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# WHAT WOULD PREDATORY PRICING LAW BE WITHOUT JOHN MCGEE? A REPLY TO PROFESSOR LESLIE

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## ABSTRACT

*In his 2012 article, Revisiting the Revisionist History of Standard Oil, Christopher Leslie takes issue with John McGee’s work on predatory pricing and its influence on antitrust law and scholarship. Leslie claims McGee’s analysis was methodologically flawed, ideologically motivated, but ultimately successful in “distorting” predatory pricing law by persuading courts to adopt a standard too permissive of anticompetitive predation. Holding aside the specific methodological critique of McGee’s analysis, in this paper I demonstrate that Leslie’s claim that McGee distorted predation law fails for a number of reasons. The most fundamental reason is that Leslie does not consider the likely counterfactual antitrust world without McGee’s analysis. Specifically, Leslie does not consider the very likely alternative explanation for the decline in plaintiffs’ success in predation cases—namely, Phillip Areeda and Donald Turner’s seminal 1975 analysis. Whether debates continue within the economics literature regarding the details of McGee’s contribution to our understanding of predatory pricing theory and the Standard Oil saga, there is scant evidence supporting Leslie’s primary claim that McGee has had a distorting influence that has induced courts to adopt permissive attitudes toward anticompetitive predation. Nor is there evidence in the economics literature supporting Leslie’s ancillary claim that current law underdeters anticompetitive predation. A proper*

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*understanding of the intellectual foundations of modern predation doctrine reveals a doctrine far more stable and durable than Leslie implies.*

## I. INTRODUCTION

In his 2012 article, *Revisiting the Revisionist History of Standard Oil*,<sup>1</sup> Christopher Leslie takes issue with John McGee's work on predatory pricing and its influence on antitrust law and scholarship.<sup>2</sup> Neither challenging McGee<sup>3</sup> nor contesting what Leslie describes as Chicago School conventional wisdom are particularly novel claims in the predation literature. Chicago School scholars have themselves long recognized price predation is possible and can be a theoretically rational means of exploiting dominance.<sup>4</sup> Leslie's ultimate claim, however, is much more ambitious and warrants further discussion: McGee's account "distorted" predatory pricing law by inducing courts to impose too strict a standard on plaintiffs, thereby undetering anticompetitive predation. The ambitious, and more interesting, element of Leslie's claim has little to do with the assertion that McGee's account is wrong; Leslie presses the case that alleged methodological and factual errors in a single article fundamentally warped predatory pricing law for the next fifty years.<sup>5</sup>

According to Leslie, predatory pricing scholarship and jurisprudence have never recovered from McGee's onslaught. He proffers that legal scholars and courts, which unwittingly adopted McGee's analysis, have veered antitrust law off-course since *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>6</sup> over a quarter-century ago. This detour resulted in the

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1. Christopher R. Leslie, *Revisiting the Revisionist History of Standard Oil*, 85 S. CAL. L. REV. 573 (2012).

2. John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958). McGee's work has been cited in a number of articles in this Symposium. See Leslie, *supra* note 1, at 577 n.18; Barak Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 432 n.20 (2012); Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 638 n.190 (2012); George L. Priest, *Rethinking the Economic Basis of the Standard Oil Refining Monopoly: Dominance Against Competing Cartels*, 85 S. CAL. L. REV. 499, 503 n.16 (2012); D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 720 n.187 (2012).

3. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX* 145 (1978); RICHARD A. POSNER, *ANTITRUST LAW* 208–11 (2d ed. 2001); James A. Dalton & Louis Esposito, *Predatory Price Cutting and Standard Oil: A Re-Examination of the Trial Record*, 22 RES. L. & ECON. 155 (2007); Elizabeth Granitz & Benjamin Klein, *Monopolization By "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & ECON. 1, 2 (1996).

4. See POSNER, *supra* note 3, at 208–12 (analyzing when "predatory pricing is not, and is, likely to be profitable"); *infra* note 38 and accompanying text.

