g.*, *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149, 160 (7th Cir. 1972) (stating that parallel pricing lacks probative significance when the product is fungible).

(either independently or interdependently).¹⁵⁹ This behavior is occasionally allowed, because it might be in each firm's best independent interests to refrain from dealing with a firm. Such was the situation in the fountainhead conscious parallelism case, *Theatre Enterprises v. Paramount Film Distrib. Corp.*, in which the Supreme Court in 1954 refused to overturn a jury verdict in favor of the defendants based solely on evidence of conscious parallelism.¹⁶⁰

The first Subsection describes the historical antecedents to *Theatre Enterprises* as well as that case itself. The second Subsection explains how antitrust and economics scholarship following *Theatre Enterprises* portended a change in its meaning, particularly as pertains to the so-called "plus factor" requirement.

1. *Theatre Enterprises* and its Antecedents

As several esteemed commentators have noted, "[m]odern judicial efforts to define the elements of a Section 1 agreement originated in four Supreme Court decisions, issued during a fifteen-year period beginning in 1939 with *Interstate Circuit, Inc. v. United States*."¹⁶¹ In retrospect, that is plain enough. It is not clear, however, what exactly what the cases meant at the time for in each case the Court affirmed the district court's rejection of a motion for judgment notwithstanding the verdict and it is uncertain the degree to which the scope of these decisions was limited by the procedural posture. Indeed, one plausible account of the cases from this time-period is that they simply represented broad deference to the original fact-finder.

In *Interstate Circuit*, the Court upheld the district court's finding that there was an illegal agreement by movie exhibitors to fix the prices to be charged for first-run films, for although the government did not produce any direct evidence of conspiracy, the Court noted how the

¹⁵⁹ Turner, *supra* note 156, at 678.

¹⁶⁰ 346 U.S. 537 (1954).

¹⁶¹ *E.g.*, ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS 229 (4th ed. 1989).

inference of conspiracy was justified in the circumstances at hand given the “substantially unanimous action of the distributors.”¹⁶² According to the Court, it “taxe[d] credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.”¹⁶³

In what is arguably dicta, however, the Court went further, stating how it was not “prerequisite to an unlawful conspiracy” that there is an actual agreement between the parties:

It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.¹⁶⁴

The Court would reiterate such statements several years later in *American Tobacco Co v. United States*¹⁶⁵ and *United States v. Paramount Pictures, Inc.*¹⁶⁶ In *American Tobacco*, as part of its review of conspiracy to monopolize charges under § 2, the Court asseverated that “[n]o formal agreement is necessary to constitute an unlawful conspiracy.”¹⁶⁷ A finding of conspiracy was justified “[w]here the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of

¹⁶² 306 U.S. 208, 223 (1939).

¹⁶³ *Id.* at 224; see also VI AREEDA & HOVENKAMP, *supra* note 29, at ¶1426 (“The Court’s reasoning boiled down to this: the trial judge was entitled to believe that the distributors exchanged views and coordinated their decisions with each other, although there was no direct proof.”).

¹⁶⁴ *Id.* at 226. This dicta arguably drew from its prior decision in *Eastern States Retail Lumber Dealers’ Ass’n v. United States*, in which the Court upheld the trial court’s finding that retail lumber dealers had agreed that they would not buy from wholesalers who had sold directly to consumers in competition with retailers, allowing a conspiracy to be inferred from the dealers’ circulation among their members of lists of offending wholesalers, because “the natural consequence of such action” was for the retailers to withhold their patronage. 234 U.S. 600, 609, 612 (1914).

¹⁶⁵ 328 U.S. 781 (1946).

¹⁶⁶ 334 U.S. 131 (1948)

¹⁶⁷ 328 U.S. at 809.

minds in an unlawful arrangement.”¹⁶⁸ And, in *Paramount Pictures*, involving § 1 and § 2 claims, the Court described how “[i]t is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.”¹⁶⁹

Finally, in 1954, came *Theatre Enterprises*. In that case, a plaintiff suburban Baltimore movie theater sought to show first-run movies, either exclusively or simultaneously with downtown theaters (who, by nature at the time had certain advantages related to drawing power and promotion). Rival movie distributors all denied the plaintiff’s request, with each at least cognizant of the other theaters’ refusal as well. The plaintiff charged a horizontal boycott conspiracy. At the end of the trial, the case was submitted to a jury, which found no conspiracy. Both the appeals court and the Supreme Court affirmed, rejecting the plaintiffs’ claim that it was entitled to a directed verdict of conspiracy due to the parallel nature of the different theaters’ refusal to deal with it. Notably, the Supreme Court explained:

The crucial question is whether respondents’ conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. But this Court has never held that proof of parallel behavior conclusively establishes agreement, or phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy [a footnote]; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.¹⁷⁰

¹⁶⁸ *Id.* at 810; *see also* *United States v. Masonite Corp.*, 316 U.S. 265, 275-76 (1942) (holding that a concerted agreement to fix prices existed where several competitors knowingly made unilateral agreements setting a minimum price with the same manufacturer, relying on the dicta from *Interstate Circuit*).

¹⁶⁹ 334 U.S. at 142.

¹⁷⁰ *Theatre Enterprises v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 & n.8 (1954) (citations omitted). The footnote cited James A. Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950). I describe Rahl’s work and the significance of this citation to it *infra* notes 208-210 & accompanying text.

The Court then held that defendants' justification that individual business judgment motivated their conduct raised fact issue requiring the issue of conspiracy to be submitted to the jury.¹⁷¹

As William Kovacic has aptly noted, this group of four cases established three conceptual points of reference:

First, courts would characterize as concerted action interfirm coordination realized by means other than a direct exchange of assurances. Second, courts would allow agreements to be inferred by circumstantial proof suggesting that the challenged conduct more likely than not resulted from concerted action. Third, courts would not find an agreement where the plaintiff showed only that the defendants recognized their interdependence and simply mimicked their rivals' pricing moves.¹⁷²

It was uncertain, however, just how far these principles extended considering that, in each case, the Supreme Court sided with the district court. For instance, while it was acknowledged that a jury could infer an agreement from circumstantial evidence that suggested "that the challenged conduct more likely than not resulted from concerted action," it was left completely unanswered whether one could reasonably infer an agreement from circumstantial proof of challenged conduct that was equally likely — or less likely than not — to result from concerted action (as interdependent conduct). Indeed, as John Heninger has observed, "[n]othing in the *Theatre Enterprises* opinion suggests that a plaintiff's verdict returned on evidence of conscious parallelism alone *must be set aside*. On the contrary, the *Interstate Circuit / Theatre Enterprises* line of cases afforded a fact finder considerable free rein to infer conspiracies."¹⁷³ Or, as one

¹⁷¹ *Id.* at 542.

¹⁷² William E. Kovacic, *Antitrust Policy and Horizontal Collusion in the 21st Century*, 9 LOY. CONSUMER L. REP. 97, 100 (1997).

¹⁷³ John R. Heninger, Note, *The Evolving Summary Judgment Standard for Antitrust Conspiracy Cases*, 12 J. CORP. L. 503, 507 (1987) (emphases added); see also Stephen A. Nye, *Can Conduct Oriented Enforcement Inhibit Conscious Parallelism?*, 44 A.B.A. ANTITRUST L.J. 206 (1975). But see VI AREEDA, *supra* note, 29, at ¶1412(b) ("The noteworthy aspect of the Supreme Court's opinion [in *Theatre Enterprises*] was that its tone suggested that the plaintiff's evidence was insufficient even to permit a jury finding of conspiracy, and that tone was very much at odds with the Court's earlier *Interstate Circuit* decision.").

commentator from that era put it, “judges and juries [were] occasionally [] convinced by the explanations, and the Supreme Court [showed] no disposition to interfere.”¹⁷⁴

2. The Change in *Theatre Enterprises*’ Generally Accepted Meaning

But simply to recite that this line of cases supported deference to the initial factfinder is not to tell the entire story. Over the next few decades, *Theatre Enterprises* gradually began to transform from “delineat[ing] one boundary of the problem: proof of consciously parallel action does not *require* a finding that such action is conspiratorial”¹⁷⁵ to becoming the predominant citation for the notion that evidence of consciously parallel behavior was not by itself sufficient to defeat a defendant’s motion of summary judgment.¹⁷⁶ That is to say, in Cover’s terminology the narrative of conspiracy under § 1 changed from the two decades before *Theatre Enterprises* to the next few decades thereafter, altering the interpretive framework in which circumstantial evidence of parallel business behavior (and thus *Theatre Enterprises*) was considered. This Subsection describes that narrative progression, the ways in which different actors (economists, legal scholars, courts, government entities, etc.) contributed to it, and *Theatre Enterprises*’ corresponding conversion.

a. The two decades before *Theatre Enterprises*: The inevitable perniciousness of oligopolies

In the years following the New Deal, courts and scholars began to accept that “in many oligopolistic markets, fundamental structural features of the market determin[e] the way in

¹⁷⁴ Robert J. Levy, *Some Thoughts on “Antitrust Policy” and the Antitrust Community*, 45 MINN. L. REV. 963, 979 (1961). As Levy explained, it was also “infrequent” for appellate courts to reverse a jury verdict on the basis of inferences drawn from circumstantial evidence of parallel conduct. *See id.* at 979 n.51.

¹⁷⁵ Bernard R. Sorkin, *Conscious Parallelism*, 2 ANTITRUST BULLETIN 281, 295 (1957).

¹⁷⁶ *See, e.g., Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 201 F.3d 436, at **9 (4th Cir. 1999) (unpublished); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989).

which the market operate[d],”¹⁷⁷ in particular with how several firms in an oligopoly, acting interdependently, could exert control over prices (and the market more generally) to the detriment of smaller producers.¹⁷⁸ With this realization, the paradigmatic image of conspirators transformed from groups of men in smoke-filled room hammering out an explicit agreement to sophisticated paramours using subtle and complex signals,¹⁷⁹ and the issue transformed from whether government intervention was required — everybody seemed to agree it was — but how to go about it: § 1, § 2, or the Federal Trade Commission (FTC) Act.

Following the New Deal, there was increasing disquietude with how oligopolistic industry structure decreased firm competitiveness. Prominent scholars, including Arthur Burns¹⁸⁰ and Edward Chamberlin,¹⁸¹ expounded foundational components of what is now-called “interdependence theory,” focusing on how “these few sellers [in an oligopoly] *instinctively* collaborated to maintain the high prices and low output typical of classical monopolies” through measures such as price leadership and price following;¹⁸² and, “[l]engthy TNEC [Temporary National Economic Committee] hearings [in 1940] and massive studies linked industrial concentration with the business inertia that foiled fiscal policies to stimulate economic health.”¹⁸³

¹⁷⁷ Carl Kaysen, *Collusion Under the Sherman Act*, 65 Q.J. ECON. 263, 270 (1950).

¹⁷⁸ See M.A. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1304 (1948).

¹⁷⁹ See, e.g., W. HAMILTON & I. TILL, ANTITRUST IN ACTION 15 (TNEC Monograph No. 16, 1940) (“The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.”).

¹⁸⁰ ARTHUR R. BURNS, THE DECLINE OF COMPETITION 1-42, 76-266 (1936); ARTHUR R. BURNS & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

¹⁸¹ EDWARD CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 30-55 (1933). For one contemporary account that explains “[t]he renaissance of economic thought initiated by Edward Chamberlin and his contemporaries [that] has partly rendered obsolete the theories behind antitrust legislation that was conceived in the earlier era,” see Note, *Conscious Parallelism-Fact or Fancy?*, 3 STAN. L. REV. 679, 679 (1951). For a seminal work on interdependence theory a decade later, see WILLIAM FELLNER, COMPETITION AMONG THE FEW 3-50, 175-83 (1949).

¹⁸² See Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1522, 1541-42 & nn. 190-92 (1984) (emphasis added). Rowe calls this the “Oligopoly Model.”

¹⁸³ See *id.* 1520-21 & nn. 49-56 (citing sources); see also Joseph Bain, *Industrial Concentration and Government Anti-Trust Policy*, in THE GROWTH OF THE AMERICAN ECONOMY 708 (Williamson ed. 1944),

These views, “[f]or a generation, ... propelled antitrust crusades against economic concentration, toward an ideal where political and economic pluralism converged.”¹⁸⁴

Unlike prior eras, which focused on bad acts, these post-New Deal crusade against concentration focused less on the nature of the oligopolist’s actions — as the oligopolist, like all other producers, was simply attempting to maximize its profits by taking account of all available information — and more on how the mere existence of few sellers facilitated interdependent decisionmaking, such as considering rivals’ reactions.¹⁸⁵ Indeed, as Chamberlin explained: “Independence of the producers [in an oligopoly] and the pursuit of their self-interest are not sufficient to lower [the price level]. Only if the number is large enough to render negligible the effect of an adjustment by any one upon each of the others is the equilibrium price the purely competitive one.”¹⁸⁶ In this light, the non-competitive price levels in oligopolistic industries level was seen as unavoidable.

The inevitability of interdependent considerations by oligopolists created havoc in ascertaining whether or not an actual agreement existed — in particular, a nonwritten one — for on the one hand, it was recognized that non-competitive price levels were “often the result of independently pursued self-interest, without collusion of any sort,”¹⁸⁷ but, on the other, it was grasped that “the more the structure of a market conduces to restraint, and the fewer and less conspicuous the necessary collusive measures, the stronger is the drive to use them, and the harder they are to detect — especially when those ‘conspiring’ are (almost) unaware of the

¹⁸⁴ *Id.* at 1560; see Adelman, *supra* note 178, at 1304 (“The underlying idea is that we are dealing with one and only one phenomenon, namely, control over prices, which is present to some extent everywhere, and excessive *degrees* of which may be socially objectionable. A decade ago, such a notion was almost completely absent from the law.”).

¹⁸⁵ See, e.g., Sorkin, *supra* note 175, at 296. (“Chamberlin’s distinctive contribution to the theory of oligopoly is the proposition that each such producer, when rational and fully informed, must take account of his total influence upon the price, indirect as well as direct, if he is to maximize his profit. From this Chamberlin concluded, a monopoly price will result.”).

¹⁸⁶ GEORGE W. STOCKING & MYRON W. WATKINS, *MONOPOLY AND FREE ENTERPRISE* 88 (1951).

