ABSTRACT

Supreme Court rejects arguments of American manufacturers to apply antitrust laws to Japanese competitors. It dismisses argument that such activity constitutes predatory practice.

FREE TRADE OR…?
SOME DOUBTS ABOUT MATSUSHITA V. ZENITH

By

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INTRODUCTION

A whole body of literature now exists and is increasing in volume as to the trade relations and business practices of Japanese and American firms. From automobiles and computers to television sets and tape players, Japanese competitors have only entered the American market in the past quarter of a century but have come to master an increasingly larger share of it – arousing fears among some of the complete domination. Ironies abound as the Japanese community applied both its genius and its culture to the competitive marketplace. Japan has created its own steel industry – when initially it was thousands of miles removed from the raw iron ore necessary for the production process and even lacked a fleet of ocean vessels to carry them back to the home islands. By way of contrast, the American steel industry has dwindled and diminished in its capacity despite ready access to fuel and ore. Some of the organizational techniques implement by Japanese firms were first conceived by American corporate strategists who saw their theories spurned in their own country and welcomed to an adopted home in the Far East.[1] And so a duel of titans has developed raising highly-charged issues of unfair competition, dumping and labor exploitation. It was inevitable that such a struggle on the business front would be prodigiously fruitful in litigation. In this essay, we will examine one such case dealing with this coming to power of Japanese business.[2] But, indeed, this case is multum in parvo – for ensconced in the pleadings, motions, arguments and judgments is the present day confrontation between two giant competitors in the international business field. By the very nature of the case, its legal holding is not only jurisprudential significance alone. By the issues it raises and the positions it examines, this case leads one on an excursion through the whole galaxy of international competition that now exists between these two mighty engines of economic enterprise.

LAYING OUT THE BACKGROUND

The suit under scrutiny was initiated by the American manufacturers, Zenith Corporation and the National Union Electric Corporation. Their complaint asserted that their Japanese counterparts had conspired together to drive the American firms from the American market through the device of charging exceptionally high prices for television sets in Japan but selling them at a much lower price in the United States. Their allegation thus claimed a classic case of dumping as it is known in international trade. Their case sought relief from violations of the Sherman, The Robinson-Patman, the Wilson Tariff and the Antidumping Acts. The Japanese firms had requested an award of summary judgment on all of the claims. The Federal District Court had rendered that judgment in their favor[3] while the Federal Court of Appeals reversed and affirmed in part.[4] Involved in this particular litigation was a whole range of issues that included such diverse topics

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as predatory pricing, the international application of American antitrust laws, and the defense of sovereign compulsion to a charge of price-fixing. All of this mélange of international trade questions was subsumed under the procedural issue of granting summary judgment. The Supreme Court of the United States overturned the Court of Appeals in a close five to four decision that restored the summary judgment. It thus extinguished the attempt of American companies to use federal antitrust statutes to combat Japanese competition based on alleged predatory pricing.

START OF MAJORITY'S ANALYSIS

Justice Lewis Powell presented the majority opinion of the Court. He began by noting that to state the facts of the case was indeed "a daunting task." The Federal Courts had already devoted hundreds of pages in the reports in regard to this case. And the parties themselves had presented a forty-volume long appendix describing the "essence of the evidence." Powell is at pains to comment that he was not going to "repeat what these many opinions" had decided nor "summarize the mass of documents" that constituted the record. Instead, he presented a brief "summary" of this lengthy legal saga. After raising their claims under varied statutes, the American companies listed "all the documentary evidence that would be offered if the case proceeded to trial." This came after "several years of detailed discovery." The Japanese defendants challenged the evidence the American firms were intending to present. This included "various governmental records and reports…business documents…and a large portion of…expert testimony."[5] In three different decisions,[6] the Federal District Court ruled all three items inadmissible as evidence. It was on the evidence left after these decisions that the motion for summary judgment was granted. The Federal District Court simply decided that this remaining evidence failed to "raise a genuine issue of material fact as to the existence of the alleged conspiracy." It held that the arguments of the American firms rested on their competitors' "parallel conduct in the Japanese and American markets." But the Federal District Court determined that "any inference of conspiracy" was baseless. It believed that any possible existent conspiracy worked no injury to the American firms and purposefully cut prices only to "compete in the American market and not to monopolize it." Justice Powell described how the Court of Appeals reversed the District Court by first determining that evidence it had excluded was in fact admissible. So on that "newly enlarged record," the Court of Appeals held the grant of summary judgment to be "improper." Instead, it ruled that a "factfinder reasonably could" make a number of conclusions. And these were varied and of legal significance. One could show that the "Japanese market…was characterized by oligopolistic behavior" based on the exchange of pricing information among its few producers. This system provided the opportunity for a stable combination to raise…prices and profits in Japan." The American manufacturers were unable to respond competitively because the Japanese government had "imposed significant barriers to entry." The Japanese were also compelled to operate at "full capacity" which "exceeded the needs" of their domestic market.[7]