5. See Leslie, *supra* note 1, at 577–78.

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

familiar *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>7</sup> standard governing predatory pricing cases, which requires plaintiffs to demonstrate both (1) price below an appropriate measure of cost and (2) a dangerous probability of recoupment.<sup>8</sup>

Leslie's claim that *Brooke Group*, in some important respect, is a manifestation of McGee's perverse impact on the development of price predation jurisprudence is interesting. Leslie's distortion claim, however, begs the counterfactual: What would predatory pricing law be without McGee's analysis? Counterfactual analysis is, of course, standard antitrust fare. It also illuminates the fact that Leslie's is an inherently empirical claim. As I will demonstrate below, the claim ultimately fails for a number of reasons. Perhaps the most fundamental weakness is that Leslie does not consider alternative hypotheses that might explain the change in predation law he attributes to a distortion induced by McGee's work. There is a very likely alternative explanation for the decline in plaintiffs' success in predation cases. Namely, Phillip Areeda and Donald Turner's seminal 1975 analysis.<sup>9</sup> Areeda and Turner's work proved incredibly influential with both courts and scholars. Further, the evidence suggests that Areeda and Turner's work had a significant negative impact on plaintiffs' prospects in predation claims well before *Matsushita* was decided, a fact fatal to Leslie's distortion account. Leslie's error in this regard illustrates an important point about modern predation law. Contrary to Leslie's account of a fragile doctrine susceptible to hijacking by a single paper over fifty years ago, the intellectual foundation of modern predation doctrine is a robust one—as former Federal Trade Chairman William Kovacic has observed—with roots in both the Chicago and Harvard antitrust traditions.<sup>10</sup>

Part II briefly reviews Leslie's distortion claim, evaluating his proffered evidence and finding that it is not nearly as sufficient as the claim is bold. Part III takes on the counterfactual thought experiment necessary to evaluate Leslie's claim: What would predatory pricing law look like today absent McGee's work? Part IV concludes.

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7. *Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

8. *Id.* at 222–24.

9. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

10. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 43–51.

## II. DID MCGEE'S ANALYSIS DISTORT PREDATION LAW? THEORY AND EVIDENCE

Leslie challenges both McGee's characterization of *Standard Oil's* facts<sup>11</sup> as well as its implications for predation law.<sup>12</sup> While McGee himself offered some caution with respect to his findings and analysis,<sup>13</sup> Leslie characterizes McGee's work as standing for the following three factual or theoretical propositions: (1) Standard Oil did not engage in predatory pricing; (2) firms do not even attempt predatory pricing; and (3) predatory pricing is inherently unprofitable.<sup>14</sup> Leslie's primary point of contention is apparently that McGee "never defined cost, never enumerated Standard's actual prices, and never actually compared cost to price."<sup>15</sup> So far as his criticism of McGee rests on the factual allegation that Standard Oil did or did not engage in price predation, it is far from novel.<sup>16</sup>

Leslie's distortion claim is potentially more provocative, but not entirely novel. Richard Posner, for example, remarked that "early [predatory pricing] literature was excessively influenced . . . by John McGee's pathbreaking article."<sup>17</sup> Leslie extends this distortion argument from the scholarly literature to the courts. He asserts that "McGee was wildly successful in spinning an alternative narrative" that was "suprising[ly]" embraced by the courts.<sup>18</sup> Given the impressive power McGee's work has allegedly wielded, Leslie ultimately concludes that his scholarship "risks distorting antitrust jurisprudence because predatory pricing law, as shaped by McGee[] . . . , creates a risk of false negatives."<sup>19</sup> But how? Leslie never articulates the precise manner in which McGee's scholarship warped antitrust's predatory pricing standard, but the clear implication is that current law is underdeterrent and the Chicago School is

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11. Leslie, *supra* note 1, at 580–81.

12. *Id.* at 581–82.

13. McGee, *supra* note 2, at 169 ("This limited study suggests that what businessmen do to one another is much less significant to monopoly than what they find it useful to do together to serve their common interest.").

14. Leslie, *supra* note 1, at 579.

15. *Id.* at 599.

