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## Holmes and the Bald Man: Why Rule of Reason Should Be the Standard in Sherman Act Section 2 Cases

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# Holmes and the Bald Man: Why Rule of Reason Should Be the Standard in Sherman Act Section 2 Cases

## **Abstract**

[Excerpt] "It has been argued that the antitrust laws' legislative history supports the notion that the laws were meant to prohibit anticompetitive price cuts – regardless of whether they are below cost. Thus, predatory pricing claims used to turn simply on whether the allegedly predatory price was intended to harm rivals. In fact, liability for predatory price discrimination was found without requiring probable or actual monopolization. Yet some cases brought early under Section 2 suggest that below cost pricing was indicative of, if not proof of, the type of conduct Section 2 prohibits. The results under this old scheme were mixed."

## **Keywords**

Sherman Act, monopolies, anti-trust

## Holmes and the Bald Man: Why Rule of Reason Should Be the Standard in Sherman Act Section 2 Cases

WILLIAM J. MICHAEL\*

### I. INTRODUCTION

It can prohibit a firm from adding capacity in anticipation of an increase in demand for the firm's product.<sup>1</sup> Filing false papers with the government can run afoul of its prohibitions.<sup>2</sup> Deceptive conduct may violate it.<sup>3</sup> A firm can be liable for treble damages under it for tortious conduct.<sup>4</sup> Bribing competitors' employees to shift business or divulge trade secrets can get a firm in trouble under it,<sup>5</sup> as can buying up rivals' necessary inputs.<sup>6</sup>

That said, the United States Supreme Court and the brightest scholars are not even sure of its purpose.<sup>7</sup> Courts and commentators recognize their

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1. See *U.S. v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).

2. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

3. See *Natl. Assn. of Pharm. Mfrs. v. Ayerst Laboratories*, 850 F.2d 904, 912-13 (2d Cir. 1988); *Intl. Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980); *U.S. v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (per curiam) (holding that exclusionary conduct was proven where Microsoft deceived Java developers about whether using Microsoft's development tools would make software incompatible with rival operating systems); see also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (holding that a conspiracy to spread false information about rival product safety is anticompetitive); *Am. Socy. of Mech. Engrs., Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (same).

4. See e.g. *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

5. See *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980).

6. See *Am. Tobacco Co. v. U.S.*, 328 U.S. 781 (1946).

7. See e.g. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 127 (1986) (Stevens, J., dissenting) (stating that one purpose of the Clayton Act is to protect small business); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets."); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940) ("The end sought was the prevention of restraints . . . which . . . raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services."); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (dismissing efficiency gains not passed on to consumers); Robert H. Bork, *The Antitrust Paradox* 107-15 (Basic Books 1978) (total wealth maximization); Richard A. Posner, *Antitrust Law: An Economic Perspective* 8-22 (U. of Chi. Press 1976) (total wealth maximization); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 Intl. Rev. L. & Econ. 73 (1985); Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941, 948 n. 25 (2002) ("Despite the wish of economists and their fellow travelers that the goal of antitrust be to promote overall efficiency, neither case law nor legisla-

own limited ability to come to terms with its commands.<sup>8</sup> Perhaps as a result, “free market ideologues have waged war on [it] for the past thirty or so years.”<sup>9</sup> It has gone through substantial evolution over time,<sup>10</sup> to the point where it “means not what its framers may have thought, but what economists and economics-minded lawyers and judges think.”<sup>11</sup> A mighty school was founded in the Midwest – Chicago – to try and add content to

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tive history stands for the proposition that overall economic welfare or wealth maximization trumps low prices.”); Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213, 220 (1979) (“The primary objective of antitrust policy is to promote full and fair market competition and to reap the benefits that competition brings with it.”); Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Leg. Stud. 667 (1994) (total wealth maximization); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 68 (1982) (goal is the prevention of unfair wealth redistribution “from consumers to firms with market power”); David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219 (1988); Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. Chi. L. Rev. 165, 168 (2005) (“There is widespread agreement that the clearly articulated purpose of antitrust is to protect consumers.”); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979). The current dominant view is that antitrust laws are designed to protect consumers. See *Am. Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1319 (7th Cir. 1991) (Posner, J.) (“The modern conception of the Sherman Act is of a statute that seeks to protect consumers from monopolistic practices rather than competitors from competitive practices.”). Monopsony may be a different story. See Michael C. Naughton, *Buyer Power Under Attack: Recent Trends in Monopsony Cases*, 18 Antitrust 81, 82-83 (2004); see also Roger D. Blair & Kristine L. Coffin, *Physician Collective Bargaining: State Legislation and the State Action Doctrine*, 26 Cardozo L. Rev. 1731 (2005) (monopsony generally).

8. See e.g. *Ariz. v. Maricopa County Med. Socy.*, 457 U.S. 332, 343 (1982) (“[J]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice’s effect on competition.”); *Microsoft*, 253 F.3d at 952-53 (recognizing limits of judiciary to balance technological benefits of arrangements against anticompetitive effects); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 Geo. L.J. 1623, 1624 (2005) (Judges and juries “cannot define monopolization but . . . know it when they see it.”).

9. David F. Shores, *Economic Formalism in Antitrust Decisionmaking*, 68 Alb. L. Rev. 1053, 1093 (2005). One might identify the initial shot fired in the war as Bork’s *Antitrust Paradox*, *supra* n. 7.

10. See e.g. Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, in *Post-Chicago Developments in Antitrust Law* 60, 60-64 (Antonio Cucinotta, Roberto Pardolesi, & Roger Van den Bergh, eds., 2002) (discussing antitrust’s classical and structural eras); Massimo Motta, *Competition Policy: Theory and Practice* 7 (Cambridge U. Press 2004) (describing pre-Chicago antitrust efforts as fueled “more by the desire to restrain large firms than by the objective of increasing economic efficiency”); see generally *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (holding that the imposition of territorial restrictions on resellers is a per se violation of the Sherman Act); *Stand. Oil Co. of Cal. v. U.S.*, 337 U.S. 293, 314 (1949) (holding that a practice substantially lessens competition if it can be shown that “competition has been foreclosed in a substantial share of the line of commerce affected.”); *U.S. v. Yellow Cab Co.*, 332 U.S. 218 (1947) (holding that a conspiracy to eliminate competition violates the Sherman Act regardless of the amount or importance of interstate commerce affected); *Intl. Salt Co. v. U.S.*, 332 U.S. 392, 396 (1947) (holding that “foreclos[ing] competitors from any substantial market” is per se illegal); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (holding that resale price maintenance is illegal); Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. Rev. 1020, 1032-33 (differentiating between allocative efficiency and consumer welfare).

11. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179, 209 (1987).

its strictures.<sup>12</sup> But then “some economists started kicking the tires on the Chicago results.”<sup>13</sup>

What is it? Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracies to monopolize.<sup>14</sup> It “has been a source of puzzlement to lawyers, judges and scholars. . . .”<sup>15</sup> Its standards are “not just vague but vacuous.”<sup>16</sup> “Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined.”<sup>17</sup> Indeed, “[t]here is great variation in how the courts analyze unilateral practices.”<sup>18</sup> Thus, although scholars<sup>19</sup> and courts<sup>20</sup> have attempted to describe what Section 2 prohibits, about the

12. See e.g. David S. Evans & A. Jorge Padilla, Symposium, *Antitrust: Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 74, 77 (2005) (stating that in the 1950s, the Chicago School began arguing that many unilateral practices should be *per se* legal and that the Chicago School “revolutionized antitrust”); Edmund W. Kitch e.d., *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J. L. & Econ. 163 (1983) (overview of Chicago School antitrust literature); Richard A. Posner, *The Chicago School of Antitrust*, 127 U. Pa. L. Rev. 925 (1979); *The New Palgrave Dictionary of Economics and the Law* vol. 1, 227-33, 601-05 (Peter Newman ed., Stockton Press 1998) (origins of Chicago School).

13. Evans & Padilla, *supra* n. 12 at 78-79. True or not, Kodak has been criticized by the same group that supposedly obtained the imprimatur. See e.g. Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 Am. Econ. Rev. 837 (1990). Evans and Padilla believe that the post-Chicago group received a “limited Supreme Court imprimatur” in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), wherein the Court rejected a *per se* legal approach in favor of a rule of reason approach. See e.g. Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal – Why Aspen and Kodak are Misguided*, 68 Antitrust L.J. 659, 678-81 (2001); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 318-23 (2001) (recognizing contributions of post-Chicago School of antitrust); Motta, *supra* n. 10.

14. 15 U.S.C. § 2 (2006).

15. Kauper, *supra* n. 8, at 1623; see also Harold Demsetz, *Barriers to Entry*, 72 Am. Econ. Rev. 47, 48-52 (1982) (whether barrier to entry is desirable depends on whether one believes that the property right to exclude creating the barrier is desirable).

16. Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 255 (2003).

17. Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 147-48, 164 n. 4 (2005). According to Hovenkamp, “[t]he first Supreme Court case that treated unilateral exclusionary conduct on the merits was *Stand. Oil Co. of N.J. v. U.S.*, 221 U.S. 1 (1911).”

