**False Analogies to Predatory Pricing in Antitrust Law**

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Antitrust law is common law. The reach of common-law rules expands as courts analogize new forms of conduct to fact patterns from earlier cases. For example, in antitrust jurisprudence, courts have reasoned that agreements among competitors to reduce output have the same economic effect as price-fixing agreements, which were per se illegal. Because output restraints were analogous to price restraints, the former should also be condemned as per se illegal. This process for developing the common law antitrust works well so long as the analogies are appropriate. False analogies, however, can lead courts to condemn benign conduct or to exonerate anticompetitive conduct.

Beginning in the mid-1980s, false analogies involving predatory pricing cases have fundamentally distorted most aspects of antitrust law. Predatory pricing is a relatively unique form of anticompetitive conduct. From the monopolist’s standpoint, predatory pricing involves two distinct phases: predation and recoupment. During the predation phase, the predator charges a price below its own costs, based on the belief that its competitors will not be able to match this low price unless they, like the predator, are willing to sustain a loss on every sale. After its rivals have exited the market, the recoupment phase begins. Here, the predator can then charge a monopoly price because there are no other sellers to price discipline the new monopolist. The monopolist’s goal is to charge a price high enough and long enough to be able to recoup its losses during the predation phase and to reap monopoly profits for the foreseeable future.[[2]](#footnote-2)

Although the Supreme Court condemned predatory pricing as violating antitrust laws over a century ago, under the influence of the Chicago School, the Court changed course. In its *Matsushita* opinion, a bare majority of the Court announced that predatory pricing is neither attempted nor successful. It announced that predatory pricing claims are implausible and as such, plaintiffs bringing such claims should have to satisfy a heightened evidentiary standard in order to survive summary judgment. Seven years later in *Brooke Group*, the Court imposed a recoupment requirement on plaintiffs bringing predatory pricing claims under section 2 of the Sherman Act, which condemns illegal monopolization and attempted monopolization. As in *Matsushita*, the *Brooke Group* Court asserted that predatory pricing does not occur and that such claims should be relatively more difficult to prove because the initial stages of predatory pricing benefit consumers with lower prices and resemble the competitive process in which firms compete for business by lowering prices.

The Court’s reasoning was incorrect; predatory pricing does occur and can be profitable. Moreover, the anticompetitive harms of predatory pricing can exist independently of whether the monopolist actually recoups its investment in below-cost pricing. If the Court’s mistakes were confined within predatory pricing jurisprudence, the impact would not be so troubling. Unfortunately, lower federal courts have significantly magnified the errors of the *Matsushita* and *Brooke Group* opinions by applying the holdings and heightened legal rules of these predatory pricing cases to all manner of antitrust violations. For example, courts routinely invoke the heightened evidentiary requirements of *Matsushita* in order to grant summary judgment against antitrust plaintiffs bringing claims of price-fixing, output restrictions, market division, tying arrangements, group boycotts, and conspiracies to impose mandatory arbitration clauses. None of these categories of claims are implausible and none involve conduct that can be reasonably described as either proconsumer or procompetitive. Similarly, in the context of section 2 claims, the Supreme Court has taken its holding in *Brooke Group* and used it to distort the law applying to other forms of monopoly conduct, including predatory bidding and price squeezes.

Courts have essentially taken the most atypical antitrust violation – one that initially unconditionally lowers prices – and have used the reasoning behind these predatory pricing cases to undermine antitrust law more generally. The court has subjected predatory pricing claims to a heightened summary judgment standard and an additional hard-to-prove element for specific reasons: the perceived implausibility of predatory pricing and the pro-consumer short-term effects, which resemble pro-competitive conduct. Yet even when the justifications for imposing additional burdens on plaintiffs do not exist, courts routinely invoke the rules from predatory pricing cases to dispose of cases involving conduct that is in no way analogous to predatory pricing.

Part One of this Article reviews the Supreme Court’s predatory pricing from its beginning. The Supreme Court first recognized predatory pricing as an antitrust violation in 1911 when it considered a pair of high profile cases, one against the Standard Oil Company and the other against the American Tobacco Company. Both cases involved monopolistic empires that had engaged in a variety of anticompetitive conduct, predatory pricing being but one stratagem in a larger market-controlling scheme. Both cases condemned predatory pricing as violating antitrust laws.

Beginning in the mid-1980s, however, under the influence of the Chicago School, the Supreme Court fundamentally rolled back predatory pricing law. In *Matsushita*, for example, the Court asserted that predatory pricing does not occur and that predatory-pricing conspiracy claims are implausible and, therefore, must satisfy a higher evidentiary standard in order to survive summary judgment. In Brooke Group, the Court reiterated its belief that predatory pricing does not occur and added that failed attempts at predatory pricing benefit consumers and, therefore, antitrust plaintiffs must prove that the defendant possessed a dangerous probability of recoupment in order to prevail on a predatory pricing claim. The two cases came close to effectively eliminating predatory pricing as a cause of action altogether.

Part Two diagnoses several problems with the Supreme Court’s predatory pricing jurisprudence. First, economic theory explains how predatory pricing can be rational behavior and empirical studies show that the Court’s claims that predatory pricing is implausible and does not occur are incorrect. Second, predatory pricing is anticompetitive – and can injure consumers and efficient rivals – even if the predator never recoups its investment in below-cost pricing. Third, courts, including the Supreme Court, have applied the recoupment requirement in a manner than can make the element impossible to satisfy, even when recoupment takes place.

Part Three explains how the mistakes of the Supreme Court’s predatory pricing jurisprudence have infected other areas of antitrust law that bear little or no resemblance to predatory pricing claims.

**I. The Supreme Court’s Predatory Pricing Jurisprudence**

The Supreme Court’s approach to predatory pricing can be divided into two periods. From the early twentieth century until the influence of the Chicago School of law and economics began to permeate the Supreme Court’s antitrust decisions, federal courts took a rather dim view of monopolists using below-cost pricing to drive their competitors from the market. After the writings of the Chicago School theorists took hold in a bare majority of Supreme Court Justices, the substance of predatory pricing law began to change dramatically, becoming much more pro-defendant. This part reviews the Supreme Court’s predatory pricing decisions in each of these two areas.

**A. The Pre-Chicago Era**

The Supreme Court’s predatory pricing jurisprudence dates back over one century to its 1911 decision in *United States v. Standard Oil*, in which the Justices upheld the district court’s holding that Standard Oil had violated the Sherman Act through its monopolistic conduct. One cornerstone of John D. Rockefeller’s scheme to monopolize the petroleum market involved predatory pricing. Standard Oil participated in several disparate regional markets and, predictably, charged different prices depending on whether it faced competitors who could price discipline it. Absent collusion, companies will generally charge a competitive price in competitive markets, and a monopoly price in monopolized markets.[[3]](#footnote-3) Standard Oil, however, was not content to behave competitively in competitive markets. In her groundbreaking exposé of Standard Oil, journalist Ida Tarbell described how Standard sold its product at either a monopoly price or a below-cost price, depending on whether it controlled the market or faced competitors, which Standard Oil sought to vanquish in order to convert the market from competitive to monopolized.[[4]](#footnote-4) Tarbell’s investigative reporting transformed the public’s general apprehension about Standard into a more focused denunciation of the company’s specific misconduct.[[5]](#footnote-5) Her work animated the government’s antitrust prosecution of Standard Oil, which led to the dissolution of the company.[[6]](#footnote-6)

The Court in *Standard Oil* condemned several anticompetitive acts committed by John D. Rockefeller’s behemoth, including his practice of using predatory pricing to drive his rivals from the market. While the Supreme Court ultimately dissolved Standard Oil for violating the Sherman Act by committing a range of anticompetitive acts, one important takeaway of the opinion is that predatory pricing violates antitrust law.[[7]](#footnote-7) [[8]](#footnote-8) Although the opinion did not delineate the contours of predatory pricing, subsequent courts cited *Standard Oil* for the proposition that predatory pricing could violate Section 2 of the Sherman Act.

That same year, 1911, the Supreme Court revisited the issue of predatory pricing in *United States v. American Tobacco Co*.,[[9]](#footnote-9) which explored the history of the tobacco industry. Beginning in the late nineteenth century, the American Tobacco Company – under the leadership of James Duke – had famously “used its monopoly profits from cigarette sales to fund predatory pricing in the remaining American tobacco markets: plug or chewing tobacco, snuff, cigars, and fine-cut loose smoking tobacco.”[[10]](#footnote-10) The company intentionally suffered six-figure deficits annually in order to inflict similar losses on its rivals.[[11]](#footnote-11) The Court discussed how American Tobacco had fought the so-called plug war and snuff war with the alternative goals of “driving competitors out of the business or compelling them to become parties to a combination”[[12]](#footnote-12) and how American “by lowering the price of plug below its cost” had sustained over $4 million is losses, but had nonetheless secured “control of important plug tobacco concerns” as a result and came to dominate the industry.[[13]](#footnote-13) The conduct, the Court concluded, violated the Sherman Act.

Although the *Standard Oil* opinion received more attention, the combination of

*American Tobacco* and *Standard Oil* clearly brought predatory pricing within the reach of the Sherman Act.[[14]](#footnote-14) In the wake of *Standard Oil* and *American Tobacco*, Congress endorsed the Court’s condemnation of predatory pricing by enacting Section 2 of the Clayton Act and, later, Section 3 of the Robinson-Patman Act, both of which were designed to codify Standard Oil’s prohibition of below-cost pricing.[[15]](#footnote-15)

In the decades that followed 1911, courts considering predatory pricing claims merely asked whether the defendant had engaged in below-cost pricing, not whether the monopolist’s scheme had proven profitable or was likely to.[[16]](#footnote-16) During this time period, predatory-pricing plaintiffs were generally successful.[[17]](#footnote-17)

Antitrust law governing predatory pricing ultimately became too pro-plaintiff as demonstrated by the Supreme Court’s opinion in *Utah Pie Co. v. Cont'l Baking Co.*,[[18]](#footnote-18) in which the Supreme Court reinstated in a judgment for a predatory pricing plaintiff despite the fact that the plaintiff dominated the market. After the *Utah Pie* decision, which was widely panned, commentators sought to rein in predatory pricing jurisprudence by providing more rigor as to what – exactly – constituted below-cost pricing. In 1975, Professors Phillip Areeda and Donald Turner argued that marginal cost was the appropriate measure of cost for predatory pricing purposes, but that marginal cost was too difficult to measure, so average variable cost – which should be close to marginal cost over the relevant range of production – should be used as a proxy for marginal cost.[[19]](#footnote-19) Professors Areeda and Turner further argued that any price above average variable cost should be presumed to be lawful. The Areeda-Turner test became highly influential, even when not adopted outright by courts.[[20]](#footnote-20) Under this new, more rigorous approach, predatory pricing claims became harder to prove.[[21]](#footnote-21)

**B. Under the Influence of Chicago**

**1. Matsushita**

In 1986, the Supreme Court again heard a pair of cases that dealt with predatory pricing issues. In the first case, *Matsushita Electric Industrial Co. v. Zenith Radio*,[[22]](#footnote-22) the Supreme Court considered predatory pricing in a Section One context. In *Matsushita*, two American manufacturers of consumer electronics products accused a group of 21 Japanese manufacturers of pricing their consumer electronics below cost in order to drive the remaining American firms from the market. The antitrust plaintiffs argued that the Japanese firms had long-term designs on cartelizing the American market, as they had done in Japan. The plaintiffs explained that the defendants had cartelized the Japanese market and “used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business,” after which the Japanese would operate as a cartel in the American market, “restricting output and raising prices above the level that fair competition would produce.”[[23]](#footnote-23) The cartel profits “would more than compensate [the antitrust defendants] for the losses they incurred through years of pricing below market level.”[[24]](#footnote-24) After the district court granted the defendants’ motion for summary judgment, the Third Circuit reversed, holding that the plaintiffs had presented sufficient evidence to support their theory that the defendants conspired to engage in predatory pricing to gain control of the American market for consumer electronics.

In a 5-to-4 decision, the Supreme Court reversed the Third Circuit. Animating the Court’s decision was a concern that antitrust law should not discourage firms from engaging in aggressive – but legal – competition on the merits. Invoking its earlier *Monsanto* opinion, the *Matsushita* majority “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.”[[25]](#footnote-25) This concern over false positives became a common law theme in antitrust jurisprudence because it would be a tragic irony if competition law deterred competitive behavior.[[26]](#footnote-26) Thus, the Court set out to operationalize its concern by articulating a new legal standard for summary judgment in the context of challenged conduct that appears procompetitive or proconsumer.