Likewise, the Japanese firms had agreed with their government's Ministry of International Trade and Industry[8] -- the much written about MITI—to fix "minimum prices" for products exported to America and to sell them "only to five American distributors." And evidence was presented as well that the Japanese companies did "undercut…by a variety of rebate schemes" and concealed these from both MITI and the United States Customs Service to "avoid various customs regulations" and "action under

the anti-dumping laws." So "on inferences from the foregoing," the Court of Appeals concluded one could establish "a conspiracy to depress prices in the American market…to drive out American competitors" and that such a scheme was "funded by excess profits obtained in the Japanese markets." It did not pass on the Japanese defense of sovereign compulsion: that the pressure of MITI forced the firms to act the way they did. Rather the Court of Appeals observed it remained "unclear that the …prices in fact were mandated by the Japanese government notwithstanding a statement to that effect by MITI itself." So the Supreme Court had granted certiorari on the issue of summary judgment and liability under "antitrust laws for a conspiracy in part compelled by a foreign sovereign."[9]

MAKING A DECISION

After this review of the litigation so far, Justice Powell wanted to emphasize what did "not" constitute the claims of the American companies. For example, no recovery could be sought for antitrust damages "based solely on an alleged cartelization of the Japanese market" since "American antitrust laws did not regulate the competitive conditions of other nations' economies." It was true that the Sherman Act did reach "conduct outside our borders but only when it has an effect on American commerce." An "alleged cartelization of the Japanese market" only gave that country's firms "the option of either producing fewer goods or selling more goods in other markets." But this Hobson's choice did not result from such cartelization – at least according to Justice Powell. Nor would any recovery be allowed if the Japanese firms were charging "higher than competitive prices in the American markets." This behavior indeed violated the Sherman Act but "could not injure" the American firms. From Justice Powell's perspective, these stood to "gain from any conspiracy to raise the market price." Nor could the American manufacturers obtain recovery due to a "conspiracy to impose nonprice restraints that either" raised market prices or limited output. These restrictions might be "harmful to competitions" but "actually benefit" American competitors by "making supracompetitive pricing more attractive." Consequently, none of the drawn inferences "by themselves" could give the American firms "a cognizable claim … for antitrust damages."[10]

The American companies went even further in their arguments. For, if "these supposed conspiracies" were "not themselves grounds for recovery," they were certainly "circumstantial evidence of another conspiracy that is cognizable." This was such a one as to "monopolize the American market by…pricing below the market level." It was the gravamen of the American complaint that the Japanese had "used their monopoly profits from the Japanese market to price predatorily" and so drive the Americans "out of business." Their whole concerted purpose and aim was to "cartelize the American ... market" by "restricting output and raising prices above the level fair competition would produce." Their "resulting monopoly profits" could "more than compensate … for the losses they incurred through years of pricing below market level." The Court of Appeals had decided that such a system of predatory pricing, "if proved," constituted a "per se violation" of the Sherman Act. The Japanese manufacturers did not dispute this. Rather the issue remained whether the Americans had "adduced sufficient evidence in support of their theory to survive summary judgment." Here Justice Powell carefully remarks that the description of predatory pricing is "used chiefly in cases in which a single firm, having a dominant share … cuts its prices… to force competitors out… or perhaps to

deter potential entrants from coming in." Thus the term refers to "pricing below some appropriate measure of cost." While there was "a good deal of debate, in both the cases and in the law reviews" as to what constituted such cost, Justice Powell was not ready to "resolve the debate here." Instead, to recover and damages the Americans would be required to demonstrate they were driven out of business in their own market by either "pricing below the level necessary to sell … or some appropriate measure of cost."[11]

