The Nomos and Narrative of Matsushita

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INTRODUCTION

Around twenty-one years ago, Robert Cover left an indelible mark on legal scholarship with his epic tale of world formation and development, \textit{Nomos and Narrative}.\textsuperscript{1} He posited the idea that our culture consists of a multitude of insular communities (nomoi), each of whose experiences is guided by those texts and events (narratives) that give its legal precepts normative meaning, thereby connecting each community’s vision of reality to its ideal. Occasions arose, however, where different communities’ visions of the ideal could not be contained within each community alone and thus came into conflict.\textsuperscript{2} Resolution entailed reconciliation of the competing narratives and ideals in a manner that respected the insularity of each nomos as much as possible but, where need be, recognized that one vision was normatively better than another and let it prevail.\textsuperscript{3}

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\textsuperscript{2} See, \textit{e.g.}, \textit{id.} at 34.
\textsuperscript{3} \textit{E.g.}, \textit{id.} at 13 n.35 (“The problem of ‘world maintenance’ is a problem of the coexistence of different worlds and a problem of regulating the splitting of worlds.”); \textit{id.} at 13 & n.36 (describing the “coercive constraints imposed on the autonomous realization of normative meanings”).
Cover was specifically concerned with the civil rights movement's recent redemptive attempts to impose its narrative of racial equality on the various religious nomoi throughout the United States. He questioned the imposition of mainstream norms of equality on individuals whose conscience, guided by particular religious convictions, indicated otherwise. Unlike the U.S. Supreme Court in *Bob Jones University v. United States,* Cover did not believe there was an easy answer to this normative battle, because both mainstream equality norms and the ideals of religious liberty had great worth.

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

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

In the 1960s and 1970s, the antitrust summary judgment standard was relatively unambiguous. Summary procedures were to be used "sparingly in complex antitrust litigation," as "the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." As a result, many cases went to the jury—even those

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4. E.g., id. at 28 ("The principle that troubled these amici [in *Bob Jones University v. United States*] was the broad assertion that a mere 'public policy,' however admirable, could triumph in the face of a claim to the first amendment's special shelter against the crisis of conscience.").
7. See *In re Int'l Bus. Machs. Corp.*, 687 F.2d 591, 594 (2d Cir. 1982) (describing stipulation of dismissal of "what had been one of the nation's longest antitrust suits"). The seventeen-month median total length of private antitrust cases, from complaint to termination, exceeds the nine-month median for federal litigation generally. Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1009 (1986).
relying primarily on circumstantial evidence to prove conspiracy—because judges disallowed the inference of conspiracy only in the rare instance that the defendant had "conclusively disproved [it] by pretrial discovery," as in First National Bank v. Cities Service Co., or when the specific antitrust claim faced substantive limitations.12

By the late 1970s and early 1980s, Chicago School scholarship had taken hold. A group of scholars, viewing antitrust laws through advancements in industrial organization scholarship, attributed increasing importance to setting legal rules and policies that maximized consumer welfare (otherwise known as "economic efficiency"). In response to this scholarship, the courts became more attuned to the *ex ante* inefficiencies caused by the antitrust laws, particularly antitrust's treble damages remedy, and sought to relax various prohibitions and thus make the laws more efficient—in Cover's terms, "redemption" of the antitrust laws through economics.16 For example, in Monsanto Co. v. Spray-Rite Service Corp., the Court held that a single piece of circumstantial evidence that could have resulted from either a conspiracy or independent behavior was insufficient for a plaintiff to survive a motion for judgment notwithstanding the verdict.17 Monsanto stated that for a plaintiff to defeat a motion for a directed verdict, he needs to present evidence, direct or circumstantial, "that tends to exclude the possibility" that the alleged conspirators acted independently.18 The "tends to exclude" standard was necessary when the circumstantial evidence might have been caused by procompetitive behavior because

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12. See, e.g., infra note 261 (listing parallel refusal to deal cases where summary procedures were deemed appropriate).
13. I use the term "Chicago School" scholarship broadly to refer to industrial organization scholarship, much of it at the University of Chicago during the 1970s and early 1980s, which found its way into jurisprudence, particularly antitrust. The origin of the school is usually attributed to an antitrust course taught jointly by Aaron Director and Edward Levi in the early 1950s. See, e.g., James May, Redirecting the Future: Law and the Future and the Seeds of Change in Modern Antitrust Law, 17 Miss. C. L. Rev. 43 (1996).
14. See generally Frank H. Easterbrook, Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4 (1984) (discussing the Court's increasing cognizance of ex ante effects). The term "ex ante effects" refers to the predicted effects that a rule of liability will have on future behavior.
16. See infra notes 163-70 and accompanying text (describing Cover's use of the concept of redemption).
17. Monsanto notes 163-70 and accompanying text (describing Cover's use of the concept of redemption).
18. Id.
fear of paying treble damages would deter firms from partaking in the procompetitive behavior in the first place.\(^\text{19}\)

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,\(^\text{20}\) a 1986 predatory pricing case, efficiency concerns were central to the Court’s resolution again, as the Court tried to extrapolate *Monsanto*’s principles into the summary judgment context. The Court set forth the current summary judgment standard:

> Respondents correctly note that “[o]n summary judgment the inferences to be drawn from the underlying facts... must be viewed in the light most favorable to the party opposing the motion.” But antitrust law limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case. Thus, in *Monsanto*, we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently. Respondents... must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.\(^\text{21}\)

As the Court would explain later in the opinion, inferences should be limited in predatory pricing cases because cutting prices (the main evidence of the alleged conspiracy) was the very essence of competition, and such price-cutting conduct would be deterred if evidence of low prices sufficed to permit the inference of conspiracy.\(^\text{22}\)

Nineteen years later, courts and commentators still struggle to decipher what the *Matsushita* standard requires and how to reconcile that with the Court’s prior summary judgment jurisprudence, which was generally plaintiff permissive.\(^\text{23}\) *Matsushita*’s broad language created many questions: Should judges limit inferences at the summary judgment stage in all antitrust cases or only a subset (and, if so, which subset)? When ascertaining whether the evidence “tends to exclude” the possibility of independent action, should the judge weigh the evidence? How are deterrence concerns related to that standard? Does *Matsushita* apply outside antitrust?\(^\text{24}\)

\[^{19}\] Id.
\[^{20}\] 475 U.S. 574 (1986).
\[^{22}\] Id. at 594.
\[^{24}\] Compare id. at 1569 n.173 (arguing that *Matsushita* applies outside antitrust), and *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987)
In 1992, the Court tried to clarify the matter in *Eastman Kodak Co. v. Image Technical Services, Inc.* In that decision, the Court claimed that *Matsushita* "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases...[as] *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." The Court then refused to limit the range of permissible inferences drawn from ambiguous evidence when the observable behavior did not appear "always or almost always to enhance competition" because the risk of deterring procompetitive conduct was insubstantial.

Despite *Kodak*’s "clarification," various federal circuit courts have had difficulty reconciling *Kodak* and *Matsushita*, especially in conspiracy cases. As one certiorari petition from 1999 claimed, several circuits cite *Matsushita* when the conspiracy is implausible (usually affirming a grant of summary judgment for the defendant) and *Kodak* when it is plausible (usually ruling that the case should proceed to trial). The problem, with which *Kodak* only partially grappled, is that the very definition of reasonableness had been fundamentally altered by *Matsushita*, the history that preceded it, and the consumer welfare "narrative" of which it was part. Reasonable, as used in *Matsushita*, no longer referred simply to the case at hand. The term "reasonable" had incorporated what I call a "case-external" dimension, whereby the reasonableness of any specific inference in a case also depended on how permitting the inference might affect business competition more generally.

As this Article attempts to demonstrate, this alteration in the meaning of reasonableness occurred in two ways. First, pre-*Matsushita*, it occurred in the augmentation of the substantive requirements in one particular sub-area of antitrust law (a nomos): conscious parallelism cases. Conscious parallelism is when several firms knowingly behave alike, typically setting prices, and the question is whether this parallel behavior resulted due to a conspiracy (usually


26. *Kodak*, 504 U.S. at 468 (citation omitted).

27. *Id.* at 479.

28. Petition for Certiorari, 7-Up Bottling Co. v. Archer Daniels Midland Co., 191 F.3d 1090 (9th Cir. 1999) (No. 99-1218). But see In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002) (Posner, J.) (relying on *Matsushita* (and not *Kodak*) although finding the conspiracy to be plausible).
illegal)\(^{29}\) or independent decisions (permissible).\(^{30}\) Since 1954, when the Court said that evidence of consciously parallel behavior did not demand a directed verdict in favor of the plaintiff,\(^{31}\) the lower courts have increasingly required that evidence of conscious parallelism be supplemented with so-called plus factors\(^{32}\) before allowing a case to be submitted to the jury, for only when plus factors are present does the evidence "tend to exclude the possibility that the defendants acted independently."\(^{33}\) Due in large part to scholarship by Donald Turner and others, the plus-factor requirement really took hold in the circuit courts in the mid-1970s, as a way both to differentiate plausible from implausible conspiracies and to deal with the impossibility of devising a judicially enforceable remedy for interdependent pricing.\(^{34}\) In fact, in the lower court proceedings of *Matsushita*, the U.S. Court of Appeals for the Third Circuit had relied upon the conscious parallelism cases as justification for the proposition that inferences may be limited at the summary judgment stage.\(^{35}\) Second, and more directly related to Chicago School concerns, the definition of reasonableness also changed to account for *Matsushita*'s explicit

\(^{29}\) Some conspiracies are legal. E.g., Northwest Wholesale Stationers Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296-98 (1985) (applying the rule of reason to concerted refusals to deal if the defendants lack market power or exclusive access to an element essential to competition).


\(^{31}\) Id. at 540-41.

\(^{32}\) "Plus factor" is nothing more than an "inelegant" label for "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy." VI Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1433(e) (2000). Sometimes courts use the term "plus factor" explicitly to describe this inquiry for the additional facts; other times, they merely look for the additional facts. Recent lower court examples are: In re *Flat Glass Antitrust Litigation*, 385 F.3d 350 (3d Cir. 2004); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003); *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc); *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98-2847, 1999 WL 691840, at *9 (4th Cir. Sept. 7, 1999) (unpublished); In re *Baby Food Antitrust Litigation*, 166 F.3d 112, 122, 124 (3d Cir. 1999); and *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991). Pre-*Matsushita* examples include: In re *Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 304 (3d Cir. 1983); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978); *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 1042-43 (2d Cir. 1978); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202-07 (3d Cir. 1961); and *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952). For more pre-*Matsushita* cases, see infra note 274.

\(^{33}\) Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1232-33 (3d Cir. 1993) (citing In re *Japanese Elec. Prods.*, 723 F.2d at 304) (the lower court opinion in *Matsushita*).

\(^{34}\) See, e.g., infra notes 277-78 (describing Turner's influence and citing cases).

\(^{35}\) See *In re Japanese Elec. Prods.*, 723 F.2d at 304.
incorporation of Monsanto's "tends to exclude" standard and its concerns with deterring procompetitive conduct.

Cover's metaphor of "nomos" and "narrative" provides a useful orienting mechanism for understanding this transition in antitrust. "Nomos," because some of these sub-areas of antitrust law are partly insular and thus their own little sub-worlds: the Supreme Court, for instance, has never expressly discussed the use of plus factors despite their existence in circuit court doctrine for more than fifty years. "Narrative," because the consumer welfare focus that developed from Chicago School scholarship had as much of a transformative, and indeed redemptive, effect on the antitrust laws as the civil rights movement had on public law norms of equality more generally.

Nevertheless, the application of Cover's metaphor to antitrust summary judgment comes with a twist. In Cover's work, the question was whether equality norms should be applied to the religious insular communities at all. That was because the insular communities truly were separate from the mainstream. In the world of antitrust, such separateness does not exist, as Chicago School concerns were, at the very least, partly responsible for both the rise of the plus-factor requirement within the conscious parallelism nomos and for the development of antitrust law more generally. This difference, however, between Cover's subject and antitrust does not mean his metaphor is inapposite but simply that it applies differently. As this Article attempts to explain, conscious parallelism cases had already compensated for the relevant Chicago School concerns through requiring certain kinds of plus factors to be set forth at the summary judgment stage. Since Matsushita, several circuit courts have attempted to limit inferences in conscious parallelism cases at the summary judgment stage not only through requiring the existence of certain types of plus factors but also by requiring that they meet a higher burden of proof (applying the "tends to exclude" language of Matsushita and Monsanto). This Article contends that the latter requirement arguably represents an improper extension of the deterrence concerns from Matsushita and Monsanto into a sub-area of law in which they serve no role, thus overapplying Matsushita in the conscious parallelism nomos. As this Article attempts to demonstrate, this potential overapplication of the consumer welfare narrative within the conscious parallelism nomos is just as troublesome as was the application of the mainstream equality narrative to the insular religious nomos at all.

This Article has six parts. Part I provides some background, briefly describing the role of circumstantial evidence in summary judgment disputes, the six major antitrust summary judgment precedents, and Monsanto. Part II discusses the various ways that courts and commentators have interpreted Matsushita and the strengths and weaknesses of the various approaches. It then introduces my
understanding of Matsushita, which integrates several aspects of the various approaches currently used. Part III describes the development of the conscious parallelism nomos and the consumer welfare narrative, further explaining their interrelation as part of the transformation of the antitrust laws in the 1970s and 1980s. Part IV then draws on this understanding of the conscious parallelism nomos and the consumer welfare narrative to describe the relationship between the various considerations of Matsushita and "reasonableness." Part V explains how these considerations apply in a subset of conscious parallelism cases—oligopoly parallel pricing cases—discussing in particular how the Eleventh Circuit improperly relied on Matsushita in the recent Williamson Oil case to enhance the level of proof needed for a plaintiff to defeat a defendant’s motion for summary judgment when the evidence is primarily circumstantial. It explains that, although there may be legitimate reasons to restrict a plaintiff’s use of circumstantial evidence in oligopoly parallel pricing cases, it is wrong to attribute these reasons to Matsushita itself. Part VI describes how my critique of several oligopoly parallel pricing cases dovetails with Richard Posner’s similar critique of the same cases in his recent second version of Antitrust Law, and how our critiques of the case law complement each other: We both argue that lower courts have inappropriately extended the "tends to exclude" requirement from Monsanto and Matsushita to the oligopoly pricing context, but we reach this result for different reasons. Posner believes the error arises from considering interdependent pricing to be inevitable, whereas I believe that the main problem is overapplication of deterrence concerns.

I. BACKGROUND ANTITRUST SUMMARY JUDGMENT ELEMENTS

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

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

This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . ." It has been interpreted to require that "[o]n summary judgment

36. 346 F.3d at 1287.
38. Id. at 99-100.
39. Id. at 69-100.
the inferences to be drawn from the underlying facts... must be viewed in the light most favorable to the party opposing the motion."

The judge, however, "is free to take the case from the jury if the nonmovant's interpretation of the indirect evidence is 'unreasonable.'"

Part I examines the meaning of those general principles in the section 1 antitrust context. Part I.A discusses why the range of permissible inferences from circumstantial evidence is a significant issue in section 1 cases. Part I.B describes seven important Supreme Court cases on the matter: the six main antitrust summary judgment precedents and Monsanto (because of its incorporation in Matsushita).

A. Circumstantial Evidence in Section 1 Cases

Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade [is] illegal." It requires concerted action among multiple firms. This action is "horizontal" if it occurs among competitors at the same level of market structure, and "vertical" if it occurs between parties at different levels of the chain of distribution. To perhaps oversimplify, questions on summary judgment are of two sorts: (1) Given the observable behavior, what other facts can one infer, and (2) does section 1 restrict that observed and inferred behavior? For example, a summary judgment motion might turn on (1) whether the fact finder may reasonably infer that an agreement existed from evidence of parallel behavior, and (2) whether that agreement is illegal.

Inference limitation only applies to the first sort of question. These questions are factual, even though the precise facts that are inferred can have legal consequences and result from the use of circumstantial evidence, such as firm pricing levels. (No inferences are required from direct evidence to establish a fact.)


44. Many antitrust cases discuss when a directed verdict is appropriate, such as the Theatre Enterprises case. See infra Part I.B.


49. See, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939) (discussing how "[a]s is usual in cases of alleged unlawful agreements... the government is without the aid of direct testimony... [it] is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators" to establish agreement). Circumstantial evidence is sometimes called "indirect evidence."

50. Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1233 (3d Cir. 1993). Direct evidence is either documentary or the first-hand testimony of a witness who perceived the events. Its primary issues are genuineness...
evidence "is, by definition, consistent with both competing theories [of legal and illegal behavior]. Inferences can be drawn from the evidence that would support either the movant or the non-movant, although the inferences may not be equally plausible."\textsuperscript{51}

This dual plausibility often makes section 1 summary judgment determinations difficult because judges want to punish illegal behavior but also generally prefer not to intervene in the normal course of business affairs.\textsuperscript{52} Moreover, it is a significant area of contention in conspiracy cases in particular, for while many conspiracies are per se illegal (automatically illegal once the fact finder infers that a conspiracy exists),\textsuperscript{53} strong direct evidence (such as secret memos and tapes of discussions) is rare.\textsuperscript{54} Hence, the central issue in many section 1 cases is whether the judge should permit the fact finder to infer a conspiracy from the circumstantial evidence.\textsuperscript{55}

Part I.B describes the six major antitrust summary judgment precedents, as well as \textit{Monsanto} (because of the large role it plays in \textit{Matsushita}). Part I.B is intended to be a purely neutral description of the relevant cases, laying out the basic issue of each case and how the Court chose to resolve it. Substantive analysis of the opinions begins later in Part II.

B. \textit{The Six Major Antitrust Summary Judgment Cases (and Monsanto)}

\textit{Poller v. Columbia Broadcasting System, Inc.}\textsuperscript{56} asserted the basic principle that antitrust cases were not well suited to summary procedures. \textit{Poller} involved a cancelled affiliation contract between CBS and one of its UHF-based outlets, which Poller alleged was part of a conspiracy by CBS and others to destroy UHF broadcasting and protect CBS's "vast interest in VHF stations throughout the United


\textsuperscript{52} In the corporate law context, this is witnessed through the business judgment rule. In antitrust cases, this nonintervention preference can be seen in the last couple of decades through the rise of analysis under the rule of reason as well as the requirement of certain predicate facts before attaching per se liability. See infra Part III.C.1.

\textsuperscript{53} See infra Part III.C.1 (discussing how most conspiracies are per se illegal).

\textsuperscript{54} In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990).

\textsuperscript{55} VI Areeda & Hovenkamp, supra note 32, ¶ 1410(c) ("The practical issue in actual litigation will often be the propriety of allowing a jury to infer the existence of an agreement from indirect evidence."). The range of permissible, or perhaps even mandated, inferences can play a large role in non-conspiracy cases too, such as in \textit{Kodak}, described infra text accompanying notes 104-14, in terms of whether certain facts can be presumed true without proof of actual market conditions.