¹⁸⁷ Rahl, *supra* note 170, at 760; *id.* (“This state of [non-competitive parallelism] is the result of ‘mutual awareness’ on the part of the different firms, but it is more like a stalemate in a contest than a collusive ‘concert of action.’”).

fact!”¹⁸⁸ The upshot, at least with respect to finding an agreement, was three-fold: First, the requirements of what might constitute a conspiratorial agreement were liberalized to include “independent actions taken in mutual awareness”¹⁸⁹ — what Carl Kaysen had famously called “agreements to agree.”¹⁹⁰ Second, because these “agreements to agree” left very little of a paper trail, circumstantial evidence to prove conspiracy became relied upon more heavily. Third, the fact-finder’s role increased, because it had the ultimate responsibility of sorting through this newly-produced morass of circumstantial evidence to determine whether or not such an agreement existed.¹⁹¹

In addition to those changes, which affected conspiracy charges under both § 1 and § 2, the specific effect of the “inevitable perniciousness” concern varied by section due to the different sorts of behavior addressed by, and remedies of, each context. Section 1 was concerned with specific anticompetitive practices, such as the formation of a price-fixing agreement, and its remedies were directed generally toward stopping those practices, usually through the issuance

¹⁸⁸ See Adelman, *supra* note 178, at 1322.

¹⁸⁹ See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (“It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.”); cf. Adelman, *supra* note 178, at 1343 (“In action alleging a price-fixing combination, there has clearly been a shift of attention from literal collusion to what might be called the collusive effect of independent actions taken in mutual awareness.”); Rahl, *supra* note 170, at 758-59 (“Blending with the liberalization of evidence has been a somewhat broadened judicial perception of the mechanics of conspiracy formation. Today, an industrial conspiracy need not be concluded in a formal compact, negotiated and solemnized by concurrent exchange of pledges. ‘Meetings of the minds’ does not require meeting of the bodies. So long as assent to joint participation is manifest it does not matter how it came about.”).

¹⁹⁰ Kaysen, *supra* note 177, at 268; see also Michael D. Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y. SCH. L. REV. 881, 883 & n.10 (1979) (describing how during this time “it was suggested that an oligopolist’s consciousness of his competitors’ likely reactions to a marketing action could be viewed as a form of agreement and that in this way, the Sherman Act could be reinterpreted to meet what were perceived to be new economic realities”).

¹⁹¹ See, e.g., Adelman, *supra* note 178, at 1323 (“Elements of control which may be as effective as they are subtle are built into the market and may operate almost independent of any conscious joining of policy. But it must be said that we have no barometers of such control and few standards by which to distinguish desirable from undesirable forms.”); see also Note, *supra* note 181, at 694 (“Since the mere ‘fact’ of uniformity, without more, cannot rationally give rise to any one inference in preference to another, it will not be probative by itself. But an examination of the setting in which the uniformity occurred, such as the duration and extent of uniformity, the progressiveness of the industry, and other indicia of competition or the lack of it, may well give rise to an inference of conspiracy or conscious parallelism.”).

of an injunction.¹⁹² Section 1, therefore, was not seen as the optimal way to reach the problem of oligopolistic interdependence both because its perceived inevitability made it hard to find specific practices to enjoin and because the industrial organization and antitrust scholarship of the time did little to identify specific practices that tended to make an industry less competitive.¹⁹³ In this sense, the perceived perniciousness and inevitability of interdependent decisionmaking in oligopolies seemed, at least in theory, to “cancel each other out” in the § 1 context, and § 1 cases consequently remained firmly in the hands of the fact-finder, particularly as to whether to infer an “agreement to agree” or not.¹⁹⁴

Section 2, conversely, did not suffer from such theoretical problems, as it was concerned simply with the aggregation of monopoly power. A fairly common § 2 remedy was divestiture of assets and dissolution of the firms that comprised the monopoly.¹⁹⁵ At least theoretically, the perceived inevitability of the oligopolistic interdependence worked in favor of § 2’s application, because collaborative inevitability was all the more reason that the drastic remedy of divestiture

¹⁹² See, e.g., Posner, *supra* note 156, at 1590-91; cf. Mark R. Patterson, *The Role of Power in the Rule of Reason*, 68 Antitrust L.J. 429, 432 (2000) (“But the focus of the Court in Section 1 cases has always been on conduct rather than structure . . .”).

¹⁹³ See, e.g., Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 224-25 (1985) (“The monopolistic competition model [by Chamberlin] . . . was far more complicated and made it far more difficult to examine a particular business practice and proclaim it efficient or inefficient. For example, within that model product differentiation could increase consumer choice or encourage innovation; however, it could also be a mechanism by which large firms in concentrated industries avoided price competition with one another.”).

¹⁹⁴ Appellate courts rarely reversed a jury verdict of conspiracy or not when the case was built on circumstantial evidence of parallel business conduct. See, e.g., Levy, *supra* note 174, at 979 n.51; cf., e.g., *United States v. Sherman*, 171 F.2d 619 (2d Cir. 1948). But this is not to say that every appellate court upheld lower court findings on whether there was a conspiracy. In a couple high-profile cases involving the motion picture industry, the Third Circuit granted a j.n.o.v., holding that there was a conspiracy as a matter of law. See *William Goldman Theatres v. Loew’s, Inc.* 150 F.2d 738 (3d Cir. 1945); *Ball v. Paramount Pictures, Inc.*, 169 F.2d 317 (3d Cir. 1948). Conversely, the Eighth Circuit in *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949), reversed a jury finding that there was a conspiracy, noting that “[i]n order to justify a jury in finding a verdict of guilty based entirely upon circumstantial evidence, the facts must not only be consistent with the guilt of the defendants, and each of the defendants, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence.” See *id.* at 367; see also *id.* at 368 (discussing how this rule follows from Chamberlin’s work). Other circuits noted the *Pevely Dairy* approach, but usually found it less than compelling. See, e.g., *C-O-Two Fire Equip. v. United States*, 197 F.2d 489, 495-96 (9th Cir. 1952). For a contemporaneous account discussing how the *Pevely Dairy* “rule on the use of circumstantial evidence substitutes the judge for the jury in the process of drawing inferences from the evidence presented,” despite the presence of some circuit court support, see Note, *supra* note 181, at 695 & n.83.

¹⁹⁵ See, e.g., Posner, *supra* note 156, at 1591.

and dissolution was required. Following up on the Second Circuit's opinion in *United States v. Alcoa*¹⁹⁶ in 1945, which involved a one-firm monopoly, the government immediately turned its attention toward several industries in which a handful of firms jointly exercised monopoly power via an alleged conspiracy to monopolize.¹⁹⁷ The Supreme Court, in *American Tobacco* and *Paramount Pictures*, quickly endorsed this application of § 2, leading several prescient scholars, most famously Eugene Rostow, to prescribe to § 2 a very broad role in dismantling oligopolistic interdependence.¹⁹⁸ But for practical reasons, most pertaining to the severity (and costs) of the dissolution remedy, the application of § 2 to oligopolistic industries remained limited to a few select targets, such as the tobacco and motion picture industry.

The most aggressive attempt to curtail parallel business conduct occurred in the context of §5 the FTC Act, a civil statute which prohibited “unfair methods of competition in or affecting commerce.”¹⁹⁹ (Both criminal and civil penalties were possible under the Sherman Act.) In

¹⁹⁶ *United States v. Alum. Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (Learned Hand, J.). For more on how *Alcoa* represents a synthesis of prior monopolization doctrine and New Deal concerns with how existing power advantages perpetuated themselves, see Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281 (2003).

¹⁹⁷ See, e.g., ELEANOR FOX & LAWRENCE SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* 128 (1989) (describing how *Alcoa* marked the beginning of the “structural consensus” approach to monopolization.).

¹⁹⁸ See, e.g. May, *supra* note 12, at 53. Rostow's pathbreaking work was Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947). There, Rostow explained how “[t]he new judicial view of monopoly is likely to embrace many market situations in which effective control of price policy is vested in a small number of large sellers, whether or not those sellers overtly conspire together and whether or not they act to limit the freedom of others to enter the field.” *Id.* at 576. He believed the problem was widespread because “[s]uch powers [to raise and lower their prices together] inhere in the few large sellers who between them produce the dominant fraction of supply. They are the inevitable economic consequences of size, within the structural framework of a market which attaches particular strategic importance to certain elements of control, and sets limits upon the extent to which prices can safely be raised.” *Id.* at 586. He thus concluded that “[i]n all those markets the policy of price and output which prevails, under the impact of the power of the major companies operating there, is effectively monopolistic pattern — every bit as monopolistic as the policy declared illegal in the *Tobacco* case.” *Id.* at 587.

Rostow expanded on this work in Eugene V. Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949), explaining how “the necessary consequence of the economic organization of the industry is that the large and dominant sellers, if they have a decent regard for their own interests, will act as if they had ‘combined,’ in the sense of the *Tobacco* and *Paramount* cases, although their officers may never have talked to each other, on the phone or the golf course,” *id.* at 783. Edward Levi also originally espoused similar thoughts in Edward Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947), but he later became more skeptical in applying § 2 to oligopolies, see Edward Levi, *A Two-Level Anti-Monopoly Law*, 47 NW. U. L. REV. 567 (1952). For other similar work, see the sources cited in Adelman, *supra* note 178, at 1305 n.40.

¹⁹⁹ 38 Stat. 717 (1914) codified as amended, 15 U.S.C. §§ 41-58.

several actions in the late 1940s, the FTC initiated suits that were based, in part, on the notion that “conscious parallelism of action” in delivered pricing systems without more could lead to a conspiracy in violation of § 5.²⁰⁰ Of particular note were the *Cement* case and the *Rigid Steel Conduit* case. “The *Cement* case was the first attempt by the Commission to strike at delivered pricing on a theory of conspiracy.”²⁰¹ Although much of the evidence pertained to the common use of a delivered pricing method with common knowledge of such use and uniformity of prices, there was also substantial direct evidence of conspiracy, and the FTC was ultimately victorious in the Supreme Court.²⁰² In the *Rigid Steel Conduit* case, “the respondents were charged in two counts, one for conspiracy and the other for the common use, with common knowledge of such use, of a basing point system.”²⁰³ After a hearing, the Commission “discharged two of the respondents under the first count, but held them as violators under the second count and included them in the general cease and desist order.”²⁰⁴ The Seventh Circuit affirmed, which the Supreme Court later affirmed by an equally divided court with no opinions filed.²⁰⁵ Although neither of these cases created firm precedential support for the idea that conscious parallelism without more could suffice for violations of §5 of the FTC Act, each case advanced that argument

²⁰⁰ See, e.g., Sumner S. Kittelle & George P. Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing*, 16 LAW & CONTEMP. PROB. 228, 229-35 (1950) (describing the historical development of FTC action against “conscious parallelism” from the *Salt Producers* case in 1941 through the *Rigid Steel Conduit* case in 1949).

²⁰¹ Kittelle & Lamb, *supra* note 200, at 230-31.

²⁰² *FTC v. Cement Institute*, 333 U.S. 683 (1948).

²⁰³ *Id.* at 233.

²⁰⁴ Rahl, *supra* note 170, at 761.

²⁰⁵ *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff’d per curiam sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949). It was in the context of discussion of the Seventh Circuit’s opinion in this case that the term “conscious parallelism of action” was first coined. See Kittelle & Lamb, *supra* note 200, at 228 (discussing its usage in FTC NOTICE TO THE STAFF: IN RE COMMISSION POLICY TOWARD GEOGRAPHIC PRICING PRACTICES, Oct. 12, 1948, p.3: “It would have been possible to describe this state of facts as a price conspiracy on the principle that, when a number of enterprises follow a parallel course of action in the knowledge and contemplation of the fact that all are acting alike, they have, in effect, formed an agreement. Instead of phrasing its charge in this way, the Conspiracy chose to rely on the obvious fact that the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion, and, for this reason, the Commission treated the conscious parallelism of action as violation of the Federal Trade Commission Act.”).

substantially: In the *Cement* case, the Supreme Court stated in dicta that “[w]hile we hold that the Commission's findings of combination were supported by evidence, that does not mean that existence of a ‘combination’ is an indispensable ingredient of an ‘unfair method of competition’ under the Trade Commission Act”;²⁰⁶ in the *Rigid Conduit* case, the Seventh Circuit explicitly noted that “the second count,” which for some respondents was the only applicable count, “did not rest upon an agreement or combination.”²⁰⁷

These developments in the FTC Act, however, did not have an analogous effect on the Sherman Act, for, as James Rahl observed in 1950, the “elevat[ion] of parallelism-without-collusion to respectable status [under the FTC Act] [made] a similar achievement under the Sherman Act more difficult.”²⁰⁸ Indeed, as part of its explanation in the *Cement* case, and its description of why the FTC applied to the facts at hand, the Court observed that whereas a conspiracy or combination was required for a violation of §1 of the Sherman Act,

individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained.²⁰⁹

As Rahl noted, the “implications” to the *Cement* and *Rigid Conduit* cases were “clear, if tenuous: conspiracy and conscious parallelism are not legally the same thing. . . . [even if they] may be from the point of view of economics and public policy.”²¹⁰

Theatre Enterprises in 1954 seized on this understanding. Citing Rahl’s work in the midsts of its famous phrase “[C]ircumstantial evidence of consciously parallel behavior may

²⁰⁶ *Cement Institute*, 333 U.S. at 721 n.19 (citing *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 455 (1922))

²⁰⁷ *Triangle Conduit*, 168 F.2d at 176; see also *id.* at 177 (“And price uniformity especially if accompanied by an artificial price level not related to the supply and demand of a given commodity may be evidence from which an agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred.”).

²⁰⁸ Rahl, *supra* note 170, at 761.

²⁰⁹ *Cement Institute*, 333 U.S. at 708.

²¹⁰ Rahl, *supra* note 170, at 762.

have made heavy inroads into the traditional judicial attitude toward conspiracy [a footnote]; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely” it held that there was not necessarily a “concert of action” as was relevant to § 1 of the Sherman Act even though there was a consciously parallel refusal to deal. Thus, the jury’s verdict that no Sherman Act conspiracy existed was upheld.

Soon, though, the conscious parallelism narrative and *Theatre Enterprises* role within it would begin to change: first, in the two decades after *Theatre Enterprises* was decided, in the parallel refusal to deal context; second, after that time-period, in the parallel pricing context as well. The next subsection describes the former.

b. The two decades after *Theatre Enterprises*: The expansion of structuralism and increased inevitability concerns within the mainstream; some challenges from Chicago scholars

In the mid-1950s and 1960s, the “structure-conduct-performance” model of economic analysis became increasingly accepted.²¹¹ That was especially so amongst “Harvard School” theorists who developed a “no fault monopolization” approach to the problems associated with oligopolistic interdependence under § 2 of the Sherman Act.²¹² In “the leading synthesis of antitrust law and economics of its time,” Kaysen and Turner’s *Antitrust Policy*,²¹³ itself the product of a several year discussion amongst several preeminent legal scholars and

²¹¹ See, e.g., Oliver E. Williamson, *Economics and Antitrust Enforcement: Transition Years*, 17 ANTITRUST 61, 61 (Spring 2003). For examples of prominent scholarship, see JOE S. BAIN, *INDUSTRIAL ORGANIZATION* (1959), and EDWARD S. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* (1959).