16. See *supra* note 3 and accompanying text. Leslie does not take a definitive stand on whether the facts suggest Standard Oil engaged in predation. Leslie, *supra* note 1, at 602 ("[T]he trial record may not tell us with certainty whether Standard engaged in predatory pricing, as we define it today.").

17. POSNER, *supra* note 3, at 208. Posner goes on to critique McGee's work and to discuss the conditions under which "the prospects for successful predation are brighter," *id.* at 214—demonstrating not only that he acknowledges predatory pricing can theoretically be rational, but further that he also is not "accept[ing] without question McGee's" conclusions. Leslie, *supra* note 1, at 579.

18. Leslie, *supra* note 1, at 578–79.

19. *Id.* at 603.

to blame.<sup>20</sup>

This argument is essentially empirical, and it can—and should—be evaluated as such, to the extent possible. A reasonable starting point is to evaluate McGee’s adoption and endorsement by courts, alternative explanations for changes in the law that would otherwise be attributed to McGee, and actual empirical evidence that anticompetitive predation is frequent under the modern standard. The evidence Leslie musters in favor of the distortion principle is inadequate to support his claim for a number of reasons.

The first, and perhaps most detrimental, flaw in Leslie’s analysis is the dearth of evidence supporting his contention that courts in fact overly relied on McGee in developing predatory pricing jurisprudence. Leslie asks “why [McGee’s article is] so widely embraced by . . . judges as proving that predatory pricing does not occur and cannot succeed.”<sup>21</sup> The answer, quite simply, is that it is not. Leslie’s evidence supporting this claim consists entirely of a variety of citations to McGee from scholars and courts.<sup>22</sup> Leslie acknowledges that it took the Supreme Court nearly thirty years to cite McGee’s work<sup>23</sup>—and even then, the Court cited McGee only as a supplemental source,<sup>24</sup> or alongside a string of others.<sup>25</sup> He correctly notes that both *Matsushita* and *Advo, Inc. v. Philadelphia Newspapers, Inc.*<sup>26</sup> cite McGee—but he does not mention that these are the *only* two court cases that cite McGee’s 1958 article.<sup>27</sup> Leslie focuses on widespread judicial

20. Leslie asserts that the reason scholars and judges have readily embraced McGee’s analysis is because “McGee argued against antitrust enforcement as part of a larger political, legal, and academic movement against strong antitrust law,” and that “McGee’s analysis was consistent with the Chicago School’s policy goals.” *Id.* at 602–03. Leslie does not attempt to reconcile this assertion with the analyses of Chicago School scholars, including many whom he cites in his article, who explicitly rejected McGee’s contention that predation was impossible or provided alternative anticompetitive explanations. *See infra* notes 39–40 and accompanying text.

21. Leslie, *supra* note 1, at 602.

22. Leslie also mentions that courts prior to *Matsushita* cited *Standard Oil* for the proposition that price predation can constitute a violation of the Sherman Act but points out that such citations are less common post-*Matsushita*. *Id.* at 578 n.26. However, it is unclear what inferences the reader is invited to draw from this evidence. It is clear that price predation remains an antitrust violation under current law. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993) (articulating the requirements for demonstrating a cognizable predatory pricing case). Leslie may be implying that any apparent fall in references to predation after *Matsushita* is attributable to McGee. Such a decrease in judicial references to predation, however, would be consistent with a reduction in predation cases for any reason.

23. Leslie, *supra* note 1, at 577.

24. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

25. *Id.* at 589–90.

26. *Advo, Inc. v. Phila. Newspapers, Inc.*, 51 F.3d 1191 (3d Cir. 1995).