18. Evans & Padilla, *supra* n. 12, at 73.

19. See generally e.g. Hovenkamp, *supra* n. 17.

20. Recently, the Supreme Court explained Section 2 thusly:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. . . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

*Verizon Commun., Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (original emphasis omitted). The classic definition of a Section 2 claim occurred in *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). On another occasion, the Court defined monopolizing conduct as “the use of monopoly power to ‘foreclose competition, to gain a competitive advantage, or to destroy a competitor.’” *Eastman Kodak Co.*, 504 U.S. at 482-83 (quoting *U.S. v. Griffith*, 334 U.S. 100, 107 (1948)). Try squaring that definition with the United States Court of Appeals for the Seventh Circuit’s observation in *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, that “injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals’ wounds.” 864 F.2d 1409, 1413 (7th Cir.

best that can be said is that it prohibits a firm from “do[ing] something bad.”<sup>21</sup> Though “we have made some progress toward a new standard, there is still a long way to go.”<sup>22</sup>

The ambiguity of what Section 2 prohibits can have grave consequences. “Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry.”<sup>23</sup> In today’s fast paced marketplace, “[i]t is desirable for [firms] to be able to know what the law is – what is permitted and what is not.”<sup>24</sup> Uncertainty “dulls investment and deters welfare-increasing competition.”<sup>25</sup> On the other hand, “[f]irms will get away with welfare-reducing practices if competition policy is too lenient. . . .”<sup>26</sup> Also, to the extent that preventing administrative difficulties is a legitimate concern of antitrust analysis, Section 2’s ambiguity certainly does not further administrative ease.<sup>27</sup> At least one commentator has suggested that plaintiffs have won cases not on the merits, but “[a]t least in part because of the looseness of existing Section 2 standards.”<sup>28</sup> And in a world where competition is global, uncertainty resulting

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1989); see also *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767 (1984). On yet another occasion, the Supreme Court indicated that a firm does not engage in monopolizing conduct if the conduct is a function of “valid business reasons,” a “normal business purpose,” or “legitimate business reasons.” See e.g. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597, 605, 608 (1985). What is “valid,” “normal,” or “legitimate?” See Elhaug, *supra* n. 16, at 265. As Kauper has observed,

[t]he court’s [in *LePage’s, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003)] lengthy analysis of the major Supreme Court decisions following the decision in *Alcoa* comes to the unremarkable conclusion that ‘a monopolist will be found to violate [Section Two] of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.’

Kauper, *supra* n. 8, at 1633. The court in *Microsoft* gave a “fairly elaborate definition [of exclusionary conduct] that included allocation of proof burdens” that Hovenkamp has described as “fairly unfocused.” Hovenkamp, *supra* n. 17, at 152-53. Recognizing the limits of the Supreme Court’s definition of conduct prohibited by Section 2, Elhaug has observed that “[c]ourts and commentators have offered other formulations to get around these problems with the *Grinnell* test.” Elhaug, *supra* n. 16, at 263.

21. Edlin, *supra* n. 7, at 950.

22. Kauper, *supra* n. 8, at 1625, 1627. Kauper has further observed that the Supreme Court has not “particularly distinguished itself in Section Two cases.”

23. Michael E. Porter, *The Competitive Advantage of Nations* 662 (Free Press 1990).

24. Shores, *supra* n. 9, at 1055; see also Edlin, *supra* n. 7, at 967 (“One advantage of a bright-line rule is that it would let incumbents know where they stand.”). In the context of one theory of Section 2 liability, essential facilities, Elhaug has remarked that “the persistence of the essential facilities doctrine in the lower courts demonstrates that the Supreme Court’s more general monopolization standards have not provided sufficient guidance to make it clear that antitrust duties to deal do not apply to monopolists who develop ‘superior’ products.” Elhaug, *supra* n. 16, at 262.

25. Evans & Padilla, *supra* n. 12, at 74.

26. *Id.* at 80.

27. See e.g. *AD/SAT v. Associated Press*, 920 F. Supp. 1287 (S.D.N.Y. 1996) (recognizing that preventing administrative difficulties is a legitimate concern to antitrust analysis).

28. Kauper, *supra* n. 8, at 1624.

in differences in the application of competition law can result in conduct being legal in one jurisdiction and illegal in another.<sup>29</sup>

Scholars<sup>30</sup> and the government<sup>31</sup> have taken their shots at coming up with a test for identifying conduct prohibited by Section 2 – all of which have their problems.<sup>32</sup> But then there's the golden boy – predatory pricing.

29. See Elhauge, *supra* n. 16, at 264-65 (“The utter vacuity of this sort of standard is neatly illustrated by the fact that the same conduct – using above-cost price cuts to drive out rivals – has been labeled ‘competition on the merits’ in the United States, but not ‘normal competition’ in Europe.”).

30. See e.g. ABA Sec. on Antitrust, *2002 Annual Rev. of Antitrust L. Devs.* 249 (5th ed., ABA 2003) (conduct is “especially” likely to be predatory if it is “improper for reasons extrinsic to the antitrust laws.”); Richard A. Posner, *Antitrust Law* 194-95 (2d ed., U. of Chi. Press 2001) (conduct capable of excluding an equally efficient rival); Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust* 113 (West 1977) (asserting that competitive behavior can be distinguished from anticompetitive behavior because the latter involves “the predator . . . acting in a way which will not maximize present or foreseeable future profits unless it drives or keeps others out or forces them to tread softly. . . . Such conduct makes sense if, but only if, it is seen as a means of driving out or controlling competitors.”); William J. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 *Yale L.J.* 1 (1979) (proposing that price used to capture monopoly is market price and should be frozen there to avoid predatory pricing); Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 *Cornell L. Rev.* 1, 59 (2005) (“Examples of desirable predation rules include complete immunity against predation claims for firms with market shares below particular thresholds, *per se* legality for prices above the specified cost threshold, and well-defined safe harbors for mixed bundling schemes.”); Edlin, *supra* n. 7 (advocating for a price freeze when faced with new competition, and suggesting a “quality freeze” too); Elhauge, *supra* n. 16, at 256 (arguing that “the proper monopolization standard should focus on whether the alleged exclusionary conduct succeeds in furthering monopoly power (1) only if the monopolist has improved its own efficiency or (2) by impairing rival efficiency whether or not it enhances monopolist efficiency”); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price*, 96 *Yale L.J.* 209 (1986) (only exclusionary conduct that raises rivals’ costs and allows firm to charge supra-competitive prices should be prohibited); Ari Lehman, *Eliminating the Below-Cost Pricing Requirement from Predatory Pricing Claims*, 27 *Cardozo L. Rev.* 343 (2005) (only possibility of recoupment should be considered in predatory pricing cases); Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 *Yale L.J.* 8 (1981) (sacrifice of profits test); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 *Geo. Mason L. Rev.* 617, 650-51 (1999) (proposing analysis of impacts of conduct on raising barriers to competition and efficiency effects); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 *Mich. L. Rev.* 551 (1991) (contending that high concentration and barriers to entry are prerequisites to successful exclusionary conduct). Hovenkamp has opined that a “workable” definition of exclusionary conduct must satisfy two criteria: 1) it must define prohibited conduct with “tolerable accuracy, in particular, without excessive false positives” and 2) it must “be administrable by a court, perhaps in a jury trial.” See Hovenkamp, *supra* n. 17, at 148.

31. See Br. for U.S. & FTC as Amici Curiae Supporting Petr. at 15-25, *Verizon*, 540 U.S. 398 (conduct that sacrifices profits and conduct the profitability of which depends on excluding rivals).

32. See e.g. Edlin, *supra* n. 7, at 945-49 (advocating predation test without requiring sacrifice of short-run profits); Elhauge, *supra* n. 16 (criticizing sacrifice test, efficiency-based tests, and balancing); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 *Antitrust L.J.* 3, 56-57 (2004) (criticizing sacrifice theory of predation); see Hovenkamp, *supra* n. 17, at 154, 157, 160 (excluding equally efficient rival “can underdeter in situations where the rival that is most likely to emerge is less efficient than the dominant firm”) (“‘Sacrifice’ of short-run revenues is a necessary, but hardly a sufficient, condition for condemning a unilateral refusal to deal under [section] 2.”) (“In sum, raising rivals’ costs is a sometimes useful but also incomplete definition of exclusionary practices.”). Regarding Edlin’s price and quality freezes, one should consider very seriously the Seventh Circuit’s admonition that “the antitrust laws do not deputize district judges as one-man regulatory agencies.” *Chi. Prof. Sports LP v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996).

“We may have a lot of uncertainty around the edges [of the predatory pricing doctrine], including what precise measure of costs to use. But we can spot the bald man and the above-cost pricer without difficulty in most cases. . . .”<sup>33</sup> The test for measuring predatory pricing is certain,<sup>34</sup> business knows where it stands,<sup>35</sup> it fosters vigorous price competition rather than stifling it,<sup>36</sup> and it avoids costly erroneous decisions.<sup>37</sup> Indeed, many start with the predatory pricing standard and try to extrapolate from it a standard that could apply more generally under Section 2.<sup>38</sup>

In this article, I take the opposite approach. Rather than trying to “spot the bald man” through a rule-based economic analysis, as occurs in predatory pricing cases, we should take a page from Justice Holmes, who wrote: “General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major

33. Elhaage, *supra* n. 16, at 268.

34. See *e.g. id.* at 268 (“[T]he one exception to the current vacuity of monopolization standards may be the most maligned area of monopolization law – predatory pricing doctrine. You may love it or you may hate it, but at least you have some idea what the doctrine means.”); Hovenkamp, *supra* n. 17, at 148 (“About the best antitrust has been able to produce are rules designed for specific classes of cases, such as the cost rules governing predatory pricing. . . .”).