²¹² See Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 919-20 (2003) (describing Chamberlin, Mason, and Bain as Harvard economists, and Derek Bok, Areeda, and Turner as Harvard antitrust scholars, as well as their structuralist approach to monopolization). For a more detailed exposition on the “no fault monopolization” approach to antitrust, see ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE* 603-05 (2002).

²¹³ CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY* (1959); see GAVIL, KOVACIC & BAKER, *supra* note 212, at 604 (describing its preeminence).

economists,²¹⁴ concluded that “[t]he principal defect of present antitrust law [was] its inability to cope with market power created by jointly acting oligopolists”²¹⁵ and that deconcentration (and dissolution) of oligopolistic industries was necessary even though these oligopolists were not necessarily guilty of any conduct that violated the Sherman Act.²¹⁶ In subsequent, highly influential work on conscious parallelism²¹⁷ and joint monopolization,²¹⁸ Turner further detailed the advantages of using § 2 to address the problem of oligopolistic interdependence, namely, consciously parallel pricing: In particular, he focused upon how § 1 would be ineffective in curtailing interdependent pricing behavior, for all the oligopolists were doing was, like any firm, simply considering their rivals’ reaction when making their pricing decisions — a problem that did not readily lend itself to injunctive relief.²¹⁹ These proposals by Turner and the other “Harvard School” theorists,” found their most mainstream acceptance in many legislative proposals of the day, including the White House Task Force Report on Antitrust Policy (the “Neal Report”).²²⁰

²¹⁴ KAYSSEN & TURNER, *supra* note 213, at xix n.22. Members of the group were Morris Adelman, Robert Bishop, Robert Bowie, Kingman Brewster, David Cavers, Kermit Gordon, Lincolnd Gordon, Carl Kaysen, John Linter, Edward Mason (chairman), Albert Sack, Donald Trautman, and Donald Turner. *Ibid.*

²¹⁵ *Id.* at 110.

²¹⁶ *See id.* at 110-19; *see also* Hovenkamp, *supra* note 212, at 920. Kaysen and Turner believed that additional legislation was required for although the firms jointly “possess[ed] substantial degrees of market power,” their conduct did not violate the Sherman Act. *See* KAYSSEN & TURNER, *supra* note 213, at 110.

²¹⁷ Turner, *supra* note 15 .

²¹⁸ Turner, *supra* note 156; Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1217-31 (1969).

²¹⁹ Turner, *supra* note 156, at 669 (explaining how the only way interdependent pricing could be remedied is through having the courts act like “public-utility commissions,” which is unreasonable). As then-Judge Breyer would later explain the difficulty of applying § 1 to the problem of interdependence among oligopolists:

Courts have noted that the Sherman Act prohibits agreements, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under section 1 of the Sherman Act. That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for “interdependent” pricing. How does one order a firm to set its prices without regard to the likely reactions of its competitors?

Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) (Breyer, J.).

²²⁰ *See, e.g.*, POSNER, *supra* note 32, at 101 & n.1.

Despite this support for § 2, and criticism of using § 1, to address the problems associated with oligopolistic interdependence, circuit court cases continued to involve § 1. In these cases, the circuit courts retained their general preference to let the juries sort out whether the observed parallel behavior resulted from a conspiracy, including “agreements to agree,” or from independent decisionmaking, especially when the case involved parallel pricing.²²¹ The main exception, where summary procedures were deemed appropriate, occurred where the specific facts made the allegation of conspiracy implausible.²²² Often citing to *Theatre Enterprises* or *Cities Service*, a vast majority of alleged parallel refusals to deal in this period was disposed of on these grounds.²²³

²²¹ For examples of cases involving parallel pricing that were allowed to be submitted to the jury, see *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328 (9th Cir. 1972); *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962); *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397 (4th Cir. 1958); *Morton Salt Co. v. United States*, 235 F.2d 573 (10th Cir. 1956); and *Nat’l Lead Co. v. FTC*, 227 F.2d 825 (7th Cir. 1955) (FTC Act). But see *Klein v. Am. Luggage Works, Inc.*, 323 F.3d 787 (3d Cir. 1963) (not allowing a vertical price-fixing case to be submitted to the jury); *Independent Iron Works v. U.S. Steel Corp.*, 322 F.2d 656, 665 (9th Cir. 1963) (stating how “[s]imilarity of prices in the sale of standardized products such as the types of steel involved in this suit will not alone make out a prima facie case of collusive price fixing in violation of the Sherman Act” as well as the fact that the prices were not actually uniform). This trend corresponds with the holding in *Poller* (decided in 1962) that summary procedure is inappropriate when motive plays a leading role.

²²² E.g., *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253 (1968).

²²³ For cases involving a parallel refusal to deal (at least on certain terms) where summary procedures were deemed appropriate, see *Dahl, Inc. v. Roy Cooper Co., Inc.*, 448 F.2d 17 (9th Cir. 1971); *Norfolk Monument Co., Inc. v. Woodlawn Mem. Gardens, Inc.*, 404 F.2d 1008 (4th Cir. 1968), *rev’d* 394 U.S. 700 (1969); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966); *Ford Motor Co. v. Webster’s Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966); *Naumkeag Theatres Co. v. New England Theatres Co.*, 345 F.2d 910, 911-12 (1st Cir. 1965) (holding that the evidence did not support the existence of parallelism); and *Winchester Theatre Co. v. Paramount Film Distrib. Corp.*, 324 F.2d 652 (1st Cir. 1963). For cases involving a parallel refusal to deal where jury resolution was appropriate, see *Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188 (9th Cir. 1958). In the “middle” was *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), where the Ninth Circuit said that “[c]onscious parallel action is indeed evidence which, with other evidence, may support a finding of conspiracy[, b]ut standing alone it is not enough,” but then found there to be additional evidence allowing the inference of conspiracy. See *id.* at 84-85. For cases citing *Theatre Enterprises*, see *Seagram*, 416 F.2d at 85; *Ford Motor*, 361 F.2d at 880; *Naumkeag*, 345 F.2d at 912; and *Moore*, 251 F.2d at 211. For cases citing *Cities Service*, see *Dahl*, 448 F.2d at 19; *Seagram*, 416 F.2d at 85; *Norfolk Monument*, 404 F.2d at 1011.

Most interesting was how courts in the parallel pricing context differed in their reliance on *Theatre Enterprises* than did courts in the parallel refusal to deal context. Compare, e.g., *Nat’l Lead*, 227 F.2d at 834 (“While parallel business behavior among competitors is not illegal *per se*, [citing *Theatre Enterprises*] we do not believe the protective mantle of ‘conscious parallelism’ can clothe with immunity a system employed by substantially all members of an industry whereby all offer their products for sale at any given time and at any given point throughout the nation at identical prices, without regard to differences in shipping costs.”), with *Ford Motor Co. v. Webster’s Auto Sales, Inc.*, 361 F.2d 874, 881 (1st Cir. 1966) (“At this stage we would be slow to infer a

When trying to justify why evidence of conscious parallelism was less probative of conspiracy in the parallel refusal to deal context than in the parallel pricing context, two circuits (and at least one commentator) latched onto some language from the Ninth Circuit's 1952 opinion in *C-O-Two Fire*,²²⁴ and concluded that more than evidence of conscious parallelism was required to allow an inference of conspiracy in the refusal to deal context — there needed to be evidence of “plus factors” as well.²²⁵ None of these sources, however, provided much guidance in terms of what these “plus factors” might be.

In addition, substantial dissent to this perspective of oligopolistic conduct began to emerge among several scholars later to be associated with the “Chicago School” of Antitrust, namely George Stigler, Richard Posner, and Harold Demsetz. Stigler demonstrated the impediments to the formation and maintenance of cartel agreements, particularly the incentives for cartel members to try to secretly undercut one another;²²⁶ Posner, in a very famous *Stanford Law Review* article²²⁷ and subsequent book — the first edition of *Antitrust Law*²²⁸ — built on Stigler's contributions and argued that oligopolistic interdependence was not inevitable but rather took many separate, complicit decisions and thus, without more, qualified as tacit

horizontal conspiracy from evidence of parallelism in this non-price-fixing context. ‘Conscious parallelism’ in business behavior has not yet been held to be per se conspiratorial conduct. [*Theatre Enterprises*]. This record offers nothing more to suggest a horizontal agreement among dealers.”).

²²⁴ *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489, 493, 497 (9th Cir. 1952) (describing the trial court's analysis).

²²⁵ *Naumkeag Theatres Co. v. New England Theatres Co.*, 345 F.2d 910, 911-12 (1st Cir. 1965) (“Plaintiff's burden is to show that there was evidence warranting a finding of something additional from which a reasonable inference of conspiracy may be made, or, as it puts it, of conscious parallelism ‘plus.’”); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 205 n.19 (3rd Cir. 1961), *cert. denied*, 369 U.S. 839 (1962) (“In other cases utilizing the theory of conscious parallelism to find conspiracy, at least two of the following three circumstances are present: ‘plus’ factors such as those emphasized in the simple refusal to deal cases, *supra*; parallelism of a much more elaborate and complex nature; a web of circumstantial evidence pointing very convincingly to the ultimate fact of agreement.”). Perhaps other commentators referenced this aspect of *C-O-Two Fire*, *Delaware Valley Marine*, and *Naumkeag*, but I have not come across them in my research.

²²⁶ George Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 45-48 (1964); see Hovenkamp, *supra* note 212, at 921 (describing Stigler's article as “groundbreaking”). For other work detailing transaction cost impediments to joint profit maximization, see Oliver E. Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439, 1469-76 (1974).

²²⁷ Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

²²⁸ RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

collusion prohibited by § 1;²²⁹ Demsetz explored how large firms were highly profitable even in unconcentrated industries (likely from efficiencies).²³⁰ These works, at least by the mid-1970s, served not so much as to create a coherent position on oligopolistic behavior of their own, as to destabilize the intellectual foundations of the prevalent “Harvard School” structuralist approach and to call its condemnations of certain behavior and its economic framework for so analyzing into severe question, which would play out in the (approximately) thirty years thereafter.²³¹

c. The mid 1970s to Today: The increasing acceptance of the plus factor requirement

The period from the mid 1970s to today is marked primarily by the increasing acceptance of the use of “plus factors” to distinguish between conspiratorial and independent behavior in all conscious parallelism cases, including parallel pricing cases. Although a large part of the expanding use of “plus factors” is fairly attributable to *Matsushita* itself — courts began to use evidence of plus factors as a way to satisfy *Matsushita*’s “tend to exclude” requirement — the expansion began much earlier in circuit court opinions, most prominently in *Venzie Corp. v.*

²²⁹ See, e.g., Posner, *supra* note 227, at 1566-75; see also Hovenkamp, *supra* note 212, at 921 (describing Posner’s work and Stigler’s influence). Although Professor Daniel Markovits was highly critical of Posner’s account of oligopoly, he too advocated using § 1 of the Sherman Act to attack oligopolistic pricing. See Daniel Markovits, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare, Part IV, The Allocative Efficiency and Overall Desirability of Oligopolistic Pricing Suits*, 28 SZTAN. L. REV. 45, 55-60 (1975); Daniel Markovits, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare, Part III, Proving (Illegal) Oligopolistic Pricing: A Description of the Necessary Evidence and a Critique of the Received Wisdom about its Character and Cost*, 27 STAN. L. REV. 307, 315-19 (1975).

²³⁰ Harold Demsetz, *Two Structures of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 166-67 (Goldschmid, Mann, & Weston eds. 1974); Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973). For similar criticism of the proposition that concentration leads to the same poor economic performance as actual agreements, see Yale Brozen, *Concentration and Profits: Does Concentration Matter?*, 19 ANTITRUST BULL. 381, 388 (1974).

²³¹ GAVIL, KOVACIC & BAKER, *supra* note 212, at 605 (“A catalyzing event took place in 1974 in what came to be known as the Airlie House Conference. At the Airlie House meeting, critics of structuralism synthesized a developing literature that challenged the economic basis for deconcentration. The results of the conference and related research were widely seen as refuting major elements of structuralist oligopoly theory and discrediting deconcentration. [This] indirectly helped inject Chicago school views into the mainstream of antitrust analysis and thus helped foster a broader conservative redirection of antitrust.”) (citation omitted).

This Chicago School work only began being cited by the circuit courts in the 1970s. Westlaw searches reveal, for instance, that Posner’s article on *Oligopoly and the Antitrust Laws* was cited 10 times after 1976, none before, whereas Stigler’s article was cited six times in 1976 and after but none before.

*United States Mineral Prods. Co.*²³² Below, I examine first *Venzie* and other cases from the mid 1970s to the 1980s. I explain second how *Matsushita* altered the jurisprudential domain as regards the use of “plus factors,” especially in parallel pricing cases involving oligopolists.²³³

1. *Venzie* and its immediate postcursors

Starting with the Third Circuit’s 1975 opinion in *Venzie* (a parallel refusal to deal case), the “plus factors” approach — whereby plaintiffs *would have to* prove the existence of parallel business behavior plus provide additional evidence (often referred to under the moniker “plus factors”) to present a submissible case — really began to take off, sometimes with courts explicitly referring to the “plus factors” moniker but other times, as in *Venzie* itself, not:

[Describing why summary judgment for the defendants was appropriate:] [The plaintiffs’] evidence does not, however, include two elements generally considered critical in establishing conspiracy from evidence of parallel business behavior: (1) a showing of acts by defendants in contradiction of their own economic interests [citing *Delaware Valley Marine*²³⁴]; and (2) satisfactory demonstration of a motivation to enter an agreement [citing *Cities Service*].

The absence of action contrary to one’s economic interest renders consciously parallel business behavior ‘meaningless, and in no way indicates agreement. . . .’ [citing Turner’s article on *Conscious Parallelism*].²³⁵

A majority of the circuits soon followed this approach, often citing to *Venzie*, including a few price-fixing cases as well as parallel refusal to deal cases.²³⁶ More and more, these courts cited

²³² 521 F.2d 1309 (3d Cir. 1975). In this subsection, I focus only on the circuit courts’ adoption of a plus factors approach, which I do for narrative convenience alone, as other actors from this period treated oligopolistic behavior similarly. For instance, the Justice Department adopted a “facilitating practices” approach to oligopolistic conduct, see Memorandum from John H. Shenefield, Assistant Attorney General, Antitrust Division, *Shared Monopolies*, reprinted in [1978] 874 ANTITRUST & TRADE REG. REP. (BNA), at F-1, which, as commentators at the time noted, involved a straightforward application of well-established legal principles with respect to unreasonable restraints and “plus factors.” See, e.g., Milton Handler, *Antitrust — 1978*, 78 COLUM. L. REV. 1363, 1417-24 (1978).

