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**PROBABILITY, CONFIDENCE, AND *MATSUSHITA*:
THE MISUNDERSTOOD SUMMARY JUDGMENT
REVOLUTION**

*Luke Meier**

This article offers a reinterpretation of the Supreme Court's seminal decision in Matsushita Electric Industrial Co. v. Zenith Radio Corporation. Although Matsushita is often credited with ushering in a new era of summary judgment by shifting power from the jury to trial court judges, this conclusion is based on an erroneous understanding of the case. In reality, Matsushita is a narrow decision that does not alter the relationship between judge and jury. Appreciating the true import of Matsushita is possible only by delineating between the concepts of probability and confidence. The Supreme Court's decision in Matsushita is usually understood as having been decided according to a probability analysis, but the best interpretation of the case is that it was decided pursuant to a confidence analysis. Recognizing the true basis of the Matsushita decision dispels the popular belief that Matsushita requires an aggressive use of summary judgment by trial judges. In addition, properly understanding Matsushita is the key to comprehending the pleading requirement of "plausibility," which the Supreme Court introduced in Bell Atlantic v. Twombly.

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I. INTRODUCTION

In my article *Probability, Confidence, and the Reasonable Jury Standard*,¹ I explore the difference between the concepts of probability and confidence as they pertain to disputed questions of fact in litigation. Stated simply, the concept of probability requires an estimate as to the *likelihood* of a given fact being true; the confidence inquiry asks *how sure* one is in the accuracy of that probability estimate. Generally speaking, the more evidence one has regarding an unknown fact the more confident one can be in a probability estimate of that given fact. In the *Reasonable Jury* article, I explain that a judge can use either a probability analysis or a confidence analysis to dispose of a suit through summary judgment. I also explain why the legal profession has, for the most part, failed to distinguish between these separate theories of summary judgment. I conclude that this failure can be primarily attributed to the Supreme Court's gloss on the language of Rule 56 of the Federal Rules of Civil Procedure. This judicial gloss—the reasonable jury standard²—obscures the distinction between confidence and probability at the summary judgment stage.³

This article builds on the foundation established in the *Reasonable Jury* article by demonstrating the importance of separating the concepts of probability and confidence. More specifically, this article will focus on the incorrect—and unfortunate—interpretation assigned to the Supreme Court's opinion in the infamous antitrust case of *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*.⁴

The *Matsushita* decision is one of the Supreme Court's most frequently cited cases.⁵ Along with the other 1986 “trilogy” cases—*Anderson v. Liberty Lobby*⁶ and *Celotex Corp. v.*

¹ Luke Meier, *Probability, Confidence and the Reasonable Jury Standard*, 84 MISS. L.J. (2015) (forthcoming).

² See *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

³ See *id.* at 255–56; see also Meier, *supra* note 1.

⁴ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁵ See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357 (2010) (listing *Matsushita* as the third-most cited Supreme Court case by federal courts and tribunals).

⁶ *Anderson*, 477 U.S. at 242.

*Catrett*⁷—the *Matsushita* opinion is often credited for ushering in a new era of summary judgment.⁸ In this new era, trial court judges are to aggressively “screen” cases to prevent “unworthy” cases from proceeding to the jury for a full-blown trial.⁹ The *Matsushita* opinion, in particular, is thought to support this modern approach to summary judgment.¹⁰ In *Matsushita*, the Supreme Court upheld the trial court’s grant of summary judgment in favor of the defendant despite a vigorous dispute by the plaintiffs and defendants regarding the material facts of the litigation.¹¹ Thus, more so than the *Anderson* and *Celotex* cases—which both rested

⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

⁸ See, e.g., Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 517 (2012) (“Conventional wisdom long held that the Trilogy caused a fundamental shift in pretrial practice by leading lawyers to be more aggressive in seeking summary judgment and by leading judges to be more willing to grant it.”); Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE WEST. L. REV. 453, 455 (2010) (stating that this trilogy of Supreme Court cases “invigorated summary judgment practice”); William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1712 (2001) (“The Supreme Court’s invigoration of federal summary judgment practice occurred in the 1985 term when the Court decided a trilogy of cases . . .”).

⁹ See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 994 (2003) (“In a series of cases in 1986, the Supreme Court sent a clear signal to the lower courts that summary judgment could be relied upon to weed out frivolous lawsuits and avoid wasteful trials.”) (internal quotation marks omitted); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1913 (1998) (concluding that the trilogy cases “promoted summary judgment from a housekeeping device for picking up obviously unworthy cases to a major option to be encouraged, or even pushed, in all kinds of disputes, large and small, even in some involving factual controversies”).

¹⁰ See, e.g., James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1568 (1995) (stating that *Matsushita* is a “major landmark in summary judgment jurisprudence” despite efforts by commentators to limit the case); but see Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1348 (2005) (“*Celotex* most clearly altered well-established summary judgment practice, and in any event, *Celotex*, far more than the others [in the trilogy], decisively opened the eyes of the federal courts to the propriety of summary judgment in certain cases . . .”).

¹¹ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595–98.

on technical legal questions¹²—*Matsushita* has been cited as the lynchpin¹³ of the modern trend in which summary judgment is used more aggressively by the trial court judge to take issues away from the jury.¹⁴ Pursuant to this understanding of the case, the

¹² See *Celotex*, 477 U.S. at 323 (“[W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim.”); Adam Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 94 (2006) (“*Anderson* raised the narrow issue of the property approach to summary judgment motions when the dispositive issue is subject to a heightened standard of proof.”).

¹³ See, e.g., Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 510 (2009) (“*Matsushita* . . . created a modern and dynamic summary judgment mechanism.”). Because of the profound effect on summary judgment that *Matsushita* has had, it is still studied and debated in a way that *Anderson* and *Celotex* are not. See, e.g., Spencer Waller Weber, *Matsushita at Twenty: A Conference Introduction*, 38 LOY. U. CHI. L.J. 399, 399–400 (2007) (explaining why the *Matsushita* case was selected as a symposium topic).

¹⁴ See, e.g., Joe Sims & Philip A. Proger, *Litigation Issues in Dealer Termination Pricing Cases*, 60 ANTITRUST L.J. 465, 466 (1991) (“*Matsushita* seem[s] to encourage courts to use summary judgment more aggressively . . . where the prevailing view had been that summary judgment should be used sparingly given the inherently circumstantial nature of much of the proof.”). Although all commentators agree that federal jury trials are vanishing, they disagree as to whether the “modern” approach to summary judgment, as shaped by the 1986 trilogy, is responsible for this trend. Compare Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1332–35 (2005) (discussing the empirical studies documenting the decrease in federal civil jury trials and concluding that “common sense” suggests that the Court’s decision in *Matsushita* (as well as *Celotex* and *Anderson*) is at least partly responsible for this trend), with Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, LOY. U. CHI. L.J. 561, 561 (2012) (remarking that “numerous empirical studies have shown [that] the summary judgment trilogy has had scant impact on judicial reception to enhanced utilization of summary judgment as a means to streamline litigation”). I consider myself as an adherent of the “common sense” view urged by Professor Redish; even if it is difficult to empirically demonstrate a cause-and-effect relationship between the 1986 trilogy cases and the subsequent decline in jury trials, this does not mean that no such relationship exists. See, e.g., Brooke D. Coleman, *Summary Judgment: What We Think We Know Verses What We Ought to Know*, 43 LOY. U. CHI. L.J.

Supreme Court's decision in *Matsushita* signaled to lower court judges: Avoid the costs and expense of trial if the evidentiary record leans towards one party's version of the material facts in dispute.¹⁵

But there has always been some uneasiness regarding this conventional understanding, and use, of *Matsushita*. Some commentators and courts have insisted that *Matsushita* was a unique case that should be limited to the antitrust context.¹⁶ There is ample support within the *Matsushita* opinion for this view; various portions of the opinion reference factors unique to antitrust

705, 719 (2012) (“[T]hese numbers do not tell us how many potential plaintiffs chose not to file their claims because of the chilling effect of the trilogy and increased use of summary judgment.”).

¹⁵ See, e.g., D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 42 (1988) (quoting a federal judge, in open court on a motion for summary judgment, as saying that “the Supreme Court has told us [in the trilogy cases] to make wider use of summary judgment to eliminate cases”).

¹⁶ See, e.g., *In re Dana Corp.*, 574 F.3d 129, 158 (2d Cir. 2009) (stating that it had “considerable difficulty with the bankruptcy court’s [] reliance on *Matsushita*” because the case before the court did not involve antitrust litigation); *White v. Cmty Care, Inc.*, No. CIV.A.07-1507, 2008 WL 5216569, at *15 n.16 (W.D. Pa. 2008 Dec. 11, 2008) (saying that *Matsushita* was “factually distinguishable” from the civil rights case before the court); Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 510–11 (2009) (acknowledging that there were transsubstantive portions of the *Matsushita* opinion, such as the rejection of the former “slightest doubt” interpretation of Rule 56 in favor of the reasonable jury standard used for directed verdicts, but also explaining that the portion of the opinion in which the Court considered whether the plaintiffs’ evidence was plausible “only makes sense if characterized as a matter of substantive antitrust law”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1044–68 (2003) (concluding that *Matsushita* “seems specific to the antitrust context”); William W. Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 41 HASTINGS L.J. 1, 6–7 (1993) (concluding that *Matsushita* “rests on a specific point of antitrust law”); Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 628 (2003) (“*Matsushita* may be an artifact of antitrust law . . .”).

law.¹⁷ This more limited view of *Matsushita*, however, undermines the broad principles the case is used to support. If the *Matsushita* decision was the result of factors unique to the antitrust context, the case cannot justify the broader, seismic shifts that have occurred within summary judgment law in the past twenty-five years.

In addition, viewing *Matsushita* as a unique product of antitrust law seems inconsistent with the transsubstantive nature of Rule 56 of the Federal Rules of Civil Procedure. It is beyond dispute that the Federal Rules of Civil Procedure were adopted with the view that the principles and approaches contained therein could be applied even-handedly to cases involving all different types of substantive law.¹⁸ If *Matsushita* was truly the byproduct of the antitrust setting of the case, there has yet to be a credible explanation as to how this conclusion is consistent with the transsubstantive nature of the Federal Rules.

Thus, a stalemate has developed regarding the appropriate understanding of *Matsushita*. Many commentators and lower courts continue to cite *Matsushita* outside of the antitrust context.¹⁹ Under this view, *Matsushita* is an extremely important case because it requires a reorientation of the respective roles of trial court judge and jury regarding the resolution of facts. The transsubstantive nature of the Federal Rules, including Rule 56, supports this understanding of *Matsushita*. In addition, the Supreme Court's subsequent characterization of *Matsushita* as not "introduc[ing] a special burden on plaintiffs facing summary

¹⁷ See *infra* notes 116–22 and accompanying text.

¹⁸ See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 383 (2010) ("It was almost inevitable that the Advisory Committee would draft transsubstantive rules . . .").

¹⁹ See, e.g., *Smith v. Boyer*, 2012 WL 2116502, at *4 (E.D. Cal. Jun 11, 2012) (citing *Matsushita* in a civil rights case); *United States v. Degayner*, 2008 WL 4613084 (M.D. Fla. Oct 16, 2008) (citing *Matsushita* in a False Claims Act case); Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 338 (2010) ("[*Matsushita*] is frequently taught in civil procedure classes as a summary judgment case, not an antitrust case."); Miller, *supra* note 16, at 1068–69 nn.456–63 (listing older cases applying *Matsushita* outside of the antitrust context).

judgment in antitrust cases”²⁰ arguably lends support to the view that *Matsushita* is a broadly applicable opinion whose import is not limited to the antitrust context. Other commentators and courts continue to insist, however, that *Matsushita* was a product of forces unique to the antitrust context;²¹ the language of the *Matsushita* opinion strongly supports this view.

The stalemate that has developed has not been resolved because the proponents of each of these differing views have failed to adequately address fundamental problems regarding their respective positions. Thus, those who broadly interpret *Matsushita* as changing the respective roles of judge and jury have failed to explain the portions of the opinion that emphasize the case’s antitrust context.²² On the other hand, those who view *Matsushita* as unique to antitrust law have failed to reconcile the Court’s emphasis on antitrust-unique factors with the transsubstantive nature of the Federal Rules.²³

This stalemate will continue so long as *Matsushita* is understood as having been decided pursuant to a probability analysis. According to the current, conventional wisdom regarding *Matsushita*, the Court’s decision to affirm summary judgment for the defendants revolved around the question as to whether the defendants had, in fact, engaged in the illegal agreement alleged by the plaintiffs.²⁴ This conventional wisdom regarding *Matsushita*

²⁰ Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 468 (1992).

²¹ Risinger, *supra* note 15, at 42.

²² See, e.g., Duane, *supra* note 10, at 1554–95 (proposing a broad interpretation of *Matsushita* but never accounting for the antitrust-specific language in the opinion).

²³ See, e.g., Miller, *supra* note 16, at 1029–34 (concluding that the antitrust context of *Matsushita* was important to the Court’s conclusion but not reconciling this view with the transsubstantive nature of the Federal Rules of Civil Procedure).

²⁴ See, e.g., Stephen J. Fortunato, Jr., *Summary Judgment in Rhode Island: Is It Time to Wrap the Mantra in Celotex?*, 2 ROGER WILLIAMS U. L. REV. 153, 170 (1997) (“[*Matsushita*] gave to federal trial judges the authority, if not the mandate, to review even the most complex evidence and then make a determination as to whether the evidence could support reasonable inferences by a fact finder regarding the material prongs of the burden imposed by the substantive law on the party seeking to have the favorable inferences drawn.”).

finds support in various portions of the Court's opinion.²⁵

This stalemate will not be resolved as long as the case continues to be understood from a probability perspective. If, however, *Matsushita* is viewed according to a confidence analysis, the internal inconsistencies that arise under the probability understanding of the case are resolved. Under a confidence reading of *Matsushita*, the Supreme Court did not base its decision on whether the illegal antitrust agreement the plaintiffs alleged had, *in fact*, occurred. Instead, what the Court decided was that there was so *little* evidence on this point that *any* conclusion as to the probability of the existence of the agreement would necessarily involve an unacceptable margin of error, thus requiring that summary judgment be entered against the plaintiff. Under a confidence analysis, a court determines the acceptable "margin of error" or level of confidence that will be required in a particular case.²⁶ This purely legal analysis compels a court to consider the consequences of allowing a jury to make a probability determination on a scant record. This analysis can be informed by factors unique to the substantive law involved in a particular dispute.

Thus, if *Matsushita* was decided according to a confidence analysis, the Court quite sensibly considered that an erroneous conclusion regarding the factual dispute in *Matsushita* could result in debilitating consequences for businesses engaged in perfectly legal—and economically desirable—conduct. Under this view, because of the particular antitrust costs associated with an erroneous factual conclusion, the Court in *Matsushita* required additional evidence before the case could reach the jury. By requiring that more evidence be assembled before the case is submitted to a jury, the margin of error associated with any jury conclusion decreases and a sufficient degree of confidence can be had in the conclusion actually reached by the jury.

A confidence interpretation of *Matsushita* can thus explain why the Court's opinion emphasized factors unique to antitrust law. Moreover, if *Matsushita* was decided according to a confidence analysis, the Court's reliance on factors unique to antitrust law is

²⁵ See *infra* notes 111–21 and accompanying text.

²⁶ See Meier, *supra* note 1.

fully consonant with the transsubstantive approach of the Federal Rules. A confidence analysis is transsubstantive in the sense that a trial judge must always be satisfied that there is a sufficient amount of evidence in the case to satisfy the confidence threshold. That said, the *application* of this transsubstantive standard may require a judge setting this confidence threshold to consider the subject matter of the litigation. In this sense, a confidence analysis is similar to the pleading standard set out in Federal Rule 8. Both standards are transsubstantive, but applying them in a particular case requires consideration of the substantive law at stake.

A confidence understanding of *Matsushita* can thus resolve the current stalemate regarding this infamous case by explaining the Court's antitrust-specific language in a way that is consistent with the transsubstantive nature of the Federal Rules. The *Matsushita* opinion, carefully considered with a little bit of effort, supports the view that the Court's decision was actually based on a confidence inquiry ("Is there a sufficient amount of evidence in the record to permit the case to proceed to the jury for a probability analysis?") rather than a probability inquiry ("Does the record evidence support the conclusion that an illegal conspiracy did, in fact, occur?"). Given that the language of *Matsushita* is consistent with a confidence analysis, and considering that this reading of the case resolves the current stalemate regarding the appropriate interpretation of that case, the confidence reading of *Matsushita* is the superior interpretation.

Resolving the true meaning of *Matsushita*, over twenty-five years after the case was decided, is not simply an academic exercise. The *Matsushita* opinion is still used as the basis for the modern, zealous use of summary judgment that has eroded the role of the jury and warped the distinction between law and fact.²⁷ This view, based on a misunderstanding of *Matsushita*, should be rejected. Properly understood, *Matsushita* is actually a narrow case with relatively little importance outside of the antitrust context.

