Can Antitrust Law Incorporate Insights from Behavioral Economics?

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The Chicago School of law and economics revolutionized antitrust law. By applying insights from microeconomics, scholars associated with the Chicago School introduced more rigor into antitrust analysis. Antitrust law is now viewed through an economics lens. Today, it is essentially impossible to practice antitrust law without understanding several economic concepts.

 The field of economics, however, has evolved in ways that undermine many of the fundamental insights of the Chicago School. This paper explores how behavioral economics has improved upon the basic microeconomic models that have been so influential in antitrust jurisprudence over the past few decades. The insights from behavioral economics challenge the policy prescriptions associated with the Chicago School. The traditional form of Law and economics associated with the Chicago School argues that many aspects of antitrust law are unnecessary because business decision-makers are rational and markets are self-correcting. According to this theory, firms do not engage in costly anticompetitive conduct. Behavioral economics identifies several ways in which individuals – and firms – deviate from so-called rationality. The lessons from behavioral economics demonstrate how antitrust enforcement can make markets more efficient than a strict laissez-faire approach.

Behavioral economics represents a refinement and improvement over traditional microeconomics. Unfortunately, courts may be resistant to incorporating the insights from behavioral economics into antitrust jurisprudence. This paper explores why. The reasons include the relative simplicity of basic microeconomics compared to the more nuanced explanation of business behavior offered by behavioral economics. The paper examines some of the benefits of including behavioral economic concepts in antitrust analysis and the barriers to doing so. It argues for less reliance on theory and greater appreciation of facts.

I. The Traditional Microeconomic Explanation of Markets and Antitrust

Law and economics theory is the dominant paradigm in antitrust jurisprudence.[[2]](#footnote-2) Scholars associated with the Chicago School have been largely successful in defining the goals and assumptions of antitrust analysis. The goal of antitrust law, according to the law and economics paradigm, is efficiency. The underlying assumption to their antitrust analysis is rationality.[[3]](#footnote-3) Rationality in this context is defined as profit maximization.[[4]](#footnote-4) While necessary to make their economic models work, this rationality assumption has distorted antitrust analysis and has led to incorrect results in actual antitrust litigation.

The assumption of rationality affects antitrust doctrine because courts assume that firms do not engage in irrational behavior. [[5]](#footnote-5) Courts use the rationality assumption to argue that some forms of unilateral and conspiratorial conduct are irrational and therefore must not have occurred. In many cases, the theory of rationality employed by the court is inconsistent with the actual facts of the case. This results in courts holding, as a matter of law, the conduct alleged by the plaintiffs did not happen despite the fact that the evidence in the case proves, as a matter of fact, the conduct did happen.

With respect to predation, for example, courts have held that predatory pricing is irrational and therefore must not occur. In *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,[[6]](#footnote-6) the Supreme Court asserted that “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.”[[7]](#footnote-7) The Court essentially implemented the Chicago School theory that predatory pricing is irrational because the predatory firm must incur losses with certainty even though there is only a mere probability that the losses can be recouped in the future.[[8]](#footnote-8)

This line of thinking distorted the result in *Brooke Group v. Brown & Williamson Tobacco Corp*.,[[9]](#footnote-9) in which one tobacco firm sued its competitor for engaging in below cost pricing of generic cigarettes. Because it was losing market share in the market for branded cigarettes, Liggett began selling generic cigarettes, which had plain packaging, minimal marketing, and a significantly lower price than traditionally branded cigarettes. Price-sensitive consumers shifted away from branded cigarettes to Liggett’s generic cigarettes. One of the firms that lost considerable sales of its branded cigarettes was Brown & Williamson (B&W), which responded by manufacturing its own generic cigarettes and initiating a price war against Liggett. Liggett brought an antitrust suit, claiming that B&W was charging a price below cost that was “intended to pressure [Liggett] to raise its list prices on generic cigarettes, so that the percentage price difference between generic and branded cigarettes would narrow. … The resulting reduction in the list price gap … would restrain the growth of the economy segment and preserve Brown & Williamson’s supracompetitive profits on its branded cigarettes.”[[10]](#footnote-10) After the jury found that B&W had engaged in predatory pricing, federal judges rejected the jury verdict because they found Liggett’s theory of the case to be “economically irrational” since it required B&W to recoup its losses through oligopoly pricing.[[11]](#footnote-11) The court concluded that B&W must not have been charging a price below cost because it “had no reasonable prospect of recouping its predatory losses,” and thus was entitled to judgment as a matter of law.[[12]](#footnote-12) As a result of the Supreme Court’s decision in *Brooke Group*, lower courts have rejected predatory pricing claims, asserting that such schemes are “unlikely to be attempted by rational businessmen.”[[13]](#footnote-13) The assumption of rationality has become dispositive in predatory pricing cases.

 Does microeconomic theory correctly predict and explain the actual conduct in these cases? In many instances, the facts prove that the plaintiff’s exposition of the facts accurate. *Brooke Group* proves an instance of this. The evidence showed that B&W did charge a price below its costs.[[14]](#footnote-14) After the period in which Brown and Williamson engaged in the predatory pricing, Liggett did in fact increase the price of generic cigarettes and the market price for generic cigarettes rose dramatically to the point where it exceeded the previous price for brand name cigarettes. In turn, the price of brand name cigarettes skyrocketed. In other words, Brown and Williamson’s tactic of engaging in predatorily low prices in generic cigarettes did have the effect of increasing market prices of both generic and brand name cigarettes. Brown and Williamson recouped its losses and then some. Its predatory pricing strategy proved economically successful and the Supreme Court still concluded that the plaintiff’s theory was irrational and therefore the anticompetitive conduct must not have happened.