²³³ In Part VI *infra*, I describe how some lower courts have overinterpreted *Matsushita*’s application in parallel pricing cases, effectively requiring too much of plaintiffs at the summary judgment stage.

²³⁴ See *supra* note 225 (describing *Delaware Valley Marine*’s explicit use of a “plus factors” approach).

²³⁵ *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975).

Theatre Enterprises only for the proposition that conscious parallelism is not equal to conspiracy.²³⁷

The reason why courts began to require “plus factors” tended to vary by the context of the case. In parallel refusal to deal cases, the “plus factor” requirement became a way to screen out when the inference of conspiracy was highly implausible in the case at hand because there was *independent* business justifications for the parallel decisions (such as in *Theatre Enterprises* itself)²³⁸ — that is to say, interdependence played very little, if any, role in the decisions.²³⁹ But in parallel pricing cases, particularly horizontal ones between oligopolists, the justification for the plus factors requirement was not the implausibility of the conspiratorial inference as much as it was the non-remediability of the problem (Turner’s concern). Indeed, as then-Judge Breyer explained well:

²³⁶ See *Royal Drug Co., Inc. v. Group Life and Health Insurance Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984) (vertical price-fixing); *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128, 139 & n. 10 (2d Cir. 1984) (§ 5 of the FTC Act; horizontal parallel pricing); *Paul Kadair, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 1027 n.27 (5th Cir. 1983) (parallel refusal to sell to plaintiff); *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 494 n.10 (5th Cir. 1982) (parallel refusal to deal); *Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1201 & n.3 (7th Cir. 1981) (horizontal price-fixing); *In re Plywood Antitrust Litigation*, 655 F.2d 627, 634 (5th Cir. 1981) (horizontal price-fixing; looking to evidence of parallel pricing plus direct evidence of communication between high-level personnel on pricing policy but not using the moniker “plus factors”); *Weit v. Continental Ill. Nat’l Bank & Trust Co. of Chicago*, 641 F.2d 457, 462-63 (7th Cir. 1981) (horizontal price-fixing); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980) (parallel refusal to deal); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 114 (3d Cir. 1980) (vertical price-fixing); *Program Eng’g, Inc. v. Triangle Pub., Inc.*, 634 F.2d 1188, 1195 n.9 (9th Cir. 1980) (parallel refusal to deal); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978) (multiple practices, analogous to a parallel refusal to deal); *Gainesville Utils. Dept. v. Florida Power & Light Co.*, 573 F.2d 292, 301 (5th Cir. 1978) (horizontal market division); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977) (parallel refusal to deal); *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 110-11 (2d Cir. 1975) (parallel refusal to purchase). The First Circuit had already adopted a “conscious parallelism plus” approach in *Naumkeag*. See *supra* note 225.

²³⁷ See, e.g., (add two cases)

²³⁸ See, e.g., VI AREEDA & HOVENKAMP, *supra* note, at ¶ 1412b.

²³⁹ See Turner, *supra* note 156, at 681; see also Randall David Marks, *Can Conspiracy Theory Solve the Oligopoly Problem?*, 45 MD. L. REV. 387, 406 (1986) (“Despite its lack of discriminative value, the ‘against self-interest’ factor ... [helps] screen out cases in which agreement cannot be present.”); Blechman, *supra* note 190, at 897 (“It is relatively easy to say that if this ‘plus factor’ [actions contrary to one’s economic interest] is not present — that is, if each firm would act in a given way regardless of whether its competitors acted in the same way — then the defendants’ actions are independent and no agreement may be inferred. That would be the case, for example, where each of several suppliers has its own legitimate business reason for not dealing with a particular customer.”). For more modern reasoning on this point, see VI AREEDA & HOVENKAMP, *supra* note, at ¶¶ 1412d, 1413b.

Courts have noted that the Sherman Act prohibits agreements, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under section 1 of the Sherman Act. That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for “interdependent” pricing. How does one order a firm to set its prices without regard to the likely reactions of its competitors?²⁴⁰

Nevertheless, in both types of cases — parallel refusals to deal and parallel pricing — this imposition of a “plus factors” requirement coincided nicely with the general non-interventionist approach of most Chicago School scholars.²⁴¹

The main difference among the circuit courts concerned exactly how plausible the inference of conspiracy had to be relative to that of independent conduct. The main view

²⁴⁰ *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) (citing several cases, including *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253-54 (2d Cir. 1987)). Notably, then-Judge Breyer does not justify this requirement via *Monsanto* or *Matsushita* or implausibility concerns. *Apex Oil* does, to be sure, cite *Monsanto* and *Matsushita*, but it explicitly dismisses their concerns with implausibility in the horizontal price-fixing context; rather, *Apex Oil*, 822 F.2d at 253-54 rests its logic on the *Modern Home* case cited *supra* note 236, and *In re Plywood Antitrust Litigation*, 655 F.2d 627, 633-37 (5th Cir. 1981).

Interdependent oligopolist pricing was often treated much differently than interdependent refusals to deal. Compare *Apex Oil*, 822 F.2d at 253 (describing how proof of interdependent pricing among oligopolists did not suffice to raise an inference of a tacit agreement), with *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1978) (discussing how proof that the decisions were interdependent would have sufficed to “raise the inference of a tacit agreement to boycott”). There are two reasons for this divergence, one logical and one practical, both related to Turner. The logical reason was that interdependent oligopolist pricing better fit with “competitive norms” than interdependent decisions not to deal with a firm and therefore more likely to result from seriatim pricing decisions by firms that merely took rivals’ likely reactions into its decision-making calculus, which were allowed, as opposed to “agreements to agree,” which were not. See Turner, *supra* note 156, at 662-66, 682, 684-704. Thus, when there was an interdependent decision not to deal with someone, there more likely would be “an action against self-interest.” See, e.g., *Modern Home Institute*, 513 F.2d at 111. The practical reason was that Areeda and Turner drew such a distinction in their treatise debuting in 1978, see ¶ 1405, which became increasingly relied upon as the definitive statement of antitrust law. [Still needs to be verified.] For more on the relationship of interdependence to collusion (as well as the possible lack thereof), see *Bogosian*, 561 F.2d at 447.

Another way to think of the difference, at least descriptively, is that parallel refusals to deal were seen as being either: (1) independently made or (2) concertedly made; whereas with parallel pricing, there appeared to be three options: (1) completely independent conduct (where the parallel prices resulted, say, from parallel cost structures and product qualities), see, e.g., *Weit v. Continental Ill. Nat’l Bank & Trust Co. of Chicago*, 641 F.2d 457, 462-63 (7th Cir. 1981); *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149, 160 (7th Cir. 1972), (2) seriatim interdependent decisions (where the parallel prices resulted from independent decisions to be a price leader or a price follower), or (3) tacit collusion (where there was a set agreement as to who would be a price leader and price follower and thus there was no independent decision-making at all).

²⁴¹ See, e.g., BORK, *supra* nte 83, at 178-197. As described above, Posner was more skeptical of tacit collusion than many of his Chicago School contemporaries. See *supra* notes 227-229 & accompanying text. Posner’s view, while accepted by economists, was not very accepted by the courts. See Marks, *supra* note 239, at 399. This may very well be the result, in part, because of “historical accident: the Turner view won acceptance first.” *Id.* at 400.

appeared to that “when a plaintiff firm does show common action plus an appropriate ‘plus factor’ which may rationally indicate that defendants have expressly or impliedly committed themselves to a common course of action, it ... earns its way to the jury.”²⁴² The First, Fifth and Ninth Circuit adopted this standard explicitly,²⁴³ while other circuits did so implicitly (by not addressing the level of proof required at the summary judgment stage while prior precedents indicated that the inference of conspiracy need only be reasonable).²⁴⁴ The Third, Seventh, and Eighth Circuits, however, indicated that the inference of conspiracy need be more attractive than that of independent behavior for the case to be submitted to the jury.²⁴⁵ But even this difference was slightly illusory given that some courts applying a higher standard viewed the successful showing of a plus factor’s existence as sufficient,²⁴⁶ which, at the end of the day, was all that the remaining decisions of the time seemed to demand as well.

²⁴² LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 319 (1977).

²⁴³ See, e.g., *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1261, 1267 (9th Cir. 1983) (“Thus, in a case like the one before us, a plaintiff cannot overcome a motion for summary judgment without alleging sufficient facts to raise a reasonable inference of an illegal combination or conspiracy.”); *Southway Theatres*, 672 F.2d at 495 (“The ultimate inference that a conspiracy existed need not be more probable than the inference that the refusal to deal resulted from independent business judgment.”); *Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F.2d 910, 911-12 (1st Cir. 1965) (Plaintiff’s burden is to show that there was evidence warranting a finding of something additional from which a reasonable inference of conspiracy may be made, or, as it puts it, of conscious parallelism ‘plus.’”).

²⁴⁴ See, e.g., *Wilder Enter., Inc. v. Allied Artists Picture Corp.*, 632 F.2d 1135, 1139 (4th Cir. 1980); *Pennington v. United Mine Workers of Am.*, 325 F.2d 804, 811 (6th Cir. 1963); *Bordonaro Bros. Theatres v. Paramount Pictures*, 176 F.2d 594, 596-97 (2d Cir. 1949).

²⁴⁵ See, e.g., *Weit v. Continental Illinois Nat’l Bank & Trust Co. of Chicago*, 641 F.2d 457, 463 (7th Cir. 1981) (“[W]hen the plaintiff ... relies on circumstantial evidence alone, the inference of unlawful agreement rather than individual business judgment must be the compelling, if not exclusive, rational inference.”) (citing *Pevely Dairy Co. v. United States*, 78 F.2d 363 (8th Cir. 1949), which as I describe *supra* note 194, was anomalous for its time); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978) (“An inference of conspiracy is not warranted where the conduct is at least as consistent with legitimate business decisions by the distributor as with the planned exclusion of the plaintiffs.”); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977) (“The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action.”). But see *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 743 (8th Cir. 1982) (“Nonetheless, the elements of a conspiracy are rarely established through means other than circumstantial evidence, and summary judgment is only warranted when “the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided.” The court must be convinced that the evidence presented is insufficient to support any reasonable inference of a conspiracy.”) (citations omitted).

²⁴⁶ See, e.g., *Bogosian*, 561 F.2d at 446.

Left unanswered, however, was a pivotal question: Exactly how convinced did a court have to be that a “plus factor” existed as to allow the case to be submitted to the jury? That is to say, the ultimate inference at issue was whether or not one could infer a conspiracy, and for that ultimate inference courts looked to evidence of conscious parallelism and “plus factors,” and when those “plus factors” were “established,” they allowed a case to be submitted. But that begged the question of what it took to establish a “plus factor” in the first place, as often the evidence establishing those “plus factors” such as actions against self-interest was circumstantial as well, hence establishing a “plus factor” required an inference too. It was only after *Matsushita* was decided that courts began to address this problem.

2. *Monsanto* and *Matsushita*’s influence on conscious parallelism cases

Following *Monsanto* and *Matsushita*, the plus factor requirement, as espoused in conscious parallelism cases and commentary (namely, the Areeda treatise), developed as follows: First, the number of factors recognized as “plus factors” increased from motive to behave collectively, acts against self-interest unless pursued collectively, and high levels of interfirm communication to those three as well as “market conduct that appears irrational absent agreement,” “past history of industry collaboration,” “facilitating practices,” “industry structure” (including market structure and product and purchaser information), and “industry performance.”²⁴⁷ Second, the existing “plus factors” became more refined: For instance, “high-level of interfirm communication” became a high level of information exchange that “had an impact on pricing decisions.”²⁴⁸ Third, courts began explicitly differentiating between the value of different “plus factors,” as some were seen as necessary for a finding of conspiracy, whereas

²⁴⁷ See, e.g., GAVIL, KOVACIC & BAKER, *supra* note 212, at 283.

²⁴⁸ *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1034 (8th Cir. 2000) (en banc).

others sufficient for such a finding.²⁴⁹ Fourth, courts have turned their scrutiny to the requisite plausibility of the existence of a plus factor in the first place, often requiring circumstantial evidence that must “tend to exclude the possibility of independent behavior” to ... constitute a plus factor in the first place.²⁵⁰

The third and fourth changes were especially significant in oligopolistic parallel pricing cases. The third change was significant because the existence of certain plus-factors such as “industry structure” and motive to conspire followed directly from the oligopolistic market structure and the incentives for joint pricing therein; hence the conclusion that these “plus factors” were only necessary shifted the subject of the dispute to that of other plus factors, such as actions against self-interest, whose existence was often more debatable. But this leads to the significance of the fourth change: Whereas conspiracy is hard to prove, “mere interdependence” is hard to disprove; since the interest a firm may be acting toward may be an interdependent

²⁴⁹ See, e.g., VI AREEDA, *supra* note 29, at ¶ 1412; see also *Blomkest*, 203 F.3d at 1043 (Gibson, J., dissenting) (“With *Monsanto* in mind, it is useful to distinguish between “plus factors” that establish a background making conspiracy more likely and ‘plus factors’ that tend to exclude the possibility that the defendants acted without agreement. For instance, ‘motive to conspire’ and ‘high level of interfirm communications,’ are often cited as ‘plus factors’ that tend to exclude the possibility that the defendants acted without agreement. For instance, ‘motive to conspire’ and ‘high level of interfirm communications,’ are often cited as ‘plus factors’ because they make conspiracy possible. Background facts showing a situation conducive to collusion do not tend to exclude the possibility of independent action, but they nevertheless form an essential foundation for a circumstantial case. In [*Matsushita*], the Supreme Court held that a conspiracy case based on circumstantial evidence must be economically plausible. The background ‘plus factors’ of market structure, motivation and opportunity play an important role in establishing such plausibility. Generally, these background ‘plus factors’ are necessary but not sufficient to prove conspiracy. . . . On the other hand, acts that would be irrational or contrary to the defendant’s economic interest if no conspiracy existed, but which would be rational if the alleged agreement existed, do tend to exclude the possibility of innocence.”). Most courts have found actions contrary to self-interest to be sufficient. See, e.g., *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999) (“[Actions against self-interest] will consistently tend to exclude the likelihood of independent conduct.”).

