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Antidumping Act: Lessons from
Antitrust Economics

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Reprinted from the *Stanford Journal of International Law*
Volume 18, Issue 2, Summer 1982
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A Framework for Administering The 1916 Antidumping Act: Lessons from Antitrust Economics*

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The 1916 Antidumping Act is an ambiguous statute with virtually no legislative history. This article analyzes the Act from an economic perspective, arguing that Congress probably intended not to shield American industries from foreign competition by proscribing international price discrimination, but to protect American consumers by proscribing only international predatory pricing. Yet the social costs of any such attempt to protect consumers are likely to exceed the social benefits. Congress should, the article concludes, repeal the Act. As a second-best alternative, courts should adopt an approach that would reduce the probability that litigation under the Act will impair consumer welfare.

The Antidumping Act of 1916¹ prohibits the sale of foreign goods

* The author thanks James R. Atwood, Dudley H. Chapman, Frank H. Easterbrook, Peter D. Ehrenhaft, Abbott B. Lipsky, Jr., Robert S. Stillman, and Malcolm E. Wheeler for their helpful comments. These persons do not necessarily endorse the views expressed in this article, nor has the author accepted all of their suggestions. He also thanks Moses Abramovitz, William O. Jones, and Gerald M. Meier for helpful conversations about the history of economic thought on international trade.

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¹ 15 U.S.C. § 72 (1976) (formally enacted as part of the Revenue Act of 1916, ch. 463, § 801, 39 Stat. 798). The substantive provisions of the Act read:

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

in the United States at a price "substantially less than the actual market value or wholesale price of such articles . . . in the principal markets of the countries to which they are commonly exported."² Sixty-four years passed before any court decided the merits of a claim based on the Act.³ In 1980, Judge Becker of the Eastern District of Pennsylvania granted the defendants in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*⁴ a summary judgment that articulates the standard of comparability under the 1916 Act between a foreign product sold in the United States and similar products manufactured and sold abroad.

Perhaps more important than the holding in *Matsushita* is the court's conclusion that the 1916 Act is an antitrust statute, not a protectionist tariff.⁵ As such, the Act cannot be invoked to insulate American producers from foreign competitors; rather, like the Sherman Act,⁶ it must function solely as a "consumer welfare prescription."⁷

Id. The 1916 Act's penalties and private remedies are identical to those originally provided in the Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)) and in the Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12, 13, 14-21, 22-27, 29 *id.* §§ 52-53 (1976)). Both the 1916 Act and the Clayton Act allow private plaintiffs to sue for treble damages. Compare 15 U.S.C. § 72 with *id.* § 15. Like the 1916 Act, the Sherman Act originally had maximum criminal penalties of one year's imprisonment, a \$5,000 fine, or both. Compare 15 U.S.C. § 72 with Sherman Act, ch. 647, §§ 1, 2, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1, 2 (1976)). The maximum criminal penalties for violations of the Sherman Act are now three years' imprisonment and fines of \$100,000 per individual and \$1 million per corporation. 15 U.S.C. §§ 1, 2 (1976). In 1979, Senator Mathias introduced a bill that would have increased the maximum fine under the 1916 Act from \$5,000 to \$50,000. S. 938, 96th Cong., 1st Sess. (1979). Apparently, no individual has ever been convicted of violating the 1916 Act. See Marks, *United States Antidumping Laws—A Government Overview*, 43 ANTITRUST L.J. 580, 581 (1975).

² 15 U.S.C. § 72 (1976).

³ Several courts have considered standing under the 1916 Act. See *Jewel Foliage Co. v. Uniiflora Overseas Florida, Inc.*, 497 F. Supp. 513 (M.D. Fla. 1980); *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Bywater v. Matsushita Elec. Indus. Co.*, 1971 Trade Cas. (CCH) ¶ 73,759 (S.D.N.Y. 1971). Other courts have considered the Act's allegedly unconstitutional vagueness, see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251 (E.D. Pa. 1975), and its relationship during discovery to the fifth amendment protection against self-incrimination, see *Wagner & Adler Co. v. Mali*, 74 F.2d 666 (2d Cir. 1935); see also *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414, 416-17 (E.D. Pa. 1979) (ordering discovery); *Smokey's of Tulsa, Inc. v. American Honda Motor Co.*, 453 F. Supp. 1265 (E.D. Okla. 1978) (interpreting venue); *G.O. Carlson, Inc. v. Avesta Jernverks, A.B.*, No. 76-1257 (E.D. Pa. Mar. 29, 1977) (dismissing a complaint under the 1916 Act upon settlement by the parties).

⁴ 494 F. Supp. 1190 (E.D. Pa. 1980), *appeal docketed*, No. 80-2080 (3d Cir. May 7, 1980). See generally Note, *The Antidumping Act of 1916: Antitrust and Product Comparability in Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 20 COLUM. J. TRANSNAT'L L. 133 (1981).

⁵ *Id.* at 1197, 1215. But cf. Neville, *The Antidumping Act of 1916: A War-Time Legacy*, 26 N.Y.L. SCH. L. REV. 535, 548 (1981) ("The 1916 Act is not an antitrust law.").

⁶ 15 U.S.C. §§ 1, 2 (1976).

⁷ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting R. BORK, *THE ANTI-*

It is questionable, however, whether future decisions under the 1916 Act and future congressional efforts to amend the Act⁸ will actually enhance consumer welfare. Any construction of, or amendment to, the Act could generate two kinds of judicial errors, both of which would impair consumer welfare.⁹ A false positive, or type I, error occurs when the Act prohibits pricing behavior that, far from injuring consumers, is competitively neutral or welfare enhancing. A false negative, or type II, error occurs when the Act fails to prohibit pricing behavior that is in fact likely to injure consumers by driving domestic producers from the market, to the point where foreign producers can then charge supracompetitive prices. The paradox of legal rulemaking regarding allegedly predatory conduct is that a rule which reduces the incidence of one type of error increases the incidence of the other.¹⁰ Thus, to maximize consumer welfare, courts

TRUST PARADOX 66 (1978)); *see also* R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 18-20 (1976). The Court's conclusion that the Sherman Act is a "consumer welfare prescription" does not appear to result from a meticulous parsing of the legislative history of the statute. It seems instead to reflect the Court's belief that, although the legislative history of the Sherman Act can support alternative inferences about the purpose of the antitrust laws, maximization of consumer welfare is the inference most consistent with informed modern legal and economic theory.

⁸ Atwood and Brewster note that "unless revived by Congress, the 1916 Act is likely to continue to be insignificant, invoked only where a plaintiff hopes to gain a psychological advantage by adding multiple counts to an antitrust complaint." 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 3.10 (2d ed. 1981). A recent bill sponsored by Senator Mathias would have eliminated the current predatory intent clause and proscribed the mere sale of the imported goods if they "would necessarily and directly . . . injure an industry or labor in any line of commerce in any section of the United States." S. 938, § 2, 96th Cong., 1st Sess. (1979). *See Unfair Foreign Competition Act of 1979: Hearings on S. 938 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 2* (1979) (statement of Sen. Mathias) [hereinafter cited as *Hearings on S. 938*]. Under the Carter Administration, the U.S. Trade Representative and the Departments of Commerce, Justice, and State opposed S. 223, 96th Cong., 2d Sess. (1980), a bill akin to Senator Mathias' 1979 bill. Letter from Robert C. Cassidy, Jr., General Counsel, Office of the U.S. Trade Representative, to Sen. Abraham Ribicoff, reprinted in *Possible Amendments to the "1916 Antidumping Act": Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance, 96th Cong., 2d Sess. 142, 144-48* (1980) [hereinafter cited as *Hearing on Possible Amendments*]. In recent correspondence, Senator Mathias reported that although "[t]he future of [a subsequent bill like S. 938] is uncertain . . . [s]everal of my colleagues . . . are quite interested in revising the 1916 Revenue Act" Letter from Charles McC. Mathias, Jr. to Joseph Gregory Sidak (Apr. 22, 1981) (copy on file with the STANFORD JOURNAL OF INTERNATIONAL LAW); *see also* S. 1068, 97th Cong., 1st Sess. (1981) (would eliminate intent clause); Almstedt, *International Price Discrimination and the 1916 Antidumping Act—Are Amendments in Order?*, 13 LAW & POL'Y INT'L BUS. 747 (1981). During the 93d Congress, several bills that would have attenuated the predatory intent standard failed to clear committee. *See* H.R. 328, § 401, 93d Cong., 1st Sess. (1973); S. 1204, 93d Cong., 1st Sess. (1973); S. 323, § 401, 93d Cong., 1st Sess. (1973).

⁹ *See* Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 223 (1979); *see also* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 318-19 (1981).

¹⁰ *See* Joskow & Klevorick, *supra* note 9, at 223.

cannot set out to eradicate either all of the type I or all of the type II errors that may arise from enforcement of the 1916 Act, but rather must construe the Act so as to produce a legal rule that minimizes the sum of the social costs from both type I and type II errors.¹¹

Part I of this article explores the probable purpose of the 1916 Act and concludes that it was intended to combat international predatory pricing below cost, not nonpredatory differential pricing between nations. Using principles of antitrust economics, Part II examines the nature of the type I and II errors that might arise from litigation under the Act. The analysis suggests that the possibility of type I errors is substantial, while that of type II errors is virtually nonexistent, and culminates with a proposal that the best rule under the 1916 Act is no rule at all—Congress would unambiguously improve consumer welfare by repealing the Act. But since this proposal may prove to be quixotic, Part III outlines an economic framework by which courts could reduce the combined social cost of type I and II errors, as well as conserve judicial resources, under the Act. Using this framework, a court would dismiss any claim under the 1916 Act unless the plaintiff could prove initially that the defendant has market power.