The *Matsushita* Court built its new standard on the foundation of motive. The opinion began with the premise that “if the factual context renders [the plaintiffs’] claim implausible – if the claim is one that simply makes no economic sense – [the plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”[[27]](#footnote-27) The Court stated that even though inferences must be drawn “in the light most favorable to the party opposing the motion,”[[28]](#footnote-28) “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.”[[29]](#footnote-29) But the Court linked these standards to the perceived rationality of the alleged conspiracy. For example, the *Matsushita* majority further held that “the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a ‘genuine issue for trial’ exists…”[[30]](#footnote-30) The Court concluded that “[l]ack 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.”[[31]](#footnote-31)

In applying this new standard to the plaintiffs’ antitrust claims, the Matsushita majority relied on several of its own findings. First, the *Matsushita* majority asserted that predatory pricing conspiracies did not occur because the conspirators would necessarily suffer financial losses in the initial stages. Alleged conspirators would not incur the losses inherent in below-cost pricing unless they had a reasonable expectation of recouping this investment.[[32]](#footnote-32) The Court asserted that a predatory pricing conspiracy is intrinsically speculative[[33]](#footnote-33) and, thus, irrational unless “the conspirators [] have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.”[[34]](#footnote-34) But after requiring a “reasonable expectation” of recoupment, the Court immediately asserted that this was not possible because “the success of [predatory pricing] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition.”[[35]](#footnote-35) Because “[t]he predator must make a substantial investment with no assurance that it will pay off,”[[36]](#footnote-36) the Court concluded that firms do not even attempt, let alone succeed in, predatory pricing schemes. As its ace in the hole on this empirical question, the *Matsushita* majority asserted that “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.”[[37]](#footnote-37) The Court concluded that the alleged predatory pricing conspiracy made “no practical sense” and, thus, “in light of the absence of any rational motive to conspire,” the plaintiffs’ claim could not survive summary judgment.[[38]](#footnote-38) Thus, the Court held that there was no motive to conspire and that lack of motive triggered the heightened summary judgment standard, which the plaintiffs could not satisfy.

Second, the Court reiterated its concern about deterring procompetitive conduct. The majority observed that “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.”[[39]](#footnote-39)

The majority remanded the case with instructions for the Third Circuit to reinstate summary judgment for the defendants unless the plaintiffs presented “sufficiently unambiguous” evidence, which “must “ten[d] to exclude the possibility” that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy.”[[40]](#footnote-40) The majority seemed to label predatory pricing conspiracies “economically senseless” as a matter of law.[[41]](#footnote-41) As such, the *Matsushita* opinion has effectively eliminated predatory pricing as a viable cause of action.[[42]](#footnote-42)

In essence, the *Matsushita* Court did three things: (1) express concerns about antitrust law condemning pro-competitive or pro-consumer activity; (2) articulated new legal standards designed to increase an antitrust plaintiff’s burdens when the complaint alleged a conspiracy that was both unlikely and pro-consumer in its initial states; and (3) determine whether these concerns and, thus, the heightened burdens applied to an alleged predatory pricing conspiracy. The heightened standard of *Matsushita* was not antitrust-wide but limited to implausible and procompetitive conduct; thus “[b]ecause predatory pricing presumptively violates rational economic behavior, plaintiff must produce evidence ‘that tends to exclude the possibility’ of independent action …”[[43]](#footnote-43) Part Three explains how courts have unhinged *Matsushita* from its moorings.

**2. Cargill**

In the second predatory pricing case of 1986, *Cargill, Inc. v. Monfort of Colorado, Inc*.,[[44]](#footnote-44) the nation’s fifth largest beef backer sought to enjoin a merger between the second and third largest firms in the market. The plaintiff argued that the merged parties would engage in a “price-cost squeeze” that would cause the plaintiff to lose profits.[[45]](#footnote-45) The Supreme Court invoked *Brunswick* for the proposition that losses caused by an increase in competition do not constitute antitrust injury and, thus, cannot be the basis for an antitrust claim.[[46]](#footnote-46) The Court rejected the notion that the merged parties could impose antitrust injury by charging low – but above-cost – prices, even if a more efficient merged entity could gain market share at the expense of less efficient rivals. The Court worried that “[t]o hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result…”[[47]](#footnote-47)

The *Cargill* Court then ventured into a discussion of predatory pricing. The Court suggested that the proposed merger could demonstrate antitrust injury if it could show that it was threatened with removal from the market because the merged entity would engage in predatory pricing, which the court described as “a practice that harms both competitors *and* competition.”[[48]](#footnote-48) The *Cargill* majority, however, concluded that the plaintiff had not properly raised a predatory pricing claim before the district court.[[49]](#footnote-49) Nonetheless, the Court added in a footnote that even if the plaintiff had adequately pled predatory pricing, the majority Justices were doubtful the claim could succeed because the plaintiff did not present facts showing that the defendant had the ability to absorb its rivals’ market shares nor sufficiently high barriers to entry.[[50]](#footnote-50)

At this point, the Cargill opinion seemed to simultaneously embrace and back away from some of the key language and assertions in *Matsushita*. For example, after rejecting the plaintiff’s particular predatory pricing theory, the Court went on to describe “predatory pricing is an anticompetitive practice forbidden by the antitrust laws. While firms may engage in the practice only infrequently, there is ample evidence suggesting that the practice does occur.”[[51]](#footnote-51) While noting that there were obstacles to successful price predation, the *Cargill* majority nonetheless acknowledged that there was no consensus on the wisdom of predatory pricing, noting that “the commentators disagree as to whether it is ever rational for a firm to engage in such conduct…”[[52]](#footnote-52) After seeming to distance itself from *Matsushita*’s claim of academic unanimity regarding predatory pricing, the *Cargill* Court went on to quote *Matsushita*’s assertion that “predatory pricing schemes are rarely tried, and even more rarely successful,”[[53]](#footnote-53) albeit without the prefatory language that there was a consensus on these points.

Finally, the Court concluded that even if predatory pricing is rare, it should still be condemned, noting that “[i]t would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur.”[[54]](#footnote-54)  And, again, the Court repeated its concern that the early stage of predatory pricing resembles price competition, which should not be condemned.[[55]](#footnote-55)

**3. Brooke Group**

The Supreme Court revisited the issue of predatory pricing in a different context in *Brooke Group v. Brown & Williamson Tobacco Corp*.[[56]](#footnote-56) To expand its tobacco sales, Liggett began selling low-priced generic cigarettes, which proved quite popular and diverted sales from the branded-cigarette market. To diminish the competitive threat posed by generic cigarettes, Brown & Williamson – which had been losing considerable sales in branded cigarettes – entered the generic cigarette market while charging predatorily low prices. Its goal was not to monopolize the market for generic cigarettes, but to pressure Liggett to raise the price of its generic cigarettes so that generic cigarettes did not so effectively price discipline branded cigarettes.[[57]](#footnote-57) Liggett argued that B&W would recoup its losses in the generic cigarette market through oligopoly pricing in the branded cigarette market, which would occur after Liggett raised the price of generic cigarettes and the threat of low-priced generic cigarettes stopped putting a damper on price increases in the branded-cigarettes market.

Liggett sued B&W for violating the Robinson-Patman Act, but the Supreme Court essentially treated the litigation as a Section 2 predatory pricing case. The *Brooke Group* majority conflated the two statutes because “the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.”[[58]](#footnote-58) The Supreme Court imposed the same two elements for both statutes: (1) a price below cost, and (2) a reasonable probability of recoupment. To satisfy the recoupment requirement, the *Brooke Group* majority opined that the plaintiff must be able to show that the defendant could both drive its rivals from the market through below-cost pricing and then charge a supra-competitive price long enough to recoup its investment. This second component of the recoupment requires the plaintiff show that it is unlikely that other firms will enter – or reenter – the market in response to the predator charging a supracompetitive price.

This recoupment requirement represented a seismic shift in antitrust jurisprudence. Predatory pricing plaintiffs now faced a unique burden – it was not sufficient to prove that a monopolist acquired or maintained its monopoly power through anticompetitive conduct, not on the merits; predatory pricing plaintiffs now had to also prove that the predator’s scheme was profitable. This new burden made little sense because antitrust law does not give a whit about a monopolist’s profitability;[[59]](#footnote-59) rather, it cares about monopolists injuring the competitive process and, consequently, consumers.

The recoupment requirement is particularly problematic because federal judges often incorrectly conclude that recoupment is unlikely when recoupment is probable or, in many cases, has actually occurred. In some markets, courts have interpreted the recoupment requirement in a fashion that makes it impossible for the plaintiff to prove recoupment even though the defendant has engaged in below-cost pricing and has subsequently recouped its losses. As such, the recoupment requirement operates as a nonliability mandate. Professors Areeda and Hovenkamp have explained, “any requirement that a plaintiff actually provide evidence indicating that the monopoly ‘payoff’ will be greater than the predation investment involves undue speculation and becomes a virtual rule of nonliability.”[[60]](#footnote-60) The courts’ cramped reading of the recoupment requirement has made it “virtually impossible” for predatory pricing plaintiffs to survive summary judgment.[[61]](#footnote-61) The recoupment requirement creates false negatives.[[62]](#footnote-62) By making predatory pricing claims virtually impossible to prove, the recoupment requirement rewards, and thus encourages, predatory conduct.[[63]](#footnote-63)

Nevertheless, the *Brooke Group* Court rationalized this new too-difficult-to-satisfy element with several justifications. First, the Court reasoned that predatory pricing claims should be particularly difficult to prove because the initial conduct is price cutting, which initially benefits consumers. The Court justified the recoupment requirement, in particular, because “unsuccessful predation is in general a boon to consumers.”[[64]](#footnote-64)

Second, and related, the Court was concerned about antitrust law deterring pro-competitive price cutting. Quoting its *Cargill* opinion, which in turn quoted its *Matsushita* opinion, the *Brooke Group* reminded readers that

the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because ‘cutting prices in order to increase business often is the very essence of competition ...[;] mistaken inferences ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect.[[65]](#footnote-65)

In the context of predatory pricing claims, courts have often wondered that an insufficiently lenient standard could “‘chill the very behavior the antitrust laws seek to promote’”[[66]](#footnote-66) and “[r]isk averse firms in particular might avoid legitimate pricing strategies out of fear of prosecution or litigation.”[[67]](#footnote-67) The recoupment requirement is motivated and justified, in part, by the fear of deterring “competitive price cutting.”[[68]](#footnote-68) But this rationale was specific to predatory pricing claims, not other antitrust claims.[[69]](#footnote-69) The antitrust jurisprudence that makes it so hard to prove predatory pricing claims is driven by a fear of false positives.[[70]](#footnote-70)

Third, the Court suggested that there was no corresponding concern about false negatives because predatory pricing does not occur. The Court quoted *Matsushita* from the assertion that “‘predatory pricing schemes are rarely tried, and even more rarely successful,’” and adding that “the costs of an erroneous finding of liability [of predatory pricing] are high.”[[71]](#footnote-71) Given the Court’s beliefs that false negatives do not happen and that false positives are incredibly costly, it is not surprising that the Court invented an element that essentially eliminates all positives.

**II. The Flawed Premises of Predatory Pricing Jurisprudence**

The Supreme Court’s predatory pricing jurisprudence of the modern era is founded on several assumptions. First, the Court has assumed that predatory pricing does not occur because it is (theoretically) implausible and, therefore, the risks of false negatives are low. Second, the court has emphasized that the first step predatory pricing is proconsumer because consumers benefit from low prices. Third, and related, the Court expressed concern that unless predatory pricing claims are very difficult to bring and win, antitrust law could deter procompetitive price-cutting. And finally, the Court in *Brooke Group* assumed that below cost pricing cannot injure consumers or competition unless the predator recoups its investment in predatory pricing. This was the justification for imposing a recoupment requirement that makes it significantly harder for predatory pricing plaintiffs to prevail.