35. See *e.g.* Kauper, *supra* n. 8, at 1635 (“It is undoubtedly true that businesses would be comforted by a bright line, below cost standard. . . .”); Shores, *supra* n. 9, at 1055 (“[W]hen the Supreme Court adopted the general rule that above-cost price cuts never violate the antitrust laws, it made the law of predatory pricing more predictable than it had previously been.”).

36. See *e.g. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226-27 (1993) (“It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.”); John R. Lott, Jr., *Are Predatory Commitments Credible? Who Should the Courts Believe?* (U. of Chi. Press 1999) (often, what competitors claim is predation is often just ordinary competition); Evans & Padilla, *supra* n. 12, at 73 (“[T]here is no reason to assume that aggressive unilateral pricing is bad – quite the opposite.”); Hovenkamp, *supra* n. 17, at 157 (“We do not condemn the monopolist who cuts price to an above cost level because it knew that a rival would be forced to exit from the market. Such behavior is completely consistent with our conception of proper competition.”); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & Econ. 137 (1958); Shores, *supra* n. 9, at 1080 (“It is appropriate that the courts and the government tread cautiously in limiting a firm’s freedom to cut prices.”); *but see* Malcolm R. Burns, *Predatory Pricing and the Acquisition Cost of Competitors*, 94 J. Polit. Econ. 266 (1986) (cost to a firm of acquiring competitors reduced through predation).

37. See *e.g. Brooke Group*, 509 U.S. at 226; *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (“[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.”); Evans & Padilla, *supra* n. 12, at 83 (“There is no automatic way to expunge mistaken decisions of the Supreme Court. A practice once condemned is likely to stay condemned, no matter its benefits. A monopolistic practice wrongly excused will eventually yield to competition, though, as the monopolist’s higher prices attract rivalry.”) (quoting Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 15 (1984)); Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. Cal. L. Rev. 657, 701-02 (2001) (Competition will constrain false acquittal costs, “[a] dominant firm that consistently charges monopoly prices will attract entrants to its market.”); see also Joskow & Klevorick, *supra* n. 7, at 223 (“[A]ny [predatory pricing] standard that encourages entry by forcing price to be kept above long-run marginal cost for a period of time necessarily runs the risk of preserving inefficient firms. . . .”).

38. See Elhaage, *supra* n. 16, at 269 (“The relative success with predatory pricing doctrine has led courts and commentators to try to generalize it into a global standard for determining what conduct meets the exclusionary conduct element of the monopolization test.”).



premise.”<sup>39</sup> If predatory pricing is as good as it gets, and it still fails to capture conduct with anticompetitive consequences, then we should abandon all strict rules-based approaches to Section 2 cases in favor of a fact-based Rule of Reason analysis.<sup>40</sup> After all, as Justice Holmes recognized, “a page of history is worth a volume of logic.”<sup>41</sup>

In Part II of the article, I generally describe predatory pricing law – where we’ve been and where we are. In Part III of the article, I try to take some of the luster off of the golden boy and point out deficiencies in the current predatory pricing standard. In Part IV of the article, I advocate for adopting the Rule of Reason as the standard in Section 2 cases.

## II. PREDATORY PRICING – FROM HAIRY HIPPY TO BALD MAN

It has been argued that the antitrust laws’ legislative history supports the notion that the laws were meant to prohibit anticompetitive price cuts – regardless of whether they are below cost.<sup>42</sup> Thus, predatory pricing claims used to turn simply on whether the allegedly predatory price was *intended* to harm rivals.<sup>43</sup> In fact, liability for predatory price discrimina-

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39. *Lochner v. N.Y.*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

40. The classic articulation of the Rule of Reason occurred in *Bd. of Trade of City of Chi. v. U.S.*, 246 U.S. 231, 238-41 (1918) (setting forth:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business . . . ; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.

); see also *State Oil Co. v. Kahn*, 522 U.S. 3, 10, 22 (1997); *Natl. Socy. of Prof. Engrs. v. U.S.*, 435 U.S. 679 (1978); *Stand. Oil*, 221 U.S. 1; William C. Holmes, *Antitrust Law Handbook* 466 (1995 ed., Clark Boardman Callaghan 1995); James A. Keyte, *What It Is and How It Is Being Applied: The “Quick Look” Rule of Reason*, 11 *Antitrust* 21 (1997) (explaining the quick look rule and analyzing its applications); Sullivan, *supra* n. 30, at 187-88.

41. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

42. See e.g. Shores, *supra* n. 9; see also H.R. Rpt. 74-2287, at 7-8 (1936) (reprinted in *The Legislative History of the Federal Antitrust Laws and Related Statutes* vol. 4, 3187 (Earl W. Kintner ed., Chelsea H. Publishers 1980)); Sen. Rpt. 74-1502 at 4 (Feb. 3, 1936) (reprinted in *The Legislative History of the Federal Antitrust Laws and Related Statutes* vol. 4, 3014-15 (Earl W. Kintner ed., Chelsea H. Publishers 1980)); Sen. Rpt. 63-698 at 1 (1914) (reprinted in *The Legislative History of the Federal Antitrust Laws and Related Statutes* vol. 2, 1744 (Earl W. Kintner ed., Chelsea H. Publishers 1978)); H.R. Rpt. 63-627 at 8-9 (July 22, 1914) (reprinted in *The Legislative History of the Federal Antitrust Laws and Related Statutes* vol. 2, 1090-91 (Earl W. Kintner ed., Chelsea H. Publishers 1978)).

43. See e.g. *Moore v. Mead’s Fine Bread Co.*, 348 U.S. 115, 118 (1954); *Forster Mfg. Co. v. FTC*, 335 F.2d 47, 52 (1st Cir. 1964); *Md. Baking Co. v. FTC*, 243 F.2d 716, 718 (4th Cir. 1957); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 517 (6th Cir. 1944). Elhauge has offered that this standard “helped not a whit in sorting out bad pricing from good.” Elhauge, *supra* n. 16, at 269.

tion was found without requiring probable or actual monopolization.<sup>44</sup> Yet some cases brought early under Section 2 suggest that below cost pricing was indicative of, if not proof of, the type of conduct Section 2 prohibits.<sup>45</sup> The results under this old scheme were mixed.<sup>46</sup>

Then came Areeda and Turner's "watershed article"<sup>47</sup> – *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*.<sup>48</sup> They proposed using cost analysis to evaluate pricing behavior to identify and distinguish predatory pricing from competitive pricing.<sup>49</sup> Criticism of Areeda and Turner's theory came early, and primarily focused on the difficulty in measuring cost.<sup>50</sup> More recent scholarship also points to the difficulty of measuring cost, but goes further by arguing that a strict, cost-based analysis does not adequately capture prices that may be predatory even though above cost.<sup>51</sup>

Then came the Supreme Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>52</sup> In it, the Supreme Court directed federal courts to play a gatekeeping role to ensure that only economically sound

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44. See e.g. *Utah Pie Co. v. Conl. Baking Co.*, 386 U.S. 685 (1967). Edlin has called such cases "particularly galling." Edlin, *supra* n. 7, at 953.

45. See e.g. *U.S. v. Am. Tobacco Co.*, 221 U.S. 106, 160 (1911) (observing that American Tobacco was engaging in "ruinous competition, by lowering the price of plug below its cost").

46. See e.g. Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239, 2250 (2000) (asserting that before 1975, "[p]laintiffs won most litigated cases, including those they probably should have lost").

47. Shores, *supra* n. 9, at 1087.

48. 88 Harv. L. Rev. 697 (1975).

49. See *id.*

50. See e.g. Sullivan, *supra* n. 30, at 110-11. Areeda and Turner even went back and forth with one of their immediate critics, F.M. Scherer, exchanging volleys on the cost-based approach. Compare F.M. Scherer, *Predatory Pricing Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 868 (1976) (specifically his section entitled *Predatory Pricing and the Sherman Act: A Comment*, at 883-85), with Phillip Areeda & Donald F. Turner, *Scherer on Predatory Pricing: A Reply*, 89 Harv. L. Rev. 891 (1976), with F.M. Scherer, *Some Last Words on Predatory Pricing*, 89 Harv. L. Rev. 901 (1976). Oliver Williamson agreed with Areeda and Turner that marginal cost pricing had certain benefits to which Areeda and Turner referred, but was concerned that their proposed legal rule would immunize short-term price cuts that would lead to supra-competitive prices later. See Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 290 (1977).