\textsuperscript{56} 368 U.S. 464 (1962).
The district court granted summary judgment in favor of CBS, considering the cancellation "the normal right of a producer to select the outlet for its product." The Supreme Court reversed, claiming that it was a genuine issue of fact as to whether the cancellation was independently motivated by CBS:

It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that "it is quite clear what the truth is." Certainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Seven years later, the Court decided *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, bolstering the notion that summary procedures should be used sparingly in antitrust cases. In *Norfolk Monument*, the plaintiff alleged that the defendants had conspired to engage in various activities aimed at decreasing the plaintiff's sales in order to monopolize the manufacture and sale of bronze grave markers in violation of section 1 and section 2 of the Sherman Act. The case was based almost entirely on circumstantial evidence of restrictive rules the defendants had adopted that operated to the plaintiff's detriment (such as "[d]espite the unskilled nature of the work, all of the memorial parks refuse to permit the plaintiff to install markers sold by it; all of them insist that the work be done by the cemeteries themselves"). The Supreme Court, in a per curiam opinion, reversed the district court's grant of the defendants' motion for summary judgment, citing how "[t]he justification for these restrictive rules was disputed by the petitioner . . . . The reasonableness of the rules was a material question of fact whose resolution was the function of the jury and not of the court on a motion for summary judgment." It was irrelevant that the key

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57. *Id.* at 466.
58. *Id.* at 468.
59. *Id.* at 472-73 (citations omitted).
60. 394 U.S. 700 (1969) (per curiam).
61. *Id.* at 701.
62. *Id.*
63. *Id.* at 702-03.
evidence was circumstantial;\textsuperscript{64} the Court, heeding \textit{Poller}, claimed that summary judgment was inappropriate as the plaintiff's case had not been "conclusively disproved by pretrial discovery."\textsuperscript{65}

Similarly, in \textit{Fortner Enterprises, Inc. v. United States Steel Corp.}, the Court reversed an appellate decision affirming a grant of summary judgment in a tying case.\textsuperscript{66} In \textit{Fortner}, the plaintiffs sought to obtain loans from the United States Steel Corp. for buying land.\textsuperscript{67} The United States Steel Corp. agreed to provide the loans if the plaintiffs agreed to erect a prefabricated house manufactured by United States Steel Homes Credit Corp. (a wholly owned subsidiary of United States Steel Corp.).\textsuperscript{68} Relying on earlier precedent, the district court granted summary judgment in favor of the defendants, noting, among other deficiencies, that United States Steel Corp. did not have market power over the tying product (money).\textsuperscript{69} The Supreme Court reversed, observing the possibility that the Credit Corp.'s "uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages."\textsuperscript{70} Heeding \textit{Poller}'s language that "summary judgment in antitrust cases is disfavored," the Court held that summary judgment was improper even though it was possible "that these allegations [of a unique economic advantage] will not be sustained when the case goes to trial."\textsuperscript{71}

But, even in this plaintiff-permissive era, summary judgment was appropriate when pretrial discovery had conclusively disproved the plaintiff's case. Such was the situation in \textit{Cities Service}.\textsuperscript{72} In that case, it was acknowledged that several oil companies maintained a worldwide oil cartel and a conspiracy to boycott Iranian Oil in all markets.\textsuperscript{73} At issue was whether the evidence of Cities Service's

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\textsuperscript{64.} \textit{Id.} at 704 (quoting \textit{Theatre Enters., Inc. v. Paramount Film Distrib. Corp.}, 346 U.S. 537, 540 (1954) ("B[usiness behavior is admissible circumstantial evidence from which the fact finder may infer agreement.").) \\
\textsuperscript{65.} \textit{Id.} \\
\textsuperscript{66.} \textit{Fortner Enters., Inc. v. United States Steel Corp.}, 394 U.S. 495, 509-10 (1969). \\
\textsuperscript{67.} \textit{Id.} at 497. \\
\textsuperscript{68.} \textit{Id.} \\
\textsuperscript{69.} \textit{Id.} at 498. \\
\textsuperscript{70.} \textit{Id.} at 505. \\
\textsuperscript{71.} \textit{Id.; id.} at 506 ("[O]n the record before us it would be impossible to reach such conclusions as a matter of law, and it is not our function to speculate as to the ultimate findings of fact."). On remand, a jury, and later a judge in a bench trial, both rendered judgment for the plaintiff, and the Court of Appeals affirmed. When the case again came to the Supreme Court, however, the Court unanimously reversed both lower courts noting that the type of unique credit terms "will not give rise to any inference of economic power in the credit market." \textit{United States Steel Corp. v. Fortner Enters., Inc.}, 429 U.S. 610, 622 (1977). I thank Professor Thomas Morgan for drawing my attention to \textit{Fortner}. His casebook, Thomas D. Morgan, Cases and Materials on Modern Antitrust Law and Its Origins (2d ed. 2001), discusses the opinions in \textit{Fortner I} and \textit{Fortner II} well. \\
\textsuperscript{73.} \textit{Id.} at 259-60. \\
\end{tabular}
refusal to deal with the plaintiff, which paralleled the other companies' refusal to deal with him, supported the inference that Cities Service was part of the conspiracy. The Supreme Court held that it did not, affirming the grant of Cities Service's motion for summary judgment. It noted that in the absence of contradictory evidence, the inference of conspiracy from the parallel-refusal-to-deal evidence would be reasonable. However, in light of the "overwhelming" evidence to the contrary concerning the divergence of Cities Service's business interests from those of the other oil companies and its lack of economic motive to partake in the conspiracy (Cities Service had no interests in foreign oil, whereas the other conspirators did), the "competing" inference of independent action was "much more plausible." The Court thus held that the inference of conspiracy as to Cities Service was unreasonable.

Such was the situation before Monsanto, which involved a defendant's motion for a directed verdict. At issue in Monsanto was whether one could reasonably infer a vertical price-fixing conspiracy from the sole fact that a manufacturer had terminated a distributor after other distributors had complained about the price cutting. The question was difficult because, under United States v. Colgate & Co., a manufacturer could legally set retail prices in advance and terminate noncompliant distributors, but, under Dr. Miles Medical Co. v. John D. Park & Sons Co., it was illegal for a manufacturer and distributor to set prices together in advance, and evidence of termination was consistent with both courses of conduct. As the Court recognized, particular care was required when determining whether to allow an inference of conspiracy because those terminations permitted by Colgate were often procompetitive when used to facilitate the

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74. Id. at 286.
75. Id. at 284-88.
76. Id. at 277.
77. Id. at 278-84 (discussing Cities Service's substantial fear of nationalization); id. at 279 ("Petitioner himself consistently argues that Cities' interests in this entire situation were directly opposed to those of the other defendants. The others had large supplies of foreign oil; Cities did not. The others allegedly were members of an international cartel to control foreign oil; Cities was not.").
78. Id. at 277, 285 (differentiating Poller v. Columbia Broadcasting System, 368 U.S. 464, 472-73 (1962)).
79. Id. at 287 ("Here [the plaintiff] is unable to point to any benefits to be obtained by Cities from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from Cities' 'parallel refusal to deal' does not logically follow." (citation omitted)).
81. Monsanto, 465 U.S. at 759.
83. 220 U.S. 373, 404-09 (1911).
adoption of non-price restraints that protected against "free riders,"84 and might be deterred by too lenient an evidentiary standard.85 To reduce this risk of deterrence from allowing the inference of conspiracy, the Court set forth the "tends to exclude" requirement:

[S]omething more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."86

The Court considered the "tends to exclude" standard necessary, because "[i]f an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded,"87 and the possibility of treble damages would cause an "irrational dislocation"88 in the market. Thus, the mere fact that a price-cutter was terminated was itself insufficient to allow an inference of conspiracy. Nevertheless, the Court held that the plaintiff's verdict was ultimately proper in light of "unambiguous" evidence of conspiracy in the form of a newsletter relating to price-level enforcement policies.89

Matsushita came two years later, building on Monsanto's foundation.90 Matsushita involved an alleged predatory pricing conspiracy among twenty-four Japanese electronics manufacturers, whereby the Japanese manufacturers were selling their products at high prices in Japan but pricing their American products low to drive certain American electronics manufacturers out of the market.91 Zenith, the plaintiff, had presented evidence of parallel actions by these firms, from which it claimed that a jury could infer the existence

84. Monsanto, 465 U.S. at 762-63 ("The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere." (citing Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977)).
85. Id. at 763 (stating how complaints about price-cutters are "natural" and "unavoidable" reactions by distributors to the activities of their rivals and discussing how lenient evidentiary standards might deter firms from adopting beneficial non-price restraints).
86. Id. at 764.
87. Id. at 763.
88. Id. at 764.
91. Id. at 577-78.
of a conspiracy.\textsuperscript{92} The district court granted the defendants' motion for summary judgment.\textsuperscript{93} The Third Circuit reversed as to twenty-one defendants, holding that Zenith had presented sufficient evidence of conspiracy.\textsuperscript{94} The Supreme Court reversed, mostly because it disagreed with the Third Circuit's application of the summary judgment standard to the facts.\textsuperscript{95}

The majority opinion is worth parsing in sequence, starting with its Section III. After first discussing general principles concerning what qualifies as a "genuine issue for trial," the Court immediately cited \textit{Cities Service} for the proposition "that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."\textsuperscript{96} Very shortly thereafter is the passage quoted in the introduction of this Article, recasting \textit{Monsanto}'s holding in terms of the relative plausibility of inferences and citing \textit{Cities Service} for additional support:

Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in \textit{[Monsanto]}, we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. \textit{[Monsanto; Cities Service.]} To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. \textit{[Monsanto.]} Respondents . . . must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. \textit{[Cities Service.]}\textsuperscript{97}

Section IV.A of the opinion discussed why predatory pricing schemes are implausible based on economic theory because predatory pricing is unlikely to work, especially costly when it fails, and

\textsuperscript{92} Id. at 580-81; see also Collins, supra note 43, at 496 n.20 (describing the evidence of parallel behavior).
\textsuperscript{95} Id.
\textsuperscript{96} Matsushita Elec. Indus. Co., 475 U.S. at 578.
\textsuperscript{97} Id. at 587-88 (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984); First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 280 (1968) (other internal citations omitted)); see also Collins, supra note 43, at 508 (discussing how Monsanto "never even mentioned the relative plausibility or consistency of the inferences").
therefore self-deterring.\(^9\) In Section IV.B, the opinion returned to *Monsanto*, this time emphasizing its deterrence concerns:

In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. Respondents ... seek to establish this conspiracy indirectly, through evidence ... of rebates and other price-cutting activities ... But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."\(^9\)

In Section V, the Court revisited the issue of economic implausibility, basing its decision not to permit the inference of conspiracy on lack of motive.\(^10\) Yet, in footnote twenty-one, the Court claimed that the "tends to exclude" standard applied to plausible allegations too:

We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. [*Monsanto*] establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.\(^10\)

Justice White's dissent critiqued this "confused" holding:

In a similar vein, the Court summarizes [*Monsanto*], as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . ." Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such


proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.102

He then discussed how the predatory pricing conspiracy might have been plausible if the Japanese companies favored growth over profit maximization.103

Perhaps heeding Justice White’s concerns, Kodak104 tried to clarify the situation; but Kodak was not a conspiracy case, so its effect was limited. Kodak involved eighteen independent service organizations (“ISOs”) alleging that Eastman Kodak had adopted policies to limit the availability of parts used to service its equipment.105 The ISOs alleged that through these policies, Kodak tied the sale of service for its equipment to the sale of parts, violating section 1.106 The principle issue concerned a tying law prerequisite: “whether a defendant’s lack of market power in the primary equipment market precludes—as a matter of law—the possibility of market power in derivative aftermarkets.”107 The district court held yes, granting Kodak's motion for summary judgment.108 The Ninth Circuit reversed.109 The Supreme Court affirmed the Ninth Circuit’s decision. In so affirming, the Kodak Court addressed Matsushita:

Because the defendants had every incentive not to engage in the alleged conduct... the Court found an “absence of any rational motive to conspire.” In that context, the Court determined that the plaintiffs’ theory of predatory pricing... was “speculative,” and was not “reasonable.” Accordingly, the Court held... that summary judgment would be appropriate [unless the plaintiffs] came forward with more persuasive evidence to support their theory.

The Court’s requirement in Matsushita that the plaintiffs’ claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did

102. Id. at 600-01 (White, J., dissenting) (footnotes omitted).
103. Id. at 604.
105. Id. at 455.
106. Id. at 459. There also was a section 2 (monopolization) claim.
107. Id. at 455.
108. Id. at 456.
109. Id.
not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.\(^{110}\)

The Court later rejected Kodak's argument that it was entitled to a presumption that it lacked aftermarket market power as a matter of law, reasoning that the plaintiffs' claims made "economic sense" when considering actual market conditions (such as the presence of switching costs that might have locked consumers into using Kodak equipment and to thus require Kodak service).\(^{111}\) According to the Court, the risk of deterring procompetitive conduct did not warrant a conclusive presumption that Kodak lacked aftermarket power as a matter of law in these circumstances, as

the facts in this case are just the opposite [of *Matsushita*]. The alleged conduct—higher service prices and market foreclosure—is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.\(^{112}\)

As the Court explained, Kodak's behavior was not sufficiently procompetitive on its face as to warrant limiting the range of permissible inferences at the summary judgment stage:

We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. *We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact.* In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment.\(^{113}\)

Justice Scalia dissented, disagreeing not with the majority's interpretation of *Matsushita*, but with the holding that tying arrangements were per se illegal. He claimed that the rule of reason should apply to aftermarket ties because they might serve various procompetitive functions.\(^{114}\)

*Kodak's* attempted clarification still left several questions open, such as: Where a competing inference of independent action exists, does a judge have to weigh that inference against the inference of

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110. *Id.* at 468.
111. *Id.* at 477-78 (citation omitted).
112. *Id.* at 478.
113. *Id.* at 479 (emphasis added).
114. *Id.* at 502 (Scalia, J., dissenting).
conspiracy? How is implausibility related to deterring procompetitive conduct? And, how are both implausibility and deterrence concerns related to reasonableness? Part II analyzes how post-Matsushita courts and commentators have responded.

II. INTERPRETING MATSUSHITA

In general, courts and commentators have interpreted Matsushita in three ways: (1) the “tends to exclude” requirement applies in all antitrust cases; (2) the “tends to exclude” requirement applies only when the sought inference is implausible; and (3) the “tends to exclude” requirement applies when there is a significant risk of deterring procompetitive conduct. Part II.A discusses each of these approaches in turn.

A. The Three Readings of Matsushita

1. Universal Applicability

The broadest reading of Matsushita would apply the “tends to exclude” requirement to all antitrust situations. It would commit judges to weighing\textsuperscript{115} the plausibility (or consistency) of inferences against one another at the summary judgment stage. Only if the judge believes the plaintiff’s inference to be more likely does the case go to the jury.\textsuperscript{116}

A literal reading of Matsushita supports this broad reading. Matsushita claims that “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case,”\textsuperscript{117} without qualifying the “a” to describe a particular subset of section 1 cases. Matsushita also plainly cites Monsanto for the proposition that equal inferential consistency does not suffice to defeat a motion for summary judgment.\textsuperscript{118} Furthermore, this reading makes sense of footnote twenty-one’s claim that inferences should be limited when the conspiratorial motive is plausible.\textsuperscript{119}

\textsuperscript{115} But see Duane, supra note 23, at 1557 (discussing two different models of weighing).
\textsuperscript{116} Riverview Inv., Inc. v. Ottawa Cmty. Improvement Corp., 899 F.2d 474, 483 (6th Cir. 1990).
\textsuperscript{118} But see supra note 97 and accompanying text (discussing how Monsanto does not really claim this).
\textsuperscript{119} Supra note 101 and accompanying text.
Some lower courts have adopted this reading, and it clearly is the focus of Justice White's Matsushita dissent. Several commentators, even the esteemed Phillip Areeda and Herbert Hovenkamp, have suggested the viability of this approach to Matsushita. Other times, however, it serves as the strawman against which commentators support “alternative” readings. This broad reading is often considered a strawman because of its obvious problems. For instance, it seems inconsistent with Kodak, which refused to presume the lack of aftermarket market power and stated that Matsushita did not dictate any inference limitation in that case. It also is probably inconsistent with Cities Service as well, as many lower courts refused to interpret Cities Service to require a judge to grant summary judgment “solely on the grounds that he thought the defendant’s inference was the more probable one.” Finally, this reading contradicts clear pronouncements outside the antitrust context that the jury should be responsible for weighing the evidence.

2. Implausibility

This reading applies the “tends to exclude” requirement when the inference sought is implausible, either because of the case’s specific facts (as in Cities Service) or theoretical implausibility (as with predatory pricing cases). It recognizes that although the circumstantial evidence may have been produced by both permissible

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120. E.g., Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 495 (2d Cir. 2004); The Corner Pocket v. Video Lottery Techs., Inc., 123 F.3d 1107, 1112 (8th Cir. 1997); Wallace v. Bank of Bartlett, 55 F.3d 1166, 1167-68 (6th Cir. 1995). My standard for adoption is citing Matsushita’s “tends to exclude” language without any qualifications on its applicability.

121. See supra text accompanying note 102.

122. VI Areeda and Hovenkamp, supra note 32, ¶ 1405 (claiming without qualification that “a conspiracy may not be found unless the evidence reasonably suggests that it is more likely than not”); see also Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 Geo. L.J. 1065 (1986) (discussing how Matsushita may mean this broad reading).


124. See supra note 112 and accompanying text.

125. Collins, supra note 43, at 502 (citing Serv. Merch. Co. v. Boyd Corp., 722 F.2d 945, 949 (1st Cir. 1983); AT&T v. Delta Communications Corp., 590 F.2d 100, 101 (5th Cir. 1978)). But see Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977) (citing First National Bank v. Cities Service Co., 391 U.S. 253 (1968), as establishing the proposition that a conspiracy may not be inferred unless “the circumstances... make the inference of rational, independent choice less attractive than that of concerted action”).


and impermissible behavior, the implausibility of the allegations makes the inference of illegal concerted action less likely to be true. The judge therefore requires stronger evidence than normally necessary to permit the inference.

This implausibility reading coheres with Cities Service's focus on lack of motive. Perhaps more importantly, it is consistent with how both Matsushita and Kodak state the "tends to exclude" requirement after discussing implausibility concerns.128 And, this reading accords with the Court's contemporaneous non-antitrust summary judgment pronouncements in Anderson v. Liberty Lobby, Inc., where the Court applied a heightened level of scrutiny at the summary judgment stage to a substantively implausible defamation case.129

Lower courts have applied this reading both within antitrust cases and non-antitrust ones, the most famous application being Judge Posner's opinion in In re High Fructose Corn Syrup Antitrust Litigation.132 Several commentators have embraced it as well.133 This reading, however, is incomplete. Matsushita's footnote twenty-one claims that the "tends to exclude" standard applies even when a plausible motive to conspire exists, which at least means that more than implausibility can trigger application of a heightened standard.

128. Supra text accompanying notes 96-97, 110.
129. Anderson, 477 U.S. at 249-52 (describing how defamation suits were substantively disfavored due to First Amendment protections provided to the investigative media under New York Times v. Sullivan, 376 U.S. 254 (1964)). Anderson involved a libel suit (concerning limited-purpose public figures) subject to New York Times v. Sullivan. Id. at 245. The main question of the case was whether the clear and convincing evidence requirement of New York Times must be considered by a court ruling on a motion for summary judgment. Id. at 247. The Court held that a heightened evidentiary standard did apply at the summary judgment stage. Id. at 252.
130. E.g., City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 568 n.29 (11th Cir. 1998); Ezzo's Invs., Inc. v. Royal Beauty Supply, Inc., 94 F.3d 1032, 1036 (6th Cir. 1996); Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987).
131. E.g., Adams v. Metiva, 31 F.3d 375, 382 (6th Cir. 1994); McLaughlin v. Liu, 849 F.2d 1205, 1207-09 (9th Cir. 1988); Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291, 293-94 (5th Cir. 1987).
132. 295 F.3d 651, 661 (7th Cir. 2002). Writing extra-judicially, Judge Posner has set forth thorough criteria for when a plaintiff's allegation of conspiracy does and does not make economic sense. See, e.g., Posner, supra note 37, at 69-100; see also infra Part VI (discussing Posner's work more thoroughly).
3. Deterring Procompetitive Conduct

This reading interprets the "tends to exclude" requirement as a precautionary measure. It focuses on how "any company engaged in the innocent conduct could not help but do the very thing which plaintiff suggested should be proof of illegal conduct." If the court allows an inference of illegal conduct from the observed behavior, companies will forego the innocent conduct out of fear of antitrust's treble damages remedy, hence deterring the innocent conduct. This reading limits the range of permissible inferences when the innocent conduct is procompetitive because the deterrence of that conduct causes overall societal loss, defeating the purposes of the Sherman Act. Stronger evidence is required to minimize these external effects.