As for the fundamental and immediate question of the summary judgment, the American companies had to "establish…there is a genuine issue of material fact as to whether" their Japanese competitors had "entered into an illegal conspiracy that caused" the Americans "to suffer a cognizable injury." And such a "showing" had "two components." To begin with, the American firms had to prove "more than a conspiracy in violation of the antitrust laws." They also had to "show an injury to them resulting from the illegal conduct." The Japanese have been charged with "a whole host of conspiracies in restraint of trade." But in regard to most of them, the Americans could not have suffered an "'antitrust injury'" since what was alleged "actually tend to benefit" them. So from this vantage point, the evidence did not defeat the motion for summary judgment. The second component under the Federal Rules of Civil Procedure was that the "issue of fact" had to be "'genuine'". So when a moving party had met its burden, its opponent had to "do more than simply show…there is some metaphysical doubt as to the material fact." Under the Rules that party had to demonstrate there existed "a genuine issue of act for trial."[12]

So, for Justice Powell, it followed that if the "factual context" rendered the American "claim implausible," that is, "if the claim…simply makes no economic sense," then "more persuasive evidence" would be necessary to "support their claim." Justice Powell cited a 1968 decision especially pertinent to this analysis—at least of the variety Justice Powell adopted—"strongly suggested" there was "no motive to join the alleged conspiracy." The Court had admitted that the defendant's "refusal to deal" when taken "in isolation" might have "sufficed to create a triable issue." But such a refusal must be "evaluated in its factual context." Thus, absent "any rational motive to join the…boycott" and because such "refusal to deal was consistent with…independent interest," such a refusal "by itself" simply could not "support a finding of antitrust liability." While it was true that in summary judgment cases inferences were to be taken in "'the light most favorable to the partly opposing'" such, nonetheless, Justice Powell reminded the Court that "antitrust law limits the range of permissible inferences from ambiguous evidence in a case." So the court had ruled that "conduct as consistent with permissible competition as with illegal conspiracy does not" by itself "support an inference of antitrust conspiracy." That meant that in the present case the Americans had to demonstrate than an "inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could have harmed respondents." The Japanese argued that this analysis exactly fitted the present situation. The putative conspiracy was one both "economically irrational and practically infeasible." No motive then could have existed for them to "engage in the alleged predatory pricing conspiracy." Indeed, a "strong motive" could be found for them "not to conspire in the manner" the American companies alleged they did. So when viewed "in the light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy," the Japanese affirmed that "no trier of fact reasonably could find that the conspiracy" the

Americans hypothesized even existed. But this argument in turn compelled the Court to examine the "nature of the alleged conspiracy and the practical obstacles to its implementation."[13]

PARTICULARIZING THE ECONOMIC MODEL

Justice Powell observed than any "predatory pricing conspiracy is by nature speculative" precisely because any such agreement to "price below the competitive level requires the conspirators to forego profits that free competition would offer them." Such "forgone profits" would be looked upon as "an investment in the future." But for such an investment to make economic sense, according to Powell, those participating in the venture had to possess" a reasonable expectation of recovery, in the form of later monopoly profits, more than the losses suffered." And Justice Powell summons up the scholarship of both Professor Bork and Professor McGee to sustain that statement. Likewise, the "success of such schemes" remained "inherently uncertain" because while "short-run loss is definite… the long-run gain depends on successfully neutralizing the competition." Even the achievement of monopoly power was "not enough" because monopoly pricing could breed "quick entry by new competitors to share in the excess profits." For the real success of the predatory pricing depended on "maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." And Justice Powell again calls upon sympathetic scholarly support for his contention that there was no certain guarantee of return for these initial losses entailed in the predatory practice. Indeed, he forcefully asserts that there existed "a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful." While Powell noted that these insights "apply even to predatory pricing by a single firm," here the American companies charges that "a large number of firms… conspired over…many years to charge below-market prices…to stifle competition." But such a conspiracy was "incalculably more difficult to execute" than one "undertaken by a single predator." Those involved in such conspiracy must allocate the gains and losses that are its consequences. But since "success is speculative and depends on a willingness to endure losses for an indefinite period," every party to the scheme had a "strong incentive to cheat" by permitting its co-conspirators to "suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds." This necessary allocation of profit and loss was "difficult to accomplish." And if any cheating occurred, the conspiracy inevitable failed since "its success depends on depressing the market price for all buyers." Justice Powell further opined that if predatory schemes were "generally unlikely to occur," they were "especially so" in situations like the present where "prospects of attaining monopoly power seem slight." To have adequately recovered their losses, the Japanese companies would have had to "obtain enough market power to set higher than competitive prices, and then…sustain those prices to earn in excess profits what they earlier gave up in below-cost prices."[14]