51. See e.g. Robert Pitofsky et al., *Trade Regulation* 868-69 (5th ed., West 2003); Richard A. Posner, *supra* n. 30, at 217-20 (suggesting that Areeda and Turner's test is too generous to defendants); Jonathan B. Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 Antitrust L.J. 585, 591 (1994) (price cuts that don't fall below cost may still injure competition); Patrick Bolton et al., *Predatory Pricing: Response to Critique and Further Elaboration*, 89 Geo. L.J. 2495, 2499 (2001) (advocating the use of factual evidence in addition to economic theory); Bolton et al., *supra* n. 46, at 2242-62 (discussing criticism of Areeda and Turner and suggesting alternatives); Edlin, *supra* n. 7, at 942 ("above-cost pricing can . . . hurt consumers by limiting competition"); see also Crane, *supra* n. 30, at 3 (recognizing that "some commentators and courts have wondered whether the Supreme Court has become too solicitous of price competition and too skeptical about claims of predation").

52. 475 U.S. 574 (1986).

cases go to a jury.<sup>53</sup> Courts applying *Matsushita* have interpreted it as creating “a legal presumption, based on economic logic, that predatory pricing is unlikely to threaten competition.”<sup>54</sup>

With *Matsushita* as a backdrop, and despite the criticism of Areeda and Turner’s cost-based approach, the Supreme Court formally adopted a cost-based approach to evaluating predatory pricing claims in *Brooke Group v. Brown & Williamson Tobacco Co.*<sup>55</sup> Specifically, the Court explained that a successful predatory pricing claim requires proof that 1) the price is below an appropriate measure of cost, and 2) “the competitor had a reasonable prospect, or, under [Section] 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.”<sup>56</sup> In laymen’s terms, “[i]f you price below your incremental costs and have enough market power to make it reasonably likely than you can recoup your losses by raising prices after you have disciplined or driven out your rival, then you have engaged in predatory pricing. If you price above cost, you are home free.”<sup>57</sup>

*Brooke Group* has been viewed as a dramatic break with precedent.<sup>58</sup> Whereas *Brooke Group* creates a safe harbor<sup>59</sup> for price cuts so long as they are above some measure of cost, the Supreme Court’s previous cases on predation had required only a showing of an *intent* to harm competition.<sup>60</sup> Nonetheless, *Brooke Group* – concededly revolutionary – had roots

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53. See *id.* at 587-88; see also Crane, *supra* n. 30, at 47 (“*Matsushita* invites district courts in the first instance, and courts of appeal in the second, to scrutinize the economic logic of predatory pricing cases and only permit theoretically sound cases to proceed to the jury.”). Crane sees in *Matsushita* a “counterweight to anticorporate jury tendencies in the form of heightened judicial scrutiny of plaintiffs’ predatory pricing claims.” *Id.*; see also James L. Warren & Mary B. Cranston, *Summary Judgment After Matsushita*, Antitrust 12-13 (Summer 1987) (describing *Matsushita*’s stringent gatekeeping standards).

54. *Advo, Inc. v. Phila. Newsps., Inc.*, 51 F.3d 1191, 1196 (3d Cir. 1995) (emphasis omitted); see also *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1255 (5th Cir. 1988) (stating that the Court in *Matsushita* decided “that the economic disincentives to predatory pricing often will justify a presumption that an allegation of such behavior is implausible”). As Wesley J. Liebler has noted, “almost all of the predatory pricing cases that have come before the courts since 1975 could have been decided summarily for the defendant under the standards set forth in *Matsushita*.” Wesley J. Liebler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 Notre Dame L. Rev. 1052, 1054 (1986).

55. 509 U.S. at 222-24.

56. *Id.*

57. Elhauge, *supra* n. 16, at 268; see also Edlin, *supra* n. 7, at 950-55 (laying out current state of predation law).

58. See e.g. Shores, *supra* n. 9, at 1086.

59. See Kauper, *supra* n. 8, at 1628 (“*Brooke Group* comes close to establishing a safe harbor for predatory pricing cases, a safe harbor based on a combination of below-cost sales and the use of market share or capacity data to establish the reasonable likelihood of recoupment or its absence.”); Lehman, *supra* n. 30, at 372.

60. See e.g. *Brooke Group*, 509 U.S. at 221 (discussing previous predation jurisprudence). In fact, shortly before *Brooke Group*, the Court specifically declined to decide whether a party could show predatory pricing when the pricing in question is above some measure of cost. *Matsushita*, 475 U.S. at

in previous cases.<sup>61</sup> Notwithstanding the evolution of predatory pricing towards a comparably clear rule based approach, it “is currently generating considerable debate in academic literature.”<sup>62</sup> The debate extends to what constitutes predatory pricing<sup>63</sup> – commentators still are not sure what it is.<sup>64</sup> Further, predatory pricing has variations across the globe.<sup>65</sup>

### III. DULLING THE GOLDEN BOY

Predatory pricing law has lost its focus. Rather than focusing on the forest – the competitive consequences of conduct – courts are preoccupied with a single tree – whether the *Brooke Group* test has been met regardless of *actual* competitive consequences. This is a function of a preoccupation with economic theory rather than cold, hard facts. It is also a function of a preoccupation with classifying conduct rather than evaluating the results of conduct as demonstrated by facts. These general propositions manifest themselves in the problems specific to *Brooke Group* – it does not result in certainty, foster price competition, or benefit consumers.

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585 n. 9; *Utah Pie*, 386 U.S. at 702. Elhauge has suggested that it did not even do so in *Brooke Group* to the extent that its statement that the Court has “rejected . . . the notion that above-cost prices . . . inflict injury to competition cognizable under the antitrust laws” is dicta. See Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power*, 112 Yale L.J. 681, 697 (2003) (quoting *Brooke Group*, 509 U.S. at 223).

61. See e.g. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1400-01 (7th Cir. 1989); *Barry Wright Corp.*, 724 F.2d 227. *Barry Wright* has been described as an “influential pre-*Brooke Group* case in which the court held that predatory pricing suits could not be brought when prices exceed all measures of cost.” Edlin, *supra* n. 7, at 987.

62. Lehman, *supra* n. 30, at 343; see generally Bolton et al., *supra* n. 46; David Close, “Don’t Fear the Reaper”: *Why Transferable Assets and Avoidable Costs Should Not Resurrect Predatory Pricing*, 88 Iowa L. Rev. 433 (2002); Edlin, *supra* n. 7; Elhauge, *supra* n. 60; Avishalom Tor, *Illustrating a Behaviorally Informed Approach to Antitrust Law: The Case of Predatory Pricing*, 18 Antitrust 52 (2003).

63. Compare Baumol, *supra* n. 30, at 2-3 (above cost pricing can be predatory); Edlin, *supra* n. 7, at 945-46 (same); Williamson, *supra* n. 50, at 290-92 (same), with Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 269-304; 333-37 (1981) (above cost pricing can not be predatory); Elhauge, *supra* note 30 (above cost pricing can not be predatory).

64. Compare Daniel A. Crane, *Multiproduct Discounting: A Myth of Nonprice Predation*, 72 U. Chi. L. Rev. 27 (2005) (equating bundling with predatory pricing), with Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev. 229 (2005) (multi-product ties create unique antitrust concerns); Ordovery & Willig, *supra* n. 30, at 55 (collecting critiques).

65. See e.g. Elhauge, *supra* n. 16, at 264 (European Commission approach to predatory pricing); Norman W. Hawker, *Predatory Pricing Law in the United States and Canada*, 7 U. Miami Bus. L. Rev. 201 (1999) (Canadian approach to predatory pricing law); Ross Jones, *An International Perspective on Anti-Competitive Pricing Practices by Dominant Carriers & Regulatory Rules to Facilitate Competitive Entry – Australia*, 14 DePaul Bus. L.J. 243, 249-50 (2002) (Australian approach to predatory pricing law).

### A. *The First Swipe – Economic Theory*

Rules based on economic theory are great – if you price below cost, you may be pricing predatorily, if you don't, you're not – but such rules have the same limitations as all rules. “[T]he trick is to carry general principle as far as it can go in substantial furtherance of the precise statutory or constitutional prescription.”<sup>66</sup> Wedding predatory pricing analysis to a cost-based standard is not necessarily commensurate with the legislative history of the antitrust laws.<sup>67</sup> Further, economic theory does not bear any relationship to reality in all cases.<sup>68</sup> For example, though the Supreme Court in *Brooke Group* declared that “predatory pricing schemes are rarely tried, and even more rarely successful,”<sup>69</sup> predatory pricing claims continue to be filed<sup>70</sup> and recent scholarship suggests that predation occurs far more often than previously believed.<sup>71</sup> When economic theory does bear a rela-

66. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1183 (1989); see also Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 Ind. L. Rev. 57 (2003) (survey of legal formalism).

67. See generally *supra* n. 42; Shores, *supra* n. 9, at 1091 (“In short, *Brooke Group* stands for the proposition that economic theory trumps legislative history. . .”).

68. See e.g. R.H. Coase, *The Firm, the Market, and the Law* 3-4 (U. Chi. Press 1988).

The rational utility maximizer of economic theory bears no resemblance to the man on the Clapham bus or, indeed, to any man (or woman) on any bus. There is no reason to suppose that most human beings are engaged in maximizing anything unless it be unhappiness, and even this with incomplete success.

*Id.*

69. *Brooke Group*, 509 U.S. at 226 (citation omitted); see also Bork, *supra* n. 7, at 144 (arguing that “[u]nsophisticated theories of predation . . . [have led] to drastic overestimation of its likelihood”); Easterbrook, *supra* n. 63, at 264 (“[T]here is no sufficient reason for antitrust law or the courts to take predation seriously.”).