Similar to the different values assigned to different plus-factors, courts consider the presumption of conspiracy raised through the existence of plus factors to be rebuttable. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n. 30 (11th Cir. 1991); *Balaklaw v. Lovell*, 822 F. Supp. 892, 903 (N.D.N.Y. 1993) (“[T]he mere presence of one or more of these ‘plus factors’ does not necessarily mandate the conclusion that there was an illegal conspiracy . . . for the court may still conclude, based upon the evidence before it, that the defendants acted independently of one another . . .”).

²⁵⁰ See, e.g., *Williamson Oil v. Philip Morris*, 346 F.2d 1287, 1311 (11th Cir. 2003); VI AREEDA, *supra* note 29, at ¶ 1415d (describing how a business action must not only seem to be against self-interest but so compellingly against their self-interest as to make the inference of independent action implausible, as well as corresponding cases).

one,²⁵¹ raising the level of proof required to establish an action against self-interest has effectively been a way to insulate defendants from liability for oligopolistic parallel pricing (which I describe further in Part V).

While some of these changes might simply be an indication of the natural refinement of the plus factor requirement as courts become more comfortable with it,²⁵² the overwhelmingly preponderant justification for these changes has to be seen as *Monsanto* and *Matsushita*’s “tends to exclude” standard itself, for in conscious parallelism cases, it was usually this evidence of “plus factors” that provided that additional something that allowed the court to say that the evidence tended to exclude the possibility of independent conduct and thus satisfied the “tends to exclude” requirement.²⁵³ This is especially so with respect to the third and fourth changes listed above, as almost every decision concluding either that (i) a plus factor has not been established or (ii) that a plus factor has been established but it is not sufficient to present a submissible case, have done so in the context of explaining why the “tends to exclude” standard has not been met.

Highly illustrative is the Eleventh Circuit’s recent decision in *Williamson Oil*, an oligopolistic parallel pricing case involving several tobacco companies. There, after citing how *Monsanto* and *Matsushita* require evidence “‘that tends to exclude the possibility’ that the

²⁵¹ See AREEDA, *supra* note 29, at ¶ 1415e.

²⁵² In explaining why he agrees with a heightened evidentiary requirement in conscious parallelism cases, Areeda explained that: “Although the line between coordination through recognized interdependence and some commitment is shadowy, the distinction is important so long as antitrust law allows the former but condemns the latter. Furthermore, unless we can see a rational mental process by which a judge or jury can move from an observed fact — say, price leadership — to a conclusion of ‘conspiracy’ or ‘no conspiracy,’ the case must be resolved by rules of law allocating burdens of proof or creating presumptions that certain behavior will — or will not — be treated as an agreement.” VI AREEDA, *supra* note 29, at ¶ 1410.

²⁵³ See, e.g., *Petruzzi’s IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993) (citing *In re Japanese Elec. Prods.*, 723 F.2d at 304) (describing how it is only when plus factors are “present does the evidence tend to exclude the possibility that the defendants acted independently”); see also *Blomkest*, 203 F.3d at 1033. Indeed, the Fifth Circuit altered its position after *Monsanto*. Whereas previously the inference of conspiracy need only be reasonable in light of the evidence, see *Southway Theatres*, 672 F.2d at 495, it then required the evidence to “tend to exclude” the possibility of independent conduct, see *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1438 (5th Cir. 1984) (citing *Mosanto*).

alleged conspirators acted independently,”²⁵⁴ the court explained how to present a submissible case, a plaintiff had to demonstrate the “existence of one or more plus factors that ‘tends to exclude the possibility that the alleged conspirators acted independently.’”²⁵⁵ And, later in the opinion, the court explained how, because of *Monsanto* and *Matsushita*, the inference that a plus factor existed in the first place had to be more plausible than the inference that it did not; describing the action versus self-interest plus factor, the court said:

“[W]e must exercise prudence in labeling a given action as being contrary to the actor’s economic interests, lest we be too quick to second-guess well-intentioned business judgments of all kinds. . . . Accordingly, appellants must show more than that a particular action did not ultimately work to a manufacturer’s financial advantage. Instead, in the terms employed by *Matsushita*, the action must ‘tend[] to exclude the possibility of independent action.’ Thus, if a benign explanation for the action is *equally* or more plausible than a collusive explanation, the action cannot constitute a plus factor. Equipoise is not enough to take the case to the jury.”²⁵⁶

In Part V, I explain why I believe some of this change to be invalid, but here it is worth pointing out that the Eleventh Circuit does not seem to be alone in requiring a higher level of proof regarding the existence of a plus factor.²⁵⁷ Most of the other circuits have left the issue unanswered.²⁵⁸ Indeed, the only circuit to take a directly contrary position appears to be the Seventh Circuit, as it requires additional evidence of conspiracy at the summary judgment stage only when the plaintiff’s theory makes no economic sense.²⁵⁹

C. The Consumer Welfare Narrative

²⁵⁴ *Williamson Oil*, 346 F.2d at 1300.

²⁵⁵ *Id.* at 1301.

²⁵⁶ *Id.* at 1310 (citation omitted) (emphasis added).

²⁵⁷ See, e.g., *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032-33 (8th Cir. 2000) (en banc).

²⁵⁸ See, e.g., *In re Citric Acid Litigation*, 191 F.3d 1090, 1102 (9th Cir. 1999); *In re Baby Food*, 166 F.3d 112, 133 (3d Cir. 1999). My standard for leaving the question unaddressed is stating the plus-factor requirement without elaborating on what is required to establish it in the first place.

²⁵⁹ *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002) (Posner, J.). Judge Posner has taken this view extrajudicially as well. See, e.g., POSNER, *supra* note 32, at 69-100.

All the while this change occurred in the conscious parallelism nomos, a broader transformation transpired in the antitrust laws more generally, particularly a narrowing of the liability rules, as augmenting “consumer welfare” became an increasingly important part of antitrust analysis in the late 1970s and 1980s. The first subsection briefly describes that change, while the second subsection turns to its consequent ramifications for evidentiary rules as manifested in *Monsanto* and *Matsushita*.²⁶⁰

1. Narrowing of liability rules due to consumer welfare concerns

The narrowing of liability rules is primarily exhibited in the movement away from *per se* liability (illegal once identified), and toward a more open-ended and permissive inquiry, in many different types of antitrust suits. In 1967, for instance, *per se* rules applied to horizontal price-fixing conspiracies,²⁶¹ concerted refusals to deal,²⁶² vertical price-fixing conspiracies,²⁶³ vertical non-price restraints,²⁶⁴ and tying arrangements.²⁶⁵ Even without any showing of actual market power, courts were willing to presume the behavior’s anticompetitive effect. But by 1986, the situation was vastly different.²⁶⁶ In certain areas of law, *per se* rules applied but the circumstances in which they did had been lessened greatly: Horizontal conspiracies that fixed price were not *per se* illegal if the “[purpose and effects of the literal price-fixing agreement] facially appears to be one that would [not] always or almost always tend to restrict

²⁶⁰ Standing requirements also become more stringent, particularly the requirement that plaintiffs prove “antitrust injury,” *see* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and the barring of suits by indirect purchasers, *see* *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Although these standing requirements are vastly important, I do not focus on them in this Section.

²⁶¹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

²⁶² *Klor’s v. Broadway-Hale Stores*, 359 U.S. 207 (1959).

²⁶³ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

²⁶⁴ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

²⁶⁵ *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958).

²⁶⁶ I use 1986 here because it is the year of *Matsushita*. More diminishments to *per se* liability also occurred after *Matsushita*, both in terms of the development of the quick-look doctrine, *see* *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), and in relation to vertical price-fixing conspiracies, *see* *Business Electronics Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

competition,”²⁶⁷ or if the restraint is “essential if the product is to be available at all;”²⁶⁸ in concerted refusal to deal cases, the Court required the threshold determination whether the “concerted activity [is] characteristically likely to result in predominantly anticompetitive effects” or if it is designed to make markets more competitive before applying per se liability;²⁶⁹ and, in tying cases, the per se rule only applied if the defendant possessed a significant share of the tying product market.²⁷⁰ But in other areas of law, namely vertical non-price restraints, per se condemnation was tossed altogether in favor of analysis under the Rule of Reason (where the restraint would be allowed if reasonable).²⁷¹

In each of these situations, the change from per se rules was largely motivated by concerns for “consumer welfare” and its common pseudonym “economic efficiency.”²⁷² This is

²⁶⁷ *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 24 (1979) (excepting a “blanket license” from per se treatment because of its design to render markets more competitive). The Court there described how the term “price fixing,” as warrants per se liability, is a “term of art” that applies only after considerable judicial experience with a type of arrangement. *Id.* at 9.

²⁶⁸ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Ok.*, 468 U.S. 85, 101 (1984) (applying the rule of reason to an agreement between the NCAA and member institutions for televising college football games).

²⁶⁹ *Northwest Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).

²⁷⁰ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977); *see also* Donald L. Beschle, *Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 *HASTINGS L.J.* 471, 495-96 (1987) (“Cases involving tying arrangements have followed the general pattern of retaining the black letter rule of per se illegality while at the same time narrowing the scope of activity subject to the rule.”).

²⁷¹ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

²⁷² *See, e.g., Northwest Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (describing past group boycotts that were *per se* illegal: “[T]he practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.”); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Ok.*, 468 U.S. 85, 104 (1984) (“But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same--whether or not the challenged restraint enhances competition.”); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984) (“And from the standpoint of the consumer--whose interests the statute was especially intended to serve--the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package.”); *ibid.* at 35 (O’Connor, J., concurring) (“The time has therefore come to abandon the “*per se*” label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have.”); *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 20 (1979) (describing how although the blanket licenses fixed price they were “designed to increase economic efficiency and render markets more, rather than less, competitive.”). *But see* William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 *VA. L. REV.* 1221, 1237-38, 1253-57 (1989) (arguing that the Court has refused fully to embrace consumer welfare as the exclusive goal of antitrust). My claim is not that a consumer welfare approach to the antitrust laws has been fully adopted but rather simply that consumer welfare concerns gained vastly increased importance in this time period.

especially clear with respect to *Sylvania* and the Court's decision to analyze vertical non-price restraints under the Rule of Reason. There, in reversing application of the *per se* rule, the Court explained how vertical arrangements that reduce intrabrand competition might enhance interbrand competition through helping the manufacture achieve certain distributional efficiencies (*e.g.*, inducing retailers to invest labor and capital in unknown products, to provide promotional activities, to provide service and repair, and to control freeriders);²⁷³ and that interbrand competition is the primary concern of the antitrust laws.²⁷⁴ The Court did not deem the reduction in intrabrand competition a problem because interbrand competition “provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.”²⁷⁵ Rule of Reason analysis was appropriate for only then would courts be able to assess the “relevant economic impact.”²⁷⁶

These increased concerns with “consumer welfare” and economic efficiency were largely — but not entirely — in response to Chicago School scholarship,²⁷⁷ which tended to view economic efficiency as the main, if not sole, goal of the antitrust laws.²⁷⁸ Indeed, in *Sylvania*, the Court relied heavily on Bork's²⁷⁹ and Posner's²⁸⁰ work (as well as many other scholars) in

²⁷³ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977).

²⁷⁴ *Id.* at 52 & n.19.

²⁷⁵ *Id.* at 52 n.19.

²⁷⁶ *Id.* at 56.

²⁷⁷ See, *e.g.*, GELLHORN & KOVACIC, *supra* note 161, at 156-222; Thomas A. Piraino, Jr., *Reconciling the Per se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 685-99 (1991).

²⁷⁸ See, *e.g.*, Page, *supra* note 272, at 1243. Chicagoans' analysis focused mainly on alleged exclusionary conduct. They tended to prefer *per se* legality for practices such as resale price maintenance, predatory pricing, and tying arrangements and favored “little other than prosecuting plain vanilla cartels and mergers to monopoly.” Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986). To say that Chicago scholars have not gotten all they wanted is not to negate that they have caused a substantial change in antitrust law. Indeed, the whole concept of nomos and narrative is that there are conflicting concerns that must be reconciled in order to serve as legitimate sources of authority. Thus, Chicago's inability to completely reform the antitrust law is, to a degree, proof that there is a nomotic-narrative conflict deserving recognition.

²⁷⁹ Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and the Market Division (II)*, 75 YALE L.J. 373, 403 (1966)

²⁸⁰ Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 293 (1975).

discussing the “free-rider effect” and other competitive benefits to vertical non-price restraints, justifying the Rule of Reason approach to analyzing those restraints.²⁸¹ In later cases cutting back on *per se* condemnation, this shift in *Sylvania* served as an important conceptual lodestar, even though a rule of reason approach was not adopted entirely.²⁸²

2. The consequent ramifications for evidentiary rules, particularly summary judgment²⁸³

Narrowed liability rules (due to “consumer welfare” concerns) caused evidentiary rules to become stricter — at least where possible *per se* liability still lay on the horizon if the observable behavior was characterized as an agreement²⁸⁴ — namely out of fear that too loose evidentiary rules would deter procompetitive conduct. This phenomenon began in *Monsanto* as the Court adopted the “tends to exclude” standard as a way to protect conduct permitted (and perhaps even encouraged) by *Sylvania*. In *Monsanto*, the issue concerned the permissible range of inferences that could be drawn from the termination of a price-cutter given that such termination was consistent with both a resale price maintenance conspiracy (*per se* illegal under *Dr. Miles*) and unilateral conduct (allowed by *Colgate*). Through the 1960s, *Colgate* had been substantially eroded,²⁸⁵ but *Sylvania* injected *Colgate* with a newfound importance: *Colgate* conduct was the

²⁸¹ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 48-56 & nn. 13-24 (1977).

²⁸² See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Ok.*, 468 U.S. 85, 103 (1984); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 n.11 (1984); *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 13 n.24, 20 (1979). For a more contemporary view on *Sylvania*’s implications, see Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977), and Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

In *Jefferson Parish*, however, the Court justified its “market power” prerequisite in terms of “leveraging,” a problem that had been described by Areeda and Turner. See *Jefferson Parish*, 466 U.S. at 14 n.20 (citing V P. Areeda & D. Turner, *Antitrust Law* ¶ 1134a at 202 (1980)); see also *id.* at 22 n.35. Justice O’Connor’s concurrence in *Jefferson Parish* more closely tracks a “Chicago School” “consumer welfare” approach. See, e.g., *id.* at 39 n.9 (citing Ward Bowman, among others, for the “single monopoly profit” theory).

²⁸³ See generally Calkins, *supra* note 104 (discussing the equilibrating tendencies of summary judgment, treble damages and substantive developments in antitrust law).

²⁸⁴ The reason for this is obvious: If business behavior is automatically deemed illegal once identified as an agreement, the whole battle will be over whether or not an agreement existed in the first place.