Another example of a court emphasizing rationality at the expense of actuality is *APS v. Hughes*,[[15]](#footnote-15) which involved allegations of a concerted boycott against the supplier of a specialized missile part. APS and one other competitor supplied a particular missile part to two defense contractors, Hughes and Raytheon. When APS raised its price to Raytheon, Raytheon responded by agreeing with Hughes to boycott any further purchases from APS. APS sued the companies for violating Section One of the Sherman Act. The district court granted summary judgment to the defendants and the Ninth Circuit affirmed, asserting that it would be irrational for Hughes and Raytheon to boycott one supplier in a duopolized parts market because that would leave the two defense contractors at the mercy of the remaining monopolist over that part. The Ninth Circuit concluded that “APS’s argument makes no economic sense.”[[16]](#footnote-16) At first look, the defendants conduct may seem irrational, but that doesn’t mean that they didn’t do it, as the actual facts of the case established. Procedurally, the defendants themselves conceded (for the purposes of summary judgment) that they agreed to boycott APS. The court acknowledged that “defendants do not contest APS’s allegation that because Raytheon was ‘angered at APS’s attempt to charge Raytheon an increased price for A3’s,’ Raytheon convinced Hughes to join it in refusing to deal with APS ‘for the purpose and with the intent of driving APS out of the market for the manufacture of A3’s.’” Substantively, looking at the actual evidence in the case, the Ninth Circuit concluded “the evidence establishes *without contradiction* that Raytheon and Hughes boycotted APS to punish it.”[[17]](#footnote-17) The rationality assumption led the court astray. Regardless of whether or not a group boycott by Hughes and Raytheon was rational, it happened.[[18]](#footnote-18)

The problem with the rationality assumption is not that it never holds. Most of the conduct engaged in by firms is easily understood as profit maximizing. But litigation becomes complicated when firms engage in conduct that seems to violate the assumption of rationality. Exposed to a steady stream of traditional microeconomic theory, when some judges see a perceived deviation from rationality, they reject it and conclude that this nonconforming conduct must not be happening. This refusal to appreciate the prevalence of so-called irrational behavior in modern economies can distort fact-finding in individual cases.

II. Behavioral Economics Explains Deviations from Rationality

In evaluating plaintiffs’ claims of alleged anticompetitive conduct, many antitrust courts have adopted the law and economics movement’s rationality assumption. But this assumption is not universally accepted by scholars. Challenging the traditional law and economics model’s assumption of rationality, behavioral law and economics shows that people do not always behave rationally. Behavioral law and economics seeks “to explore the implications of actual (not hypothesized) human behavior for the law.”[[19]](#footnote-19) The new paradigm accepts, among other things, a level of uncertainty in decision-making.[[20]](#footnote-20) Through experiments, “behavioral studies show that humans use fundamentally defective heuristics to simplify choices made under conditions of uncertainty.”[[21]](#footnote-21) Invoking research from other academic fields, “such as psychology, neuroscience, and sociology, behavioral economists note that a sizeable percentage of their test subjects systemically deviate from these rational choice theories’ predicted outcome in several important ways.”[[22]](#footnote-22) In particular, some studies show that corporate decision-making violates the rationality assumption.[[23]](#footnote-23)

Rational decision-making is constrained by an individual’s access to information and abilities to process that information. This is generally referred to as bounded rationality, which “the obvious fact that human cognitive abilities are not infinite. We have limited computational skills and seriously flawed memories.”[[24]](#footnote-24) It is not surprising that firms do not always behave rationally. For example, executive compensation appears to be an area of business decision-making where non-profit-maximizing behavior is the norm. While American corporations grant their CEOs compensation packages worth hundreds of millions of dollars, “academics have found little evidence that higher executive pay leads to better company performance, and [a] recent study of three thousand companies actually found that the firms whose directors were the most well-connected – and which paid their CEOs most lavishly – in fact underperformed the market.”[[25]](#footnote-25) This hardly qualifies as rational behavior.

The value of behavioral economics is that it explains why deviations from rational behavior occur. It does so by identifying a series of cognitive biases that can distort decision-making. Some of these biases include hindsight bias, optimism or overconfidence bias, as well as the desire to avoid perceived unfairness. Many other important cognitive biases exist and are explained extensively in the behavioral economics literature.

 Hindsight bias exists when people overestimate the ex ante probability of an event occurring after they have been told what outcome actually occurred.[[26]](#footnote-26) Hindsight bias is ubiquitous as “people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared ‘relatively inevitable’ before it happened. People believe that others should have been able to anticipate events much better than was actually the case.”[[27]](#footnote-27) Professors Korobkin and Ulen have explained the early research in this area:

“In what is arguably the most famous of the many hindsight bias studies, Baruch Fischhoff gave five groups of subjects a passage to read describing the events leading up to a military confrontation between the British army and the Gurkas in Nepal in the nineteenth century and asked them, on the basis of that information alone, to specify the likelihood that four specified military outcomes would have resulted. Each of four groups was told that a different outcome of the four specified outcomes actually occurred, while the fifth group (the control group) was given no information on the actual outcome. Subjects in each of the groups to whom the investigators gave an outcome reported an *ex ante* prediction of that outcome that was considerably higher than the prediction for that outcome made by the subjects in the control group.  In other words, information about what actually occurred apparently influences our judgments concerning what we thought would occur before we knew the outcome. Events that have actually occurred can seem, through the lens of hindsight, to have been almost inevitable.”[[28]](#footnote-28)

Optimism bias exists when individuals overestimate their likelihood of success, including their own talents or merits relative to other people. Professor Avishalom Tor has explained that “the psychological literature reveals a number of cognitive processes that lead entrants, like other individuals making judgments with significant personal stakes under uncertainty, to be overconfident about the prospects of their ventures and insensitive to background statistical information.”[[29]](#footnote-29) Professor Tor’s last observation is particularly instructive: the problem is not lack of information. Professors Russell Korobkin and Tom Ulen note: “Even when actors know the actual probability distribution of a particular event, their predictions as to the likelihood that that event will happen to them are susceptible to the “overconfidence bias”: the belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us.”[[30]](#footnote-30)

Finally, people sense of fairness can lead them to engage in conduct that from an outside perspective would appear to be irrational. In general, we do not expect people to incur costs unless they receive a direct tangible benefit. For example, quality being equal, it is rational for consumers to purchase goods and services from the provider charging the lowest price. Nevertheless, research shows that “People are willing to pay to punish someone who has been unfair. This is the same behavior that drives boycotts, where consumers refrain from buying something they normally enjoy in order to punish an offending party. Conventional economics has sometimes recognized such behavior, but it has received little attention in law and economics, where, unfortunately, it may often be quite relevant.”[[31]](#footnote-31) This desire to avoid results that are unfair - even at significant cost to the decision-maker - can be interpreted as a deviation from rationality if rationality is defined solely through the lens of profit maximization.