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

This reading has surfaced in a Ninth Circuit opinion and in scholarship. Despite its strengths, it has technical, historical, and substantive problems. The technical problem is that neither Matsushita nor Kodak mentions deterring procompetitive conduct when introducing the "tends to exclude" requirement; both decisions only declare deterrence concerns later in the opinion. The historical problem is that previous summary judgment cases, such as Cities Service, did not discuss deterrence issues, even though inferences were limited there as well. The substantive problem is that there are many situations in which inferences should be limited even though the behavior is not procompetitive in the sense that Monsanto and

136. Issacharoff & Loewenstein, supra note 8, at 85.
137. In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990) ("We think that the key to the proper interpretation of Matsushita lies in the Court's emphasis on the dangers of permitting inferences from certain types of ambiguous evidence ... [and the] inference's possible anticompetitive side-effects."). Petroleum Products also requires that the defendant's conduct be consistent with other plausible motivations before inquiring into the deterrent effects. Id. at 440.
138. Collins, supra note 43, at 507-12. Collins, however, thinks that "the issues of deterrence and reasonableness are logically distinct," and therefore "a rule to avoid deterrent effects supplements ... the basic test that all inferences be reasonable." Id. at 509. I disagree, as I believe the amount of deterred procompetitive conduct affects which inferences are reasonable. See infra Part IV.B.2.
139. Supra text accompanying notes 96-97, 110.
Matsushita use the term, as I explain to be the case in oligopoly parallel pricing cases in Part V.

These three interrelated problems arise from reducing Matsushita to a unitary focus. For that reason, some courts and commentators have adopted an approach that integrated these elements. The Third Circuit limits inferences based on implausibility, deterrence concerns, and substantive law. So do William Schwarzer and Alan Hirsch. The problem, however, is that none of these sources explains why all these prongs are related to reasonableness. Thus, others seem reticent to follow.

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

B. The Three Considerations of Matsushita

In my view, the most accurate reading of the existing case law is that a judge should limit the range of permissible inferences at the summary judgment stage when:

140. In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004) ("[T]wo important circumstances underlying the Supreme Court’s decision in Matsushita [were] (1) [that] the plaintiffs' theory of conspiracy was implausible [and] (2) [that] permitting an inference of antitrust conspiracy in the circumstances ‘would have the effect of deterring significant procompetitive conduct.’") (quoting Petruzzi’s IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224, 1232 (3d Cir. 1993)); see also Intervest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 161-62 (3d Cir. 2003) (same); In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999) (same). Petruzzi’s discusses substantive law limitations directly after discussing what Matsushita requires. See Petruzzi's, 998 F.3d at 1232. Baby Food discusses substantive law limitations in an entirely different part of the opinion. See In re Baby Food, 166 F.3d at 128, 132-38. In an unpublished opinion, the Fourth Circuit also appears to take this position. See Merck-Medco Managed Care, LLC v. Rite Aid Corp., No. 98-2847, 1999 WL 691840, at *6 (4th Cir. Sept. 7, 1999).

141. Schwarzer & Hirsch, supra note 24, at 7. It is reasonable to conclude from Kodak that, once an antitrust defendant moves beyond established substantive law principles that limit the range of permissible inferences and seeks summary judgment based on economic theory, the defendant ‘bears a substantial burden in showing that . . . despite evidence of increased prices and excluded competition, [plaintiff’s inference] of market power [drawn from defendant’s conduct] is unreasonable’ [because of the risk of deterring procompetitive conduct].

Id. (footnotes omitted). Implausibility concerns are part of these “established substantive law principles.”

142. Schwarzer and Hirsch primarily attempt to reconcile Kodak and Matsushita with non-antitrust summary judgment jurisprudence. See id. at 10-20.

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

144. As I describe infra, this reading of the case law may or may not be normatively desirable. This Article attempts to avoid the normative debate on the optimal summary judgment standard as much as possible. Rather, it attempts merely to explain why and how the case law developed as it did and discuss how a judge whose
(1) (Implausibility) the specific claim is factually implausible;

(2) (Deterrence) the observable business behavior under question appears “always or almost always to enhance competition”; and

(3) (Substantive Law) the substantive antitrust law governing this type of claim traditionally requires inferences to be limited.

Although these really are three types of considerations, it is easiest to think of each as its own prong in a three-part test: The implausibility prong is directed primarily at situations where some circumstantial evidence might cohere with either conspiratorial or independent behavior if considered by itself, but the facts, when taken as a whole, make the inference of conspiracy implausible. Cities Service is one example. The deterrence prong generally addresses situations where the defendants' behavior in a particular case would have occurred whether a conspiracy existed or not, but a need to limit inferences arises due to concerns about how allowing such influences in the particular case could affect the economy as a whole. As I explain in more detail below, the deterrence prong causes a judge to look to the frequency of how often the business behavior under question appears to be procompetitive: Inferences are only limited when the observable business behavior appears “always or almost always to enhance competition”—a threshold level of competitiveness. This prong encompasses what is generally referred to as “theoretical implausibility” because it is those very situations when the behavior appears always or almost always to enhance competition that theorists tend to posit that the alleged conspiracy is implausible. Finally, inferences are sometimes limited by the substantive requirements governing the relevant sub-area of antitrust law involved. For instance, in conscious parallelism cases, plaintiffs must produce evidence of certain plus factors in addition to evidence of parallel behavior to defeat a defendant's motion for summary judgment. The substantive law prong addresses all such substantive evidentiary requirements.

There is, of course, some pairwise overlap between the “prongs.” For instance, in conspiracy cases, deterrence concerns implicate the existence of factual implausibility because the observable conduct is unlikely to be part of a conspiracy when it appears “always or almost always to enhance competition” (2-1 overlap), and vice-versa, as “courts should not permit factfinders to infer conspiracies when such

The sole goal is fidelity to the case law would decide cases at the summary judgment stage. Some normative discussion is thus of course required because part of the reason the case law developed as it did was due to certain normative beliefs. But, I have tried to restrict my efforts in this Article to being descriptive of these normative elements and not independently weighing in on the matter. I leave it to the reader to judge how well this is accomplished.
inferences are implausible, because the effect of such practices is often to deter procompetitive conduct" (1-2 overlap). And, implausibility concerns bespeak substantive law limitations. Motive, for example, is a plus factor in conscious parallelism cases. Hence, limiting the range of permissible inferences because of the lack of motive can be interpreted either as applying the implausibility prong or applying the substantive law prong (1-3 overlap). Finally, there is significant overlap between the deterrence prong and the substantive law prong because the whole purpose of having a deterrence prong is to protect specific types of facially procompetitive behavior, which is usually reflected in how the rules governing certain sub-areas of antitrust law are designed (2-3 overlap). In fact, virtually every application of the first two prongs could be viewed as a substantive requirement of that sub-area of antitrust law, although not necessarily vice-versa.

Nevertheless, there are three advantages to keeping the three considerations separate as “prongs.” First, although significant overlap exists, there are some situations where only one consideration applies. As I display with oligopoly parallel pricing cases (a subset of conscious parallelism cases), the range of permissible inferences is substantively limited even though the underlying business behavior is not particularly desirable. As such, inferences are limited because of the substantive law considerations (3) but not deterrence concerns (2), and even when the alleged conspiracy is plausible in light of all the facts (1). Second, and less intuitive, this three-pronged formulation provides greater analytical clarity by differentiating between situations in which inferences are limited solely because of “consumer welfare” concerns and those that are not. As I have defined each aspect of my proposed approach, the implausibility prong tracks traditional summary judgment concerns; the deterrence prong tracks those concerns that have arisen anew due to advances in industrial organization scholarship and the “consumer welfare” narrative; and the substantive law prong tracks those limitations of each nomos, regardless of whether the nomos incorporates Chicago School concerns or not. Third, this three-pronged formulation is more adaptive in light of scholarly developments than a more conflated analysis. Many current scholars, for instance, dispute Matsushita’s conclusion that predatory pricing conspiracies actually are theoretically implausible. Nonetheless, these same critics seem to


agree that cutting prices is the very essence of competition and thus might be comfortable limiting inferences because of deterrence concerns, even when the alleged conspiracy is plausible in the case at hand.

Outlining the application of this three-part formulation to Cities Service, Monsanto, Matsushita, and Kodak will perhaps make its contours clearer. Cities Service is the paradigmatic example of when inferences would be limited because of implausibility concerns. There, one piece of evidence was consistent with both independent and conspiratorial behavior but the rest of the evidence did not support Cities Service’s participation in the conspiracy because it lacked motive. In Monsanto, inferences would be limited because of deterrence concerns. As the Monsanto Court admitted, the alleged conspiracy was plausible, but the range of permissible inferences from evidence of termination was limited nonetheless because of the risk of deterring Colgate-permitted, Sylvania-encouraged conduct. In Matsushita, inferences would certainly be limited because of deterrence concerns; application of the implausibility prong, however, would be more defendant-specific. As the Third Circuit explained, it appeared to be plausible from the facts that twenty-one of the defendants had engaged in a predatory pricing conspiracy. Although the Supreme Court did reverse the Third Circuit’s determination, the reversal was primarily because the Court believed predatory pricing conspiracies to be theoretically implausible. According to my three-pronged formulation, theoretical implausibility is treated differently from factual implausibility. The implausibility prong applies only when defendants can point to specific facts that make the existence of a conspiracy implausible. Theoretical implausibility, the notion that the conduct is unlikely to be part of a conspiracy because it appears to benefit the economy, is addressed under the deterrence prong. In Kodak, the range of permissible inferences would not be limited, as none of the various considerations would apply. Tying law has no inherent evidentiary limitations in that context; the allegation was plausible; and the observable conduct was not sufficiently procompetitive as to warrant the need to protect against deterrence.

Admittedly, even this explanation is confusing, especially for those not familiar with this area of antitrust law. It will hopefully be clearer

147. See supra notes 77-79 and accompanying text.
148. See supra notes 87-88 and accompanying text.
149. See supra note 94 and accompanying text.
150. See supra note 98 and accompanying text.
by the end of the Article, once Cover's metaphor of nomos and narrative is explained in more detail, and its application to antitrust is discussed more thoroughly. Part III begins that effort.

III. THE SUBSTANTIVE LAW NOMOS AND THE CONSUMER WELFARE NARRATIVE

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

A. The Original Nomos and Narrative

In Cover's view, societal cohabitation is a mix of "nomos," "narrative," and law. "Nomoi" are the many coexisting sub-groups within our society, each possessing alternative views of the past and visions of the future and each interacting with one another as part of our normative universe. "Narratives" are the understandings of normative texts and the historical experiences that the individuals within a nomos share and look to for moral guidance. And, "[l]aw...
may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.\textsuperscript{154}

More specifically, in Cover's model, there are “two corresponding ideal-typical patterns for combining corpus, discourse, and interpersonal commitment to form a nomos.”\textsuperscript{155} First, there is a “world-creating” pattern that he calls the “paideic” because the individuals share “(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.”\textsuperscript{156} Within a paideic nomos, individuals possess a strong, “shared sense of a revealed, transparent normative order.”\textsuperscript{157} Its creation is a form of “juridical mitosis.”\textsuperscript{158} Second, there is a “world-maintaining” pattern that he calls the “imperial,” in which “norms are universal and enforced by institutions,” and interpersonal commitments are weak.\textsuperscript{159} This pattern takes hold when the unity of a paideic nomos begins to collapse, and discord begins to develop, as a way to maintain coherence.\textsuperscript{160}

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their connections to possible and plausible states of affairs. It requires that one integrate not only the “is” and the “ought,” but the “is,” the “ought,” and the “what might be.” Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.

\textit{Id.} at 9-10. For instance, Cover describes how different Americans may view the Reconstruction Amendments differently:

All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance. And even were we to share some single authoritative account of the framing of the text even if we had a national history declared by law to be authoritative—we could not share the same account relating each of us as an individual to that history. Some of us would claim Frederick Douglass as a father, some Abraham Lincoln, and some Jefferson Davis. Choosing ancestry is a serious business with major implications.

\textit{Id.} at 17-18.

155. \textit{Id.} at 12.
156. \textit{Id.} at 12-13.
157. \textit{Id.} at 14, 16 (“The paideic is an etude on the theme of unity. Its primary psychological motif is attachment.”).
158. \textit{Id.} at 15.
159. \textit{Id.} at 13, 16 (“The imperial is an etude on the theme of diversity. Its primary psychological motif is separation.”).
160. \textit{See id.} at 15. As Cover so eloquently describes:

The diversity of every such world is being consumed from its onset by domination. Thus, as a meaning in a nomos disintegrates, we seek to rescue it—to maintain some coherence in the awesome proliferation of meaning lost as it is created—by unleashing upon the fertile but weakly organized

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

To illustrate "the [c]ompetition [b]etween [i]nsular and [r]edemptive [m]odels," Cover contrasted two antislavery variants before the Civil War. On one hand, the "Garrison abolitionists" recognized not only the normative abhorrence of slavery, but also the constitutional protection of it, and therefore sought disengagement from participation in the state. This "disengagement did not entail physical or social insularity, but a radical insularity of the normative world alone." They sought not to "fit[] the Constitution into the jurisgenerative cells an organizing principle itself incapable of producing the normative meaning that is life and growth.

Id. at 16; see also id. (describing how, in the United States, "the social organization of legal precept has approximated the imperial ideal type..., while the social organization of the narratives that imbue those precepts with rich significance has approximated the paideic").

161. Id. at 10.

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

163. See id. at 34.

164. Id.

165. Id. at 35.

166. Id.

167. Id. at 36.
definition of a perfectionist community," but to resist and repudiate the Constitution. On the other hand, the “radical constitutionalists” such as Frederick Douglass sought to transform the interpretation of the Constitution such that no amendment was necessary. They "embraced a vision—a vision of an alternative world in which the entire order of American slavery would be without foundation in law," and attempted through narrative (particularly the guarantee from the Preamble of the Declaration of Independence to “form a more perfect union, establish justice, . . . and secure the blessings of liberty” and the structure of the Constitution) to alter the existing interpretations of various constitutional provisions as to hold slavery unconstitutional.

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

Until 1970, the IRS granted tax-exempt status to private schools under 501(c)(3) without regard to their racial admissions policies, and granted charitable deductions for contributions to such schools under section 170 of the Code. In 1971, the IRS introduced Revenue Ruling 71-447, which stated that both the courts and the IRS have long recognized that:

> [T]he statutory requirement of being “organized and operated exclusively for the religious, charitable, . . . or educational purposes” was intended to express the basic common law concept [of “charity”] . . . .

All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.

Based on the “national policy to discourage racial discrimination in education,” the IRS ruled that “a [private] school not having a racially nondiscriminatory policy as to students is not ‘charitable’ within the

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168. See id. at 36-37.
169. The Declaration of Independence pmb. (U.S. 1776).
170. See Cover, supra note 1, at 37-40.
173. Bob Jones, 461 U.S. at 577-78 & n.2. Section 170(a) allows deductions for certain “charitable contributions.” Section 170(c) defines charitable contribution as a gift “to or for the use of” an organization “operated exclusively for religious, charitable, . . . or educational purposes,” effectively tracking § 501(c)(3). Id. at 578 n.2.
common law concepts reflected in sections 170 and 501(c)(3) of the Code."  

The IRS's interpretation of the Code disqualified Bob Jones University from tax-exempt status because of the University's discriminatory policies, particularly its disciplinary rules prohibiting interracial dating and marriage.  

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

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

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

The Court assumes a position that places nothing at risk and from which the Court makes no interpretive gesture at all... The grand national travail against discrimination is given no normative status in

176. Id. at 580-81.  
177. Id. at 586. To support this statement, the Court looked to nineteenth century cases involving the charitable law of trusts, such as Perin v. Carey, 65 U.S. (24 How.) 465, 501 (1861), which stated that a public charitable use must be "consistent with local laws and public policy." Bob Jones, 461 U.S. at 588.  
179. Id. at 593-96.  
180. Cover, supra note 1, at 60-68.  
181. Id. at 64 (describing how the IRS interpretation substantially interfered with the "nomian insularity of a religious educational institution"); cf. id. at 26-33 (discussing how insular communities rightly coexist within a society).
the Court's opinion, save that it means the IRS was not wrong. The insular communities, the Mennonites and Amish, are rightly left to question the scope of the Court's decision: are we at the mercy of each public policy decision that is not wrong? If the public policy here has a special status, what is it?...

... The insular communities deserved better—they deserved a constitutional hedge against mere administration. And the minority community deserved more—it deserved a constitutional commitment to avoiding public subsidization of racism.\textsuperscript{182}

As did Cover, I do not know how to solve the struggle of civil rights versus religious freedom. But I believe his thoughts have utility nonetheless helping to understand the underlying tensions in similar struggles elsewhere. As I explain in the remainder of this part, antitrust, for instance, has its nomoi and its narratives too, into which Cover's work lends insight. In Part III.B, I focus on the "nomos" element to Cover's work, explaining how conscious parallelism cases are similar to the insular religious communities and occupy their own paideic nomos within antitrust. In Part III.C thereafter, I turn to the role of narrative in the development of the antitrust laws more generally, comparing the Chicago School of antitrust to the civil rights movement in Chicanos' attempt to transform the antitrust laws to redeem their vision of maximizing consumer welfare. Part III.C explains in particular that, like the "radical constitutionalists" before the Civil War and the civil rights proponents in \textit{Bob Jones}, these Chicago School scholars sought more than merely to influence the antitrust laws but to completely eliminate those economic policies and legal requirements that did not cohere with their vision of the antitrust laws. The rest of this Article then describes how these components came together in Matsushita, and the implications thereof.

B. The Conscious Parallelism Nomos

"Conscious parallelism" has no set definition. Most typically, individuals use the term "conscious parallelism" to describe oligopolistic price interdependence, which is the process "not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests."\textsuperscript{183} The situation is "interdependent" because each firm's price is based on the expectation that others will price their product equally.\textsuperscript{184} The industry's concentrated nature permits a firm to

\textsuperscript{182} \textit{Id.} at 66-67.


\textsuperscript{184} There is disagreement in the literature over whether interdependent pricing is an inherent feature of certain types of concentrated markets. \textit{Compare} VI Areeda &
monitor and react to its competitors' prices.\(^{185}\) Thus, parallel pricing may result in the oligopoly context even though no agreement exists. It is commonly considered independent, rather than conspiratorial, behavior.\(^{186}\)

But conscious parallelism can also describe other situations, such as when an oligopolist contends that his refusal to deal with a firm was made consciously parallel with other oligopolists (either independently or interdependently).\(^{187}\) This behavior is occasionally allowed because it might be in each firm's independent best interest to refrain from dealing with that firm. Such was the situation in the fountainhead conscious parallelism case, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, in which the Supreme Court in 1954 refused to overturn a jury verdict in favor of the defendants based solely on evidence of conscious parallelism.\(^{188}\)

Part III.B.1 describes the historical antecedents to *Theatre Enterprises* as well as that case itself. Part III.B.2 explains how antitrust and economics scholarship following *Theatre Enterprises* portended a change in its meaning, particularly as pertains to the so-called plus-factor requirement.

1. *Theatre Enterprises* and Its Antecedents

As is well recognized, "[m]odern judicial efforts to define the elements of a Section 1 agreement originated in four Supreme Court decisions issued during a fifteen-year period beginning in 1939 with *Interstate Circuit, Inc. v. United States*."\(^{189}\) It is less well understood, however, exactly what the cases meant at the time, for in each case the Court affirmed the district court's rejection of a motion for judgment notwithstanding the verdict, creating uncertainty as to the degree to


\[185.\] Prices may remain supracompetitive as an effect because if one firm cuts its price, the other firms can decrease their price to meet this price cut, thus making everyone worse off overall (and diminishing the incentive to reduce price initially). Peter Asch, *Industrial Organization and Antitrust Policy* 41-70 (rev. ed. 1983).

\[186.\] See Turner, supra note 184, at 672. Many factors affect the probative value of parallel pricing, such as whether the product is fungible. *E.g.*, Bendix Corp. v. Balax, Inc., 471 F.2d 149, 160 (7th Cir. 1972) (stating that parallel pricing lacks probative significance when the product is fungible).

\[187.\] Turner, supra note 184, at 678.


which the scope of these decisions was limited by their procedural posture. Indeed, one plausible account of the cases from this time period is that they simply represented broad deference to the original fact finder.