In addition, a correct interpretation of *Matsushita* is the key to understanding the "plausibility" pleading standard that the

²⁷ See, e.g., *Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, No. 11-30102012 WL 3055849, at *3 (3d Cir. July 22, 2012) (citing *Matsushita* and stating that a court "need not turn a blind eye to the weight of the evidence").

Supreme Court recently introduced in *Bell Atlantic v. Twombly*.²⁸ In *Twombly*, the Supreme Court determined that a plaintiff's complaint must assert a claim that is "plausible" to the district court judge.²⁹ Most commentators have interpreted the "plausibility" standard to require an analysis of the probable truth of the plaintiff's allegations.³⁰ If the *Matsushita* defendant was entitled to summary judgment because the plaintiff did not have enough evidence, it is relatively easy to see why the Court believed that the *Twombly* defendant was entitled to a dismissal at the pleadings stage: even if everything alleged in the *Twombly* complaint was true, this circumstantial evidence would not constitute a sufficient *amount* of evidence to enable the plaintiff to get to a jury. Thus, *Twombly*—like *Matsushita*—did *not* involve an invasion into the fact-finding terrain of the jury. Most commentators interpret *Twombly* in this light,³¹ and have rightly criticized the notion that a trial court judge should determine the

²⁸ Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

²⁹ See *id.* at 556–57.

³⁰ See, e.g., Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 859 (2012) (stating that the plausibility standard "requires a district court to refer to objective information, albeit extraneous to the complaint, to inform itself of the "truth" of the factual picture painted by the plaintiff in the complaint."); Rory Bahadur, *The Scientific Impossibility of Plausibility*, 90 NEB. L. REV. 435, 456–57 (2011) ("The Court's use of the term "possibility," however, belies the assertion that plausibility is not a probability analysis because possibility is an expression of probability."); Suzette Malveaux, *Front Loading And Heavy Lifting: How Pre-Dissmissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 83–84, 85 (2010) (concluding that the plausibility test requires a probability analysis); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 26 (2010) (stating that the plausibility analysis depends "on the relative likelihood that legally actionable conduct occurred versus a hypothesized innocent explanation."); Marc I. Steinberg & Diego E. Gomez-Cornejo, *Blurring the Lines Between Pleading Doctrines: The Enhanced Rule 8(A)(2) Plausibility Pleading Standard Converges With the Heightened Pleading Standards Under Rule 9(b) and the PSLRA*, 30 REV. OF LITIG. 1, 26 (2010) (describing *Twombly*'s plausibility standard as a "tacit probability" requirement).

³¹ See *supra* note 30 and accompanying text.

inferential value of circumstantial evidence, a function historically reserved to the jury.³² Instead, *Twombly* and *Matsushita*—properly interpreted—simply involved instances in which the court concluded, as a matter of law, that either the record evidence or the factual allegations, *even if* proven true, would not constitute an adequate amount of information from which the jury could resolve the disputed question of fact.

This article will slowly build toward the conclusion that *Matsushita* has been incorrectly interpreted as a case involving probability rather than confidence. In Section II, I will begin by quickly examining the infamous blue bus and gatecrasher hypotheticals first posed by Professors Laurence Tribe and Jonathon Cohen, respectively. Each of these hypotheticals presents a similar paradox: How can a district court judge resolve a case in favor of a defendant, before a jury trial, when the scant evidence available suggests that the plaintiff's version of a disputed, material fact to the litigation is—more likely than not—true? This “paradox” can *only* be resolved by carefully distinguishing between the concepts of confidence and probability. As such, the blue bus and gatecrasher hypotheticals serve as an excellent starting point for identifying and distinguishing between the concepts of confidence and probability in the litigation context. This section will briefly introduce the concepts of probability and confidence and demonstrate how the “paradox” of the blue bus and gatecrasher hypotheticals can only be resolved with an appreciation for how these two concepts are distinct.

Section III of this Article segues from the hypothetical, controlled context of the blue bus and gatecrasher hypotheticals to the actual cases discussed in Sections IV and V. To facilitate this

³² See Bahadur, *supra* note 30, at 456 (“If plausibility were akin to a probability requirement, plausibility would be abhorrent to the constitutionally based division of labor in the federal court system because the judge, rather than the jury, would be answering the question of whether or not the allegations in the complaint are more likely accurate than not.”); Darrell A.H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1005–06 (2010) (“It is unsurprising that *Iqbal* and *Twombly* both strenuously deny that they impose a ‘probability’ requirement at the pleading stage. Probability—at least in the civil context—is typically understood as the province of the jury. Probability pleading would have been a true sea change in the division between judge and jury.”).

transition, I will dispel the notion that the confidence principle is only important to litigation involving the type of overt statistical evidence such as that involved in the blue bus and gatecrashers hypotheticals. In reality, the confidence principle can be triggered even when the scant record evidence does not involve the type of overt statistical evidence present in those hypotheticals. The statistical evidence involved in the blue bus and gatecrasher hypotheticals made explicit the import of the confidence principle, but the confidence principle has wider applicability than the controlled settings of those cases.

In Section IV, I will proceed to a discussion of *Houchens v. American Home Assurance Co.*³³ The *Houchens* case provides a nice transition to *Matsushita* because it involves a clear application of the confidence principle in the context of an actual case. The *Houchens* court, however, failed to articulate that the justification for summary judgment in that case was confidence rather than probability. Instead, the court fell into the common trap of relying upon the oft-quoted “equal inferences rule” as an explanation for its decision. In this sense, *Houchens* is representative of a large number of cases that come close to explicitly identifying the confidence principle but instead bungle the explanation.

In Section V, I will examine the *Matsushita* opinion in light of the distinction between probability and confidence. The *Matsushita* case, compared to the blue bus and gatecrasher hypotheticals and the *Houchens* case, is not as obviously based on a confidence analysis. An understanding of the opinion as deriving from confidence principles thus requires some care and attention. This section will ultimately demonstrate that *Matsushita* was based on a confidence, rather than a probability, analysis. In doing so, the benefits of this “reinterpretation” of *Matsushita* will also be explored.

II. BLUE BUSES, GATECRASHERS, AND CONFIDENCE

The first articulation of the confidence concept was the result of efforts to explain two famous legal hypotheticals: the “blue bus” and “gatecrasher” hypotheticals. Professor L. Jonathan Cohen first

³³ 927 F.2d 163 (4th Cir. 1991).

posed the famous gatecrasher hypothetical in his book *The Probable and the Provable*:

Consider, for example, a case in which it is common ground that 499 people paid for admission to a rodeo, and that 1,000 are counted on the seats, of whom A is one. Suppose no tickets were issued and there can be no testimony as to whether A paid for admission or climbed over the fence. So by any plausible criterion of mathematical probability there is a .501 probability, on the admitted facts, that he did not pay. The mathematicist theory would apparently imply that in such circumstances the rodeo organizers are entitled to judgment against A for the admission-money, since the balance of probability (and also the difference between prior and posterior probabilities) would lie in their favour. But it seems manifestly unjust that A should lose his case when there is an agreed mathematical probability of as high as .499 that he in fact paid for admission.

Indeed, if the organizers were really entitled to judgment against A, they would presumably be equally entitled to judgment against each person in the same situation as A. So they might conceivably be entitled to recover 1,000 admission-moneys, when it was admitted that 499 had actually been paid. The absurd injustice of this suffices to show that there is something wrong somewhere. But where?³⁴

The “gatecrasher” hypothetical is rivaled in fame (or infamy) by Professor Laurence Tribe’s³⁵ “blue bus” hypothetical. Professor

³⁴ L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 75 (1977).

³⁵ According to Professor Tribe, he did not invent this hypothetical. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1341 n. 37 (1971) (calling the blue bus hypothetical a “famous chestnut”). Nevertheless, the origin of this hypothetical is generally attributed to Professor Tribe. See Jonathan J. Koehler & Daniel Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 257

Tribe's original hypothetical is rather straightforward and simple:

Consider next the cases in which the identity of the responsible agent is in doubt. Plaintiff is negligently run down by a blue bus. The question is whether the bus belonged to the defendant. Plaintiff is prepared to prove that defendant operates four-fifths of all the blue buses in town. What effect, if any, should such proof be given?³⁶

Each of these hypotheticals presents a "paradox." Almost all commentators who have considered these hypotheticals presume that each case would result in a court-ordered judgment for the defendant, before the case even reached the jury.³⁷ The paradox is that the only available evidence on the disputed question of fact in each hypothetical ("Did A pay for admission to the rodeo?" and "Was plaintiff injured by defendant's bus?") requires a conclusion that the fact needed for the plaintiff's recovery is, more likely than not, true. If anything, it seems as if the evidence would support a summary judgment in favor of *the plaintiff* rather than *the defendant*: the best guess as to what actually happened clearly supports the plaintiff's factual "story" ("A is a gatecrasher" and "It was defendant's bus") rather than the defendant's "story" ("I am not a gatecrasher" and "It was not our bus"). And, even more, there can be no reasonable disagreement that the best guess as to probability in each of these hypotheticals favors the plaintiff; the beauty of these hypotheticals is that they eliminate any doubt as to the probability of the material fact from the limited record available.

The paradox of the gatecrasher and blue bus hypotheticals can only be resolved by carefully distinguishing the concepts of probability and confidence, an insight that Professor Neil Cohen first recognized in his article *Confidence in Probability*³⁸ and

(1990) (attributing the blue bus hypothetical to Professor Tribe).

³⁶ See Tribe, *supra* note 35, at 1340–41.

³⁷ See Meier, *supra* note 1, at n.98

³⁸ Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985). Even though Professor Cohen essentially resolved the "paradox" of the blue bus and gatecrasher hypotheticals decades ago, his maneuver in distinguishing between probability and confidence has not been often replicated in the context of federal

explored in depth in my article *Confidence, Probability, and the Reasonable Jury Standard*.³⁹ A cursory explanation of the confidence principle should suffice for the purposes of this article; those seeking a full discussion of the concept can find one in my *Reasonable Jury* article. The reason that the defendant is entitled to summary judgment in the blue bus and gatecrasher hypotheticals is that there is not a sufficient *amount* of evidence such that there can be a requisite level of confidence as to *any* probability assessment from that evidence. In the gatecrasher and blue bus hypotheticals, a probability assessment from the available evidence favors the plaintiff, a conclusion that the statistical nature of the available evidence makes clear. Because the record evidence in the blue bus and gatecrasher hypotheticals is so scarce, however, the probability assessment necessarily involves a high “margin of error.” Even though the probability conclusion compelled by statistical evidence in the hypotheticals favors the plaintiff, there can be very little confidence in the ultimate validity of this probability assessment. If more evidence became available, it might dramatically alter the probability of the disputed question of fact.⁴⁰

Allowing the plaintiff to recover under the facts of the blue bus and gatecrasher hypotheticals is akin to asking a meteorologist to predict the chance of rain tomorrow based only on the weather for that same day in the previous year. We might prefer the meteorologist not make any prediction at all in this situation, particularly if people are inclined to place too much reliance on the meteorologist’s prediction and make decisions accordingly. The same concept applies to disputed questions of fact in the litigation

civil procedure. As I explain in *Probability, Confidence, and the Reasonable Jury Standard*, much of the blame for the absence of a widespread incorporation of Cohen’s insights should be attributed to the “reasonable jury” interpretation of Rule 56 of the Federal Rules of Civil Procedure, which makes the delineation of the probability and confidence principles very difficult. See Meier, *supra* note 1. Another factor working against the full-scale adoption and incorporation of Professor Cohen’s insights regarding probability and confidence is the erroneous belief that the confidence principle is triggered only by the presence of precise, statistical evidence such as that involved in the blue bus and gatecrasher hypotheticals. This issue is discussed in Section III of this Article.

³⁹ Meier, *supra* note 1.

⁴⁰ See *id.*

context and explains why commentators generally agree that the defendant in each hypothetical should prevail, as a matter of law, before the case even reaches the jury. Without sufficient information, there can be little confidence in any probability conclusion; in these situations, we prefer that the jury (or judge) not be permitted to even draw a probability conclusion from the scant record.

Thus, the blue bus and gatecrashers do not, in reality, present a paradox. The paradox only exists if one presumes that the summary judgment record is analyzed by a judge solely from the perspective of probability. But this is not what occurs. A judge, in determining whether to permit the case to go to a jury so that it can engage in a probability assessment, also considers whether there is a sufficient amount of evidence such that the legal system, and society, can have a sufficient amount of confidence in any probability conclusion from that evidence.⁴¹ Rather than presenting a paradox, the blue bus and gatecrasher hypotheticals precisely identify, in a controlled and hypothetical setting, the importance of distinguishing between confidence and probability.

III. STATISTICAL EVIDENCE AND CIRCUMSTANTIAL EVIDENCE

Before proceeding to an analysis of how the confidence principle can be used to understand actual cases, one limitation of the blue bus and gatecrasher hypotheticals must be resolved. Professor Tribe introduced the blue bus hypothetical as part of his larger theory about the pitfalls of statistical evidence.⁴² Professor

⁴¹ On the question of who applies the confidence analysis, I disagree with Professor Cohen. Professor Cohen believes that the confidence analysis is part of a jury's analysis of the burden of persuasion; I believe that the confidence analysis is performed solely by a judge. *See Meier, supra* note 1. After all, the presumed result of the blue bus and gatecrashers hypotheticals is that the plaintiffs' claims are thrown out before a jury determination. *See id.* Thus, the principle that explains the "paradox" of these two hypotheticals—the confidence analysis—must be performed by a judge rather than a jury if the pre-jury disposition of these two hypotheticals is to be justified. The jury is ill-equipped to engage in the types of policy weighing and legal interpretation that will determine the requisite amount of confidence—or allowable "margin of error"—for a particular case. *See id.*

⁴² *See Tribe, supra* note 35, at 1360–61 (explaining the "risk that the jury

Tribe's perspective stifled the entire discussion of the blue bus and gatecrasher hypotheticals, because there is an almost complete absence of efforts to apply the hypotheticals' lessons to situations involving circumstantial evidence, other than statistical evidence.⁴³ Circumstantial evidence is commonly used in civil litigation in federal courts.⁴⁴ The type of overt statistical evidence used in hypotheticals is, however, more rare.⁴⁵ Thus, the presumption that the hypotheticals are concerned only with overt statistical evidence has probably contributed to the general failure to apply the lessons from the gatecrasher and blue bus hypotheticals to real-world cases. In fact, the lessons from the hypotheticals have broad import to *all* cases involving circumstantial evidence, including—*but not limited to*—cases involving the statistical circumstantial evidence involved in the hypotheticals.

To understand this point, it is first necessary to develop a working definition of what is meant by the terms circumstantial evidence, direct evidence, and statistical evidence. In my article *Probability, Confidence, and the Reasonable Jury Standard*, I explore the difference between direct and circumstantial evidence in more depth.⁴⁶ I conclude that “direct evidence is evidence that, if credible to the jury, proves the material fact in the litigation”⁴⁷; circumstantial evidence “is evidence that, if believed by the jury, does not ‘directly prove’ the material fact to the litigation but rather supplies an inference that the material fact occurred.”⁴⁸

will give [statistical evidence] too much weight when undertaking to combine” it with other types of evidence).

⁴³ See Meier, *supra* note 1.

⁴⁴ See generally Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 243–63 (2006) (discussing how juries undervalue circumstantial evidence and overvalue direct evidence while assuming that circumstantial evidence is frequently used in everyday litigation).

⁴⁵ See Philip Mitchell Woolery, *Death Before Comparable Worth: The Limited Utility of Comparable Worth Evidence in a Title VII Cause of Action*, 51 MO. L. REV. 811, 830 (1986) (explaining that attorneys will only rarely rely exclusively on statistical evidence and will usually bring forward other types of evidence, including non-statistical circumstantial evidence).

⁴⁶ Meier, *supra* note 1.

⁴⁷ *Id.*

⁴⁸ *Id.*

To illustrate the difference between direct and circumstantial evidence, I use algebraic symbols to clarify the additional inference required for circumstantial evidence. Direct evidence comports with the following algebraic relationship: Testimony M \rightarrow Fact M? In order to deduce Fact M from Testimony M (represented by the arrow in the algebraic equation), the jury must find Testimony M credible.⁴⁹ With circumstantial evidence, however, there is an additional logical step between the adduced evidence and the relevant fact that is disputed in the litigation; this can be algebraically depicted as follows: Testimony X \rightarrow Fact X \rightarrow Fact M. Even if the jury believes the witness with regard to his or her testimony regarding Fact X, the jury must still resolve whether there is a relationship between the existence of Fact X and Fact M.

