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The Antitrust Vision and Its Revisionist Critics

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THE ANTITRUST VISION AND ITS REVISIONIST CRITICS

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The central challenge to a free society is to construct an organizational framework—a governance structure—to deal with both political and economic power. Who shall make what decisions? At whose cost and for whose benefit? To whom shall decision makers be accountable? What mechanism shall be put in place to encourage "right" decisions and to correct "wrong" decisions? Above all, how is individual freedom to be reconciled with the general welfare? How is the state to be made strong enough to protect its citizens and yet not powerful enough to enslave them?

I. THE RATIONALE OF ANTITRUST

In the political realm, the founding fathers responded to this challenge by incorporating the core principle of decentralized power in the United States Constitution.[1] As good eighteenth-century republicans, students of Locke and Montesquieu, combining a faith in the Enlightenment with their experience as colonial subjects, they sought to produce a document squarely based on popular sovereignty and opposition to arbitrary rule. Aware of man's shortcomings—his inordinate greed and insatiable lust for power—and believing that it was impossible to reform human nature, they concluded that vice could not be controlled by virtue, but that it was necessary to oppose one vice and interest with another vice and interest.[2] Therefore, they wanted to design a nation that would check interest with interest, faction with faction, class with class, and one governmental branch with another. Their master plan was to construct a system of checks and

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1. *See* THE FEDERALIST NO. 51, at 335-37 (A. Hamilton or J. Madison) (J. Cooke ed. 1961); W. LIPPMANN, AN INQUIRY INTO THE PRINCIPLES OF THE GOOD SOCIETY (1937); H. MORGENTHAU, THE PURPOSE OF AMERICAN POLITICS (1960).

2. *See* D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 126 (1990) (summary of speech by Gouverneur Morris, Pennsylvania delegate to the Constitutional Convention).

balances, a Newtonian mechanism of countervailing powers, operating harmoniously in mutual frustration. Their foremost goal was to prevent the *summum malum*: the concentration of power and the abuses that flow from it.

Thomas Jefferson, in particular, objected to the concentration of all governmental powers—legislative, executive, and judicial—in a single legislative body in his native Virginia.[3] To him, concentrating these powers in the same hands was precisely what despotic government was all about. The fact that these powers would be exercised by a legislature, popularly elected by majority vote, consisting perhaps of "upright" and decent men, made little difference.[4] "An elective despotism," he said, "was not the government we fought for . . . ."[5] The principles of liberty, he believed, required a system "in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."[6] In his *Notes on the State of Virginia*, Jefferson urged his colleagues to

> look forward to a time, and not a distant one, when a corruption in this, as in the country from which we derive our origin, will have seized the heads of government, and be spread by them through the body of the people; when they will purchase the voices of the people, and make them pay the price.[7]

The structure of the system, he said, was more important than the personal integrity of the individuals who exercised power under it, and the "time to guard against corruption and tyranny, is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered."[8]

Antitrust is inspired by the same philosophical precepts. It prescribes a central governance system for the economy which is also based on the principle of decentralized decision making. Here, the free play of market forces, not some central authority, is entrusted with the power to determine the kinds and quantities of goods to be produced, the factors of production to be employed, and the division of distributive shares. Here, individual

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3. T. JEFFERSON, *Notes on the State of Virginia*, in WRITINGS 123, 245-46 (M. Peterson ed. 1984).

4. *Id.* at 246.

5. *Id.* at 245 (emphasis omitted).

6. *Id.*

7. *Id.* at 246.

8. *Id.*

activity is to be coordinated through an autonomous and impartial planning mechanism free of human control, manipulation, or perversion. Here, competitive market forces are to harness the individual appetite for private gain to social ends. Here, society grants individuals the privilege of economic freedom because the competitive market imposes the checks and balances to constrain that freedom in the public interest.

The governance system imposed by the competitive market, of course, is neither natural nor immutable. Like any human artifact, it must be nurtured and protected from erosion and subversion. And that is the role of antitrust. Like the political system prescribed by our Constitution, it calls for a dispersion of power, buttressed by built-in checks and balances, to protect individuals from potential abuse of power and to preserve not only individual freedom but, more importantly, a free system. According to antitrust precepts—to paraphrase Justice William O. Douglas—power that controls the economy should not be in the hands of an industrial oligarchy.[9] Since all power tends to develop into a government in itself, industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whims or caprice, the political prejudices, and the emotional stability of a few self-appointed individuals. The fact that they are not vicious, but respectable and social-minded, is irrelevant. That is the philosophy and the command of the antitrust laws. They are founded on a theory hostile to private individuals amassing a power so great that even a government of the people can be trusted with it only in exceptional circumstances.

II. THE REVISIONIST CRITIQUE OF ANTITRUST

This view of antitrust has recently come under attack. A group of revisionist theorists, variously identified with the Chicago School and the New Learning, and spearheaded by Robert Bork, has rejected the "structuralist" interpretation of antitrust and embraced a policy of radical laissez-faire.[10] As propounded by Robert Bork, its most articulate

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9. *See* United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting).

10. *See, e.g., Authorization, Legislation and Oversight of the U.S. Department of Justice: Hearings Before the Senate Comm. on the Judiciary,* 100th Cong., 1st Sess. 4-11 (1988) (statement of Charles F. Rule, Acting Assistant Attorney General for Antitrust, Department of Justice); F.T.C. TRANSITION REPORT, *reprinted in* 126 CONG. REC. 21,349 (1981); W. BAUMOL, J. PANZAR & R. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982); Y. BROZEN, CONCENTRATION, MERGERS, AND PUBLIC POLICY (1982); INDUSTRIAL CONCENTRATION: THE NEW LEARNING (H. Goldschmid, H. Mann & J. Weston eds. 1974); J. MCGEE, INDUSTRIAL ORGANIZATION (1988); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); Becker, *Antitrust's Only Proper Quarry: Collusion*, BUS. WK., Oct. 12, 1987, at 22; Easterbrook, *Workable Antitrust*, 84

exponent, the New Learning doctrine resurrects the nineteenth-century belief in economic Darwinism,[11] including an abiding faith that (with the exception of price fixing) the "firm, in its own interests, will make the best choice for consumers."[12] To these it adds the assertions that the sole goal of antitrust is the maximization of "consumer welfare;"[13] that "consumer welfare" is synonymous with "economic efficiency;"[14] and that "economic efficiency" is not susceptible to quantification or measurement but, instead, can only be inferred from a firm's survival and growth (in the absence of government intervention).[15]