I. THE PROBABLE PURPOSE OF THE 1916 ANTIDUMPING ACT

The language of the 1916 Act is sufficiently ambiguous to raise doubts as to whether Congress intended the Act to protect consumers or to shield American producers from foreign competition. Arguably, were the Act not intended to shield American producers from foreign competition, Congress would not have provided that the intent necessary to establish the prima facie case could be as minimal as “the intent [to . . . *injure*] an industry in the United States.”¹² On the other hand, so minimal an intent element would make the other definitions of specific intent that are disjunctively listed in the Act—that is, the intent “[to *destroy*] . . . an industry in the United States” or “[to *prevent*] the establishment of an industry” or “[to *restrain or monopolize*] any part of trade and commerce”¹³—logically unnecessary, in contravention of the rule of thumb that Congress does not clutter statutes with meaningless verbiage. Neither of these interpretations by itself seems particularly persuasive.

¹¹ Ideally, courts should construe the 1916 Act so as to minimize the sum of three costs: (1) type I errors, (2) type II errors, and (3) the costs of administering the statute. See Easterbrook, *supra* note 9, at 223.

¹² 15 U.S.C. § 72 (1976) (emphasis added).

¹³ *Id.* (emphasis added).

To compound this ambiguity, the legislative history of the Act is largely uninformative. The antidumping statute was one of eight diverse provisions in the Revenue Act of 1916.¹⁴ The Senate report on the Revenue Act contained no discussion of the antidumping provision.¹⁵ The House report contained only two relevant paragraphs—one that substantially restated the language of the antidumping provision, and another that stated that the provision was proposed so that foreign manufacturers selling in the United States “may be placed in the same position as our manufacturers with reference to unfair competition.”¹⁶ President Wilson apparently issued no proclamation on signing the Revenue Act. In light of the limited insight that the statutory language and legislative history of the 1916 Act provide, the unofficial statements and writings of contemporary economists, lawyers, and government officials acquire particular interpretative significance.

A. *Contemporary Economic Commentary*

Jacob Viner defined dumping as “price-discrimination between purchasers in different national markets.”¹⁷ From this one might infer, as did the *Matsushita* court, that because the 1916 Act prohibits dumping it prohibits “international price discrimination” and is thus an international analogue to the Robinson-Patman Act.¹⁸ This rea-

¹⁴ Ch. 463, 39 Stat. 756 (1916). Representative Longworth remarked during floor debates on the Revenue Act: “Since I have been in Congress I do not remember any bill which has dealt with such a variety of subjects.” 53 CONG. REC. 10,528 (1916), *quoted in* *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1221 (E.D. Pa. 1980).

¹⁵ *See* S. REP. NO. 793, 64th Cong., 1st Sess. (1916).

¹⁶ H.R. REP. NO. 922, 64th Cong., 1st Sess. 9–10 (1916).

¹⁷ J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 4 (1923), *quoted in* *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1194, 1213 (E.D. Pa. 1980). Judge Higginbotham also adopted Viner’s definition as a matter of law in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251, 258–59 (E.D. Pa. 1975); *see also* W. CULBERTSON, *COMMERCIAL POLICY IN WAR TIME AND AFTER* 137–38 (1919). A committee of eminent British economists quipped in 1931: “As used by politicians, business men, legislators and the public generally, dumping has a variety of meanings, with little in common between them, except the denoting of a price which the speaker objects to as too low.” W. BEVERIDGE, *TARIFFS: THE CASE EXAMINED* 125 (1931).

¹⁸ 494 F. Supp. at 1213–14. The *Matsushita* court considered this inference “obvious.” *Id.* at 1213. The court’s confusion over Viner’s concept of dumping led it erroneously to conclude not only that the Robinson-Patman Act, 15 U.S.C. §§ 13a, 13b, 21a (1976), is relevant to the 1916 Act, but also that the Sherman Act is irrelevant. The court quoted Representative Kitchin’s remark that “the same unfair competition law which now applies to the domestic trader should apply to the foreign trader.” 53 CONG. REC. App. 1938 (1916). The court conceded that this remark did “not specify the Clayton Act, and could be read to refer to the Sherman Act instead.” 494 F. Supp. at 1223 n.44A. It nonetheless concluded that because “the Sherman Act is not concerned primarily with price discrimination” and because “the 1916 Act is a price discrimination law, it makes more sense to infer that Representative Kitchin and the House Ways and Means Committee were referring to § 2 of the Clayton Act,

soning confuses the economic meaning of price discrimination with the legal one. To economists, price discrimination merely connotes the sale of similar products at prices that have different ratios to marginal cost.¹⁹

Viner clearly used "price discrimination" in the economic sense, for he wrote in 1923 that the motivation for the 1916 Act was not ordinary international price discrimination, but "*predatory dumping*,"²⁰ which Viner considered to have as its "parallel in domestic commerce" "local price-cutting" in violation of the Sherman Act.²¹ Viner considered predatory dumping equivalent to the domes-

another price discrimination law, passed less than two years before, which is expressly limited in its scope to domestic transactions." *Id.*

Contrary to the court's conclusion, it is far from evident that Kitchin was referring to the 1914 Clayton Act. His remark quite possibly reflected the understanding that existing anti-trust laws, including the Sherman Act, had restricted extraterritorial application after the Supreme Court's 1909 decision in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). See J. VINER, *supra* note 17, at 240. This interpretation seems at least as plausible as the *Matsushita* court's interpretation: In the immediately preceding sentence of Kitchin's same speech—which the court did not quote—the Representative berated the Republican Party for "never [having] the wisdom and the judgment and the patriotism to incorporate in any legislation an unfair competition proposition" during "all of its fifty years of tariff writing." 53 CONG. REC. App. 1938 (1916). Those fifty years of tariff writing obviously spanned the enactment of the Sherman Act in 1890 as well as that of the Clayton Act in 1914.

Even had Kitchin been alluding to § 2 of the Clayton Act, the court still should not have ignored Sherman Act jurisprudence in construing the 1916 Act. As Professors Areeda and Turner have argued with respect to primary-line injury under the Robinson-Patman Act, "the intent of Congress in passing the original Clayton Act to go beyond the Sherman Act [does not] have any great significance, given that no one knew what the Sherman Act rule on predatory pricing was or would come to be and that Congress may well have been operating on pessimistic assumptions." 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 720, at 190 (1978); see also *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953).

¹⁹ See G. STIGLER, *THE THEORY OF PRICE* 209 (3d ed. 1966). Henry C. Emery, former chairman of the U.S. Tariff Board, acknowledged in 1916 that it was fallacious in discussing dumping to assume "[t]hat the price of each individual product fluctuates in a continuous relation to its cost of production." Emery, *The Problem of Anti-Dumping Legislation*, in *OFFICIAL REPORT OF THE THIRD NATIONAL FOREIGN TRADE CONVENTION* 73, 76 (1916). International price discrimination is a predictable, profit-maximizing strategy if a product's elasticity of demand or supply differs significantly between national markets and arbitrage can be prevented. See G. MEIER, *INTERNATIONAL ECONOMICS: THE THEORY OF POLICY* 112-13 (1980); K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 167-72 (1970).

²⁰ J. VINER, *supra* note 17, at 242 (emphasis added). Viner understood predatory dumping to be a strategic process: "A concern may sell at dumping prices in a given market in order to eliminate its competitors in that market or to bring them to terms [Predatory dumping] may have the more modest objective of inducing competitors by the threat of destructive competition to follow the prices quoted by the dumping concern, to share the market with it on specified terms, or otherwise to make their operations in the given market conform to the wishes of the dumping concern." *Id.* at 26; accord W. BEVERIDGE, *supra* note 17, at 130.

²¹ J. VINER, *supra* note 17, at 240, 239.

tic behavior now called predatory pricing.²² It is clear that he had predatory pricing in mind because he spoke of "cutting prices . . . especially below the cost of production, for the purpose of injuring competitors."²³

A.C. Pigou, another eminent economist, shared this view. He emphasized in 1920 that the 1916 Act, unlike the legislation enacted in Canada in 1904 and in South Africa in 1914, did not prohibit either "the clearing of surplus stock on a foreign market at less than home prices in periods of depression" or "the permanent selling abroad at the world price, by a foreign monopolistic producer, of goods for which at home he is able to charge monopoly prices."²⁴

22 The antidumping provision of the Act of 1916 has . . . been criticized on the ground that in confining its penalties to the common and systematic practice of predatory dumping it fails to provide remedies against sporadic dumping even though predatory in character and against other types of dumping which may be injurious to American industry though not predatory in intent or not provable to be so. But these are not so much criticisms of the effectiveness of the measure in attaining its objectives as of the limited character of these objectives. It was intended to reach only predatory dumping and the failure to penalize sporadic dumping was therefore well-advised. Sporadic dumping cannot result in an appreciable restraint of competition or monopolization of commerce.