In *Probability, Confidence, and the Reasonable Jury Standard*, I conclude that a judge has no ability at the summary judgment stage to weigh in on the probability of whether the disputed questions of fact exist when both parties have submitted direct evidence on this point.⁵⁰ Stated differently, a party with direct evidence of a material fact satisfies the probability component of the burden of production.⁵¹ I believe the same concept applies to the issue of confidence. A plaintiff with direct evidence on a material fact has satisfied her burden of production under the confidence inquiry; in other words, a party who has direct evidence on all material facts has “enough” evidence. Both the gatecrasher and blue bus hypotheticals, as well as the two real-world cases discussed in this section, involve situations in which a plaintiff attempted to prove a material fact by circumstantial evidence only. Thus, the widely accepted view that a party with direct evidence is entitled to a jury trial seems to be true,⁵² with regard to both the

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *Id.* I discuss the burden of production and the burden of persuasion in *Probability, Confidence, and the Reasonable Jury Standard*. I define the burden of production as the obligation of a party to convince a judge to allow the case to proceed to a jury trial, whereas the burden of persuasion is the obligation of a party to convince a jury to find for that party. *Id.*

⁵² *See, e.g.,* CHARLES ALAN WRIGHT ET. AL., 21B FEDERAL PRACTICE & PROCEDURE §5122 (2d ed. 2012) (“Where the party relies on direct evidence

probability and confidence requirements.

The academic discussion of the blue bus and gatecrasher hypotheticals, however, suggests that only a particular type of circumstantial evidence—*statistical* circumstantial evidence—implicates the confidence principle.⁵³ There is no logical reason, however, to limit the confidence principle to cases involving overt, statistical evidence.

According to the model of circumstantial evidence developed above, circumstantial evidence follows a pattern in which testimony is used in an attempt to prove a fact which is itself probative of a material fact. Thus, circumstantial evidence requires the following analytical path: Testimony → Fact X, Fact X → Material Fact. Statistical evidence follows this same general model. The only difference is that, with statistical evidence, the relationship between Fact X and the Material Fact is mathematically determined. Accordingly, testimony establishing that 100 people attended the rodeo and that only 49 paid for admission (Fact X) statistically resolves the inferential value of Fact X to the Material Fact—whether the defendant paid admission or crashed the gate. The same basic process is involved with other circumstantial evidence that does *not* involve an explicit statistical correlation for the jury but rather requires the jury to consider for itself the probative value of the circumstantial evidence to the material fact in question.⁵⁴

Take, for instance, the relatively famous case of *Smith v. Rapid Transit*,⁵⁵ which commentators sometimes rely on to support the conclusion that the blue bus and gatecrasher hypotheticals would end in a court-directed judgment for the defendant. The *Smith* case,

such as the testimony of a witness to the fact in issue, the judge plays a minimal role because of the axiom that the credibility of the witness is to be decided by the jury. The power of the judge increases, however, when a party relies upon circumstantial evidence.”).

⁵³ See Cohen, *supra* note 38, at 398 (explaining that probabilities determined by a legal fact finder are best thought of estimates).

⁵⁴ See Koehler & Shaviro, *supra* note 35, at 252 (“All evidence is probabilistic, in the sense that there is a risk of error in relying on it to support a factual conclusion about a case.”).

⁵⁵ 58 N.E.2d 754 (Mass. 1945).

which was the basis of the blue bus hypothetical,⁵⁶ involved a dispute in which the plaintiff had been injured by a bus.⁵⁷ The defendant contested the ownership of the bus involved in the accident. The plaintiff had presented circumstantial evidence that the defendant had the exclusive franchise for operating a bus line on the street in which the accident occurred.⁵⁸ The lower court directed a verdict for the defendant, and the Massachusetts Supreme Court affirmed this result.⁵⁹ In affirming the defendant's directed verdict, the Massachusetts Supreme Court reasoned as follows: "The most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident. This was not enough."⁶⁰

Thus, although *Smith* is similar to the blue bus and gatecrasher hypotheticals, it is different because the statistical probability that another bus line was involved in the accident on Main Street could not be reduced to an *exact* statistical probability.⁶¹ The evidence in *Smith* did not lend itself to a *precise* determination of the probative value of "Fact X" (that the defendant owned the only license to operate a bus route on Main Street) to the "Material Fact" (ownership of the bus that caused the accident). In order to determine the probative value of the circumstantial—but not statistical—evidence offered in *Smith*, more work was necessary. Additional questions had to be resolved. In *Smith*, this might require information as to the frequency with which other buses traveled down Main Street compared to the frequency with which the defendant's buses operated on Main Street.

Thus, in a case like *Smith* involving circumstantial evidence that is not statistical evidence, more work is required in order to

⁵⁶ See Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 531 (1989) (explaining that the blue bus hypothetical is based on the *Smith* case).

⁵⁷ *Smith*, 58 N.E.2d. at 754–55.

⁵⁸ *Id.* at 755.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *id.* ("The most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident.").

determine the probative value of the evidence. The task of accessing this probative value of the evidence is difficult in *Smith*, while in the blue bus and gatecrasher hypotheticals the hard work is already done for the jury.⁶² In both situations, however, the same *type* of reasoning process is required. As Professors Jonathon Koehler and Daniel Shaviro have stated, “All evidence is probabilistic . . .”⁶³ It is just that the probabilistic nature of statistical evidence is more apparent than for it is for “non-statistical” circumstantial evidence.⁶⁴ The reason that overt, statistical evidence was used in the hypotheticals is simply because the “paradox” of these hypotheticals is more easily realized when statistical evidence is used.

Simply because the statistical probability process was made more acute in the hypotheticals, however, is no reason to ignore the lessons from those hypotheticals when applying them to the more common situation in which the relationship between the underlying fact (“Fact X”) and the material fact (“Material Fact”) cannot be reduced to a precise statistical relationship. The hypotheticals deftly pinpointed a “paradox” that was resolved by the confidence principle. The resolution of the paradox, however, applies to real-world scenarios in which the paradox is less clearly defined due to the absence of statistical evidence.⁶⁵ In short, the problem that the confidence principle resolved is not simply a

⁶² That the inferential value of statistical circumstantial evidence is made explicit for the jury is part of Professor Tribe’s concern about the risk associated with this evidence. See Tribe, *supra* note 35, at 1331 (“[I]n at least some contexts, permitting any use of certain mathematical methods entails a sufficiently high risk of misuse . . . that it would be irrational not to take such misuse into account when deciding whether to permit the methods to be employed at all.”).

⁶³ Koehler & Shaviro, *supra* note 35, at 252.

⁶⁴ See Peter Tillers & Jonathan Gottfried, *A Collateral Attack on the Legal Maxim That Proof Beyond a Reasonable Doubt in Unquantifiable*, 5 LAW, PROB., & RISK 135, 142 (2007) (“In short, although it is not possible to do statistics without doing probability, it is possible to do probability without doing statistics.”); Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 421 n.67 (1986) (arguing that the distinction between “naked statistical evidence” and “personalized” evidence is “insupportable”).

⁶⁵ See Koehler & Shaviro, *supra* note 35, at 252 (“Overtly probabilistic evidence, however, makes the risk of error explicit.”).

problem arising from statistical evidence; rather, it is a problem that potentially arises from all circumstantial evidence. The use of statistical evidence in the blue bus and gatecrasher hypothetical merely defined the problem with more clarity.

IV. *HOUCHENS V. AMERICAN HOME ASSURANCE CO.*

The case of *Houchens v. American Home Assurance Co.*⁶⁶ involves a clear application of the confidence principle in a real-world—as opposed to a hypothetical—case, and thus serves as a nice transition to the discussion of *Matsushita* in the following section. In *Houchens*, a woman brought a life insurance policy claim after her husband had gone missing.⁶⁷ The husband had been overseas for a job in Saudi Arabia when he took a trip to Bangkok, Thailand.⁶⁸ Although immigration records revealed that he had arrived in Bangkok and entered the country,⁶⁹ he had not been seen or heard from since his arrival.⁷⁰ After approximately eight years,⁷¹ the wife, the policy's beneficiary, brought suit against the life insurer.⁷² The wife was the beneficiary under the policy.⁷³ In order to recover on the policy, the wife needed to show that her husband had died of accidental causes.⁷⁴ Under a Virginia statute, she was entitled to a presumption that her husband had died because he had been missing for over seven years, but in order to recover under the policy she still needed to prove that he had died of an accidental cause.⁷⁵ The insurance company brought a motion for summary judgment regarding the question of whether the husband's death (presumed as a matter of law to have occurred) had been accidental.⁷⁶

⁶⁶ 927 F.2d 163 (4th Cir. 1991).

⁶⁷ *Id.* at 164.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 165.

⁷⁶ *Id.* at 164–65.

The district court granted the motion,⁷⁷ and the wife appealed to the Fourth Circuit.⁷⁸ The Fourth Circuit affirmed the order of summary judgment in favor of the defendant. The Fourth Circuit acknowledged the lack of available direct evidence regarding the husband's cause of death,⁷⁹ and noted that the case depended upon the effect of the "highly" circumstantial evidence contained in the record. In addition, the court acknowledged that although the "sparse" circumstantial evidence in the case—that the husband entered Thailand during a vacation from his job in Saudi Arabia—supported an inference of accidental death, the same evidence was also consistent with non-accidental causes of death such as suicide, murder, or natural causes.⁸⁰

If *Houchens* is considered from a probability analysis only, the defendant's summary judgment should have been reversed by the Second Circuit. The material fact (Material Fact M) was the manner in which the husband died. The record contained the undisputed facts involving the husband's vacation to Thailand (Fact X). Thus, this fits the model of circumstantial evidence developed in the previous section, in which the jury is asked to infer Material Fact M from Fact X: Fact X \rightarrow Fact M. The court in *Houchens* acknowledged that deducing Fact M from Fact X was reasonable. Indeed, the court expressly conceded that "Mr. Houchens might have died accidentally."⁸¹ If the court believed, based on the record evidence, that Mr. Houchens might have died accidentally, surely a jury would not have been unreasonable in reaching the same conclusion. Thus, the decision of the Fourth Circuit affirming the grant of summary judgment for the defendant cannot be explained through a probability analysis.

However, the result in *Houchens* makes perfect sense under a confidence analysis. The problem in *Houchens* is not that it would be unreasonable to conclude that the husband died accidentally. Rather, the problem is that there is so little evidence regarding the manner of the husband's death that there can be little confidence in

⁷⁷ *Id.* at 164.

⁷⁸ *Id.*

⁷⁹ *Id.* at 167–68.

⁸⁰ *Id.* at 167.

⁸¹ *Id.*

any conclusion regarding probability on this point.

Unfortunately, rather than clearly articulating the confidence principle as the true basis for the summary judgment in favor of the defendant in *Houchens*, the Second Circuit justified its decision using language that is sometimes described as the “equal inferences rule.”⁸² In *Houchens*, the court states:

This is a case where the inferences show equal support for opposing conclusions. Mr. Houchens might have died accidentally. However, it is equally likely that he was murdered, that he died of natural causes, that he took his own life, or that he just went away somewhere and lives yet.⁸³

The *Houchens* court is not alone in using the equal inferences “rule” as justification for summary judgment in a case in which there is very little available evidence on a probative fact; many courts have dealt with the problem of the scarcity of evidence regarding a material fact by resorting to this “rule.”⁸⁴ In reality,

⁸² *Id.*

⁸³ *Id.*

⁸⁴ The most famous application of the equal inference rule might have occurred in *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333 (1933). In *Chamberlain*, the Court considered an appeal by a plaintiff against whom a directed verdict had been entered at the trial court level. *See id.* at 333. The plaintiff wished to rely on circumstantial evidence to show that the employees of the defendant had been negligent and had caused the death of the plaintiff. *See id.* at 337–38. In affirming the trial court’s directed verdict (contrary to the reversal by Judge Learned Hand writing for the Second Circuit), the Supreme Court stated:

We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.

Id. at 339. This passage, containing equal inference type language, suggests that the underlying problem in *Chamberlain* was the scarcity of record evidence on the disputes question of fact. Under this reading, *Chamberlain* is similar to a case such as *Houchens* that is clearly based on a confidence analysis. On the other hand, other portions of the *Chamberlain* case suggest that the Court’s decision was based on a probability analysis. *See, e.g., id.* at 342–43 (generally dismissing the probative value of the plaintiff’s evidence).

though, the equal inference rule is just a somewhat inarticulate explanation of the result required when the plaintiff has failed to satisfy the confidence analysis within the burden of production.

Pursuant to the usual explanation of the equal inferences rule, when there is circumstantial evidence of a material fact that offers precisely equal support for both the plaintiff's and the defendant's respective positions on that material fact, summary judgment is appropriate against the party with the burden of proof at trial.⁸⁵ The theory is that the burden of production is not met because the evidence is *equally* consistent with the plaintiff's and defendant's versions of the material facts, and in this situation the burden of persuasion *at trial* would necessitate that this tie be resolved against the party on which the burden of persuasion rests.⁸⁶

Even though there is a superficial appeal to the "equal inferences" rule as a clever melding of the burden of production and burden of persuasion,⁸⁷ a closer inspection reveals the analytical deficiencies in this train of thought. The problem with the "equal inferences" rule, and the problem with using this rule as an explanation for a case like *Houchens*, is that the rule presumes that a court—as opposed to a jury—is to analyze the probative strength of circumstantial evidence and come to a *precise* conclusion as to the probabilities of that disputed material fact.⁸⁸

In any event, there are numerous cases in which the court's reliance on the equal inferences rule is clearly based on a perceived lack of confidence in any probability conclusion drawn from the record because of the scant evidence on a disputed, material fact. *See, e.g.,* Dorsaneo, *supra* note 8, at 1710–11 (examining case law with regard to the equal inferences rule and concluding that most courts have, correctly, rejected the rule); *see also* Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 15 (2011) (employing an equal-inferences analysis as part of their advocacy of the 'inferences to the best explanation' understanding of the burden of persuasion).

⁸⁵ *See* Litton Indus. Prods., Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984) ("When circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred.").

⁸⁶ *See, e.g.,* Simmons v. Blodgett, 110 F.3d 39, 41–42 (9th Cir. 1997) (explaining the rule).

⁸⁷ For a complete discussion of the relationship between the burden of production and the burden of persuasion, see Meier, *supra* note 1.

⁸⁸ *See, e.g.,* Galloway v. United States, 319 U.S. 372, 405 (1943) (Black, J.,

This view of the judge's responsibility with regard to the probability question is misguided⁸⁹ The judge's analysis of probability at the burden of production stage is deferential. The judge does not precisely determine the probative effect of the circumstantial evidence in the record, but rather the judge considers whether a jury's conclusion on the material fact, for either the plaintiff or the defendant, would be reasonable.⁹⁰ Under the equal inference rule, however, a judge is presumably to assign a rather specific percentage as to the probative effect of

dissenting) (stating that the equal inferences rule “assumes that a judge can weigh conflicting evidence with mathematical precision”); Dorsaneo, *supra* note 8, at 1710–11 (“[T]he ‘equal inferences rule’ is not merely unnecessary it is actually quite harmful. In the hands of a reviewing judge who wants to violate the jury’s province so as to impose his or her own idiosyncratic preferences on the case, the ‘equal inferences rule’ [requires only that the judge] declare that the inferences are equal.”). The equal inference rule does have some arguably legitimate hypothetical applications, but in these contrived situations the rule is better articulated as a rule of evidence as opposed to a rule of procedure. For instances, if a plaintiff offers only circumstantial evidence of a material fact, and the plaintiff concedes (perhaps in the form of expert testimony) that this circumstantial evidence is exactly equally consistent with the plaintiff’s version of a material fact as the defendant’s version, summary judgment against the plaintiff would be appropriate. Under this unusual situation, it is questionable whether this evidence would even meet the test for relevancy under Federal Rule of Evidence 401. *See* FED. R. EVID. 401 (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action *more or less* probable that it would be without the evidence” (emphasis added)); *cf.* Roger C. Park et al., *Bayes Wars Redivivus—An Exchange*, in 8 INT’L COMMENT. ON EVIDENCE 1, 10–38 (2010) (discussing—amongst other interesting issues—the relevance of evidence that is equally consistent with the plaintiff and the defendant’s explanation of the evidence). In reality, however, a party’s attorney will almost always take the position that the circumstantial, non-statistical evidence makes that party’s version of a material fact more probable. *Cf.* *Lozana v. Lozana*, 52 S.W.3d 141, 157 (Tex. 2001) (Hecht, J., concurring in part and dissenting in part) (“It is a rule of logic, as well as law, that when the existence of a fact does not make one possible inference more probable than another, no inference can be drawn at all. For example, one cannot infer from a photograph showing the sun on the horizon that it is either sunrise or sunset; each is a possibility—indeed, they are the only possibilities—but if nothing else is known, neither possibility is any more likely than the other.”).

⁸⁹ *See* Meier, *supra* note 1.

⁹⁰ *See supra* text at notes 74–80.

circumstantial evidence, and then—if the inferences to be drawn are *exactly* in equipoise—the judge is to enter judgment against the party with the burden of persuasion at trial.

The equal inferences “rule” is thus flawed because it assumes that a judge precisely determines an exact estimate of the probabilities on a disputed material fact. Even apart from this error, however, the equal inference rule is internally nonsensical. For instance, consider a case in which the judge determines that the circumstantial evidence slightly favors the defendant’s version of a material fact. In this instance, the equal inference rule is—by definition—not triggered because the evidence does not equally support a conclusion for either the plaintiff or the defendant on a disputed question of material fact. But, notice the illogical result under the equal inferences “rule” if the judge believes that the defendant’s version of the facts is exactly as likely as the plaintiff’s version of the facts. In this scenario, according to the equal inferences rule, the judge is to enter summary judgment for the defendant. However, if the judge believes that the evidence slightly favors the defendant but that reasonable minds could differ on this conclusion, the judge is presumably required to submit the case to the jury. Under the equal inferences rule, then, the defendant is better off convincing the court that the circumstantial evidence favors each side equally than in convincing the court that the circumstantial evidence slightly favors the defendant!