Behavioral economists have identified and demonstrated several forms of cognitive bias. After reviewing the literature extensively, Professors Russell Korobkin and Tom Ulen concluded that “There is simply too much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory.”[[32]](#footnote-32) Many of these deviations are explained by the work of behavioral economists. Ultimately, cognitive biases affect everyone.[[33]](#footnote-33) For example, hindsight bias has been documented among the educated elite,[[34]](#footnote-34) including doctors[[35]](#footnote-35) and politicians.[[36]](#footnote-36) The prevalence of cognitive biases and observable deviations from rationality should make us question the rationality assumption of traditional microeconomics.

Understanding the various cognitive biases described by behavioral economics can help inform antitrust analysis. With respect to hindsight bias, when judges see alleged conspiracies and anti-competitive conduct that ultimately fails, some judges assume that the behavior alleged by the plaintiffs must not have happened. For example, in *Matsushita*, the Court held that the defendants must not have conspired to drive their competitors from the market because the alleged conspiracy had been going on for 20 years and still had not succeeded .[[37]](#footnote-37) The *Matsushita* majority concluded: “The alleged conspiracy’s failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist.”[[38]](#footnote-38) This is a classic example of hindsight bias.[[39]](#footnote-39) The rationality of business conduct should not be determined based on an ex post determination of whether the alleged conduct actually maximized profits.[[40]](#footnote-40) Sometimes what appears irrational in hindsight may have been rational at the time that the decision was made. If a conspiracy fails, the root cause of the problem may be inadequate information or overoptimistic predictions.[[41]](#footnote-41)

Overconfidence bias infects business decision-making.[[42]](#footnote-42) This has important implications for antitrust analysis. Traditional microeconomics theory teaches that firms will only enter a market when the hard data shows that such a decision is profit maximizing. Professor Avishalom Tor has shown that overoptimism often plagues these decisions as “entrants may also underestimate their likely losses upon failure.”[[43]](#footnote-43) He has explained that:

“The empirical evidence strongly suggests that negative net present value entry is commonplace. First, while entry is pervasive, amounting on average to about 50% of all existing firms every five years across all domestic manufacturing industries, entrants also exhibit strikingly high mortality rates. Within ten years, only about 20% of any entrant cohort still operates. Attrition, moreover, begins right from the start, with more than 25% of new entrants exiting within two years, over 60% disappearing within five years.”[[44]](#footnote-44)

Professor Tor concludes that “The rationality assumption--that entrants will make only positive, risk-adjusted net present value entry attempts--is difficult to reconcile with the empirical data.”[[45]](#footnote-45) If market entry and exit do not follow the path predicted by traditional microeconomics theory, that has important implications for the role of antitrust law in facilitating efficient market access.

 Finally, a desire for fairness can explain some conduct that appears to be irrational under the traditional microeconomic theory of rationality. It is conceivable that the decision-makers at Hughes and Raytheon felt that APS was engaging in patently unfair practices by hiking prices on specialized missile parts when APS knew that both defense contractors needed the parts to fulfill government contracts. Much research shows that how a price hike is communicated to consumers can determine whether or not consumers will perceive that the increase in price as fair or unfair, and thus whether or not they will acquiesce to the price hike or rebel in some manner.

 In sum, firms sometimes engage in behavior that appears to violate the assumption of rationality. When judges treat the rationality assumption as a legal truth instead of as a model-simplifying device, it can lead courts to decide cases incorrectly. Behavior economics can help explain why these deviations from rationality occur.

III. Barriers to Applying Behavioral Economics in Antitrust Analysis

Although behavioral economics is now part of the economics curriculum at many universities, it still has not penetrated antitrust jurisprudence in any meaningful way. Professor Maurice Stucke notes that “Although behavioral law and economics has become ‘the hottest area of legal scholarship,’ few behavioral economics articles relate to, or even discuss, antitrust.”[[46]](#footnote-46) This section explores why behavioral antitrust has not been particularly influential in antitrust analysis.

A. The Allure of the Chicago School: Judges and Economic Theory

In reaching their conclusions that certain alleged behavior is irrational and therefore must not have occurred as a matter of law, judges generally rely on simple microeconomic theory as explained by disciples of the Chicago School.[[47]](#footnote-47) Courts are only citing one side of the economic literature. This is unfortunate because “U.S. courts, as well as many American legal scholars, have had difficulty recognizing long-term strategic pricing behavior.  This is exhibited by a number of scholars in the antitrust area who insist on the efficiency of capital markets, resist theories based on long-run possibilities, and reject the concept of predation. Unfortunately, these legal scholars have ignored studies of strategic behavior in economic markets which demonstrate ‘the learning curve benefits of cumulative production, the attributes of investment, techniques for raising rivals' costs, strategic reputation effects, and even international strategic features.’”[[48]](#footnote-48)

It is hardly surprising that courts rely on the simple version of economic theory espoused by the Chicago School. Such theory has the primary virtue of being just that: simple. It is easy to understand and easy to apply. Judges do not necessarily understand how markets work. They have no practice running businesses – either as a monopolist defending its turf or a member of an antitrust conspiracy trying to keep it stable. Federal judge (and former University of Chicago School of Law professor) Diane Wood has noted: “Economic mumbo-jumbo is already prevalent in the field, but lawyers talk of the trade-off between the deadweight loss “triangle” and the income transfer “rectangle” at their peril in front of a judge who does not live and breathe the field.”[[49]](#footnote-49) The Chicago School approach provides an easy mechanism to dispose of complicated antitrust cases. It starts from the assumption that firms only engage in rational behavior. It then describes many antitrust violations as involving behavior that it characterizes as irrational and instructs judges that the behavior must not have occurred despite the evidence presented in any given case. This is precisely what happened in *Brooke Group* and *APS v. Hughes*.