Id. at 245 (footnote omitted); see also U.S. TARIFF COMM'N, INFORMATION CONCERNING DUMPING AND UNFAIR FOREIGN COMPETITION IN THE UNITED STATES AND CANADA'S ANTI-DUMPING LAW 33 (1919) (printed for use of the House Ways & Means Committee) (1916 Act does not prohibit "sporadic dumping") [hereinafter cited as INFORMATION CONCERNING DUMPING]; Note, *Soviet Bloc Dumping, The Revenue Act of 1916, and Economic Policy*, 27 U.C.L.A. L. REV. 1365, 1389 n.125 (1980).

23 J. VINER, *supra* note 17, at 240. William Smith Culbertson, a member of the U.S. Tariff Commission, shared this assessment of dumping. See W. CULBERTSON, *supra* note 17, at 141-42, 147-48. Similarly, Judge Higginbotham said in an interlocutory opinion in the *Matsushita* litigation: "As I read the Act, it forbids regular, continued price discrimination between purchasers in different national markets whenever the discrimination is motivated by a desire to destroy competition." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251, 259 (E.D. Pa. 1975) (emphasis added).

Yet one commentator has erroneously stated that the 1916 Act, like the Robinson-Patman Act, was "directed against the evil of differential pricing which allows the violator to obtain an advantage over his competitors and, to some degree, injures the latter." Hiscocks, *International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916*, 11 INT'L LAW. 227, 237 (1977) (emphasis added) (footnote omitted). This interpretation was explicitly rejected in *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979), a decision denying standing to an American retailer suing under the 1916 Act. The court said that Congress passed the 1916 Act "to shield local manufacturers from unfair competition in local markets" because "Congress was concerned with [the] . . . interests" of American "competitors . . . injured by . . . dumping of . . . products on the American market below cost." *Id.* at 797. The court emphasized that "[t]he Antidumping Act is not directed to price differentials generally but has a limited and specific objective which local manufacturers may be expected to pursue." *Id.*

24 A. PIGOU, *THE ECONOMICS OF WELFARE* 350, 351 (4th ed. 1932) (1st ed. 1920) (referring to 4 Edw. 7, ch. 11, § 19 (Can. 1904); Act No. 26, § 8(1), Union of South Africa Stat. (1914)). For further discussion of the Canadian and South African legislation, see W. CULBERTSON, *supra* note 17, at 150-51; J. VINER, *supra* note 17, at 192-204, 209-12; INFORMATION CONCERNING DUMPING, *supra* note 22, at 21-39.

The U.S. Act was instead directed "against destructive dumping exclusively,"²⁵ by which Pigou meant local predatory pricing—or "cut-throat competition"—of the sort the Standard Oil trust supposedly conducted in the United States.²⁶

Pigou believed that cut-throat competition "occurs only when the sale price of any quantity of commodity stands below the short-period supply price of that quantity."²⁷ He stressed that cut-throat competition "must be distinguished carefully from the practice of reducing prices down to, or towards, prime cost"—a practice that would "involve large reductions of price below the 'normal' . . . when demand is variable and prime cost is small relative to supplementary cost,"²⁸ but would "not involve 'selling at a loss' in the strict sense."²⁹

Similarly, William Smith Culbertson, a member of the U.S. Tariff Commission, wrote in 1919 that "[t]he American legislation of 1916 was directed only against" those industries that used "predatory price cutting . . . intended to destroy a foreign industry, to eliminate a competitor, or to prevent the development of competition in the import market."³⁰ The 1916 Act, concluded Culbertson, "made no provision for preventing . . . injury to American industries," especially by "the sporadic selling of goods in order to relieve a surplus . . . [or by] a permanent policy of foreign industries of selling in this country a portion of their output at a price below their domestic price in order to keep their factories running full time."³¹

Culbertson emphasized that "[i]t becomes . . . of paramount importance in tariff administration to determine whether competing articles are priced on the basis of average cost or on the basis of

²⁵ A. PIGOU, *supra* note 24, at 351.

²⁶ *Id.* at 345; *see also id.* at 268, 340, 350, 352-53.

²⁷ *Id.* at 268.

²⁸ *Id.* Economists in the early 1900's used "prime cost" to mean variable cost and "supplementary cost" to mean fixed cost. *See* A. MARSHALL, *PRINCIPLES OF ECONOMICS* 359-62 (8th ed. 1920).

²⁹ A. PIGOU, *supra* note 24, at 268. Frank W. Taussig, an economist who served as the first chairman of the U.S. Trade Commission, similarly wrote in 1920 that "in weighing the advisability of [antidumping] . . . measures it would be necessary, and at the same time extremely difficult, to ascertain whether the dumped article was exported at an abnormally low price." F. TAUSSIG, *FREE TRADE, THE TARIFF AND RECIPROCITY* 13 n.2 (1920). Taussig considered it "quite possible that the export price, while less than the domestic price, is not really below the level of normal cost." *Id.* Thus, he concluded that it was "at least doubtful whether foreign sales are in fact likely to be made for any considerable time at a price below the long-run cost of production." *Id.*

³⁰ W. CULBERTSON, *supra* note 17, at 153, 142. The *Matsushita* court was apparently unaware of these passages, even though elsewhere in its opinion it cited Culbertson's treatise as supporting authority. *See* 494 F. Supp. 1190, 1219 n.42 (E.D. Pa. 1980).

³¹ W. CULBERTSON, *supra* note 17, at 153, 141.

additional cost, that is, cost of direct labor and material plus a portion of overhead."³² Culbertson's discussion is most significant because foreign sales at "additional" cost—below at least long-run average cost³³—did not fall into the narrow category of behavior that was, to Culbertson, prohibited by the 1916 Act: "unfair price cutting for the purpose of putting a competitor out of business in a neutral market or for the purpose of destroying or preventing the rise of a foreign competing industry."³⁴

The respected British economist Alfred Marshall wrote in 1920 that dumping might involve "selling goods at less than cost price" to "ruin" a foreign competitor.³⁵ Marshall, like other economists of the period, analogized such predatory dumping to Standard Oil's alleged predatory pricing, "which involved a temporary loss to itself."³⁶ But Marshall believed that "the chief purpose of . . . [international price discrimination through] dumping is to maintain prices in the home market."³⁷ He concluded that "the desire to destroy rivals in foreign countries plays a much smaller part in such [discriminatory] dumping than is commonly supposed."³⁸

Marshall thus admonished that "care must be taken lest provisions made for the purpose of repressing malignant forms of underselling be so worded . . . as to condemn methods of trading which are practised on occasion by honourable British firms."³⁹ He endorsed a British legislative proposal, "similar to that of America,"

³² *Id.* at 146. Culbertson's concept of "additional cost" seems similar, if not identical, to long-run marginal cost:

If a manufacturer sells a part of his output in the home market at a price that covers the fixed charges of his mill and the cost of material and labor used in producing the product sold in the home market, he then can afford to sell his surplus in another market at a price that covers, with a small profit, the added cost of materials and labor.

Id. at 145.

³³ "A firm must sell in its principal market on the basis of average cost in the long-run, whereas it may sell advantageously in a secondary market a part of its product at less than average cost." *Id.* at 146.

³⁴ *Id.* at 147-48. Several pages later Culbertson advocated making the 1916 Act more protectionist by amending it to "include . . . all selling in the United States at prices below those that prevail generally abroad, or that are below the cost of manufacture abroad." *Id.* at 154.

³⁵ A. MARSHALL, *INDUSTRY AND TRADE* 157 (3d ed. 1920). Marshall observed that by 1860 protectionism in the United States was motivated primarily by "exaggerations of the harm caused by the occasional descent of some British manufacturers to the hateful practice of selling below full cost in America in order to crush rivals less amply provided with capital." *Id.* at 781. Marshall concluded that "[i]t is probable that the injury done to American manufacturers by all these paltry processes of international warfare [is] small." *Id.* at 782.

³⁶ *Id.* at 521.

³⁷ *Id.* at 522.

³⁸ *Id.*

³⁹ *Id.* at 630.

that would prohibit "selling at low prices . . . not absolutely, but only" with the same showing of predatory intent that the 1916 Act requires.⁴⁰

B. *Contemporary Political Commentary*

The political history of the 1916 Act supports the conclusion of contemporary economists that the sole focus of the Act was international predatory pricing. In 1915, Secretary of Commerce William Redfield predicted that European products would flood the United States after World War I and that dumping would be "a destructive type of the industrial struggle, intended to put out of being the forces opposed to it that the victor may exploit the field at will."⁴¹ Redfield opposed the use of tariffs to combat dumping and advocated that dumping be dealt with "rather as an offense similar to the unfair domestic competition we now forbid."⁴² The former chairman of the U.S. Tariff Board, Henry C. Emery, stated in early 1916 that Redfield "has in mind a kind of dumping entirely different . . . from that

⁴⁰ *Id.* Marshall did not elaborate on how he would have identified unlawful forms of predatory dumping. However, in discussing alleged predatory pricing by railroads, he framed the threshold economic question as "whether it is consistent with the public interest that a railway should be at liberty to 'dump' its services at less than *full* cost price, in order to drive a . . . troublesome competitor . . . out of business . . ." *Id.* at 479 (emphasis in original). Thus, it seems plausible that Marshall favored a cost-based test for identifying predatory dumping.

⁴¹ 1915 SEC'Y OF COMMERCE ANN. REP. 42. Redfield predicted:

When the war shall close . . . [t]he outreach of American industries, nay their very existence in our own land in some cases, will be resisted to the full and every stratagem of industrial war will be exerted against them. Expecting this, we must prepare for it. If it shall pass beyond fair competition and exert or seek to exert a monopolistic power over any part of our commerce, we ought to prevent it.