The equal inference “rule” could be understood as a rule that applies in cases like *Houchens* when judges intuitively realize that the defendant is entitled to summary judgment but that this conclusion cannot be justified under a probability analysis. In other words, a case like *Houchens* presents a real-life judge with a real-life “paradox” similar to the “paradox” exposed in the blue bus and gatecrasher hypotheticals. The solution to this real-life “paradox” is the same as the solution to the “paradox” posed by the blue bus and gatecrasher hypotheticals: the confidence concept. In reality, a case such as *Houchens* does not present a paradox once the decision is understood from the perspective that there simply was not enough evidence to afford the legal system sufficient confidence in any probability assessment from that evidence. Clearly articulating the confidence concept is challenging, however, and the “equal inferences rule” is an unfortunate

byproduct of the difficulty associated with verbalizing the confidence concept.

V. *MATSUSHITA ELECTRIC INDUSTRIAL CO. V. ZENITH RADIO CORP.*

The *Matsushita Electric Industrial v. Zenith Radio Corporation*⁹¹ litigation involved an antitrust claim by two American corporations against twenty-one Japanese corporations.⁹² Both the plaintiffs and defendants were in the business of producing television sets, with the defendants selling their products in both the Japanese and American markets.⁹³ The plaintiffs claimed that the defendants illegally conspired to keep the price of their television sets artificially low in the American market.⁹⁴ The ultimate goal of this conspiracy, according to the plaintiffs, was to drive American television set producers out of the American market.⁹⁵ To prevail on their claims, the plaintiffs had to prove that the defendants' low prices in the United States were the result of an actual agreement among the defendants.⁹⁶ Under well-established antitrust principles, if the various defendants' prices were simply the result of independent, parallel conduct by each of the defendants, no liability existed.⁹⁷

The District Court for the Eastern District of Pennsylvania granted summary judgment for the defendants.⁹⁸ The Supreme Court summarized the district court's conclusion as follows: "At bottom, the court found, [Plaintiffs'] claims rested on the inferences that could be drawn from [defendants'] parallel conduct in the Japanese and American markets, and from the effects of that conduct on [Defendants'] American competitors."⁹⁹ Thus, although

⁹¹ 475 U.S. 574 (1986).

⁹² *Matsushita*, 475 U.S. at 577.

⁹³ *Id.* at 577-78.

⁹⁴ *Id.* at 578.

⁹⁵ *Id.* at 577-78.

⁹⁶ *Id.* at 584-86.

⁹⁷ *Id.* at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

⁹⁸ *Id.* at 579.

⁹⁹ *Id.*

the plaintiffs had not asserted a viable legal claim by simply proving that the defendants had all sold television sets at artificially high prices in Japan and artificially low prices in the United States, the plaintiffs wished to use this parallel conduct as circumstantial evidence that an illegal conspiracy existed between the defendants.¹⁰⁰ Using the model of circumstantial evidence developed above,¹⁰¹ the plaintiffs wished to introduce testimony (Testimony X) about parallel conduct (Fact X) to prove a conspiracy (Fact M): Testimony X → Fact X → Fact M.

The Court of Appeals for the Third Circuit reversed the district court's grant of summary judgment.¹⁰² The Third Circuit concluded "that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market."¹⁰³ The Supreme Court subsequently reversed the Third Circuit.¹⁰⁴

Determining the precise rationale for the Court's decision in *Matsushita* is a difficult task; commentators have struggled with the case for over twenty-five years.¹⁰⁵ Figuring out *Matsushita* is a bit like trying to solve a Rubik's Cube: there are different sides to the problem, and while it might appear that you have solved the problem from one side, turning the Cube to a different side reveals that the maneuvers you have made to solve one side of the Cube have scrambled the other sides. Along these lines, any serious

¹⁰⁰ *Id.* at 584–85.

¹⁰¹ *See supra* Part III.

¹⁰² *Matsushita*, 475 U.S. at 580.

¹⁰³ *Id.* at 581.

¹⁰⁴ *Id.* at 598.

¹⁰⁵ *See generally* Nikolai G. Levin, *The Nomos and Narrative of Matsushita*, 73 FORDHAM L. REV. 1627, 1631 (2005) ("Nineteen years later, courts and commentators still struggle to decipher what the *Matsushita* standard requires and how to reconcile that with the Court's prior summary judgment jurisprudence, which was generally plaintiff permissive. *Matsushita*'s broad language created many questions: Should judges limit inferences at the summary judgment stage in *all* antitrust cases or only a subset (and, if so, which subset)? When ascertaining whether the evidence 'tends to exclude' the possibility of independent action, should the judge weigh the evidence? How are deterrence concerns related to that standard? Does *Matsushita* apply outside antitrust?") (internal citations omitted).

account of *Matsushita* must take into account the following aspects of the case: (1) the language in the opinion pronouncing that the Court was reviewing the legal standard for summary judgment; (2) the language suggesting that the Court's decision was based on the Court's view of the probability of the alleged conspiracy; (3) the language indicating that the antitrust context of the dispute was important to the Court's analysis; (4) the Court's reliance on its previous holding in *Monsanto Co. v. Spray-Rite Service Corp.*¹⁰⁶; (5) the transsubstantive nature of the Federal Rules of Civil Procedure; (6) the Seventh Amendment right to a federal jury trial; (7) the Court's subsequent description of the *Matsushita* holding in *Eastman Kodak Co. v. Image Technical Services, Inc.*¹⁰⁷; (8) the contemporary view that *Matsushita* is a critically important precedent; and (9) the notion that *Matsushita* helps defendants and hurts plaintiffs.

As it turns out, *Matsushita* is a Rubik's Cube that cannot be completely solved; no interpretation of *Matsushita* can account for all of the above factors, meaning that something has to give. However, the interpretation of *Matsushita* advanced in this Article—that *Matsushita* was decided according to a confidence analysis similar to that involved in the blue bus and gatecrasher hypotheticals and the *Houchens* case discussed above—comes pretty close to accounting for all of these variables. What is ultimately sacrificed is the language in the *Matsushita* opinion suggesting that the case depended upon the Court's view of the probability of the conspiracy alleged by the Plaintiffs, although I offer a theory as to how this language made its way into the Court's opinion. In addition, the contemporary view that *Matsushita* is an important summary judgment precedent must be reevaluated. Although *Matsushita* is still an important case under the theory advanced herein, it is not the “game-changing” precedent that dramatically alters the respective roles of the trial court judge and jury with regard to disputed questions of fact. The case is sometimes read and used in this manner, but this interpretation should be rejected.

The dissection of *Matsushita* below is, admittedly, somewhat

¹⁰⁶ 465 U.S. 752 (1984).

¹⁰⁷ 504 U.S. 451, 478–79 (1992).

tedious. Considering the import of *Matsushita*, however, this scrutiny is justified. Properly understanding the case as one decided according to a confidence inquiry (1) requires a reassessment of the summary judgment “revolution” that was prompted in part by *Matsushita* and (2) justifies the plausibility standard introduced by the Court in *Twombly*. In light of the stakes involved, a thorough and detailed examination of *Matsushita* is warranted.

A. *The Probability Understanding of Matsushita*

There are two fundamental ways to read *Matsushita*: through the probability principle and the confidence principle. This section discusses the probability reading. Under this reading, *Matsushita* revolved around the probability of the alleged conspiracy. This is the way that most lower courts and commentators have read *Matsushita*.¹⁰⁸ However, there are serious problems with this view of the case.

The *Matsushita* litigation depended upon the effect to be given circumstantial evidence. Recall that the dispositive factual question in the *Matsushita* litigation was whether the defendants’ parallel, low prices on television sets sold in the United States were the result of independent action or an agreement among the defendants.¹⁰⁹ The plaintiffs had no direct evidence that an

¹⁰⁸ See, e.g., Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 329 (1989) (“The result and reasoning in *Matsushita* virtually command the trial judge to invade the jury’s province . . .”).

¹⁰⁹ See *Matsushita*, 475 U.S. at 596–97. Of course, determining what distinguishes “independent action” from an “agreement” is a question of law, and the resolution of this legal question is more complex than it might initially appear. See generally William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405, 405–65 (2007) (concluding that the concept of an illegal antitrust agreement can only exist if there is communication between the conspirators and demonstrating that the recent cases support his definition, despite the contrasting school of thought (led by Judge Richard Posner) that tacit agreements and interdependent conduct also falls within the prohibition of Section of the Sherman Act); see also William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 SMU L. REV. 597 (2009) (discussing whether the infamous “Gary dinners,” in which American steel executives

agreement had been reached; there was no “smoking gun” witness to testify to witnessing an agreement being reached or to seeing a document memorializing the agreement. Thus, the illegal agreement would have to be proven by circumstantial evidence.

The plaintiffs had a variety of circumstantial evidence suggesting that the parallel low prices set by defendants in the United States were the result of an agreement. First, of course, was the fact that the defendants’ prices were uniformly low.¹¹⁰ In attempting to prove a conspiracy to agree to set low prices, it is obviously necessary that the prices be uniformly low.¹¹¹ It would make no sense for the plaintiffs to allege a conspiracy to engage in certain conduct when that conduct has not, in fact, occurred.¹¹² As the Court noted in *Matsushita*, however, the fact that the defendants were uniformly selling television sets in the United States at low prices could also be explained by independent action by each of the defendants.¹¹³ Although this might initially seem improbable (how often do twenty-one people or entities engage in the exact same behavior without some sort of agreement?), if the

gathered for a frank exchange of information regarding their businesses (including wages and prices), constitute an illegal agreement under the Sherman Act). The Supreme Court, in *Matsushita*, assumed that the dispositive question to the litigation was a factual one as to whether an agreement existed and not over the definition of what constitutes an agreement, and this Article will proceed under the same assumption.

¹¹⁰ *Matsushita*, 475 U.S. at 584.

¹¹¹ It is theoretically possible that the government might initiate a prosecution for an agreement that was later backed out of, but this seems unlikely.

¹¹² In this instance, the plaintiff pursuing a civil cause of action would not have suffered damages if an agreement—but no conduct—had occurred. It is the act that produces the damages to the plaintiff. This should be distinguished, however, from the criminal prosecution of a conspiracy. In the criminal context, the legislature might have an interest in prohibiting an agreement to engage in a conspiracy even the agreement does not result in action. See *United States v. Shabani*, 513 U.S. 10, 11, 15–17 (1994) (upholding a criminal conviction under federal statute prohibiting conspiracy to distribute narcotics even though no overt act by the defendant had been proven); see also had occurred); see also Model Penal Code § 5.03(5) (stating that an overt act must be alleged and proved except in cases where the crime conspired to is a first or second degree felony).

¹¹³ *Matsushita*, 475 U.S. at 586–87.

companies were each independently reacting to the same market conditions, the parallel conduct could actually be the result of independent action. Consider, for instance, the trend of cola companies to produce diet versions of their products. This common strategy by each of the cola makers was obviously not the result of an agreement amongst the producers. Rather, each producer was responding to the same market conditions—demand by consumers for diet versions of cola.

The *Matsushita* plaintiffs' evidence went beyond the defendants' parallel conduct of uniformly low prices in the United States, however. The plaintiffs also had direct evidence that the defendants had actually engaged in *other* agreements or conspiracies.¹¹⁴ The plaintiffs had direct testimony that the defendants had cooperated to maintain artificially *high* prices for their products in the Japanese market.¹¹⁵ Similarly, the plaintiffs also had evidence that the defendants had cooperated in various ways in the American market, albeit not in ways that gave rise to a claim by the plaintiffs against the defendants.¹¹⁶ This evidence was clearly probative of whether the defendants' low prices in the American market were the result of a conspiracy. If the defendants had entered into, maintained, and enforced business agreements in other settings, the likelihood is greater that the defendants had done so in the manner alleged by plaintiffs. If one wants to prove that Bonnie and Clyde entered into a conspiracy to rob a particular bank, it is helpful to establish that Bonnie and Clyde had worked together on previous projects.

The Supreme Court's opinion in *Matsushita*, however, focuses mostly on another bit of circumstantial evidence rather than that discussed above. The plaintiffs' theory in *Matsushita* was that the defendants had agreed to artificially hold their prices low in an effort to eventually force the plaintiffs out of the American market.¹¹⁷ This business strategy is often called "predatory pricing."¹¹⁸ As the academic

¹¹⁴ *Id.* at 580–81.

¹¹⁵ *Id.* at 580.

¹¹⁶ *Id.* at 596.

¹¹⁷ *Id.* at 578.

¹¹⁸ *Id.* at 584, n.8.

literature cited by the Court notes,¹¹⁹ predatory pricing is a somewhat risky business strategy because it requires a company to forgo present gains (represented by the higher price that could currently be charged for the product) in the hopes of capitalizing on larger gains in the future when competition has been eliminated.¹²⁰ According to the plaintiffs' complaint in *Matsushita*, the defendants conspired to engage in an ambitious predatory pricing scheme that required the elimination of well-established American companies over a long period of time.¹²¹ In *Matsushita*, the Court discusses the ambitious nature of the alleged predatory pricing conspiracy and suggests that the defendants did not have a "motive" to enter the conspiracy.¹²² To

¹¹⁹ *Id.* at 589.

¹²⁰ *Id.* at 588–89.

¹²¹ *Id.* at 590.

¹²² Admittedly, the Court's use of the term "motive" in *Matsushita* is a somewhat obscure manner of saying that the Court doubted the existence of the conspiracy. Alleged antitrust conspirators always have a motive to engage in an illegal antitrust conspiracy—to increase their profits. Whether that motive results in a conspiracy depends (among on other factors) on whether the conspirators believe the arrangement can be successfully implemented, and the likelihood—and cost—of antitrust litigation if the conspiracy is successful. Under the probability reading of *Matsushita*, the Court doubted that a conspiracy such as the one alleged by the plaintiff could be successfully executed. (The Court presumably, then, believed that the alleged conspirators would come to the same conclusion regarding the likelihood of success of that conspiracy.) Saying that there is no "motive" to engage in the activity, however, essentially hides the underlying assumption on which that conclusion regarding "motive" is based.

Moreover, some have doubted that a conspiracy need always be motivated by a desire to increase profits. For instance, in his *Matsushita* dissent, Justice White considers that a firm might be motivated by growth rather than profit-maximization. See *Matsushita*, 475 U.S. at 598 (White, J., dissenting). Others have explained that a desire for "workforce stability and industrial growth" might justify a preference for growth over profit-maximization. David F. Shores, *Narrowing the Sherman Act Through an Extension of Colgate: The Matsushita Case*, 55 TENN. L. REV. 261, 285 (1988); see also Michael J. Kaufman, *Summary Pre-Judgment: The Supreme Court's Profound, Persuasive, and Problematic Presumption About Human Behavior*, 43 LOY. U. CHI. L.J. 593, 595 (2012) (arguing that *Matsushita*'s "presumption that persons and businesses make purely rational choices with a singular intent to maximize their wealth" has been "discredited").

play on the analogy made previously: Why would Bonnie and Clyde conspire to rob a heavily-guarded bank when there is a good chance that the bank's vaults would be empty on the day of the robbery?¹²³

In addition to the "motive" language, other language in *Matsushita* also suggests that the Court's conclusion was based on a probability assessment. The Court discusses the "implausible"¹²⁴ nature of the alleged conspiracy and the necessity that the plaintiffs come forward with "more persuasive evidence"¹²⁵ to support their claim. The Court mentions that the length of time under which this conspiracy has continued suggests that "the conspiracy does not in fact exist."¹²⁶ Moreover, the Court discounted the value of the record evidence showing that the defendants had previously worked together to form agreements regarding business operations in both the Japanese and American markets.¹²⁷

Although these portions of *Matsushita* suggest a probability analysis,¹²⁸ problems arise under this interpretation. To demonstrate these problems, it will be helpful to quickly examine the nature of a judge's probability analysis at the summary judgment stage. In this regard, consider the following depiction of a judge's analysis of probability at the summary judgment stage:¹²⁹

¹²³ *Matsushita*, 475 U.S. at 590.

¹²⁴ *Id.* at 587.

¹²⁵ *Id.*

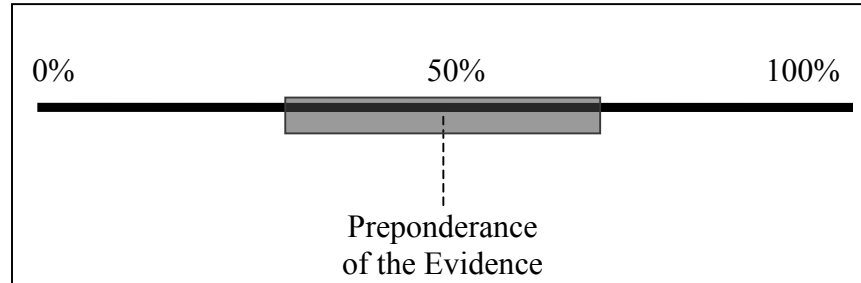
¹²⁶ *Id.* at 592.