70. See e.g. *Cargill*, 479 U.S. at 121 (recognizing that there is ample evidence that predatory pricing occurs); *Spirit Airlines, Inc. v. N.W. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005); *Multistate Leg. Stud., Inc. v. Harcourt Brace Jovanovich Legal & Prof. Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995); *Kinetic Concepts, Inc. v. Hillenbrand Industries, Inc.*, 262 F. Supp. 2d 722 (W.D. Tx. 2003) (jury verdict at trial, settled while on appeal); Crane, *supra* n. 30, at n. 18 (listing predatory pricing cases). Some, all, or none of such cases may have been filed for strategic reason. See Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991) (study showing that competitor plaintiffs systematically misuse the antitrust laws). But there is no way to be certain. See Crane, *supra* n. 30, at 36 (data is consistent with firms using predatory pricing cases strategically, “but direct proof is limited.”). Given the cost of the strategy, it may be unlikely. See Easterbrook, *supra* n. 63, at 334-35 (estimating mean litigation cost in predatory pricing case at \$3 million, and explaining that AT&T spent \$100 million to defend against predation charges); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1015 (1986) (\$75,000 to \$194,000 in 1984 dollars).

71. See e.g. Pitofsky et al., *supra* n. 51, at 869; Jean Tirole, *The Theory of Industrial Organization* 361-80 (MIT 1988) (limit pricing and predation can preclude entry); Bolton et al., *supra* n. 46, at 2250-51 (pricing below cost can send “strategic communication involving threats and sanctions”); Evans & Padilla, *supra* n. 12, at 78 (“A further strand of modern economics undercuts the proposition that firms had no incentive or ability to engage in predatory pricing.”); Yun Joo Jung et al., *On the Existence of Predatory Pricing: An Experimental Study of Reputation and Entry Deterrence in the Chain-Store*

tionship to reality, it can be in conflict with itself.<sup>72</sup> Economic theory has also limited the reach of antitrust to such an extent that important areas of the law have remained unchanged, unchallenged, and (arguably) underenforced for more than thirty years.<sup>73</sup>

In the antitrust context, “general principles based on economic theory that tell us nothing about the actual economic effect of a particular restraint in a particular case should be . . . cast aside.”<sup>74</sup> This principle – that facts demonstrating economic effect trump theory – has been recognized by courts in predatory pricing cases.<sup>75</sup> Far more frequently, plaintiffs lose if

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*Game*, 25 RAND J. Econ. 72, 73 (1994) (experiment supports theory that firms engage in predation to support reputation of strength); Alvin K. Klevorick, *The Current State of the Law and Economics of Predatory Pricing*, 83 Am. Econ. Rev. (Papers & Proc.) 162, 163 (1993) (an incumbent may be able to use predation to build a reputation for toughness and thus discourage potential new entrants); David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. Econ. Theory 253 (1982) (analyzing effect on reputation of predatory pricing); Paul Milgrom & John Roberts, *Limit Pricing and Entry Under Incomplete Information: An Equilibrium Analysis*, 50 Econometrica 443 (1982); Paul Milgrom & John Roberts, *Predation, Reputation and Entry Deterrence*, 27 J. Econ. Theory 280 (1982) (predation may be rational against new entrants because it yields a reputation that deters entrants); Ordovery & Willig, *supra* n. 30, at 77-79 (in more complex, realistic markets, aggressive pricing can yield long-run benefits).

72. See Daniel A. Farber & Brett H. McDonnell, “*Is There a Text In This Class?*” *The Conflict Between Textualism and Antitrust*, 38, <http://papers.ssrn.com/sol3/papers.cfm?abstractid=556380> (last updated Apr. 23, 2006).

So, Brown & Williamson, an experienced and successful company with many decades of intimate knowledge of this industry, apparently believed that it could better its profits by forcing Liggett back into line through a price war, but Justice Kennedy and his colleagues, armed with the best economic theory Chicago has to offer, know better – Brown & Williamson was just wasting its shareholders’ money. How arrogant. How implausible. Note that in accepting a highly contestable and specific economic theory, the Court ignores a much more general and basic piece of wisdom from economics: we should generally prefer that experienced actors within an industry are rationally pursuing their goals.

*Id.*

73. Eleanor M. Fox et al., *U.S. Antitrust in Global Context* 300, 302 (2d ed., West 2004) (“*General Dynamics* is still the latest horizontal merger case decided on its merits by the Supreme Court, and it remains good law. . . . *Marine Bancorporation* is the Supreme Court’s last word on mergers that eliminate potential competition.”). Both cases are more than thirty years old. *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *U.S. v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974).

74. Shores, *supra* n. 9, at 1054.

75. See e.g. *Contl. T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977); *Spirit Airlines*, 431 F.3d at 946 (stating that in the United States Court of Appeals for the Sixth Circuit, a plaintiff can prove predatory pricing based on factors other than the relation between an alleged predator’s price and cost); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000) (stating that in the United States Court of Appeals for the Eighth Circuit, a plaintiff can prove predatory pricing based on factors other than the relation between an alleged predator’s price and cost); *William Inglis & Sons Baking Co. v. ITT Contl. Baking Co.*, 668 F.2d 1014 (9th Cir. 1981) (in the United States Court of Appeals for the Ninth Circuit, a plaintiff can prove predatory pricing based on factors other than the relation between an alleged predator’s price and cost). According to Shores, the Supreme Court’s precedent before *Brooke Group* had been generally understood as holding that while below-cost pricing was powerful evidence of predatory intent, it was not critical to the plaintiff’s case.” Shores, *supra* n. 9, at 1085-86.

they cannot show below cost pricing.<sup>76</sup> This is so notwithstanding the fact that economics does not necessarily help decision-makers reach the right conclusions.<sup>77</sup> Indeed, it may confuse the issues to the point where it hurts more than helps.<sup>78</sup>

### B. *The Second Swipe – Missing the Forest for the Trees*

There seems to be a preoccupation with classifying specific types of conduct and trying to define standards based on conduct's classification, rather than focusing on standards for evaluating the results of conduct regardless of how the conduct is classified.<sup>79</sup> Such a preoccupation can result in overly formalistic application of rules that may excuse conduct that

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76. The Sixth Circuit in *Spirit Airlines* had to reverse the district court's award of summary judgment to Northwest Airlines since the district court had found that "the record compels the conclusion that Northwest's prices were not predatory, because the airline operated profitably" on the relevant routes. See *Barry Wright*, 724 F.2d at 227; *MCI Commun. Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983) (pricing above long run incremental costs not predatory); *Spirit Airlines, Inc. v. N.W. Airlines, Inc.*, 2003 U.S. Dist. LEXIS 26831 at \*77 (E.D. Mich. 2003); see also Debra J. Pearlstein et al. eds., *ABA Section of Antitrust Law, Antitrust Law Developments* 474, 476 (5th ed. 2002) ("[T]he Supreme Court's observation in *Brooke Group* that predatory pricing claims are 'rarely successful' has proved to be prescient. In the years since that decision, primary line injury claims frequently have been defeated on motions to dismiss or for summary judgment."); Hovenkamp, *supra* n. 17, at 156 (predatory pricing "law requires that prices be below cost."); Shores, *supra* n. 9, at 1080 (in predatory pricing cases, "the government never wins. And, of course, private plaintiffs have fared no better.").

77. See *Evans & Padilla*, *supra* n. 12, at 80 ("We are less confident in the ability of economics to help juries, courts, and regulators to reason their way to the right answers."). Elhauge has noted that "scholars have so far also been unable to devise administrable standards for sorting out desirable from undesirable conduct that tends to exclude rivals." Elhauge, *supra* n. 16, at 267; see Elhauge, *supra* n. 16, at n. 43 (Prominent antitrust economists William Baumol, Janus Ordovery, Frederick Warren-Boulton, and Robert Willig, acknowledge that courts and legal and economic scholars have "not yet been able to solve the 'vexing problem' of developing 'workable standards' for determining when conduct. . . [is] exclusionary, so that there is not yet any 'universal economic litmus test' for judging this question.").

78. See Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 *Denv. U. L. Rev.* 51, 54 (1995) (juror interviews in antitrust trials, including *Brooke Group*, revealed that "the jurors were overwhelmed, frustrated, and confused by testimony well beyond their comprehension. . . . At no time did any juror grasp – even at the margins – the law, the economics, or any other testimony relating to the allegations or defense."); Crane, *supra* n. 30, at 46 ("It would surely be surprising to find that jurors actually understand the substance of predatory pricing law, when the very definition of predation and its elements have long been, and continue to be, debated by the brightest minds in both economics and law."); Edlin, *supra* n. 7, at 956 ("My view is that one reason that two decades of information-theoretical results in economics have not had as much influence on the courts as they should is that they are relatively complex.").