Id.; see also W. CULBERTSON, *supra* note 17, at 149; J. VINER, *supra* note 17, at 242-46; *Hearings of Emergency Tariff and Antidumping on H.R. 2434 Before the Senate Comm. on Finance*, 67th Cong., 1st Sess. 129-31 (1923) (statement of Charles H. Herty) (1916 Act motivated by alleged predatory pricing of German chemical industry); 53 CONG. REC. App. 1911 (1916) (statement of Rep. Saunders) (United States "likely to be confronted with a flood of cheap foreign manufactured products" once World War I ended and "thousands of [European] laborers . . . turn[ed] from the forging of cannon . . . to the conversion of swords and spears into the implements of prosaic toil"). *But see* 53 CONG. REC. App. 1398 (1916) (statement of Rep. Keating) ("I do not share that belief, but nevertheless, I believe as reasonable men we should take the precaution suggested by the President and his advisers. It will give our business men a sense of security which they would otherwise lack . . .").

⁴² 1915 SEC'Y OF COMMERCE ANN. REP. 43. In analyzing the legislative history of the 1916 Act, the *Matsushita* court gave great weight to Secretary Redfield's 1915 report: "Although we have discovered no historical evidence *directly* linking Secretary Redfield's proposals [for legislation to supplement the Clayton Act] to the drafting of the 1916 Antidumping Act, the circumstantial evidence is strong." 494 F. Supp. 1190, 1220 (E.D. Pa. 1980) (emphasis in original). Representative Longworth shared Secretary Redfield's concern and said in 1916 that the antidumping provision of the proposed Revenue Act of 1916 would "do much to save American industries . . . from annihilation." 53 CONG. REC. 10,531 (1916).

ordinarily understood by the term . . . , something similar to the so-called unfair practice of a big trust which reduces locally and temporarily its price for the distinct purpose of driving John Jones or James Smith out of business."⁴³ Emery agreed that "such a practice is one which should be prohibited by law if it can be proven to be done for the object of establishing a monopoly."⁴⁴

Later in 1916, in a letter to the *New York Times* endorsing the pending antidumping legislation, Assistant Attorney General Samuel J. Graham similarly wrote: "Just as we have said to our people by the Clayton Act that they should not indulge in unfair competition, so we propose to say the same to the foreigner."⁴⁵ In the immediately following sentence Graham revealed a special concern for international predatory pricing, stating that:

[G]enerally accepted principles of political economy hold that it is not sound policy for any Government to permit the sale in its country by foreign citizens of materials at a price *below the cost of production* at the place produced, for the reason that such a system, in its final analysis and on a sufficient scale, spells bankruptcy.⁴⁶

Graham made no analogous reference to nonpredatory price discrimination.

These contemporary statements by Emery and Graham suggest that the resemblance of the 1916 Act to the original section 2 of the Clayton Act springs from Congress' intent to use section 2 to combat domestic predatory pricing.⁴⁷ Such a perceived congruence between

⁴³ Emery, *supra* note 19, at 81. Emery, who advocated a "flexible tariff" in lieu of Redfield's proposed antidumping legislation, *id.* at 84, concluded that "the Secretary is wrong in thinking that the chief danger of foreign competition will be found to lie in the action of some foreign monopoly in attempting to ruin some American manufacturer." *Id.* at 82.

⁴⁴ *Id.* at 81-82.

⁴⁵ N.Y. Times, July 4, 1916, at 10, col. 6, *quoted in Matsushita*, 494 F. Supp. 1190, 1222 n.44 (E.D. Pa. 1980); *cf.* 53 CONG. REC. App. 1938 (1916) (statement of Rep. Kitchin) ("We believe that the same unfair competition law which now applies to the domestic trader should apply to the foreign import trader.")

⁴⁶ N.Y. Times, July 4, 1916, at 10, col. 6 (emphasis added). The *Matsushita* court neglected to quote this sentence.

⁴⁷ Congress intended § 2 of the Clayton Act to combat the common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made.

H.R. REP. NO. 627, 63d Cong., 2d Sess. 8 (1914); *see also* FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543 (1960).

In Robinson-Patman jargon, any such price discrimination would threaten "primary-

predatory dumping and the behavior thought to be proscribed by section 2 of the Clayton Act would explain why Secretary of Commerce Redfield recommended in 1915 that an antidumping law be "supplemental to the Clayton Antitrust Act."⁴⁸

Yet these allusions by Redfield and Graham to section 2 of the Clayton Act hardly imply—as the *Matsushita* court inferred—either that these members of the executive branch believed that the antidumping law should prohibit nonpredatory price discrimination or that, by negative implication, the antidumping law was unrelated to the Sherman Act.⁴⁹ To the contrary, it was precisely because some in the executive branch considered the 1916 Act an ineffective means of deterring more general forms of international price discrimination that, as early as 1919, the U.S. Tariff Commission recommended supplementary legislation.⁵⁰ Congress, too, apparently saw a need to deter more general forms of international price discrimination. It chose not to amend the 1916 Act, but to enact an entirely new, publicly enforced tariff law. The Antidumping Act of 1921⁵¹ empowered the Treasury Department to impose dumping duties, even absent a showing of predatory intent.

C. *Reasonable Inferences About the 1916 Act*

This economic and political commentary supports two important inferences about the 1916 Act. First, although the Act does not explicitly require a showing of a reasonable probability of monopolization,⁵² contemporary commentators plainly saw monopolization—

line" injury and generate a concern "identical" to "the Sherman Act's concern with predatory pricing." 3 P. AREEDA & D. TURNER, *supra* note 18, ¶ 720c, at 190; accord R. POSNER, *supra* note 7, at 38 ("There is no need for a statute that supplements the Sherman Act's prohibition against predatory pricing; those prohibitions are adequate."); see also F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 144-50 (1962).

⁴⁸ 1915 SEC'Y OF COMMERCE ANN. REP. 43.

⁴⁹ See 494 F. Supp. 1190, 1223 n.44A (E.D. Pa. 1980).

⁵⁰ INFORMATION CONCERNING DUMPING, *supra* note 22, at 12.

⁵¹ Antidumping Act of 1921, ch. 14, §§ 201-212, 42 Stat. 11 (1921) (repealed 1979); see also H.R. REP. NO. 479, 66th Cong., 2d Sess. 2 (1919). See generally Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44 (1958).

⁵² Cf. Letter from Robert C. Cassidy, Jr., General Counsel, Office of the U.S. Trade Representative, to Sen. Abraham Ribicoff, *supra* note 8, at 143 n.*:

There [has] been little litigation under the 1916 Act, and it is, therefore, difficult to predict the extent to which a court would require proof of all of the Sherman Act elements of an attempt to monopolize as a predicate to liability under the 1916 Act. In view of the 1916 Act's emphasis on intent, it might be unnecessary to establish the dangerous probability of success that has frequently been held a requirement of liability under section 2 of the Sherman Act.

The implications of Cassidy's remark are somewhat unclear, however. The quoted passage

and not some lesser degree of competitive injury—to be the harm that the Act was intended to prevent. It would contradict this rather unambiguous contemporary commentary to cast the 1916 Act as a protectionist statute, or to interpret the Act by analogy to antitrust legislation whose focus is something less pernicious than the possibility of monopolization.

Second, although the legislative history of the 1916 Act does not define when an imported product is sold in the United States “at a price *substantially less* than the actual market value or wholesale price” in its principal markets,⁵³ leading economists believed that predatory dumping required a cost-based definition.⁵⁴ This second

follows a hypothetical case involving a “foreign monopolist” which presumably has significant market power already. *Id.* at 142.

⁵³ 15 U.S.C. § 72 (1976) (emphasis added). The *Matsushita* court inferred that Congress borrowed the phrase “actual market value or wholesale price” from ¶ R of the Tariff Act of 1913, ch. 16, § III, 38 Stat. 114, 189 (1913) (repealed 1930), which defined actual market value as “the price at which such merchandise is freely offered for sale to all purchasers” in the “principal markets of the country whence exported.” 494 F. Supp. 1190, 1215–17 (E.D. Pa. 1980). Yet the court used this inference to define the relevant product market, not to define predatory conduct. *Id.* Moreover, the court declined to note that ¶ L of the Tariff Act of 1913, *supra* at 185–86, provided that the appraising officer should “ascertain the cost of production of such merchandise” when the actual market value was unascertainable. Thus, even if the Tariff Act of 1913 were relevant to the 1916 Act, it still would not follow that the earlier statute precludes the finding of a cost-based predatory conduct element in the later statute.

⁵⁴ By 1933, Gottfried von Haberler had succinctly identified the ambiguities in using a cost-based rule to define predatory dumping:

[T]he concept of “the cost of production” is in itself ambiguous. If it means the *average cost* per unit, and the cost of management and interest and amortisation on the fixed capital are included in the total costs, then export often does take place below the cost of production.

But sales below average cost in this sense in no way involve selling at a loss. There is only a loss if the total product is sold at a price below its average cost. But when dumping takes place, as a rule the fixed costs (the general overhead costs), or a greater proportion of them than the proportion of home to total sales, are covered by the home sales, and the export need cover only the variable costs of the quantity exported in order to be profitable. The lower limit of the export-price is thus determined by the *marginal cost*, that is, by the additional cost due to expanding the output for export. The marginal cost lies below average costs in all those very frequent cases in which production can be expanded within the existing productive unit, that is, without increasing the buildings or plant or equipment or administration or bookkeeping, or at least without increasing them in the same proportion as production is increased.