27. A search on Google Scholar, performed on August 7, 2012, for federal cases citing McGee’s

adoption of *Matsushita*'s language that predatory pricing is "rarely tried, and even more rarely successful,"<sup>28</sup> and he attributes the invocation of that language to McGee's work.<sup>29</sup> But the *Matsushita* opinion itself does not support the claim; rather, it cites Bork, Areeda and Turner, and Easterbrook, as well as McGee.<sup>30</sup>

Additionally, Leslie does not consider alternative explanations for the movements in predation law he attributes to McGee. The most important of these alternative explanations, as I shall discuss below, is Areeda and Turner's pathbreaking 1975 article,<sup>31</sup> to which Leslie makes only a passing reference.<sup>32</sup>

One apparent reason for his failure to consider alternative causes of the shift in predatory pricing law is that Leslie describes the Chicago School as an accomplice to the McGee-induced distortion and views Chicago scholars as uniformly accepting McGee's characterizations and conclusions.<sup>33</sup> But this treatment is simply incorrect. Chicago School scholars have intensely debated the merits of McGee's work as well as the potential for rational price predation.<sup>34</sup> This is an unfortunate omission because it obscures the intellectual foundation of predation analysis shared by both Chicago and Harvard scholars. It is also a peculiar omission. For example, Leslie relies on Benjamin Klein and Elizabeth Granitz's important contribution to the literature<sup>35</sup>—which proffers the alternative

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1958 article resulted in just these two hits. A further advanced search on Westlaw, performed on the same day, for "McGee, Predatory Pricing Cutting" confirmed this result. Additionally, a Westlaw search shows that only ten cases cite McGee's 1980 article, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289 (1980). One of these ten is *Matsushita*. Accordingly, only eleven total cases cite any of McGee's work on predatory pricing.

28. *Matsushita*, 475 U.S. at 589.

29. Leslie, *supra* note 1, at 577.

30. Moreover, this string citation is followed by a "see, e.g." and a "see also" citation. *Id.* at 589–90 (citing *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 88 (2d Cir. 1981); BORK, *supra* note 3, at 149–55; Areeda & Turner, *supra* note 9, at 699; Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981); Roland H. Koller II, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971); McGee, *supra* note 2; McGee, *supra* note 27, at 292–94). *Advo* only cites McGee in a footnote—which also cites two other scholarly sources and *Matsushita*. *Advo*, 51 F.3d at 1196 n.5 (citing *Matsushita*, 475 U.S. at 588–90; MORRIS ADELMAN, A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY (1966); Kenneth G. Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J.L. & ECON. 223, 240 (1970)).

31. Areeda & Turner, *supra* note 9.

32. Leslie, *supra* note 1, at 585.

33. *Id.* at 577–79.

34. Richard Posner, for instance, analyzes McGee's work and concludes that "the possibility cannot be excluded that the threat of predatory pricing could have been effectively employed by the Standard Oil Trust . . ." POSNER, *supra* note 3, at 211.

35. Granitz & Klein, *supra* note 3, at 2.

hypothesis that Standard Oil was engaged in exclusionary efforts to raise rivals' costs—to illustrate flaws in McGee's argument,<sup>36</sup> but neglects to discuss the divergence within the Chicago School that their work represents.<sup>37</sup> Moreover, Leslie fails to recognize that many prominent Chicago School scholars do indeed concede the theoretical potential for rational price predation<sup>38</sup>—Robert Bork, in his classic work on antitrust, expresses skepticism concerning predation theory, but cautions that “[t]hese considerations do not demonstrate that price cutting could never under any circumstances be a successful method of predation.”<sup>39</sup> The heterogeneity of views within the Chicago School with respect to both predation and analysis of *Standard Oil* should have led Leslie to reconsider his claim that courts and scholars have uncritically accepted McGee because his views were consistent with Chicago School policy goals. The facts are simply inconsistent with Leslie's theoretical explanation.

Finally, Leslie offers no evidence that modern predation law actually underdeters. While Leslie repeatedly admonishes the *Matsushita* Court for referencing McGee, he never claims that *Matsushita* was wrongly decided, nor does he provide examples of anticompetitive predation created by the allegedly distorted modern standard.

Holding aside the lack of evidence supporting Leslie's distortion claim, his article raises the interesting issue of evaluating what predatory pricing law would be absent McGee—that is, how differently would antitrust treat these claims if McGee never wrote his 1958 paper? The evidence suggests the answer is “not much”; but the path to the answer highlights an intellectually robust predation doctrine.