²⁸⁵ Add cases

mechanism used to enforce *Sylvania*-protected restraints²⁸⁶ — which presumably enhanced a manufacturer’s competitiveness, as interbrand competition would check intrabrand market power. This *Colgate-Sylvania* hybrid concern increased the cost of a mistaken inference of conspiracy, because price-fixing agreements are subject to per se illegality and treble damages.²⁸⁷ It was in this light that *Monsantô’s* deterrence concerns arose, for a manufacturer would never adopt beneficial nonprice restraints if it could not ensure their compliance;²⁸⁸ and it would not ensure their compliance if it risked treble damages in doing so. Limiting the range of permissible inferences therefore helped prevent this deterrence.

Matsushita represented an extension of the same sort of phenomenon, as the Court there limited inferences as a way to protect price-cutting conduct, which unlike the vertical nonprice restraints in *Sylvania* that was “merely checked by interbrand competition,” that was the “essence” of interbrand competition itself. In *Matsushita*, the Court noted how predatory pricing conspiracies were substantively disfavored in much of the scholarship and the lower courts, as they were self-detering because of the implausibility of recouping lost profits.²⁸⁹ In this context, the Court deemed mistaken inferences “especially costly, because they chill the very conduct the

²⁸⁶ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-63 (1984) (“[I]t is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors’ resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that ‘freeriders’ do not interfere.”).

²⁸⁷ *Id.* at 763 (“[I]t is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to *per se* treatment and treble damages.”).

²⁸⁸ *Id.*

²⁸⁹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594-95 (1986) (citing *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir.1983), and Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 26 (1984)); see also BORK, *supra* note 83, at 149-55 (contending that predatory pricing schemes are rarely tried, and even more rarely successful); Easterbrook, *supra* note 83, at 268 (same). The Court would expand on predatory pricing’s inherent implausibility in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

antitrust laws are designed to protect.”²⁹⁰ Balanced against the concern of not punishing an implausible conspiracy, the *Matsushita* Court’s deterrence concerns were substantially, “unusually,” greater.²⁹¹ Limiting the range of permissible inferences helped the Court encourage future low prices.

But *Matsushita* did not answer all the relevant deterrence-related questions; some things still needed clarification. After *Matsushita*, for instance, it was unclear just how often the observable business behavior had to be procompetitive to “trigger” inference limitation, for while the *Matsushita* opinion described the “unusualness” of the predatory pricing situation, it never provided a lower “procompetitiveness” bound on when deterrence concerns were applicable.

Kodak did, however. As the Court explained in that decision, deterrence concerns did not arise when the alleged behavior merely was generally more procompetitive than anticompetitive: “We need not decide whether Kodak’s behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects.”²⁹² Rather, the Court stated that deterrence concerns only required inference limitation when the observed behavior was almost invariably more procompetitive than anticompetitive, “one that appears always or almost always to enhance competition”²⁹³ (thus, as Figure A demonstrates below, envisioning a procompetitiveness spectrum based on how frequently the observed behavior appeared to enhance competition, and only providing protection to that conduct at the upper end of the spectrum). As the Court explained, not only is this vastly-more-often-procompetitive behavior not illegal, it is the “very

²⁹⁰ *Matsushita Elec. Indus.*, 475 U.S. at 594 (quoting *Barry Wright Corp.*, 724 F.2d at 234 (“[We] must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.”)).

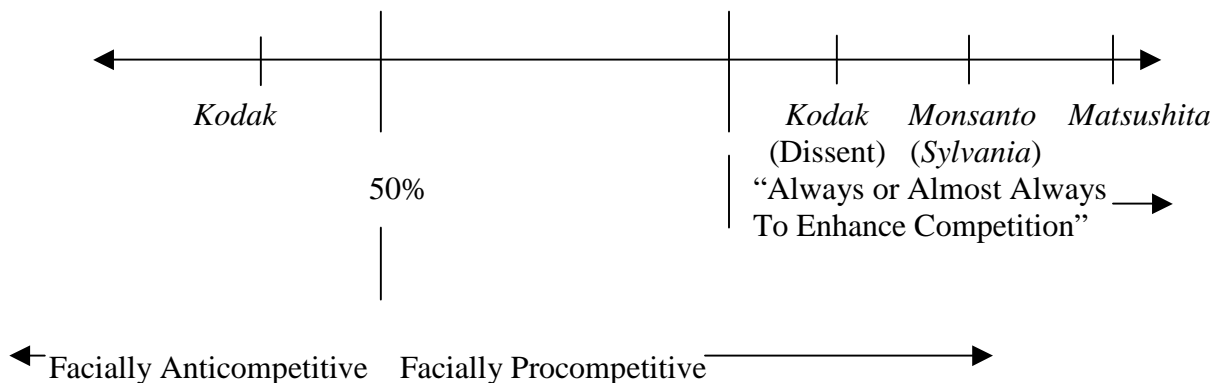
²⁹¹ *Matsushita Elec. Indus.*, 475 U.S. at 594.

²⁹² *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 (1992).

²⁹³ *Id.* This “always or almost always” language paralleled the Court’s language in *Broadcast Music*, see *supra* text accompanying note 267. Just as the exception to the per se condemnation of horizontal price-fixing conspiracies was very narrow and contextually specific in *Broadcast Music*, so is *Kodak*’s clarification of when deterrence concerns necessitate inference limitation.

conduct the antitrust laws are designed to protect.”²⁹⁴ The “facially anticompetitive” behavior of higher service prices and market foreclosure of that case simply did not qualify.²⁹⁵

Figure A (Facial Procompetitiveness)²⁹⁶



Arguably, this solution in *Kodak* is deeply unsatisfying — a make-shift solution at best to the various concerns *Matsushita* unleashed on the rest of antitrust. Like *Bob Jones*, many important questions were left unanswered: Is consumer welfare the sole goal of the antitrust laws, or are there some other values that retain importance? If so, are they important enough relative to consumer welfare such that the efficiency concerns in the case at hand (including deterrence concerns) should be subjugated to others? Perhaps one could respond that such a debate was beyond what was necessary to resolve the case, but that response does not make either decision any more palatable, especially as pertains to aspects of antitrust law to which its logic and its language implicate but receive scant, if any, discussion.

²⁹⁴ *Id.* at 478 (citing *Matsushita* and *Monsanto*).

²⁹⁵ *Id.*

²⁹⁶ Placement of the behavior is based on where I believe the Court would place it. *Matsushita* is furthest right because cutting prices is the “essence” of competition. *Monsanto* is just to the left, because the vertical nonprice restrictions permitted by *Sylvania* are presumed to enhance distributional efficiencies. (I assume that the *Monsanto* Court would estimate that enhancement to occur “almost always” because of the inherent check of interbrand competition.) Justice Scalia’s *Kodak* dissent is next to *Monsanto*, because he explicitly states that *Sylvania*’s logic should apply to *Kodak*. *Eastman Kodak*, 504 U.S. at 502 (“The same assumptions, in my opinion, should govern our analysis of ties alleged to have been ‘forced’ solely through intrabrand market power.”) (Scalia, J., dissenting). The *Kodak* opinion itself is farthest left because the majority views the observable behavior as facially anticompetitive.

The consequence to this confusion has been a divergence in lower court decisionmaking since: Whether or not a court relies on *Kodak* or *Matsushita* when considering summary procedures depends on just how far it sees *Matsushita* (and its deterrence concerns) overwriting the rest of antitrust. The result, especially in conscious parallelism cases, is that these courts risk destroying the balance of that nomos without any real authority for doing so. The nomos is thus in disarray.

Properly interpreted, *Matsushita* and *Kodak* do, I believe, set out a workable reconciliation of competing concerns; I turn to that issue in Part IV. But first it is worthwhile to explore what those two decisions appear to require in conscious parallelism cases, at least if the *Kodak* make-shift solution is accepted as true, which I do in the next Section.

D. The Interaction of the Conscious Parallelism Nomos and the Consumer Welfare Narrative

The extent of inference limitation from circumstantial evidence at the summary judgment stage in conscious parallel cases depends on the type of conspiracy being alleged. In situations involving vertical relationships,²⁹⁷ the situation will likely be analogous to *Monsanto*, where the observed behavior may well be procompetitive. In these situations, deterrence concerns may well dictate inference limitation. But, on the other hand, in the standard oligopoly parallel pricing case, efficiency concerns (and the “consumer welfare narrative”) *should have no effect* on what evidence should suffice to present a submissible case. As then-Judge Breyer noted, supracompetitive²⁹⁸ parallel pricing is not desirable,²⁹⁹ thus deterrence concerns play *no* role (as

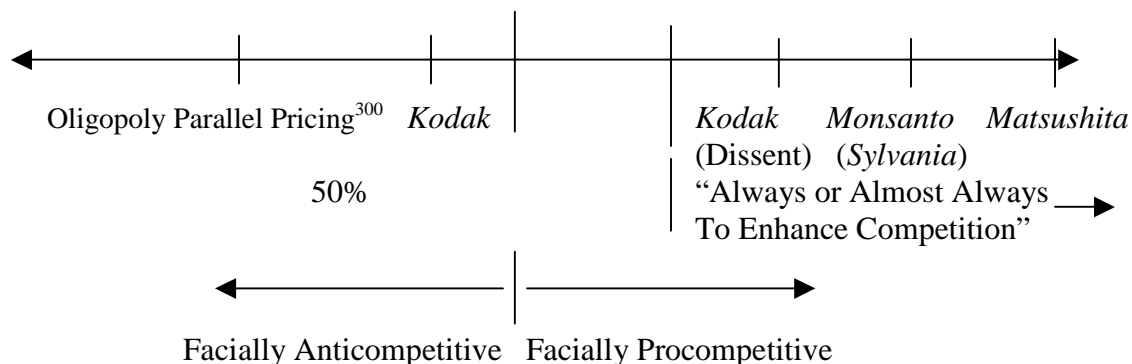
²⁹⁷ Today, people rarely consider vertical cases to raise issues of conscious parallelism, but historically they have. See *supra* notes 223, 236.

²⁹⁸ Pricing is supracompetitive when it is above the competitive level. This occurs in oligopoly situations because, if the firms are able to predict their rivals’ reaction, they will jointly set the price at the monopolistic level and divvy up the profits.

²⁹⁹ *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988).

Figure B indicates below). And, specific factual situations aside, a conspiracy in these situations is not theoretically implausible (unlike the predatory pricing scheme in *Matsushita*). Thus, the inferences that should be limited in the oligopolistic parallel pricing situations is exactly the same as it was prior to *Matsushita* and *Kodak*.

Figure B (Facial Procompetitiveness)



That, of course, does not mean that any possible evidence of conspiracy should suffice to present a submissible case. There is the plus-factor requirement: Evidence of consciously parallel behavior must be supplemented with evidence of plus factors to get to the jury. But what it does mean is that *Matsushita* did not somehow bolster the plus-factor requirement relative to what it was beforehand. Moreover, *Matsushita* certainly did not augment the requisite persuasiveness of the circumstantial evidence needed to establish the existence of a plus factor in the first place.

An objector might question such a conclusion given that efficiency concerns (and Chicago School scholarship) played a not insignificant role in the origin of the conscious parallelism nomos and development of the plus-factor requirement. The objection might go, if

³⁰⁰ As Turner explains, oligopoly parallel pricing “fits with competitive norms,” and is consistent with rational profit-maximizing behavior, but it is also consistent with noncompetitive outcomes Turner, *supra* note 156, at 662-66; see also *Petroleum Products*, 906 F.2d 432, 444 (9th Cir. 1990) (“[I]nterdependent pricing may often produce economic consequences that are comparable to those of classic cartels.”).

they served a previous role, why not incorporate the extension of similar concerns in *Monsanto*, *Matsushita*, and *Kodak* into the conscious parallelism nomos?

The response is overapplication of those decisions. Prior to those decisions, the conscious parallelism nomos had already reached its own balance. Part of that balance was efficiency concerns, but there were other considerations as well, namely the problem of remediability in the oligopolistic parallel pricing situation. To blanketly apply *Matsushita*'s "tends to exclude" standard without recognizing that (1) there was a prior balance that (2) had already incorporated the efficiency concerns to a degree is to ignore the struggles that led to that nomos' creation and development. It wrecks the equilibrium that that nomos had achieved, and for no legitimate purpose, as the purposes warranting inference limitation in *Matsushita* and *Kodak* simply are not presented.

This damaged equilibrium, of course, is not the same problem that Cover faced. In *Bob Jones*, the issue at hand was the imposition of civil rights norms on a world whose existence denied those norms. Here, at least in the conscious parallelism nomos, there is no such contrast. But I would like to suggest that to construe Cover's work as reaching that situation only is an overly narrow reading of his concerns, for very little of the struggle he describes seems to turn on the presence of diametric opposites. Rather, I see Cover as concerned with the vanquishing of any group of people or set of beliefs in the name of mainstream values without the decisive normative battle needed to give such subjugation legitimate authority. In that regard, his thesis and metaphors are equally implicated when a mainstream concern destroys the equilibrium of one community of beliefs unjustifiably, as I believe is the situation, for instance, with oligopoly parallel pricing.

The next Part details why *Matsushita* and *Kodak* present a workable solution to the problem of the range of permissible inferences from circumstantial evidence. In the Part thereafter, I return to oligopoly parallel pricing and delineate exactly how I believe some lower courts are overapplying the “tends to exclude” standard as I just described.

IV. The Three Considerations of *Matsushita*

In Section II.B, I stated my understanding of *Matsushita* and the rest of the case law concerning summary procedures leads me to conclude that a judge should limit the ability for a jury to infer a conspiracy from circumstantial evidence when:

- (1) (Implausibility) the specific claim is factually implausible;
- (2) (Deterrence) the observable business behavior under question appears “always or almost always to enhance competition”;
- (3) (Substantive Law) the substantive antitrust law governing this type of claim traditionally requires inferences to be limited.

This Part elaborates on each of these considerations as follows: There are three sections corresponding to each of the enumerated considerations listed above; within each section, the first subsection traces that consideration to the doctrine (antitrust and otherwise), while the second subsection explores why the consideration may or may not be “reasonable” at the summary judgment stage.