Moreover, the expression “selling at a loss” is ambiguous. Suppose that the price covers the current costs of the concern (both those which vary more or less proportionately with the output, such as materials and wages, and those which are more or less fixed, such as the general expenses of management) but does not permit interest or amortisation on the fixed capital. If to sell at this price is “to sell at a loss,” then selling at a loss is the general rule in times of depression. If, however, the expression is applied only when the current expenses of a concern definitely exceed its current receipts, then selling at a loss is a short-run phenomenon which occurs only because the entrepreneurs concerned hope that conditions will soon improve.

insight removes some of the mystery from the text of the 1916 Act. If foreign markets were perfectly competitive, the foreign wholesale price would equal marginal cost. The 1916 Act reflected congressional concern that European cartels would collusively raise prices above marginal cost in their own markets and use the resulting monopoly profits to subsidize predatory pricing abroad.⁵⁵ At the same time, however, Congress recognized that protectionist tariffs would, by reducing foreign competition, facilitate price fixing by American firms.⁵⁶ Consequently, Congress could not have intended the "actual market value" or the "actual . . . wholesale value" to mean an imported product's cartelized price in Europe, for this reading of the statute would have provided, by government fiat, a price umbrella under which American firms could charge supracompetitive prices. Such a reading of the statute would encourage the very harm to consumers that the 1916 Act, in proscribing predatory dumping, sought to deter.⁵⁷

II. THE SOCIAL COST OF ENFORCING THE 1916 ACT

A. *Market Power in Antidumping Cases*

Market power refers to the ability of a firm (or group of colluding

G. HABERLER, *THE THEORY OF INTERNATIONAL TRADE* 298-99 (rev. ed. A. Stonier & F. Benham trans. 1936) (1st ed. 1933) (emphasis in original).

⁵⁵ See J. VINER, *supra* note 17, at 242-46.

⁵⁶ See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1218 (E.D. Pa. 1980); cf. G. HABERLER, *supra* note 54, at 324 ("Perhaps it would be an exaggeration to say that every cartel and every trust is a child of a tariff, but beyond doubt the majority of cartels hold together only because of a protective tariff.") (emphasis in original).

⁵⁷ Cf. 61 CONG. REC. 1022 (1921) (remarks of Sen. King) (asking whether proposed 1921 Antidumping Act would "be so administered as that it may perpetuate a monopoly existing in the United States, or permit manufacturers in the United States to augment the prices they are charging to the public").

One might still argue that it is unrealistic to infer a congressional intent for a cost-based rule: Congress would not have enacted a law necessitating discovery of foreign manufacturing costs when no adequate foreign discovery procedures existed. Instead, as Malcolm Wheeler has suggested, Congress might have banned international discriminatory pricing as an imperfect way of combating predatory dumping. Private Correspondence from Malcolm E. Wheeler to Joseph Gregory Sidak (June 15, 1981).

This argument is unpersuasive for three reasons. First, contemporary commentary suggests that the 1916 Act was not intended to be a blanket ban on all varieties of international price discrimination. Second, even were the 1916 Act a broad ban on price discrimination, the discovery problem would still exist. See *Hearing on Possible Amendments*, *supra* note 8, at 15 (statement of Peter Feller); *id.* at 20 (statement of Gary Horlick). Third, Congress may well have been aware in 1916 of the narrow extraterritorial scope of antitrust subject matter jurisdiction that *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), had set forth. This congressional perception may have persisted until the decision in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). Enactment of the 1916 Act may have reflected Congress' belief that this new legislation would circumvent the restrictions that had rendered the Sherman Act broadly inapplicable to international commerce.

firms) to raise price above the competitive level without losing so many sales as to make the price increase unprofitable.⁵⁸ Economists have traditionally measured market power through the Lerner index (L)—an estimate of the proportion by which price (P) deviates from marginal cost (C') at the firm's profit-maximizing output:

$$L = (P - C')/P.^{59}$$

Professors Landes and Posner have derived an equivalent form of this equation that enables one to infer the market power of any firm (i) by simultaneously considering the entire market's price elasticity of demand (E_m^d), the defendant's market share (S_i), and the price elasticity of supply for the other firms (j) in the market (E_j^s):

$$L_i = S_i / (E_m^d + E_j^s(1 - S_i)).^{60}$$

The Landes-Posner index provides a valuable insight: As long as a court considers all three variables— E_m^d , S_i , and E_j^s —it will arrive at the same estimate of a firm's market power regardless of how it defines the relevant market. If one variable (often S_i) is overstated or understated, the other two variables will assume larger or smaller values that precisely offset the distorted estimate of the first.⁶¹

A showing of market power is, as an economic matter, essential to any antitrust case. Without it, a court has no basis for concluding that conduct of which a plaintiff complains can harm consumers

⁵⁸ Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).

⁵⁹ Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157 (1934); see also *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

⁶⁰ Landes & Posner, *supra* note 58, at 944-52. The market elasticity of demand is treated as a positive number in the Landes-Posner model.

⁶¹ First, suppose that a court considers red bicycles, rather than bicycles of all colors, the relevant product market. Suppose further that National manufactures 90 percent of all red bicycles, and that the market elasticity of demand is 1 for all bicycles and 10 for red bicycles alone. Even if one were to assume zero supply substitutability by manufacturers of non-red bicycles (that is, $E_j^s = 0$), National's 90 percent market share would, as the Landes-Posner index shows, overstate its true market power. National would have precisely the same market power as a firm manufacturing only 9 percent of all bicycles; the existence of substitutes in consumption would constrain its market power.

Substitutes in production also will constrain market power. Suppose Acme makes 90 percent of all left-handed guitars, which might plausibly constitute a relevant product market because left-handed guitarists cannot play right-handed guitars. Acme's 90 percent market share nonetheless overstates its market power if makers of right-handed guitars can easily shift into the production of left-handed guitars. Thus, a more accurate proxy for Acme's market power would be its share of the sum of (1) current left-handed guitar production and (2) potential left-handed guitar production by current makers of right-handed guitars. See Landes & Posner, *supra* note 58, at 948; see also *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1273 (9th Cir. 1975); Note, *The Role of Supply Substitutability in Defining the Relevant Product Market*, 65 VA. L. REV. 129 (1979). This is essentially the same result that would have obtained from a broader definition of the relevant product market in the first place.

either now or in the future. If the 1916 Act truly is an antitrust statute and consumers are its beneficiaries, then a showing of market power is as essential to a claim under that statute as to a claim under the Sherman Act.

B. *Type I and Type II Errors from Incorrect Inferences Regarding Market Power*

1. *The Matsushita Error: Focusing on Product Comparability Rather than Market Power.*

In *Matsushita*, two American corporations sued ten Japanese corporations for attempting to destroy the American consumer electronics products industry by predatorily dumping televisions, radios, phonographs, and cassette tape recorders for a period in excess of twenty years.⁶² The case illustrates how a court construing the 1916 Act could commit a type I error⁶³ by neglecting to analyze market power.⁶⁴

The 1916 Act requires a comparison of the price of imported articles in the United States with the "actual market value or wholesale price of *such articles* . . . in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported."⁶⁵ The undisputed facts in *Matsushita* established that electronics products designed for use in Japan were not readily usable in the United States because the two countries allocated different frequencies to their respective television and FM broadcasts and had electrical power systems of different voltages and frequencies.⁶⁶ The defendants moved for summary judgment on the ground that the 1916 Act was inapplicable because Japanese and

⁶² Although the Landes-Posner article was not published until a year after the *Matsushita* decision, its basic approach is not new to the economic literature on market power. See, e.g., Fisher, *Diagnosing Monopoly*, Q. REV. ECON. & BUS., Summer 1979, at 7, 12-14, 17-18.

⁶³ For a definition of type I and type II errors, see *supra* text accompanying notes 9-11.

⁶⁴ 494 F. Supp. 1190, 1194 (E.D. Pa. 1980). The National Union Electric Corporation sued in 1970, the Zenith Radio Corporation in 1974.

⁶⁵ 15 U.S.C. § 72 (1976) (emphasis added).

⁶⁶ The court concluded:

As a result, television and FM receivers manufactured for use in Japan cannot receive many broadcasts in the U.S. and vice versa. In addition, the Japanese electrical power system uses 100 volts and frequencies of either 50 or 60 Hertz ("Hz"), while the U.S. system is at 120 volts and only 60 Hz. Because of this difference, Japanese television receivers used in the U.S. would be in serious danger of failing because of overheating, Japanese phonographs and tape recorders of a certain design would run at the wrong speed, and the audio output of radios, phonographs, and tape recorders would include an objectionable hum.