In *Interstate Circuit*, the Court upheld the district court’s finding that there was an illegal agreement by movie exhibitors to fix the prices to be charged for first-run films, for although the government did not produce any direct evidence of conspiracy, the Court noted how the inference of conspiracy was justified in the circumstances at hand given the “substantially unanimous action of the distributors.” 190

According to the Court:

[It taxed] credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance. 191

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

It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the *Sherman* Act. 192

The Court would reiterate such statements several years later in *American Tobacco Co. v. United States* 193 and *United States v. Paramount Pictures, Inc.* 194 In *American Tobacco*, as part of its review of conspiracy to monopolize charges under section 2, the Court declared that “[n]o formal agreement is necessary to constitute an

191. Id. at 223; see also VI Areeda & Hovenkamp, supra note 32, ¶ 1426 (“The Court’s reasoning boiled down to this: the trial judge was entitled to believe that the distributors exchanged views and coordinated their decisions with each other, although there was no direct proof.”).
192. Interstate Circuit, 306 U.S. at 226-27. This dicta arguably drew from a prior decision in which the Court upheld the trial court’s finding that retail lumber dealers had agreed that they would not buy from wholesalers who had sold directly to consumers in competition with retailers, allowing a conspiracy to be inferred from the dealers’ circulation among their members of lists of offending wholesalers because “the natural consequence of such action” was for the retailers to withhold their patronage. Eastern States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600, 609, 612 (1914).
194. 334 U.S. 131 (1948).
unlawful conspiracy."\textsuperscript{195} A finding of conspiracy was justified "[w]here the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."\textsuperscript{196} And, in Paramount Pictures, involving section 1 and section 2 claims, the Court described how "[i]t is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement."\textsuperscript{197}

Finally, Theatre Enterprises came in 1954.\textsuperscript{198} In that case, a plaintiff suburban Baltimore movie theater sought to show first-run movies, either exclusively or simultaneously with downtown theaters that had certain advantages in drawing power and promotion.\textsuperscript{199} Rival movie distributors all denied the plaintiff's request, with each at least cognizant of the other theaters' refusal as well.\textsuperscript{200} The plaintiff claimed that the denials were pursuant to a conspiracy.\textsuperscript{201} At the end of the trial, the case was submitted to a jury, which found no conspiracy. Both the Court of Appeals and the Supreme Court affirmed, rejecting the plaintiffs' claim that they were entitled to a directed verdict of conspiracy due to the parallel nature of the different theaters' refusal to deal with it. Notably, the Supreme Court explained:

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; [a footnote to an article by James Rahl] but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.\textsuperscript{202}

\textsuperscript{195} Am. Tobacco, 328 U.S. at 809.
\textsuperscript{196} Id. at 810; see also United States v. Masonite Corp., 316 U.S. 265, 275-76 (1942) (holding that a concerted agreement to fix prices existed where several competitors knowingly made unilateral agreements setting a minimum price with the same manufacturer, and relying on the dicta from Interstate Circuit).
\textsuperscript{197} Paramount Pictures, 334 U.S. at 142.
\textsuperscript{199} Id. at 539-40.
\textsuperscript{200} See id.; cf. id. at 541 (discussing the "conscious unanimity of action" by the theaters).
\textsuperscript{201} Id. at 538.
\textsuperscript{202} Id. at 540-41 & n.8 (citations omitted). The footnote cited James A. Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743 (1950). See infra notes 244-46 and accompanying text (describing Rahl's work and the significance of this citation).
The Court then held that the case was properly submitted to the jury because genuine factual issues were raised regarding whether individual business judgment motivated the defendant's conduct.\textsuperscript{203}

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

First, courts would characterize as concerted action interfirm coordination realized by means other than a direct exchange of assurances. Second, courts would allow agreements to be inferred by circumstantial proof suggesting that the challenged conduct more likely than not resulted from concerted action. Third, courts would not find an agreement where the plaintiff showed only that the defendants recognized their interdependence and simply mimicked their rivals' pricing moves.\textsuperscript{204}

It was uncertain, however, just how far these principles extended considering that, in each case, the Supreme Court sided with the district court. For instance, although it was acknowledged that a jury could infer an agreement from circumstantial evidence that suggested "that the challenged conduct more likely than not resulted from concerted action,\textsuperscript{205}" it was left completely unanswered whether one could reasonably infer an agreement from circumstantial proof of challenged conduct that was equally likely, or less likely than not, to have resulted from concerted action. Indeed, as John Heninger has observed, "[n]othing in the \textit{Theatre Enterprises} opinion suggests that a plaintiff's verdict returned on evidence of conscious parallelism alone \textit{must be set aside}. On the contrary, the \textit{Interstate Circuit/Theatre Enterprises} line of cases afforded a fact finder considerable free rein to infer conspiracies."\textsuperscript{206} Or, as one commentator from that era put it, "judges and juries \textit{were] occasionally . . . convinced by the explanations, and the Supreme Court \textit{showed] no disposition to interfere."\textsuperscript{207}

\textsuperscript{203} \textit{Theatre Enters., Inc.}, 346 U.S. at 542.


\textsuperscript{205} Id.

\textsuperscript{206} John R. Heninger, Note, \textit{The Evolving Summary Judgment Standard for Antitrust Conspiracy Cases}, 12 J. Corp. L. 503, 507 (1987) (emphases added); see also Stephen A. Nye, \textit{Can Conduct Oriented Enforcement Inhibit Conscious Parallelism?}, 44 A.B.A. Antitrust L.J. 206 (1975). \textit{But see VI Areeda & Hovenkamp, supra note 32, \S 1412(b) ("The noteworthy aspect of the Supreme Court's opinion \textit{in Theatre Enterprises] was that its tone suggested that the plaintiff's evidence was insufficient even to permit a jury finding of conspiracy, and that tone was very much at odds with the Court's earlier \textit{Interstate Circuit decision].")}.

\textsuperscript{207} Robert J. Levy, \textit{Some Thoughts on \textquotedblleft Antitrust Policy\textquotedblright and the Antitrust Community}, 45 Minn. L. Rev. 963, 979 (1961). As Levy explained, it was also "infrequent" for appellate courts to reverse a jury verdict on the basis of inferences drawn from circumstantial evidence of parallel conduct. \textit{See id. at 979 n.51.}
2. The Change in *Theatre Enterprises'* Generally Accepted Meaning

But simply to recite that this line of cases supported deference to the initial fact finder is not to tell the entire story. Over the next few decades, *Theatre Enterprises* gradually began to transform from "delineat[ing] one boundary of the problem: proof of consciously parallel action does not require a finding that such action is conspiratorial"208 to becoming the predominant citation for the notion that evidence of consciously parallel behavior was not by itself sufficient to defeat a defendant's motion of summary judgment.209 Or, as Cover might say, the narrative of conspiracy under section 1 changed in between the two decades before *Theatre Enterprises* and the next few decades thereafter, altering the interpretive framework in which circumstantial evidence of parallel business behavior, and thus *Theatre Enterprises*, was considered. Part III.B.2 describes that narrative progression, and in particular the ways in which different actors (economists, legal scholars, courts, government entities, etc.) contributed to its and *Theatre Enterprises*' corresponding conversion.

a. The Two Decades Before Theatre Enterprises: The Inevitable Perniciousness of Oligopolies

In the years following the New Deal, courts and scholars began to accept that "in many oligopolistic markets, fundamental structural features of the market determine[d] the way in which the market operate[d],"210 in particular with how several firms in an oligopoly, acting interdependently, could exert control over prices and the market to the detriment of smaller producers.211 With this realization, the paradigmatic image of conspirators transformed from groups of men in smoke-filled rooms hammering out an explicit agreement to sophisticated paramours using subtle and complex signals;212 and, the issue transformed from whether government intervention was required—everybody seemed to agree it was—to the avenue by which it should proceed: section 1 or section 2 of the Sherman Act, or section 5 of the Federal Trade Commission ("FTC") Act.213

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212. See, e.g., Walton Hamilton & Irene Till, *Antitrust in Action* 15 (photo. reprint 1974) (1940) ("The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.")
Following the New Deal, there was increasing disquietude with how oligopolistic industry structure decreased firm competitiveness. Prominent scholars, including Arthur Burns and Edward Chamberlin, expounded foundational components of what is now called "interdependence theory," focusing on how "[t]hese few sellers [in an oligopoly] instinctively collaborated to maintain the high prices and low output typical of classic[al] monopolies" through measures such as price leadership and price following; and, "[l]engthy TNEC [Temporary National Economic Committee] hearings [in 1940] and massive studies linked industrial concentration with the business inertia that foiled fiscal policies to stimulate economic health." These views, "[f]or a generation, ... propelled antitrust crusades against economic concentration, toward an ideal where political and economic pluralism converged." Hence, as Chamberlin explained:


218. Rowe, supra note 216, at 1560; see Adelman, supra note 211, at 1304 ("The underlying idea is that we are dealing with one and only one phenomenon, namely, control over prices, which is present to some extent everywhere, and excessive degrees of which may be socially objectionable. A decade ago, such a notion was almost completely absent from the law.").

219. As Bernard Sorkin, for instance, has explained:

Chamberlin's distinctive contribution to the theory of oligopoly is the proposition that each such producer, when rational and fully informed, must take account of his total influence upon the price, indirect as well as direct, if
Independence of the producers [in an oligopoly] and the pursuit of their self-interest are not sufficient to lower [the price level]. Only if the number is large enough to render negligible the effect of an adjustment by any one upon each of the others is the equilibrium price the purely competitive one.\textsuperscript{220}

In this light, a noncompetitive price level was seen as unavoidable in oligopolistic industries.

The inevitability of interdependent considerations by oligopolists created havoc in ascertaining whether an actual agreement existed—and, in particular, a non-written one. On the one hand, it was recognized that noncompetitive price levels were "often the result of independently pursued self-interest, without collusion of any sort."\textsuperscript{221} But, on the other hand, it was grasped that "the more the structure of a market conduces to restraint, and the fewer and less conspicuous the necessary collusive measures, the stronger is the drive to use them, and the harder they are to detect—especially when those 'conspiring' are (almost) unaware of the fact!"\textsuperscript{222} The upshot, at least with respect to finding an agreement, was threefold. First, the requirements of what might constitute a conspiratorial agreement were liberalized to include "independent actions taken in mutual awareness"\textsuperscript{223}—what Carl Kaysen famously called an "agreement to agree."\textsuperscript{224} Second,
because these "agreements to agree" left very little of a paper trail, circumstantial evidence to prove conspiracy became relied upon more heavily. Third, the fact finder's role increased because it had the ultimate responsibility of sorting through this newly-produced morass of circumstantial evidence to determine whether such an agreement existed.225

In addition to those changes, which affected conspiracy charges under both section 1 and section 2 of the Sherman Act, the specific effect of the "inevitable perniciousness" concern varied by section due to the different sorts of behavior addressed by, and remedies of, each context. Section 1 was concerned primarily with specific anticompetitive practices, such as the formation of a price-fixing agreement, and its remedies were directed generally toward stopping those practices, usually through the issuance of an injunction.226 Section 1 was therefore viewed as a sub-optimal vehicle to remedy the problem of oligopolistic interdependence both because its perceived inevitability made it hard to find specific practices to enjoin, and because the industrial organization and antitrust scholarship of the time did little to identify specific practices that tended to make an industry less competitive.227 In this sense, the perceived perniciousness and the inevitability of oligopolistic interdependence seemed, at least in theory, to "cancel each other out," and section 1

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225. See, e.g., Adelman, supra note 211, at 1323 ("Elements of control which may be as effective as they are subtle are built into the market and may operate almost independent of any conscious joining of policy.... We have no barometers of such control and few standards by which to distinguish desirable from undesirable forms."). Consider also the explanation of one contemporaneous commentator:

Since the mere 'fact' of uniformity, without more, cannot rationally give rise to any one inference in preference to another, it will not be probative by itself. But an examination of the setting in which the uniformity occurred, such as the duration and extent of uniformity, the progressiveness of the industry, and other indicia of competition or the lack of it, may well give rise to an inference of conspiracy or conscious parallelism.

Note, supra note 215, at 694.

226. See, e.g., Posner, Oligopoly, supra note 184, at 1590-91; cf. Mark R. Patterson, The Role of Power in the Rule of Reason, 68 Antitrust L.J. 429, 432 (2000) ("But the focus of the Court in Section 1 cases has always been on conduct rather than structure....").

227. As Herbert Hovenkamp has explained:

The monopolistic competition model [by Chamberlin]... was far more complicated and made it far more difficult to examine a particular business practice and proclaim it efficient or inefficient. For example, within that model product differentiation could increase consumer choice or encourage innovation; however, it could also be a mechanism by which large firms in concentrated industries avoided price competition with one another.

cases consequently remained firmly in the hands of the fact finder, particularly as to whether to infer an "agreement to agree." 228

Section 2, conversely, did not suffer from such theoretical problems, as it was concerned simply with the aggregation of monopoly power. A fairly common section 2 remedy was divestiture of assets and dissolution of the firms that comprised the monopoly. 229 At least theoretically, the perceived inevitability of the oligopolistic interdependence worked in favor of section 2's application because collaborative inevitability was all the more reason that the drastic remedy of divestiture and dissolution was required. Following the Second Circuit's opinion in United States v. Aluminum Co. of America ("Alcoa") 230 in 1945, which involved a one-firm monopoly, the government immediately turned its attention toward several industries in which a handful of firms jointly exercised monopoly power via an alleged conspiracy to monopolize. 231 The Supreme Court, in American Tobacco and Paramount Pictures, quickly endorsed this application of section 2, leading several prescient scholars, most famously Eugene Rostow, to prescribe to section 2 a very broad role in dismantling oligopolistic interdependence. 232 But, for practical

228. Appellate courts rarely reversed a jury verdict of conspiracy when the case was built on circumstantial evidence of parallel business conduct. See, e.g., Levy, supra note 207, at 979 n.51; cf., e.g., United States v. Sherman, 171 F.2d 619 (2d Cir. 1948). But this is not to say that every appellate court upheld lower court findings on whether there was a conspiracy. In a couple of high-profile cases involving the motion picture industry, the Third Circuit granted a j.n.o.v., holding that there was a conspiracy as a matter of law. See William Goldman Theatres Inc. v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945); Ball v. Paramount Pictures, Inc., 169 F.2d 317 (3d Cir. 1948). Conversely, the Eighth Circuit in Pevely Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), reversed a jury finding that there was a conspiracy, noting that:

In order to justify a jury in finding a verdict of guilty based entirely upon circumstantial evidence, the facts must not only be consistent with the guilt of the defendants, and each of the defendants, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence.

Id. at 367 (quoting the district court); see also id. at 368 (discussing how this rule follows from Chamberlin's work). Other circuits noted the Pevely Dairy approach, but usually found it less than compelling. See, e.g., C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 495-96 (9th Cir. 1952). For a contemporaneous account discussing how the Pevely Dairy "rule on the use of circumstantial evidence substitutes the judge for the jury in the process of drawing inferences from the evidence presented," despite the presence of some circuit court support, see Note, supra note 215, at 695 & n.83.

229. See, e.g., Posner, Oligopoly, supra note 184, at 1591.
232. See, e.g., May, supra note 13, at 53. In his pathbreaking work, Eugene Rostow explained how
reasons, most pertaining to the severity (and costs) of the dissolution remedy, the application of section 2 to oligopolistic industries remained limited to a few select targets, such as the tobacco and motion picture industries.

The most aggressive attempt to curtail parallel business conduct occurred in the context of section 5 of the FTC Act, a civil statute which prohibited “[u]nfair methods of competition in or affecting commerce.” In several actions in the late 1940s, the FTC initiated suits that were based, in part, on the notion that “conscious parallelism of action” in delivered pricing systems could, without more, lead to a conspiracy in violation of section 5. Of particular note were the Cement case and the Rigid Steel Conduit case. “The Cement case was the first attempt by the Commission to strike at delivered pricing on a theory of conspiracy.” Although much of the evidence pertained to the uniformity of prices and the joint use of a

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236. Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), aff’d per curiam sub nom. Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

delivered pricing method (with common knowledge of such use), there was also substantial direct evidence of conspiracy. A violation was found based on the totality of the evidence.\textsuperscript{238} Similarly, in the \textit{Rigid Steel Conduit} case, “the respondents were charged in two counts, one for conspiracy and the other for the common use, with common knowledge of such use, of a basing point system.”\textsuperscript{239} After a hearing, the Commission “discharged two of the respondents under the first count, but held them as violators under the second count and included them in the general cease and desist order.”\textsuperscript{240} The Seventh Circuit affirmed, and the Supreme Court later affirmed by an equally divided court with no opinions filed.\textsuperscript{241} Although neither of these cases created firm precedential support for the idea that conscious parallelism without more could suffice for violations of section 5 of the FTC Act, each case advanced that argument substantially. In the \textit{Cement} case, the Supreme Court stated in dicta that “[w]hile we hold that the Commission’s findings of combination were supported by evidence, that does not mean that existence of a ‘combination’ is an indispensable ingredient of an ‘unfair method of competition’ under the Trade Commission Act.”\textsuperscript{242} In the \textit{Rigid Steel Conduit} case, the Seventh Circuit explicitly noted that “the second count,” which for some respondents was the only applicable count, “did not rest upon an agreement or combination.”\textsuperscript{243} These developments in the FTC Act, however, did not have an analogous effect on the Sherman Act, for, as James Rahl observed in 1950, the “elevat[ion] [of] parallelism-without-collusion to respectable status [under the FTC Act] [made] a similar achievement under the

\textsuperscript{238} \textit{Cement Inst.}, 333 U.S. at 721-25.
\textsuperscript{239} Kittelle & Lamb, \textit{supra} note 234, at 233.
\textsuperscript{240} Rahl, \textit{supra} note 202, at 761.
\textsuperscript{241} \textit{Triangle Conduit}, 168 F.2d at 181. As Kittelle and Lamb have explained, the FTC coined the term “conscious parallelism of action” when discussing the \textit{Rigid Steel Conduit} case:

It would have been possible to describe this state of facts as a price conspiracy on the principle that, when a number of enterprises follow a parallel course of action in the knowledge and contemplation of the fact that all are acting alike, they have, in effect, formed an agreement. Instead of phrasing its charge in this way, the Commission chose to rely on the obvious fact that the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion, and, for this reason, the Commission treated the conscious parallelism of action as violation of the Federal Trade Commission Act.

Kittelle & Lamb, \textit{supra} note 234, at 228 (describing an FTC notice to the staff).
\textsuperscript{242} \textit{Cement Inst.}, 333 U.S. at 721 n.19 (citing FTC \textit{v.} Beech-Nut Packing Co., 257 U.S. 441, 455 (1922)).
\textsuperscript{243} \textit{Triangle Conduit}, 168 F.2d at 176; \textit{see also id.} at 179 (“And price uniformity especially if accompanied by an artificial price level not related to the supply and demand of a given commodity may be evidence from which an agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred.”).
Sherman Act more difficult.”244 Indeed, as part of its explanation in the Cement case, and its description of why section 5 of the FTC Act applied to the facts at hand, the Court observed that whereas a conspiracy or combination was required for a violation of section 1 of the Sherman Act,

individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an “unfair method of competition” prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as “unfair” which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained.245

As Rahl noted, the “implications” to the Cement and Rigid Steel Conduit cases were “clear, if tenuous: conspiracy and conscious parallelism are not legally the same thing... [even if they] may be from the point of view of economics and public policy.”246

Theatre Enterprises in 1954 seized on this understanding. Citing Rahl’s work in a footnote in the midst of its famous phrase that “[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; [the footnote] but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely,” it held that there was not necessarily a “concert of action” under section 1 of the Sherman Act even though there was a consciously parallel refusal to deal.247 Thus, the jury’s verdict that no Sherman Act conspiracy existed was upheld.248 Soon, though, the “conscious parallelism” narrative and Theatre Enterprises’ role within it would begin to change: first, in the parallel refusal-to-deal context, and second, in other contexts as well. This Article next focuses on the two decades following Theatre Enterprises, during which narrative change was restricted to the parallel refusal-to-deal context. It thereafter discusses how this narrative change expanded, after that time, into the parallel pricing context too.