Two of these assumptions – the first and the last – are demonstrably wrong. As a matter of economic theory, predatory pricing can be a rational and profitable business strategy. Thus, it is not surprising that there are several empirical examples of major corporations coming to dominate markets through below cost pricing. Regarding the recoupment requirement, monopolization through predatory pricing can injure the competitive process and a distinct group of consumers regardless of whether the predator earns more in monopoly profits than it lost on its below-cost sales.

**A. Predatory Pricing Does Occur**

The assumption that predatory pricing does not happen drove the Court’s adoption of a unique legal recoupment requirement for predatory pricing claims.[[72]](#footnote-72) For example, the *Matsushita* opinion is founded on the Court’s assumption that predatory pricing does not happen. The Fifth Circuit described the *Matsushita* court as holding “that the economic disincentives to predatory pricing often will justify a presumption that an allegation of such behavior is implausible.”[[73]](#footnote-73) Similarly, the Third Circuit noted that “*Matsushita*... created a legal presumption, based on economic logic, that predatory pricing is unlikely to threaten competition.”[[74]](#footnote-74)

As a matter of both economic theory and historical truth, however, the Supreme Court was wrong to assert that predatory pricing does not happen. The following two sections explain why.

**1. The Theoretical Plausibility of Predatory Pricing**

Influenced by Supreme Court precedent and the Chicago School theorists, many judges have asserted that firms do not attempt predatory pricing because they are unwilling to incur the guaranteed costs for the uncertain possibility of a later payoff.[[75]](#footnote-75) This reasoning assumes that firms are risk averse and, consequently, too reluctant to pursue a (perceived) high-stakes tactic like predatory pricing. This line of thinking seems disconnected from the fact that most avenues to secure an illegal monopoly involve high-cost, high-risk strategies, such as buying one’s competitors and destroying their factories[[76]](#footnote-76) or committing fraud against the Patent & Trademark Office and then enforcing the fraudulent patent in federal court.[[77]](#footnote-77)

More importantly, the theoretical argument against predatory pricing is based on false assumptions that are disproven by business history. Professors Bork and McGee asserted that predatory pricing is irrational because the predator must incur disproportionate losses, as compared to the predator’s targets.[[78]](#footnote-78) influenced by such academic writings, the *Matsushita* majority assumed: “The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.”[[79]](#footnote-79) That is incorrect because price predators, such as Standard Oil, limited their below-cost pricing to specific customers of a particular rival targeted by the predator.[[80]](#footnote-80) In order to deny its current customers access to its lower prices, Standard created bogus shell companies that purported to be independent oil companies.[[81]](#footnote-81) Standard Oil used its bogus shell companies to sell oil at below-cost prices.[[82]](#footnote-82) These bogus companies would target the customers of Standard’s competitors with predatory prices.[[83]](#footnote-83) After Standard’s bogus company vanquished a targeted rival, that bogus company would vanish, leaving the customers at the mercy of Standard Oil and its elevated prices in the newly monopolized region.[[84]](#footnote-84) This vanquish-and-vanish strategy demonstrates why Bork, McGee, and *Matsushita* were wrong to assert that predatory pricing is implausible because the predator’s losses must be disproportionately higher than the target’s losses.

Although courts continue to trot out the *Matsushita* opinion’s assertion that “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful,”[[85]](#footnote-85) this assertion was wrong when the court made it and it gets more incorrect with each passing year. Before *Matsushita*, a significant body of economic literature had explained the rationality of predatory pricing. After *Matsushita*’s false claim of a consensus, more economist and legal academics explained how predatory pricing is rational and profitable.[[86]](#footnote-86)

**2. The Empirical Record of Predatory Pricing**

The *Matsushita* majority claimed that “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.”[[87]](#footnote-87) The only allegedly empirical work that the Court cites is McGee’s case study of the Standard Oil case of 1911. McGee’s work was incredibly influential.[[88]](#footnote-88) Scholars have asserted that McGee proved that predatory pricing is “seldom used”,[[89]](#footnote-89) “extremely rare”,[[90]](#footnote-90) and “does not exist.”[[91]](#footnote-91) Scholars mistakenly refer to McGee’s article an “empirical study.”[[92]](#footnote-92) Scholars assert that McGee showed that Standard Oil “never actually used” predatory pricing.[[93]](#footnote-93) Post-*Matsushita* opinions have invoked McGee’s scholarship as “empirical work” that proves “turn-of-the-century ‘robber barons’” did not “commonly practice[] predatory pricing to eliminate competitors.”[[94]](#footnote-94)

The reliance on McGee for the proposition that Standard did not engage in predatory pricing – let alone that predatory pricing doesn’t happen in general – is misplaced. McGee claimed to have reviewed the trial record of *Standard Oil* and declared: “I can not find a single instance in which Standard used predatory price cutting to force a rival refiner to sell out, to reduce asset values for purchase, or to drive a competitor out of business. I do not believe that Standard even tried to do it; if it tried, it did not work.”[[95]](#footnote-95) McGee’s final assertion is facially false: How can he say that it didn’t work given that Standard monopolized the market? More importantly, McGee’s approach cannot support his conclusion. McGee never examined either price data or cost data for Standard Oil, even though both components are necessary to prove that Standard never charged a price below cost. McGee interpreted the vague denials of Standard employees as proof positive that predatory pricing did not occur.[[96]](#footnote-96) McGee discounted the testimony of former Standard employees who related their first-hand experiences of Standard Oil engaging in predatory pricing.[[97]](#footnote-97) Economists James Dalton and Louis Esposito closely inspected the trial record from *Standard Oil* and concluded that “the Record contains considerable evidence of predatory pricing. Simply stated, the Record does not support McGee's conclusion that Standard Oil did not engage in predatory pricing.”[[98]](#footnote-98) Dalton and Esposito presented evidence that Standard charged a price below its cost in several geographic markets, including Minnesota, New York, Boston, and Colorado, among others.[[99]](#footnote-99)

McGee’s impressionistic approach pales in comparison to the work of Ida Tarbell. Tarbell had comprehensive access to Standard’s records because Mark Twain, a friend of Standard director H.H. Rogers, had introduced the two and Rogers provided candid assessments to Tarbell, as well as meeting with her regularly for two years and providing her with a desk at Standard’s Manhattan offices where she reviewed Standard’s documents relating to its practices and prices.[[100]](#footnote-100) Tarbell also surveyed state investigations of Standard Oil and reported several examples from across the country of the company engaging in predatory pricing.[[101]](#footnote-101) She showed how Standard used threats of predatory pricing to coerce dealers into not purchasing oil from Standard’s rivals.[[102]](#footnote-102) Moreover, she documented how after Standard succeeded in driving its rivals from a regional market, it would hike its prices back into profitable levels.[[103]](#footnote-103)

In addition to Tarbell’s meticulous work, government researchers, and several scholars have all cataloged numerous examples of Standard charging a price below cost in order to successfully drive its rivals from various geographic markets. After controlling for product quality, delivery methods, and timing, the U.S. Bureau of Corporations documented many instances of Standard engaging in predatory pricing. [[104]](#footnote-104) Unlike McGee, the BOC study examined and reported hundreds of pages of actual data.

Additionally, contemporary government research identified specific instances of Standard pricing below cost. In its brief, the Department of Justice faulted Standard Oil for committing predatory pricing in over one hundred local markets.[[105]](#footnote-105) Ultimately, scholars examining the actual files of Standard Oil have proven that the behemoth used predatory pricing to monopolize several regional markets.[[106]](#footnote-106)

Beyond Standard Oil, scholars have identified several historical and recent examples of monopolists acquiring or maintaining their market power through predatory pricing.[[107]](#footnote-107) The recent scholarship discussing historical cases of predatory pricing are far more sophisticated than the “more impressionistic surveys” of yesteryear.[[108]](#footnote-108) In contrast, studies that claim that predatory pricing does not happen suffer from systematic underreporting.[[109]](#footnote-109)

**B. Predatory Pricing is Anticompetitive Even Without Recoupment**

Courts have justified the recoupment requirement by asserting that “[p]redatory pricing is only harmful when the predator succeeds in recouping the losses it suffered by its earlier below-cost pricing.”[[110]](#footnote-110) This is based on the belief that the below-cost pricing during the predation stage is beneficial for consumers. For example, courts have emphasized that the first stage of predatory pricing benefits consumers who are able to purchase products or service at low prices.[[111]](#footnote-111) The *Brooke Group* majority, for example, observed that absent recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.”[[112]](#footnote-112) Similarly, lower federal courts have reasoned that “futile below-cost pricing effectively bestows a gift on consumers, and the Sherman Act does not condemn such inadvertent charity.”[[113]](#footnote-113)

Whether the monopolist earns enough supra-competitive profits in the post-predation period to cover its losses has no effect on the anti-competitive injury imposed on efficient rivals or on the amount of the overcharges actually paid by consumers in the second phase.[[114]](#footnote-114) Recoupment is unnecessary for predatory pricing to have anticompetitive effects.[[115]](#footnote-115) For example, an equally efficient competitor who is eliminated from the market by a monopolist’s below-cost pricing suffers the same antitrust injury whether or not the predator recoups its losses.

Consumers who pay a supra-competitive price during the recoupment phase suffer antitrust injury regardless of whether the predator recoups its losses.[[116]](#footnote-116) The Areeda and Hovenkamp treatise explains that “post-predation prices can be significantly supracompetitive, thereby injuring consumers, and yet be insufficient in size or duration to provide full recoupment for the defendant’s investment in predation.”[[117]](#footnote-117) Courts are mistaken to treat “consumers” as a monolithic group over time. The consumer group who are overcharged during the recoupment phase may have a different composition than the earlier group of purchasers. A consumer who pays a monopoly price receive no compensation or offset from those different consumers who paid a below-cost price during the predation phase.

Antitrust law does not care about a monopolist’s profitability.[[118]](#footnote-118) As Professors Areeda and Hovenkamp note in their treatise, “[t]he law embodies no general principle that the legal system should not punish business conduct simply because the conduct is unprofitable to the defendant.”[[119]](#footnote-119) Instead, antitrust law cares about the competitive process, efficient competitors, and consumers.

The recoupment element does not assist judges and jurors in determining whether a defendant’s aggressive pricing is anticompetitive or merely foolhardy. The recoupment inquiry only asks whether a monopolist’s conduct is lucrative. But antitrust law cares little about a monopolist’s profits; rather, antitrust law cares about whether a monopolist has acquired or maintained its monopoly power in predatory acts that injure efficient competitors and, ultimately, an identifiable class of consumers. Predatory pricing can do this even when a monopolist fails to recoup its investment in predation.

In short, courts should focus on whether a monopolist’s conduct is unnecessarily exclusionary, not whether it is profitable.

**C. The Misapplication of the Recoupment Requirement**

The recoupment requirement represents more than simply the addition of an unnecessary element. As applied by federal judges, it is too often an insurmountable burden, an element that is impossible to satisfy. Courts consistently bungle the recoupment analysis, too quickly concluding that recoupment is improbable based on unrealistic assumptions and improper legal analysis. For example, many courts improperly find no probability of recoupment because they incorrectly conclude that market entry is easier than it is.[[120]](#footnote-120) And courts assume that vanquished rivals will simply reenter the market when the monopolist attempts to recoup its losses by raising price,[[121]](#footnote-121) even though that is often unlikely.[[122]](#footnote-122) Predatory-pricing cynics incorrectly assume that capital markets will fund entry of new competitors and reentry by firms driven out by the defendant’s previous below-cost pricing, despite the fact that predatory pricing deters venture capitalists from backing firms that will challenge a monopolist willing to incur losses.[[123]](#footnote-123)

Courts habitually don’t understand the varied ways that a predator can recoup its investment in below-cost pricing. Courts routinely fail to appreciate that a predator’s recoupment can occur in another product market than the market in which the monopolist incurred its losses.[[124]](#footnote-124) For example, courts don’t appreciate how recoupment can occur in a complementary product market,[[125]](#footnote-125) in a substitute product market,[[126]](#footnote-126) or in a replacement product market.[[127]](#footnote-127) Nor do courts recognize how recoupment can take place in different geographic market.[[128]](#footnote-128)

The Supreme Court, in particular, can’t fathom how recoupment can succeed in cartelized or oligopolized markets. For example, although the *Matsushita* Court found it implausible that Japanese electronics cartel could recoup its losses in the American market,[[129]](#footnote-129) much law and economics scholarship shows how recoupment can be achieved through oligopoly pricing.[[130]](#footnote-130) Similarly, the *Brooke Group* majority was wrong to hold that the tobacco companies could not raise market prices through oligopoly pricing,[[131]](#footnote-131) because the industry was a stable oligopoly as the *Brooke Group* opinion conceded.[[132]](#footnote-132) Indeed, the list prices increased significantly, raising twice a year in similar amounts that “outpaced increases in cost, taxes, and promotional expenditures.”[[133]](#footnote-133)

Summary of Part 2:

**III. The Expansion of Predatory Pricing Jurisprudence Beyond Predatory Pricing**

The flaws in predatory pricing jurisprudence would be tragic even if they were confined within the narrow scope of predatory pricing claims. Unfortunately, in recent years the Supreme Court and lower federal courts have aggressively expanded the reach and import of *Matsushita* and *Brooke* *Group* to the point where predatory pricing law is undermining antitrust law more broadly. This section explains how.