494 F. Supp. at 1196; see also *id.* at 1204-11.

In this article, as in the *Matsushita* opinion, the term "U.S. products" is used as a shorthand for products intended for sale and use in the United States, even if they are not manu-

American televisions were different goods.⁶⁷

The *Matsushita* court thought that the "principal lesson" of the legislative history of the Act was that "the statute should be interpreted whenever possible to parallel the 'unfair competition' law applicable to domestic commerce."⁶⁸ The court concluded that the Robinson-Patman Act informs the construction of the 1916 Act because, the court asserted, the Robinson-Patman Act is the domestic analogue to the 1916 Act.⁶⁹ The court also asserted that the 1916 Act differs fundamentally from the Sherman Act because, "unlike . . . section 2 of the Sherman Act," the 1916 Act "does not require plaintiffs to show that any defendant's predatory intent was accompanied by a dangerous probability of success."⁷⁰

The *Matsushita* court thus avoided the question of whether the defendants had sufficient market power to create a reasonable probability of monopolization of the American market. The court instead focused on interpreting the phrase "such articles," stating

factured there. *See id.* at 1195 n.6. To ease exposition, the text will refer only to televisions. The discussion will, however, be fully applicable to other consumer electronics products.

⁶⁷ *Id.* at 1198-1200.

⁶⁸ *Id.* at 1223; *see also id.* at 1221 (congressional consideration of the Revenue Act of 1916 contained "no references to the specific issue presently before us: the comparability of articles sold in the United States with articles sold in foreign countries").

⁶⁹ The court reasoned as follows: Dumping is "price discrimination between purchasers in different national markets." *Id.* at 1213. The 1916 Act prohibits dumping, but nonetheless has the characteristics of an antitrust law, not a protectionist tariff. *Id.* at 1197, 1215. Section 2 of the Clayton Act, ch. 323, 38 Stat. 730, 730-31 (1914), amended by the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526-27 (1936) (current version at 15 U.S.C. § 13 (1976)), prohibits domestic price discrimination. Therefore, "since the 1916 Antidumping Act is a price discrimination law, it should be read in tandem with the domestic price discrimination law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act in 1936." 494 F. Supp. at 1223; *see also id.* at 1197 ("to give rise to a violation of the 1916 Act, the products sold in the United States and the products sold in the foreign country must be of 'like grade and quality' as that phrase is used in § 2 of the Clayton Act as amended by the Robinson-Patman Act"); *Hearing on Possible Amendments*, *supra* note 8, at 9 (statement of Sen. Danforth) (S. 223 would extend the "philosophy . . . and . . . procedure" of the Robinson-Patman Act to dumping law); *Hearings on S. 938*, *supra* note 8, at 26 (statement of Bart Fisher) ("The dumping laws are just the international analog to the Robinson-Patman Act."); *Hiscocks*, *supra* note 23, at 237.

Despite this analogy of the 1916 Act to the Robinson-Patman Act, the *Matsushita* court nonetheless determined that, "by incorporating in the 1916 Act a phrase from contemporary customs law, Congress must have intended to direct that the appraisal of imported merchandise under the 1916 Act follow the principles set forth in the Tariff Act of 1913." 494 F. Supp. at 1216. It is curious how such tariff legislation could provide a basis for interpreting a law that was, the court emphatically concluded, not a tariff statute but an antitrust statute. *See id.* at 1197, 1215.

⁷⁰ 494 F. Supp. at 1201 n.12. This conclusion, although clearly dictum, was purported to have been made as a matter of law in a footnote that cites to no authority. The court rejected the argument "that plaintiffs cannot establish predatory intent with respect to defendants whose market share in sales of consumer electronics products in the United States is small." *Id.*

that it had to decide whether American and Japanese televisions were "sufficiently similar to be comparable for purposes of the 1916 Act."⁷¹ Because of technical differences between Japanese and U.S. televisions and because "the changes necessary to make the Japanese domestic set operable in the United States could not be made by the average consumer," the court found Japanese televisions "unmarketable" in the United States and "*a fortiori* . . . not commercially interchangeable."⁷² Accordingly, the court granted the defendants' motion for summary judgment.⁷³

The court apparently concluded that market power, because it is not explicitly mentioned in the statute, is not an element of a claim under the 1916 Act. This reasoning is dubious: Section 2 of the Sherman Act does not explicitly mention market power, yet the Supreme Court has inferred a "reasonable probability" element for attempted monopolization for at least three-quarters of a century.⁷⁴ Furthermore, the text of the 1916 Act becomes only more mysterious if one excludes market power as an element for liability. It would have been incongruous for a nonprotectionist Democratic Congress in 1916⁷⁵ to have enacted an antidumping law applicable only to behavior resembling predatory pricing had those legislators not cared whether such behavior would in fact create a dangerous probability of monopolization. Otherwise, the statute's predatory intent clause would not have mentioned "destroying" an American industry or "monopolizing" an American market. Nor would the conduct element have required that the dumping be done "commonly and systematically" at prices "substantially" below the actual market value or wholesale price overseas. One could reasonably infer from this language that a "reasonable probability" element implicitly exists in the 1916 Act as it does in section 2 of the Sherman Act.

⁷¹ The court certified this question for immediate interlocutory appeal under 28 U.S.C. § 1292(b) (1976). 494 F. Supp. at 1245.

⁷² 494 F. Supp. at 1209-10.

⁷³ The court granted the defendants partial summary judgment with respect to all television receivers, non-battery-powered products, and products that receive FM radio transmissions. *Id.* at 1245. Very few products involved in the case would not fall into at least one of these categories. In a subsequent decision, Judge Becker dismissed all remaining dumping claims. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1316 n.372 (E.D. Pa. 1981).

⁷⁴ *See* *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). A long line of cases states that federal courts have congressionally delegated authority to mold the substantive elements of the antitrust laws. *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642-46 (1981); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978); *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943) (Hand, J.), *aff'd*, 326 U.S. 1 (1945); *see also* R. BORK, *supra* note 7, at 72-89.

⁷⁵ *See Matsushita*, 494 F. Supp. at 1217-18.

Sherman Act decisions on market definition and market power would have required a denial of the defendants' motion for summary judgment because Japanese and American televisions would, after minor modifications, be close enough substitutes as to be of like quality or grade. By focusing on product comparability rather than market power, the *Matsushita* court could finesse a nonprotectionist outcome only by construing the 1916 Act in a manner which ignored decisions under the Sherman Act that scrutinized demand elasticity, supply elasticity, and market share.⁷⁶

2. *How Matsushita Could Have Been Decided.*

The *Matsushita* decision suggests that the court heard enough evidence to determine whether the defendants had any appreciable market power. The record established that the technical differences between a Japanese and an American television were slight, as was the cost of converting a television for use in another country.⁷⁷ Nonetheless, the court refused as a matter of law to consider either the technological significance of the design differences or "the differences in cost of production which result from adaptation to the differing technical conventions of the U.S. and Japan."⁷⁸ This conclusion is equivalent in economic respects to placing Japanese and American televisions in separate product markets in which the price elasticity of supply is zero.⁷⁹ Yet the more narrowly one defines the relevant product market, the greater will be the price elasticity of supply and the relative importance of its constraining effect on market power.

Suppose *arguendo* that Japanese television manufacturers destroyed all American television manufacturers through prolonged predatory dumping, and thereafter significantly raised their own prices in the United States. Suppose, too, that non-Japanese foreign producers of televisions do not then shift into the production of American televisions. American consumers or entrepreneurs would, at some price, buy a non-Japanese foreign television and modify it to American technical specifications, rather than buy a television manufactured in Japan for use here.⁸⁰ American consumers would, in

⁷⁶ On the other hand, the *Matsushita* court might have leaned toward the Robinson-Patman analogy because it enabled the court to define the product market strictly and, therefore, dismiss the dumping claim outright.

⁷⁷ 494 F. Supp. at 1206-07 & nn.22-23, 1208-09.

⁷⁸ *Id.* at 1207.

⁷⁹ See Landes & Posner, *supra* note 58, at 944-51.

⁸⁰ The *Matsushita* court observed that televisions conforming to the standards of the National Television Standards Committee are used "in the United States and in Japan, and in many other countries." 494 F. Supp. at 1204. Relatively simple modifications would convert

essence, partially vertically integrate upward into television manufacturing in the sense that they (or more likely, domestic firms with expertise in television repair and modification) would convert foreign non-Japanese televisions for American use, regardless of whether the makers of those televisions intended to enter the American product market. The possibility of such consumer-induced supply substitution would substantially constrain the market power and monopoly profits of even successful predatory dumpers; it could thus have provided a basis for granting the defendants summary judgment on grounds consistent with Sherman Act decisions and principles of antitrust economics.

3. *Possible Errors from Matsushita.*

The definition of the relevant product does not by itself enable one to infer whether the defendant has market power and, thus, any reasonable chance of monopolization through predatory dumping. Instead of analogizing the 1916 Act to the Robinson-Patman Act, the court could have asked whether, on the basis of the record before it, any appreciable market power could result from the defendants' share of a product market broadly defined to include the current production of American televisions plus the potential production of such televisions by non-Japanese foreign manufacturers.

Despite its errant notions of market definition, the *Matsushita* court seemed to recognize that the defendants would have caused no competitive injury even if they had engaged in predation. The court's narrow definition of the product market virtually ensured that Japanese televisions would not be "of like quality or grade," and therefore not comparable under the Robinson-Patman Act, to American televisions.⁸¹ Indeed, the summary judgment in *Matsushita* bene-

a Japanese television for use in the United States. *Id.* at 1209 & nn.25 & 26. The court's opinion contains no indication that it would be any harder to convert a television manufactured for use in one of these "many other countries." This oversight could cause a court to understate the cross-price elasticity of demand and, therefore, overstate a firm's market power. See R. POSNER, *supra* note 7, at 128; Landes & Posner, *supra* note 58, at 960-61; Baxter, Book Review, 8 BELL J. ECON. 609, 614 (1977) (reviewing R. POSNER, *supra* note 7). It is simply the converse of the Supreme Court's economic error in the *Cellophane* case, *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 400 (1956), of examining the cross-price elasticity of demand at the allegedly monopolistic price rather than at the competitive price.