The implications for antitrust policy, especially merger policy, are clear: horizontal mergers which increase economic concentration are not necessarily objectionable. Indeed, they may be "prima facie evidence that greater concentration . . . is socially desirable."[16] Furthermore, since vertical mergers do not combine direct competitors, interfering with them obstructs "the creation of efficiency" and, therefore, "antitrust should never object to the verticality of any merger."[17] As regards conglomerate mergers, "antitrust should never interfere with any conglomerate merger. Like the vertical merger, the conglomerate merger does not put together rivals . . . . [C]onglomerates do not threaten competition, and they may

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MICH. L. REV. 1696 (1986); Gatty, *Antitrust Goal: "Economic Rationality,"* NATION'S BUS., Oct. 1981, at 59; Ginsburg & Robinson, *The Case Against Federal Intervention in the Market for Corporate Control*, BROOKINGS REV., Winter-Spring 1986, at 9; *Interview with Assistant Attorney General William F. Baxter: Merger Surge is a Test of Reagan Policy*, U.S. NEWS & WORLD REP., Aug. 3, 1981, at 51; Oliver, *Luncheon Address*, 55 ANTITRUST L.J. 349 (1986); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Reilly, *Big Shift in Antitrust Policy*, DUN'S REV., Aug. 1981, at 38; Smith, *Why Not Abolish Antitrust?*, REGULATION, Jan.-Feb. 1983, at 23; Taylor, *A Talk with Antitrust Chief William Baxter*, Wall St. J., Mar. 4, 1982, at 28, col. 3.

11. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 117-18 (1978); *see also* W. ADAMS & J. BROCK, THE BIGNESS COMPLEX 4-5, 25-30 (1986) (discussing theories, Darwinian and otherwise, employed to rationalize concentrations of economic power).

12. R. BORK, *supra* note 11, at 208.

13. *Id.* at 66-72. According to Bork, "[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription." *Id.* at 66. For insight into the revisionist view of the purposes of antitrust, see Kovacic, The Antitrust Paradox *Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413 (1990).

14. R. BORK, *supra* note 11, at 91. Bork states that "[t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare." *Id.*

15. *Id.* at 124-33.

16. *Id.* at 205.

17. *Id.* at 234, 245.

contribute valuable efficiencies."[18] Imbued with faith in economic Darwinism and the sanctity of industry structures, New Learning and Chicago School faithfuls would permit horizontal mergers between direct competitors accounting for as much as sixty to seventy percent of a particular market.[19]

Fabricated from tautological constructs, the New Learning begs the core questions of economic power and antitrust. The apostles of the New Learning monomaniacally insist upon the primacy of "consumer welfare" and "efficiency" as the only "legitimate" goals of antitrust policy.[20] They incessantly demand that all antitrust issues be resolved solely in these terms. But what do "consumer welfare" and "efficiency" mean in New Learning doctrine? To what do they refer? How do they differ from their everyday interpretation? In what context are they applied? What, in their application, do they omit from consideration? With what consequences and implications? Once these questions are examined, the New Learning dissolves into a vacuous tautology.

From the assumption that consumers make choices in attempting to maximize their individual well being, the New Learning leaps to the doctrinaire conclusion that the existing pattern of consumer choices must represent the highest possible level of consumer welfare.[21] Because

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18. *Id.* at 248.

19. *Id.* at 251. According to Bork, the law should strike only at those horizontal mergers which create "very large market shares (those that leave *fewer than three* significant rivals in the market)." *Id.* at 406 (emphasis added).

20. *Id.* at 55-66. For different views of congressional intent with respect to antitrust policy, see Flynn, *The Reagan Administration Antitrust Policy: "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 266-67 (1988) (Congress's goal was "to improve allocative efficiency without impairing productive efficiency so greatly" as to impinge upon the maximization of wealth); Fox & Sullivan, *Antitrust Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 931, 970 (1987) (Congress sought to promote competition); Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 65 (1982) (Congressional intent was to further economic objectives of a "distributive rather than an efficiency nature").

21. *See, e.g.*, D. ARMENTANO, ANTITRUST AND MONOPOLY 43 (1982) ("[r]esources are not misallocated when they are allocated in accordance with revealed consumer preferences in open markets"); R. BORK, *supra* note 11, at 105 ("[s]ince a free market system assumes that consumers define their own welfare, it follows that productive efficiency consists in offering anything, whether products or services, that consumers are willing to pay for"); R. POSNER, ECONOMIC ANALYSIS OF LAW 13 (3d ed. 1986) ("[w]here resources are shifted pursuant to a voluntary transaction, we can be reasonably sure that the shift involves an increase in efficiency"); Bork, *Panel Discussion*, in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM: LEGAL, ECONOMIC, SOCIAL AND POLITICAL PERSPECTIVES 155 (E. Fox & J. Halverson eds. 1979) ("you have to take the consumer's word on the question of what his welfare is, he buys the product because he wants it, and that is good enough for us");

consumers maximize welfare, their welfare is presumed to be at a maximum—regardless of how restricted the range of available options, regardless of how unappealing, in an absolute sense, those options might be, and regardless of the onerous external diseconomies of each available option. What is chosen maximizes consumers' welfare. Why? Because it is welfare maximizing to choose it!

For example, confronted with only large, expensive gas-guzzling automobiles, the fact that consumers buy them would be taken by the New Learning as proof that such cars maximize consumer welfare, even though consumers might have chosen small, fuel-efficient autos if they had been provided, and even though consumer welfare would have been greater as a result. But, as Warren Samuels points out, the individual confronted with a preordained range of options (i.e., choose any car so long as it is a big gas-guzzler) is a choice taker, not a choice maker.[22] Under these circumstances, consumer sovereignty is compromised and the regulatory power of the market is vitiated.