Twenty years after the commencement of their alleged conspiracy, the Japanese companies "appear to be far from achieving this goal." The "two largest shares of the retail market in television sets" were "held by RCA and…Zenith" and "not by any of" the Japanese. Nor did the American share of the market "decline appreciably during the 1970's." Rather, their "collective share" increased considerable at this time "from one-fifth or less…to close to 50%." None of the courts below found evidence to indicate the Japanese share of the market "allows them to charge monopoly prices." The Americans

now respond that the "conspiracy is ongoing" in that the Japanese "are still artificially depressing the market…to drive Zenith out." Yet the "data in the record" suggested that such a "goal is yet far distant." Justice Powell therefore thought that the "alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist." Since losses accruing from the predatory pricing occur before any gains, they had to be "'repaid' with interest." And since these losses would have been endured over a twenty year time-span, the Japanese would obviously need "a correspondingly long time to recoup." Adherence to such a regimen of "supracompetitive prices" depended as well on the "continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and …on the conspirators' ability to escape antitrust liability for the minimum price-fixing cartel." But every one of "these factors" weighed "more heavily as the time needed to recoup losses grows." Where losses have been significant, the conspirators would "most likely have to sustain their cartel for years simply to break even." That the Japanese could have taken "supracompetitive profits in the Japanese market" did not "change this calculation" for Justice Powell. For if the Japanese had "the means to sustain substantial losses in this country over a long period of time," Justice Powell believed they had "no motive to sustain such losses absent some strong likelihood that the…conspiracy in this country will eventually pay off." But the lower courts had discovered "no evidence of any such successes" with the facts in the record "actually…to the contrary." The American manufacturers and not the Japanese still maintain "the largest share of the American retail market in color television sets." Nor was there anything to suggest "any relationship between…profits in Japan and the amount" Japanese firms "could expect to gain from a conspiracy to monopolize the American market." Absent "such evidence," and "possible existence of supracompetitive profits in Japan" cannot "overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy." This held true as well of "any supposed excess production capacity" the Japanese many have developed. Such an excess of capacity would "tend to establish the ability to sell products abroad." But it did not establish "a motive for selling at prices lower than necessary to obtain sales." Nor did such excess capacity tell the Court why these Japanese companies were "willing to lose money in the United States market without some reasonable prospect of recouping their investment."[15]

RELATIONSHIP TO SUMMARY JUDGMENT

Justice Powell asserted that fact finders should not be permitted to "infer conspiracies when such inferences are implausible" for "the effect of such practices is often to deter pro-competitive conduct." For example, cutting prices to get more business frequently is "the very essence of competition." Consequently, "mistaken inferences" in such situations would be "especially costly" since they would operate to "chill the very conduct the antitrust laws are designed to protect." Admittedly, "this concern" had to "be balanced against the desire that illegal conspiracies be identified and punished." But such a proper concern became "usually one-sided" in the present case. Because predatory pricing to be successful required the "conspirators to suffer losses…to realize their illegal games" which "depend on a host of uncertainties," this meant such plans were "more likely to fail than to succeed." Justice Powell believed that the "economic realities" – or, more precisely, what he took to be those realities – worked to make such predatory pricing schemes "self-deterring" and "costly." Unlike predatory pricing by a single firm,