⁸¹ In fact, Judge Becker suggested in dictum in a subsequent antitrust opinion that the Japanese defendants had an insignificant share of the relevant product market. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1321-23 (E.D. Pa. 1981). Had Judge Becker considered supply substitutability in the earlier proceeding, the market power of the Japanese defendants would have been too insignificant to infer a reasonable probability of monopolization, even if the defendants had plainly conducted predatory

fits American consumers in the short run; it did, after all, avoid a protectionist outcome.

But the *Matsushita* decision may encourage serious type I errors. A defendant lacking market power—lacking the ability to harm consumers by extracting monopoly rents and causing deadweight loss—could be held liable if it merely sold a product of like grade or quality and violated the Act's conduct element (however that might later be defined).

If predatory pricing can and does occur, the decision threatens type II errors as well. Under the reasoning of the *Matsushita* court, a foreign firm that has violated the Act's conduct element may not be held liable even if it has market power. Holding constant all the other variables affecting the demand for an import, the cross-price elasticity of demand between the import and its domestic counterpart will fall as the relative price of the import declines. If the foreign firm cuts its price "substantially," as the 1916 Act specifies, the American good might not display commercial interchangeability with the foreign good and would thus appear to be of a different quality or grade. But this absence of substitutability at the allegedly predatory price does not indicate the absence of substitutability at the subsequently higher price that would maximize the foreign firm's profit. The absence of "commercial interchangeability" at the allegedly predatory price might lead to a conclusion that the defendant has no market power when, in fact, it does.

C. *Type I Errors from Incorrect Inferences of Predatory Conduct*

Because the *Matsushita* decision turned on product comparability, the court did not have to construe the 1916 Act's predatory intent clause. The court noted that such intent can be proven "by inference, even if the defendant's small market share makes it unlikely that [the defendant] will succeed in injuring American industry."⁸² But while

dumping. A court concerned with market power would have granted the *Matsushita* defendants summary judgment, as did Judge Becker, but for reasons more attuned to consumer welfare than the policies underlying the Robinson-Patman Act.

⁸² 494 F. Supp. 1190, 1201 n.12 (E.D. Pa. 1980) (dictum); see also *id.* at 1195 n.5. In an interlocutory decision five years earlier, Judge Higginbotham held that a violation of the 1916 Act requires specific intent. He explicitly rejected the argument "that the predatory intent requirement describes only a state of mind." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251, 259 (E.D. Pa. 1975). He read the predatory intent clause as reinforcing the conclusion that the 1916 Act "forbids regular, continued price discrimination between purchasers in different national markets whenever the discrimination is motivated by a desire to destroy competition." *Id.*

During hearings on S. 223 in 1980, counsel to an American company favoring more protectionist amendments to the 1916 Act asserted that "dumping is similar to the Robinson-

the Clayton Act sought to arrest restraints of trade in their incipency, the 1916 Act was less sweeping. Unlike the 1916 Act, section 2 of the Clayton Act, as enacted in 1914,⁸³ proscribed conduct that "may . . . substantially . . . lessen competition or tend to create a monopoly," rather than simply conduct displaying a present intent to destroy a competitor or monopolize an industry.⁸⁴ Construing the 1916 Act as an incipency statute would enhance the possibility of type I errors by analogizing the 1916 Act to the 1936 Robinson-Patman Act and not simply to its precursor, section 2 of the 1914 Clayton Act. Section 2 of the Clayton Act had a different purpose than the Robinson-Patman Act; thus, any congruence that may exist between the 1916 Act and the prohibition against domestic predatory pricing codified in section 2 of the Clayton Act does not necessarily imply a congruence between the 1916 Act and the Robinson-Patman Act. When Congress amended section 2 of the Clayton Act with the Robinson-Patman Act, its concern was not predatory pricing, but the shielding of small merchants from the competitive threat of more efficient chain stores.⁸⁵

Patman Act and not to the Sherman Act." *Hearing on Possible Amendments*, *supra* note 8, at 91 (statement of Richard O. Cunningham). Yet his rationale—that the Sherman Act "has an element of predatoriness in it, a degree of anticompetition activity that is not found in the Robinson-Patman Act"—would better support the conclusion that the predatory intent clause of the 1916 Act makes this antidumping act more similar to the Sherman Act than to the Robinson-Patman Act. *Id.* Furthermore, his argument ignores the point emphasized by Robert C. Cassidy, Jr., then General Counsel to the U.S. Trade Representative, that "in recent 'primary line' cases under the Robinson-Patman Act, where the price discrimination causes injury to the competitors of the seller, the courts have required a showing of predatory intent before a violation will be held to have occurred and treble damages awarded." Letter from Robert C. Cassidy, Jr. to Sen. Abraham Ribicoff, *reprinted in id.* at 142, 143 n.44 (citing *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) and *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976)). Cassidy concluded:

Predatory intent in this context is interpreted consistent with Section 2 of the Sherman Act. Thus, in 'primary line' cases, which are analogous to antidumping cases, the courts have imposed on those claiming to be injured by low-priced sales a burden similar to that now required under the 1916 Act.

Letter from Robert C. Cassidy, Jr. to Sen. Abraham Ribicoff, *supra*, at 144.

⁸³ Ch. 323, § 2, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13 (1976)).

⁸⁴ *See id.* (emphasis added). The Robinson-Patman Act contains an equally lenient incipency provision. *See* 15 U.S.C. § 13(a) (1976); *see also* R. BORK, *supra* note 7, at 390-91. In granting summary judgment on the antitrust claims in the *Matsushita* litigation, Judge Becker emphasized that the Robinson-Patman Act is an incipency statute. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1324 (E.D. Pa. 1981).

⁸⁵ *See* F. ROWE, *supra* note 47, at 6-23; *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-44 (1960). The 1936 Robinson-Patman amendments therefore addressed "secondary-line" injury, not "primary-line" injury. *See supra* note 47. Even some practitioners of international trade law have incorrectly characterized the 1916 Act as a prohibition against secondary-line price discrimination. *See, e.g., Hearing on Possible Amendments*, *supra* note 8, at 18 (statement of Charles O. Verill, Jr.) (1916 Act intended to address international instances of "price discrimination in markets between competing customers").

To conclude erroneously that the 1936 Robinson-Patman Act should inform the interpretation of the 1916 Antidumping Act is socially costly. It increases the likelihood that subsequent courts will not only consider Robinson-Patman decisions relevant to the definition of the product market under the 1916 Act, but that they will also consider discredited Robinson-Patman decisions such as *Utah Pie*⁸⁶ relevant to the definition of predatory conduct under the 1916 Act. The possibility of such erroneous analogies would chill aggressive price competition from foreign manufacturers.

D. *Are Type II Errors Actually Possible?*

It has been assumed so far that type I errors regarding predatory conduct result only from a misconception of the definition of such conduct under the 1916 Act, and from erroneous analogies to the Robinson-Patman Act. Type I errors could also arise if courts were to apply an overinclusive test for predatory dumping. This problem is not unique to the 1916 Act; indeed, it has been the dominant issue in the debate over whether courts should use the Areeda-Turner test⁸⁷ or some other economic test for predatory pricing under the Sherman Act.

It is unnecessary, with one exception, to restate the key arguments in that debate. Professor Easterbrook has emphasized that all of the

⁸⁶ *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). The Robinson-Patman Act has drawn nearly unanimous criticism from the nation's leading antitrust practitioners and scholars. See 3 P. AREEDA & D. TURNER, *supra* note 18, ¶ 720c; R. BORK, *supra* note 7, at 382-94; R. POSNER, *THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES* (1976); F. ROWE, *supra* note 47, at 534-55; Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, 1 ABA SEC. OF ANTITRUST L. 60 (1952). Antitrust economists share this criticism. See F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 580-83 (2d ed. 1980); Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967); Elzinga & Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & ECON. 427 (1978).

⁸⁷ Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Areeda and Turner propose that only a price below short-run marginal cost—or, as a proxy, short-run average variable cost—should be presumed to be predatory. *Id.* at 732-33. See *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) (applying the Areeda-Turner test). After surveying the literature on predatory pricing, Professor McGee concluded that, if any test for predatory pricing is to be adopted by courts, the Areeda-Turner test is the one "least likely to hurt competition." McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289, 304 (1980). For another critique of the Areeda-Turner test and other predatory pricing tests, see Easterbrook, *supra* note 9, at 263 *passim*.