The New Learning translates this circular reasoning into its canons of "efficiency" in resource allocation. According to New Learning advocate Robert Bork, for example, efficiency "is defined and measured in terms of consumer welfare. Since a free market system assures that consumers define their own welfare, it follows that productive efficiency consists in offering anything, whether products or services, that consumers are willing to pay for."[23] Thus, the mere fact that offerings are purchased is, according to New Learning doctrine, "proof" of efficient resource utilization[24]—again, regardless of how narrow the actual range of products available, regardless of the terms exacted for them, regardless of whether consumers might have bought other products if available, and regardless of whether the latter outcome would have resulted in a better, more efficient use of society's resources. In other words, if the automobile oligopoly produces only large, gas-guzzling cars and consumers buy them, then, according to New Learning doctrine, production of large, gas-guzzling cars represents the most "efficient" employment of society's scarce resources. What is produced is efficient. Why? Because it is efficient to produce it!

McGee, *Efficiency and Economies of Size*, in INDUSTRIAL CONCENTRATION, *supra* note 10, at 55, 91 ("[i]f markets are 'open' . . . and consumers are free to accept what they regard as the best offers going, there is a very strong presumption that the benefits from trade will be as high as realistically can be").

22. Samuels, *Welfare Economics, Power, and Property*, in PERSPECTIVES OF PROPERTY 61 (G. Wunderlich & W. Gibson eds. 1972).

23. R. BORK, *supra* note 11, at 104-05.

24. *See id.* at 105.

Hence, the circularity is complete: Whatever consumers choose is "efficient," and whatever firms produce maximizes "consumer welfare." If this were not so, different choices would be made. The fact that different choices are not made "proves" that the actual choices reflect a "voluntary," "non-coerced," "consensus" optimum of "consumer welfare;" it "proves" that the current allocation of resources reflects the maximum systemic "efficiency." Buttressed by the concept of Pareto optimality,[25] therefore, the New Learning is not only tautological, but it begs important questions: What choices would consumers have made if the opportunity set from which they chose had been more expansive and more diverse? Would not a different array of options lead to a different pattern of consumer choices, and greater consumer welfare? Would it not result in a different, more efficient allocation of society's resources?

More fundamentally, the New Learning evades the essential questions of political economy: Who determines the options from which consumers are permitted to choose? Who thus governs the allocation of society's resources? According to what criteria? With what consequences? For whom? With whose consent? And with what assurance that the outcome will be in the public interest?

Reflexively incanted, "consumer welfare" and "efficiency" are the shibboleths with which the New Learning reads economic power out of the picture—where economic power includes the capacity to influence the options from which consumers will be permitted to choose, to manipulate the cost of those options, and thus to govern the allocation of resources. The New Learning fails to consider that concentrations of private economic power will yield patterns of consumption and resource allocations different from those that would be produced under competitive conditions. It fails to recognize that a different private power structure will produce a different array of consumer options, with different consumer choices, and a different allocation of resources. Above all, it fails to consider that "voluntary" choice within the confines of a restricted range of alternatives maximizes neither consumer welfare nor allocative efficiency in any meaningful sense. As a result, it falls victim to the sin of suboptimization.

In so doing, the New Learning sanctifies the status quo and the existing pattern of private power. It legitimizes coercion, so long as it is exerted by private power concentrates. Thus it is tantamount to defining "consumer welfare" and "efficiency" as equivalent to whatever private power can commandeer.

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25. For a correct view of Pareto optimality, see Samuelson, *Pure Theory of Public Expenditures and Taxation*, in PUBLIC ECONOMICS 98, 106-07 (J. Margolis & H. Guitton eds. 1969) (stating that Pareto optimality cannot be arrived at by dealing with all interrelated questions simultaneously because in reality problems do arise and social welfare functions lead to different outcomes).

As a putative guide for antitrust policy, the New Learning fails to ask the relevant question of whether less concentration and more independent centers of initiative are more likely, in practice, to produce better economic performance. It fails to consider whether the competitively structured market, with a multiplicity of rivals, is more likely to expand the range of options from which consumers can choose, to foster experimentation and innovation in new products, to promote greater consumer welfare, and to result in better resource allocation and use. It fails to consider that mergers and concentration reduce the number of suppliers of options to consumers, narrow the range from which consumers can choose, and thereby jeopardize consumer welfare and efficiency. It fails to consider that merger-induced corporate concentration creates powerful bigness complexes able to manipulate consumer options and resource allocations—without any assurance that the exercise of such discretion will promote society's best interest.

In sum, the fatal flaw of the New Learning is that it rules out consideration of the core concern of antitrust—the problem of economic power in a free-enterprise economy. It mistakes means for ends and tools for truth.

III. THE REVISIONIST VIEW: AN EMPIRICAL TEST

The American automobile industry affords an appropriate case study for empirically testing the New Learning's claims. The industry is, and has long been, a powerful triopoly of firms. The Big Three producers—General Motors (GM), Ford, and Chrysler—traditionally have accounted for ninety percent or more of America's automobile production and, until recently, they collectively controlled an equivalent share of U.S. auto sales.[26] They rank as the first, third, and eleventh largest industrial corporations in the United States,[27] and are the world's first, fourth, and twenty-seventh largest manufacturers respectively.[28] They employ 1.2 million workers,

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26. *See* Adams & Brock, *The Automobile Industry*, in THE STRUCTURE OF AMERICAN INDUSTRY 101, 104-07 (W. Adams ed. 1990). In 1989, GM, Ford, and Chrysler together accounted for 83% of all U.S. automobile production, and 67% of all U.S. automobile sales. AUTOMOTIVE NEWS, 1990 MARKET DATA BOOK 12, 27 (1990). These concentration figures, however, are understated, because they exclude "captive" imports (foreign-produced automobiles imported by the Big Three under their own nameplates), and because they also fail to take into account the extensive joint-venture ties between the Big Three and most of their major foreign rivals.

27. *The Fortune 500: Largest U.S. Industrial Corporations*, FORTUNE, Apr. 22, 1991, at 280, 286.