such "successful…conspiracies involving a large number," could be "identified and punished once they succeed" because "some form of minimum price-fixing agreement" is "necessary…to reap the benefits of predation." According to Justice Powell, the Japanese firms possessed "no motive to enter into the…conspiracy." For as "presumably rational business," they had "every incentive not to engage in the conduct with which they are charged" because "its likely effect would be to generate losses…with no corresponding games." The Court of Appeals had erred in a number of ways with regard to this issue of motive. The "'direct evidence'" on which it based its conclusions was "evidence of other combinations, not of…predatory pricing." Proof that there was a conspiracy in Japan to raise prices gives "little, if any, support" to the arguments of the American manufacturers. It simply was that "a conspiracy to increase profits in one market" cannot "tend to show a conspiracy to sustain losses in another." This flaw in interpretation also held true with regard to the Japanese agreement to "limit the number of distributors of their products in the American market." Such a plan might well facilitate "a horizontal territorial allocation" but the "natural effect" was to "raise the market prices rather than reduce them." Consequently, any evidence as to such "collateral conspiracies" said "little, if anything" about a predatory cabal that existed for twenty years. The "absence of any plausible motive," then, was "highly relevant" in deciding if there was issue enough for trial. Such a lack of motive bore directly on the "range of permissible conclusions that might be drawn from ambiguous evidence." So, if there was present "no rational economic motive to conspire," and if Japanese behavior was "consistent with other, equally plausible explanations," then, such conduct could not "give rise to an inference of conspiracy." All the Japanese had done was to price "at levels that succeeded in taking business away from the Americans and restricted their ability to compete with each other." What the evidence suggested to Powell was that the Japanese "behaved competitively…or…conspired to raise prices." These possibilities were not consistent with a plan of predatory pricing involving twenty-one firms. Such a scheme made "no practical sense." It would have entailed the destruction of "companies larger and better established than themselves, a goal that" still remained "far distant" after twenty years. Even if the Japanese had achieved their monopoly power, there was no evidence to indicate they, could recover the losses they would…sustain along the way." So Justice Powell reinstated summary judgment for the Japanese companies. This action made it "unnecessary to reach the sovereign compulsion issue." The Japanese had contended that "MITI, an agency of the government of Japan" had compelled them "to fix minimum prices for export to the United States" which made them "immune from antitrust liability for any scheme in which those…prices were an integral part." But the American competitors still would not "have suffered a cognizable injury from any action that raised prices here." So the sovereign compulsion issue in this fashion was dismissed.[16]

THE DISSENT ON POLICY AND LAW

But what Justice Powell and his colleagues of the majority took so readily for economic reality was most seriously disputed as such by a majority of four members in an opinion by Justice Byron White. He begins by noting he found "remarkable" the way the majority reached its conclusion. He thought the Court of Appeals had quite properly held that "the evidence taken as a whole creates a genuine issue of fact" and therefore must be submitted to a jury. In reversing that ruling the majority "only muddies the

water." To begin with, they made "confusing and inconsistent statements" about the norm for granting summary judgment. Additionally, the majority made "a number of assumptions that invade the fact finder's province." And, finally, they criticized the Court of Appeals for "non-existent errors" and remanded the case even though it raised "genuine issues of material fact." White believed that the majority's "initial discussion of summary judgment standards" appeared "consistent with settle doctrine" but that "other language…suggests a departure from traditional…doctrine." It used the kind of language which suggested that "a judge hearing a defendant's motion for summary judgment…should go beyond the traditional…inquiry and decide for himself whether the weight of the evidence favors the plaintiff." Precedent did not support this position but rather "simply held…a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury." Nor did these past decisions overturn the principal that "all evidence must be construed in the light most favorable to the party opposing summary judgment." The majority was engaged in "overturning settled law" if it intended to bestow on judges "the job of determining if the evidence makes the inference of conspiracy more probable than not." If that was not its purpose, it should have abstained from the use of "unnecessarily broad and confusing language." In stating what the American firms had to show to win their case, the majority also acted in a manner that trespassed on the realm of the fact finders. It stated "with very little discussion" that the American companies could not recover unless they had established the existence of a particular kind of pricing system. In reaching this position, the majority had blithely ignored the evidence presented by the expert for American complainants, Dr. De Podwin. His report insisted that American firms were "harmed in two ways that are independent of whether" the Japanese competitors priced their products below a certain level needed to sell or some relevant standard of cost. That report first noted that by raising prices in Japan, Matsushita and the others caused "lower consumption" of their products there and "the exporting of more…goods to this country that would have occurred had prices in Japan been at the competitive level." The resultant increase of these exports to American caused "depressed prices here, which harmed" the American firms. The report also charged that the Japanese "exchanged confidential proprietary information" and participated in schemes whose goal was "avoiding intragroup competition in the United States market." This caused the American manufacturers to lose the business that otherwise would have been theirs if the Japanese had competed here in good faith. For Justice White this report "alone" created "a genuine factual issue regarding the harm…caused by Japanese cartelization and by agreements restricting competition among" themselves in America. Justice White pointedly remarked that even though the majority might prefer "its own economic theorizing," this was still no reason to "deny the fact finder an opportunity to consider" contrary views. By playing down the possibility of predatory pricing, the majority had likewise made a consistent assumption that the Japanese "valued profit maximization over growth." But Justice White vigorously maintained that this was "an assumption that should be argued to the fact finder, not decided by the Court." Especially was this so when the Japanese sold their products in America "at substantial losses over a long period of time."[17]