244. Rahl, supra note 202, at 761.
246. Rahl, supra note 202, at 762.
248. Id. at 542.
b. The Two Decades After Theatre Enterprises: The Expansion of Structuralism and Increased Inevitability Concerns Within the Mainstream; Some Challenges from Chicago Scholars

In the mid-1950s and 1960s, the “structure-conduct-performance” model of economic analysis became increasingly accepted. That was especially so among “Harvard School” theorists who developed a “no fault monopolization” approach to the problems associated with oligopolistic interdependence under section 2 of the Sherman Act. In “the leading synthesis of antitrust law and economics of its time,” Kaysen and Turner’s Antitrust Policy, itself the product of a several year discussion among several preeminent legal scholars and economists, concluded that “[t]he principal defect of present antitrust law [was] its inability to cope with market power created by jointly acting oligopolists,” and that dissolution of oligopolistic industries was necessary even though these oligopolists were not necessarily guilty of any conduct that violated the Sherman Act. In subsequent highly influential work on conscious parallelism and joint monopolization, Turner further detailed the advantages of using section 2 to address the problem of interdependent pricing among oligopolists instead of section 1. In particular, he focused on how section 1 would be ineffective in curtailing interdependent pricing behavior because there was no practicable way to enjoin an oligopolist from considering its rivals’ reaction when making a pricing decision.

249. See, e.g., Oliver E. Williamson, Economics and Antitrust Enforcement: Transition Years, 17 Antitrust 61, 61 (Spring 2003). For examples of prominent scholarship from this time period, see Joe S. Bain, Industrial Organization (1959), and Edward S. Mason, Economic Concentration and the Monopoly Problem (1957).


251. Carl Kaysen & Donald F. Turner, Antitrust Policy: An Economic and Legal Analysis (1959); see Gavil et al., supra note 250, at 604 (describing its preeminence).

252. Kaysen & Turner, supra note 251, at xix n.11. “[M]embers of the group were Morris Adelman, Joe Bain, Robert Bishop, Robert Bowie, Kingman Brewster, David Cavers, Kermit Gordon, Lincoln Gordon, Carl Kaysen, John Linter, Edward Mason (chairman), Albert Sacks, Donald Trautman, and Donald Turner.” Id.

253. Id. at 110.

254. See id. at 110-19; see also Hovenkamp, supra note 250, at 920. Kaysen and Turner believed that additional legislation was required for although the firms jointly “possess[ed] substantial degrees of market power,” their conduct did not violate the Sherman Act. See Kaysen & Turner, supra note 251, at 110.

255. Turner, supra note 184.


257. Turner, supra note 184, at 669 (explaining how the only way interdependent pricing could be remedied is through having the courts act like “public-utility
These proposals by Turner and the other Harvard School theorists found their most mainstream acceptance in many legislative proposals of the day, including the White House Task Force Report on Antitrust Policy (the "Neal Report").

Despite this support for using section 2 to address the problems associated with oligopolistic interdependence instead of section 1, litigants continued to bring section 1 claims. In cases involving these claims, the circuit courts retained their general preference to let the juries sort out whether the observed parallel behavior resulted from a conspiracy, including "agreements to agree," or from independent decision making, especially when the case involved parallel pricing. The main exception, where summary procedures were deemed appropriate, occurred where the allegation of conspiracy was implausible in light of all the evidence. Often citing to Theatre Enterprises or Cities Service, a vast majority of courts in this period disposed of alleged parallel refusals on these grounds.

commissions," which is unreasonable). This remains the dominant view today. As then-Judge Breyer has previously explained:

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

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

258. See, e.g., Posner, supra note 37, at 101 & n.1.

259. For examples of cases involving parallel pricing that were allowed to be
submitted to the jury, see Moore v. Jas. H. Matthews & Co., 473 F.2d 328 (9th Cir.
1972); Esco Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965); Volasco Products
Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962); Pittsburgh Plate Glass
Co. v. United States, 260 F.2d 397 (4th Cir. 1958); Morton Salt Co. v. United States, 235
F.2d 573 (10th Cir. 1956); and National Lead Co. v. FTC, 227 F.2d 825 (7th Cir. 1955)
(discussing the FTC Act). But see Klein v. Am. Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963) (not allowing a vertical price-fixing case to be submitted to the jury); Indep.
Iron Works v. U.S. Steel Corp., 322 F.2d 656, 665 (9th Cir. 1963) (stating how "[s]imilarity of prices in the sale of standardized products such as the types of steel
involved in this suit will not alone make out a prima facie case of collusive price fixing
in violation of the Sherman Act" as well as the fact that the prices were not actually
uniform). This trend corresponds with the holding in Poller v. Columbia Broadcasting System, 368 U.S. 464, 472-73 (1962), that summary procedures were
inappropriate when motive plays a leading role.


261. For cases involving a horizontal or vertical parallel refusal to deal (at least on
certain terms) where summary procedures were deemed appropriate, see Dahl, Inc. v.
Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971); Norfolk Monument Co. v. Woodlawn
Memorial Gardens, Inc., 404 F.2d 1008 (4th Cir. 1968), rev'd 394 U.S. 700 (1969); Six
Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir.
1966); Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874 (1st Cir. 1966);
Naumkeag Theatres Co. v. New England Theatres Inc., 345 F.2d 910, 911-12 (1st Cir.
Despite the divergence in outcomes, courts rarely explained why evidence of conscious parallelism was less probative of conspiracy in the parallel refusal to deal context than in parallel pricing cases. Rather, they simply intimated that the result was compelled by precedent. But, two circuits did attempt to provide a slightly more detailed explanation than the rest. Latching onto some language from the Ninth Circuit's 1952 opinion in _C-O-Two Fire Equipment v. United States_, they explained that evidence of plus factors in addition to evidence of conscious parallelism was required to allow an inference of conspiracy in the refusal to deal context. None of these sources,

1674 (holding that the evidence did not support the existence of parallelism); and _Winchester Theatre Co. v. Paramount Film Distribution Corp._, 324 F.2d 652 (1st Cir. 1963). For cases involving a parallel refusal to deal where jury resolution was appropriate, see _Standard Oil Co. v. Moore_, 251 F.2d 188 (9th Cir. 1958). In the "middle" was _Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors_, Ltd., 416 F.2d 71 (9th Cir. 1969), where the Ninth Circuit said that "[c]onscious parallel action is indeed evidence which, with other evidence, may support a finding of conspiracy. But standing alone it is not enough," but then found there to be additional evidence allowing the inference of conspiracy. See id. at 84-85. For cases citing _Theatre Enterprises_, see _Seagram_, 416 F.2d at 85; _Ford Motor_, 361 F.2d at 880; _Naumkeag_, 345 F.2d at 912; and _Moore_, 251 F.2d at 211. For cases citing _Cities Service_, see _Dahl_, 448 F.2d at 19; _Seagram_, 416 F.2d at 85; and _Norfolk Monument_, 404 F.2d at 101. Most interesting was how courts in the parallel pricing context differed in their reliance on _Theatre Enterprises_ than did courts in the parallel refusal to deal context. Compare, for instance, the description of the _National Lead_ case (a price-fixing case) with that of the _Ford Motor Co._ case (a parallel refusal to deal case). In _National Lead_, the court stated that:

While parallel business behavior among competitors is not illegal _per se_, [citing _Theatre Enterprises_] we do not believe the protective mantle of "conscious parallelism" can clothe with immunity a system employed by substantially all members of an industry whereby all offer their products for sale at any given time and at any given point throughout the nation at identical prices, without regard to differences in shipping costs.

_Nat'l Lead Co._, 227 F.2d at 834 (citation omitted). In _Ford Motor Co._, the court said the following:

At this stage we would be slow to infer a horizontal conspiracy from evidence of parallelism in this non-price-fixing context. "Conscious parallelism" in business behavior has not yet been held to be _per se_ conspiratorial conduct. [_Theatre Enterprises._] This record offers nothing more to suggest a horizontal agreement among dealers.

_Ford Motor Co._, 361 F.2d at 891 (citation omitted).

262. 197 F.2d 489, 493, 497 (9th Cir. 1952) (describing the trial court's analysis).

263. _Naumkeag Theatres_, 345 F.2d at 911-12 ("Plaintiff's burden is to show that there was evidence warranting a finding of something additional from which a reasonable inference of conspiracy may be made, or, as it puts it, of conscious parallelism 'plus.'"). Additionally, in a case involving a refusal to sell cigarettes to the plaintiff, the Third Circuit stated:

In other cases utilizing the theory of conscious parallelism to find conspiracy, at least two of the following three circumstances are present: 'plus' factors such as those emphasized in the simple refusal to deal cases... parallelism of a much more elaborate and complex nature; a web of circumstantial evidence pointing very convincingly to the ultimate fact of agreement.

however, provided much guidance in terms of what these plus factors might be.

In addition, substantial dissent to this perspective of oligopolistic conduct began to emerge among several scholars later to be associated with the Chicago School of antitrust, namely George Stigler, Richard Posner, and Harold Demsetz. Stigler demonstrated the impediments to the formation and maintenance of cartel agreements, particularly how cartel members had incentives to try to undercut one another secretly. Posner, in a very famous article and subsequent book (the first edition of Antitrust Law built on Stigler's contributions and argued that oligopolistic interdependence was not inevitable but rather took many separate, complicit decisions and thus, without more, qualified as tacit collusion prohibited by section 1. Demsetz explored how large firms were highly profitable even in unconcentrated industries (likely from efficiencies). These works, at least by the mid-1970s, served not so much as to create a coherent position on oligopolistic behavior of their own as to destabilize the intellectual foundations of the prevalent "Harvard School" structuralist approach, calling into severe question its ways of looking at, and often condemning, certain behavior.

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264. Professor Thomas Morgan has termed the augmented skepticism about the Harvard structural approach (which is traditionally associated with the Chicago School) as the move from the "third" period of antitrust development to the "fourth" period of antitrust development. See Morgan, supra note 71, at 191-842 (describing how perspectives about market structure changed between 1940 to 1974 and thereafter).


266. Posner, Oligopoly, supra note 184.


As this Article explains, the Chicago critiques gained acceptance over the next thirty years. But, what resulted in conscious parallelism cases was not so much a “Chicago approach” as a “hybrid” of the Harvard and Chicago theories, whereby the general view remained that interdependent pricing was inevitable, but this was thought not to be worth antitrust concern. Thus, the Harvard view of the behavior persisted but not the Harvard solution. Instead, the plus-factor requirement gained hold, which was largely consistent with many of the Chicago critiques but hardly representative of any established Chicagoan perspective.

c. The Mid-1970s to Today: The Increasing Acceptance of the Plus-Factor Requirement

Starting in the mid-1970s, the search for plus factors to distinguish between conspiratorial and independent behavior gained increasing acceptance in all types of conscious parallelism cases, including parallel pricing cases. Although a large part of the expanding use of plus factors is fairly attributable to Matsushita itself—courts began to use evidence of plus factors as a way to satisfy Matsushita’s “tend to exclude” requirement—the expansion began much earlier in circuit court opinions, most prominently in Venzie Corp. v. United States Mineral Products Co. Below, I examine first Venzie and other cases from the mid-1970s to the 1980s. I then explain how Matsushita

270. As one modern influential textbook has explained:
A catalyzing event took place in 1974 in what came to be known as the Airlie House Conference. At the Airlie House meeting, critics of structuralism synthesized a developing literature that challenged the economic basis for deconcentration. The results of the conference and related research were widely seen as refuting major elements of structuralist oligopoly theory and discrediting deconcentration. [This] indirectly helped inject Chicago school views into the mainstream of antitrust analysis and thus helped foster a broader conservative redirection of antitrust.
Gavil et al., supra note 250, at 605 (citation omitted). Federal courts began citing this Chicago School work in the 1970s, and increasingly in the latter half of the decade. Westlaw searches as of January 27, 2005, reveal, for instance, that Posner’s article, Oligopoly and the Antitrust Laws: A Suggested Approach, supra note 184, and Stigler’s article, supra note 265, were only cited once, cumulatively, prior to the end of 1975, but, since January 1, 1976, Posner’s article has been cited fifteen times, and Stigler’s article has been cited seven times.

271. 521 F.2d 1309 (3d Cir. 1975). I focus here only on the circuit courts’ adoption of a plus factors approach. I do this for narrative convenience alone, as historical evidence indicates that other actors from this period treated oligopolistic behavior similarly. For instance, the Justice Department adopted a “facilitating practices” approach to oligopolistic conduct, see Memorandum from John H. Shenefield, Assistant Attorney General, Antitrust Division, to All Section and Field Office Chiefs and Senior Litigators, reprinted in 874 Antitrust & Trade Reg. Rep., at F-1 (1978), which, as commentators at the time noted, involved a straightforward application of well established legal principles with respect to unreasonable restraints and plus factors. See, e.g., Milton Handler, Antitrust—1978, 78 Colum. L. Rev. 1363, 1417-24 (1978).
altered the jurisprudential domain as regards the use of plus factors, especially in oligopoly parallel pricing cases.\textsuperscript{272}

i. Venzie and Its Immediate Postcursors

Although several earlier cases had stated that a conscious parallelism plaintiff had to present evidence of parallel business behavior plus additional evidence (sometimes referred to under the moniker “plus factors”), it was only in the Third Circuit’s 1975 opinion in Venzie (a parallel refusal to deal case) that this approach—a plus factors approach—really began to develop. As Venzie explained when describing why summary judgment for the defendant was appropriate:

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

The absence of action contrary to one’s economic interest renders consciously parallel business behavior “meaningless, and in no way indicates agreement . . . .” [Citing Turner’s article on Conscious Parallelism.]\textsuperscript{273}

A majority of the circuits soon followed this approach, often citing to Venzie, including a few price-fixing cases as well as parallel refusal to deal cases.\textsuperscript{274} More and more, these courts cited Theatre Enterprises

\textsuperscript{272} I later describe how some lower courts have potentially overinterpreted Matsushita’s application in parallel pricing cases, effectively requiring too much of plaintiffs at the summary judgment stage. See \textit{infra} Part V.


\textsuperscript{274} See Royal Drug Co. v. Group Life & Health Ins. Co., 737 F.2d 1433, 1437 (5th Cir. 1984) (vertical price-fixing); E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 139 & n.10 (2d Cir. 1984) (section 5 of the FTC Act; horizontal parallel pricing); Paul Kadar, Inc. v. Sony Corp. of Am., 694 F.2d 1017, 1027 n.27 (5th Cir. 1983) (parallel refusal to sell to plaintiff); Southway Theatres, Inc. v. Ga. Theatre Co., 672 F.2d 485, 494 n.10 (5th Cir. 1982) (parallel refusal to deal); Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1201 & n.3 (7th Cir. 1981) (horizontal price-fixing); \textit{In re Plywood Antitrust Litig.}, 655 F.2d 627, 634 (5th Cir. 1981) (horizontal price-fixing; looking to evidence of parallel pricing plus direct evidence of communication between high-level personnel on pricing policy but not using the moniker plus factors); Weit v. Cont’l Ill. Nat’l Bank & Trust Co., 641 F.2d 457, 462-63 (7th Cir. 1981) (horizontal price-fixing); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 208 (3d Cir. 1980) (parallel refusal to deal); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 114 (3d Cir. 1980) (vertical price-fixing); Program Eng’g, Inc. v.
only for the proposition that conscious parallelism is not equal to conspiracy.275

The reason why courts began to require plus factors tended to vary by the context. In parallel refusal to deal cases, the plus-factor requirement became a way to screen out when the inference of conspiracy was highly implausible in the case at hand because there were independent business justifications for the parallel decisions (such as in Theatre Enterprises itself)276—that is to say, interdependence played very little, if any, role in the decisions.277 But, in parallel pricing cases, particularly horizontal ones between oligopolists, the justification for the plus-factor requirement was not the implausibility of the conspiratorial inference as much as it was the non-remediability of the problem (Turner's concern). Indeed, as then-Judge Breyer explained well:

Courts have noted that the Sherman Act prohibits agreements, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under section 1 of the Sherman Act. . . . That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for "interdependent" pricing. How does one order a firm to

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275. See, e.g., Du Pont, 729 F.2d at 139 (“The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.”) (citing Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954)); Quality Auto Body, 660 F.2d at 1201 (same).

276. See, e.g., VI Areeda & Hovenkamp, supra note 32, ¶ 1412(b).

277. See Turner, supra note 184, at 681; see also Randall David Marks, Can Conspiracy Theory Solve the “Oligopoly Problem”? 145 Md. L. Rev. 387, 406 (1986) (“Despite its lack of discriminative value, the ‘against self-interest’ factor . . . [helps] screen out cases in which agreement cannot be present.”). Or, as Michael Blechman has explained:

It is relatively easy to say that if this “plus factor” [actions contrary to one’s economic interest] is not present—that is, if each firm would act in a given way regardless of whether its competitors acted in the same way—then the defendants’ actions are independent and no agreement may be inferred. That would be the case, for example, where each of several suppliers has its own legitimate business reason for not dealing with a particular customer.

Blechman, supra note 224, at 897. For more modern reasoning on this point, see VI Areeda & Hovenkamp, supra note 32, ¶¶ 1412(d), 1413(b).
set its prices without regard to the likely reactions of its competitors?278

Nevertheless, in both types of cases—parallel refusals to deal and parallel pricing—this imposition of a plus-factor requirement coincided nicely with the general non-interventionist approach of most Chicago School scholars.279

278. Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) (citing several cases, including Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987)). Notably, in Clamp-All Corp., then-Judge Breyer does not justify this requirement via Monsanto or Matsushita or implausibility concerns. See Apex Oil Co., 822 F.2d at 253-54. Apex Oil does, to be sure, cite Monsanto and Matsushita, but it explicitly dismisses their concerns with implausibility in the horizontal price-fixing context; rather, Apex Oil tests its logic on the Modern Home case and In re Plywood Antitrust Litigation. See id. at 253-54. Interestingly, during this time, evidence of interdependent decision making became much more probative of conspiracy in the parallel refusal to deal context than in the parallel pricing context. Compare id. at 253 (describing how proof of interdependent pricing among oligopolists did not suffice to raise an inference of a tacit agreement), with Modern Home, 513 F.2d at 110 (discussing how proof that the decisions were interdependent would have sufficed to “raise the inference of a tacit agreement to boycott”). There are two reasons for this divergence, one logical and one practical, both related to Turner. The logical reason was that interdependent oligopolist pricing better fit with “competitive norms” than interdependent decisions not to deal with a firm. Thus, interdependent pricing was more likely to result from seriatim pricing decisions by firms that merely took rivals’ likely reactions into its decision-making calculus, which were allowed, as opposed to “agreements to agree,” which were not. See Turner, supra note 184, at 662-66, 682, 684-704; cf. Bogosian, 561 F.2d at 447 (discussing how interdependent pricing is not necessarily related to collusion). The practical reason was that the Areeda & Turner treatise on antitrust law debuted in 1978, reproducing many of the arguments from Turner’s prior work. See, e.g., II Philip E. Areeda & Donald F. Turner, Antitrust Law ¶ 404(b)(1) (1978) (discussing why interdependent pricing among oligopolists was not probative of conspiracy). Many individuals relied on this treatise as an accurate statement of antitrust law. Another way to think of the difference, at least descriptively, is that parallel refusals to deal tended to be seen as being either concerted or completely independent. Thus, while courts were still predisposed to grant judgment in favor of the defendant when there was an independent decision for the refusal, they viewed “interdependent” decisions much more suspiciously. See Modern Home, 513 F.2d at 111. By contrast, courts adopted a much more nuanced view of parallel pricing. On the one hand, it was recognized that parallel pricing may have resulted simply from parallel cost structures and product qualities. See, e.g., Weit, 641 F.2d at 462-63; Bendix Corp. v. Balax, Inc., 471 F.2d 149, 160 (7th Cir. 1972). On the other hand, courts and commentators were also cognizant, due largely to Turner’s work, of how seriatim independent decisions, where each firm decided merely to be a price leader or a price follower, could also create a pricing equilibrium. See, e.g., VI Philip E. Areeda, Antitrust Law, ¶ 1425(d) (1986) (published Nov. 8, 1985) (describing how sequential parallelism could create a pricing equilibrium). Both of these outcomes were typically distinguished from a situation where there was a set agreement as to who would be a price leader and price follower and thus no independent decision making at all. See, e.g., id. ¶ 1402(b)(3).