28. *The Global 500: The World's Biggest Industrial Corporations*, FORTUNE, July 29, 1991, at 244, 245.

and had $260 billion in sales, assets of $385 billion, and combined profits of $8.4 billion in 1989.[29]

These automotive giants are extensively integrated—horizontally, vertically, internationally, and conglomerately. They assemble motor vehicles at a multitude of locations across the country. They are vertically integrated upstream, producing automotive parts and components in scores of additional plants. They have vertically integrated downstream in recent years, acquiring sizable ownership stakes in seven rental car firms (including leaders Hertz and Avis).[30] They are integrated internationally, ranking among the largest motor vehicle manufacturers in a number of nations around the globe and, during the 1980s, they have woven an intricate web of joint-venture agreements with virtually all of their major foreign rivals.[31] They are extensively diversified, especially GM, which until recently controlled some 75% of U.S. bus production, 100% of passenger locomotives, and 80% of freight locomotives.[32] In the 1980s, the Big Three unleashed major conglomerate acquisition campaigns, including GM's $2.5 billion purchase of Electronic Data Systems (EDS), and its $5 billion acquisition of Hughes Aircraft Company (a leading defense contractor).[33] Ford, through acquisitions, now ranks as the nation's second-largest provider of financial services, and has purchased New Holland farm equipment and BDM (a defense contracting firm),[34] and Chrysler has acquired Gulfstream Aerospace for $628 million, along with a number of financial service concerns.[35]

Here, then, are corporate size and market power on an impressive scale. But what are the consequences of absolute and relative firm size in this major industry? How does it impact the options from which consumers are free to choose? Have corporate size, industrial concentration, and market power served to promote consumer welfare, as the New Learning claims? Has it promoted efficiency in the allocation of society's resources?

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29. *Id.*

30. *See* Patterson, *Chrysler to Acquire Dollar Rent A Car, Eyeing Broader Market in Rental Sector*, Wall St. J., June 27, 1990, at A4, col. 2.

31. For a detailed analysis of this latter phenomenon and the anticompetitive problems it poses, both in autos and more generally, see Adams & Brock, *Joint Ventures, Antitrust, and Transnational Cartelization*, 11 NW. J. INT'L L. & BUS. 433 (1991).

32. *The Industrial Reorganization Act: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 4A, at A-26 (1974) [hereinafter *Industrial Reorganization Act Hearings*] (statement of Bradford C. Snell, Assistant Counsel to the Subcommittee).

33. MOODY'S INVESTORS SERV., 1 MOODY'S INDUSTRIAL MANUAL 1233 (1989).

34. Clark, *Benton Aims Ford at "Core" Business*, AUTOMOTIVE NEWS, Apr. 30, 1990, at 1, 40; Reiff, *Slowing Traffic Ahead*, FORBES, Apr. 30, 1990, at 82.

35. MOODY'S INVESTORS SERV., *supra* note 33, at 1045.

Has it effectuated a social optimum? The empirical evidence in four important areas—urban transportation, fuel economy, automotive safety, and smog control—is instructive.

A. *Urban Transportation*

Objectively considered, allocative efficiency in the nation's urban areas calls for the combination of alternative transport modes (mass transit railways, trolleys, buses, and private passenger cars) best capable of moving masses of people quickly, comfortably, and economically, while conserving scarce land and space.

In actuality, of course, urban transportation is overwhelmingly dominated by the private automobile—a result that in many respects represents the *least* efficient allocation of resources. As one expert points out, the preeminence of the private car in America's cities produces "congestion, pollution, and a growing sense of frustration. Where all-out efforts have been made to accommodate the car, the streets are still congested, commuting is increasingly difficult, urban aesthetics have suffered, and the quality of life has been eroded."[36] Former Transportation Secretary Alan Boyd once observed that a description of a city under wartime siege would differ little from that of a contemporary American city during the daily rush hour.[37] Or as transportation specialist John Burby calculated: "Traffic in downtown New York, which in 1906 crept along behind horses at an average speed of 11.5 miles an hour, was by 1966 creeping along at 8.5 miles an hour behind the most powerful engines Detroit could mass-produce."[38]

But the predominance of the private passenger car, and its untoward economic impact upon urban environments, is not solely the result of market supply passively responding to consumer preferences. Rather, the automobile oligopoly generally, and GM in particular, acted to artificially restrict the transportation options from which urban dwellers have been permitted to choose.

As the nation's predominant producer of buses and automobiles, GM understood, at an early date, that if urban railways could be effectively eliminated as viable consumer options, the sales of its buses could be vastly expanded. And if transit systems using buses could subsequently be made to decline or fail, and urban consumers' choices further constricted, a huge market would open up for additional sales of private automobiles.

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36. W. OWEN, THE ACCESSIBLE CITY 1 (1972).

37. H. LEAVITT, SUPERHIGHWAY-SUPERHOAX 13 (1970).

38. J. BURBY, THE GREAT AMERICAN MOTION SICKNESS OR WHY YOU CAN'T GET THERE FROM HERE 4 (1971).

Thus, according to the findings of a federal court (sustaining a conviction for criminal conspiracy to violate the antitrust laws),[39] GM was instrumental in organizing National City Lines, an operating company that engineered the demise of forty-six electric mass transit systems in forty-five cities in sixteen states.[40] Through its National City Lines subsidiary, GM and its co-conspirators (a tire producer and an oil company) gained control of urban rail transit systems, literally destroyed them, and replaced them with GM buses.[41]

The consequences of the oligopoly's power to constrain consumers' choices and to restrict their options can scarcely be construed as promoting consumer welfare or social efficiency. Analyst Bradford C. Snell testified before a congressional committee that prior to GM's formation of National City Lines the Los Angeles area "was a beautiful region of lush palm trees, fragrant orange groves, and clean, ocean-enriched air. It was served then by the world's largest interurban electric railway system."[42] But, Snell continued, in the late 1930s, General Motors and allied highway interests

> purchased the local transit system, scrapped its electric transit cars, tore down its power transmission lines, ripped up the tracks, and placed GM diesel buses fueled by Standard Oil on Los Angeles' crowded streets. In sum, GM and its auto-industrial allies severed Los Angeles' regional rail links and then motorized its downtown heart.
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> Motorization drastically altered the quality of life in southern California. Today, Los Angeles is an ecological wasteland: The palm trees are dying from petrochemical smog; the orange groves have been paved over by 300 miles of freeways; the air is a septic tank into which 4 million cars, half of them built by General Motors, pump 13,000 tons of pollutants daily.[43]

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39. United States v. Nat'l City Lines, 186 F.2d 562 (7th Cir. 1951).