Behavioral economics is more complicated and more nuanced than traditional microeconomic theory. It does not provide easy answers; instead, it provides meaningful insights. For example, overconfidence may lead firms to pursue anticompetitive conduct that the Chicago School labels as irrational and thus implausible. Behavioral economics is advanced economics. Judges who loathe mastering basic microeconomic theory are going to have little enthusiasm forstudying and applying the insights of behavioral economics.

Furthermore, law traditionally lags behind economic theory. The Chicago School came to dominate antitrust law almost 20 years after it had taken root as the arguably dominant paradigm in the academy. Behavior economics will experience a similar lag. This lag will be affected, in part, by the resistance to behavioral economics in some circles, which is discussed next.

B. The Critique of Behavioral Antitrust

Another barrier exists to behavioral economics becoming part of the conventional wisdom of antitrust analysis: some scholars associated with the Chicago School have criticized behavioral economics as flawed and inapplicable to antitrust jurisprudence. Their two primary arguments are that behavioral economics is not a predictive model because biases are not systematic and that markets punish irrational behavior, which reduces the need for antitrust enforcement.

1. Behavioral Economics Is Not Predictive.

Skeptics of behavioral economics have criticized the theory as being insufficiently predictive. Some commentators, such as Joshua Wright, now a commissioner on the Federal Trade Commission, have argued that the value of models is based on their predictive power.[[50]](#footnote-50) Critics have argued that behavior economics fails this predictive criterion because “behavioral research presents too many conflicting and overlapping biases to make confident overall predictions about consumer perceptions.”[[51]](#footnote-51) They contend that, in general, “Behavioral economic analysis of law cannot serve as the basis for broad normative policy conclusions because it cannot provide a coherent alternative model of human behavior capable of generating testable predictions and policy conclusions in a wide range of areas.”[[52]](#footnote-52) Joshua Wright has applied this line of argumentation to antitrust, suggesting that behavioral economics cannot be applied in antitrust cases because of its lack of predictive power.[[53]](#footnote-53) Another way of framing this issue is counter-balancing biases. Some scholars assert that the biases explained by behavioral economics should cancel each other out and, thus, these biases are not particularly important in the aggregate.[[54]](#footnote-54)

There are two responses to the argument that behavioral economics is not useful because errors are not systematic and thus behavior economics cannot predict deviations from rationality. First, scholars have demonstrated that some errors may be systematic.[[55]](#footnote-55) Some behavioral economists argue that seemingly irrational behavior is neither random nor unpredictable and instead this “behavior is systematic and can be modeled.”[[56]](#footnote-56) They see the purpose of incorporating behavioral economics insights into legal analysis “is to offer better predictions and prescriptions about law based on improved accounts of how people actually behave.”[[57]](#footnote-57) So, while scholars within the traditional law and economics movement “claim that deviations from rational choice generally are not systematic, and thus generally will cancel each other out,”[[58]](#footnote-58) scholars associated with the behavioral law and economics movement argue that individual rationality does not necessarily balance out and that biases are in fact systematic.[[59]](#footnote-59) I will not enter the fray on this argument because, as explained next, this debate does not determine the utility of behavior economics in antitrust analysis.

 Second, for the purposes of using behavioral economics in antitrust analysis, the issue of predictability is something of a red herring. A theory does not have to be predictive in order to be useful. A theory can be simply explanatory and help us understand why observed conduct has taken place. For many types of observed antitrust violations, simple microeconomics is neither predictive nor explanatory. For example, microeconomic theory cannot explain why B & W charged a price below its costs for over a year or why Hughes and Raytheon agreed to boycott one of their two suppliers of a critical missile part. Instead of predicting or explaining this behavior, judges following the traditional law and economics approach simply deny its existence despite all the evidence to the contrary. A behavioral economics approach acknowledges that deviations from rationality sometimes occur and it’s important to understand why in order to interpret the evidence in a specific case. For example, one does not have to have a predictive model bias in order to appreciate the fact that some firms may engage in exclusionary conduct because they are overconfident that their investment in predation will be recouped later.

Similarly, the issue of whether cognitive biases are systematic or counterbalancing does not answer the question of whether incorporating behavior economics insights will improve antitrust analysis. While the academic debate over whether observed irrational behavior balances out is fascinating, it is ultimately irrelevant to antitrust litigation. Theory deals in aggregates; litigation deals with individual episodes of anticompetitive behavior. For example, if one overconfident defendant overestimates the probability that predatory pricing will be net profitable and therefore pursues a predation strategy that drives its competitors from the market (in a manner that inflicts antitrust injury) and the monopolist charges a supracompetitive price but ultimately fails to recoup all of its losses through subsequent monopoly pricing, it is no defense that another firm may underestimate the expected value of predatory pricing and forego such conduct.

2. The Market Punishes Irrational Conduct

Another critique of behavioral economics is that its insights do not justify stronger antitrust enforcement because markets will correct themselves. Any discussion about the reasons why some firms behave irrationally invites the question of how this can persist in a competitive market. Basic microeconomics theory argues that the most efficient firms will drive inefficient or irrational firms from the market.[[60]](#footnote-60) The thrust of this argument is that – even if behavior economics is correct and that firms do not behave rationally – antitrust remedies are still unnecessary because the market can punish irrational anticompetitive conduct better than antitrust.

While it is true that inefficient firms sometimes exit the market by declaring bankruptcy, by being acquired by a more efficient firm, or by shifting productive capacity into another product line, most firms that make bad – apparently irrational – decisions continue in business.[[61]](#footnote-61) One explanation might be that market discipline is not immediate and even irrational firms can adjust their strategies. Professors Korobkin and Ulen argue that “if it were true that competition drives imperfectly rational behavior out of business markets, such results would not occur instantaneously, and at any given moment in time a substantial number of participants in markets would likely be imperfectly rational actors who have not yet learned their lessons.”[[62]](#footnote-62)

Additionally, if the biases described and observed by behavioral economists are widespread, then the market discipline mechanism would break down. The argument that inefficient firms will be driven from the market assumes that the rest of the market is populated by efficient firms who can discipline the less efficient firms. If such perfectly efficient firms do not in fact exist and police markets, then inefficient firms can remain in the market despite their limited information, bounded rationality, and overconfidence, which may lead them to make suboptimal decisions in some situations. When these suboptimal decisions also violate antitrust laws, they should be punished accordingly.[[63]](#footnote-63)