279. See, e.g., Bork, supra note 98, at 178-197. As described above, Posner was more skeptical of interdependent pricing than many of his Chicago School contemporaries. See supra notes 250-52 and accompanying text. Posner’s view, while accepted by economists, was not very accepted by the courts. See Marks, supra note 277, at 399. This may very well be the result, in part, of an “historical accident: the Turner view won acceptance first.” Id. at 400.
The main difference among the circuit courts concerned exactly how plausible the inference of conspiracy had to be relative to that of independent conduct. The main view appeared to be that “when a plaintiff firm does show common action plus an appropriate ‘plus factor’ which may rationally indicate that defendants have expressly or impliedly committed themselves to a common course of action, it . . . earns its way to the jury.” The First, Fifth, and Ninth Circuits adopted this standard explicitly, while other circuits did so implicitly (by not addressing the level of proof required at the summary judgment stage while prior precedents indicated that the inference of conspiracy need only be reasonable). The Third, Seventh, and Eighth Circuits, however, indicated that the inference of conspiracy need be more attractive than that of independent behavior for the case to be submitted to the jury. But, even this difference was slightly illusory given that some courts applying a higher standard viewed the successful showing that a plus factor existed as sufficient.

281. See, e.g., Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1261 (9th Cir. 1983) (“Thus, in a case like the one before us, a plaintiff cannot overcome a motion for summary judgment without alleging sufficient facts to raise a reasonable inference of an illegal combination or conspiracy.”); Southway Theatres v. Ca. Theater Co., 672 F.2d 485, 415 (5th Cir. Unit B 1982) (“The ultimate inference that a conspiracy existed need not be more probable than the inference that the refusal to deal resulted from independent business judgment.”); Naumkeag Theatres Co. v. New England Theatres, Inc., 345 F.2d 910, 911-12 (1st Cir. 1965) (“Plaintiff’s burden is to show that there was evidence warranting a finding of something additional from which a reasonable inference of conspiracy may be made, or, as it puts it, of conscious parallelism ‘plus.’”).
283. See, e.g., Weit v. Continental Ill. Nat’l Bank & Trust Co., 641 F.2d 457, 463 (7th Cir. 1981) (“[W]hen the plaintiff . . . relies on circumstantial evidence alone, the inference of unlawful agreement rather than individual business judgment must be the compelling, if not exclusive, rational inference.”) (citing Pevely Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), which as I describe supra note 228, was anomalous for its time); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978) (“An inference of conspiracy is not warranted where the conduct is at least as consistent with legitimate business decisions by the distributor as with the planned exclusion of the plaintiffs.”); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977) (“[P]roof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action.”). But see Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733, 743 (8th Cir. 1982) (“[T]he elements of a conspiracy are rarely established through means other than circumstantial evidence, and summary judgment is only warranted when ‘the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided.’” (citations omitted)).
284. See, e.g., Bogosian, 561 F.2d at 446.
which was ultimately all that the remaining decisions of the time seemed to demand as well.

Left unanswered, however, was a pivotal question: Exactly how convinced did a court have to be that a plus factor existed as to allow the case to be submitted to the jury? That is to say, the ultimate inference at issue was whether one could infer a conspiracy, and for that ultimate inference courts required evidence of conscious parallelism and plus factors, and would allow a case to be submitted when plus factors were “established.” But that rule begged the question of what it took to establish a plus factor in the first place, as often the evidence establishing those plus factors, such as actions against self-interest, was circumstantial as well. Hence, establishing the existence of a plus factor required an inference too. It was only after *Matsushita* was decided that courts began to address what it took to establish the existence of a plus factor in the first place.

ii. *Monsanto* and *Matsushita*’s Influence on Conscious Parallelism Cases

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

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285. For a more detailed description of particular recent cases, see Werden, *supra* note 215, at 753-59.
286. See, e.g., Gavil et al., *supra* note 250, at 283.
287. Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1034 (8th Cir. 2000) (en banc) (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999)).
288. See, e.g., VI Areeda & Hovenkamp, *supra* note 32, ¶ 1412. Or, as Judge Gibson put the point in his *Blomkest* dissent: With *Monsanto* in mind, it is useful to distinguish between “plus factors” that establish a background making conspiracy [more] likely and “plus factors” that tend to exclude the possibility that the defendants acted without agreement. For instance, “motive to conspire” and “high level of interfirm communications,” are often cited as “plus factors” that tend to...
have turned their scrutiny to the requisite plausibility of the existence of a plus factor in the first place, often requiring circumstantial evidence that must "tend to exclude the possibility of independent behavior" to constitute a plus factor in the first place.\(^{289}\)

The third and fourth changes were especially significant in oligopoly parallel pricing cases. The third change was significant because the existence of certain plus factors such as "industry structure" and motive to conspire followed directly from the oligopolistic market structure and the incentives for joint pricing therein. Hence, the conclusion that these plus factors were only necessary shifted focus to whether the plaintiff had set forth sufficient evidence of other plus factors, such as actions against self-interest, which is often more difficult to prove. But this is exactly why the fourth change became especially pernicious for plaintiffs: Whereas conspiracy is hard to prove, "mere interdependence" is hard to disprove; because a firm

exclude the possibility that the defendants acted without agreement. For instance, "motive to conspire" and "high level of interfirm communications," are often cited as "plus factors" because they make conspiracy possible. Background facts showing a situation conducive to collusion do not tend to exclude the possibility of independent action, but they nevertheless form an essential foundation for a circumstantial case. In \([Matsushita]\), the Supreme Court held that a conspiracy case based on circumstantial evidence must be economically plausible. The background "plus factors" of market structure, motivation and opportunity play an important role in establishing such plausibility. Generally, these background "plus factors" are necessary but not sufficient to prove conspiracy.

On the other hand, acts that would be irrational or contrary to the defendant's economic interest if no conspiracy existed, but which would be rational if the alleged agreement existed, do tend to exclude the possibility of innocence.

\(Blomkest,\) 203 F.3d at 1043-44 (Gibson, J., dissenting) (citations omitted). Most courts have found actions contrary to self-interest to be sufficient. See, e.g., Williamson Oil Co. v. Philip Morris, USA, 346 F.3d 1287, 1310 (11th Cir. 2003) ("It is firmly established that actions that are contrary to an actor's economic interest constitute a plus factor that is sufficient to satisfy a price fixing plaintiff's burden in opposing a summary judgment motion."); Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999) ("[Actions against self-interest will consistently] tend to exclude the possibility of independent conduct."); Merck-Medco Managed Care, LLC v. Rite Aid Corp., No. 98-2847, 1999 WL 691840, at *10 (4th Cir. Sept. 7, 1999) ("Evidence of acts contrary to an alleged conspirator's economic interest is perhaps the strongest plus factor indicative of a conspiracy."). But see \(In re Flat Glass Antitrust Litig.,\) 385 F.3d 350, 360-61 (3d Cir. 2004) (holding that an "action against self-interest" is not a "sufficient" plus factor, arguing that actions against self-interest arise from merely interdependent behavior as well). Three examples of actions that are normally against self-interest are: "(a) the disclosure of otherwise confidential pricing information; (b) the uniform adoption of marketwide standard terms of sale, and (c) adherence by all firms in the market to a standard pricing policy contrary to market conditions." Thomas A. Piriano, Jr., \(Regulating Oligopoly Conduct Under the Antitrust Laws,\) 89 Minn. L. Rev. 9, 54 (2004).

\(^{289}\). See, e.g., \(Williamson Oil,\) 346 F.3d at 1311; VI Areeda & Hovenkamp, \(supra\) note 32, ¶ 1415(d) (describing how a business action must not only seem to be against self-interest but so compellingly against their self-interest as to make the inference of independent action implausible and citing cases).
may be acting toward an interdependent interest, raising the level of proof required to establish an action against self-interest has, in many cases, effectively shielded defendants from liability for oligopoly parallel pricing.

While some of these changes might simply be an indication of the natural refinement of the plus-factor requirement as courts become more comfortable with it, the overwhelmingly preponderant justification for these changes has to be seen as Monsanto and Matsushita's "tends to exclude" standard itself, for it was precisely this plus-factor evidence that usually provided that additional something that allowed the court to conclude that the evidence "tends to exclude" the possibility of independent conduct. This is especially so with respect to the third and fourth changes listed above, as almost every decision concluding either that (1) a plus factor has not been established or (2) that a plus factor has been established but is not sufficient to present a submissible case, have done so in the context of explaining why the "tends to exclude" standard has not been met.

Highly illustrative is the Eleventh Circuit's recent decision in Williamson Oil, an oligopoly parallel pricing case involving several tobacco companies. There, after citing how Monsanto and Matsushita require evidence "that tends to exclude the possibility" that the alleged conspirators acted independently, the court explained how to present a submissible case: a plaintiff had to demonstrate the "existence of one or more 'plus factors' that 'tends to exclude the"
possibility that the alleged conspirators acted independently.'

And, later in the opinion, the court explained how, because of *Monsanto* and *Matsushita*, the inference that a plus factor existed in the first place had to be more plausible than the inference than it did not; describing the action versus self-interest plus factor, the court said:

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

In Part V, I explain why this arguably represents a misreading of *Matsushita*, but here it is worth pointing out that the Eleventh Circuit does not seem to be alone in requiring a higher level of proof to establish the existence of a plus factor. Most of the other circuits appear, at least implicitly, to agree. Indeed, the only circuit to take a directly contrary position appears to be the Seventh Circuit, where a decision authored by Judge Posner holds that additional evidence of conspiracy is required at the summary judgment stage only when the plaintiff’s theory makes no economic sense.

C. The Consumer Welfare Narrative

While this change occurred in the conscious parallelism nomos, a broader transformation transpired in the antitrust laws more generally, particularly a narrowing of the liability rules, as augmenting “consumer welfare” became an increasingly important part of antitrust analysis in the late 1970s and 1980s. Part III.C.1 briefly describes that change, while Part III.C.2 turns to its consequent

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296. *Id.* at 1301.
297. *Id.* at 1310 (citation omitted) (emphasis added).
298. Piriano, *supra* note 288, at 28 (“Lower federal courts have decided simply to grant summary judgment to defendants when the evidence of conspiracy is evenly balanced, or is ambiguous.”); *id.* (citing Blomkest, 203 F.3d at 1035, 1051, as an example).
299. See, e.g., *In re* Citric Acid Litig., 191 F.3d 1090, 1102 (9th Cir. 1999); *In re* Baby Food Antitrust Litig., 166 F.3d 112, 133 (3d Cir. 1999). My standard for leaving the question unaddressed is stating the plus-factor requirement without elaborating on what is required to establish it in the first place.
300. *In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002). Judge Posner has taken this view extrajudicially as well. See, e.g., Posner, *supra* note 37, at 69-100.
ramifications for evidentiary rules as manifested in *Monsanto* and *Matsushita*.301

1. The Narrowing of Liability Rules Due to Consumer Welfare Concerns

The narrowing of liability rules is primarily exhibited in the movement away from per se liability (illegal once identified), and toward a more open-ended and permissive inquiry, in many different types of antitrust suits. By 1967, for instance, per se rules applied to horizontal price-fixing conspiracies,302 concerted refusals to deal,303 vertical price-fixing conspiracies,304 vertical non-price restraints,305 and tying arrangements.306 Even without any showing of actual market power, courts were willing to presume the behavior's anticompetitive effect. But by 1986, the situation was vastly different.307 In certain areas of law, per se rules still applied but the circumstances in which they did had been lessened greatly. Horizontal agreements that literally fixed prices were not per se illegal if the “[purpose and effects of the agreement] facially appear[ed] to be one that would [not] always or almost always tend to restrict competition,”308 or if the restraint is “essential if the product is to be available at all.”309 In concerted refusal to deal cases, the Court required the threshold determination whether the “concerted activity [is] characteristically likely to result in predominantly anticompetitive effects” or if it is designed to make markets more competitive before applying per se

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


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


308. Broad. Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 19-20 (1979) (excepting a “blanket license” from per se treatment because of its design to render markets more competitive). The Court there described how the term “price fixing,” as warrants per se liability, is a “term of art” that applies only after considerable judicial experience with a type of arrangement. *Id.* at 9.

liability. 310 In tying cases, the per se rule only applied if the defendant possessed a significant share of the tying product market. 311 But in other areas of the law, namely vertical non-price restraints, per se condemnation was eliminated altogether in favor of analysis under the rule of reason (where the restraint would be allowed if reasonable). 312

In each of these situations, the change from per se rules was largely motivated by concerns for "consumer welfare" and its common pseudonym "economic efficiency." 313 This is especially clear with respect to Sylvania and the Court's decision to analyze vertical non-price restraints under the rule of reason. There, in reversing application of the per se rule, the Court explained how vertical arrangements that reduce intrabrand competition might enhance interbrand competition through helping the manufacturer achieve certain distributional efficiencies (such as inducing retailers to invest labor and capital in unknown products, to provide promotional activities, to provide service and repair, and to control freeriders); 314 and that interbrand competition is the primary concern of the antitrust laws. 315 The Court did not deem the reduction in intrabrand
competition a problem because interbrand competition "provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." Rule of reason analysis was appropriate because only then would courts be able to assess the "relevant economic impact."

These increased concerns with "consumer welfare" and economic efficiency were largely, but not entirely, in response to Chicago School scholarship, which tended to view economic efficiency as the main, if not sole, goal of the antitrust laws. Indeed, in *Sylvania*, the Court relied heavily on Robert Bork's and Posner's work (as well as many other scholars) in discussing the "free-rider effect" and other competitive benefits to vertical non-price restraints, justifying the rule of reason approach to analyzing those restraints. In later cases cutting back on per se condemnation, this shift in *Sylvania* served as an important conceptual lodestar, as these courts would point to *Sylvania* as undercutting, if not displacing, prior assumptions. Thus,

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316. Id. 317. Id. at 56. 318. See, e.g., Gellhorn & Kovacic, supra note 189, at 156-222; Thomas A. Piriano, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685, 685-99 (1991). A critical reason why the Supreme Court accepted this scholarship in 1977, although resisting some of its conclusions previously, was the appointment by President Nixon of Justices amenable to that theory (Burger, Blackmun, Powell, and Rehnquist). Cf. infra note 326 (discussing some of these Justices' concern with how loose evidentiary rules potentially contributed to the existence of nuisance-value settlements). 319. See, e.g., Page, supra note 313, at 1243; see also Piriano, supra note 288, at 14 n.26 (discussing how Chicago School adherents "argue that antitrust enforcement should be concerned only with protecting consumers from the overcharging that can occur when firms gain an amount of market power that allows them to artificially restrain output" and that "antitrust policy need not consider social goals unrelated to such abuses of market power, such as the protection of small businesses or the fairness of the competitive process"). Chicagoans' analysis focused mainly on alleged exclusionary conduct. They tended to prefer per se legality for practices such as resale price maintenance, predatory pricing, and tying arrangements, see Judson, supra note 127, at 1242, and favored "little other than prosecuting plain vanilla cartels and mergers to monopoly." Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1701 (1986). To say that Chicago scholars have not gotten all they wanted is not to negate that they have caused a substantial change in antitrust law. Indeed, the whole point of Cover's work is that there are conflicting concerns that must be reconciled to serve as legitimate sources of authority. Thus, Chicago's inability to reform the antitrust laws completely is, to a degree, proof that there is a nomotic-narrative conflict deserving recognition.


although these cases did not adopt a rule of reason approach entirely,\textsuperscript{324} the redemptive features of \textit{Sylvania} and the Chicago scholarship it relied upon was apparent.

2. The Consequent Ramifications for Evidentiary Rules, Particularly Summary Judgment\textsuperscript{325}

The Court’s concern with “consumer welfare” did not end with narrowed liability rules. Consumer welfare considerations affected the development of evidentiary rules too, especially in those contexts where per se liability would attach once the fact finder found an agreement. In particular, the Court became cognizant of how “lenient” evidentiary rules, which allowed an agreement to be inferred from certain observable business behavior, could cause firms to forego that behavior, even if it was actually part of a procompetitive course of conduct. “Stricter” evidentiary rules, including restrictions on when an agreement could permissibly be inferred from circumstantial evidence, were therefore needed to reduce the risk that procompetitive conduct would be deterred.\textsuperscript{326}

\textsuperscript{324} See \textit{Jefferson Parish}, 466 U.S. at 15-16 (requiring certain threshold factors to be established before the per se rule against tying arrangement applies); \textit{BMI}, 441 U.S. at 9 (looking to the history and effect of a restraint that literally fixes prices before the per se rule against price-fixing applies).

\textsuperscript{325} See generally Calkins, supra note 122 (discussing the equilibrating tendencies of summary judgment, treble damages, and substantive developments in antitrust law).

\textsuperscript{326} Another contemporary concern was that loose evidentiary rules helped plaintiffs bring frivolous claims solely to extort a “nuisance settlement.” See, e.g., \textit{Reiter v. Sonotone Corp.}, 442 U.S. 330, 345 (1979) (“District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions.”); \textit{cf.} \textit{Harlow v. Fitzgerald}, 457 U.S. 800, 819-20 n.35 (1982) (“Insufficient lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and ‘firm application of the Federal Rules of Civil Procedure’ is fully warranted in such cases.” (citation omitted)); \textit{Herbert v. Lando}, 441 U.S. 153, 180 n.4 (1979) (Powell, J., concurring) (“In some instances, it might be appropriate for the district court to delay enforcing a discovery demand, in the hope that the resolution of issues through summary judgment or other developments in discovery might reduce the need for the material demanded.”); \textit{ACF Indus., Inc. v. EEOC}, 439 U.S. 1081, 1086-88 (1979) (Powell, J., dissenting from denial of certiorari)
Monsanto is illustrative. At issue, as described above, was whether a conspiracy could be inferred from evidence of a termination of a price-cutter, when that termination might have been unilateral conduct, which was permitted by Colgate, or part of a resale price maintenance conspiracy, which was per se illegal under Dr. Miles. Recognizing that Colgate-permitted terminations could be used to enforce a procompetitive non-price restraint protected by Sylvania, and that no manufacturer would adopt such a non-price restraint if it risked treble damages in ensuring its compliance, the Court adopted the "tends to exclude" standard, noting that it was necessary to limit the range of permissible inferences from the ambiguous evidence of termination to prevent procompetitive conduct from being deterred.

Matsushita represented an extension of the same sort of concern, as the Court there limited inferences as a way to protect price-cutting conduct, which unlike the vertical non-price restraints in Sylvania that were merely checked by interbrand competition, was the "essence" of interbrand competition itself. In Matsushita, the Court noted how predatory pricing conspiracies were substantively disfavored in much of the scholarship and the lower courts, as they were self-deterring because of the implausibility of recouping lost profits. In

(commenting upon how widespread discovery abuse has become a prime cause of delay and expense in civil litigation). Indeed, "[p]olling data demonstrates clearly that the popular perception of the character and the ethics of American lawyers, and the prestige of the profession, have plunged precipitously since the 1970s." Michael Asimow, Bad Lawyers in the Movies, 24 Nova L. Rev. 533, 536 (2000). The existence of discovery abuses and claims brought solely to extort a nuisance-value settlement surely contributed to this growing public distrust of lawyers.

327. See supra notes 82-83 and accompanying text.

328. As Monsanto explained:

[I]t is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that "freeriders" do not interfere.


329. Id. at 763. Similar concerns arose in the Fortner remand in 1977. See United States Steel Corp. v. Fortner Enter., Inc., 429 U.S 610 (1977). Although the defendants' unique credit arrangement was once the basis for a reversal of a grant of summary judgment in favor of the defendants (because it purportedly was a fact-based issue whether it led to market power over the provision of credit), see Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 506 (1969), the Court remarked in 1977 that it led to no inference of market power over the provision of credit whatsoever. Fortner, 429 U.S. at 621-23. For more on Fortner, see supra notes 66-71 and accompanying text.