40. *Id.* at 568.

41. *Id.* at 565-66. In addition, GM President Alfred Sloan organized the National Highway Users Conference (NHUC) in 1932 "to combine representatives of the Nation's auto, oil, and tire industries in a common front against competing transportation interests." *Industrial Reorganization Act Hearings*, *supra* note 32, at A-44 (statement of Bradford C. Snell, Assistant Counsel to the Subcommittee). The organization's announced objectives were dedication of gasoline taxes solely to highway purposes and the promulgation of an ongoing program of highway construction. Its 2800 lobbying groups subsequently persuaded more than forty states to create trust funds, and NHUC has repeatedly succeeded in defeating efforts to use highway trust funds for alternative transport options. *Id.*

42. *Industrial Reorganization Act Hearings*, *supra* note 32, at A-31 (statement of Bradford C. Snell, Assistant Counsel to the Subcommittee).

43. *Id.*

Nor was the situation in Los Angeles unique.[44] More generally, after examining the historical record, transportation expert George Smerk concluded that street "railways and trolley bus operations, even if better suited to traffic needs and the public interest, were doomed in favor of the vehicles and material produced by the [National City Lines] conspirators"[45]—evidence scarcely indicative of social optimality or the operation of an open, competitive market reflecting the free play of consumer preference.

B. *Fuel Efficiency and the Small Car*

Because automobiles account for nearly half of the country's oil consumption,[46] the fuel efficiency, or inefficiency, of the Big Three's automobiles exerts a decisive impact on America's consumption of petroleum, its dependence on geopolitically volatile foreign oil supplies, and the urgency and eventual success of its national energy policy. Has oligopoloid size contributed to efficient resource allocation in these respects? Hardly.

The Big Three refused for decades to make smaller, less expensive and more fuel-efficient automobiles available to consumers, despite indications of consumer interest in these options. In fact, as early as the 1940s, the United Auto Workers urged Detroit to build small, fuel-efficient cars, citing an opinion survey conducted by the Society of Automotive Engineers indicating that sixty percent of the public favored this type of automobile.[47] Later, a committee of the National Academy of Engineering found that a secular shift in consumer preferences toward small cars "was evident long before OPEC quadrupled the price of crude oil" in the 1970s.[48]

Rather than respond to this consumer preference, however, the Big Three withheld small, fuel-efficient cars from the American market,[49] and effectively evaded the competitive market test of consumer choice. In

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44. *See id.* at A-32; *see also infra* note 77.

45. G. SMERK, URBAN TRANSPORTATION 50 (1965).

46. Flavin, *Detroit: America's Best Source of Oil*, N.Y. Times, Aug. 26, 1990, § 3, at 13, col. 2.

47. Blumberg, *Snarling Cars*, NEW REPUBLIC, Jan. 24, 1983, at 12.

48. NAT'L ACADEMY OF ENG'G, THE COMPETITIVE STATUS OF THE U.S. AUTO INDUSTRY 20 (1982).

49. However, it is significant that the American auto oligopoly was not averse to making small, fuel-efficient automobiles available abroad. For example, a small, light-weight car developed by GM was marketed in Australia in 1948 by a GM subsidiary, while Ford's light car appeared the same year as the French Ford Vedette. *See* White, *The American Automobile Industry and the Small Car, 1945-1970*, 20 J. INDUS. ECON. 179, 181 (1972).

1962, for example, Ford canceled the planned introduction of its Cardinal, which featured a front-mounted, transverse, four-cylinder engine and front-wheel drive, similar to the GM X-cars, the Ford Escort, and the Chrysler Omni introduced twenty years later.[50]

The noncompetitive mutual interdependence and oligopolistic group-think characteristic of concentrated market structures seems to have played a key role in the industry's refusal to supply smaller, more economical automobiles. As brilliantly documented by economist Lawrence J. White, GM, Ford and Chrysler each recognized that vigorous unilateral entry into small car production would likely trigger entry into the field by the others and, in turn, would undermine their group-monopoly profits on large cars:

> Twice, one or two of the Big Three pulled back from plunging ahead with a small car when the market did not look large enough for all three. . . . A sizable niche might well have been carved out at the bottom of the market by a Big Three producer in 1950, or again, with a "subcompact" in 1962 or 1963. Room-for-all considerations, however, appeared to rule this out.[51]

On the basis of their behavior, White concludes that

> the Big Three definitely recognized their mutual interdependence, since in the absence of retaliation by rivals a single firm contemplating the production of a small car should have expected to gain more profits from stealing the dissatisfied customers from other firms than he would lose from dissatisfied customers of his own large cars. . . . [B]ut the Big Three mutually contemplating a small car could only see lost profits from reduced sales of large cars.[52]

Of course, the social ramifications of the industry's performance struck home with a vengeance in the 1970s, when the nation was convulsed by oil shortages, gasoline crises, mile-long service-station lines, and armed service-station attendants. Yet, the industry continued to resist efforts to

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50. NAT'L ACADEMY OF ENG'G, *supra* note 48, at 70. The industry's attitude was summarized in a 1957 *Fortune* article: "If GM has said it once, it's said it ten thousand times: 'A good used car is the answer to the American public's need for cheap transportation.'" Sheehan, *A Big Year for Small Cars*, FORTUNE, Aug. 1957, at 105. "I think there is something wrong with those people who buy small cars," a GM official categorically declared. B. YATES, THE DECLINE AND FALL OF THE AMERICAN AUTOMOBILE INDUSTRY 34 (1983).