36. Leslie, *supra* note 1, at 596.

37. Indeed, Granitz and Klein's work alone has prompted vigorous debate from within the Chicago School and remains the leading account of the Standard Oil monopoly. *See generally* Granitz & Klein, *supra* note 3 (proffering the original hub-and-spoke theory of exclusionary conduct); Benjamin Klein, *The “Hub-and-Spoke” Conspiracy that Created the Standard Oil Monopoly*, 85 S. CAL. L. REV. 459 (2012) (building on the original hub-and-spoke theory and replying to critiques); George L. Priest, *Rethinking the Economic Basis of the Standard Oil Refining Monopoly: Dominance Against Competing Cartels*, 85 S. CAL. L. REV. 499 (2012) (challenging this explanation of Standard Oil's behavior).

38. *See, e.g.*, BORK, *supra* note 3, at 145 (“[T]here seems nothing inherently impossible in the theory [of predatory pricing]. The issue is the probability of the occurrence of predation and the means available for detecting it.”); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 186 (1976) (“[P]redatory pricing cannot be dismissed as inevitably an irrational practice . . . .”); Easterbrook, *supra* note 30, at 268 (“It is conceivable that predation could be profitable. Short-run sacrifice for later reward often is a rational way to maximize profits . . . . The question, though, is whether profitable predation is probable.”).

39. BORK, *supra* note 3, at 154.

### III. WHERE WOULD PREDATORY PRICING LAW BE WITHOUT JOHN MCGEE?

Leslie's distortion claim is difficult to evaluate in a manner that would avoid the methodological flaws he ascribes to McGee's work on *Standard Oil*. As discussed, the clear implication of Leslie's claim is that McGee's analysis has stunted the healthy development of predation doctrine.<sup>40</sup> Leslie thus raises an interesting thought experiment and one that highlights some important features of our "common law" system of antitrust jurisprudence.

Leslie's distortion claim is inherently an empirical one. In order to isolate the impact of McGee's influence on predation law, basic empirical methods require one to have an understanding (or at least a theory) of how predation law would have developed over the last fifty-four years in the absence of his work. Developing this understanding is a challenging task; but it is necessary to engage in the sort of causal inference Leslie's claim invites. The importance of constructing counterfactuals in antitrust analysis is familiar territory for antitrust lawyers and economists. Leslie makes no attempt to engage in such an exercise; instead, he attributes changes in predation law to McGee without considering alternative explanations of those changes.<sup>41</sup>

Recall that Leslie's claim is that McGee's analysis gained "serious traction" when the Supreme Court cited it favorably in *Matsushita* for the proposition that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."<sup>42</sup> In the "aftermath of *Matsushita*," Leslie contends, "antitrust plaintiffs generally lost predatory pricing claims."<sup>43</sup> This assertion begs the question of

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40. Leslie's argument thus has much in common with the themes in the recent collection of essays launching the argument that "conservative economics" has enjoyed excessive influence over modern antitrust law. HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008). As with the bulk of those essays, Leslie does little to provide evidence that the Supreme Court's modern predation decisions—*Matsushita* and *Brooke Group*—were wrongly decided or to appeal to empirical evidence supporting the notion that anticompetitive predation is frequent. See generally Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 5 COMPETITION POL'Y INT'L 179 (2009) (criticizing several of the essays in *Overshot the Mark* for failing to provide empirical support for the claim that Post-Chicago theory has greater predictive power or theoretical robustness than its Chicago predecessors).

41. Ironically, Leslie does so while going to great lengths to ensure that readers understand that McGee's work is "not truly empirical," that courts and scholars accepted it as such because its "conclusions fit with the economic theory that those who cite it were advocating," and that "McGee provided no empirical evidence to support his theoretical assertions." Leslie, *supra* note 1, at 599, 602.

42. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

43. Leslie, *supra* note 1, at 577.

whether there were any important events in the intellectual development of the antitrust analysis of predatory pricing between McGee's 1958 article and *Matsushita* in 1986 that could have potentially been responsible for the shift toward a more significant burden of production facing plaintiffs. I have already indicated Areeda and Turner's 1975 analysis was precisely such an event.