¹²⁷ The Court's opinion also discounts the plaintiffs' expert report. *Id.* at 594 n.19 ("[I]n our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV-A, *supra*, that suggest that such conduct is irrational.").

¹²⁸ See, e.g., Stephen J. Fortunato, Jr., *Summary Judgment in Rhode Island: Is It Time to Wrap the Mantra in Celotex?*, 2 ROGER WILLIAMS U. L. REV. 153, 170 (1997) ("*Matsushita* clearly requires the trial judge to thoroughly assess the facts—dare I say weigh?—in order to determine if a jury could reach one or more conclusions supported by the evidence.").

¹²⁹ The development of this chart is more fully discussed in *Probability, Confidence, and the Reasonable Jury Standard*. See Meier, *supra* note 1.

Figure A



In Figure A, the probability issue is charted horizontally, with the right side of the line representing 100% probability that the material fact alleged by the plaintiff did—in fact—occur, and the left side of the chart representing 0% probability that alleged material fact occurred. Because a judge’s analysis regarding probability at summary judgment is merely to determine whether to send the case to the jury, the judge asks only whether a reasonable jury could resolve the disputed question of fact for either the plaintiff or the defendant.¹³⁰ The nature of this judicial inquiry explains the remaining features of Figure A. First, because the judge is considering how the jury might reasonably resolve the disputed question of fact, the burden of persuasion applicable to the jury’s decision must be considered. In Figure A, the usual burden of persuasion used for civil litigation—a preponderance of the evidence—has been used and marked at the corresponding 50% probability point. Second, recall that the role of a judge is not to act as *the* fact-finder, but rather to determine whether the record is such that a jury would be reasonable in deciding the case for either party to the dispute. Thus, a judge must assign *a range* of probability assessments that represents a “reasonable” conclusion from the evidence. This notion is captured by the shaded bar on top of the horizontal probability continuum. In Figure A, the judge has

¹³⁰ The reasonable jury standard nicely captures the relation between judge and jury with regard to probability (albeit not with regard to confidence). See Meier, *supra* note 1.

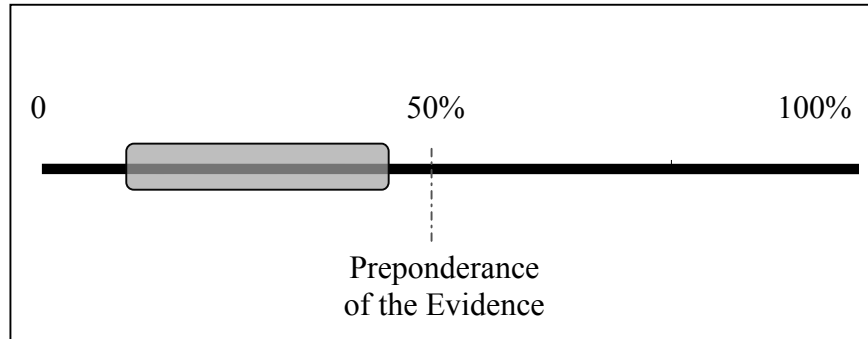
examined the record evidence and concluded that a range of probability conclusions from the evidence would be reasonable. Because the range assigned by the judge extends over the 50% probability point associated with the preponderance of the evidence burden of persuasion, a jury would be reasonable in resolving the disputed question of fact in favor of either the plaintiff or the defendant. Thus, summary judgment is not appropriate in Figure A and the case must proceed to a jury trial.

Of course, in *Matsushita*, the Court *did* conclude that summary judgment—for the defendants—was appropriate. Thus, if the Court decided *Matsushita* according to a probability analysis, the range of reasonable probability assessments (on the question of whether the defendants had, in fact, engaged in an illegal conspiracy) must have been wholly to the left of the relevant preponderance of the evidence standard. This might occur for two different reasons. A discussion of each follows below.

1. The “No Chance!” Probability Interpretation of *Matsushita*

The first probability interpretation of *Matsushita* I will label as the “No Chance!” interpretation. Under this view, the Court thought the alleged conspiracy was extremely unlikely. Thus, the probability range assigned by the Court in *Matsushita* was completely to the left of the preponderance of the evidence point because, even allowing for “reasonable” differences, a jury could not legitimately conclude that the conspiracy had—more likely than not—actually occurred. This variation of the probability understanding of *Matsushita* is depicted below in Figure B:

Figure B



Under Figure B, the *Matsushita* Court would start with the presumption that the plaintiffs' conspiracy was extremely improbable. Even after allowing for reasonable disagreements regarding the probative value of the record, the range of reasonable conclusions did not extend beyond the relevant 50% mark associated with the preponderance of the evidence standard. Thus, summary judgment in favor of the defendant was appropriate.

The "No Chance!" view of *Matsushita* is flatly inconsistent with portions of the *Matsushita* opinion. Indeed, the Court was careful to emphasize that its decision to reinstate the trial court's grant of summary judgment was *not* simply the result of a disagreement with the Third Circuit over the probative value of the record evidence. *Matsushita* opens with the following declaration: "This case requires that we again consider *the standard* district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case."¹³¹ To underscore this point, *Matsushita* reiterates "that we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence."¹³² In each of these statements, the Court seems to be stressing that the issue before the Court involves a question about the legal standard for summary judgment.

Under the "No Chance!" view of *Matsushita*, however, the Court's conclusion was based solely on the Court's analysis of the

¹³¹ *Matsushita*, 475 U.S. at 576 (emphasis added).

¹³² *Id.* at 577.

probative value it assigned to the various pieces of circumstantial evidence in the record. This evaluation of evidence and assigning of probabilities is not a legal inquiry into the standard governing summary judgment but rather an inquiry into the probative value of a particular evidentiary record. The Court in *Matsushita* seemed to be adamant, though, that the result did not depend on this sort of evidentiary inquiry. The problem with the Third Circuit's conclusion, according to the Court, was not that it had come to the wrong conclusion regarding the probative value of the evidence but that it had used the wrong *legal* standard.¹³³ Thus, unless the Court misstated its reasoning in *Matsushita*, the opinion did not depend simply on the Court's own views regarding the probative value of the evidence.

Not surprisingly, then, nobody seems to interpret *Matsushita* as simply a product of Justices Powell, Burger, Rehnquist, Marshall, and O'Connor's¹³⁴ views regarding the probability value of the record evidence in that case. Primarily, the debate regarding *Matsushita* has been whether the "new" legal approach to summary judgment contained therein should be limited to the antitrust context only or applied broadly to other cases. Even those who believe *Matsushita* applies only to the antitrust context do not do so under the theory that the case hinged on the Court's own view of the probability of an agreement in that particular case.¹³⁵ Thus, there seems to be a general consensus that *Matsushita* is an important case that informs the *legal* standard a trial court judge must apply in deciding summary judgment. The analysis of the Court pursuant to the "No Chance!" interpretation of *Matsushita* does not address the standard a district court judge must apply at the summary judgment stage but merely represents the result that must occur in a *particular* case when a court believes the summary judgment evidence produced in that litigation is predominantly one-sided.

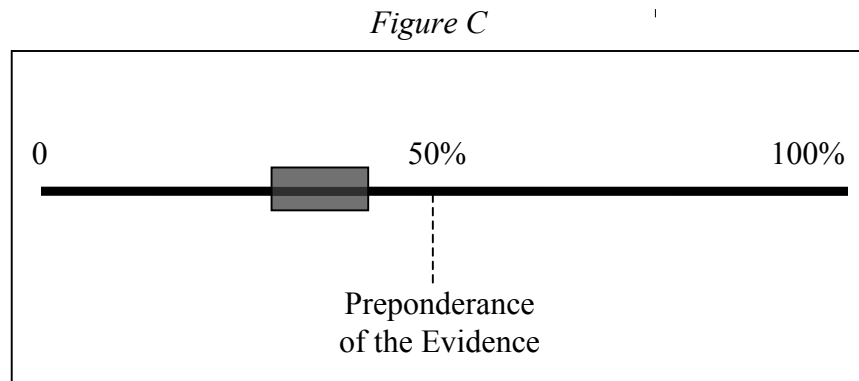
¹³³ *Id.*

¹³⁴ These five Justices constituted the majority in *Matsushita*. *See id.* at 576.

¹³⁵ *See* Schwarzer & Hirsch, *supra* note 16, at 6–7 (concluding that *Matsushita* "rests on a specific point of antitrust law" that precludes plaintiffs from relying solely on legal business conduct to prove an illegal antitrust agreement).

2. The “What is Reasonable?” Probability Interpretation of *Matsushita*

A second way the Court could have used a probability analysis to reach the conclusion that the *Matsushita* defendants were entitled to summary judgment is the “What Is Reasonable?” probability view. Under this view, the reason that the probability range was to the left of the preponderance of the evidence point was because the Court redefined the allowance judges should make for “reasonable” disagreements over probability of a material fact from the summary judgment record. This view is depicted below in Figure C:



In Figure C, summary judgment is appropriate because the range of probability assessments representing “reasonable” jury conclusions shrank. Since the Court was less generous in characterizing deviations from the Court’s own views regarding probability as “reasonable,” the case is now one in which the only reasonable probability conclusions from the summary judgment record are to the left of the important burden of persuasion point. Thus, a decision in favor of the defendant at the summary judgment stage is appropriate because a jury verdict for the defendant is the only reasonable conclusion from the record evidence.

The “What Is Reasonable?” probability view of *Matsushita* addresses one of the shortcomings associated with the “No Chance!” view. The “What Is Reasonable?” view of *Matsushita* is consistent with language in the opinion indicating that the question

before the court was the “standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.”¹³⁶ According to the “What is Reasonable?” reading of *Matsushita*, the Supreme Court’s legal standard was different from the standard used by the Court of Appeals because the Supreme Court’s standard required district court judges to be less tolerant in establishing the range of “reasonable” conclusions that could be drawn from a summary judgment record.¹³⁷ Thus, the Court’s characterization of the issue presented in *Matsushita* as involving the summary judgment *standard* (rather than the *application* of that standard to a particular case) is consistent with the “What is Reasonable?” understanding of *Matsushita*.

In addition, the “What is Reasonable?” view of *Matsushita* is consistent with the widely-held view that *Matsushita* is an important case regarding the law of summary judgment. If the Court decided in *Matsushita* that trial court judges should generally be less willing to allow for deviations from their own

¹³⁶ *Matsushita*, 475 U.S. at 576.

¹³⁷ Because courts (at both the trial court level and the appellate level) do not use mathematical expressions to delineate their views of the “reasonable” range of probability assessments from a particular evidentiary record, it is somewhat difficult to conceive how an appellate court would know that a lower court was applying the wrong standard in performing this task. Nevertheless, I believe that it is a mistake to assume that the standard is being misapplied if appellate courts are frequently reversing the grant of summary judgment by lower courts. See, e.g., Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, (2012) (“Grants of summary judgment are reversed at too high a rate to have been properly granted. The very premise of summary judgment is that there are no genuine disputes of material fact, that *no* reasonable jury could find for the nonmovant, and that the law is so clear that there is *no* valid reason to postpone entry of judgment. By these standards, the grant of summary judgment (partial or whole) by a federal district judge (at least on no-genuine-dispute-of-fact grounds) should be affirmed nearly 100% of the time.”). Any legal principle, regardless of whether it is a clear rule or a murky standard, will involve close cases whose resolution is not clear. Stated differently, reasonable minds can disagree on what is reasonable, and those types of cases are much more likely to show up on an appellate docket. See Sward, *supra* note 16, at 575 (“[W]hat is ‘reasonable’ [under the reasonable jury test] is often in the eyes of beholder, meaning that the [reasonable jury] test gives judges more power.”) (internal quotation marks omitted).

view of probability, the case dramatically altered the relationship between trial court judge and jury with regard to disputed questions of material fact. According to this view, the *Matsushita* analysis must be applied in all types of federal civil litigation, not just the antitrust context. Many scholars read *Matsushita* in this light.¹³⁸

However, this view of *Matsushita* is problematic on many fronts. First, it does not adequately account for the Seventh Amendment right to a jury trial.¹³⁹ This concern is best illustrated by pushing the concept associated with the “What is Reasonable” view of *Matsushita* to its logical extreme. This would result in completely removing the fact-finding process from the province of the jury (at least when there was no direct evidence on a material issue of fact). A judge would assign a probability assessment to any disputed fact, disregard any deviations as “unreasonable,” and then grant summary judgment to either the plaintiff or defendant depending on the conclusion reached by the judge. Obviously, this result would not be desirable—nor would it be constitutional.¹⁴⁰ No one has advocated for this view of *Matsushita*.

But even without such an absolute interpretation of the case, there is at least¹⁴¹ tension between *Matsushita* and both the

¹³⁸ See Miller, *supra* note 16, at 1068–69, nn.456–63 (listing cases applying *Matsushita* outside of the antitrust context); see also Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 338 (2010) (“[*Matsushita*] is frequently taught in civil procedure classes as a summary judgment case, not an antitrust case.”). These conclusions are sometimes based upon the Supreme Court’s subsequent decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992). See, e.g., Duane, *supra* note 10, 1569 n.174 (1995) (concluding that *Eastman* resolves that *Matsushita* is not limited to the antitrust context); but see Levin, *supra* note 105, at 1631–32 (addressing the question “Does *Matsushita* apply outside antitrust?” and concluding that *Eastman* does not resolve the issue). For a discussion of *Kodak*’s description of the *Matsushita* decision, see *infra* Subsection V(B)(3).

¹³⁹ U.S. CONST. amend. VII.

¹⁴⁰ See Daniel P. Collins, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 492 (1988) (“If the judge is given too much leeway in deciding what a ‘rational’ jury would find, this may infringe on the non-movant’s seventh amendment right to a jury trial.”).

¹⁴¹ Some commentators have argued that *any* involvement by a trial court judge in determining the probability of a material fact is a violation of the

Seventh Amendment's protection of the right to a civil jury trial and the Supreme Court's frequent admonition that a trial judge is not to substitute his or her opinion of the evidence for that of the jury.¹⁴² To state the concept slightly differently, if one assumes that a judge could not constitutionally disregard *any* contrasting conclusion from the summary judgment evidence as unreasonable, a decision to "shrink" the range of reasonable conclusions from the evidence moves closer to that constitutional line. Not surprisingly, the constitutionality of summary judgment was not seriously questioned (at least in contemporary discussions) until some lower courts (and commentators) viewed *Matsushita* as a green light to apply the reasonable standard in a new, aggressive manner.¹⁴³

For present purposes, it is not necessary to attempt to resolve precisely how much constitutional latitude a judge has in making a probability assessment from the record evidence and determining what sorts of conclusions might be "reasonable." It is sufficient to establish that there is a constitutional line, and that the "What is Reasonable?" interpretation of *Matsushita* either crosses this line or, at the very least, edges towards this constitutional line. These constitutional concerns work against the "What is Reasonable?" interpretation of *Matsushita*.

In addition to the Seventh Amendment concern created by the "What is Reasonable?" view, this view also cannot account for the antitrust-specific language in the opinion. At various places within the opinion, the Court acknowledged that the antitrust law context influenced its analysis. For instance, the Court accentuated the

Seventh Amendment. See, e.g., Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that modern summary judgment is unconstitutional because it permits a judge to engage in a probability analysis). This issue is beyond the scope of this Article. For present purposes, it is sufficient to note that, if the Supreme Court sanctioned a more "aggressive" application of the judge's probability inquiry at summary judgment, this makes the potential Seventh Amendment problems more acute.

¹⁴² See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the trial judge's function is not himself to weigh the evidence and determine the truth of the matter . . .").

¹⁴³ See Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been A Material Change in Standards*, 63 NOTRE DAME L. REV. 770, 771-75 (1988) (examining the effect of *Matsushita*, but not wanting to "reinvent the wheel," on the constitutionality of summary judgment under the Seventh Amendment).

antitrust nature of the dispute at the beginning of the opinion when it framed the question to be analyzed: “This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment *in an antitrust conspiracy case*.”¹⁴⁴ Similarly, the Court stated that “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 [Sherman Antitrust Act] case.”¹⁴⁵ Later in the opinion, the Court explains the unique problems that can arise when a jury concludes that a defendant has predatorily priced when, in fact, this has not occurred: “[M]istaken inferences in [predatory pricing] cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”¹⁴⁶

Of course, a more refined version of the “What is Reasonable?” interpretation accounts for the opinion’s antitrust-specific language. Under this more refined variation, trial courts should be less willing to defer to the jury only for antitrust cases or for particular types of antitrust cases.¹⁴⁷ While this interpretation accounts for antitrust-specific language, there are still problems associated with it. The first is that—like the generic version of the “What is Reasonable?” interpretation—the antitrust-specific version seems to undermine Seventh Amendment principles.