51. White, *supra* note 49, at 191.

52. *Id.* at 180.

make more fuel-efficient cars available to consumers. Just months before the first OPEC oil embargo in 1973, the chairman of GM pointed to nuclear power as an important means for resolving what he denigrated as the nation's energy "question."[53] In 1979, one month before the overthrow of the Shah of Iran and the onset of the nation's second oil crisis in six years, GM's President Elliott M. (Pete) Estes assured the public that automotive "fuel economy standards are not necessary and they are not good for America."[54] In 1985, when government fuel-economy standards once again began to constrain their decision-making power, the auto giants capitalized on their economic size, and used the threat of massive plant shutdowns and job layoffs to bludgeon Congress into relaxing the mileage standards.[55] And in the midst of the 1990 Iraq-Kuwait oil crisis, with automotive fuel economy actually declining over the two-year period preceding it,[56] the oligopoly continued to resist efforts to

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53. *Automotive Research and Development and Fuel Economy: Hearings Before the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 564 (1973) [hereinafter *Automotive Research and Development Hearings*] (statement of Richard C. Gerstenberg, Chairman, General Motors Corp.).

54. E. CRAY, CHROME COLOSSUS 524 (1980).

55. Unless the fuel economy requirements were relaxed, a GM Vice-President warned Congress, "full-line manufacturers [that is, GM and Ford], to achieve compliance, face the prospect of restricting product availability . . . ." *Automobile Fuel Economy Standards: Hearings Before the Subcomm. on Energy Regulation and Conservation of the Senate Comm. on Energy and Natural Resources*, 99th Cong., 1st Sess. 57 (1985) (statement of Dr. Marina N. Whitman, Vice-President, Public Affairs, General Motors Corp.). This, she pointedly noted for the benefit of Congress, "translates into plant closings, job losses, and lower economic growth." *Id.* Failure by Congress to accede to the industry's demands, she repeated, "would mean inevitably fewer sales, closing some plants, putting people out of work, slowing down the economy." *Id.* at 81. To drive the point home, GM submitted an extensive list of eighty-eight plants—with the city and state location of each conveniently specified—that could be adversely affected should the Congress refuse to act. *Id.* at 284-88. Ford echoed GM's demands, despite evidence that the fines for failing to meet the government fuel economy standards would amount to less than one percent of suggested retail prices of the least fuel-efficient cars, and despite the fact that even the industry-oriented National Highway Traffic Safety Administration (NHTSA) conceded that the auto companies "may, to some extent, influence demand through their marketing and pricing strategies." *Id.* at 27 (statement of Diane K. Steed, Administrator, NHTSA).

Nevertheless, the industry's threats were crowned with success in July, 1985, when NHTSA relaxed automotive fuel standards in accordance with the demands of GM and Ford, citing adverse economic consequences, including "substantial sales losses for the manufacturers and increased unemployment in the auto industry" if the standards were not lowered. Stuart, *U.S. Announces It Will Ease '86 Auto Fuel Economy Rule*, N.Y. Times, July 19, 1985, at A12, col. 1.

56. *See* Sullivan, *It Wouldn't Be Easy, But U.S. Could Ease Reliance on Arab Oil*, Wall St. J., Aug. 17, 1990, at A4, col. 2.

boost auto fuel efficiency, thereby exacerbating America's continuing dependence on unreliable foreign oil supplies.[57]

The oligopoly's relative immunity from external control—indeed, its considerable power to dictate social choices—seems clear. Whether this promotes consumer welfare or a rational allocation of resources is, to say the least, an open question.

Energy analyst Christopher Flavin pointed out that if "average [auto] fuel economy was just five miles per gallon higher, we would be importing two million fewer barrels of oil each day, and in a much better position to withstand the effects of the embargo on Iraq." Flavin, *supra* note 46, at 13, col. 2. Yet at the height of the Iraq-Kuwait oil crisis, GM introduced its Buick Roadmaster, "a 4,410-pound monster with a V-8 engine that gets sixteen miles to the gallon in city driving." White & Templin, *Gas Price Jump Finds Car Makers Backsliding on Fuel Efficiency*, Wall St. J., Sept. 14, 1990, at A1, col. 6.

The industry defends its fuel-economy record by claiming that its attention has been devoted to safety and pollution control achievements, which conflict with higher mileage. *Id.* at A4, col. 3. But this defense is contradicted by the industry's traditional resistance to safety and pollution improvements, *see infra* notes 58-82 and accompanying text, as well as by the industry's backwardness in such innovations as multivalve engines, which pollute less and achieve higher mileage, *see infra* note 103 and accompanying text. For example, Honda's stratified-charge CVCC engine of the 1970s obtained higher mileage while being less polluting (and without the need for complicated catalytic converters that the U.S. oligopoly eventually adopted to reduce automotive emissions). B. YATES, *supra* note 50, at 168.

More generally, the National Highway Traffic Safety Administration was able, during the 1970s, to design and build experimental automobiles which obtained 32 to 50 miles per gallon, yet were able to protect occupants in 50 mile-per-hour frontal crashes. *See* McGinley, *Gas Savings vs. Safety Stirs Debate*, Wall St. J., Sept. 6, 1990, at B1, col. 1.

57. *See, e.g.*, Hanna, *Don't Mandate Higher-Mileage Cars*, USA Today, Aug. 10, 1990, at 10A, col. 2.

It is supremely ironic that after doing all it could to keep fuel-efficient automobiles off the market and out of consumer choice sets for decades, the industry should now defend its recent resistance to higher fuel-economy standards in the name of promoting consumer choice. Thus, Thomas Hanna, President of the Motor Vehicle Manufacturers Association, argues that if higher fuel-economy requirements are enacted, "[m]illions of Americans . . . will have to forego the performance, comfort and utility of the kinds of cars and trucks most suited to their needs." *Id.* Obviously, the fact that consumers have for decades been denied the choice of high fuel-economy cars seems not to concern the industry, which apparently holds sacrosanct its power to restrict consumer choice.