The majority had also reversed the Court of Appeals because it could find little evidence for a predatory pricing conspiracy and neglected to consider the question of

motivation. But White bluntly denounced this aspect of the majority's analysis as being "without substance." The Court of Appeals had quite correctly observed that "this case is distinguishably from traditional 'conscious parallelism' cases in that there is direct evidence of concert of action among" the Japanese firms. But the Court of Appeals did not leap "unthinkingly from this observation" to conclude the evidence had been presented to establish damages to the American companies. Indeed, that court "twice specifically" noted that "horizontal agreements allocating customers, through illegal, do not ordinarily injure competitors." It was only after carefully "reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term below-cost sales," that the Court of Appeals decided a fact finder could "reasonably conclude" the Japanese scheme was "not a simple price-raising device." Justice White could find "nothing erroneous in this reasoning."[18]

THE BIAS OF THE MAJORITY

The majority opinion had also faulted the Court of Appeals because it was "not sufficiently skeptical" of the American charge of Japanese predatory pricing. But Justice White did not believe the Court should "engage in academic discussion about predation." It was only required to find if a "genuine issue of material fact" had been created. According to Justice White that court had quite properly performed its duty in this regard. It had found the American evidence was "sufficient to create a genuine factual issue regarding long-term, below-cost sales by" the Japanese cohorts. The majority had attempted to "whittle away" at this judgment by belittling the evidential value of expert testimony in the light of its economic prejudices. For Justice White, however, the issue is not whether any particular expert was "persuasive" or that the majority accepted an economic analysis hostile to anti-trust. It was simply if "viewing the evidence in the light most favorable to the" Americans, "a jury or other fact finder could reasonably conclude" that the Japanese companies had participated in "long-term, below-cost sales." Justice White agreed with the Court of Appeals that the "answer to this question is yes." The Court of Appeals had accepted Dr. De Podwin's expert testimony as "sufficient to create genuine factual issue regarding the correctness of his conclusion" about Japanese commercial behavior. Once having made this decision, it was unnecessary for the Court of Appeals to "address the District Court's analysis" – and the one adopted by the majority now – "point by point." Any "criticisms of De Podwin's methods" were "arguments that a fact finders should consider." Consequently, Justice White believed a genuine issue of fact had been presented – one which demanded the fact finding of a jury trial.[19]

PERSONAL OBSERVATIONS

By making it much more easy for the Japanese firms to achieve a summary judgment, the Supreme Court majority would naturally withhold all these issues from going before a jury. Perhaps this was the strategy of the Japanese manufacturers in seeking such a motion. Who knows how a jury would have decided this case? Or what factors would have weighed heavily with them? One can ruminate over the passions and the xenophobia aroused as issues of unemployment and plant closings were melodramatically rehearsed. But none of this will be heard or discussed or argued over now. It will all pass sub silentio. For Justice Powell and his narrow majority this is a most happy and fortunate result. Since they have always ready at hand their own expert analysis concocted by a particular breed of scholarly commentators, why bother with so

ignorant and inexpert a body as a jury? Why inflame a public opinion perhaps already too aroused? Leave it to the dispassionate experts – or, at least, some of them.

This inevitably and unavoidably leads us to the main unstated criticism of Powell and his majority colleagues. Who are these experts who build the models and provide the analysis they adopt as their own – as reality? And are there not others as fully credentialed and as professionally elevated who think and argue otherwise? Far be it for one trained in the narrow disciplined of the law to call into question this new order of economic reality. But is there no other way of perceiving that reality? Certainly Dr. De Podwin thought differently from the authorities cited by Justice Powell. Certainly he believed predatory pricing schemes could exist and could flourish and were possible. Such things did happen in this economic reality and were economically rational Professors Bork and Easterbrook to the contrary notwithstanding. This aspect of the arguments reaches into a most significant realm of public policy. By adopting the economic analysis he did, did not Justice Powell adopt as well a particular and critical view of antitrust law: that such jurisprudence is outdated and dangerous, the product of the populist passions of an earlier and primitive era, totally out of place in the brave, new world of international trade that has developed in the last generation?[20] One recognizes the relaxation of antitrust principles over the past decade. Nor do we hear the clarion call for a per se approach sounded by a Black or a Douglas. Instead, there are accommodations and attenuation and adaptation with well-place citations to Posner and Areeda and Bork for supports. But if this process of throwing antitrust into the dustbin of legal history is to be really and permanently effective, should not its proponents go to the elected Congress and ask for repeal there instead of accomplishing their goal by hiding behind the skirts of solemnly berobed justices who treat their often subsidized scholarly musings as the true definition of economic reality? Or is this not just another example of the judicial activism of the scholarly marauders of the New Right?