Areeda and Turner's seminal 1975 analysis of predation not only had significant influence on legal doctrine, but it was also considerably more influential with antitrust courts and scholars than was McGee's article.<sup>44</sup> The more interesting question is whether the shift in antitrust jurisprudence Leslie attributes to McGee occurred after *Matsushita*, as he claims, or was instead already set in motion by the impact of Areeda and Turner's article well before then. It is most certainly the case that Areeda and Turner had an immediate impact: two courts endorsed the Areeda and Turner analysis in dismissing plaintiffs' predation allegations within a few months of the article's publication.<sup>45</sup> By 1978, a modified version of the Areeda and Turner price-cost test appeared in their treatise,<sup>46</sup> and it was Areeda and Turner, not McGee, who were the most frequently cited commentators in *Matsushita* and *Brooke Group*.<sup>47</sup> By 1981, well before *Matsushita*, Steven C. Salop describes the powerful impact Areeda and Turner had already had on antitrust courts and scholars, noting that

more than any other article, it has led courts to begin taking an economic view of predation, either by actually adopting the rule or by using it as a starting point. Indeed, the progress the courts have made in the past 6 years in increasing their own economic sophistication has been dramatic.<sup>48</sup>

44. As noted above, only two court cases cite McGee's 1958 article, and ten more cite his 1980 article. See *supra* note 27 and accompanying text. In contrast, Westlaw searches as of August 7, 2012 indicate 116 cases (104 federal and twelve state) cite Areeda and Turner's 1975 piece. If one restricts attention to 1975–1981, the years immediately following the publication of Areeda and Turner's work, sixty-five cases cite Areeda and Turner; in contrast, zero cases cite McGee's 1958 article and just four cite his 1980 article.

45. See *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358–59 (9th Cir. 1976); *Int'l Air Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714, 723–25 & n.21 (5th Cir. 1975); Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 767–68, 791 (1981). On the influence of Areeda, Turner, and the Harvard School more generally on U.S. predatory pricing law, see Kovacic, *supra* note 10, at 43–51.

46. 3 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶¶ 710–22 (1978).

47. *Brooke Group* does not cite McGee, but cites Areeda and Turner's works several times. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221, 222, 233, 238, 239 (1993). *Matsushita* also cites Areeda and Turner, see *Matsushita*, 475 U.S. at 585 n.9, 589, 591, more frequently than it does McGee, see *id.* at 289, 290.

48. Steven C. Salop, *Strategy, Predation, and Antitrust Analysis: An Introduction*, in STRATEGY, PREDATION, AND ANTITRUST ANALYSIS 1, 10–11 (Steven C. Salop ed., Federal Trade Commission

And by the mid-1980s—but notably *prior* to *Matsushita*—most courts based their predatory pricing standard on “the relation of the suspect price to the firm’s costs.”<sup>49</sup>

There is a more direct empirical test of Leslie’s claim. Leslie argues that *Matsushita* was the genesis of McGee’s distortion and attributes plaintiffs’ difficulties in predation cases post-*Matsushita* to McGee. However, if the adoption of the Areeda-Turner test in lower courts had already begun to take form prior to *Matsushita* in 1986, and plaintiffs were unable to satisfy that standard well before then, it follows that Leslie cannot logically attribute those changes to McGee’s analysis of *Standard Oil*. Leslie does not consider this possibility. But immediately after the Areeda and Turner article was published, it became clear that predation law had taken a pro-defendant turn—that is, defendants were successful in fending off predation claims during this time period without any help from McGee.

Empirical analyses of predatory pricing cases confirm that Areeda and Turner’s work—and not McGee’s—effected serious changes in predatory pricing rules and case outcomes. In his examination of seventy-three litigated predatory pricing cases that arose prior to 1971, Roland H. Koller II found that private plaintiffs, the DOJ, and the FTC prevailed in forty-five cases (over 60 percent) while defendants prevailed in just twenty-eight instances (slightly below 40 percent).<sup>50</sup> Predatory pricing claims were alive and well into the early 1970s. However, predatory pricing plaintiffs’ fortunes had already turned soon thereafter. James Hurwitz and William Kovacic analyzed fifty-seven cases alleging predatory pricing, broadly construed, disposed of on the merits between 1975 and 1981 and found that defendants tended to prevail.<sup>51</sup> The tides had turned. Defendants were successful in forty-five cases (almost 80% percent); meanwhile, plaintiffs

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1981).