332. Id. at 594-95 (citing Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983); Frank H. Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26 (1984)); see also Bork, supra note 98, at 149-55 (contending that predatory pricing
this context, the Court deemed mistaken inferences "especially costly, because they chill the very conduct the antitrust laws are designed to protect."333 Balanced against the concern of not punishing an implausible conspiracy, the Matsushita Court's deterrence concerns were substantially, "unusually," greater.334 Limiting the range of permissible inferences helped the Court encourage future low prices.

But Matsushita did not answer all the relevant deterrence-related questions; some things still needed clarification. After Matsushita, for instance, it was unclear just how often the observable business behavior had to be procompetitive to "trigger" inference limitation, for while the Matsushita opinion described the "unusualness" of the predatory pricing situation, it never provided a lower "procompetitiveness" bound on when deterrence concerns were applicable.335

Kodak, however, did. As the Court explained in that decision, deterrence concerns did not apply when the alleged behavior merely was generally more procompetitive than anticompetitive: "We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects."336 Rather, the Court stated that deterrence concerns only required inference limitation when the observed behavior was almost invariably more procompetitive than anticompetitive, "one that appears always or almost always to enhance competition."337 Thus, as Figure A demonstrates below, envisioning a procompetitiveness spectrum based on how frequently the observed behavior appeared to enhance competition, and only providing protection to that conduct at

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schemes are rarely tried, and even more rarely successful); Easterbrook, supra note 98, at 268 (same). The Court would expand on predatory pricing's inherent implausibility in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

333. Matsushita Elec. Indus. Co., 475 U.S. at 594. The Court went on to quote Barry Wright Corp.: "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." Id.

334. Id.

335. Herbert Hovenkamp has put the point well: Matsushita spoke in the context of a highly improbable twenty-year-long predatory pricing conspiracy and required high-quality evidence to permit such a conspiracy to be presented to a jury.... However, Matsushita itself said little about proof requirements in a case where underlying structural evidence indicates that the offense is quite plausible and would be profitable for the defendants. Hovenkamp, supra note 250, at 925-26.


337. Id. This "always or almost always" language paralleled the Court's language in BMI. See supra text accompanying note 308. Just as the exception to the per se condemnation of horizontal price-fixing conspiracies was very narrow and contextually specific in BMI, so is Kodak's clarification of when deterrence concerns necessitate inference limitation.
the upper end of the spectrum. As the Court explained, not only is this vastly-more-often-procompetitive behavior not illegal, it is the "very conduct the antitrust laws are designed to protect." The "facially anticompetitive" behavior of higher service prices and market foreclosure of that case simply did not qualify.

**FIGURE A (FACIAL PROCOMPETITIVENESS)**

![Figure A](image)

But even *Kodak* did not answer all the questions that *Matsushita*, and the change that preceded it, unleashed on antitrust. Indeed, *Kodak* arguably left some of the most important questions unanswered, such as whether consumer welfare is the sole goal of the antitrust laws, or whether some other values retain importance, and, if the latter, whether those values important enough relative to consumer welfare are such that efficiency considerations (including deterrence concerns) should be subjugated in the case at hand.

Because *Kodak* chose not to grapple with these issues—that is, to come to grips with the "redemptive" attributes of *Monsanto*, *Matsushita*, and the rest of the consumer welfare narrative—the lower courts have had to struggle with these issues themselves. The result has been a split with courts relying on *Matsushita* if they believe it and its deterrence concerns to have overwritten the rest of antitrust but relying on *Kodak* if not.

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339. *Id.*

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

341. See *supra* note 28 and accompanying text.
In no sub-area of cases is this confusion more self-evident than in conscious parallelism cases. Part III.D explains what *Matsushita* and *Kodak* appear to require in those cases. Part IV discusses how and why these requirements cohere with the notion that a case is submissible when the sought inference is "reasonable."

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

The extent of inference limitation from circumstantial evidence at the summary judgment stage in conscious parallelism cases depends on the type of conspiracy being alleged. In situations involving vertical relationships, the situation will likely be analogous to *Monsanto*, where the observed behavior may well be procompetitive. In these situations, deterrence concerns will necessitate inference limitation. But, on the other hand, in the standard oligopoly parallel pricing case, efficiency concerns (and the "consumer welfare narrative") should have no effect on what evidence should suffice to present a submissible case. As then-Judge Breyer noted, supracompetitive parallel pricing is not desirable. Thus, deterrence concerns play no role (as Figure B indicates below). And, specific factual situations aside, a conspiracy in these situations is not theoretically implausible (unlike the predatory pricing scheme in *Matsushita*). Therefore, in oligopoly parallel pricing cases, the amount of inference limitation is exactly the same as it was prior to *Matsushita* and *Kodak*.

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342. Today, people rarely consider vertical cases to raise issues of conscious parallelism, but historically they have. *See supra* notes 261, 274.

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


345. *Cf. In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 358 (3d Cir. 2004) ("Here, like in *Petruzzi's*, plaintiffs' theory of conspiracy—an agreement among oligopolists to fix prices at a supracompetitive level—makes perfect economic sense. In addition, absent increases in marginal cost or demand, raising prices generally does not approximate—and cannot be mistaken as—competitive conduct."). Although the Third Circuit in *In re Flat Glass* pointed out "the absence of the *Matsushita* Court's concerns," it was more circumspect about whether inferences should be limited regardless, noting how "this Court and others have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists." *Id.*, but also how prominent commentators have criticized these cases as resting "at least in part as 'an unfortunate misinterpretation' of *Matsushita.*" *Id.* at 359 n.9 (citing Hovenkamp, *supra* note 250, at 925).
That conclusion, of course, does not mean that any possible evidence of conspiracy should suffice to present a submissible case. There is the plus-factor requirement: evidence of consciously parallel behavior must be supplemented with evidence of plus factors to get to the jury. But what it does mean is that *Matsushita* did not somehow bolster the plus-factor requirement relative to what it was beforehand. Moreover, *Matsushita* certainly did not augment the requisite persuasiveness of the circumstantial evidence needed to establish the existence of a plus factor in the first place.

An objector might question such a conclusion given how the Chicago School critiques played a considerable role in how the conscious parallelism nomos, and the plus-factor requirement, developed. The objection might go, if they served a previous role in how the nomos developed, why not incorporate the extension of such concerns in *Monsanto, Matsushita*, and *Kodak* back into the conscious parallelism nomos?

The response to this objector is that incorporating deterrence concerns in this manner would overapply those decisions. Prior to those decisions, the conscious parallelism nomos had already reached its own balance. Part of that balance was efficiency concerns, but there were other, practical considerations as well, such as the non-remediability of oligopoly parallel pricing (a Harvard view). To blanketly apply *Matsushita*’s “tends to exclude” standard without recognizing that (1) there was a prior balance that (2) had already incorporated the efficiency concerns to a degree is to ignore the struggles that led to that nomos’ creation and development and wreck

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346. As Turner explains, oligopoly parallel pricing “fits with competitive norms” and is consistent with rational profit-maximizing behavior as well as noncompetitive outcomes. Turner, *supra* note 184, at 662-66; *cf.* In re Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 444 (9th Cir. 1990) (“*Interdependent* pricing may often produce economic consequences that are comparable to those of classic cartels.”).

347. *See supra* Part III.B (discussing the development of the plus-factor requirement in conscious parallelism cases).
the equilibrium that that nomos had achieved without any real authority for doing so.

This damaged equilibrium, of course, is not the same problem that Cover faced. In Bob Jones, the issue at hand was the imposition of civil rights norms on a world whose existence denied those norms. Here, at least in the conscious parallelism nomos, there is no such contrast.

But I would like to suggest that to construe Cover's work as reaching that situation only is an overly narrow reading of his concerns, for very little of the struggle he describes seems to turn on the presence of diametric opposites. Rather, I see Cover to be concerned with the vanquishing of any group of people or set of beliefs in the name of mainstream values without the decisive normative battle needed to give such subjugation legitimate authority. In that regard, his thesis and metaphors are equally implicated when a mainstream concern destroys the equilibrium of one community of beliefs unjustifiably, as I believe has arguably occurred in certain conscious parallelism cases.

To be sure, calling an equilibrium "unauthorized" means only that the process for reaching it has been deficient. It does not mean that the new equilibrium is substantively worse. The new equilibrium may, for various reasons, be more substantively desirable to many by making the economy better off as a whole.

In Part V, I return to these issues in the context of oligopoly parallel pricing cases in particular. The next part, however, details how and why my understanding of the equilibrium set forth by Matsushita and Kodak coheres with Kodak's statement that "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." 348

IV. THE THREE CONSIDERATIONS OF MATSUSHITA

In Part II.B, I stated that my reading of the case law, including Matsushita and Kodak, indicates that a judge should limit the range of permissible inferences at the summary judgment stage when:

1. (Implausibility) the specific claim is factually implausible;

2. (Deterrence) the observable business behavior under question appears "always or almost always to enhance competition"; and

3. (Substantive Law) the substantive antitrust law governing this type of claim traditionally requires inferences to be limited.

This part elaborates on each of these considerations by explaining how they arise in the doctrine and how they affect the "reasonableness" of an inference at the summary judgment stage.

A. Implausibility

1. Within the Doctrine

Implausibility concerns date back in the antitrust case law to at least Cities Service. Matsushita clearly recognizes these concerns, as does Kodak. They also arise in non-antitrust cases.

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

Of course, if the current economic theories are valid, it follows that a theoretically implausible inference will be factually implausible as well. But validity is speculative at best. Indeed, that is a central

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349. See supra notes 72-79 and accompanying text.
350. See supra notes 96-98 and accompanying text.
351. See supra notes 110-11 and accompanying text.
352. See, e.g., supra notes 129, 131 and accompanying text.
353. See supra notes 77-79 and accompanying text.
354. See supra note 98 and accompanying text.
355. I base this conclusion on the abundance of evidence regarding cartelization in Japan, among other reasons. See, e.g., In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983) (discussing how keiretsus control channels of distribution in Japan as well as other ways the Japanese home market is sheltered from various forms of competition). Note, however, that the inference of conspiracy still might not be permitted due to deterrence concerns.
premise of Kodak. In that case, the Court was reticent to conclude that Kodak lacked market power in the service aftermarket simply because it lacked market power in the equipment market to begin with—a conclusion urged by contemporary economic theory on tying arrangements—preferring instead to look at “actual market realities.” Hence, it seems safe to say that the doctrine supports inference limitation when the inference is factually implausible, but theoretical implausibility is on much more tenuous ground.

2. The Legitimacy of Its Consideration

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

A tougher issue pertains to the legitimacy of a common variant of the implausibility inquiry, that the plaintiff’s allegation “makes economic sense” before allowing submission to the fact finder. Economic theory is the baseline for whether a particular allegation makes economic sense. The legitimacy of considering whether an allegation “makes economic sense” at the summary judgment stage therefore turns on the degree to which the applied economic theory is accepted. When an economic proposition is universally accepted, there is no harm in applying it; when it is radical, there is great harm; in between, the determination is more difficult. All this is to say is that economic theory, like any sort of theory, can play a role in interpreting the facts of a given case, including determinations whether a sought inference is likely to be accurate, but its utility in

359. See, e.g., supra note 300 and accompanying text.
such a role is limited by the apparent validity of the theory. Because theories are necessarily imperfect, so is the correlation between allegations that make "economic sense" and those that make actual sense, hence warranting, at the very least, added caution in relying on theory as the basis for summary procedures.\textsuperscript{361}

B. Deterrence

1. Within the Doctrine

As described in Part III, deterrence concerns are traceable to the augmented consumer welfare concerns that were present in \textit{Monsanto}\textsuperscript{362} and \textit{Matsushita}\textsuperscript{363} but not in \textit{Kodak}.\textsuperscript{364} Although deterrence concerns may be related to implausibility concerns,\textsuperscript{365} deterrence concerns are relevant regardless of whether the sought inference is implausible—hence \textit{Matsushita}'s admonition in footnote twenty-one that the "tends to exclude" standard applies even when the inference is plausible.\textsuperscript{366}

2. The Legitimacy of Its Consideration

Unlike implausibility concerns, deterrence concerns have very little to do with "case-internal reasonableness" and the accuracy of the sought inference in the case at hand. Rather, their focus is on how allowing the inference in the case at hand will affect future business behavior more generally, particularly situations where the presence of possible treble damage liability might cause a firm to refrain from certain procompetitive behavior that would have benefited society as a whole. This focus is more purposive: The antitrust laws are

\textsuperscript{360} This proposition is a central premise of \textit{Daubert}'s focus on relevance and reliability in determining whether expert testimony should be admitted. See \textit{Daubert} v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). But it must of course be recognized that the \textit{Daubert} standard, in particular the consideration of how well-accepted a theory need be, is much more lenient than a comparable consideration in the summary judgment context. Under \textit{Daubert}, the issue is merely whether certain testimony (and expert opinions) will aid the trier of fact and is therefore admissible. By contrast, in the summary judgment context, the issue is whether that evidence is so persuasive that resolution as a matter of law is warranted. Hence, situations may exist where an economic theory is sufficiently disputed that expert testimony based on that theory would be relevant and admissible under \textit{Daubert} but summary judgment would not be warranted.

\textsuperscript{361} See supra note 360.

\textsuperscript{362} See supra notes 86-89, 327-29 and accompanying text.

\textsuperscript{363} See supra notes 99-101, 332-34 and accompanying text.

\textsuperscript{364} See supra notes 112-13, 336-39 and accompanying text.

\textsuperscript{365} Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593 (1986) ("[C]ourts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.").

\textsuperscript{366} \textit{Id.} at 597 n.21 (citation omitted).
designed, at least in large part, to promote economic competition; deterrence concerns aid this purpose by limiting the realm of submissible cases to those whose submission aids the competitiveness of the economy as a whole. In that light, incorporating deterrence concerns into the summary judgment determination is "case-external reasonable" insofar as they help augment aggregate societal welfare.

Preventing deterrence, of course, is not the only aspect of promoting economic competition. Stopping violations of the antitrust laws, such as breaking up cartels, presumably will promote economic competition too, at least as long as the laws are economically well-founded. The issue therefore becomes finding a balance between preventing procompetitive behavior from being deterred and preventing violations from going unpunished, which the third sentence in the following aforementioned passage from *Kodak* explicitly recognizes:

> We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment.367

But this recognition only begins the legitimacy inquiry, for the question is how is that balance to be constructed. The second sentence above provides one attempted resolution: The "risk of deterring procompetitive behavior by proceeding to trial" only outweighs "the risk that illegal behavior will go unpunished" when the observable business behavior "appears always or almost always to enhance competition."368 *Kodak*, to be sure, does not unambiguously endorse that approach—the language allows the construction that observable business behavior that "appears always or almost always to enhance competition" may simply be one example of when a legal presumption is warranted in the absence of actual economic impact—but it is probably the best reading of the two sentences together, particularly the Court's use of the word "therefore."369 Moreover, such a reconciliation has several potential justifications. The first and foremost reason is that inference limitation is a blunt tool. Allowing a case to be submitted to the fact finder due to circumstantial evidence does not necessitate that the fact finder will draw the sought inference but merely permits it. Conversely, summary procedures deny fact

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368. *Id.*
369. *Id.*
finders that opportunity, which is costly because they are presumed
the best at drawing the correct inferences (hence why we have
designated fact finders), and is particularly costly when a violation
goes unpunished. The gains to using summary procedures therefore
have to be high enough to justify those costs. It is arguably only
where the observable business behavior appears “always or almost
always to enhance competition” that those stakes are met.

But that explanation still does not explain fully why an “always or
always to enhance competition” threshold is better than possible
alternatives. Two other reasons help that task. The first is
coherence with other aspects of antitrust law, as an “always or almost
always”-oriented standard also applies elsewhere in antitrust cases
involving truncated analysis, namely, to whether per se liability
attaches to alleged “price-fixing” arrangements, “group boycotts,”
and other types of agreements. The second is that an “appears

370. Daniel Collins, writing pre-Kodak, discusses how inferences should be limited
because of deterrence concerns when the defendant can
show... that anyone engaging in the innocent conduct he asserts actually
took place would be highly likely to perform the very behavior that is the
basis of the plaintiff's inference... He would thus be required to show, not
that innocence follows logically from this behavior, but rather that the
behavior follows causally from the innocence.

371. As the Court explained in BMI:

More generally, in characterizing this conduct under the per se
rule, our inquiry must focus on whether the effect and, here
because it tends to show effect, the purpose of the practice are to
threaten the proper operation of our predominantly free-market
economy—that is, whether the practice facially appears to be one
that would always or almost always tend to restrict competition
and decrease output, and in what portion of the market, or instead
one designed to “increase economic efficiency and render markets
more, rather than less, competitive.”

U.S. 284, 289-290 (1985) (“The decision to apply the per se rule turns on whether the
practice facially appears to be one that would always or almost always tend to restrict
competition and decrease output... or instead one designed to ‘increase economic
efficiency and render markets more, rather than less, competitive.'”)

373. FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 458-459 (1986) (“[W]e have been slow... to extend per se analysis to restraints imposed in the context of business
relationships where the economic impact of certain practices is not immediately
obvious” (citation omitted)). The reasons militating against the use of summary
procedures are of course different from the reasons militating against the use of per se
liability rules. The former are primarily concerned with accurately determining
always or almost always to enhance competition” threshold could also serve as a fairly reliable indicator of implausibility, for if the behavior appears to enhance competition today, that means that the anticompetitive payoff to such behavior, if there is one, must be at some point in the future. Potential uncertainties and difficulties involved with recouping current lost profits heavily mitigate against the prospect of such a long-term anticompetitive plan. Many allegedly theoretically implausible conspiracies, such as predatory pricing, could thus be disposed of on deterrence grounds even while admitting imperfections in existing scholarship.

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

C. Substantive Law

1. Within the Doctrine

Substantive law concerns derive in main part from the pre-Matsushita doctrine in each sub-area of antitrust law, such as the conscious parallelism nomos. Except as modified by the implausibility and deterrence concerns described above, they remain unaltered from what they were prior to Matsushita and Kodak.

The qualifier “in main part” is necessary because Monsanto and Matsushita arguably implicitly support certain aspects of substantive doctrine, thus providing independent justification for their consideration. Such is the case with the plus-factor requirement within the conscious parallelism nomos. If, for instance, one considers the establishment of a plus factor as evidence that “tends to exclude” the possibility of independent conduct, one could interpret the “tends whether an agreement exists, while the latter focuses on whether a particular business arrangement is helpful to the economy. But, at heart, these reasons are similar in that both are concerned with encouraging procompetitive business behavior.

374. These proponents might, for instance, favor a legal presumption based on deterrence concerns whenever the observable business behavior “usually” enhances competition.

375. See supra Part II.C (discussing the effect of the consumer welfare narrative).
to exclude” standard in Monsanto and Matsushita as justifying
the plus-factor requirement in conscious parallelism cases.

2. The Legitimacy of Its Consideration

The legitimacy of these concerns is indigenous to each type of case
and is oriented in the reasons that led to their adoption. For
evidentiary limitations that existed prior to Monsanto, Matsushita,
and Kodak, such as the plus-factor requirement, their legitimacy is rooted
in whatever inspired the limitation to begin with and not in those
decisions.376 In other words, their justifications existed prior to
Monsanto, Matsushita, and Kodak, and, except where inconsistent
with the implausibility and deterrence concerns described above, they
must stand or fall on their own force.

In sum, the doctrine answers many questions, but others persist.
The reason, in part, is because of the divergent ways in which different
individuals view the antitrust laws and optimal antitrust policy.
Subjective differences about which “inference[s] of conspiracy [are]
reasonable in light of the competing inferences of independent
action”377 will thus always remain.