The *Matsushita* court refrained from considering the relevance of the Areeda-Turner test to the 1916 Act. 494 F. Supp. 1190, 1200 (E.D. Pa. 1980). In a subsequent decision on the antitrust claims, Judge Becker also declined to "add our 'two cents' to the ongoing controversy over the Areeda-Turner . . . theory." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1123 n.19 (E.D. Pa. 1981).

proposed tests for predatory pricing share the common flaw of assuming, without any supporting empirical evidence, that such predation is common enough to be taken seriously.⁸⁸ Easterbrook argues that successful predation is implausible on economic grounds and that unsuccessful predation is self-punishing and, therefore, self-detering; consequently, neither should be a concern of the antitrust laws.⁸⁹ Therefore, any type II errors are likely to be far rarer in frequency and lesser in consequence than type I errors. Taking into account the judicial cost of administering any one of these proposed predation rules, consumers would be better off with a rule of per se legality for predatory pricing.⁹⁰

Easterbrook's reasoning applies with equal force to the 1916 Act: Construction of the Act is quite susceptible to type I errors, while the implausibility of successful predatory dumping suggests that type II errors are rare, if not nonexistent. This view of predatory dumping is hardly new. Pigou wrote in 1906 that predatory dumping would be an unsuccessful strategy for monopolization because it would require the dumper to acquire a "world-embracing monopoly."⁹¹ Marshall shared this view.⁹² Even the U.S. Tariff Commission reported in 1919 that the evidence of dumping in the United States was "somewhat meager."⁹³

Perhaps a socialist country could tax its own consumers to subsidize a lengthy strategy of selling at a loss abroad.⁹⁴ But even this scenario would be unlikely to lead to monopolization because consumers with rational expectations could protect themselves against the possibility that a foreign predator would later attempt to recoup its short-run losses through supracompetitive prices. American consumers could simply stockpile the subsidized imports or (equivalently) obligate the foreign seller to a long-term supply contract at the "predatory" price.⁹⁵

Moreover, any case of predatory dumping actionable under the 1916 Act would, in light of the broad extraterritorial reach of anti-trust subject matter jurisdiction,⁹⁶ be actionable under section 2 of

⁸⁸ Easterbrook, *supra* note 9, at 276.

⁸⁹ *Id.* at 265-318.

⁹⁰ *Id.* at 333-37.

⁹¹ A. PIGOU, PROTECTIVE AND PREFERENTIAL IMPORT DUTIES 23 (1906).

⁹² A. MARSHALL, *supra* note 35, at 781-82; accord W. BEVERIDGE, *supra* note 17, at 130.

⁹³ See INFORMATION CONCERNING DUMPING, *supra* note 22, at 34; see also *Hearing on Possible Amendments*, *supra* note 8, at 129 (statement of Dudley H. Chapman).

⁹⁴ See Note, *supra* note 22.

⁹⁵ See Easterbrook, *supra* note 9, at 269.

⁹⁶ See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Zenith Radio*

the Sherman Act as well. The Sherman Act's case law on predatory pricing provides the proper framework for the analysis of predatory dumping⁹⁷ and makes the 1916 Act entirely redundant.⁹⁸ No type II errors would result if the 1916 Act were not enforced.

But this redundancy should not be confused with harmlessness. Enforcement of the 1916 Act risks type I errors and imposes completely unnecessary costs on courts and defendants. Under these circumstances, the socially optimal construction of the 1916 Act would not be an elaborate rule that seeks to minimize the combined costs of type I and type II errors (along with litigation costs); rather, it would be no rule at all. Congress should, in short, repeal the 1916 Act.

III. A FRAMEWORK FOR ANALYZING CLAIMS UNDER THE 1916 ACT

Repeal of the 1916 Act does not appear imminent.⁹⁹ Courts should, as a second-best alternative, adopt a framework for adjudicating claims under the Act that would minimize the combined social costs of type I and type II errors, along with the litigation costs of administering the Act. The framework for litigation under the 1916 Act should be as follows: A court should not hear evidence of predatory conduct until the plaintiff has proven that the defendant has substantial market power (as distinguished from merely a large market share). If the plaintiff cannot meet this burden, the court should dismiss the claim without addressing the issues of predatory conduct or intent. If, on the other hand, substantial market power is shown, the test for predatory dumping should parallel the test for predatory pricing under section 2 of the Sherman Act. Only if the court first finds that a defendant with substantial market power has in fact engaged in predatory dumping should the court consider whether that defendant had the requisite predatory intent.

This framework reflects the probable intent of Congress that the

Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161 (E.D. Pa. 1980); 1 J. ATWOOD & K. BREWSTER, *supra* note 8, §§ 6.12-.22. Even if this broad extraterritorial sweep is contracting in response to criticism by foreign governments, it would be naive to assume that the 1916 Act would retain a broader extraterritorial scope than the Sherman Act; objections to the extraterritorial application of American antitrust laws apply with equal force to the 1916 Act. *See generally* Note, *Enjoining the Application of the British Protection of Trading Interests Act in Private American Antitrust Litigation*, 79 MICH. L. REV. 1574 (1981).

⁹⁷ *See Hearing on Possible Amendments, supra* note 8, at 133 (statement of Dudley H. Chapman); *id.* at 26 (statement of N. David Palmeter).

⁹⁸ *See id.* at 4, 7 (statement of Robert C. Cassidy, Jr.); *id.* at 29 (statement of N. David Palmeter).

⁹⁹ To the contrary, recent bills have proposed amendments to the 1916 Act that would make the statute clearly more protectionist. *See supra* note 8.

1916 Act deter only predatory dumping—dumping that genuinely threatens to destroy competition and monopolize a market—thereby enabling a foreign manufacturer to raise prices for American consumers in the long run. In scrutinizing allegedly predatory dumping, a court could apply either the Areeda-Turner test or another of the proposed tests for predatory pricing. As a practical matter, the prerequisite showing of substantial market power would prevent most cases from ever advancing to the point where a court would have to determine whether the dumping in question constituted predatory pricing.

The same reasoning applies to proof of intent. Ascertaining the intent of a large foreign corporation is costly and not particularly relevant to the impact on consumer welfare of the pricing behavior at issue. At the same time, the evidence that would be proffered to prove specific predatory intent under the 1916 Act is especially susceptible to misinterpretation. Businesspersons tend to use economic jargon more loosely than lawyers or economists; thus, any such loose talk might appear to contain inculpatory catch-phrases.¹⁰⁰ The likelihood that evidence bearing on predatory intent will be misinterpreted is especially great where, as in *Matsushita*, the defendant regularly conducts business both in a foreign language and according to customs unfamiliar to an American judge or jury. For these reasons, courts should avoid trying the issue of predatory intent until after the plaintiff has proven substantial market power and predatory dumping.

Of course, to say that the plaintiff must first prove substantial market power naturally invites the question: How much market power is substantial? A firm cannot charge consumers supracompetitive prices and cause deadweight loss if it has no market power; thus, to hold a firm liable for antitrust damages when it has no appreciable market power would not enhance consumer welfare.¹⁰¹ But frequently a firm will have *some* market power and therefore the capac-

¹⁰⁰ See R. POSNER, *supra* note 7, at 189-90 ("What juries (and many judges) do not understand is that the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality Especially misleading here is the inveterate tendency of sales executives to brag to their superiors about their competitive prowess, often using metaphors of coercion that are compelling evidence of predatory intent to the naive.").

¹⁰¹ *Id.* at 191. The Supreme Court and antitrust commentators have criticized this type of divergence between antitrust liability and cognizable antitrust injury. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1977); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980); Note, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329 (1981).

ity to cause some deadweight loss, however slight. The legal conclusion that a firm's market power is "substantial" should, in theory, turn on whether the firm engenders more than some unacceptable threshold amount of deadweight loss. That threshold, Landes and Posner argue, depends on the absolute size, as measured in total sales, of the market—the larger the market, the less market power the defendant would need to generate the threshold amount of deadweight loss.¹⁰² The impracticability of this approach, however, is that it requires knowledge of either the defendant's marginal cost or of both its market share and the market elasticity of demand. These calculations may, as Landes and Posner concede, be impossible to perform.¹⁰³

A more troublesome problem with this criterion for market power is that the cost of type I errors, like the cost of deadweight loss, increases with the absolute size of the market. The possibility of type I errors might, in addition, deter foreign competition in more than just a single product market. Limited information and uncertainty about the "threshold" amount of market power would make it difficult for foreign managers in related product markets to tell whether their aggressive pricing would lead to liability under the 1916 Act.

To circumvent these problems, a court hearing a case under the 1916 Act should follow two steps. First, it should take supply substitutability into account¹⁰⁴ in defining the relevant product market and computing market shares therein. Second, it should evaluate the defendant's share of this broadly defined market in light of the market elasticity of demand, since that elasticity imposes an absolute ceiling on the market power that any one firm can have. These two steps would not ensure perfect estimates of the defendant's market power, but they would help to indicate whether allegedly predatory dumping could actually harm American consumers.

IV. CONCLUSION

Though seldom invoked, the 1916 Antidumping Act is not innocuous. Its long dormancy has made the statute particularly susceptible to judicial misinterpretation which may, in the long run, impair consumer welfare and encourage costly litigation. These potential costs are an unnecessary burden on American consumers and the federal judiciary. Section 2 of the Sherman Act provides an entirely satisfac-

¹⁰² See Landes & Posner, *supra* note 58, at 954 n.32.

¹⁰³ See *id.* at 941, 943.

¹⁰⁴ The elasticity of supply for the competitive fringe will rarely be directly measurable.

tory weapon for combating the evil at which the 1916 Act was most likely aimed.

Congress should, accordingly, repeal the 1916 Act. Until then, courts should reject the dubious notion that the 1916 Act is an analogue to the Robinson-Patman Act; they should require, as a prerequisite to any further inquiry under the Act, a showing by the plaintiff of the defendant's market power; and they should recognize that the Act prohibits only predatory dumping, an economic phenomenon that is rare if not imaginary.