**A. Brooke Group: From Predatory Pricing to Predatory Bidding**

In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*.,[[134]](#footnote-134) the Supreme Court evaluated a claim of so-called predatory bidding, in which Weyerhaeuser overpaid and bought more saw logs than it needed. Unable to obtain the necessary inputs, Weyerhaeuser’s competitor Ross-Simmons was driven out of business.[[135]](#footnote-135) When Ross-Simmons sued Weyerhaeuser for violating Section Two of the Sherman Act, the district judge instructed the jury that Weyerhaeuser had engaged in anticompetitive conduct if the jury concluded that Weyerhaeuser “purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price.” After a nine-day trial, the jury found that Weyerhaeuser had violated Section 2 of the Sherman Act and the jury calculated Ross-Simmons’ damages to be over $26 million, which was automatically trebled to $78 million. Both the district court and the Ninth Circuit rejected Weyerhaeuser’s argument that Ross-Simmons should have to satisfy *Brooke Group*’s recoupment requirement for predatory pricing claims.[[136]](#footnote-136)

The Supreme Court took a different tack and treated the case as a logical extension of its predatory pricing jurisprudence. Along the way, the Court made some rather intriguing concessions and arguments. For example, the Court conflated predatory bidding with predatory overbuying, holding that they were identical and should be treated identically. The Court noted: “Predatory bidding on inputs is not analytically different from predatory overbuying of inputs. …Our use of the term ‘predatory bidding’ is not meant to suggest that different legal treatment is appropriate for the economically identical practice of ‘predatory overbuying.’”[[137]](#footnote-137) What the Court termed “predatory overbuying” is simply hoarding inputs, a relatively common form of anticompetitive conduct.

The *Weyerhaeuser* Court built its whole opinion on the premise: “Predatory-pricing and predatory-bidding claims are analytically similar.”[[138]](#footnote-138) The similarities that the Court pointed are completely irrelevant to the reasons that the Court advanced in *Matsushita* and *Brooke Group* for imposing additional burdens on predatory pricing plaintiffs. For example, the Court cited scholarship and precedent for the uncontroversial economic truth that monopoly and monopsony are symmetrical distortions of the competitive market.[[139]](#footnote-139) From this, the Court jumped to the conclusion that “[t]he kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.”[[140]](#footnote-140) This is incongruous; for antitrust liability purposes, the relationship between the economic concepts of monopolization and monopsonization is largely irrelevant. What matters is the actual conduct at issue and its effects. After all, different methods of illegal monopolization are fundamentally dissimilar from each other and evaluated under different tests, some of which allow for business justifications and others that do not. For example, monopolization through patent fraud[[141]](#footnote-141) bears little resemblance to monopolization through exclusionary distribution contracts[[142]](#footnote-142) or refusals to deal.[[143]](#footnote-143)

The Court next tried to list the similarities between predatory pricing and predatory bidding in order to justify affording them identical legal treatment. First, the Court created a false analogy between these two forms of predation by claiming that

“predatory-pricing plaintiffs and predatory-bidding plaintiffs make strikingly similar allegations. A predatory-pricing plaintiff alleges that a predator cut prices to drive the plaintiff out of business and, thereby, to reap monopoly profits from the output market. In parallel fashion, a predatory-bidding plaintiff alleges that a predator raised prices for a key input to drive the plaintiff out of business and, thereby, to reap monopsony profits in the input market. Both claims involve the deliberate use of unilateral pricing measures for anticompetitive purposes.”[[144]](#footnote-144)

That is absurd: charging below-cost prices is fundamentally different than a firm purchasing more inputs than it needs in order to deprive its rivals of necessary inputs in order to prevent the rival from competing. The former gives a benefit to consumers, the latter does not. The latter makes it physically impossible for a rival to make products, the former does not.

Second, the Court analogized predatory prices and hoarding inputs because “both claims logically require firms to incur short-term losses on the chance that they might reap supracompetitive profits in the future.”[[145]](#footnote-145) This similarity is true, but irrelevant to the point of being trite. The outlay of capital in the speculative hope of future returns not only describes almost all monopoly conduct; it describes almost all business ventures in a free market. Moreover, although the Court emphasized that “[a] predatory-bidding scheme requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future,”[[146]](#footnote-146) predatory bidding is different than predatory pricing because with the former strategy, the monopolist acquires and stockpiles inputs that it can use later. The predatory bidder secures an asset.[[147]](#footnote-147) In contrast, a price predator secures no collateral or assets in exchange for its upfront investment in predation. That makes overbuying inputs less risky than below-cost pricing.

The *Weyerhaeuser* Court next invoked the three themes common to the Supreme Court’s predatory pricing jurisprudence: the conduct doesn’t happen; the conduct benefits consumers; and prohibiting the conduct would chill procompetitive behavior. Whatever one thinks of these arguments as applied to predatory pricing, each of these arguments is undoubtedly inapplicable to predatory overbuying. First, the Court asserted that predatory bidding, like predatory pricing is “rarely tried, and even more rarely successful.”[[148]](#footnote-148) This claim is demonstrably false. The hoarding of inputs to prevent rivals from being able to manufacture and sell products is common. [Proof coming…]

Second, the *Weyerhaeuser* Court sought to equate the short-term pro-consumer benefits of below-cost pricing to the effects of predatory overbuying. The Court began by invoking *Brooke Group* for the proposition that “a failed predatory-pricing scheme may benefit consumers.”[[149]](#footnote-149) Justice Thomas then reasoned: “In the first stage of a predatory-bidding scheme, the predator's high bidding will likely lead to its acquisition of more inputs. Usually, the acquisition of more inputs leads to the manufacture of more outputs. And increases in output generally result in lower prices to consumers.”[[150]](#footnote-150) From this, he concluded “a failed predatory-bidding scheme can be a ‘boon to consumers’ in the same way that we considered a predatory-pricing scheme to be.”[[151]](#footnote-151) Justice Thomas’s analogy and conclusions are both flawed. What he is describing is not overbuying, which is purchasing more inputs than one needs and hoarding them; hoarding means that the inputs are not used to make more outputs. The Court hypothesizes a long-term possibility of increased output to justify an immediate anticompetitive effect. But in a footnote, the Court concedes: “Consumer benefit does not necessarily result at the first stage because the predator might not use its excess inputs to manufacture additional outputs. It might instead destroy the excess inputs.”[[152]](#footnote-152) The Court said nothing to mitigate this concession, a concession that proves predatory pricing and predatory bidding are not analogous: predatory pricing causes an immediate benefit to consumers and predatory bidding does not.

Third, the *Weyerhaeuser* Court asserted that predatory overbuying is procompetitive – like prior decisions claimed predatory pricing was – and, consequently, antitrust law should be highly deferential so that it does not chill procompetitive conduct. Justice Thomas began by reciting the underlying premises of its predatory pricing cases, namely that

the costs of erroneous findings of predatory-pricing liability were quite high because “‘[t]he mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition,’” and, therefore, mistaken findings of liability would “‘“chill the very conduct the antitrust laws are designed to protect.”’”[[153]](#footnote-153)

The Court then analogized predatory bidding to predatory pricing, asserting that “like the predatory conduct alleged in *Brooke Group,* actions taken in a predatory-bidding scheme are often “the very essence of competition.”[[154]](#footnote-154) This is a perplexing claim; unlike price cutting, buying more inputs than one needs or will use in order to deny them to a rival is neither inherent in competition, nor does it facilitate the competitive process in which efficient rivals compete for business by offering customers lower prices or higher quality. In short, hoarding inputs is *not* the “essence of competition.”

The Supreme Court also tried to assert that predatory bidding is procompetitive because it reflects efficiency. The Court began by praising Weyerhaeuser’s supposed efficiency, noting that the company had invested $75 million in capital improvements, increasing production, and using “state-of-the-art technology.”[[155]](#footnote-155) In contrast, the Justices chastised Ross-Simmons for “engag[ing] in little efficiency-enhancing investment.”[[156]](#footnote-156) The Court then justified predatory bidding as something that “more efficient” firms may engage in.[[157]](#footnote-157) Of course, acquiring monopoly power through efficiency is competition on the merits and would not violate antitrust laws. But the evidence did not show that Weyerhaeuser achieved its market power through efficiency. Rather, Weyerhaeuser drove its rival from the market by hoarding inputs. Moreover, while the Court commended Weyerhaeuser for using new “sawing equipment[] to increase the amount of lumber recovered from every log,” the Court failed to acknowledge that this would logically mean that Weyerhaeuser would need *fewer* logs, not more. Why was it buying more logs than it needed, if not to drive Ross-Simmons from the market, as it did?

To address this question, the Court then sought to hypothesize why an efficient firm would engage in predatory bidding. Justice Thomas speculated that “[a] more efficient firm might bid up input prices to acquire more inputs as a part of a procompetitive strategy to gain market share in the output market.”[[158]](#footnote-158) Acquiring inputs to build market share is rational, but that’s not what predatory *over*buying entails. Predatory bidding involves increasing the price of inputs. An efficient firm does not want its input prices to be higher; more importantly, an efficient firm does not overpay in order to purchase more inputs than it needs. Such overpurchasing is not efficient.

After gerryrigging the themes from its predatory pricing jurisprudence to apply to predatory overbuying, Justice Thomas asserted that “[g]iven the multitude of procompetitive ends served by higher bidding for inputs, the risk of chilling procompetitive behavior with too lax a liability standard is as serious here as it was in *Brooke Group*.”[[159]](#footnote-159) Because, according to Thomas, predatory bidding had the same benefits as predatory pricing, it should have the same recoupment requirement. Consequently, the Court held that “[a] predatory-bidding plaintiff also must prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.”[[160]](#footnote-160) In so holding, the Court failed to recognize that anticompetitive effects exist even without recoupment.[[161]](#footnote-161)

The Court justified the recoupment requirement by harkening back to the implausibility arguments first announced in Matsushita. Justice Thomas asserted that “[a]bsent proof of likely recoupment, a strategy of predatory bidding makes no economic sense because it would involve short-term losses with no likelihood of offsetting long-term gains.”[[162]](#footnote-162) The Court repeated its refrain that “[w]ithout such a reasonable expectation, a rational firm would not willingly suffer definite, short-run losses.”[[163]](#footnote-163) But this is true of *all* business ventures, many of which ultimately fail, but that doesn’t mean that the ventures were not attempted or did not have negative effects on society or on competition. More importantly, although recoupment might be necessary for a predatory bidding or hoarding to “make sense,” in the Court’s parlance, recoupment is not necessary for the conduct to be anticompetitive, for the conduct to destroy equally or more efficient competitors, or to impose antitrust injury on consumers. After imposing the recoupment requirement for predatory bidding claims, the Court gave no meaningful guidance on how plaintiffs could satisfy the element.[[164]](#footnote-164)

Finally, the Court tried to force hoarding inputs into the predatory-pricing legal template in ways that defy common sense. Justice Thomas asserted that “[t]he first prong of *Brooke Group*’s test requires little adaptation for the predatory-bidding context. A plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs.”[[165]](#footnote-165) That’s absurd; while the first step of predatory pricing is charging a below-cost price, the first step of predatory bidding is paying too much. The predator never needs to charge a below-cost price for outputs in order for hoarding to be profitable. Indeed, the predator will seek to charge a supra-competitive price for its output as its rivals – unable to purchase sufficient inputs, as was Ross-Simmons – are unable to price discipline the monopolist.[[166]](#footnote-166)

By conflating Justice Thomas appears to be trying to eliminate predatory overbuying as an antitrust cause of action. For example, he held that “*only* higher bidding that leads to below-cost pricing in the relevant output market will suffice as a basis for liability for predatory bidding.”[[167]](#footnote-167) This ignores the fact that predatory bidding and the resulting control of necessary inputs can lead to monopoly pricing in output markets, which will inflict antitrust injury on consumers.