C. *Automotive Safety*

Over the course of the twentieth century, the Office of Technology Assessment reported in 1979, "approximately two million persons have died and nearly 100 million have been injured through the use of motor vehicles—a total that is more than three times the combat losses suffered by the United States in all wars."[58] The average death toll from auto crashes of 121 people per day is equivalent to the occurrence of a major airline disaster every day, and imposes an economic burden on the country estimated at nearly $60 billion per year.[59]

Can this carnage be attributed to the exercise of choice by drivers? Have they knowingly chosen to subject themselves to this kind of bodily risk? Has the auto oligopoly merely responded to a perverse consumer preference for life-threatening thrills? Hardly. A more likely explanation is that the industry for decades has denied consumers the freedom to choose safer automobiles, simply by refusing to make them available.

Patents awarded the auto giants in the 1920s and 1930s for such safety features as padded dashboards and collapsible steering columns were shelved for decades, until their use was mandated by government decree.[60] The industry also ignored or dismissed important results of safety research conducted by others.[61]

As one result, automobiles became progressively more dangerous in design over the post-World War II era. In a comparative analysis conducted in 1955, for example, Cornell University researchers found that "when injury producing accidents occur, occupants of 1950-54 cars are injured more often than occupants of 1940-49 cars. Further, there is a statistically significant increase in the frequency of fatality among the occupants of 'newer' cars."[62] A little over a decade later, the Senate Commerce Committee

> was presented with graphic evidence that the interior design of many 1966 model cars reveal interiors bristling with rigid tubes,

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58. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, CHANGES IN THE FUTURE USE AND CHARACTERISTICS OF THE AUTOMOBILE TRANSPORTATION SYSTEM (1979), *quoted in* D. BOLLIER & J. CLAYBROOK, FREEDOM FROM HARM 65 (1986).

59. D. BOLLIER & J. CLAYBROOK, *supra* note 58, at 65-66.

60. *See Federal Role in Traffic Safety: Hearings Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 89th Cong., 2d Sess., pt. 3, at 1319-21 (1966) [hereinafter *Federal Role in Traffic Safety Hearings*]; *see also* R. NADER, UNSAFE AT ANY SPEED 92-93 (1965) (discussing the industry's shelving of safety-enhancing patents).

61. *See* R. NADER, *supra* note 60, at 143.

62. *Id.* at 134.

> angles, knobs, sharp instruments, and heavy metal of small radius of curvature. . . . The committee was likewise made aware of the substantial needless hazards to pedestrians presented by external fins, ornamental protrusions, sharp edges, stylistically angled bumpers.[63]

Throughout this period, the oligopoly insisted that safety should be optional, supplied only in response to consumer demand and preference (or the lack thereof).[64] Yet the Big Three steadfastly refused to release the safety information essential to informed, rational consumer decision making:

> The industry has actively cultivated a consumer ignorance about safety by promoting a concept of an automobile that stressed style, ride, and performance. While eager to tell the potential consumer about the rated horsepower, acceleration capability and kinds of interior decor, the automaker will not tell him, even if he demands it, such important facts about the safety of the cars as: brake stopping ability, tire skid and blowout resistance, roof collapse strength, door latch and door hinge strength, the dash panel's and windshield's cushioning ability, the amount of rearward displacement of the steering wheel and shaft under a forward crash into a fixed barrier, the side and roof crash resistance of the vehicle and the seat anchorage strength. These technical values can all be given in quite precise terms against expressed criteria.[65]

Instead, the oligopoly has expended enormous sums to extol raw power and rocket acceleration, and then traditionally retreated behind its plea that "safety doesn't sell," despite considerable evidence to the contrary. For example, in his study of the industry in the early 1970s, John Jerome found that Ford could not meet the unexpectedly strong consumer demand for the safety package it offered as an option in its 1956 model line.[66] Yet, Ford

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63. SENATE COMM. ON COMMERCE, NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT OF 1966, S. REP. NO. 1301, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2709, 2711.

64. *See* R. NADER, *supra* note 60, at 250-51.

65. *Federal Role in Traffic Safety Hearings*, *supra* note 60, at 1279.

66. J. JEROME, THE DEATH OF THE AUTOMOBILE 273 (1972). As explained in a 1956 press release issued by the Ford Motor Company:

> Since two of the five [safety] features—crash padding and seat belts—were optional with the customer, it was possible to measure demand by totaling up the number sold. The demand surprised even the optimistic Ford staff. No optional feature

abruptly dropped the safety package in the same year it was offered—perhaps, some suggest, because of pressure exerted on it by GM.[67] Ford also remained silent after discovering (through its own internal testing) the dangerous design of GM's infamous Corvair, a reticence that seems to have been motivated in part by Ford's desire to maintain cordial relations with its fellow oligopolist.[68]

The market power of the Big Three to restrict consumer choice, and to manipulate the allocation of resources, is particularly clear in the case of the industry's decades-long battle against the air bag. Despite estimates that air bags can save thousands of lives annually, and that they can prevent hundreds of thousands of serious injuries, GM, according to a Senior Vice-President of the Insurance Institute for Highway Safety (IIHS), "pursued a policy of withholding that technology from the public, encouraging delay of federal passive restraint requirements, and discouraging consumer interest in the handful of air bag-equipped cars it produced in the mid-1970s."[69] GM persistently refused to publicize air bags despite its own surveys (subsequently suppressed for eight years) revealing that forty to fifty percent of GM's customers would be willing to pay "a significant amount" for air-bag protection; despite a 1985 IIHS poll revealing that over half (fifty-two percent) of those polled were in favor of "requiring car manufacturers to equip new cars with airbags even if airbags cost $350";[70] and despite the conclusion of two former GM officials that air bags for front-seat occupants would cost only $148 per car, rather than the far higher costs decried by the industry.[71] In fact, in a 1976 front-page exposé, the *Wall Street Journal* disclosed that air bags "received no wholehearted promotion" by GM and, further, that "the company and its dealers actively *discouraged* [air bag] sales."[72]

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in Ford history caught on so fast in the first year.

D. BOLLIER & J. CLAYBROOK, *supra* note 58, at 67. Ford officials estimated that the safety package boosted the firm's annual sales by approximately 200,000 automobiles. *Id.* at 68.

67. *See* L. IACOCCA, IACOCCA 296 (1984).

68. *See* E. CRAY, *supra* note 54, at 409.