79. See e.g. Elhauge, *supra* n. 16, at 342 (lamenting the use of "a barrage of conclusory labels like 'exclusionary,' 'predatory,' 'valid,' 'legitimate,' and 'competition on the merits' to cover for a lack of any well-defined criteria for sorting out desirable from undesirable conduct that tends to exclude rivals"); Kauper, *supra* n. 8, at 1626 ("Much of the effort in the past has been directed toward tailoring standards more precisely to particular conduct. The leveraging doctrine, the concept of essential facilities, and the relatively specific rule governing predatory pricing are products of this effort."); but see Kauper, *supra* n. 8, at 1640 ("The Court has moved away from standards tailored to particular conduct.").

has anticompetitive consequences.<sup>80</sup> Further, classification “is not always very helpful in evaluating novel practices.”<sup>81</sup> Whole volumes are written trying to classify conduct that may violate the antitrust laws.<sup>82</sup> Despite the efforts at classification, clarity remains elusive.<sup>83</sup>

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80. See e.g. *Maricopa*, 457 U.S. at 343 (“[T]he result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context.”); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) (“[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect. . . . We are dealing with what has been called the ‘synergistic effect’ of the mixture of the elements.”). The Supreme Court has recognized as much in the area of vertical non-price restraints. Compare *Arnold, Schwinn & Co.*, 388 U.S. 365 (drawing a distinction between sale and consignment of goods as they relate to legality of vertical non-price restraints), with *Contl. T.V.*, 433 U.S. 36 (overruling *Schwinn* and recognizing distinction between sale and consignment as false for purposes of antitrust law). In *U.S. v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003), American Airlines won summary judgment on a predatory pricing claim because the trial court found that it was pricing above variable costs despite evidence that it drove competitors from the market and, thereafter, raised prices – in Lehman’s words, “exactly the harm economists worry about with anticompetitive behavior.” Lehman, *supra* n. 30, at 355; see also Edlin, *supra* n. 7, at 943 (criticizing *AMR* decision). Shores thus concludes that “[t]he distinction between sales and consignments was formalistic because it failed to address the core issue in every antitrust case: Does the challenged restraint adversely affect competition in the market?” Shores, *supra* n. 9, at 1054. Hovenkamp, praising theories based on raising rivals’ costs, explained that the benefits of such theories are that they “show that certain practices that have been the subject of antitrust scrutiny for a long time can be anticompetitive even though they do not literally ‘exclude.’” Hovenkamp, *supra* n. 17, at 159. In other words, just because conduct cannot be shoehorned into a definition of “exclusionary” conduct does not mean that it is not anticompetitive. And what is more important under the antitrust laws, whether conduct can fit into an arbitrary definition or its results – competitive or anticompetitive? Edlin has opined that “a single rule – the *Brooke Group* rule – does not fit all cases well.” Edlin, *supra* n. 7, at 960-61 (examples). Elhauge has recognized the “sad state in which current monopolization doctrine finds itself, employing conclusory labels that offer little insight into which forms of conduct should and should not be deemed undesirable or illegal.” Elhauge, *supra* n. 16, at 255.

81. Hovenkamp, *supra* n. 17, at 150. One example may be the conduct at issue in *Conwood Co.*, 290 F.3d 768 (tobacco manufacturer discarded competitor’s point of sale displays and put competitor’s product in disadvantage positions in own displays). It is a much maligned decision. See e.g. Hovenkamp, *supra* n. 17, at n. 20; Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* vol. 3A, ¶ 782, 206 (Aspen Supp. 2004) [hereinafter *Areeda & Hovenkamp, Antitrust Law* vol. 3A] (“In *Conwood* the Sixth Circuit brushed aside most of the accepted principles developed in the case law and the main text for distinguishing antitrust violations from tortious and even competitive practices.”). Although criticism may not be unwarranted, one should consider that “accepted principles” should be applied given the nuances in particular markets, which is what the court did in *Conwood*. For example, there was evidence in the record – indeed, the parties agreed – regarding the importance of point of sale advertising to the tobacco industry. See e.g. *Conwood*, 290 F.3d at 774. Thus, although destroying point of sale displays in other industries may not be a big deal, in tobacco it may very well be. Given that, a systemic plan to destroy point of sale displays in the tobacco industry (coupled with the other conduct described in *Conwood*) may be worthy of a jury question on monopolization.

82. See e.g. Areeda & Hovenkamp, *Antitrust Law* vol. 3, *supra* n. 81 (referencing, for example: ch. 7A “Horizontal Acquisitions and Agreements”; ch. 7B “Exclusionary Practices: Patents”; and ch. 7C “Exploitative, Predatory, and Strategic Pricing”); *id.* (referencing, for example: ch. 7D “Exclusionary Practices by Vertically Integrated Dominant Firms”; ch. 7E “Unfair, Predatory, and Tortious Competition Unrelated to Pricing Policies”, ch. 7F “Exclusionary Practices by the Regulated Monopolist”; and ch. 8 “Power and the Power-Conduct Relationship in Monopolization and Attempt”).

83. Hovenkamp has argued, for example, that Areeda and Turner have given different definitions of exclusionary conduct over the evolution of their treatise on antitrust. See Hovenkamp, *supra* n. 17, at 149.



In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, for example, the Supreme Court conceded that “contrary inferences might reasonably be drawn” about whether the conduct at issue could “fairly be characterized as exclusionary. . . .”<sup>84</sup> Thus, if it “is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects,”<sup>85</sup> courts and regulators should focus their attention not on whether certain conduct meets some definition,<sup>86</sup> but on the conduct’s competitive effects.<sup>87</sup>

### C. *The Brooke Group Fallacy*

Over reliance on economics and a preoccupation with classification manifests itself in the problems with *Brooke Group* – problems that contradict and, in many respects, swallow its benefits. Since the Court in *Brooke Group* left open the question of the relevant measure of costs,<sup>88</sup> it provides no certainty on what may constitute predatory pricing.<sup>89</sup> Some courts adopted average variable cost as the relevant measure, others average total cost.<sup>90</sup> Areeda and Turner themselves recognized the challenges

84. *Aspen Skiing*, 472 U.S. at 604.

85. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993).

86. *Conwood*, 290 F.3d at 784 (“[A]nticompetitive’ conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.”).

87. Pitofsky has criticized the notion that above-cost price cuts cannot produce competitive harm as “simplistic and overly generous to predators and would-be monopolists.” Pitofsky et al., *supra* n. 51, at 868.

88. *Brooke Group*, 509 U.S. at 222 n. 1.

89. See e.g. *Rebel Oil Co. v. A. Richfield Co.*, 146 F.3d 1088, 1092 (9th Cir. 1998) (stating that “[n]either the Supreme Court nor this circuit has concluded what would be the appropriate measure of cost in a predatory pricing case.”); Crane, *supra* n. 30, at 43 (stating:

Predatory pricing litigation is an unpredictable enterprise. The legal standards governing predation claims require examination of complex economic facts, such as whether costs exceeded revenues and whether defendant would have been able to recoup the costs of below-cost pricing. Even tests meant to provide clear guidance on permissible and impermissible pricing behavior leave open significant space for adjudicatory ambiguity.

); Shores, *supra* n. 9, at 1087 (“Thus, while the court was clear in adopting a cost-based standard, it failed to define that standard.”).

90. See Michael L. Denger & John A. Herfort, *Predatory Pricing Claims After Brooke Group*, 62 Antitrust L.J. 541, 548-49 (1994); Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 8.5a (3d ed., West 2005) (representative cases); Penelope A. Preovolos, *Unfair Practices and Predatory Pricing*, 1408 PLI/Corp 687 passim (2004) (listing the First Circuit as “incremental or variable”; the Second Circuit as “average variable cost/presumptions”; the Fifth Circuit as average variable or marginal costs; the Sixth Circuit as a hybrid; the Seventh Circuit as a “pure recoupment”; the Eighth Circuit as “average variable cost/presumptions”; the Ninth Circuit as average variable cost/presumptions; the Tenth Circuit as using marginal or average variable costs as a “valuable indicator”; the Eleventh Circuit as average total cost; and the D.C. Circuit, Third Circuit and Fourth Circuit as declining to adopt any measure of cost). Just recently, the Tenth Circuit observed that “[d]espite a great deal of debate on the subject, no consensus has emerged as to what the most ‘appropriate’ measure of cost is in predatory pricing cases.” *AMR Corp.*, 335 F.3d at 1115. Relatedly, it is

to relying on marginal cost.<sup>91</sup> Thus, the “only certainty after *Brooke Group* is that for the plaintiff to prevail on a predatory pricing claim, it must prove that the defendant priced below whatever cost standard the court deciding the case has adopted.”<sup>92</sup> Importantly, there is no reason to believe that the Supreme Court will step in and clear up this uncertainty.<sup>93</sup> As a result, the issues of what is the appropriate measure of costs, and how to measure such costs, are frequently issues of fact that seriously undermine any claim to certainty.<sup>94</sup>

Uncertainty regarding the appropriate measure of cost by which predatory pricing claims are evaluated is compounded by the fact that business schools teach little, if any, antitrust principles.<sup>95</sup> Thus, there is little reason to believe that managers consider principles of predatory pricing law when making business decisions.<sup>96</sup> Further, the whole notion of linking price to some measure of cost, and punishing those that price below the ordained measure of costs, has been described as “chimerical” in real markets because “pricing at marginal cost will not produce revenues equal to total production costs.”<sup>97</sup>

The uncertainty surrounding the appropriate measure of costs may deter price competition.<sup>98</sup> To the extent that *Brooke Group*'s cost standard is

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uncertain whether the “meeting competition” defense is operable in a predatory pricing case. See *U.S. v. AMR Corp.*, 140 F. Supp. 2d 1141, 1204-08 (D. Kan. 2001).