More importantly, this is not just analogizing predatory pricing and predatory bidding; it suggests that the only way that a plaintiff can establish antitrust liability for predatory bidding is to prove that the defendant engaged in predatory pricing. But, of course, the Court has said in its earlier predatory pricing opinions that predatory pricing does not happen and it constructed a legal test that is virtually impossible to satisfy.

Whatever one thinks of predatory pricing and the Court’s case law on such claims, Justice Thomas’s conflation of predatory pricing and predatory overbuying is beyond reason. The purpose of doing so seems to be to immunize yet another form of anticompetitive conduct from antitrust liability.

**B. Matsushita: From Predatory Pricing to All Conspiracies**

**1. Price-Fixing Conspiracies**

Price fixing is the quintessential antitrust violation. Price-fixing agreements must normally be proven with circumstantial evidence. Direct proof, such as recordings or written agreements, is generally unavailable because conspirators take great effort to conceal their crime. Proving agreements through circumstantial evidence traditionally entails a two-step process of proof. First, the plaintiff shows that competitors engaged in parallel conduct, such as lockstep price increases, referred to as “conscious parallelism,” which the Supreme Court has defined as “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 and their interdependence with respect to price and output decisions.”[[168]](#footnote-168) Because conscious parallelism alone is insufficient to prove collusion,[[169]](#footnote-169) the plaintiff must also show the presence of plus factors,[[170]](#footnote-170) which “when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.”[[171]](#footnote-171)

Despite the universal agreement that the Sherman Act should condemn price-fixing agreements, courts routinely grant summary judgment to price-fixing defendants even when plaintiffs can prove significant conscious parallelism and plentiful plus factors. Many courts invoke the heightened summary judgment standards of *Matsushita* to justify refusing to allow price-fixing claims to go to a jury.[[172]](#footnote-172) Several courts have held that *Matsushita*’s heightened standard applies to all antitrust conspiracies.[[173]](#footnote-173) For example, the Ninth Circuit in *In re Citric Acid Litigation*[[174]](#footnote-174) held that “*Matsushita* is the Supreme Court's foremost explanation of how summary judgment works in the antitrust context. … The Court warned that permitting the inference of conspiratorial behavior from evidence consistent with both lawful and unlawful conduct would deter pro-competitive conduct—an especially pernicious danger in light of the fact that the very purpose of the antitrust laws is to promote competition.” In using the *Matsushita* standard to grant summary judgment to a price-fixing defendant, the court never what “pro-competitive conduct” was being deterred, especially given that the citric acid was, in fact, being controlled by an illegal cartel.

Other courts have acknowledged that *Matsushita*’s more rigorous standard applies only when the plaintiff’s antitrust conspiracy claim is implausible, then they nonetheless apply the *Matsushita* standard to admittedly plausible claims. [Discussion of several cases will happen here]

The *Matsushita* opinion has wreaked havoc on price-fixing jurisprudence, which is surprising because horizontal price fixing and predatory pricing conspiracies are diametric opposites. The *Matsushita* Court justified the heightened summary judgment standard based on three rationales: predatory pricing claims are inherently implausible; a predatory pricing scheme benefits consumers in its initial stage; and predatory pricing appears like procompetitive conduct that should not be chilled by overly aggressive antitrust rules.

None of these rationales are applicable to price-fixing claims. First, in contrast to the Supreme Court’s assertions of the implausibility of predatory pricing claims, price fixing is inherently plausible. At their front end, price-fixing conspiracies can involve significant coordination among competitors. But such conspiracies do not require a substantial financial investment.

Second, while predatory-pricing attempts involve initially lower prices, which benefit consumers, traditional price-fixing conspiracies entail no such short-term advantages. The pricing strategies are fundamentally distinct. Predators plan to move price in different directions at different times; prices are slashed in the short run (the predation phase) with the intention of ultimately increasing price in the long run (the recoupment phase). Price fixers begin by jacking up price; the second stage of price-fixing resembles the first stage: prices are increased again. Price-fixing conspiracies routinely involved a dozen or more lock-step price increases. The short-term and long-term effects of price-fixing are generally to reduce output and raise price, all to the detriment of consumers.

Moreover, failure looks very different in predatory pricing versus price fixing. The opinions in *Matsushita* and *Brooke Group* praised failed predatory pricing as being a “boon to consumers” because the consumers who paid a below-cost price received a windfall. If the predator fails to recoup its investment, then consumers as a whole overall are better off.[[175]](#footnote-175) In contrast, even when price-fixing conspiracies ultimately fail, all consumers are generally worse off. Failure in the context of price fixing takes the form of prices increasing in unison and then lowering back down toward their initial pre-conspiracy level.

Third, the fear of chilling procompetitive conduct infuses predatory-pricing law. The principle here is that if price-cutting behavior could be the basis for antitrust liability, then firms may not reduce price, even when the price remains above cost. These concerns do not map neatly onto price-fixing activity because judges should be less troubled by the prospect of antitrust liability deterring firms from raising price in unison. Despite this, several courts have invoked *Matsushita*’s language to justify granting summary judgment to price-fixing defendants. For example, the court in *In re* *Chocolate Confectionary Antitrust Litigation*[[176]](#footnote-176) asserted that “[t]he plus factor requirement derives from concerns expressed by the Supreme Court in *Matsushita*, to wit: that mistaken inferences of unlawful actions could ‘chill the very conduct the antitrust laws are designed to protect.’”[[177]](#footnote-177) This is odd because uniform price increases among competitors, as occurred among the chocolate manufacturers in the case, is not “the very conduct the antitrust laws are designed to protect.” Similarly, the court in *Holiday Wholesale Grocery Co. v. Philip Morris Inc*.,[[178]](#footnote-178) granted summary judgment to tobacco defendants while quoting *Matsushita*’s edict “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.’”[[179]](#footnote-179) The court did not explain how the twelve lockstep price increases committed by the defendants were “procompetitive conduct,” let alone conduct that federal courts should be worried about deterring.

**2. Output Restraints**

**3. Market Division**

**4. Conspiracies to Impose Arbitration Clauses**

Agreements among rivals that all will impose arbitration clauses are a particularly insidious form of anticompetitive conspiracy. By agreeing to force all of their respective customers into arbitration, firms can prevent their customers from taking them to court for a variety of illegal acts. Furthermore, competing firms may conspire to standardize their arbitration clauses so as to eliminate pro-consumer protections, such as relatively long statutes of limitations, generous discovery procedures, as well as injunctive relief, fee-shifting, and damage multipliers for successful plaintiffs.[[180]](#footnote-180) Most importantly, competitors may use an arbitration conspiracy to impose industry-wide class waivers,[[181]](#footnote-181) which effectively immunize wrongdoers because “consumers almost never initiate individual claims against companies in arbitration.”[[182]](#footnote-182) Consequently, when they permeate an industry, class action waivers imbedded in arbitration clauses can effectively abolish a statutory regime such as antitrust law or anti-discrimination protections.[[183]](#footnote-183)

Although all firms in an industry are better off if all customers and employees are precluded from going to court (and are forced to waive pro-consumer and pro-employee protections), no individual firm may act on its own without losing customers.[[184]](#footnote-184) Firms can solve this problem by collectively adopting anti-consumer arbitration clauses.[[185]](#footnote-185) In 1930’s *Paramount Famous Lasky Corp. v. United States*,[[186]](#footnote-186) the Supreme Court recognized the inherent harms caused by conspiracies to impose arbitration clauses and condemned them in language indicative of per se illegality.[[187]](#footnote-187)

In finding that the defendants did not conspire to impose arbitration clauses, the *Ross* court invoked *Matsushita*[[188]](#footnote-188) for the proposition that “antitrust law ‘limits the range of permissible inferences from ambiguous evidence in a [Section] 1 case,’” that “‘conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy,’” and that “Plaintiffs must present evidence ‘that tends to exclude the possibility that the alleged conspirators acted independently.’”[[189]](#footnote-189) The judge held that the plaintiffs alleging a conspiracy to arbitrate could not meet the *Matsushita* standard.

The court’s reliance on *Matsushita* is flawed.[[190]](#footnote-190) The *Ross* court erred by imposing a higher evidentiary burden on the plaintiffs because the *Matsushita* test is designed for conspiracies that are economically irrational.[[191]](#footnote-191) The heightened burden of *Matsushita* does not apply when the alleged conspiracy is plausible.[[192]](#footnote-192) The *Matsushita* Court confronted an alleged conspiracy to engage in predatory pricing, which would necessitate that the conspirators suffer losses for several years, which the Court found to not make economic sense. In contrast, a conspiracy to arbitrate is economically rational because competitors would benefit if they all agreed to impose arbitration agreements in order to make mandatory arbitration the industry standard. Unlike the predatory pricing conspiracy alleged in *Matsushita*, the conspiracy to arbitrate does not impose short-term losses in the hopes of eventual recoupment.[[193]](#footnote-193)

In contrast to the first phase of predatory pricing, conspiracies to impose arbitration clauses injure consumers at every step. The conspiracy hurts consumers immediately as they are denied choice in the market and compelled to purchase an inferior product or service, one that is burdened with an arbitration clause that precludes class actions.[[194]](#footnote-194) Furthermore, a conspiracy to arbitrate can supplement and strengthen an underlying price-fixing arrangement by preventing the victims of the price-fixing conspiracy from being able to litigate their antitrust claims in court or through class actions. By using uniform arbitration terms to limit discovery, the conspirators can better conceal their crime.[[195]](#footnote-195)

In short, conspiracies to impose arbitration clauses are both plausible, profitable, and inherently anti-consumer. *Matsushita*’s rationale does not apply.

**Conclusion**

Predatory pricing is fundamentally different than other forms of monopoly conduct. And predatory pricing conspiracies are fundamentally different than other forms of anticompetitive collusion. It makes no sense that the Supreme Court is using cases involving predatory pricing claims in order to issue sweeping pro-defendant antitrust decisions and then invoking those opinions to make it appreciably harder – if not impossible – for plaintiffs to bring antitrust claims that bear no meaningful resemblance to predatory pricing.

Fox 1: Pro-market does not mean pro-consumer. Under-selling may benefit consumers but may hurt the market because too many goods are used.

Fox 2: Over-buying or under-selling, the same thing?

Enjoining too high prices does not hurt consumers. Disciplining over-buying is okay. It has the effect of protecting

Fox 3: So many other cases where trade association’s discount ban were not ruled illegal. “Good for long-term to ban discount – pro-competitive” Dental association case, Gypsum

Fox 4: Current (conservative) antitrust law is not for low price it is for freedom to charge low price whenever you want.

Christopher: “Chicago school maybe good early to correct too pro-plaintiff.

KS: Predatory pricing. . . 🡪 Focus on performance vs. structure. . . .HHI is used for merger approval. HHI is used not just in antitrust law but used for diversity of. . . no nexus between HHI and law & economics. HHI is used

Korean – the number of competitors, diversity of competitors.

Complete misunderstanding of Brunswick. Protects competition, the number of competitors

Fox: Jury verdict against Weyhauser over-bidding and yet Supreme Court found against it.

Newman: After over-bidding and turn around selling below-cost, safe harbor?

Christopher: Can’t be safe harbor. Over-bidding itself is harmful.

KS: What should be compared is whether they will lower the buying price later, hurting the producers.