But, it is the role of law to resolve, and thus transcend, such
differences—to, in Cover’s terms, serve as “a bridge linking a concept
of a reality to an imagined alternative.”378 And, in my view, the law—
Matsushita, as clarified by Kodak—sets forth a clear analytic
approach, entailing three types of considerations: implausibility,
deterrence, and substantive law. The next part provides a specific
example of how my proposed reading of Matsushita would apply in an
oligopoly parallel pricing case, focusing on the Eleventh Circuit’s
recent decision in Williamson Oil.379

V. OLIGOPOLY PARALLEL PRICING

Williamson Oil is, in many ways, representative of how modern
courts analyze oligopoly parallel pricing. The case involved a class
action among several hundred cigarette wholesalers who alleged that
the cigarette manufacturers conspired between 1993 and 2000 to fix
cigarette prices at unnaturally high levels, and that this collusion
resulted in wholesale list price overcharges of nearly $12 billion.380
The Eleventh Circuit ultimately decided that the plaintiffs had not set
forth sufficient evidence to present a submissible case, thus affirming

376. For the plus factor requirement, this is primarily the non-remediability
concern.
378. Cover, supra note 1, at 9.
379. Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).
380. Id. at 1291.
the district court’s grant of summary judgment in favor of the cigarette manufacturers.\textsuperscript{381}

Although the result might be correct, some of its reasoning was troubling. For instance, although the panel correctly recognized that evidence of consciously parallel pricing needed to be supplemented with evidence of plus factors to present a submissible case,\textsuperscript{382} it made this supplemental burden too tough. By reading too much into the “tends to exclude” standard of \textit{Matsushita} and \textit{Monsanto}, the panel inappropriately raised the level of proof required to establish the existence of a plus factor in the first place beyond what those cases required.

Using my formulation of \textit{Matsushita}’s three considerations, only the substantive law prong would apply to limit the range of permissible inferences at the summary judgment stage on the facts as cited by the \textit{Williamson Oil} court. The alleged price-fixing conspiracy was not factually implausible,\textsuperscript{383} and deterrence concerns did not apply as

\textsuperscript{381} Id.

\textsuperscript{382} See id. at 1301.

\textsuperscript{383} The alleged price-fixing conspiracy concerned wholesale prices after November 1993. In the tobacco industry, there are both premium brands and discount brands (and several variants). Prior to the early 1990s, there was intense price competition among the discount brands, leading to an increased price gap between the premium brands and the discount brands. See id. at 1291-92. This was to the detriment of certain premium-intensive manufacturers. \textit{Id.} On April 2, 1993, Philip Morris—a premium-intensive manufacturer—starkly cut the retail price of Marlboro cigarettes in a bold move known around the industry as “Marlboro Friday.” See \textit{id.} at 1292. This move set off a price war among the tobacco companies in the retail market, leading to decreased profits all around and drastically shifting market shares. \textit{See id.} In November, R.J. Reynolds Co. (an industry leader) increased the wholesale price among its premium and discount brands, which was followed by all its major competitors. \textit{See id.} at 1293. This initial RJR-led price increase was followed by eleven more parallel increases between May 4, 1995, and January 14, 2000. \textit{Id.} at 1294. The gap between premium and discount wholesale prices remained the same. \textit{See id.} Market shares also fluctuated less in this period than between 1991 and 1993. \textit{Id.} at 1296. According to the wholesaler class, many of these lockstep increases were contrary to the self-interest of non-premium intensive manufacturers except if they were acting collusively, because they could have profited more through further competition among discount brands. \textit{See id.} at 1294. The class also pointed to several instances in which some firms were in much stronger financial positions than others, such as following the settlement of health care litigation with numerous state attorney generals, but those firms chose not to exploit their relative strength and instead copied others’ behavior. \textit{See id.} Additionally, the class pointed to several devices allegedly used to facilitate collusion, such as: (1) the use of a “permanent allocation scheme” to signal the initial price increase, (2) the use of “credit memos” that would provide various manufacturers with time to match rivals’ prices, and (3) the use of a common consultant to exchange sales data by tracking shipments from manufacturers to wholesalers and from the wholesalers to retailers and provide reports to all of them regarding the shipments of its competitors. \textit{See id.} at 1294-96. The tobacco companies responded to these allegations by claiming that what occurred was mere oligopolistic interdependence and consciously parallel wholesaler pricing. \textit{Id.} at 1294-95. In particular, they pointed to the fact that although wholesale competition was minimal following 1993, retail competition was particularly intense. \textit{See id.} at 1294, 1297. They
supracompetitive pricing does not facially appear always or almost always to enhance competition. Thus, under my understanding of *Matsushita*, the only limitation on inferences are substantive law ones—the plus-factor requirement.

But that realization, of course, does not end the inquiry, for the plus-factor requirement has historically been susceptible to several variations, and modern incantations of it are often intermixed with discussions of *Monsanto*, *Matsushita*, and their concerns. It consequently is very difficult to say exactly what the plus-factor requirement is.

Nevertheless, I think three related guidelines can be discerned to govern the application of the plus-factor requirement, at least in horizontal supracompetitive price-fixing cases. The first guideline is that its application today in these situations should be the same today as it was before *Matsushita*. The second guideline is that although there was a divergence among pre-*Matsushita* decisions about exactly how persuasive the existence of a plus factor made a plaintiff's case, there was no heightened standard by which a plus factor needed to be established in the first place: The inference needed to establish the existence of a plus factor, such as an action against self-interest, only needed to be reasonable. The third guideline is that not all plus factors are equal. Some, such as motive to conspire, are necessary for the conspiratorial inference to be reasonable, but others, such as the action versus self-interest plus factor, are sufficient. Together, I

also pointed to the fact that cigarette prices were lower during most of the period than they were prior to Marlboro Friday and that market share fluctuated more than it had prior to 1991. See id. at 1297. They claimed that these fluctuations alone were evidence that no agreement existed. See id. Here, I express no opinion on the substantive merits of the litigation except to say that, if the evidence is viewed in the light most favorable to the wholesalers, the existence of a conspiracy is not sufficiently implausible to warrant inference limitation on that ground.

384. See supra Part III.B.

385. See supra Part III.B.2.c. The reason, I presume, is the longstanding belief that it is the domain of the ultimate fact finder to choose which inference to draw among the various reasonable inferences, especially where the motive and intent underlying actions play leading roles. Cf. Poller v. Columbia Broad. Sys., 368 U.S. 464, 473 (1962) (describing how the case should proceed to the fact finder unless conclusively disproved by pretrial discovery).

386. See, e.g., Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1043 (8th Cir. 2000) (en banc) (Gibson, J., dissenting). This is, of course, a dissenting opinion, but I believe it is borne out by the history of the conscious parallelism cases. Nevertheless, it is important to note that not all cases agree about what constitutes a “sufficient” plus-factor. In the Third Circuit’s recent opinion in *In re Flat Glass*, for instance, it explicitly rejected the proposition that an action against self-interest constituted a “sufficient” plus factor, arguing that actions against self-interest arise from merely interdependent behavior as well. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004). Rather, the *Flat Glass* panel believed that the most important evidence will generally be non-economic evidence “that there was an actual, manifest agreement not to compete.” That evidence may involve “customary indications of traditional conspiracy,” or “proof
interpret these three guidelines to mean that to present a submissible case a plaintiff needs only to set forth evidence that allows for a reasonable inference that all the necessary plus factors exist and at least one sufficient plus factor exists as well.\textsuperscript{387}

Although the court in \textit{Williamson Oil} abides by the third guideline, it violated the first two. First, it augmented the plus-factor requirement, explaining that, because of \textit{Matsushita} and \textit{Monsanto}, a plaintiff had to demonstrate the “existence of one or more plus factors that ‘tends to exclude the possibility that the alleged conspirators acted independently’”\textsuperscript{388} to present a submissible case (thus violating the first guideline described above).\textsuperscript{388} Second, the court therefore reasoned that, because of \textit{Monsanto} and \textit{Matsushita}, the inference that a plus factor existed in the first place had to be more plausible than the inference than it did not (thus violating the second guideline described above). Consider, as an example, its description of the action versus self-interest plus factor:

\begin{quote}
[W]e must exercise prudence in labeling a given action as being contrary to the actor’s economic interests, lest we be too quick to second-guess well-intentioned business judgments of all kinds. Accordingly, appellants must show more than that a particular action did not ultimately work to a manufacturer’s financial advantage. Instead, in the terms employed by \textit{Matsushita}, the action must “tend[,] to exclude the possibility of independent action.” Thus, if a benign explanation for the action is \textit{equally} or more plausible than a collusive explanation, the action cannot constitute a plus factor. Equipoise is not enough to take the case to the jury.\textsuperscript{389}
\end{quote}

But this passage ignores the fact that unlike the predatory pricing conspiracy in \textit{Matsushita}, the implausibility and deterrence concerns that led the Court to apply a heightened standard in that case is absent in horizontal supracompetitive price-fixing conspiracies. Although

\begin{quote}
that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.”
\end{quote}

\textit{Id.} at 361 (citations omitted).

387. For how evidence may be ambiguous as to whether an act is against a firm’s self-interest, consider the situation where a rival follows an initial actor even though that means less profits in the short run. As Areeda and Kaplow explain, this evidence may or may not be against the rival’s self-interest when firm behavior is interdependent: “Although rivals might profit more in the short run by leaving the initial actor to suffer the adverse consequences of unfollowed nonreversible action, they might follow in order not to dissuade each other from initiating moves that would increase industry profits when all do follow.” Phillip Areeda & Louis Kaplow, Antitrust Analysis \S\ 237(c) (5th ed. 1997). The dual plausibility would make evidence of this plus factor a “tie” at the summary judgment stage. The case should go to the jury because the firm’s intent in following the initial actor determines whether the conduct was in the firm’s best interest or part of a conspiracy.

388. \textit{Williamson Oil}, 346 F.3d at 1301.

389. \textit{Id.} at 1310 (citation omitted) (emphasis added).
there may be good reasons supporting such a heightened standard, such as the non-remediability of oligopoly parallel pricing, it is wrong to attribute that heightened standard to Matsushita instead of to those reasons directly.\footnote{390}

Of course, there remains the possibility that the balance of the oligopoly parallel pricing nomos has changed since Kodak was decided, and the result in Williamson Oil may cohere with that new equilibrium. A central goal of this Article has been to describe the evolutionary way in which precedents have been read as time has progressed and knowledge and experience have been accumulated. It thus may very well be the case that there are post-Kodak justifications for reading Matsushita and Kodak differently from how they were originally understood (such as widespread acquiescence to the take on those cases in the Areeda treatise).\footnote{391} The Third Circuit makes this very point in the recent In re Flat Glass Antitrust Litigation decision.\footnote{392}

But that sort of argument is very different from the one made by the Williamson Oil court, which feigned as if it were simply applying well established law.\footnote{393} Unfortunately, as this Article has attempted to demonstrate, it can hardly be said that there is such “established” law, much less that it compelled the approach that the Eleventh Circuit used in Williamson Oil.\footnote{394}

\footnote{390. See supra Part III.D; see also supra note 144 (describing how my reading of Matsushita may well not be optimal because there may be certain normative or practical reasons for over-reading Matsushita.)

391. Whether the balance of the nomos has changed since Kodak is an interesting question that warrants further inquiry. Here, I simply note that cases such as Williamson Oil and Blomkest, which granted summary judgment in favor of the defendant even in the face of evidence that was dually consistent with conspiratorial and interdependent behavior (such as a five-day “market-correction program” by the industry leader), see Blomkest, 203 F.3d at 1050 (Gibson, J., dissenting), and the continued predominance of the Areeda treatise, might support the existence of a changed nomos. But other cases, such as In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651 (7th Cir. 2002), cut the other way.

392. 385 F.3d 350, 358 (3rd Cir. 2004) (noting how “despite the absence of the Matsushita Court’s concerns, this Court and others have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists”) (citing, among other cases, Williamson Oil); see also id. at 360 (attributing this result to “a line of scholarship that started with Donald Turner in 1962 and continued in large part in Phillip Areeda’s influential antitrust treatise”).

393. See Williamson Oil, 346 F.3d at 1302.

394. Gregory Werden makes a similar critique. Stating that “[t]he Eleventh Circuit was right to affirm in the light of the plaintiffs’ evidence,” he found “some of the reasoning [to be] troubling.” Werden, supra note 215, at 758-59. But, instead of focusing on the action against self-interest plus factor, as this Article does, he concentrates on how the court improperly diminished the significance of information exchanges that plausibly facilitated the monitoring of the conspiracy merely because “there was also a ‘plausible’ innocent explanation.” Id. at 759; cf. id. (noting how “[t]he court appears to have held that evidence of pricing coordination facilitated by communications is insufficient to withstand summary judgment because oligopolists coordinate prices even without agreement”).}
In sum, barring any shift in the balance of the conscious parallelism nomos since Kodak was decided, the Williamson Oil court required too much from the plaintiffs to present a submissible case. If the court thought that the evidence of actions against self-interest really was equipoise, a position that is belied by the remainder of its analysis on the issue, the case should have proceeded to trial.

VI. COMPARISON TO POSNER

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

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

Posner argues that his approach "is consistent not only with the language of Section 1 of the Sherman Act but also with the Supreme

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395. See, e.g., Williamson Oil, 346 F.3d at 1311 (discussing how firms’ decision to follow the price increase was in each firm’s individual economic interests); id. at 1312 (describing how competition temporarily shifted from the wholesale to the retail level); id. (explaining why it made economic sense for firms “to shift the focus away from gaining market share for their discount brands and toward increasing profitability by concentrating on, and increasing prices of, the premiums”); id. (describing how there was large uncertainty by the industry leaders, Philip Morris and RJ Reynolds, whether a price increase would be followed).

396. Posner, supra note 37.

397. Id. at 51-100.

398. The seventeen indicators to identify which markets are conducive to collusion are: market concentrated on the selling side; no fringe of small sellers; inelastic demand at competitive price; entry takes a long time; buying side of market unconcentrated; standard product; nondurable product; principal firms sell at the same level in the chain of distribution; price competition more important than other forms of competition; high ratio fixed to variable costs; similar cost structures and production processes; demand static or declining over time; prices can be changed quickly; sealed bidding; market is local; cooperative practices; and the industry’s antitrust “record.” Id. at 69-79.

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

400. Id. at 94, 99.
Court's decisions, though it is certainly not compelled by them. He also laments the improper incorporation of the "tends to exclude" standard from Monsanto and Matsushita in many price-fixing cases, attributing the problem to various courts' tendencies to view interdependent pricing as independent, rather than tacitly collusive, behavior.

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

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

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

There are, however, three differences between my reading and his approach worth noting; two with our readings of the case law and one regarding why we believe some circuit courts are improperly extending Monsanto and Matsushita. Our reading of the case law differs in that Posner focuses only on the implausibility aspect of analysis at the summary judgment stage whereas I believe that deterrence and substantive law concerns also serve a role in the

401. Id. at 95.
402. As Judge Posner has stated:
The development of the law in this area has been handicapped by an unfortunate dictum in Monsanto Co. v. Spray-Rite Service Corp. that to survive a motion for summary judgment the plaintiff in a price-fixing case must present evidence that "tends to exclude the possibility of independent action" by the defendants. It is unusual to require a plaintiff as part of his burden of proof to prove a sweeping negative; but what makes the dictum especially unfortunate is the ambiguity of the term "independent action." Most courts mistakenly regard tacitly collusive behavior as independent and therefore infer from the dictum in Monsanto that the plaintiff must negate the possibility that supracompetitive pricing was achieved without explicit agreement. This produces the paradox that the more conducive the market's structure is to collusion without express communication, the weaker the plaintiff's case.
Id. at 99-100 (footnotes omitted); cf. id. at 55 (criticizing the view that interdependent pricing is a form of independent behavior and explaining that it really is a form of tacitly collusive behavior).
403. Id. at 100 (footnote omitted).
The main reason for this difference, I believe, is simply that our analyses have different purposes. Posner attempts to describe the optimal summary judgment approach for price-fixing cases that is consistent with Supreme Court precedent; I try to provide the most accurate parsing of the cases giving due regard to their history and context, which may or may not be normatively or economically optimal.

The more important difference between Posner's reading and my own involves explanation of why various circuit courts have overapplied the "tends to exclude" standard derived from Monsanto and Matsushita. In his view, the problem is simply that, following Turner, many courts tend to view interdependent pricing among oligopolists as independent behavior and thus not illegal without further proof of conspiracy. In my view, however, the problem is deeper. I also believe that certain courts' analyses have gone astray because of their improper incorporation of deterrence concerns in situations where they do not apply, at least according to the language in Kodak.

This difference is important because it is easy for courts and commentators to note the longstanding Turner/Posner debate on whether interdependent pricing should be construed as independent (Turner) or collusive (Posner), and conclude that, because the courts have sided with Turner on that underlying debate, there really is no confusion concerning the appropriate summary judgment standard today. Also affecting the current jurisprudential confusion is a very significant debate on just what sorts of business behavior the antitrust laws should seek to encourage and not deter.

Kodak suggests that only observable business behavior that appears "always or almost always to enhance competition" deserves protection against deterrence. But, as described above, reexamination of that proposition may be required in light of subsequent economic and jurisprudential developments. Until some sort of accord is reached on just what types of business behavior should be facilitated by the antitrust laws, the case law will almost certainly remain in disarray even if the Turner/Posner debate is resolved.

404. Posner thus never discusses Kodak and its role limiting when deterrence concerns apply at the summary judgment stage.
405. See Posner, supra note 37, at 94, 100.
406. Cf supra note 279 (describing how courts have been wary to follow Posner's views, despite their significant acceptance by economists because the Turner view "gained acceptance first").
408. See supra notes 391-92 and accompanying text.
CONCLUSION

A large amount of confusion surrounds the appropriate summary judgment standard today. A common consequence, especially in conspiracy cases, is that plaintiffs looking to Kodak's statement that "Matsushita "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases," feel blindsided when a court holds that equipoise is insufficient for a case to proceed to trial; and defendants, looking to Matsushita's plain language that "[t]o survive a motion for summary judgment... a plaintiff... must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently," are upset when equipoise is enough.

A large part of this confusion is due to oversimplification as to how the current summary judgment standard developed and how it relates to the traditional requirement that the sought inference must be "reasonable" before a case can proceed to trial. As this Article has attempted to explain, there is no simple explanation for either this history or which inferences qualify as "reasonable," as the current standard is a patchwork of competing considerations that have originated at different times and for different reasons, and which are viewed differently by different individuals. Far from being a constant through time, the appropriate standard has been quite Evolutionary, changing as individuals' ways of interpreting current and historical events have transformed through time as narratives have changed. It still remains to be seen, for instance, just what effect the narrative currently in vogue—the consumer welfare narrative—will have on future summary judgment disputes.

It has been the goal of this Article to enrich the debate by breaking through misperceptions of historical uniformity. But this step is only the beginning in deciding what the summary judgment standard should be, because history and precedent are only two elements of propriety. Highly significant as well are practical considerations (such as the potential non-remediability of oligopoly parallel pricing and the lamentable existence of "nuisance value settlements") and theoretical considerations (such as the relative importance of deterrence concerns in our antitrust regulatory regime and just what

409. Kodak, 504 U.S. at 468.
411. See supra note 326 (discussing the Court's concern in several cases with how lenient summary judgment standards might undesirably increase the "nuisance" value of a lawsuit). See generally Randy J. Kozel & David Rosenberg, Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment, 90 Va. L. Rev. 1849 (2004) (discussing how mandatory summary judgment could be used to mitigate the nuisance-value settlement problem). How the summary judgment standard affects plaintiffs' ability to bring frivolous claims brought solely to extort nuisance value settlements is a relevant factor when determining "case-external reasonableness."
types of business behavior should not be deterred). To address these issues, however, first principles of antitrust law need to be considered, and while this Article has attempted to explain the history of how such factors have been considered, it has not attempted to grapple with them directly. Hopefully, with the history of the antitrust summary judgment standard and the conscious parallelism cases better understood, future efforts can shift to these more substantive concerns.

Indeed, given the many years since the Court has last forayed into the conscious parallelism nomos, it would be highly desirable if the Court were to grant certiorari in another conscious parallelism case soon. When it does so, the Court will have an opportunity to address what Matsushita and Kodak stood for originally and reconsider these historical understandings in light of subsequent developments. The Court thus will have a moment for principled adjudication and reconciliation similar to what the Court faced previously in Bob Jones, where the Court can decide either to protect the balance of the past or construct a new equilibrium for the future.

In Cover's eyes, the Court failed to grasp this responsibility in Bob Jones. Only time will tell if the Court will fail to do so again.

412. See supra text accompanying note 182.