IV. Incorporating Behavioral Economics into Antitrust Analysis

Ultimately these critiques of behavioral economics should not prevent courts from utilizing the insights of this branch of economics in antitrust litigation. Many of the arguments against employing behavioral economics in antitrust analysis are flawed because they fail to recognize the distinction between adjudicative fact-finding and economic policymaking. Joshua Wright argues that “The absence of a meaningful basis on which to discern when specific individuals or firms behave subject to a cognitive bias, as opposed to rationally, renders behavioral law and economics impossible to implement in antitrust.”[[64]](#footnote-64) While mentioning individuals, he is focused on the aggregate. His approach is one of an economist, not a litigator. But the difference between economics and litigation is critical to properly understand the value of behavioral economics. Richard Posner has explained: “Economics is concerned with explaining and predicting tendencies and aggregates rather than the behavior of each individual person; and in a reasonably large sample, random deviations from normal rational behavior will cancel out.”[[65]](#footnote-65) Posner’s explanation of economics shows how the Chicago School vision is ill-suited for the dynamics of litigation. Litigation is not about aggregate behavior, but about evaluating the behavior of individuals, both individual people and individual firms. A focus on aggregate normalcy is misplaced. Indeed, in many ways the entire litigation process is designed to address the deviations from normalcy – the man who robs a bank, the woman who kills her spouse, and the firm that monopolizes a market. The fact that – on average – people may not engage in deviant behavior in no way suggests that the legal process should be blind to the deviations that do occur, and to punish them when they violate the law.

Policy-making and fact-finding are different processes. The purpose of litigation is to determine what this particular defendant did and whether the defendant’s conduct caused a legally cognizable injury. Antitrust judges need not predict how boundedly rational individuals should perform a particular situation. Neither do antitrust plaintiffs: they merely need to show that *this* defendant – whether rational, boundedly rational, or irrational – in fact engaged in anticompetitive conduct, regardless of whether that behavior conforms to a particular school of academic thought.[[66]](#footnote-66) The judiciary’s function is not to fit the defendant’s conduct into a larger theoretical construct. When evaluating the plausibility of antitrust claims, defendants are neither data points nor opportunities to reject some researcher’s null hypothesis. Policy requires a theory; fact-finding does not. The assumption of rationality may be appropriate for policymaking, but it is not a replacement for fact-finding in individual legal cases. Courts assert that they will not let economic theory trump the facts in a given case.[[67]](#footnote-67) Yet, we see this happen repeatedly.[[68]](#footnote-68) Behavioral economics explains why courts should look at facts and empirical evidence in a given case instead of relying on microeconomic assumptions.

**Conclusion**

The Chicago School of Law and Economics has been successful in influencing many areas of law, most notably antitrust law. The Chicago School introduced more rigorous economic analysis into antitrust decision-making. At its core, the Chicago School posited that antitrust law should be interpreted so as to maximize allocative efficiency. It also assumed that businesses behave rationally in pursuit of their sole goal: maximizing profits. Although market failures were theoretically possible, the Chicago School argues that such failures were rare and thus did not justify antitrust interference with the free market. The genius of the Chicago School was its simplicity: markets operate efficiently; market failures rarely occur; and thus antitrust is largely unnecessary. The Chicago School has changed the shape of antitrust law by weakening it. When faced with clear examples of anticompetitive conduct and anti-competitive injury, courts will often assert that neither occurred - despite the evidence presented - because Chicago School theory argues that firms do not engage in anticompetitive conduct and antitrust injury does not occur because markets are self-correcting. The Chicago School theory is simple and easy to apply, which makes it attractive to judges trying to dispose of antitrust cases. Unfortunately, the theory is often wrong. Firms do not always behave "rationally," as defined by the Chicago School.

Behavioral Economics can shore up many of the deficiencies in the Chicago School of Law and Economics. Behavioral Economics can explain many of the deviations from so-called rational behavior that the Chicago School claims do not happen. Behavioral Economics takes the facts as a given and seeks to explain why observed conduct takes place. In contrast, the Chicago School often argues against the presented facts when they are inconsistent with Chicago theory. In battles between facts and theory, facts should always win. Too often, judges rely on the economic theory espoused by the Chicago School instead of analyzing the facts before them. Behavioral Economics may make it easier for judges to focus on facts instead of theory because Behavioral Economics can explain why Chicago theory is too sweeping and simplistic in its descriptions of markets and its policy prescriptions.

However, it may be difficult for judges to appreciate the insights from Behavioral Economics for many reasons. First, Behavioral Economics is more complicated and nuanced than Chicago's theory. The Chicago School presents an easy mechanism to dispose of antitrust claims by positing that many forms of antitrust violations do not occur. Second, there are no easy avenues to educate judges about Behavioral Economics, especially compared to the infrastructure that Chicago School advocates have employed, such as flying hundreds of judges to conferences where they are indoctrinated into the Chicago model of efficient markets and perfectly rational decision-makers. We need to educate judges - and others - about the proper role of Behavioral Economics in antitrust jurisprudence.