91. Areeda & Hovenkamp, *Antitrust Law* vol. 3, *supra* n. 82, at ¶ 740, at 423.

92. Shores, *supra* n. 9, at 1087.

93. See Kauper, *supra* n. 8, at 1628 (*Brooke Group*'s failure to define appropriate measure of cost “reflects a conscious effort to avoid a difficult issue that divided lower courts.”); see also *Cargill*, 479 U.S. at 117-18; *Matsushita*, 475 U.S. at 584-85 n. 8.

94. *Broadway Delivery Corp. v. United Parcel Serv. of Am.*, 651 F.2d 122, 131 (2d Cir. 1981) (rejecting plaintiff's argument that defendant priced below average variable cost where plaintiff failed to present expert testimony on the issue); *Spirit Airlines*, 431 F.3d 917; *McGahee v. N. Propane Gas Co.*, 858 F.2d 1487, 1504 n. 38 (11th Cir. 1988) (“When average variable cost is appropriate to use, as well as determining what costs are variable, is an issue of fact requiring expert testimony.”).

95. See Crane, *supra* n. 30, at 49; Lawrence J. White, *Microeconomics and Antitrust in MBA Programs: What's Thought, What's Taught*, 47 N.Y.L. Sch. L. Rev. 87, 92 (2003) (describing the antitrust-related curricula of certain business schools).

96. See Crane, *supra* n. 30, at 50-54 (discussing survey results of in-house lawyers regarding predatory pricing law's impact on business decisions).

97. Baumol, *supra* n. 30, at 21.

98. See Crane, *supra* n. 30, at 27 (discussing airline and tobacco industries and concluding that “it is quite possible that predatory pricing law facilitated the high prices that it is meant to deter”); Lehman, *supra* n. 30, at 372 (stating:

In light of the uncertainty surrounding the measure of cost used for antitrust purposes, the best way for a firm to avoid antitrust trouble is to avoid price competition that comes anywhere close to cost levels. By creating a safe harbor for prices above a certain measure of cost, the Court is encouraging competitors to avoid vigorous price competition, the opposite of what it intended.

); see generally Richard A. Posner, *Economic Analysis of Law* 243-44 (5th ed., Aspen Law & Bus. 1998) (“[A] savage penalty will induce people to forgo socially desirable activities at the borderline of

certain, it serves as an excuse for courts to set firms' prices – if a firm is pricing predatorily under *Brooke Group*, all the court has to do is order that the firm set its prices above cost.<sup>99</sup> The assertion that courts must err on the side of the market because decisions are so hard to overturn is not compelling,<sup>100</sup> and concerns that a rule other than *Brooke Group* would chill price competition have been posited but not proven.<sup>101</sup> Additionally, *Brooke Group* imposes an undue and unnecessary burden on defendants because plaintiffs need not prove recoupment – “[p]redators can face treble damages suits for pricing too low, even if they never offend the law’s ultimate concern by pricing too high.”<sup>102</sup> And despite many years of favorable law, “defendants continue to pay out substantial sums to settle predatory pricing lawsuits,” thus undermining *Brooke Group*’s efficacy at deterring unwarranted predatory pricing claims.<sup>103</sup>

Lastly, *Brooke Group*’s rules excuse conduct that may have anticompetitive consequences. For example, a firm may lower its prices in response to a new entrant and drive the entrant from the market. Thereafter, the firm may raise its prices without having to face competition from the vanquished new entrant. Consumers are thus denied the benefit of competition on the merits.<sup>104</sup> Further, such a result may deter entrants in the first place.<sup>105</sup> The bottom-line is that above-cost predatory pricing may occur, it may harm competition, and it should not be excused simply because it does not meet the *Brooke Group* test so long as it results in anticompetitive consequences.<sup>106</sup>

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the criminal activity.”); John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 Va. L. Rev. 965 (1984) (uncertainty leads to overcompliance).

99. See e.g. *Am. Bldg. Prods., L.L.C. v. Ashley Aluminum, Inc.*, 1997 U.S. Dist. Lexis 15612 (E.D. La. 1997) (ordering defendant to return its prices to pre-predation levels pending final adjudication of case); *Advantage Publications, Inc. v. Daily Press, Inc.*, 1983 U.S. Dist. Lexis 16912 (E.D. Va. 1983) (ordering defendant to hold its advertising rates at specified levels pending final adjudication of case); Crane, *supra* n. 30, at 44 (“[D]etermining which costs are fixed or variable in a particular case requires complex expert testimony.”).

100. *GTE Sylvania* overruled *Schwinn*. Some cases addressed the nearly century-old *per se* rule against vertical price fixing. *St. Oil Co. v. Kahn*, 522 U.S. 3 (1997); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

101. See e.g. Crane, *supra* n. 30, at 4 (“[T]he ‘chilling price competition’ claim was posited but never established.”).

102. According to Crane, this is a function of the fact that attempted predation is captured by the Sherman Act. *Id.* at 3.

103. *Id.* at 16, 29.

104. See e.g. *Spirit Airlines*, 431 F.3d 917; see generally *AMR Corp.*, 335 F.3d 1109; *supra* n. 80 and accompanying text; see also Edlin, *supra* n. 7, at 944, 966.

105. See Edlin, *supra* n. 7, at 945.

106. See e.g. Pitofsky et al., *supra* n. 51, at 868; Crane, *supra* n. 30, at 9 (“If the prey is less efficient than the predator, the predator may be able to exclude the prey from the market by pricing above its own cost but below the prey’s.”); Elhauge, *supra* n. 16, at 338 (“In short, the absence of evidence that monopoly prices, profits, or shares eventually rose in the long run does not mean the exclusionary conduct was not anticompetitive.”); Hovenkamp, *supra* n. 17, at 156 (“Even above-cost predatory

## IV. THE RULE SHOULD BE REASON IN SECTION 2 CASES

“[A]bstract principles never provide an infallible guide to economic effect.”<sup>107</sup> As described above, this has proved true in the most prominent area of antitrust law that has relied heavily on abstract principles to guide economic effect – predatory pricing.<sup>108</sup> To the extent that rules fail in the predatory pricing context, they should be abandoned not only in that context, but in all Section 2 cases that involve much more amorphous standards and conduct.<sup>109</sup>

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pricing strategies are unprofitable in the short run, and a rational firm will make such an investment only if it anticipates that it will be profitable in the long run.”). The Supreme Court has said that “above-cost predatory pricing schemes [are] beyond the practical ability of a judicial tribunal to control.” *Verizon*, 540 U.S. at 414; *see also* Joskow & Klevorick, *supra* n. 7, at 255 (“[N]o practical way exists to distinguish a predatory price cut to a point above average total cost from one that is a short-run profit-maximizing response to the growth of competition.”). Implicit in this observation is that above-cost predatory pricing occurs, but is beyond the ability of courts to distinguish from beneficial price competition. As suggested *infra*, a Rule of Reason approach addresses the Court’s concern by focusing on facts rather than bright-line rules that may or may not prove administrable. Others have asserted that above-cost pricing should not fall under the Sherman Act. *See Brooke Group*, 509 U.S. at 223 (“We have rejected . . . the notion that above-cost prices . . . inflict injury to competition cognizable under the antitrust laws.”); Posner, *supra* n. 30, at 215 (arguing that above-cost pricing should not be unlawful because it cannot exclude an equally efficient competitor); Easterbrook, *supra* n. 53; Edlin, *supra* n. 7, at n. 6 (“The proposition [that above-cost pricing can harm competition] is quite radical in that even economists who believe that predatory pricing is relatively common have generally been content to follow the courts in thinking that the key element of predation is short-run sacrifice by the predator. . . .”); Elhauge, *supra* n. 60; Hovenkamp, *supra* n. 17, at 156 (“If there is no sacrifice of immediate profits – that is, if the price cut is profitable immediately – then the price is efficient and absolutely lawful.”); Ordovery & Willig, *supra* n. 30, at 54; Shores, *supra* n. 9, at 1055 (“For example, when the Supreme Court adopted the general rule that above-cost price cuts never violate the antitrust laws, it made the law of predatory pricing more predictable than it had previously been. In doing so, the Court clarified that a reduction in price cannot be challenged on antitrust grounds, provided it does not go below cost.”) In some instances, this may be a function of a belief that there is no realistic alternative. *See e.g.* Hovenkamp, *supra* n. 17, at 314-15 (“Until antitrust tribunals are able to identify above cost prices as anticompetitive in a reliable manner, a consumer-oriented antitrust policy has no choice but to adhere to the admittedly underdeterrent below cost pricing requirements of the Areeda-Turner or some similar rule.”). If so, it confirms the preoccupation with classification to the detriment of demonstrable economic effects. What does the evidence show is the economic impact of conduct? That should be the question – not what is the relationship between price and cost.

107. Shores, *supra* n. 9, at 1054.

108. Elhauge is of the view that “the Supreme Court has explicitly rejected the proposition that above-cost pricing can be predatory.” Elhauge, *supra* n. 16, at 318. Circuit courts apparently do not see that so clearly. *See* Shores, *supra* n. 9.