1. \* Chancellor’s Professor of Law, University of California Irvine School of Law. [↑](#footnote-ref-1)
2. Transamerica Computer Co., Inc. v. IBM Corp., 698 F.2d 1377, 1384 (9th Cir. 1983) (“Predatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time.”). [↑](#footnote-ref-2)
3. Leslie, USC [↑](#footnote-ref-3)
4. Ida M. Tarbell, The History of the Standard Oil Company 221 (1904), reprinted 1963. [↑](#footnote-ref-4)
5. Leslie, USC; Daniel Yergin, The Prize 105 (1991) (describing Tarbell’s exposé as “[a]rguably … the single most influential book on business ever published in the United States”). [↑](#footnote-ref-5)
6. Leslie, USC [↑](#footnote-ref-6)
7. U.S. v. A. Schrader’s Son, 264 F. 175, 181 (D. Ohio 1919) (citing *Standard Oil* for the predatory pricing violates “the second section of the Sherman Anti-Trust law”). *See also* Malcolm v. Marathon Oil Co., 642 F.2d 845, 853 n.16 (5th Cir. 1981) (“Predatory pricing violates s 2 of the Sherman Act, 15 U.S.C. § 2, when there is an attempt to monopolize”) (citing *Standard Oil*). [↑](#footnote-ref-7)
8. *See* Biddle Purchasing Co. v. Federal Trade Commission, 96 F.2d 687, 689 (2d Cir. 1938); *see also* National Ass’n of Regulatory Utility Com’rs v. F.C.C., 525 F.2d 630, 638 (D.C. Cir. 1975) (citing *Standard Oil* for proposition that “[c]utting prices below marginal cost in order to discourage competition is the most blatant form of predatory behavior and, at least where the price cutter holds significant market power, is subject to attack under Sherman Act §2”); Outboard Marine Corp. v. Pezetel, 461 F.Supp. 384, 400 (D.C.Del. 1978) (citing *Standard Oil* for proposition that “predatory pricing” is “an antitrust violation generally manifested by selling below ones own cost for the purpose of effectuating long term domination of the market.”). [↑](#footnote-ref-8)
9. 221 U.S. 106 (1911). [↑](#footnote-ref-9)
10. Brian Dean Abramson, *Let Them Eat Smoke: The Case for Exempting the Tobacco Industry from Antitrust*, 6 Cardozo Pub. L. Pol’y & Ethics J. 345, 361 (2008). [↑](#footnote-ref-10)
11. Walter Adams & James W. Brock, *Predation, "Rationality," and Judicial Somnambulance*, 64 U. Cin. L. Rev. 811, 830–31 (1996) (“The American Tobacco Company deliberately elected to sustain the financial losses resulting from its predatory pricing: Company documents examined by the court indicated that the firm was prepared to lose as much as $175,000 annually in order either to punish Porto Rican-American for its failure to cooperate politically or to exploit its uncooperativeness as the pretext for driving it from the market.”) [↑](#footnote-ref-11)
12. Id. at 182. [↑](#footnote-ref-12)
13. Id. at 160–61. [↑](#footnote-ref-13)
14. *See, e.g*., Malcolm v. Marathon Oil Co., 642 F.2d 845, 854 (5th Cir. 1981) (“Predatory pricing violates § 2 of the Sherman Act, 15 U.S.C. § 2, when there is an attempt to monopolize, see United States v. American Tobacco Co., 221 U.S. 106, 180-84 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 43 (1911).”); Janich Bros. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir.1977) (“Courts have long recognized that “ predatory pricing may be a means of obtaining or maintaining a monopoly position in violation of Section 2 of the Sherman Act....”) (*citing* United States v. American Tobacco Co., 221 U.S. 106, 160, 182 (1911), and Standard Oil Co. v. United States, 221 U.S. 1, 43 (1911)); J.H. Westerbeke Corp. v. Onan Corp., 580 F.Supp. 1173, 1188 (D.C.Mass.,1984) (“Conduct unnecessary for the competitive process, by comparison, includes merging to monopoly, long term exclusive supply contracts, exploitation of purchasing leverage, predatory pricing, etc. Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911)”). [↑](#footnote-ref-14)
15. McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1498 (11th Cir. 1988) (quoting H.R.Rep. No. 2287, 74th Cong., 2d Sess. 8 (1914)); U.S. v. National Dairy Products Corp., 372 U.S. 29, 33-34 (1963) (discussing legislative history of Robinson-Patman Act and citing *Standard Oil* for proposition “[t]hat sales below cost without a justifying business reason may come within the proscriptions of the Sherman Act has long been established”). [↑](#footnote-ref-15)
16. Timothy J. Trujillo, *Predatory Pricing Standards Under Recent Supreme Court Decisions and Their Failure to Recognize Strategic Behavior as a Barrier to Entry*, 19 J. Corp. L. 809, 813 (1994). [↑](#footnote-ref-16)
17. *See* Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory And Legal Policy*, 88 Geo. L.J. 2239, 2250 (2000); James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 Vand. L. Rev. 63, 140-45 (1982). [↑](#footnote-ref-17)
18. 386 U.S. 685 (1967). [↑](#footnote-ref-18)
19. Philip E. Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of The Sherman Act*, 88 Harv. L. Rev. 697 (1975). [↑](#footnote-ref-19)
20. *See* McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1495 (11th Cir. 1988) (describing the Areeda-Turner test as like the Venus de Milo: “much admired and often discussed, but rarely embraced”). [↑](#footnote-ref-20)
21. Bolton, Brodley & Riordan, *supra* note \_\_ at 2250-51, 2253. [↑](#footnote-ref-21)
22. 475 U.S. 574 (1986). [↑](#footnote-ref-22)
23. *Id*. at 584. [↑](#footnote-ref-23)
24. *Id*. [↑](#footnote-ref-24)
25. *Id*. at 593 (quoting *Monsanto,* 465 U.S., at 762-764).  [↑](#footnote-ref-25)
26. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226–27 (1993) (“It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.”). [↑](#footnote-ref-26)
27. Id. at 587. [↑](#footnote-ref-27)
28. *Id*. at 587-88 (citing *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)). [↑](#footnote-ref-28)
29. Id. at 588. [↑](#footnote-ref-29)
30. Id. at 596. [↑](#footnote-ref-30)
31. *Id*. at 596-97. [↑](#footnote-ref-31)
32. 475 U.S. at 588-89 (For the “investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.”). [↑](#footnote-ref-32)
33. *Id*. at 588 (“A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them.”). [↑](#footnote-ref-33)
34. Id. at 589. [↑](#footnote-ref-34)
35. Id. at 589. [↑](#footnote-ref-35)
36. *Id*. at 589 (quoting Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 268 (1981)). [↑](#footnote-ref-36)
37. Id. at 589-90 (citing Bork, *supra,* at 149-155; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 699 (1975); Easterbrook, *supra;* Koller, The Myth of Predatory Pricing-An Empirical Study,  \*590 4 Antitrust Law & Econ.Rev. 105 (1971); McGee, Predatory Price Cutting: The *Standard Oil (N.J.) Case,* 1 J.Law & Econ. 137 (1958); McGee, Predatory Pricing Revisited, 23 J.Law & Econ., at 292-294). [↑](#footnote-ref-37)
38. Matsushita at 597. [↑](#footnote-ref-38)
39. *Id*. at 594. [↑](#footnote-ref-39)
40. Id. at 597-98. [↑](#footnote-ref-40)
41. The dissent characterized the majority’s language as “unnecessarily broad and confusing,” and noted that “[i]f 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.” Id. at 601 (White, J., dissenting). [↑](#footnote-ref-41)
42. *See, e.g*., U.S. v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003); WorldCom, Inc. v. F.C.C., 238 F.3d 449 (D.C. Cir. 2001); Stearns Airport Equipment Co., Inc. v. FMC Corp., 170 F.3d 518 (5th Cir. 1999); Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191 (3rd Cir. 1995); Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253 (5th Cir. 1988); Mathias v. Daily News, L.P., 152 F.Supp.2d 465 (S.D.N.Y. 2001); Servicetrends, Inc. v. Siemens Medical Systems, Inc., 870 F.Supp. 1042 (N.D.Ga. 1994); National Benefit Administrators, Inc. v. Blue Cross and Blue Shield of Alabama, Inc., 1989 WL 146413, 1989-2 Trade Cases P 68,831 (M.D. Ala. 1989). [↑](#footnote-ref-42)
43. Clamp-All Corp. v. Cast Iron Soil Pipe Inst., No. CIV. A. 84-1325-Z, 1987 WL 9760, at \*4 (D. Mass. Mar. 31, 1987), aff'd, 851 F.2d 478 (1st Cir. 1988). [↑](#footnote-ref-43)
44. 479 U.S. 104 (1986). [↑](#footnote-ref-44)
45. *Id*. at 108. [↑](#footnote-ref-45)
46. *Id*. at 109-11. [↑](#footnote-ref-46)
47. *Id*. at 116. [↑](#footnote-ref-47)
48. *Id*. at 117-18. See also id. at 118 (“In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition.”). [↑](#footnote-ref-48)
49. *Id*. at 119. [↑](#footnote-ref-49)
50. *Id*. at 119 n.15. [↑](#footnote-ref-50)
51. *Id*. at 121. [↑](#footnote-ref-51)
52. *Id*. at 122. [↑](#footnote-ref-52)
53. *Id*. at 122 n.17 (quoting *Matsushita*, 475 U.S., at 587). [↑](#footnote-ref-53)
54. *Id*. at 121. [↑](#footnote-ref-54)
55. *Id*. at 122 n.17 (“Moreover, the mechanism by which a firm engages in predatory pricing-lowering prices-is the same mechanism by which a firm stimulates competition…”). [↑](#footnote-ref-55)
56. 509 U.S. 209 (1993). [↑](#footnote-ref-56)
57. *Id.* at 217 (Liggett claimed that B&W’s predatory pricing was “intended to pressure it to raise its list prices on generic cigarettes, so that the percentage price difference between generic and branded cigarettes would narrow. … The resulting reduction in the list price gap … would restrain the growth of the economy segment and preserve Brown & Williamson’s supracompetitive profits on its branded cigarettes.”). [↑](#footnote-ref-57)
58. *Id*. [↑](#footnote-ref-58)
59. Leslie, Recoupment at \_\_. [↑](#footnote-ref-59)
60. Areeda & Hovenkamp, *supra* note \_\_ at ¶724. [↑](#footnote-ref-60)
61. Benz, *supra* note \_\_ at 741 (noting that is “virtually impossible to defeat a motion for summary judgment” by a predatory pricing defendant); Areeda & Hovenkamp, *supra* note \_\_ at ¶726 (“By the stringency of its demand for proof of recoupment, the Court cleared the way for summary rejection of most predatory pricing claims.”). [↑](#footnote-ref-61)
62. Leslie, Recoupment, at \_\_. [↑](#footnote-ref-62)
63. *See* Hovenkamp (“Antitrust Enterprise”), *supra* note \_\_ at 161 (“[W]hile an overly ag­gressive predatory pricing law deters some legitimate conduct, complete nonenforcement encourages anticompetitive conduct.”). [↑](#footnote-ref-63)
64. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993). [↑](#footnote-ref-64)
65. Brooke Grp., 509 U.S. at 226 (internal quotations and citation omitted). [↑](#footnote-ref-65)
66. Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300, 304 (5th Cir. 1984) (quoting *Northeastern Telephone Co. v. American Telephone & Telegraph Co.,* 651 F.2d 76, 88 (2d Cir. 1981); Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1197 (3rd Cir. 1995) (noting “danger of chilling competition”); United States v. AMR Corp., 335 F.3d 1109, 1114 (10th Cir. 2003) (“Chicago scholars argued that lowering prices could only be pro-competitive and any prohibition on such conduct could ultimately deter firms from engaging in conduct that is socially beneficial.”) (citing Richard J. Pierce, Jr., *Is Post-Chicago Ready for the Courtroom? A Response to Professor* *Brennan*, 69 Geo. Wash. L. Rev. 1103, 1106 (2001)). See also Tri-State Rubbish Inc. v. Waste Mgmt, Inc., 998 F.2d 1073, 1080 (1st Cir. 1993) (noting that predatory pricing “can easily be confused with merely low prices which benefit customers.”) (citation omitted); Dial A Car, Inc. v. Transportation, Inc., 82 F.3d 484, 487 (D.C. Cir. 1996) (“Predatory pricing claims, because they are premised on a temporary increase in competition, inherently ask the court to penalize potentially beneficial conduct.”). [↑](#footnote-ref-66)
67. Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 790 (1981). [↑](#footnote-ref-67)
68. Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., 35 F.Supp.2d 597, 602-03 (S.D. Ohio 1999). [↑](#footnote-ref-68)
69. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983) (“A legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one the Sherman Act’s most basic objectives: the low price levels that one would find in well-functioning markets.”). [↑](#footnote-ref-69)
70. *See* United States v. AMR Corp., 335 F.3d 1109, 1114 (10th Cir. 2003) (“Chicago scholars argued that lowering prices could only be pro-competitive and any prohibition on such conduct could ultimately deter firms from engaging in conduct that is socially beneficial.”); Morgan v. Ponder, 892 F.2d 1355, 1358-59 (8th Cir. 1989) (“Indeed, there is a real danger in mislabeling such practices as predatory, because consumers generally benefit from the low prices resulting from aggressive price competition.”). [↑](#footnote-ref-70)
71. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993) (quoting *Matsushita,* 475 U.S., at 589). [↑](#footnote-ref-71)
72. Kwoka & White, *supra* note \_\_ at 173; Trujillo, *supra* note \_\_ at 820 (“The Court’s recoupment standard is premised upon the theory that ‘predatory pricing schemes are rarely tried, and even more rarely successful,’ and, as a result, the prerequisites to recovery are purposefully difficult to establish.”). [↑](#footnote-ref-72)
73. Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1255 (5th Cir. 1988). [↑](#footnote-ref-73)
74. Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1196 (3d Cir. 1995). [↑](#footnote-ref-74)
75. Bathke v. Casey’s General Stores, Inc., 64 F.3d 340, 343 (8th Cir. 1995). [↑](#footnote-ref-75)
76. United States v. American Can Co., 230 F. 859 (D. Md. 1916). [↑](#footnote-ref-76)
77. Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965). [↑](#footnote-ref-77)
78. McGee, *supra* note \_\_ at 140; Bork, *supra* note \_\_ at 148. [↑](#footnote-ref-78)
79. Matsushita at n.17 [↑](#footnote-ref-79)
80. *See* Dalton & Esposito, *supra* note \_\_ at 161 (“Standard also employed a sophisticated and extensive intelligence network. Its employees identified the shipments and customer destinations of wholesalers of competing refiners using information obtained from agents of the railroads, retailers of refined oil products, and other employees of Standard. Standard maintained this information in an elaborate card catalogue that was then used to direct its sales force to capture or recapture the customers of rival refiners.”); *see also id*. at 168 (“Standard responded to the threat of losing customers by selectively reducing its prices. Standard Oil of Kentucky had developed a customer database for the geographic markets in which it operated and used it to identify customers that had defected to Red C.”); Leslie, USC (“According to the testimony from Standard’s own agents, Standard offered lower prices or rebates only to those buyers making purchases from independent refiners, not to Standard’s own customers.”); Dalton & Esposito, *supra* note \_\_ at 175 (discussing testimony from Standard’s agent in Kansas City agent). [↑](#footnote-ref-80)
81. Tarbell, *supra* note \_\_ at 51. [↑](#footnote-ref-81)
82. Bureau of Corporations, *supra* note \_\_ at 438 (“Instances have been known where the Standard has virtually given oil away to destroy the business of independent concerns. These extraordinary cuts are perhaps most often made in the form of sales to consumers by bogus-independent concerns.”). [↑](#footnote-ref-82)
83. Tarbell, *supra* note \_\_ at 51-52; Dalton & Esposito, *supra* note \_\_ at 169 (collecting examples). [↑](#footnote-ref-83)
84. Tarbell, *supra* note \_\_ at 60-61; Leslie, USC [↑](#footnote-ref-84)
85. *See, e.g*., Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 686 (6th Cir. 2016) (quoting *Matsushita*); United States v. AMR Corp., 335 F.3d 1109, 1114 (10th Cir. 2003) (same); Bay Guardian Co. v. New Times Media LLC, 187 Cal. App. 4th 438, 456, 114 Cal. Rptr. 3d 392, 404–05 (2010) (same). [↑](#footnote-ref-85)
86. Norman Hawker, *Predatory Pricing Law in the United States and Canada*, 7 U. Miami Bus. L. Rev. 201, 217 (1999) (citing James E. Meeks, *Predatory Behavior as an Exclusionary Device in the Emerging Telecommunications Industry*, 33 Wake Forest L. Rev. 125, 132, 136-41 (1998); Walter Adams & James W. Brock, Predation, “Rationality,” and Judicial Somnambulance, 64 U. Cin. L. Rev. 811, 855-67 (1996); Alvin K. Klevorick, The Current State of the Law and Economics of Predatory Pricing, 83 Am. Econ. Rev. 162 (1993)) [↑](#footnote-ref-86)
87. *Id*. at 589 (citations omitted). [↑](#footnote-ref-87)
88. *See, e.g*., James A. Dalton & Louis Esposito, *Predatory Price Cutting and Standard Oil: A Re-Examination of the Trial Record*, 22 Research in L. & Econ. 155, 156 (2007) (“This single publication appears to serve as a foundation of the U.S. Supreme Court's position on the issue of predatory pricing, as well as the basis for the assertion by many economists that predatory pricing is irrational and rarely occurs.”); Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 Geo. Wash. L. Rev. 1103, 1117 (2001) (“McGee's analysis was instrumental in persuading the Supreme Court to issue two opinions in the past fifteen years in which it has expressed an extremely skeptical attitude toward predatory pricing complaints.”); Donald J. Boudreaux & Burton W.Folsom, *Microsoft and Standard Oil: Radical Lessons for Antitrust Reform*, 44 Antitrust Bulletin 555, 559 (1999) (asserting that “[t]he reasons for [McGee’s] conclusion are today well-known and need not be reviewed here”); *see* James A. Dalton & Louis Esposito, *Standard Oil and Predatory Pricing: Myth Paralleling Fact*, 38 Rev. Indus. Org’n. 245, 255-57 (2011) (showing McGee’s influence in economics textbooks and legal scholarship); David D. Friedman, Law’s order: What economics has to do with law and why it matters 249-50 (2000) (“Despite the widespread belief that Rockefeller maintained his position by selling oil below cost in order to drive competitors out of business, a careful study of the record of the antitrust case that led to the breaking up of Standard Oil found no evidence that he had ever done so. The story appears to be the historian's equivalent of an urban myth.”) (citing McGee). [↑](#footnote-ref-88)
89. William H. Jordan, *Predatory Pricing After Brooke Group: The Problem of State “Sales Below Cost” Statutes*, 44 Emory L.J. 267, 274 (1995). [↑](#footnote-ref-89)
90. Daniel R. Fischel, Andrew M. Rosenfield & Robert S. Stillman, *The Regulation of Banks and Bank Holding Companies*, 73 Va. L. Rev. 301, 327 (1987) (citing only McGee). [↑](#footnote-ref-90)
91. Yeomin Yoon, *The Korean Chip Dumping Controversy: Are They Accused of Violating an Unjust Law?*, 19 N.C. J. Int’l L. & Com. Reg. 247, 263-64 (1994) (citing McGee). [↑](#footnote-ref-91)
92. See, e.g., Michael A. Salinger, *The Insights of Joseph Brodley’s Scholarship for the Current Debates over the Antitrust Treatment of Single-Firm Conduct*, 90 B.U. L. Rev. 1543, 1546 n.19 (2010) (referring to McGee as “empirical study”); C. Scott Hemphill, Note, The Role of Recoupment in Predatory Pricing Analyses, 53 Stan. L. Rev. 1581, 1601 n.60 (2001) (same); *Predatory Pricing – Oligopolistic Tacit Collusion*, 107 Harv. L. Rev. 322, 329 (1993) (same). [↑](#footnote-ref-92)
93. Bruce Johnsen & Moin A. Yahya, *The Evoluation of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. Pa. J. Const. L. 403, 407 n.20 (2004). [↑](#footnote-ref-93)
94. Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1196 (3rd Cir. 1995) (citing McGee, *supra* note \_\_ at 168-69). [↑](#footnote-ref-94)
95. John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & Econ. 137, 157 (1958). [↑](#footnote-ref-95)
96. Leslie, USC at \_\_ (discussing McGee at 166). [↑](#footnote-ref-96)
97. McGee at 148. Leslie, USC at \_\_ (explaining why McGee’s interpretation is unpersuasive). [↑](#footnote-ref-97)
98. Dalton & Esposito, *supra* note \_\_ at 158. [↑](#footnote-ref-98)
99. Dalton & Esposito, *supra* note \_\_ at 171-84. [↑](#footnote-ref-99)
100. *Id*. at 104. [↑](#footnote-ref-100)
101. Tarbell at 42-62. [↑](#footnote-ref-101)
102. Tarbell at 43 (quoting Peter Shull, of Independent Oil Company of Mansfield, Ohio, testimony before the Ohio Investigative Committee). [↑](#footnote-ref-102)
103. Tarbell at 59 (“the price of oil has always gone back with a jerk to the point where it was when the cutting began, and not infrequently it has gone higher – the public pays.”); *see id*. (“Several of the letters already quoted in this chapter show the immediate recoil of the market to higher prices with the removal of competition.”). [↑](#footnote-ref-103)
104. Bureau of Corporations, *supra* note \_\_ at 491-92; Id. at 438 (“When necessary, [Standard] puts the prices in a given locality down even below its own cost of manufacture, transportation, and delivery.”). [↑](#footnote-ref-104)
105. *See* Reply Brief for the United States, Standard Oil Co. v. U.S., 1911 WL 19167 at \*44. [↑](#footnote-ref-105)
106. *See, e.g*., Ron Chernow, Titan: The Life of John D. Rockefeller, Sr. 258 (1998) (“Rockefeller’s files are [] rife with references to this practice of predatory pricing”; quoting 1886 letter from Standard executive to J*.* D. Rockefeller, suggesting that Standard sold a quarter of his oil at cost or below). [↑](#footnote-ref-106)
107. Sandeep Vaheesan, *Reconsidering* Brooke Group*: Predatory Pricing in Light of the Empirical Learning*, 12 Berkeley Bus. L.J. 81, 110 (2015); Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 Antitrust L.J. 645, 649 (1989) (citing studies); Malcolm R. Burns, *Predatory Pricing and the Acquisition Cost of Competitors*, J. Pol. Econ. 266 (1986). [↑](#footnote-ref-107)
108. Predatory Pricing: Strategic Theory and Legal Policy, 88 Geo. L.J. 2239, 2246 (2000) (“By contrast, recent case studies that have found striking episodes of conduct clearly consistent with predatory pricing, such as the Burns study of the American Tobacco case, have used powerful econometric techniques not employed in earlier, more impressionistic surveys, or have probed deeply into historical archives, as have Fiona Scott Morton and Genesove and Mullin.”). [↑](#footnote-ref-108)
109. Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategy Theory and Legal Policy*, 88 Geo. L.J. 2239 (2000) [↑](#footnote-ref-109)
110. Western Parcel Express v. United Parcel Serv., 65 F.Supp.2d 1052, 1063 (N.D. Cal 1998). [↑](#footnote-ref-110)
111. Rose Acre, 881 F.2d at 1401 (“Price less than cost today, followed by the competitive price tomorrow, bestows a gift on consumers. Because antitrust laws are designed for the benefit of consumers, not competitors, a gift of this kind is not actionable.”). [↑](#footnote-ref-111)
112. *Brooke Group*, 509 U.S. at 224; *see also* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990) (“Low prices benefit consumers regardless of how those prices are set.”); Michael L. Freedman, *Predatory Pricing after* Brook Group*: Economic Goals Prevail*, 58 Alb. L. Rev. 243, 253 (1994) (citing *Brooke Group*) (“Without the possibility of recoupment, below-cost pricing results in enhanced consumer welfare and will not be discouraged by the courts.”). [↑](#footnote-ref-112)
113. Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1200 (3rd Cir. 1995) [↑](#footnote-ref-113)
114. See Leslie, Recoupment at \_\_ (using competing scenarios to prove this point). [↑](#footnote-ref-114)
115. Leslie, Recoupment, at \_\_. [↑](#footnote-ref-115)
116. Leslie, Recoupment at \_\_. [↑](#footnote-ref-116)
117. Areeda & Hovenkamp, *supra* note \_\_ at ¶726. [↑](#footnote-ref-117)