1. \* Professor of Law, University of California Irvine School of Law [↑](#footnote-ref-1)
2. Richard A. Posner, Antitrust Law (2d ed. 2001). [↑](#footnote-ref-2)
3. Keith N. Hylton, Antitrust Law: Economic Theory and Common Law Evolution 226 (2003) (describing rationality assumption as “an accurate description of firms.”). [↑](#footnote-ref-3)
4. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing The Rationality Assumption From Law And Economics*, 88 Cal. L. Rev. 1051, 1066 (2000) (“Nearly all law-and-economics literature on business organizations, following the neoclassical economic theory of firms, is built on the explicit or implicit assumption that firms seek to maximize profits.”). [↑](#footnote-ref-4)
5. Clark v. Flow Measurement, Inc., 948 F.Supp. 519, 526 (D.S.C. 1997) (“The only way for a plaintiff to show willful acquisition or maintenance of monopoly power is to provide evidence that the business accused of violating antitrust laws had an economically viable scheme in place. This stems from the fact that there is a strong inference that rational businessmen would not engage in activities that are economically senseless.”) (citations omitted). [↑](#footnote-ref-5)
6. 475 U.S. 574 (1986). [↑](#footnote-ref-6)
7. *Id*. at 589 (citations omitted). [↑](#footnote-ref-7)
8. See United States v. AMR Corp., 335 F.3d 1109, 1114 (10th Cir. 2003) (“Scholars from the Chicago School of economic thought have long labeled predatory pricing as implausible and irrational. Frank Easterbrook, a leader of the Chicago School, once concluded that “there is no sufficient reason for antitrust law or the courts to take predation seriously.” Frank H. Easterbrook, Predatory Strategies & Counterstrategies, 48 U. Chi. L. Rev. 263, 264 (1981).” ). [↑](#footnote-ref-8)
9. 509 U.S. 209 (1993). [↑](#footnote-ref-9)
10. *Brooke Group*, 509 U.S. at 217. [↑](#footnote-ref-10)
11. *Brooke Group*, 509 U.S. at 219 (*quoting* Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 964 F.2d 335, 342 (4th Cir. 1992)). [↑](#footnote-ref-11)
12. *Id*. at 243. [↑](#footnote-ref-12)
13. Stearns Airport Equipment Co. v. FMC Corp., 170 F.3d 518, 528 (5th Cir. 1999) [↑](#footnote-ref-13)
14. 509 U.S. at 231 (“There is also sufficient evidence in the record from which a reasonable jury could conclude that for a period of approximately 18 months, Brown & Williamson's prices on its generic cigarettes were below its costs…”). [↑](#footnote-ref-14)
15. 141 F.3d 947 (9th Cir. 1998) [↑](#footnote-ref-15)
16. Id. at 953. [↑](#footnote-ref-16)
17. *Id*. at 953 (*emphasis added*). [↑](#footnote-ref-17)
18. The decision also exposes the deficiency that some courts have in distinguishing between rational and irrational behavior. Although perhaps irrational on its face, such a group boycott is perfectly rational if the two defense contractors were attempting to communicate to the suppliers of the myriad other parts that any attempts to raise price will be greeted with swift action. See Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 University of Pennsylvania Law Review 261 (2010) (discussing APS v. Hughes). [↑](#footnote-ref-18)
19. Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1476 (1998). [↑](#footnote-ref-19)
20. Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 Mich. L. Rev. 482, 503 (2002). [↑](#footnote-ref-20)
21. Samuel Issacharoff, Can There Be a Behavioral Law and Economics?, 51 Vand. L. Rev. 1729, 1732 (1998). [↑](#footnote-ref-21)
22. Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust In the Twenty-First Century*, 38 Loy. U. Chic. L. J. 513, 527 (2007); see Larry T. Garvin, Adequate Assurance of Performance: Of Risk, Duress, and Cognition, 69 U. Colo. L. Rev. 71, 145 (1998) (“Cognitive psychology and experimental economics have found a smorgasbord of cognitive errors, which collectively falsify most of the axioms of rational choice theory.”). [↑](#footnote-ref-22)
23. Valerie P. Hans, *The Jury’s Response to Business and Corporate Wrongdoing*, 52 Law & Contemp. Probs. 177, 196 (Aut. 1989) (“Sociologists and other scholars have demonstrated numerous instances in which corporations violate principles of rationality.” ) (citing M. Ermann & D. Lundman, Corporate Deviance (1982)). [↑](#footnote-ref-23)
24. Jolls, Sunstein, & Thaler, supra note \_\_ at 1477. See also Tor, *supra* note 58 at 503 (“Unlike traditional theories of entry, a behavioral approach does not expect entrants to make decisions under uncertainty according to norms of strict rationality. Instead, it accepts that entrants are boundedly rational: they may weigh the pros and cons of entry, but their ability to do so rationally is impeded by the limitations of human cognition and affected by motivation and emotion.”). [↑](#footnote-ref-24)
25. James Surowiecki, *The Sky-High Club*, The New Yorker, January 22, 2007 at 32.

Corporate payments to outgoing CEOs seem even more irrational. For example, it is hard to explain how Home Depot was engaging in profit-maximizing behavior when its board of directors lavished more than $200 million on its deposed CEO, Bob Nardelli, after Home Depot’s stock price declined six percent during Nardelli’s tenure at the helm. *Id*. Yet even after his disastrous tenure at Home Depot, Chrysler recently selected Nardelli as its new CEO. [↑](#footnote-ref-25)
26. Korobkin & Ulen, *supra* note xx at 1095. [↑](#footnote-ref-26)
27. Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in Judgment under Uncertainty: Heuristics and Biases 335, 341 (Daniel Kahneman, Paul Slovic, and Amos Tversky, eds. 1982). [↑](#footnote-ref-27)
28. Korobkin & Ulen, *supra* note xx at 1095-96. [↑](#footnote-ref-28)
29. Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 Mich. L. Rev. 482, 503 (2002). [↑](#footnote-ref-29)
30. Korobkin & Ulen, supra note xx at 1091 (citing Christine Jolls, [*Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659 & n.22 (1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1277&FindType=Y&ReferencePositionType=S&SerialNum=0110399529&ReferencePosition=1659) (noting that nearly two hundred studies support this descriptive claim)). [↑](#footnote-ref-30)
31. Jolls, Sunstein, & Thaler, supra note xx at 1495. [↑](#footnote-ref-31)
32. Korobkin & Ulen, *supra* note xx, at 1055 (footnote omitted). [↑](#footnote-ref-32)
33. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 633 (1999) (“These cognitive illusions – sometimes referred to as biases – are not limited to the uneducated or unintelligent, and they are not readily capable of being unlearned. Instead, they affect us all with uncanny consistency and unflappable persistence.”). [↑](#footnote-ref-33)
34. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 633 (1999). [↑](#footnote-ref-34)
35. Jolls, Sunstein, & Thaler, *supra* note xx at 1523 (“Hindsight bias has been observed in a large number of studies, including studies of ‘expert’ actors such as physicians, who, when asked to assess the probabilities of alternative diagnoses, given a set of symptoms, offer significantly different estimates depending on what they are told the actual diagnosis turned out to be.”) (citation omitted). [↑](#footnote-ref-35)
36. Donald C. Pennington, *Being Wise after the Event: an Investigation of Hindsight Bias*, 1 Current Psych. Res. 271, 273 (1981) (predicing results in British general election). [↑](#footnote-ref-36)
37. Matsushita, 475 U.S. at 591; Jessica L. Goldstein, *Single Firm Predatory Pricing in Antitrust Law: The* Rose Acre *Recoupment Test and the Search for an Appropriate Judicial Standard*, 91 Colum. L. Rev. 1757, 1767 (1991) (“Because the defendant Japanese firms had failed to achieve monopoly power even two decades after the commencement of the alleged conspiracy, the Court concluded that the conspiracy did not exist.”). [↑](#footnote-ref-37)
38. *Matsushita*, 475 U.S. at 592; *see also* Randolph Sherman, *The* Matsushita *Case: Tightened Concepts of Conspiracy and Predation?*, 8 Cardozo L. Rev. 1121, 1131 (1987).