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[1] The list of book on Japanese business is a lengthy one. But a good representative sample would include: Ezra Vogel, Japan as Number One (Cambridge, Mass., 1979), Brock Yates, The Decline and Fall of the American Automobile Industry (New York, 1983), and David Halberstam, The Reckoning (New York, 1986). And for Japanese steel, see: Marvin Berkowitx and Krishna Mohan, "The Role of Global Procurement in Value Chain of Japanese Steel," 22 Columbia Journal of World Business 4 (Winter, 1987) pp. 99-110 as well as Krishna Mohan, "Raw Materials Procurement Strategy: The Differential Advantage and Success of Japanese Steel" 24 Journal of Purchasing and Material Management 1 (Spring, 1988), pp. 15-22.

[2] Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S. Ct 1348 (1986).

[3] 513 F. Supp. 1100 (ED Pa. 1981).

[4] 723 F. 2d 238 (CA3 1983).

[5] Matsushita, op cit., pp. 1351-1352.

[6] Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1125 (ED Pa 1980); Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1190 (ED Pa. 1980), Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1313 (ED Pa. 1981).

[7] Matsushita, op cit., pp. 1352-1353.

[8] For MITI, see Chalmers Johnson, MITI and the Japanese Miracle (Stanford, Calif., 1982).

[9] Matsushita, op. cit., pp. 1353-1354.

[10] Ibid. , p. 1354 and citing to United States v. Aluminum Company of America, 148 F. 2d 416, 443 (CA2 1945), (L. Hand, J.); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704, 824, S. Ct. 1404, 1413 (1962); and Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. , 429 U.S. 477, 488-489, 97 S. Ct. 690, 697 (1977).

[11] Ibid., pp. 1354-1355 and acting to Southern Pacific Communication Co. v. American Telephone and Telegraph Co., 238 U.S. App. D.C. 309, 331, 336, 740 F. 2d 980, 1002-1007 (1984) and Barry Wright Corp. v. ITT Grunnell Corp., 724 F. 2d 227, 232-235 (CA 1 19983).
[12] Ibid, pp. 1355-1356 and citing to First National Bank of Arizona v. Cities Service Co. 391 U.S. 253, 288-289, 88 S. Ct. 1575, 1592 (1968); Brunswick Crop v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 97 S. Ct. 690, 697 (1977); and Federal Rules of Civil Procedure 56(c), (e).
[13] Ibid, pp. 1356-1357 and citing to United States v. Diebold Inc. 369 U.S. 654, 655, 82 S. Ct. 933, 944 (1962), and Monsanto Co. v. Spray-Rite Service Corp. 465 U.S. 752, 104 S. Ct. 1464 (1982).
[14] Ibid, pp. 1357-1358 and citing to Robert Bork, The Antitrust Paradox 145 (1978); McGee, "Predatory Pricing Revisited," 23 Journal of Law and Economics 263, 268 (1981); and Areeda and Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 Harvard Law Review 697 (1975).
[15] Ibid., pp. 1358-1360.
[16] Ibid, pp.1360-1362 and citing to Estabrook, "The Limits of Antitrust" 63 Texas Law Review 1, 26 (1984) and United States v. Topco Associates 405 U.S. 596, 92 S. Ct. 1126 (1972).
[17] Ibid., pp. 1362-1365.
[18] Ibid., pp. 1365-1366.
[19] Ibid., p. 1366
[20] For varied treatments of the alleged economic primitivism of American Populism and its antitrust legacy, see Richard Hofstadter, The Age of Reform (New York, 1955); Norman Pollack, The Populist Response to Industrial America (New York, 1962) and Lawrence Goodwyn, Democratic Promise (New York, 1976).