49. 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 737b-c (3d ed. 2008) (documenting various courts’ implementation of cost-based standards and evidence). *See also* *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (“Thus, most courts now find their standard, not in intent, but in the relation of the suspect price to the firm’s costs.”).

50. Koller, *supra* note 30, at 110. Koller examined 123 cases total, and determined that defendants were legally “adjudged” to have engaged in predatory pricing in ninety-five cases total; this number includes thirty-two consent decrees and eighteen cases decided on procedural issues, which arguably should be omitted from the sample. *Id.* at 110–11 & n.8. Hence, forty-five is a lower bound on the number of cases in which plaintiffs prevailed. Additionally, Koller found private plaintiffs prevailed in twelve cases, the DOJ eight, and the FTC twenty-five. *Id.*

51. James Hurwitz & William Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 140 n.295, 151–56 (1982).

prevailed in just twelve cases (slightly above 20 percent).<sup>52</sup> In fact, scholars noted in 1981 that plaintiffs had yet to prevail under the influential Areeda-Turner test.<sup>53</sup> Contrary to Leslie's claims, these data demonstrate that McGee's scholarship did not distort predatory pricing law at all; indeed, it is clear that the major "culprit" responsible for these changes is Areeda and Turner, not McGee.

Leslie hypothesizes that the Chicago School hijacked predatory pricing law by reflexively adopting McGee's analysis without question, resulting in an equilibrium in which "predatory pricing claims fail as a matter of law because the Supreme Court has held that predation is neither tried nor successful."<sup>54</sup> Leslie's omission of Areeda and Turner's remarkable influence on predation law prior to *Matsushita* is fatal to his argument. But perhaps more importantly, the "double helix" of Chicago and Harvard influence on modern predation law illuminates the fact that the intellectual backbone of modern competition policy is not so fragile as to render itself captured by the influence of a single scholar in a single paper. The anti-intervention instinct in modern predation law is attributable neither to McGee nor to any other single scholar; rather, as Kovacic observes, that instinct is attributable to "a double helix that intermingles Chicago School perspectives with the Harvard School contributions of Phillip Areeda, Donald Turner, and Stephen Breyer. Harvard has had as much to do as Chicago with creating many of the widely observed presumptions and precautions that disfavor intervention by U.S. courts and enforcement agencies."<sup>55</sup>

This more robust and inclusive understanding of the intellectual foundation of modern predation law suggests that the way forward in developing efficient legal rules has little to do, after all, with the particular merits of McGee's analysis of potential predation in *Standard Oil*. Whether *Brooke Group* is ultimately a superior legal rule for alleged price predation—that is, whether it minimizes the social costs of false positives

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52. *Id.* at 140 n.295. Hurwitz and Kovacic's original work found defendants prevailed in all sixteen cases that had reached final judgment from which no further appeal was possible; plaintiffs succeeded at the trial level in four cases, which were all on appeal at the time the article was published. Another nine cases had not yet reached a decision on the merits. *Id.* I updated their findings where further information regarding subsequent decisions or retrial decisions was available. Where no additional information was obtainable, I deferred to Hurwitz and Kovacic's original classifications. I characterize a party as successful if it prevailed at the latest merits stage for which information is available (for example, if a plaintiff won a preliminary injunction and no further information about the case was available, the case counts as a plaintiff win).