The justification for the antitrust-specific version would need to be based on the peculiar risks associated with resolving disputed questions of facts in the antitrust context. In *Matsushita*, the Court appears to offer such a justification: “mistaken inferences in

¹⁴⁴ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986) (emphasis added).

¹⁴⁵ *Id.* at 588.

¹⁴⁶ *Id.* at 594. This antitrust-specific language in *Matsushita* has never been accounted for by those who claim that *Matsushita* broadly altered the relationship between trial judge and jury in all federal, civil suits. If the Court intended an across-the-board redefinition of the relationship between trial judge and jury, the antitrust-specific language in the opinion is misplaced and unnecessary. Thus, many commentators read *Matsushita* as a decision which should be confined only to the antitrust context. See *supra* note 16.

¹⁴⁷ See Levin, *supra* note 105, at 1646–51 (exploring different interpretations of *Matsushita*, including those that limit the case’s import to “all antitrust situations”).

[predatory pricing] cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”¹⁴⁸ The “false positive”¹⁴⁹ error that the Court appeared to be concerned with in *Matsushita* is only remedied, however, if trial court judges are somehow better than jurors at assessing probability from an evidentiary record, *assuming that Matsushita was decided accorded to a probability theory*. If judges are just as likely to falsely conclude that a conspiracy existed when it did not, the problem of false positives is not solved by telling judges to be more stringent in characterizing different conclusions from the record as “reasonable.”

Of course, as an empirical matter, it is entirely possible that judges—as opposed to juries—are better equipped to assess probability in antitrust cases. Judges, after all, are pretty smart people and at least some of them might have more experience in

¹⁴⁸ *Matsushita*, 475 U.S. at 594. The concern of the Court appears to be that a mistaken litigation conclusion regarding the factual question of whether a conspiracy existed might have the effect of deterring the type of “clean” competition on which a functioning market is based. In other words, someone who has a superior business model might refrain from engaging in the type of cutthroat (but socially useful) business practices that would take market share from a competitor, because these business practices might be mistaken for conduct illegal under antitrust law. The assumption made by the Court in expressing this concern is not necessarily sound. Unless the costs associated with a mistaken conclusion regarding the existence of an antitrust conspiracy outweigh the potential gains from delivering a superior product at a better price, a more efficient market participant will presumably have every incentive to maximize income by increasing market share. Granted, considering the treble damages associated with antitrust claims, the possibility that a mistaken conclusion could affect conduct at the margins does exist, but realistically it seems hard to fathom that a market participant would ever refrain from activity resulting in increased profits and market share simply because of the possibility that they might inaccurately be adjudged as having violated antitrust law. Nevertheless, even if the concern expressed by the Court might not have any (or little) effect from a wealth maximization standpoint, the concern expressed by the Court is at least valid from a wealth distribution perspective: A mistaken factual conclusion about the existence of antitrust conspiracy does result in a wealth transfer from a superior market participant to an inferior market participant.

¹⁴⁹ In the scientific community a “false positive” error is often referred to as a “Type I error.” See KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE* 75 (MIT Press 1997).

antitrust matters than would a typical juror.¹⁵⁰ Thus, it is possible (from an empirical point of view) that shifting the probability question from jury to judge—and this is the effect (at the margins, at least) of the “What is Reasonable?” interpretation of *Matsushita*—might improve the overall accuracy of the decision-making process.

Regardless, this line of thinking seems to run afoul of the Seventh Amendment. Even if the superiority of judges over juries in assessing probability could be empirically demonstrated—in antitrust cases or beyond—the probability decision has been constitutionally committed to the jury. As Professor Suja Thomas has emphatically stated, “[The Seventh Amendment] was the choice of the founders. Period. Any attempt to merge efficiency and the jury ignores the decision that the founders made—to have a jury trial right.”¹⁵¹ For better or worse, the Seventh Amendment gives juries the power to determine disputed questions of fact in a litigation context. Even if the policy behind the Seventh Amendment was solely attributed to a belief that juries are more accurate than judges in assigning probabilities to disputed questions of material fact,¹⁵² empirically demonstrating the invalidity of this assumption does not justify a deviation from this constitutional decision. Thus, the same Seventh Amendment concerns that worked against the generic “What is Reasonable?”

¹⁵⁰ This presumption will not always be valid, of course. A business executive sitting on a jury is probably better suited to determine the probability that an illegal antitrust conspiracy existed than is the typical federal court judge.

¹⁵¹ Suja A. Thomas, *Before and After the Summary Judgment Trilogy*, 43 LOY. U. CHI. L.J. 499, 512–13 (2012).

¹⁵² It seems relatively clear that the Seventh Amendment right to a jury trial is based on more than just the accuracy of jury decisions regarding material questions of fact. See, e.g., Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 670–71 (1973) (discussing the antifederalists’ arguments in favor of Seventh Amendment, which included the “protection of debtor defendants[,] the frustration of unwise legislation . . . the vindication of the interests of private citizens in litigation with the government[,] and the protection of litigants against overbearing and oppressive judges”); see also Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1013, 1017–18 (1994) (discussing the historical importance of the Seventh Amendment).

probability reading of *Matsushita* also undermine the more limited antitrust-only version of this probability theory.

In addition to the Seventh Amendment concern, the anti-trust specific version is contrary to the transsubstantive nature of the Federal Rules of Civil Procedure. The Federal Rules establish the procedural rules that govern civil litigation in federal courts.¹⁵³ It is well established that these procedural rules are to apply uniformly to all different types of substantive disputes,¹⁵⁴ with a few exceptions to this transsubstantive principle specifically delineated within the text of various rules.¹⁵⁵ Of course, these transsubstantive rules can be altered by positive law. This occurred, for instance, in the Prison Litigation Reform Act (“PLRA”).¹⁵⁶ In the PLRA, Congress imposed a procedural requirement, applicable to suits filed by prisoners “with respect to prison conditions,” that requires a prisoner plaintiff to exhaust potential administrative remedies within the prison system before filing suit in federal court.¹⁵⁷ No such exhaustion requirement exists within the Federal Rules.¹⁵⁸

Despite *Matsushita*’s specific reliance on antitrust law, there is no antitrust statute that indicates a Congressional intent to alter the usual relationship—as established by the Federal Rules—between the judge and jury with regard to disputed questions of fact. Absent specific text indicating an intent to alter the standard approach contained within the Rules, the Supreme Court has consistently rejected attempts by lower courts to surmise this intent based on policy concerns: “[C]ourts should generally not depart from the usual practice under the Federal Rules on the basis of

¹⁵³ See FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts . . .”).

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., FED. R. CIV. P. 9 (establishing a different pleading standard for certain types of cases).

¹⁵⁶ Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (codified at 42 U.S.C. § 1997(e) (1996)).

¹⁵⁷ *Id.*

¹⁵⁸ See *Porter v. Nussle*, 534 U.S. 516, 523 (2002) (observing that, for plaintiffs pursuing civil rights claims, exhaustion of administrative remedies is not generally required before filing suit in federal court).

perceived policy concerns.”¹⁵⁹ Therefore, an antitrust-specific version would be contrary to the transsubstantive nature of the Federal Rules.

Of course, this is not to say that the *application* of the Federal Rules to a particular dispute will always be blind to the substantive law involved in the litigation. This is obvious if one considers Rule 8, which addresses whether a party has properly pleaded a claim for relief that can survive a motion to dismiss.¹⁶⁰ A judge applying the standard from Rule 8—a “short and plain statement of the claim”¹⁶¹—cannot do so without considering the substantive law implicated by the dispute. If the complaint alleges facts that are inconsistent with recovery under the substantive law, the complaint must be dismissed. This conclusion is reached, however, only by considering how the procedural standard of Rule 8 applies to the substantive law implicated by the dispute.¹⁶² A judge cannot know whether the plaintiff pleaded a “short and plain statement of the claim” unless the judge knows the legal claim involved in the dispute.

The notion that the application of the Federal Rules will sometimes be informed by the substantive law at stake cannot explain the *Matsushita* Court’s reference to antitrust law, however, *at least if Matsushita was decided under a probability theory*. The

¹⁵⁹ *Jones v. Bock*, 549 U.S. 199, 200 (2007); *see also id.* at 214 (“We think that the PLRA’s screening requirement does not-explicitly or implicitly-justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself.”). This concept that the procedures established under the Federal Rules of Civil Procedure cannot be changed without clear statutory language is a spin on the familiar principle that the Rules Enabling Act does not alter substantive rights. If the question is one of procedure, the Federal Rules offer a default solution from which a deviation can be justified only with clear Congressional intent.

¹⁶⁰ FED. R. CIV. P. 8.

¹⁶¹ *Id.*; *see also* *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁶² *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 830 (2010) (explaining that a judge determining whether a complaint complies with Rule 8 must determine whether “any legal claim exists that would be consistent” with the factual allegations of the complaint).

probability issue relates to the likely existence of facts. Resolving who and how the existence of these facts will be determined is a legal question that is addressed in Rule 56. Resolving *this* legal issue—as opposed to the legal issue addressed in Rule 8—does not require a reference to the underlying substantive law. Disputed questions of fact must be resolved for all types of federal litigation; in light of the transsubstantive nature of the Federal Rules, the assumption should be that Rule 56 provides a uniform approach to resolving disputed questions of fact in federal litigation, absent specific Congressional guidance to the contrary. The antitrust-specific version of the “What is Reasonable?” probability theory of *Matsushita* is based on the assumption that, because judges are better at resolving disputed questions of fact in the antitrust context, a judge should be less willing to accept differing factual perspectives on the record as “reasonable.” The transsubstantive nature of the Rules, however, seems to preclude this sort of pick-and-choose approach. There is no satisfactory justification for a unique legal approach to resolving disputed question of antitrust facts without some clear signal that the transsubstantive nature of the Rules is inoperative; no such signal exists in the backdrop to *Matsushita*.

To summarize, any interpretation of *Matsushita* that is based on the assumption that the Court’s decision depended upon a probability analysis results in grave problems. The notion that *Matsushita* derived from the Justices’ individual perspectives that there was little probability that the alleged conspiracy had actually occurred (the “No Chance!” interpretation) is inconsistent with the language of the opinion. This language confirms that the Court was interested in the standard applicable to summary judgment rather than the application of that standard to a particular evidentiary record.

The “What is Reasonable?” interpretation of *Matsushita* improves upon the “No Chance!” interpretation by acknowledging that the Court was interested in the summary judgment standard rather than its application. Under the “What is Reasonable?” interpretation, the Court’s decision changed the summary judgment standard by directing lower courts to be less tolerant in defining the range of probability conclusions from the record evidence that qualify as reasonable. Some have, and continue, to interpret

Matsushita in this manner, but this view results in tension—if not an outright violation—of the Seventh Amendment right to a jury trial.

Moreover, the “What is Reasonable?” view cannot account for the language that seems to place much emphasis on the antitrust nature of the dispute. This antitrust-specific language can be accounted for under a more refined version of the “What is Reasonable?” interpretation. Under this more limited interpretation, the Court believed that judges should be more reluctant to allow for reasonable disagreements regarding probability only when a case involves antitrust law or perhaps a specific issue within antitrust law. This variation of the “What is Reasonable?” view depends on the premise that, at least for antitrust cases, judges are more capable than juries in assessing the probability of the material facts in dispute. Here again, though, this view seems to run afoul of the Seventh Amendment’s commitment to jury decision making with regard to disputed questions of material fact: even if judges are better at assessing probability in this specific context, this truth would not seem to justify a deviation from principles of the Seventh Amendment. Moreover, the antitrust-only version of the “What is Reasonable?” view of *Matsushita* seems to violate the transsubstantive principle of the Rules.

Thus, despite the language in *Matsushita* that suggests that the Court’s decision rested on a probability analysis, multiple problems arise under this view. All of the problems are resolved, however, by a confidence reading of the case.

B. *The Confidence Reading of Matsushita*

In the same manner in which a confidence understanding resolves the “paradox” of the blue bus and gatecrasher hypotheticals, a confidence reading of *Matsushita* also resolves the many “paradoxes” that arise under a probability reading of the case. Under a confidence reading of *Matsushita*, summary judgment was necessary because an insufficient degree of confidence could be had in any probability assessment from the minimal circumstantial evidence in that case. Because of the state of the record in *Matsushita*, any conclusion regarding

probability—by either the judge *or* the jury—was going to be a rough guess based on incomplete information.

The only other commentator to suggest anything akin to a confidence reading of *Matsushita* is Daniel Collins, in a 1988 student note in the *Stanford Law Review*.¹⁶³ Although Collins does not use the “confidence” terminology employed in this Article and by others such as Professor Neil Cohen,¹⁶⁴ he does posit that an “alternate reading”¹⁶⁵ of *Matsushita* would emphasize the notion that “permitting certain circumstantial inferences may have the effect of deterring perfectly legitimate conduct that the antitrust laws seek to protect.”¹⁶⁶ This line of thinking focuses on the risk of false positives and the adequacy of information and not on the probability that an actual conspiracy occurred. In addition, Collins analogizes this interpretation of *Matsushita* to Professor Jonathan Cohen’s gatecrasher hypothetical.¹⁶⁷ The confidence principle drives Collins’s note, even if the principle is not explicitly identified as such.¹⁶⁸

Collins does very little, however, to explain why this proposed interpretation of *Matsushita* is correct. And, in his defense, Collins might not have perceived the need to do so: when Collins wrote his student note in 1988, he could not have anticipated that the interpretation of *Matsushita* he was considering would be so important. The summary judgment “revolution” inspired by a probability reading of *Matsushita* had not yet occurred, and the plausibility standard of *Twombly* (which *Matsushita*, correctly understood, elucidates) was decades down the road.

¹⁶³ Daniel Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 492 (1988).

¹⁶⁴ See Cohen, *supra* note 38, at 399 (explaining the concept and term).

¹⁶⁵ Collins, *supra* note 140, at 507.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 511–12.

¹⁶⁸ Courts and commentators have occasionally cited Collins’s note, but unfortunately not for his primary thesis—his “alternate reading” of *Matsushita*. See, e.g., *McLaughlin v. Liu*, 849 F.2d 1205, 1209 n.9 (1988); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 153 n.69 (2000) (both citing Collins’s article for generic points but neither discussing his “alternate reading” of *Matsushita*).

In any event, I aim to pick up where Collins left off in his impressive note: I wish to not only explain a confidence interpretation of *Matsushita*, but to demonstrate why this interpretation is correct. The remainder of this section will be devoted to the eight reasons why *Matsushita* should be read according to a confidence analysis.

1. Different Fixes for Different Problems

Before proceeding to a discussion of the superiority of a confidence reading of *Matsushita*, a few additional remarks regarding the distinction between probability and confidence are warranted.

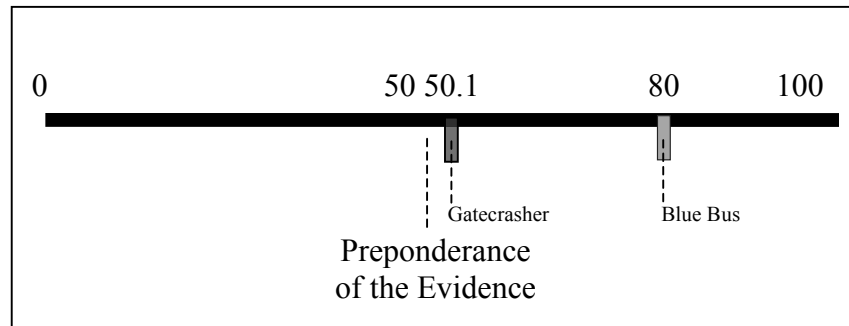
The probability interpretations of *Matsushita* discussed above all proceed along the following analytical path: because a jury might make an erroneous decision with regard to probability, this decision-making process should be shifted to judges. By shifting the probability question from juries to judges, the problem of “false positives” identified in *Matsushita* is avoided because judges are presumably superior to juries in performing a probability analysis.

A confidence reading of *Matsushita*, however, proceeds along a dramatically different path. Under a confidence analysis, the problem is not with the *jury*’s ability to accurately perform a probability analysis. Rather, the problem is that the “highly circumstantial” nature of the record means that *any* probability assessment from that record—regardless of *who* is performing this probability analysis—will be impaired. The confidence problem thus requires a different “fix” than the probability problem. The probability problem is the jury’s accurateness is assessing probability; the fix is to shift probability decision making from the jury towards the judge. The confidence problem, however, is with the incomplete state of the record; the fix here is to prevent a probability analysis from even occurring. If the problem is the inadequate quantity of evidence in the record (confidence), shifting decision-making power from the jury to the judge does not address the problem.