The Court attached incorrect significance to the 20-year time frame when it asserts that “because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup.” Matsushita, 475 U.S. at 592. If the predatory price were 5% below the competitive price and the cartel subsequently successfully charged a price 30% above the otherwise prevailing market price, 20 years of predatory losses could be recouped in a few years. [↑](#footnote-ref-38)
39. See Leslie, supra note xx (discussing hindsight bias in Matsushita). [↑](#footnote-ref-39)
40. Perhaps the wisdom of a particular decision can be determine ex post, i.e. whether or not the firms exceeded in achieving its goal, but not its rationality. [↑](#footnote-ref-40)
41. For example, if there had been an initial conspiracy, the planned (or hoped for) course of events may not have “required sustain[ed] losses for decades.” Instead, the Japanese manufacturers may have underestimated the resolve of the incumbent sellers in the American market and they may have projected a stream of cartel profits beginning sooner and lasting sufficiently long. The plaintiffs did not claim that the Japanese planned two decades of predatory losses. [↑](#footnote-ref-41)
42. See Tor, supra note XX at 506 (“Optimistic bias is common in investment decisionmaking, as exemplified by a recent study examining portfolio allocation decisions of eighty MBA students from the Kellogg Graduate School of Management at Northwestern University in a computerized investing simulation.”). [↑](#footnote-ref-42)
43. Tor, supra note XX at 509 [↑](#footnote-ref-43)
44. Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 Mich. L. Rev. 482 (2002) Tor, supra note XX at p. 490. [↑](#footnote-ref-44)
45. Tor, supra note XX at p. 497. [↑](#footnote-ref-45)
46. Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust In the Twenty-First Century*, 38 Loy. U. Chic. L. J. 513, 515 (2007). [↑](#footnote-ref-46)
47. See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc., 107 S.Ct. 484 n. 17 (rejecting predatory pricing as irrational by citing Bork, McGee, and Posner). [↑](#footnote-ref-47)
48. Benz, supra note xx at 719-20 (quoting Oliver E. Williamson, Delimiting Antitrust, 76 GEO.L.J. 271, 277-78 (1987)). [↑](#footnote-ref-48)
49. Diane P. Wood, *Generalist Judges In A Specialized World*,50 SMU L. Rev. 1755, 1767 (1997). [↑](#footnote-ref-49)
50. Joshua D. Wright & Judd E. Stone II, Misbehavioral Economics: the Case against Behavioral Antitrust, 33 Cardozo Law Review 1517, 1527 (2012) (“Misbehavioral Economics”) (“Economic methodology has long required that competing models succeed or fail based on their predictive power.”). [↑](#footnote-ref-50)
51. Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1422, 1427 (1999) [↑](#footnote-ref-51)
52. Arlen, supra note xx at 1777. [↑](#footnote-ref-52)
53. Joshua D. Wright & Judd E. Stone II, Misbehavioral Economics: the Case against Behavioral Antitrust, 33 Cardozo Law Review 1517, 1528 (2012) (“Misbehavioral Economics”) (“Any successful application of behavioral economics to antitrust law must therefore rise or fall on its ability to predictably and accurately discern anticompetitive conduct from procompetitive conduct in a manner that can be confidently and consistently applied by judges and regulators.”). [↑](#footnote-ref-53)
54. Richard A. Posner, Frontiers of Legal Theory 261 (2001) (“The real significance of randomness in rational-choice economics is further explaining why that economics can accommodate a good deal of irrational behavior without a fatal loss of predictive power. Most questions that economists ask concern aggregate rather than individual behavior ....”); Stephen M. Bainbridge, [Mandatory Disclosure: A Behavioral Analysis, 68 U. Cin. L. Rev. 1023, 1035 n.54](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW8.01&referencepositiontype=S&serialnum=0282140451&fn=_top&sv=Split&tc=-1&findtype=Y&referenceposition=1035&db=1259&vr=2.0&rp=%2ffind%2fdefault.wl&mt=LawSchoolPractitioner) (“It is the systematic nature of these biases that is critical. Standard economic analysis recognizes that individual decisionmakers may depart from rationality, but assumes that such departures come out in the wash-they cancel out so that the average or equilibrium behavior of large groups will be consistent with rational choice. By asserting that decisionmakers exhibit systematic biases, behavioral economics denies that claim.” (citation omitted)); Arlen, supra note xx at 1766. Jennifer Arlen, *Comment: The Future of Behavioral Economic Analysis of Law,* 51 Vand. L. Rev. 1765 (1998) (“Law and economics scholars do not claim that this rational choice model perfectly captures all human behavior. But they do claim that deviations from rational choice generally are not systematic, and thus generally will cancel each other out. For example, law and economics scholars argue that even if people do not accurately estimate the risk that they will be injured, some people will overestimate the risk while others will underestimate it, producing only “noise” and not a systematic bias.”). [↑](#footnote-ref-54)
55. Robert A. Prentice, Chicago Man, K-T Man, and the Future of Behavioral Law and Economics, 56 Vand. L. Rev. 1663, 1725 (2003) (“evidence that many of these heuristics and biases are systematic rather than random is overwhelming.”); Arlen, supra note xx at 1766 (“Behavioral economic analysis of law scholars argue that people do not behave consistently with rational choice theory, and, moreover, that the deviations from rational behavior are systematic, not random.”); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515, 548-49 (1985). [↑](#footnote-ref-55)
56. Jolls, Sunstein, & Thaler, supra note xx at 1475. [↑](#footnote-ref-56)
57. Christine Jolls, [Behavioral Economic Analysis of Redistributive Legal Rules, 51 Vand. L. Rev.. 1653, 1654 (1998)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW8.01&referencepositiontype=S&serialnum=0110399529&fn=_top&sv=Split&tc=-1&findtype=Y&referenceposition=1654&db=1277&vr=2.0&rp=%2ffind%2fdefault.wl&mt=LawSchoolPractitioner); Jeffrey J. Rachlinski, The “[New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters, 85 Cornell L. Rev. 739, 739 (2000)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW8.01&referencepositiontype=S&serialnum=0115776155&fn=_top&sv=Split&tc=-1&findtype=Y&referenceposition=739&db=1111&vr=2.0&rp=%2ffind%2fdefault.wl&mt=LawSchoolPractitioner) (“Recently, legal scholars have become interested in new theories of human decision making that researchers in psychology and empirical economics are developing. These new theories promise to predict people's reactions to law more accurately than either law and economics or traditional legal scholarship.” (footnote omitted)); Richard H. Thaler, The Winner’s Curse: Paradoxes and Anomalies of Economic Life 4 (1992) (“many of the departures from rational choice that have been observed are systematic—the errors tend to be in the same direction. If most individuals tend to err in the same direction, then a theory which assumes that they are rational also makes mistakes in predicting their behavior.”). [↑](#footnote-ref-57)
58. *Id*. at 1766 (“For example, law and economics scholars argue that even if people do not accurately estimate the risk that they will be injured, some people will overestimate the risk while others will underestimate it, producing only “noise” and not a systematic bias.”); Posner, *supra* note 72 at 1556 (“Most questions economists ask concern aggregate rather than individual behavior, for example the effect on the quantity purchased of cigarettes of an increase in the cigarette excise tax, not the effect of the tax increase on Mr. Cigarette Smoker A or Ms. Cigarette Smoker B.”). [↑](#footnote-ref-58)
59. Korobkin & Ulen, supra note xx, at 1057 n.19 (“As we show below, the experimental evidence establishes that the deviations are, indeed, systematic and not randomly distributed around a (rational actor) mean.”); Thomas Russell & Richard Thaler, *The Relevance of Quasi Rationality in Competitive Markets*, 75 Am. Econ. Rev. 1071, 1081 (1985) (“The notion that individual irrationalities will disappear in the aggregate must be rejected.”). [↑](#footnote-ref-59)
60. Edward L. Rubin, [*Putting Rational Actors in Their Place: Economics and Phenomenology*, 51 Vand. L. Rev. 1705, 1715 (1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1277&FindType=Y&ReferencePositionType=S&SerialNum=0110399531&ReferencePosition=1715) (“Neoclassical economists believe that the competitive market will induce optimal behavior among firms by shaping those that are adaptable, and eliminating those that are not.”); Russell & Thaler, supra note xx at 1071 (“the knee-jerk reaction of some economists that competition will render irrationality irrelevant is apt only in very special cases, probably rarely observed in the real world.”); Stucke, supra note XX at 515 (“Even some of the behavioral economics literature assumes that the rational choice theories may be better suited to predict corporate behavior in the marketplace, since irrational companies (i.e., those that do not maximize profits) presumably are driven out by their rational profit-maximizing competitors.”) (citations omitted); Jayendu Patel et al., The Rationality Struggle: Illustrations from Financial Markets, 81 Am. Econ. Rev. 232, 232 (1991) (“For most economists it is an article of faith that financial markets reach rational aggregate outcomes, despite the irrational behavior of some participants, since sophisticated players stand ready to capitalize on the mistakes of the naive.”). [↑](#footnote-ref-60)
61. Russell & Thaler, supra note xx at 1074 (““Markets will eliminate the errors.” While this statement is sometimes made, it is not clear by what mechanism markets will eradicate irrational choices. While it has been argued that evolution will eventually eliminate firms that choose improperly, there is no such process at work for individuals. So far as we know, quasi rationality is rarely fatal.”). [↑](#footnote-ref-61)
62. Korobkin & Ulen, supra note xx at 1071. [↑](#footnote-ref-62)
63. Joshua Wright argues that even if the critiques from Part Three were incorrect, behavioral economics is still irrelevant for antitrust law. In particular, he and his co-author:

“claim that even if the entire body of knowledge known as “behavioral economics” was sufficiently robust and empirically demonstrated to satisfy each of the hurdles identified above, and if we can reliably assume that firms also exhibit predictable biases, and if those biases can somehow be mitigated within regulators, behavioral economics nonetheless fails to offer any clear policy implications for antitrust law, and certainly does not systematically support a more interventionist competition policy.”

They are mistaken. Behavioral economics is still important in antitrust law because it helps to explain that monopolies are more durable and predatory than microeconomic theory predicts. [↑](#footnote-ref-63)
64. D. Wright & Judd E. Stone II, Misbehavioral Economics: the Case against Behavioral Antitrust, 33 Cardozo Law Review 1517, 1534 (2012) (“Misbehavioral Economics”); Arlen, supra note xx at 1788 (“Behavioral economic analysis of law is unlikely to replace conventional law and economics unless it can formulate a superior model of human behavior suitable for making normative decisions about optimal legal regimes.”). [↑](#footnote-ref-64)
65. Richard A. Posner, Economic Analysis of Law 19 (5th ed. 1998)). [↑](#footnote-ref-65)
66. *Cf*. Matsushita, 475 U.S. at 605-06 (White, J., dissenting) (“But the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact.”). [↑](#footnote-ref-66)
67. Brooke Group, 509 U.S. at 229 (“However unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability.”). [↑](#footnote-ref-67)
68. Leslie, supra (collecting and analyzing cases). [↑](#footnote-ref-68)