109. *See e.g.* Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738 (1981) (for predatory pricing); Easterbrook, *supra* n. 63 (for antitrust in general); Evans & Padilla, *supra* n. 12, at 80 (“Yet where the Chicago School tended to advocate per se legality, post-Chicago thinking enthuses over rule of reason analyses.”); Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 Cal. L. Rev. 1582 (1983) (for mergers); Joskow & Klevorick, *supra* n. 7 (for predatory pricing); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Perspectives 43 (2000); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977) (for vertical restraints). As Kauper has noted in connection

The broad teaching of Supreme Court jurisprudence provides a foundation for demonstrable economic effect being a guide to all antitrust cases.<sup>110</sup> Economic theory should not be excluded from consideration,<sup>111</sup> but it should not be the “end all, be all.”<sup>112</sup> Rule of Reason analysis will ensure that novel practices, and practices that do not fit into any neat classification, will be captured *if* they are anticompetitive.<sup>113</sup> By focusing on demonstrable economic effects based on the evidence presented, courts and juries will be more able to distinguish between anticompetitive low prices and procompetitive low prices.<sup>114</sup>

Further, a Rule of Reason approach based on demonstrable economic effects will give business an opportunity to justify its conduct – prove that it’s procompetitive – thus increasing certainty and the range of permissible conduct.<sup>115</sup> Though it has been said that “businesses have difficulty documenting and sometimes even articulating efficiencies[,]”<sup>116</sup> antitrust law should be applied so as to require it. After all, business is in the best position to justify its conduct – it decides to engage in it, presumably to make money. If business cannot justify its conduct on competitive grounds, the “dog that didn’t bark” may be revealing.

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with leveraging and essential facilities doctrine, “greater specificity has come to be viewed by many as wrongheaded.” Kauper, *supra* n. 8, at 1626.

110. See *Spectrum Sports*, 506 U.S. at 459 (Conduct violates Section 2 “only when it actually monopolizes or dangerously threatens to do so.”); Shores, *supra* n. 9, at 1054 (“The broad teaching of *Sylvania* is that all antitrust analysis, not merely application of the *per se* rule in a particular context, must be based upon demonstrable economic effect.”).

111. See Edlin, *supra* n. 7, at 943 (*Brooke Group* elements “may be sufficient to make out a predatory pricing case, but they should not be necessary.”); Evans & Padilla, *supra* n. 12, at 80 (“We are, however, convinced that economic knowledge, both theory and evidence, can provide useful guidance in the design of administrable legal rules. . .”).

112. See Evans & Padilla, *supra* n. 12, at 86 (“Economics has not identified the necessary and sufficient conditions for any unilateral practice to be anticompetitive.”); Shores, *supra* n. 9, at 1055 (“While relevant economic theory might be a useful tool in resolving factual issues, it should not displace fact analysis in the determination of economic effect.”).

113. See Shores, *supra* n. 9, at 1629 (“[A]ny reformation of standards must deal with the gestalt case, where liability is based on the cumulative effect of a series of acts, none of which themselves would satisfy Section Two’s conduct requirement.”).

114. See Edlin, *supra* n. 7, at 952 (“[T]he challenge for courts has been to find a way to distinguish anticompetitive low prices from procompetitive low prices.”).

115. Although the Rule of Reason may lack precisely defined boundaries, under it, business has the opportunity to show, by proof, that conduct is procompetitive. Business need not understand the particularities of the Rule of Reason. See Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 *Cardozo L. Rev.* 1535 (2005) (persons operate in ignorance of criminal law, but have a general understanding). To the extent that “[d]istinguishing procompetitive from anticompetitive actions with certainty is impossible[,]” Rule of Reason analysis will focus on facts – the only conceivable basis on which to make such distinction with any degree of legitimacy. Evans & Padilla, *supra* n. 12, at 75.

116. Evans & Padilla, *supra* n. 12, at 82.

Rule of Reason analysis will also limit presumptions in Section 2 cases; presumptions that may not hold any water.<sup>117</sup> Also, it could be used as a tool to mitigate the frequency with which Section 2 cases are brought for strategic purposes.<sup>118</sup> To the extent that plaintiffs would have to present concrete evidence to support a Section 2 claim, rather than simply an economics expert that can create an issue of fact by arguing about the appropriate measure of cost, a court could more readily evaluate the record supporting the claim and issue sanctions in appropriate circumstances.

Rule of Reason is the old standby.<sup>119</sup> It has been around antitrust law for nearly one hundred years.<sup>120</sup> When all else fails, courts rely on it.<sup>121</sup> Thus business and the courts have experience with it and are used to it,<sup>122</sup> which is why commentators advocate its use in contexts in which courts lack experience.<sup>123</sup> The Rule of Reason's pedigree underscores why it should be used in Section 2 cases.

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117. See *id.* at 82 (arguing that "there should be no presumption on the part of competition authorities that . . . practices are anticompetitive, even when undertaken by firms with monopoly power").

118. See William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985); Crane, *supra* n. 30, at 8; Kauper, *supra* n. 8, at 1624 (Since Section 2 cases are likely to be brought by competitors, "one could argue that the cases themselves are potentially anticompetitive.").

119. See *e.g.* *FTC v. Ind. Fedn. of Dentists*, 476 U.S. 447, 458-59 (1986) (applying rule of reason instead of per se rule when the restraint's effect is not immediately ascertainable).

120. *Stand. Oil*, 221 U.S. 1.

121. See *Broad. Music v. CBS*, 441 U.S. 1, 24-25 (1979) (explaining when Rule of Reason will apply); Herbert Hovenkamp, *Economics and Federal Antitrust Law* 143 (Law. ed., West 1985) (same); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 464 (1966) (same).

122. See *e.g.* *Maricopa*, 457 U.S. at 343-44 (noting Court conclusively presumes restraint unreasonable when experience allows confident prediction Rule of Reason would condemn); Ernest Gellhorn, *Antitrust Law and Economics In A Nutshell* 6-9 (1976) (historical development of Rule of Reason); Peter Nealis, *Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason*, 61 Ohio St. L.J. 347 (2000); Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 41 (1991) (noting that courts have significant experience with the Rule of Reason in vertical contexts); *but see* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 Vand. L. Rev. 1753, 1754 (1994) (opining that "the modern rule of reason has no substantive content" and that because plaintiffs are reluctant to bring rule of reason suits, the federal courts have little experience in applying it).

123. See *e.g.* Jennifer L. Dauer, *Political Boycotts: Protected by the Political Action Exception to Antitrust Liability or Illegal Per Se?*, 28 U. Cal. Davis L. Rev. 1273, 1307-08 (1995) (noting that courts could easily apply Rule of Reason to mixed-motive boycotts since courts have extensive experience with Rule of Reason); Charles D. Marvin, *Baseball's Unilaterally Imposed Salary Cap: This Baseball Cap Doesn't Fit*, 43 Kan. L. Rev. 625 (1995) (challenge to baseball's salary cap likely to be evaluated under the Rule of Reason); Howard Morse, *Settlement of Intellectual Property Disputes in the Pharmaceutical and Medical Device Industries: Antitrust Rules*, 10 Geo. Mason L. Rev. 359, 361, 367 (2002) (arguing for a rule of reason approach because courts lack experience with exclusion payments).

## V. CONCLUSION

Predatory pricing law, in its current form, relies too heavily on economic theory to the exclusion of competitive facts.<sup>124</sup> As a result, predatory pricing claims have almost been read out of the antitrust laws.<sup>125</sup> But the current predatory pricing standard does not deliver on its promises of certainty or enhancing competition.<sup>126</sup>

Commentators have for a long time suggested that modern theory will solve the riddle of Section 2, but “we have seen very little progress in the theoretical literature that would help regulators and courts separate procompetitive from anticompetitive behavior.”<sup>127</sup> The lack of progress flows from too much complication. Courts and commentators should refocus on Sherman Act fundamentals, for as Justice Holmes explained: “The life of the law has not been logic; it has been experience.”<sup>128</sup> If the Sherman Act is the “Magna Carta of free enterprise,”<sup>129</sup> and “[i]f the goal of antitrust is consumer welfare, then the inquiry should focus on that goal, not on whether a firm is maximizing profits in the short run.”<sup>130</sup> The appropriate tool for conducting such an inquiry is the Rule of Reason. Although predatory pricing law – and the law governing Section 2 generally – may be a ‘damned if you do, damned if you don’t’ enterprise[.]’<sup>131</sup> the damning should be a function of evidence, where business has the full opportunity to justify the procompetitive results of its conduct, not on theory.

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124. See Shores, *supra* n. 9, at 1056 (opining that “the Court has gone too far in determining economic effect by relying on abstract economic principles.”).

125. See *id.* at 1085.

126. See *e.g.* Crane, *supra* n. 30, at 44 (“The structure of predatory pricing law does not provide business executives a high degree of certainty about the legal reception of price cuts.”); Edlin, *supra* n. 7, at 941 (“*Brooke Group* was no great day for consumers, for well-functioning markets, or for antitrust law.”).

127. Evans & Padilla, *supra* n. 12, at 98 (referencing Kovacic & Shapiro, *supra* n. 109, at 58-59).

128. Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

129. *Verizon*, 540 U.S. at 415.

130. Edlin, *supra* n. 7, at 978.

131. Crane, *supra* n. 30, at 65.