A. Implausibility

1. Within the doctrine

Implausibility concerns date back in the antitrust case law at least to *Cities Service*.³⁰¹ *Matsushita* clearly recognizes these concerns,³⁰² as well as *Kodak*.³⁰³ They also arise in non-antitrust cases too.³⁰⁴

The bigger confusion in the case law concerns the potential difference between what may be called “factual implausibility” and what may be called “theoretical implausibility.” By factual implausibility, I mean an inference that is implausible in light of the remaining facts at hand. *Cities Service* is one example, as the parties in that case agreed that a world-wide conspiracy existed and the only question was whether Cities Service was part of that conspiracy; given the fact that Cities Service’s interests diverged from the rest of the conspirators, it was factually implausible that Cities Service was part of the conspiracy.³⁰⁵ Theoretical implausibility is related to factual implausibility, but it involves the additional inference that current economic theories are valid. One way to think of the difference might be in “but for” terms: Given the facts at hand the inference might be plausible “but for” the current economic wisdom indicating that such inferences are not likely to be true. Predatory pricing, as involved in *Matsushita* itself, is the paradigmatic example. A major part of the Court’s holding that the inference of conspiracy was unreasonable concerned the Chicago School scholarship indicating that predatory pricing conspiracies were very unlikely to exist because of the difficulties of recouping lost profits.³⁰⁶ “But for” this economic wisdom, the Court might have considered the conspiracy plausible.³⁰⁷

³⁰¹ See *supra* notes 59-65 & accompanying text.

³⁰² See *supra* notes 81-83 & accompanying text.

³⁰³ See *supra* notes 92-93 & accompanying text.

³⁰⁴ See, e.g., *supra* notes 110, 112 & accompanying text.

³⁰⁵ See *supra* notes 59-65 & accompanying text.

³⁰⁶ See *supra* note 83 & accompanying text.

³⁰⁷ I base this conclusion on the abundance of evidence regarding cartelization in Japan, among other reasons. Note, however, that this is not to say that the inference of conspiracy would be necessarily allowed. Deterrence concerns would mitigate against allowing the inference of conspiracy.

Of course, if the current economic theories are valid, it follows that a theoretically implausible conspiracy will be factually implausible as well. But validity is speculative at best. Indeed, that is a central premise of *Kodak*. In that case, the Court was reticent to conclude that Kodak lacked market power in the service aftermarket simply because it lacked market power in the equipment market to begin with — a conclusion urged by contemporary economic theory on tying arrangements³⁰⁸ — preferring instead to look at “actual market realities.”³⁰⁹ Hence, it seems safe to say that the doctrine supports inference limitation when the inference is factually implausible, but theoretical implausibility is on much more tenuous ground.

2. The legitimacy of its consideration

The legitimacy of considering implausibility flows directly from Rule 56’s requirement that there be a “*genuine* issue as to any material fact” before a case proceeds to trial,³¹⁰ for when the desired inference is implausible, the factual controversy is not genuine. In this situation, summary procedures are used to prevent factfinders from drawing an inference unlikely to be accurate in the case at hand. An implausible inference thus is not “reasonable” because it is likely to be wrong. I call this accuracy aspect of reasonableness “case-internal reasonableness.”

A tougher issue pertains to the legitimacy of a common variant of the implausibility inquiry, that the plaintiff’s allegation of conspiracy “makes economic sense” before allowing

³⁰⁸ See, e.g., Thomas L. Greaney, *Chicago’s Procustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857, 868 (2004) (“Despite misgivings about its potential for misuse, some scholars interpret *Kodak* as representing a path-clearing endorsement for departures from classical economic theory where empirical doubts are raised about application of unvarnished Chicago School principles.”); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal — Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L.J. 659 (2000).

³⁰⁹ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (“Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”). For an example of the law review literature focusing on this issue, see Judson, *supra* note 108.

³¹⁰ FED. R. CIV. PROC. 56(c) (emphasis added).

submission to the fact-finder.³¹¹ This, of course, entails consideration of economic theory, for their needs to be a baseline to evaluate whether or not a particular allegation makes economic sense. Its legitimacy, I believe, turns on the degree to which the applied economic theory is accepted: When an economic proposition is universally accepted, there is no harm in applying it; when it is radical, there is great harm; in between, the determination is more difficult. All this is to say is that economic theory, like any sort of theory, can play a role in interpreting the facts of a given case and determining whether a sought inference is likely to be accurate in the case at hand, but its utility in such a role is limited by the apparent validity of the theory.³¹² Because theories are necessarily imperfect, so is the correlation between allegations that make “economic sense” and actual sense, hence warranting, at the very least, added caution in relying on theory as the basis for summary procedures.³¹³

B. Deterrence

1. Within the doctrine

As described in Part III, deterrence concerns are traceable to the augmented consumer welfare concerns that were present in *Monsanto*³¹⁴ and *Matsushita*³¹⁵ but not in *Kodak*.³¹⁶ While

³¹¹ See, e.g., *supra* note 259 & accompanying text.

³¹² This proposition is one of the central premises of *Daubert*'s focus on relevance and reliability in determining whether expert testimony should be admitted. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But it must of course be recognized that the *Daubert* standard, in particular the consideration of how well-accepted a theory need be, is much more lenient than a comparable consideration in the summary judgment context, for the issue in *Daubert* is merely whether or not certain testimony (and expert opinions) will aid the trier of fact and therefore is admissible, whereas the issue in the summary judgment context is whether that evidence is so persuasive that resolution as a matter of law is warranted. Hence, there may be many situations where an economic interpretation of the facts is relevant but the underlying theory is sufficiently disputed as to make summary judgment improper

³¹³ See *supra* note 312.

³¹⁴ See *supra* notes 69-74, 285-288 & accompanying text.

³¹⁵ See *supra* notes 84-86, 289-291 & accompanying text.

³¹⁶ See *supra* notes 94-95, 292-295 & accompanying text.

deterrence concerns may be related to implausibility concerns,³¹⁷ deterrence concerns are relevant regardless of whether or not the conspiracy is implausible — hence *Matsushita*’s admonition in footnote 21 that the “tends to exclude” standard applies even when the inference is plausible.³¹⁸

2. The legitimacy of its consideration

Unlike implausibility concerns, deterrence concerns have very little to do with “case-internal reasonableness” and the accuracy of the sought inference in the case at hand. Rather, their focus is on how allowing the inference in the case at hand will affect future business behavior more generally, particularly situations where the presence of possible treble damage liability might cause a firm to refrain from certain procompetitive behavior that would have benefited society as a whole. This focus is more purposive: The antitrust laws are designed (at least in large part) to promote economic competition; deterrence concerns aid this purpose by limiting the realm of submissible cases to those whose submission aids the competitiveness of the economy as a “whole”. In that light, incorporating deterrence concerns into the summary judgment determination is “case-external reasonable” insofar as they help augment *aggregate* societal welfare.

Preventing deterrence, of course, is not the only aspect of promoting economic competition. Punishing violations of the antitrust laws, such as that against cartelization, presumably promotes economic competition as well.³¹⁹ The issue therefore becomes finding a

³¹⁷ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986) (“Courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.”).

³¹⁸ *Id.* at 597 n.21 (citation omitted).

³¹⁹ I say “presumably” because it will only be true if both the substantive laws are economically well-founded and that which is deemed a violation of the law actually is one (*i.e.*, no mischaracterization occurs).

balance between preventing procompetitive behavior from being deterred and preventing violations from going unpunished, which the third sentence in the following aforementioned passage from *Kodak* explicitly recognizes:

We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment.³²⁰

But this recognition only begins the legitimacy inquiry, for the question is how is that balance to be constructed. The second sentence above provides one attempted resolution: The “risk of deterring procompetitive behavior by proceeding to trial” only outweighs “the risk that illegal behavior will go unpunished” when the observable business behavior “appears always or almost always to enhance competition.” *Kodak*, to be sure, does not unambiguously endorse that approach — the language allows the construction that observable business behavior that “appears always or almost always to enhance competition” may simply be one example of when a legal presumption is warranted in the absence of actual economic impact — but I do think it is the best reading of the two sentences together, particularly the use of the word “therefore.” Perhaps more importantly, I think such a reconciliation has substantial logical force. The first and foremost reason is that inference limitation is a blunt tool. Allowing a case to be submitted to the factfinder due to circumstantial evidence does not necessitate that the factfinder draw the desired inference of conspiracy but merely permits it. Conversely, summary procedures deny factfinders (often juries) that opportunity, which is costly because they are presumed the best at drawing the correct inferences (hence why we have designated factfinders), and is particularly costly when a

³²⁰ *Id.* at 479.

violation goes unpunished. The stakes warranting summary procedures therefore have to be high enough to justify those costs. It is arguably only where the observable business behavior appears “always or almost always to enhance competition” that those stakes are met.

But that explanation still does not explain fully why an “always or almost always to enhance competition” threshold is better than possible alternatives.³²¹ Two other reasons help that task. The first is coherence with other aspects of antitrust law, as an “always or almost always”-oriented standard also applies elsewhere in antitrust cases involving truncated analysis, namely, to whether or not *per se* liability attaches to alleged “price fixing” arrangements³²² and “group boycotts,”³²³ and more generally.³²⁴ The second is that an appears always or almost always to enhance competition threshold could also serve as a fairly reliable indicator of implausibility, for if the behavior appears to enhance competition today, that means that the anticompetitive payoff to such behavior, if there is one, must be at some point in the future.

³²¹ Daniel Collins, writing pre-*Kodak*, discusses how inferences should be limited because of deterrence concerns when “the defendant must be able to show . . . that anyone engaging in the innocent conduct he asserts actually took place would be highly likely to perform the very behavior that is the basis of the plaintiff’s inference He would thus be required to show, not that innocence follows logically from this behavior, but rather that the behavior follows causally from the innocence.” Collins, *supra* note 38, at 517. There are important differences between this “highly likely to perform” standard and the “always or almost always to enhance competition” standard that *Kodak* adopts, namely that Collins looks for how frequently *one will observe the behavior if one is acting legally*, while the *Kodak* standard looks for how frequently *the observable behavior is procompetitive*. This difference has ramifications in situations such as oligopoly parallel pricing, as I explain *infra* Part V.

³²² *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979) (“More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy — that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’”) (citations and footnote omitted).

³²³ *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290 (1985) (“The decision to apply the *per se* rule turns on ‘whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output ... or instead one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’”) (citations omitted).

³²⁴ *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 458-459 (1986) (“[W]e have been slow ... to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious”); The reasons mitigating against the use of summary procedures (the need to determine whether a particular arrangement exists) are of course different from the reasons mitigating against the use of *per se* liability rules (the need to determine the effect of a particular arrangement on the economy). But at heart these reasons are similar in that both are concerned with not condemning business behavior that is procompetitive, and not deterring future procompetitive behavior.

Potential uncertainties and difficulties involved with recouping current lost profits heavily mitigate against the prospect of such a long-term anticompetitive plan. Many allegedly theoretically implausible conspiracies, such as predatory pricing, could thus be disposed of on deterrence grounds even while admitting imperfections in existing scholarship.

This balance of course will not be universally accepted. Chicago School proponents that take more stock in conspiratorial impediments, such as the omnipresent incentive to cheat secretly, will place greater value in deterrence concerns and less in the possibility that there are conspiracies that exist to be punished, and therefore would favor a balance less onerous to defendants.³²⁵ But, as I argued above, although Chicago School theories were heavily influential in changing the law in the late 1970s and 1980s through the “consumer welfare” narrative, these theories did not completely triumph in either the public or the courts. The balance so described might be suboptimal, but it is where our case law stands now.

C. Substantive Law

1. Within the doctrine

In main part, substantive law concerns come from the pre-*Matsushita* doctrine from each substantive law nomos, such as the conscious parallelism nomos, except as modified by the implausibility and deterrence concerns described above. That is to say, except for implausibility and deterrence concerns not already internalized in the substantive doctrine prior to *Matsushita*, the requirements for a submissible case are the same both before and after *Matsushita*.

The qualifier “[i]n main part” is necessary *Monsanto* and *Matsushita* arguably implicitly support certain aspects of substantive doctrine, thus providing independent justification for their

³²⁵ For instance, instead of requiring the behavior “always or almost always to enhance competition” before triggering a legal presumption based on deterrence concerns, these proponents may simply require the behavior “usually” to enhance competition before doing so.

consideration. Such is the case with the plus factor requirement within the conscious parallelism nomos: If, for instance, one considers the establishment of a plus factor as evidence that “tends to exclude” the possibility of independent conduct, one could interpret the “tends to exclude” standard as justifying the plus factor requirement in conscious parallelism cases.

2. The legitimacy of its consideration

The legitimacy of these concerns is indigenous to each of type of case and is oriented in the reasons that led to their adoption, which is simply to say that their justification existed prior to *Monsanto*, *Matsushita*, and *Kodak*, and except as pertains to the implausibility and deterrence concerns described above remains intact. Because these justifications are unique for each type of case, each nomos using the terminology of this Article, it would be best to turn to a specific example, which I do in the next Part with conscious parallelism cases involving parallel pricing among oligopolists.

V. Oligopoly Parallel Pricing

Conscious parallelism can take several forms, but the paradigmatic scenario is horizontal parallel pricing among oligopolists that a plaintiff seeks to portray as a horizontal price fixing conspiracy among the oligopolists. Such was the scenario in the Eleventh Circuit’s recent decision in *Williamson Oil v. Philip Morris USA*.³²⁶

The case involved a class action among several hundred cigarette wholesalers who alleged that the cigarette manufacturers conspired between 1993 and 2000 to fix cigarette prices at unnaturally high levels, and that this collusion resulted in wholesale list price overcharges of

³²⁶ 346 F.3d 1287 (11th Cir. 2003).

nearly \$12 billion.³²⁷ The Eleventh Circuit ultimately decided that the plaintiffs had not set forth sufficient evidence to present a submissible case, thus affirming the district court's grant of summary judgment in favor of the cigarette manufacturers.³²⁸ In doing so, it erred.

Much of the decision and the *Williamson Oil* court's discussion of plus-factor doctrine is completely in accord with that of this Article. The court discussed for instance how evidence of consciously parallel pricing needed to be supplemented with evidence of plus factors to present a submissible case.³²⁹ But, as this Part attempts to explicate, it made this supplemental burden too tough by reading too much into the tends to exclude standard of *Matsushita* and *Monsanto* and thus raising the level of proof required to establish the existence of a plus factor in the first place.

Using my formulation of *Matsushita*'s three considerations, only the substantive law prong would apply to limit the range of permissible inferences at the summary judgment stage on the facts of *Williamson Oil*: The alleged price-fixing conspiracy was neither factually nor theoretically implausible,³³⁰ and deterrence concerns did not apply as supracompetitive pricing

³²⁷ *Id.* at 1291.

³²⁸ *Id.*

³²⁹ *See id.* at 1301.