53. Brodley & Hay, *supra* note 45, at 768.

54. Leslie, *supra* note 1, at 603.

55. Kovacic, *supra* note 10, at 80.

and false negatives as well as administrative costs—requires an analysis of existing economic theory and empirical evidence. Leslie, for example, could in principle be correct that *Brooke Group* underdeters predation, though incorrect that the modern standard should be attributed to McGee. Bruce H. Kobayashi surveys the theoretical and empirical literature in great detail and characterizes the last two decades of scholarship as disturbing the “relatively settled consensus” on the rarity of price predation and describes some empirical studies “consistent with successful predation.”<sup>56</sup> As Kobayashi notes, however, many of these studies are incapable of distinguishing anticompetitive from pro-competitive conduct and the data are consistent with both.<sup>57</sup> The existing economic theory and empirical evidence are importantly limited<sup>58</sup> and do not support the proposition that anticompetitive predation could be more efficiently deterred by another legal rule.<sup>59</sup> This is not to imply that predation does not exist; it almost certainly does. However, the case for the *Brooke Group* rule does not rest solely on the nonexistence of price predation.<sup>60</sup> Rather, its validity is further buttressed by the joint Chicago and Harvard Schools’ recognition that the error costs and chilling effects associated with condemning pro-competitive price cuts are significant considerations when crafting an appropriate liability rule, and that these concerns may overshadow abstract possibilities of harmful conduct.

The theoretical and empirical literature on predation will continue to grow and with it, our understanding of the economics of price predation, its frequency, whether we can reliably identify it in practice, and the welfare consequences of different legal rules governing price-cutting. A necessary

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56. Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, in ANTITRUST LAW AND ECONOMICS 116, 150 (Keith N. Hylton ed., 2010).

57. *Id.* at 125–28.

58. These studies are limited not only by the scarce amount of information available for evaluating the true effects of an alleged price predator’s conduct, but also further by the inherent difficulty in discerning the difference between pro- and anticompetitive price cutting. Accordingly, many scholars come to conflicting conclusions even when evaluating the same set of cases. Compare Koller, *supra* note 30, with Richard O. Zerbe, Jr. & Donald Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655 (1982), and Richard O. Zerbe, Jr. & Michael T. Mumford, *Does Predatory Pricing Exist? Economic Theory and the Courts After Brooke Group*, 41 ANTITRUST BULL. 949 (1996). As such, these empirical studies may reveal individual instances of false positives and false negatives, but they do not support strong conclusions as to the frequency or magnitude of either.

59. Kobayashi, *supra* note 56, at 150.

60. *Id.* (citing AREEDA & HOVENKAMP, *supra* note 49, at ¶737b–c) (“The reasons these tests for predatory pricing were adopted was not because there is widespread consensus that above-cost pricing strategies can never be anticompetitive in the long run. Rather, it is because our measurement tools are too imprecise to evaluate such strategies without creating an intolerable risk of chilling competitive behavior.”).

condition for consumer-welfare oriented antitrust law is that our legal rules are sensitive to both the changes in our economic understanding of business practices and the social costs and benefits of rules versus standards.

#### IV. CONCLUSION

Leslie's goal in attributing to McGee what he perceives as a distortion in predation law resulting in underdeterrence appears to be shifting the burden to those who are skeptical of price predation.<sup>61</sup> There is obvious irony in a methodological critique focused on McGee's allegedly unsound empirical methods that itself makes causal inferences without any attempt to construct a "but-for" world and omits perhaps the single most important event in the intellectual history of predation law. However, there is also a lesson in the relative value of focusing the energies of the antitrust community on evidence-based antitrust—efforts to create, identify, and craft antitrust rules around the best existing theory and evidence—rather than on rhetorical battles over antitrust "schools."<sup>62</sup> While debates can rage on within the economics literature regarding McGee's contribution to our understanding of predatory pricing theory, there is scant evidence supporting the proposition that McGee has had much influence on modern predation law, much less a seriously distorting influence inducing courts to adopt permissive attitudes toward anticompetitive predation. The *Brooke Group* standard reflects concerns of administrability and chilling pro-competitive price-cutting. These concerns are shared by both the Chicago and Harvard Schools, and no doubt by others. A proper understanding of the intellectual foundations of modern predation doctrine reveals a doctrine far more stable and durable than Leslie implies.

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61. Leslie, *supra* note 1, at 602 ("If predatory pricing skeptics wish to refute this case, they can attempt to do so, but they face an evidentiary burden.").

62. Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence Based Antitrust*, 78 ANTITRUST L.J. (forthcoming 2012).