118. *See, e.g.*, *United States v. Falstaff Brewing Corp*., 410 U.S. 526, 572 (1973); Greene v. General Food Corp., 517 F.2d 635, 646 (5th Cir. 1975) (“In any event, the degree of profitability or its lack resulting from an alleged antitrust violation should play no part in the determination whether the plaintiff’s suit should be barred on equitable grounds.”); Leslie, Recoupment, at \_\_; [↑](#footnote-ref-118)
119. Areeda & Hovenkamp, *supra* note \_\_ at ¶725. [↑](#footnote-ref-119)
120. Leslie, Recoupment at \_\_. [↑](#footnote-ref-120)
121. Leslie, Recoupment at \_\_ (explaining how difficulty and unlikely reenter is). [↑](#footnote-ref-121)
122. Leslie, Rationality Analysis. [↑](#footnote-ref-122)
123. Leslie, Recoupment at \_\_. [↑](#footnote-ref-123)
124. Leslie, Recoupment at \_\_. [↑](#footnote-ref-124)
125. Leslie, Recoupment at \_\_ (discussing *Microsoft*); Edlin & Farrell, *supra* note \_\_ at 509 (noting that “‘sacrifice’ in one product can be immediately recouped (often quite legitimately) because it boosts profits in a complementary product.”). [↑](#footnote-ref-125)
126. Leslie, Recoupment at \_\_ (discussing *Brooke Group*) [↑](#footnote-ref-126)
127. Leslie, Recoupment at \_\_ (discussing *Stitt Spark Plug Co. v. Champion Spark Plug Co*., 840 F.2d 1253 (5th Cir. 1988); *Kentmaster Manuf. Co. v. Jarvis Products Corp*., 146 F.3d 691 (9th Cir. 1998); *Directory Sales Mgmt Corp. v. Ohio Bell Telephone Co*., 833 F.2d 606 (6th Cir. 1987)). [↑](#footnote-ref-127)
128. Leslie, Recoupment at \_\_. [↑](#footnote-ref-128)
129. *Matsushita*, 475 U.S. at 592. [↑](#footnote-ref-129)
130. *See* Bolton, Brodley & Riordan, (“Response”) *supra* note \_\_ at 2502 (“While a predatory pricing strategy by an oligopoly may be partially undermined by free riding, it can still be profitable. As a result, some or all members of the oligopoly may have an incentive to adopt aggressive policies, such as below-cost pricing, that contribute to the foreclosure of new entrants.”) (citing Kyle Bagwell & Garey Ramey, *Oligopoly Limit Pricing*, 22 RAND J. Econ. 155, 165-67 (1991); B. Douglas Bernheim, *Strategic Deterrence of Sequential Entry into an Industry*, 15 RAND J. Econ. 1, 1-4 (1984); Richard Gilbert & Xavier Vives, *Entry Deterrence and the Free Rider Problem*, 53 Rev. Econ. Stud. 71, 81 (1986); Michael H. Riordan & Richard P. McLean, Industry Structure with Sequential Technology Choice, 47 J. Econ. Theory 1, 1-3 (1989); Michael Waldman, *Noncooperative Entry Deterrence, Uncertainty and the Free Rider Problem*, 54 Rev. Econ. Stud. 301, 301-02 (1987)). [↑](#footnote-ref-130)
131. *Brooke Group*, 509 U.S. at 238. [↑](#footnote-ref-131)
132. *Id*. at 214 (“The cigarette industry…has long been one of America’s most profitable, in part because for many years there was no significant price competition among the rival firms.”). [↑](#footnote-ref-132)
133. *Id*. [↑](#footnote-ref-133)
134. 549 U.S. 312 (2007). [↑](#footnote-ref-134)
135. *Id*. at 316. [↑](#footnote-ref-135)
136. Confederated Tribes of Siletz Indians of Ore. v. Weyerhaeuser Co., 411 F.3d 1030, 1035-1036 (9th Cir. 2005). [↑](#footnote-ref-136)
137. *Weyerhaeuser*, 549 U.S. at 322 n.3. [↑](#footnote-ref-137)
138. *Id*. at 321. [↑](#footnote-ref-138)
139. *Id*. at 321-22 (citing Hovenkamp, The Law of Exclusionary Pricing, 2 Competition Policy Int'l, No. 1, pp. 21, 35 (Spring 2006); Kirkwood at 653; *Khan v. State Oil Co.,* 93 F.3d 1358, 1361 (C.A.7 1996); *Vogel v. American Soc. of Appraisers,* 744 F.2d 598, 601 (C.A.7 1984)). [↑](#footnote-ref-139)
140. *Id*. at 322. [↑](#footnote-ref-140)
141. *See* Walker Process [↑](#footnote-ref-141)
142. *See* Dentsply [↑](#footnote-ref-142)
143. *See* Aspen Skiing [↑](#footnote-ref-143)
144. *Id*. at 322. [↑](#footnote-ref-144)
145. *Id*. at 322. [↑](#footnote-ref-145)
146. *Id*. at 323. [↑](#footnote-ref-146)
147. Justice Thomas wrote that “a firm might bid up input prices to acquire excess inputs as a hedge against the risk of future rises in input costs or future input shortages.” *Id*. at 323. His reasoning is deeply flawed because guarding against future price increases is not a reason why any firm would want to affirmatively “*bid up* inputs prices.” The most logical reason why a firm would want to do that would be to hurt its rivals. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price,* 96 Yale L.J. 209 (1986). In any case, Thomas’s concession reveals a fundamental distinction between predatory pricing and predatory overbuying. [↑](#footnote-ref-147)
148. *Id*. at 323 (“More importantly, predatory bidding mirrors predatory pricing in respects that we deemed significant to our analysis in *Brooke Group*. In *Brooke Group,* we noted that “‘predatory pricing schemes are rarely tried, and even more rarely successful.’” 509 U.S., at 226 (quoting *Matsushita,* 475 U.S., at 589)). [↑](#footnote-ref-148)
149. *Id*. at 324 (citing BG, 509 U.S., at 224). [↑](#footnote-ref-149)
150. *Id*. at 324. [↑](#footnote-ref-150)
151. *Id.* [↑](#footnote-ref-151)
152. *Id*. at 324 n.5 (“Also, if the same firms compete in the input and output markets, any increase in outputs by the predator could be offset by decreases in outputs from the predator's struggling competitors.” ) (citing Salop 677, n. 22). [↑](#footnote-ref-152)
153. 549 U.S. at 320 (quoting Brooke Group and *Cargill,* *supra,* at 122, n. 17). [↑](#footnote-ref-153)
154. *Id*. at 323. [↑](#footnote-ref-154)
155. *Id*. at 315. [↑](#footnote-ref-155)
156. *Id*. at 316. [↑](#footnote-ref-156)
157. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 323 (2007) (“A more efficient firm might bid up input prices to acquire more inputs as a part of a procompetitive strategy to gain market share in the output market.”) [↑](#footnote-ref-157)
158. *Id*. at 323. [↑](#footnote-ref-158)
159. *Id*. at 325. [↑](#footnote-ref-159)
160. *Id*. at 325. [↑](#footnote-ref-160)
161. *See supra* notes \_\_. [↑](#footnote-ref-161)
162. *Id*. at 325. [↑](#footnote-ref-162)
163. *Id*. at 319. [↑](#footnote-ref-163)
164. The Court conceded that predator bidder could recoup through monopoly pricing in the output market, but then asserted that this was not applicable in the case before it. *Weyerhaeuser* at 321 n.2 (“If the predatory firm's competitors in the input market and the output market are the same, then predatory bidding can also lead to the bidder's acquisition of monopoly power in the output market. In that case, which does not appear to be present here, the monopsonist could, under certain market conditions, also recoup its losses by raising output prices to monopolistic levels.”). [↑](#footnote-ref-164)
165. *Id*. at \_\_; see id. (“That is, the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs.”). [↑](#footnote-ref-165)
166. Without citing any data, the record or anything at all, the *Weyerhaeuser* Court asserted that the case did not “it present a risk of significantly increased concentration in the market in which the monopsonist sells, *i.e.,* the market for finished lumber.” Id. at 321. Yet this is precisely the result when a monopolist hoards inputs. [↑](#footnote-ref-166)
167. *Id*. at 325. [↑](#footnote-ref-167)
168. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993). [↑](#footnote-ref-168)
169. Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1032–33 (8th Cir. 2000) (“Evidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws.”); Mitchael v. Intracorp, Inc., 179 F.3d 847, 858–59 (10th Cir.1999) (“While consciously parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, standing alone, to prove conspiracy.”). [↑](#footnote-ref-169)
170. *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398 (3d Cir. 2015) (“Accordingly, evidence of conscious parallelism cannot alone create a reasonable inference of a conspiracy. To move the ball across the goal line, a plaintiff must also show that certain plus factors are present.”); Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1033 (8th Cir. 2000) (“A plaintiff has the burden to present evidence of consciously paralleled pricing *supplemented with* one or more plus factors.”). [↑](#footnote-ref-170)
171. Apex Oil Co. v. DiMauro, 822 F.2d 246, 253–54 (2d Cir. 1987). [↑](#footnote-ref-171)
172. *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 901 F.3d 383, 396 (3rd Cir. 2015). [↑](#footnote-ref-172)
173. *In re* Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999). [↑](#footnote-ref-173)
174. 191 F.3d 1090, 1094 (9th Cir. 1999). [↑](#footnote-ref-174)
175. This is not the correct metric because those consumers who pay a monopoly price in the recoupment phase suffer antitrust injury regardless of whether consumers during the predation phase saved more than the later consumer overpaid. Leslie, Recoupment \_\_ [↑](#footnote-ref-175)
176. 999 F.Supp.2d 777 (M.D. Pa. 2014). [↑](#footnote-ref-176)
177. *Id.* at 786 (quoting *Matsushita,* 475 U.S. at 594). [↑](#footnote-ref-177)
178. 231 F.Supp.2d 1253 (N.D. Ga. 2002). [↑](#footnote-ref-178)
179. *Id.* at 1267 (quoting *Matsushita* at 593). [↑](#footnote-ref-179)
180. Leslie, NCLR [↑](#footnote-ref-180)
181. CFPB Arbitration Study, *supra* note 34 at 1-10, § 1.4.1 (“Nearly all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis.”). [↑](#footnote-ref-181)
182. Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 Sw. L. Rev. 87, 98 (2012). [↑](#footnote-ref-182)
183. Lemley & Leslie, *supra* note \_\_ at 37; Leslie, Arbitration Bootstrap [↑](#footnote-ref-183)
184. *See generally* Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 Wm. & Mary L. Rev. 327, 410-11 (2010) (“The imposition of unfair or burdensome terms by multiple sellers suggests that any of those sellers could attract buyers by *not* imposing those terms...”) (emphasis in original). In deposition testimony from an attorney at Citigroup in one conspiracy-to-arbitrate case “reveal[ed] that [the] Defendants may have been concerned that consumers would cancel their cards if Citigroup unilaterally adopted an arbitration clause.” *In re* Currency Conversion Fee Antitrust Litig., 2012 WL 401113 at 1, 7 (S.D.N.Y. 2012). [↑](#footnote-ref-184)
185. Leslie, NCLR [↑](#footnote-ref-185)
186. 282 U.S. 30 (1930). [↑](#footnote-ref-186)
187. Leslie, NCLR (explaining how the language and approach of *Paramount Famous Lasky* was per se). [↑](#footnote-ref-187)
188. 475 U.S. 574 (1986). [↑](#footnote-ref-188)
189. Ross v. Am. Exp. Co., 2014 WL 1396492, \*24 (S.D.N.Y. 2014) (quoting *Matsushita*, 475 U.S. at 588). [↑](#footnote-ref-189)
190. As an initial matter, *Matsushita* merely established the evidentiary burden for surviving a motion for summary judgment, which the plaintiffs had already done. [↑](#footnote-ref-190)
191. Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. Penn. L. Rev. 261 (2010). [↑](#footnote-ref-191)
192. In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002). [↑](#footnote-ref-192)
193. *See* Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 Colum. L. Rev. 1695 (2013).

     Notably, when the district court in *In re Currency Conversion Fee Antitrust Litigation* applied *Matsushita*, it concluded that “a conspiracy to adopt arbitration clauses would not be entirely irrational,” and denied the defendants’ motion for summary judgment. *In re* Currency Conversion Fee Antitrust Litig., 2012 WL 401113 at 1, 7 (2012). [↑](#footnote-ref-193)
194. Ross v. American Exp. Co., 35 F.Supp.3d 407, 434 (S.D.N.Y. 2014) (“The mere existence of the clauses, diminishes the cards’ value by foreclosing the opportunity for cardholders to go to court and address grievances through class action litigation.”). Leslie, NCLR [↑](#footnote-ref-194)
195. Leslie, N.C. L. Rev. [↑](#footnote-ref-195)