This concept can be deftly demonstrated by returning to the blue bus and gatecrasher hypotheticals. Recall that in each

hypothetical a purely probabilistic view seemed to compel a victory for the plaintiff; the statistical, circumstantial evidence indicated that the material fact in dispute had occurred. Figure D depicts these two cases from a probability perspective:

Figure D



Notice that for each of these hypotheticals, the probability assessment will be exactly the same for either a jury at trial or a judge at summary judgment. A jury forced to give an assessment of probability from the record evidence would have to conclude that the material fact in dispute was 80% probable in the blue bus hypothetical and 50.1% probable in the gatecrasher hypothetical. A judge's assessment of probability at summary judgment is different than a jury's assessment of probability at trial; a judge is only to determine whether a jury could reasonably come to a probability conclusion for either side. This analysis has been depicted in this Article as a range or continuum of reasonable probability conclusions from the evidence. For the blue bus and gatecrasher hypotheticals, however, there is only *one* reasonable probability conclusion from the evidence: 80% in the blue bus hypothetical and 50.1% in the gatecrasher hypothetical. Thus, the range of reasonable probability conclusions for the judge at summary judgment shrinks to the exact same point estimate as the jury's assessment of probability at trial. Indeed, that is the beauty of these hypotheticals: by removing any dispute as to the probability required from the record evidence, these hypotheticals show that another concept is at play.

Consider, then, how shifting decision-making power from jury to judge is completely ineffective at resolving the "problem" if the

problem is the inadequate quantity of evidence. The blue bus and gatecrashers hypotheticals demonstrate that even if the probability determination is completely shifted from jury to judge, the judge will still get the “wrong” answer through a probability analysis. In the hypotheticals, the range of reasonable probability conclusions was nonexistent, meaning that the judge’s summary judgment conclusion pursuant to the reasonable jury standard would suggest an award of summary judgment for the plaintiff. Yet, a judge performing a probability analysis would reach the same “incorrect” result as a jury forced to make a probability conclusion at trial. Only by performing a confidence analysis can the judge reach the “right” result in the hypotheticals, which is to award summary judgment to the defendant. This confidence approach completely precludes a probability analysis from ever being performed, by judge or jury.

Of course, characterizing *Matsushita* as deriving from probability or confidence principles is more difficult than characterizing the blue bus and gatecrashers hypotheticals as such. In the hypotheticals, a probability analysis means victory for the plaintiff; only a confidence analysis can explain a summary judgment for the defendant. In *Matsushita*, however, the grant of summary judgment in favor of the defendant could have been the result of either a probability analysis or a confidence analysis; unlike the hypotheticals, a precise and agreed-upon determination of the probability of the alleged conspiracy in *Matsushita* is simply not feasible. In attempting to make this determination regarding the true nature of the decision in *Matsushita*, however, it is helpful to remember that each analysis derives from a different problem: if the problem in *Matsushita* was jury decision making, the decision was based on a probability analysis. If the problem in *Matsushita* was the incomplete state of the record, the decision was based on a confidence analysis.

2. *Matsushita* Involves a Legal Standard

So, was confidence—rather than probability—the impetus for the Supreme Court’s decision in *Matsushita*? Earlier, I compared *Matsushita* to a Rubik’s Cube. Under a confidence understanding of the case, most of the sides of this Rubik’s Cube start to align

and the problems that arise under a probability view of the case subsides. First, recall that the “No Chance!” probability reading of *Matsushita* could not account for the language in the opinion strongly suggesting that the issue before the Court involved the standard for summary judgment rather than its application to a particular summary judgment record.¹⁶⁹ A confidence reading of *Matsushita* comports with the language in the opinion indicating that the issue before the Supreme Court was the “*standard* district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.”¹⁷⁰ A confidence inquiry requires a judge to make a *legal* determination as to whether there is an acceptable amount of evidence to proceed to a probability analysis. The nature of this analysis is explored in more depth in *Probability, Confidence, and the Reasonable Jury Standard*,¹⁷¹ This analysis essentially requires judges to ask two policy questions: (1) of the universe of available evidence on the disputed question of material fact, how much exists in the current summary judgment record?; and (2) what are the potential negative consequences of allowing the case to proceed to a jury for a probability assessment from this record? If these are the questions that the Court was wrestling with in *Matsushita*, it makes sense that the Court would characterize this inquiry as a legal one involving the *standard* for summary judgment. This type of inquiry does not involve the probable truth of the plaintiff’s allegations.

3. Antitrust Law and *Eastman Kodak*

A confidence reading explains the Court’s emphasis on antitrust law when it determined that summary judgment was appropriate. Recall the various passages within *Matsushita* that emphasize the antitrust context of the case, such as the following: “[M]istaken inferences in [predatory pricing] cases such as this one are especially costly, because they chill the very conduct the

¹⁶⁹ See *supra* subsection V(A)(1).

¹⁷⁰ *Matsushita Elec. Indus. Co. v. Radio Zenith Corp.*, 475 U.S. 574, 576 (1986) (emphasis added).

¹⁷¹ Meier, *supra* note 1.

antitrust laws are designed to protect.”¹⁷² This type of policy inquiry is fully consistent with—indeed, it is required by—a confidence analysis.

A confidence analysis requires a judge to make a policy decision concerning the consequences of allowing a jury to make a probability assessment from the evidence. Commentators have offered a host of policy considerations that might inform this inquiry. For instance, Professor Charles Nesson posits that it is critical that the general public view jury trials as legitimate, and that allowing cases to proceed to a jury for a probability analysis, despite a meager record, might undermine the credibility of the entire system.¹⁷³ Similarly, Professor Adrian A.S. Zuckerman submits that a judge must be concerned with protecting the integrity of the system and that allowing cases with a scant summary judgment record to proceed to trial might undermine the integrity of the system.¹⁷⁴ Professor Zuckerman suggests that the public will reject civil verdicts in which the defendant is seemingly judged not on his or her individual actions but instead on belonging to a certain group (for example, owning blue busses) that statistically suggests that the defendant is liable.¹⁷⁵ Professor Richard Lempert focuses on another component of the confidence inquiry, arguing that a judge should consider, as part of a

¹⁷² *Matsushita*, 475 U.S. at 594.

¹⁷³ See Charles Nesson, *The Evidence or The Events? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1379 (1985) (citing cases) (“Although the defendant probably caused the plaintiff’s injury, the factfinder cannot reach a conclusion that the public will accept as a statement about what happened. . . . Because the judicial system strives to project an acceptable account about what happened, then, the plaintiff’s evidence is insufficient, notwithstanding the high probability of its accuracy.”).

¹⁷⁴ See Adrian A.S. Zuckerman, *Law Fact or Justice?*, 66 B.U. L. REV. 487, 499 (1986) (stating that confidence in verdicts is “crucial to public respect for judicial adjudication”).

¹⁷⁵ See *id.* (“Judgments based on naked statistical distributions openly acknowledge that the individual defendant may well belong to the innocent minority, and therefore undermine the citizen’s confidence that the legal system will protect him from mistaken conviction of crime or mistaken imposition of liability.”).

confidence analysis, the incentive of plaintiffs¹⁷⁶ to produce more specific evidence so as to survive summary judgment.¹⁷⁷

The policy concerns that these authors identify have universal application to every type of case, but there is no reason that policy concerns unique to a particular body of law might not also be considered. This is precisely what occurred in *Matsushita* when the Court stated that “mistaken inferences in [predatory pricing] cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”¹⁷⁸ The *Matsushita* Court was concerned about the policy effect of allowing a jury to infer the existence of an illegal antitrust conspiracy solely from evidence that, absent an agreement, was not only legal but desirable.¹⁷⁹

The antitrust-specific concerns that drove the Court in *Matsushita*, however, were *not* present in the Court’s subsequent antitrust case of *Eastman Kodak v. Image Technical Services, Inc.*,¹⁸⁰ which explains why the Court reached a different conclusion regarding summary judgment in *Kodak* than in

¹⁷⁶ As I explain in *Probability, Confidence, and the Reasonable Jury Standard*, the party with the burden of persuasion at trial will be the party who suffers when a court concludes, pursuant to a confidence analysis, that the evidence is insufficient to survive summary judgment. See Meier, *supra* note 1.

¹⁷⁷ See Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 460 (1986) (discussing the incentive on plaintiffs to come forward with more evidence).

¹⁷⁸ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

¹⁷⁹ This policy concern does not depend on the probability that an agreement exists in a *particular* case. Rather, the concern is that a market participant will recognize that a decision based only on circumstantial evidence involves a high margin of error and that, inevitably, mistakes in future cases—including “false positive” results in which a conspiracy is incorrectly determined to exist—will preclude otherwise desirable market conduct. See Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORN. J.L. & PUB. POL’Y 1, 21 (2010) (“Recognizing ex ante the danger of incurring discovery expenses and possible liability, defendants are motivated to keep well short of the line that separates legal from illegal conduct. In eschewing legal conduct that may give rise to litigation, defendants dumb-down their conduct to their own, and society’s, detriment. That, too, is a cost of false positive error.”).

¹⁸⁰ 504 U.S. 451 (1992).

Matsushita. In *Kodak*, the Court considered the plaintiffs' claim that Kodak had tied its business of servicing Kodak machines to Kodak's business of selling parts for its machines.¹⁸¹ For Kodak to be liable on this claim, it must have had "appreciable economic power" or "market power" in the parts market.¹⁸² The Supreme Court treated the question of whether Kodak had market power in the parts market as a question of fact to be resolved by the jury.¹⁸³ Kodak argued that it was entitled to summary judgment because it did not have market power in the equipment market and thus could not have market power in the parts market.¹⁸⁴

The *Kodak* case thus bears a loose resemblance to *Matsushita*; in both cases the defendant argued that the circumstantial evidence in the summary judgment record compelled a decision—before trial—for the defendant. The Court noted, however, that the "false positive" concerns from *Matsushita* were not as acute in *Kodak* because the *Kodak* plaintiffs—unlike the *Matsushita* plaintiffs—were not asking the jury to infer illegal behavior from conduct that was both legal and desirable.¹⁸⁵ Thus, *Kodak* and *Matsushita* demonstrate that the policy concerns that inform the confidence inquiry will not necessarily be uniform across cases, even those involving the same general subject matter.¹⁸⁶

¹⁸¹ *Id.* at 454–55.

¹⁸² *Id.* at 464.

¹⁸³ *Id.* at 469–79 (analyzing the question of market power as a factual issue); *but see* William W. Schwarzer, *Making the Rule of Reason Analysis More Manageable*, 56 ANTITRUST L.J. 233, 234 (1988) ("[I]n many cases [determination of the relevant market] is susceptible to decision on summary judgment; it is not a jury question at all.").

¹⁸⁴ *Kodak*, 504 U.S. at 464–66.

¹⁸⁵ *Id.* at 478 ("Nor are we persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because, as in *Matsushita*, there is a significant risk of deterring procompetitive conduct.").

¹⁸⁶ Interpreting *Matsushita* as having been decided according to a confidence analysis also provides context to the *Kodak* Court's description of the *Matsushita* decision. In *Kodak*, the Court said that "[t]he Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Kodak*, 504 U.S. at 468. Linguistically speaking, this sentence is a nightmare, and it is difficult to determine precisely what the Court meant by this statement. Some have interpreted this comment as requiring that the

4. The Seventh Amendment Right to a Jury Trial

A confidence reading also avoids the Seventh Amendment issues that plague the probability reading. This concept is explored in greater depth in my Article “Probability, Confidence, and the Constitutionality of Summary Judgment.”¹⁸⁷ To briefly summarize, while there are serious Seventh Amendment concerns in shifting the probability analysis away from the jury and toward the judge,¹⁸⁸ the historical use of a confidence analysis as part of the involuntary nonsuit confirms that there is no constitutional problem when a judge determines that there is an inadequate amount of evidence from which to conduct a probability analysis.¹⁸⁹ When this occurs, the judge has not addressed the probability of the material facts to the litigation but simply determined, as a matter of law, that no probability analysis will occur. There is a longstanding history of courts concluding that certain evidence is not sufficient—as a matter of policy rather than probability—to warrant submission to a jury for a probability determination.¹⁹⁰ At the time the Seventh Amendment was adopted in 1791, English courts could enter an involuntary nonsuit against a plaintiff, before trial, when that plaintiff had failed to

analysis of *Matsushita* be applied outside the antitrust context. *See, e.g.*, Duane, *supra* note 10, at 1569 n.174 (1995) (concluding that [*Kodak*] resolves that *Matsushita* is not limited to the antitrust context). This interpretation is difficult to square with the antitrust-specific language in the opinion—at least if *Matsushita* was decided according to a probability analysis. If, however, *Matsushita* was decided according to a confidence analysis, the *Kodak* Court’s characterization of *Matsushita* makes sense. *Matsushita* was not decided according to an analysis that imposed a special burden in antitrust cases. Rather, a confidence analysis is always part of a judge’s inquiry at the summary judgment stage, be it an antitrust case or another type of case. This confidence analysis, however, can be informed by policy concerns that are unique to a particular subject matter.

¹⁸⁷ *See generally* Luke Meier, *Probability, Confidence, and the Constitutionality of Summary Judgment*. (forthcoming) (concluding that no Seventh Amendment violation occurs when summary judgment is entered pursuant to a confidence analysis).

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

assemble an adequate record from which the jury could reach a probability determination.¹⁹¹

5. The Transsubstantive Nature of the Federal Rules of Civil Procedure

A confidence reading of *Matsushita* also reconciles the case with the transsubstantive approach of the Federal Rules of Civil Procedure. Recall that, under a probability reading of *Matsushita*, the Court's emphasis on the antitrust setting of the case seems to run afoul of the transsubstantive nature of the Federal Rules.¹⁹² A confidence reading of *Matsushita*, however, explains how the Court could weigh antitrust-specific considerations yet stay true to the Federal Rules' transsubstantive approach.¹⁹³ A confidence analysis requires a judge to ask the *same* question in every case: is there an adequate amount of evidence to allow this case to proceed to a jury for a probability determination?

The *application* of this transsubstantive standard might require a judge to consider the particular substantive law involved in the case. Thus, in *Matsushita*, the Court considered the negative consequences of allowing an antitrust plaintiff to proceed to a jury probability determination based on circumstantial evidence of legal (and desirable) behavior that was also probative of illegal conduct.¹⁹⁴ That a procedure rule might be *applied* differently for different types of cases, however, is fully consonant with the transsubstantive ideals of the Federal Rules. This is obvious when one considers the pleading standard of Rule 8. Obviously, a judge cannot know whether a plaintiff has pled a claim under Rule 8 without considering the substantive law involved.¹⁹⁵ Yet no one

¹⁹¹ *See id.*

¹⁹² *See supra* Subsection V(A)(2).

¹⁹³ Of course, this inquiry begs an additional question: Even if the *Matsushita* Court was, in reality, applying a confidence analysis to affirm the defendants' summary judgment, does Rule 56 permit judges to engage in this type of inquiry? I plan to address this question in future scholarship.

¹⁹⁴ *See supra* notes 165–80.

¹⁹⁵ Clermont & Yeazell, *supra* note 162, at 830 (explaining that a judge determining whether a complaint complies with Rule 8 must determine whether “any legal claim exists that would be consistent” with the factual allegations of

would contend that Rule 8 is inconsistent with the transsubstantive nature of the Federal Rules.¹⁹⁶ Simply put, the application of transsubstantive rules will often depend on the subject matter context of the case. Under a confidence reading of *Matsushita*, then, the Court's consideration of antitrust-specific considerations was completely consistent with the transsubstantive approach contained in the Federal Rules.

6. The Probability Language in *Matsushita* and *Monsanto Co. v. Spray-Rite Service Corp.*

In light of the numerous advantages to a confidence reading of *Matsushita*, the final step is to determine whether this understanding of the case is consistent with the language of the opinion. As mentioned previously, there are concededly some portions of the *Matsushita* opinion that suggest that the Court was concerned with probability rather than confidence.¹⁹⁷ The best reading of *Matsushita*, however, is that this probability language was actually dicta and that the plaintiffs' evidence was insufficient regardless of probability.

The most direct language in this regard is found in a concluding footnote toward the end of the Court's opinion. The footnote in question follows this textual sentence: "[i]n sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a 'genuine issue for trial.'"¹⁹⁸ After this sentence, the Court states the following in a footnote: "We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.* establishes that conduct that is as consistent

the complaint).

¹⁹⁶ See Stephen N. Subrin, *How Equity Conquered Common Law*, 135 U. PA. L. REV. 909, 977 (1987) (describing the transsubstantive objectives behind Rule 8).

¹⁹⁷ See *supra* notes 114–22 and accompanying text.

¹⁹⁸ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986).

with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.”¹⁹⁹ This footnote is imperative to understanding the Court’s thought process in *Matsushita*.²⁰⁰ The footnote suggests that, despite the attention the Court gives to the probability issue (which the Court loosely characterizes as the “motive” question), the plaintiffs’ evidence did not meet the burden of production *even if* the conspiracy alleged by the plaintiffs was more straightforward and thus more believable.

To understand this point, first consider the sentence in the text of the Court’s opinion preceding the footnote. The sentence in the text summarizes the circumstantial evidence available in the case. It lists the circumstantial evidence favoring the defendant,²⁰¹ which the Court calls the “rationale motive” issue as a shorthand way to express the notion that the plaintiffs’ theory of predatory pricing involves a risky, long-term scheme attacking a well-established American company on its home turf.²⁰² The Court then lists the circumstantial evidence relied on by the plaintiff: that the defendants have cooperated in other ways in both the Japanese and American markets, including agreements (that are not alone actionable) regarding prices in Japan and American.²⁰³ The textual sentence concludes that this list of evidence does not create a triable issue of fact under Rule 56.²⁰⁴

The footnote following this sentence in the text, however, posits that even if the circumstantial evidence regarding the defendants’ “motives” was removed from the case, the plaintiffs’ evidence might still be insufficient to warrant submission to the jury. “Ambiguous conduct,” says the Court in the footnote, “does not, without more, support even an inference of conspiracy.”²⁰⁵

¹⁹⁹ *Id.* at 597 n.21.