³³⁰ The alleged price-fixing conspiracy concerned wholesale prices after November 1993. In the tobacco industry, there are both premium brands and discount brands (and several variants). Prior to the early 1990s, there was intense price competition among the discount brands, leading to an increased price gap between the premium brands and the discount brands. *See id.* at 1291-92. This was to the detriment of certain premium-intensive manufacturers. *Id.* On April 2, 1993, Phillip Morris — one of the premium-intensive manufacturers — starkly cut the retail price of Marlboro cigarettes in a bold move known around the industry as “Marlboro Friday.” *See id.* at 1292. This move set off a price war among the tobacco companies in the retail market, leading to decreased profits all around and drastically shifting market shares. *See id.* In November, R.J. Reynolds Co. (an industry leader) increased the wholesale price among its premium and discount brands, which was followed by all its major competitors. *See id.* at 1293. This initial RJR-led price increase was followed by eleven more parallel increases between May 4, 1995, and January 14, 2000. *Id.* The gap between premium and discount wholesale prices remained the same. *See id.* Market shares also fluctuated less in this period than between 1991 and 1993. *Id.* at 1296.

According to the wholesaler class, many of these lockstep increases were contrary to the self-interest of non-premium intensive manufacturers except if they were acting collusively, because they could have profited more through further competition among discount brands. *See id.* at 1294. The class also pointed to several instances, such as following the settlement of health care litigation with numerous state attorney generals, in which some firms were in much stronger financial positions than others — namely, Philip Morris — but it chose not to exploit its relative strength but rather copying others' behavior. *See id.* Additionally, the class pointed to several devices used to facilitate collusion, such as: (1) Philip Morris's use of a “permanent allocation scheme” to signal the initial price increase, (2) the use of “credit memos” that would provide various manufacturers with time to match rivals' prices,

does not facially appear always or almost always to enhance competition. Thus, the only limitation on inferences is the plus-factor requirement.

But that realization, of course, does not end the inquiry for the plus-factor requirement is susceptible of several variations, at least historically as Section III.B attempted to show, and modern incantations of it are often intermixed with discussions of *Monsanto Matsushita*, and their concerns, such that it is difficult to say exactly what the plus-factor requirement is. Three related guidelines, however, could be derived to govern its application in modern horizontal supracompetitive price-fixing cases. The first guideline is that its application today in these situations should be the same today as it was before *Matsushita*. The second guideline is that although there was a divergence among pre-*Matsushita* about exactly how persuasive the existence of a plus-factor made a plaintiff's case, there was no heightened standard by which a plus factor needed to be established in the first place: The inference needed to establish the existence of a plus factor, such as an action against self-interest, need only be reasonable.³³¹ The reason, I presume, is the longstanding belief that it is the domain of the ultimate factfinder to choose which inference to draw among the various reasonable inferences, especially where the motive and intent underlying actions play leading roles.³³² The third guideline is that not all plus-factors are equal: Some such as motive to conspire are necessary for the conspiratorial

and (3) the use of a common consultant to exchange sales data by tracking shipments from manufacturers to wholesalers and from the wholesalers to retailers and provide reports to all of them regarding the shipments of its competitors. *See id.* at 1294-96.

The tobacco companies responded to these allegations by saying what occurred was mere oligopolistic interdependence and consciously parallel wholesaler pricing. In particular, they pointed to the fact that although wholesale competition was minimal following 1993, retail competition was particularly intense. *See id.* at 1294, 1297. They also point to the fact that cigarette prices were lower during most of the period than they were prior to Marlboro Friday and that market share fluctuated more than it had prior to 1991, as well as the fact that these fluctuations alone were evidence that no agreement existed. *See id.* at 1297.

Here, I do not seek to decide whether or not a conspiracy existed, but I do wish to note that the presence of a conspiracy does not seem implausible on the facts above, especially given the lack of price competition, the firms' different competitive positions, and the mechanisms to track and match competitors' behavior.

³³¹ *See infra* Subsection III.B.2.c.

³³² *Cf. Poller Broad. Co. v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) (describing how the case should proceed to the factfinder unless conclusively disproved by pretrial discovery).

inference to be reasonable, but others such as the action versus self-interest plus factor are sufficient.³³³ Together, the three guidelines mean that to present a submissible case a plaintiff needs only to set forth evidence that allows for a reasonable inference that all the necessary plus-factors exist and at least one sufficient plus-factor exists as well.³³⁴

Although it seemed to abide by the third guideline, *Williamson Oil* violated the first two. First, it augmented the plus-factor requirement because of *Monsanto* and *Matsushita*, explaining that, because of *Matsushita* and *Monsanto* plaintiff had to demonstrate the “existence of one or more plus factors that ‘tends to exclude the possibility that the alleged conspirators acted independently’” to present a submissible case (thus violating the first guideline described above).³³⁵ Second, the court therefore explained how, because of *Monsanto* and *Matsushita*, the inference that a plus factor existed in the first place had to be more plausible than the inference than it did not (thus violating the second guideline described above). Consider, as an example, its description of the action versus self-interest plus factor:

“[W]e must exercise prudence in labeling a given action as being contrary to the actor’s economic interests, lest we be too quick to second-guess well-intentioned business judgments of all kinds. . . . Accordingly, appellants must show more than that a particular action did not ultimately work to a manufacturer’s financial advantage. Instead, in the terms employed by *Matsushita*, the action must ‘tend[] to exclude the possibility of independent action.’ Thus, if a benign explanation for the action is *equally* or more plausible than a collusive explanation, the action

³³³ See, e.g., *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1043 (8th Cir. 2000) (en banc) (Gibson, J., dissenting). This is of course a dissenting opinion, but I believe it is borne out by the history of the conscious parallelism cases.

³³⁴ For how evidence may be ambiguous of whether an act is or is not against a firm’s self-interest, consider the situation where a rival follows an initial actor even though that means less profits in the short run. As Areeda explains, this evidence may or may not be against the rival’s self-interest when firm behavior is interdependent: “Although rivals might profit more in the short run by leaving the initial actor to suffer the adverse consequences of unfollowed nonreversible action, they might follow in order not to dissuade each other from initiating moves that would increase industry profits when all do follow.” PHILLIP AREEDA, *ANTITRUST ANALYSIS* ¶ 237(c) (5th ed. 1997). The dual plausibility would make evidence of this plus factor a “tie” at the summary judgment stage. The case should go to the jury because the firm’s intent in following the initial actor determines whether the conduct actually was interdependent or if it was conspiratorial.

³³⁵ *Id.* at 1301.

cannot constitute a plus factor. Equipoise is not enough to take the case to the jury.”³³⁶

This requires more from plaintiffs than *Matsushita* or the other cases from the conscious parallelism nomos legitimately require. It is of course true that some modern courts and commentators discuss how such a heightened standard is “reasonable,” but that is only accurate where implausibility and deterrence considerations apply, which is *not* the case with horizontal supracompetitive price-fixing conspiracies. On the facts presented in *Williamson Oil*, the motion for summary judgment should have been denied.³³⁷

VI. Comparison to Posner

Recently, Judge Richard Posner published a second version of his eminent work *Antitrust Law*.³³⁸ It presents a refinement of his earlier work in light of modern developments and is quite an analytical achievement. No current work that does not attempt to account for its arguments can dare be called complete.

³³⁶ *Id.* at 1310 (citation omitted) (emphasis added).

³³⁷ Arguably other cases have made the same mistake albeit less explicitly. Consider the recent Eighth Circuit en banc decision in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000). The case involved an alleged horizontal supracompetitive price-fixing conspiracy like *Williamson Oil*. In *Blomkest*, the plaintiffs produced evidence of a “market correction program” by the industry leader, PCS — evidence purporting to demonstrate an action versus self-interest. On December 18, 1989 — which followed a situation where a price-cutter had upset a long period of stable pricing — PCS cut its prices for five days to restabilize prices in the industry. *Id.* at 1050 (Gibson, J., dissenting). Along with this program, the plaintiffs set forth evidence of a memo stating that “[p]rogram was reasonable one — checked with people. . . . People started cheating . . . We wanted to get their agreement.” *Id.*

The majority never discussed this evidence, but did affirm the grant of summary judgment in favor of the defendants. Judge Gibson in dissent, however, thought the word “cheating” was very probative of conspiracy because “[i]n plain English, the use of the word ‘cheating’ denotes the breach of an agreement or convention, not independent action. Without an agreement, price cutting would be called ‘competing,’ not ‘cheating.’” *Id.*

The question was whether this price cut was an example of PCS’s price leadership or of conspiracy maintenance. The motive and intent underlying the price cut and use of the word “cheater” play leading roles in differentiating between the two possibilities. Under the reading set forth in this article, this evidence should have sufficed to establish the existence of a sufficient plus factor — the necessary plus factors were established with other evidence — and therefore allowed the case to proceed to the jury.

³³⁸ POSNER, *supra* note 32.

Much of Posner's analysis focuses upon "price fixing and the oligopoly problem."³³⁹ Instead of the traditional agreement-oriented approach, he presents an "economic approach" to the problem, using seventeen economic indicators to identify which markets are susceptible to collusion³⁴⁰ and fourteen other economic indicators to determine whether collusive pricing exists in those markets.³⁴¹ A case is submissible when enough of both types of indicators are satisfied such that the inference of express or tacit collusion is reasonable.³⁴²

Posner argues that his approach "is consistent not only with the language of Section 1 of the Sherman Act but also with the Supreme Court's decisions, though it is certainly not compelled by them."³⁴³ He also laments the improper incorporation of the tends to exclude standard from *Monsanto* and *Matsushita* in many price fixing cases, attributing the problem to various courts' acceptance of tacit coordination as independent behavior.³⁴⁴

³³⁹ See *id.* at 51-100.

³⁴⁰ The seventeen indicators to identify which markets are conducive to collusion are: Market concentrated on the selling side; no fringe of small sellers; inelastic demand at competitive price; entry takes a long time; buying side of market unconcentrated; standard product; nondurable product; principal firms sell at the same level in the chain of distribution; similar cost structures and production processes; demand static or declining over time; sealed bidding; market is local; cooperative practices; the industry's antitrust "record." *Id.* at 69-79.

³⁴¹ The fourteen indicators to identify collusive pricing are: fixed relative market shares; marketwide price discrimination; exchanges of price information; regional price variations; identical bids; price, output, and capacity changes at the formation of the cartel; industrywide resale price maintenance; declining market shares of leaders; amplitude and fluctuation of price changes; demand elastic at the market price; level and pattern of profits; market price inversely correlated with number of firms or elasticity of demand; basing-point pricing; exclusionary practices. *Id.* at 79-93.

³⁴² See *id.* at 94, 99.

³⁴³ *Id.* at 95.

³⁴⁴ See *id.* at 99-100 ("The development of the law in this area has been handicapped by an unfortunate dictum in *Monsanto Co. v. Spray-Rite Service Corp.* that to survive a motion for summary judgment the plaintiff in a price-fixing case must present evidence that 'tends to exclude the possibility of independent action' by the defendants. It is unusual to require a plaintiff as part of his burden of proof to prove a sweeping negative; but what makes the dictum especially unfortunate is the ambiguity of the term 'independent action.' Most courts mistakenly regard tacitly collusive behavior as independent and therefore infer from the dictum in *Monsanto* that the plaintiff must negate the possibility that supracompetitive pricing was achieved without explicit agreement. This produces the paradox that the more conducive the market's structure is to collusion without express communication, the weaker the plaintiff's case.") (footnotes omitted).

But Posner is harsh regarding the so-called plus factor requirement. Although his economic approach incorporates many of what may be called the necessary plus-factors, he chides the search for some plus factors as nonsensical:

A similar ambiguity inheres in cases requiring the plaintiff to show that the defendants were acting “contrary to their self-interest.” What the courts mean is that the defendants were behaving in a way that was in their self-interest only if they were fixing prices. But the formula invites the defendants to argue that they were not competing because it was not in their self-interest to compete — which hardly ought to be extenuating.³⁴⁵

At heart, I believe that his approach and my reading are deeply consonant in that they only see *Matsushita* as reaching part, but not all, of the problem. His economic approach would influence if not guide analysis under what I call implausibility concerns.

There are, however, three differences between my reading and his approach worth noting; two with our readings of the case law and one regarding *why* we believe some circuit courts are improperly extending *Monsanto* and *Matsushita*. Our reading of the case law differs in that Posner focuses only on the implausibility aspect of analysis at the summary judgment stage whereas I also see deterrence and substantive law concerns as part of the analysis.³⁴⁶ The main reason for this difference, I believe, is simply that our analyses have different purposes: Posner’s is to describe the optimal approach applicable to price fixing cases at the summary judgment stage that was consistent with Supreme Court opinions; mine is to provide the most accurate parsing of the cases (Supreme Court and circuit court) giving due regard to their history and context, which may or may not be normatively or economically optimal.

The more important difference between Posner’s reading and my own involves attribution of why several circuit courts have overapplied the tends to exclude standard derived

³⁴⁵ *Id.* at 100.

³⁴⁶ Posner thus never discusses *Kodak* and the role that it played in limiting when deterrence concerns apply at the summary judgment stage. See *infra* notes 292 & accompanying text.

from *Monsanto* and *Matsushita*. In his view, the problem is simply that many courts tend to view tacit collusion among oligopolists as independent behavior and thus not illegal without further proof of conspiracy.³⁴⁷ In my view, however, that is only part of the problem. I also believe that several circuit courts go astray because of the improper incorporation of deterrence concerns in situations where they do not apply, at least according to *Kodak*.

VII. Conclusion

There is a serious concern in antitrust cases today that the summary judgment standard has become untethered from its historical roots. The main cause for this divergence is oversimplification of how the current standard developed. Until this history is understood, attempts to further refine the doctrine will continue to run into historical obstacles, or at least will seem to.

As this Article has attempted to explain, there is no unifying history of the antitrust summary judgment standard or even the *Matsushita* decision itself. What we have today is a patchwork of competing considerations that have taken on different weight as individuals' ways of interpreting current and historical events have transformed through time, as they have adopted new narratives. It still remains to be seen just how successful the narrative currently in vogue — the consumer welfare narrative — will ultimately be.

It has been the goal of this Article to enrich the debate by breaking through misperceptions of historical uniformity. But this step is only the beginning in deciding what the summary judgment standard *should* be, as history and precedence, after all, are only two elements of propriety. Equally significant are practical considerations such as the potential nonremediability of oligopoly parallel pricing and theoretical considerations such as the relative

³⁴⁷ See POSNER, *supra* note 32 at 94, 100.

importance of deterrence concerns in our antitrust regulatory regime. To answer those questions, however, first principles of antitrust law need to be considered, and while this Article has attempted to explain how such principles *have been* considered, it has not attempted to grapple with them directly. Hopefully, with the history better understood, focus can shift to these more substantive concerns.