²⁰⁰ I am not alone in assigning significance to this footnote. For extensive discussions the importance of footnote 21 of the *Matsushita* opinion, see Levin, *supra* note 105, at 1646–47; Randolph Sherman, *The Matsushita Case: Tightened Concepts of Conspiracy and Predation*, 8 *CARD. L. REV.* 1121, 1132–33 (1987); David F. Shores, *supra* note 122, at 312–13.

²⁰¹ *Matsushita*, 475 U.S. at 597.

²⁰² See *supra* text accompanying notes 111–17.

²⁰³ *Matsushita*, 475 U.S. at 597.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 597 n.21.

The Court supports this conclusion with a citation to the *Monsanto Co.* decision.²⁰⁶ An inspection of the *Monsanto* decision reveals that the plaintiff's evidence in that case was "ambiguous" in the exact same manner as the evidence involved in *Matsushita*, and that the summary judgment in *Monsanto* was clearly based on a confidence analysis.

The *Monsanto*²⁰⁷ case dealt with essentially the same question raised in *Matsushita*: when does an antitrust plaintiff have sufficient evidence to meet her burden of production and get to the jury on the question of whether the defendant engaged in an illegal conspiracy?²⁰⁸ The *Monsanto* case implicated this question in the context of vertical price-fixing agreements (as opposed to the predatory pricing context involved in *Matsushita*).²⁰⁹ The plaintiff in the *Monsanto* litigation had been terminated in its capacity as a distributor of herbicide products manufactured by the defendants in that case.²¹⁰ The defendants claimed that the termination occurred because the plaintiff failed "to hire trained salesmen and promote sales to dealers."²¹¹ The plaintiff, however, argued that its termination was based on a failure to comply with a pricing scheme developed as part of an agreement between defendants and some of defendants' other distributors.²¹² A manufacturer can independently establish a price that its distributors must comply with in order to remain a distributor,²¹³ but it is a violation of antitrust law for this price to be established through an agreement between the manufacturer and (at least some) distributors.²¹⁴

²⁰⁶ *Id.*

²⁰⁷ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

²⁰⁸ *Compare id.* at 755 (considering what standard of proof a plaintiff must meet in an antitrust vertical price-fixing conspiracy case), *with Matsushita*, 475 U.S. at 576 (considering what standard of proof a plaintiff must meet in an antitrust conspiracy to price-fix case).

²⁰⁹ *Compare Monsanto*, 465 U.S. at 755 (framing the conspiracy issue in the context of vertical price fixing), *with Matsushita*, 475 U.S. at 584–585 (framing the conspiracy issue in the context of predatory pricing).

²¹⁰ *Monsanto*, 465 U.S. at 757.

²¹¹ *Id.* at 752.

²¹² *Id.*

²¹³ *Id.* at 760–61.

²¹⁴ *Id.*

In *Monsanto*, the district court concluded that a jury determination was necessary to resolve whether the plaintiff had been terminated as a distributor because of its failure to comply with a pricing scheme established through a conspiracy.²¹⁵ The plaintiff's evidence, as summarized by the Supreme Court in *Monsanto*, consisted of essentially two bits of evidence. First, according to the Court, there was "substantial direct evidence of agreements to maintain prices."²¹⁶ Second, there was circumstantial evidence that an agreement existed (and that the plaintiff had been fired for failing to comply with the terms of this agreement).²¹⁷ This circumstantial evidence consisted of complaints filed by other distributors about the plaintiff's low prices for the defendants' products.²¹⁸

The Court of Appeals for the Seventh Circuit affirmed the decision of the district court in the *Monsanto* litigation, agreeing that the plaintiff's burden of production had been satisfied and that a jury resolution was necessary.²¹⁹ More specifically, the Seventh Circuit concluded that the plaintiff's circumstantial evidence was alone sufficient to satisfy the plaintiff's burden of production and thus reach the jury.²²⁰ The Supreme Court reversed the Seventh Circuit on the question of whether the circumstantial evidence put forward by the plaintiff was, alone, sufficient to get the plaintiff to the jury.²²¹ As the Court explained:

[I]t is of considerable importance that independent action by the manufacturer . . . be distinguished from price-fixing agreement, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an

²¹⁵ *Id.* at 758.

²¹⁶ *Id.* at 765.

²¹⁷ *Id.* at 767.

²¹⁸ *Id.*

²¹⁹ *Id.* at 758.

²²⁰ *Id.* at 758–59.

²²¹ *Id.* at 759.

agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the [distinction made in the law between independent action and illegal conspiracy] will be seriously eroded.²²²

In this language from *Monsanto*, the Court is clearly articulating the *policy* reasons why circumstantial evidence might not be sufficient to satisfy the plaintiff's burden of production in an antitrust case. In short, there is significant danger in allowing a jury to find a defendant liable when the evidence produced involves a high margin of error and the consequences from an erroneous factual decision are serious. According to the Court in *Monsanto*, the problem with relying solely on circumstantial evidence in proving an antitrust conspiracy *is not* with the probative value of the evidence under a probability analysis:

“We do not suggest that [the plaintiff's circumstantial evidence] has no probative value at all, but only that the burden remains on the antitrust plaintiff to introduce *additional evidence* sufficient to support a finding of unlawful contract, combination, or conspiracy.”²²³

Although the Court in *Monsanto* does not use the *term* “confidence” in its opinion, it is relatively clear that this *concept* of sufficiency of information guided the Court's decision. According to the *Monsanto* Court, the problem with relying solely on circumstantial evidence to prove an antitrust conspiracy is not that a person would be unreasonable in concluding that the circumstantial evidence slightly favored a conclusion that a conspiracy exists. Instead, the problem is that the evidence is “highly ambiguous.”²²⁴ In other words, there is a high margin of error associated with the evidence—similar to a poorly conducted public opinion poll. And, because the consequences of an

²²² *Id.* at 763.

²²³ *Id.* at 764 n.8 (emphasis added). This requirement of producing additional evidence of an antitrust violation is sometimes referred to as the “plus factor” requirement. *See, e.g.*, Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CAL. L. REV. 683, 749–52 (2011) (discussing ‘plus factors’).

²²⁴ *Monsanto*, 465 U.S. at 763.

erroneous decision are severe, it is better that a probability analysis not be performed (by either the judge or the jury).

The exact same can be said about the circumstantial evidence the plaintiffs relied on in *Matsushita*. The plaintiffs' evidence demonstrated that an agreement among the defendants to price predatorily was a possible explanation for the defendants' low prices. The plaintiffs' evidence also showed that the defendants had worked together to coordinate business activities on different issues, including the establishment of price floors in Japan.²²⁵ In this regard, the evidence was "probative" in the same manner that the *Monsanto* evidence was probative. But, it was also "ambiguous" because neither case involved a "smoking gun" bit of evidence on the disputed, material fact. Thus, any conclusion drawn from the evidence (either that a conspiracy did, or did not, exist) would necessarily involve a high margin of error and little confidence that the probability assessment was accurate.

In attempting to figure out the true basis of *Matsushita*, the Court's multitude of references to *Monsanto* is telling.²²⁶ The *Monsanto* decision was clearly based on a confidence analysis rather than a probability analysis, and the Court in *Monsanto* did a relatively good job of articulating this somewhat elusive concept. The *Matsushita* opinion is, admittedly, not as clear or eloquent in describing the confidence concept as the true basis for summary judgment in that case. Nevertheless, the Court recognized that the difficult problem it was wrestling with in *Matsushita* was conceptually identical to the problem in *Monsanto*.

The *Matsushita* Court's difficulty in verbalizing the confidence concept is analogous to what occurred in *Houchens*, discussed above. In fact, in one passage within *Matsushita*, the Court falls back on language similar to the "equal inferences rule" that the *Houchens* court relied on: "[C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy."²²⁷ Earlier, in analyzing the *Houchens* case (which clearly involved an

²²⁵ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–97 (1986).

²²⁶ *See id.* at 588, 597–98.

²²⁷ *Id.* at 597 n.21.

application of the confidence principle), I characterized the “equal inferences” language in that case as the product of a judge that intuitively understands the confidence concept but mangles the explanation of this tricky concept.²²⁸ The “equal inferences”-type language in *Matsushita* should be understood in the same manner.

Because the probative value of the plaintiffs’ evidence of a conspiracy could legitimately be seen as unpersuasive, communicating the confidence concept in *Matsushita* was even more challenging. Recall that one of the benefits of the blue bus and gatecrasher hypotheticals is that these hypotheticals zero in (with pinpoint accuracy) on the paradox of a judge entering judgment against a plaintiff when the only available evidence suggests that the plaintiff’s version of the contested, material facts is most likely true.

The *Matsushita* litigation (and most other real—as opposed to hypothetical—cases) does not replicate the same circumstances that made the paradox in the blue bus and gatecrasher hypotheticals so explicit. It is not clear in *Matsushita*, as it was in the blue bus and gatecrasher hypotheticals, that a probability analysis based solely on the available record evidence would favor the plaintiffs. Rather, one could legitimately look at the record evidence in *Matsushita* and conclude that the enormous, and complicated, predatory pricing scheme asserted by the plaintiffs was unlikely. This factor complicated the elucidation of the confidence principle in *Matsushita*. Because the confidence issue was not as conspicuously thrust to the forefront as it was in the hypotheticals or even in *Houchens*, it is perhaps not surprising that the Court might struggle in expressing this tricky concept.²²⁹ There

²²⁸ See *supra* Section IV.

²²⁹ Part of the problem might inhere in the limitations of the English language. See Vern R. Walker, *Theories of Uncertainty: Explaining the Possible Sources of Error in Inferences*, 22 CARDOZO L. REV. 1523, 1540 (2001) (“The descriptive function of a theory of uncertainty is less obvious from the grammar of English.”). As someone who has struggled to write clearly about the confidence concept using primarily the English language (rather than mathematical formulas), I would forcefully concur with Professor Walker’s assertion. Cf. LUDWIG WITGENSTEIN, LOGICO-TRACTATUS PHILOSOPHICUS 5.6 (“The limits of my language mean the limits of my world.”). In any event, I am not as critical as others about the mathematical limitations of most of within the

is a reason that the hypotheticals are thought to be a jurisprudential “paradox,” and that is because the answer to this paradox is not an easy one for lawyers (as opposed to mathematicians) to comprehend.

Therefore, it is perhaps not completely surprising in a case such as *Matsushita*, where there is both a lack of record evidence on a material issue of fact *and* where a probability analysis of that record evidence could be viewed as favoring the defendant, that the Court would allow some probability language to creep into the opinion even though the true basis for the decision was a confidence analysis.

7. Why *Matsushita* Helps Defendants and Hurts Plaintiffs

There is a general consensus that the summary judgment standard applied by the Court in *Matsushita* helps defendants but not plaintiffs. This conclusion makes sense if *Matsushita* was decided according to a confidence analysis but not if *Matsushita* was decided according to a probability analysis.

Under a probability reading of *Matsushita*, the allocation of authority with regard to disputed questions of fact was shifted from the jury to the judge. There is no reason, however, why this shift would help defendants at the expense of plaintiffs. Under a probability analysis, a judge determines whether a jury would be reasonable in resolving the disputed question of fact, and there is no logical reason as to why this standard cannot work for plaintiffs as well as against plaintiffs.²³⁰ This analysis is neutral between plaintiffs and defendants. If a jury would be unreasonable in

legal profession. *See, e.g.*, RICHARD A. POSNER, THE DECLINE OF LAW AS AN AUTONOMOUS DISCIPLINE: 1962–1987, 100 HARV. L. REV. 761, 778 (1987) (discussing the “prevalent (and disgraceful) math-block that afflicts the legal profession”). Perhaps this is because I do not consider myself as exempt from the affliction that Judge Posner laments. *Cf.* Peter Tillers, *Trial by Mathematics—Reconsidered*, 10 LAW, PROBABILITY & RISK 167, 173 (2011) (“[T]he day may yet come when rigorous formal argument about evidence, factual inference and factual proof looks and feels warm and friendly to ordinary and mathematically illiterate people such as me.”).

²³⁰ *But see supra* note 226.

resolving the facts either way, summary judgment is appropriate. Thus, if *Matsushita* was decided according to a probability analysis, the increased power of judges regarding the probability of disputed facts would theoretically result in an equal number of additional pre-verdict judgments for both the plaintiff and the defendant.²³¹

But this, of course, is not how *Matsushita* has been interpreted. Instead, *Matsushita* is viewed as a case that benefits defendants because it makes it more likely that a judge will grant a defendant's motion for summary judgment.²³² This makes perfect sense if *Matsushita* was decided pursuant to a confidence analysis, because a confidence analysis always works *against* the party with the burden of production. A party with the burden of production has the burden of assembling an adequate amount of evidence at summary judgment; a confidence analysis determines whether this has occurred. Because a plaintiff has the burden of production on almost all issues,²³³ viewing *Matsushita* as being decided under a confidence analysis explains the conventional wisdom that *Matsushita* helps defendants at the expense of plaintiffs.

²³¹ There is a somewhat technical way to explain how *Matsushita* benefits defendants at the expense of plaintiffs, even if *Matsushita* was decided under a probability test. Summary judgment is appropriate against the plaintiff if *even one* of the myriad facts that the plaintiff must prove in order to recovery is unreasonable. On the other hand, summary judgment is appropriate against the defendant only if the jury would be unreasonable in finding for the defendant on *every* fact needed for the plaintiff. The asymmetrical risks involved with increased judicial fact-finding could explain why the standard in *Matsushita* is perceived to help defendants at the expense of plaintiffs. That said, this explanation seems less persuasive than the explanation offered in the text above, which is that *Matsushita* helps defendants because it was decided pursuant to a confidence analysis, which can only work *against* the party with the burden of production.

²³² See, e.g., Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 47 (2005) (describing the "gatekeeping" aspect of the *Matsushita* decision); William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 403 (2011) ("*Matsushita* expanded the ability of defendants to obtain summary judgment by inviting lower courts to scrutinize the economic plausibility of the plaintiff's evidence of conspiracy.") (emphasis added).

²³³ See WRIGHT, *supra* note 52, at §5122 (explaining that the burden of production is usually on the plaintiff).

8. *Twombly*'s Plausibility Standard

There is one final factor that supports the confidence understanding of *Matsushita*. Understanding *Matsushita* through a confidence theory makes sense of the plausibility standard that the Court introduced in *Bell Atlantic v. Twombly*.²³⁴ Most commentators have rejected this “new” pleading standard under the mistaken premise that the plausibility analysis requires judges to determine the probability of disputed facts based only on the pleadings.²³⁵ However, once one views *Matsushita* through a confidence analysis, it is relatively easy to see the logic of the progression from *Matsushita* to *Twombly*: if the plaintiff alleges facts that, by themselves, are insufficient to satisfy the confidence analysis to which they will be subjected at the summary judgment stage, there is no reason to delay this legal conclusion past the pleadings stage. This concept is explored in more depth in my article *Probability, Confidence, and Twombly's Plausibility Standard*,²³⁶ but the relevancy to the current discussion is worth noting. Once one interprets *Matsushita* under a confidence analysis, clarity arises, not just with regard to *Matsushita* and summary judgment but also with regard to the entire pre-trial process under the Federal Rules (including the plausibility analysis of *Twombly*).

VI. CONCLUSION

The best reading of *Matsushita*, considering the multitude of factors that one must consider in examining the case, is that it was decided under a confidence analysis. If these factors are analogized to a Rubik's cube, a confidence reading of *Matsushita* aligns almost all the sides of the cube.

A confidence reading of *Matsushita* cannot account for two sides of this Rubik's cube. One is the language in the *Matsushita* opinion suggesting that the impetus for the Court's decision was

²³⁴ See 550 U.S. 544 (2007).

²³⁵ See *supra* notes 28–29.

²³⁶ See Luke Meier, Comment, *Probability, Confidence, and Twombly's Plausibility Standard*, SMU L. Rev. (forthcoming).

probability. As explained above, however, this language can be discounted as a byproduct of the difficulty associated with attempting to verbalize the elusive confidence concept. This task was made even more difficult in *Matsushita* by the probative weakness of the plaintiffs' evidence. Moreover, a careful reading of *Matsushita* and the Court's previous decision in *Monsanto Co. v. Spray-Rite Service Corp* suggests that—even if the Court meant to speak in probability terms—it qualified this probability language, which would make it dicta.

A confidence interpretation of *Matsushita* also cannot account for the broad, historical significance assigned to the case. The import of *Matsushita*, however, derives from the presumption that it was decided according to a probability analysis. This premise is incorrect. As such, the conclusion that *Matsushita* dramatically reshaped summary judgment doctrine should be reconsidered.