69. *Motor Vehicle Safety and the Marketplace: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 71 (1983) [hereinafter *Motor Vehicle Safety Hearings*] (statement of Ben Kelley, Senior Vice-President, IIHS).

70. *Airbags & Seatbelts . . . Why Not Both?*, AIDE: THE MAGAZINE FROM USAA, Summer 1985, at 10, 13-14 [hereinafter *Airbags & Seatbelts*].

71. *Motor Vehicle Safety Hearings*, *supra* note 69, at 71-76; *see also Airbags & Seatbelts*, *supra* note 70, at 14 (discussing cost of air bags and the development of a new system estimated to cost under $100).

72. Karr, *Saga of the Air Bag, Or the Slow Deflation of a Car-Safety Idea*, Wall St. J., Nov. 11, 1976, at A1, col. 4 (emphasis added). GM's behavior in this regard has not

Reviewing the record in 1983, the Supreme Court sharply castigated the industry for having "waged the moral equivalent of war against air bags."[73] Only last year did GM finally announce that by 1995 a driver's-side air bag will be standard equipment in every car it builds in the United States.[74]

Here again, the industry's concentrated market structure, and the anticompetitive concern for group protection that it fosters, has afforded the oligopoly the power to restrict consumer choice by collectively withholding product options from the market. The phenomenon is neither new nor surprising. It was elucidated long ago by GM President Alfred Sloan, when he confided:

> I feel that General Motors should not adopt safety glass for its cars . . . . I can only see competition being forced into the same position. Our gain would be purely a temporary one and the net result would be that both competition and ourselves would have reduced the return on our capital and the public would have obtained still more value per dollar expended.[75]

Freedom of choice? Consumer welfare? Allocative efficiency? Only the Theater of the Absurd would countenance such abuse of language and distortion of meaning.

D. *Automotive Smog Pollution*

By the early 1960s, the typical American automobile spewed approximately one ton of pollutants per year into the nation's atmosphere, and motor vehicles accounted for an estimated sixty percent of all air pollution.[76] Initially an acute problem in southern California, automotive air pollution soon reached epidemic proportions in every major metropolitan region of the nation.[77] Here again, the auto oligopoly's

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been unique. As one frustrated consumer recently characterized it, "[t]rying to get an air bag out of Ford is like trying to get a pearl out of a lockjawed oyster." Karr & McGinley, *Auto Shoppers Encounter Stiff Resistance When Seeking Air Bags at Ford Dealers*, Wall St. J., July 31, 1986, at B27, col. 3.

73. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 49 (1983).

74. Myerson, *A Boost for the Air Bag*, N.Y. Times, Sept. 2, 1990, § 3, at 2, col. 3.

75. *Planning, Regulation and Competition: Automobile Industry—1968: Hearings Before the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. 967 (1968) (statement of Alfred P. Sloan, Jr., President, General Motors Corp.).

76. L. WHITE, THE AUTOMOBILE INDUSTRY SINCE 1945, at 228-29 (1971).

77. *See generally* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES REGARDING

performance has been conducive neither to consumer welfare nor to achieving an efficient allocation of resources.

At first, the industry simply denied the existence of the problem—human sensory perceptions and the industry's own internal research findings to the contrary notwithstanding.[78] "Waste vapors are dissipated in the atmosphere quickly and do not present an air-pollution problem," Ford assured Los Angeles County supervisors in 1953.[79] "The fine automotive powerplants which modern-day engineers design do not 'smoke.'"[80]

Later, as the pollution problem worsened and national concern rose, the Big Three forged a cartel to eliminate rivalry among themselves in the development of automotive pollution-control technology, and to prevent it from reaching the market. In an antitrust suit filed in 1969 (which the industry did not contest), the Justice Department found that the auto giants "conspired not to compete in research, development, manufacture, and installation of [automotive pollution] control devices, and did all in their power to delay such research, development, manufacturing, and installation."[81] The Justice Department found that the Big Three ignored promising inventions, refused to purchase pollution-control technologies developed by others, delayed installing smog controls already available and known to them, and at times disciplined members of the cartel whose

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AIR POLLUTION, H.R. DOC. NO. 47, 90th Cong., 1st Sess. 1-3 (1967) (air pollution having health effects in both large and small cities); H.R. REP. NO. 728, 90th Cong., 1st Sess. 8 (1967) (finding that no major metropolitan area in the United States lacked an air pollution problem); S. REP. NO. 403, 90th Cong., 1st Sess. 10 (1967) (finding air pollution a problem not only in large urban areas, but in smaller communities as well); H.R. REP. NO. 916, 90th Cong., 1st Sess. 1 (1967) (conference report on the Air Quality Act of 1967, finding that most of the nation's population is located in expanding urban areas suffering from a growth in the amount and complexity of air pollution).

78. "GM has been cognizant of the exhaust gas problem for many years," the firm's Administrative Director John M. Campbell stated in 1953, "and the research laboratories of GM have been responsible for the discovery of much of the basic information on exhaust gas that is available today on this subject." *Automotive Research and Development Hearings, supra* note 53, at 619. Internal memoranda suggest that GM had been sufficiently concerned about the automotive air pollution problem to begin researching it at least as early as 1938. *See* 117 CONG. REC. 15,626-27 (1971) (remarks concerning smog control antitrust case "brought against American auto manufacturers for conspiring to retard the development of a smog-free vehicle").

79. *Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st Sess., pt. 1, at 158 (1967) (statement of Dan J. Chabek, News Department, Ford Motor Co.).

80. *Id.*

81. 117 CONG. REC. 15,627 (1971) (remarks on smog control antitrust case against auto manufacturers).

adherence to the collective suppression effort might temporarily waiver. "Since the industry was fortified from the beginning of the program with the agreement among its members not to take competitive advantage over each other," the Justice Department concluded, "all auto manufacturers were able through the years to stall, delay, impede and retard research, development, production and installation of motor vehicle air pollution control equipment."[82]

E. *Summary*

Thus, an empirical analysis highlights the central flaws of the New Learning. It shows that market power includes the discretionary power to control the choices from which consumers are permitted to select, and the power to thereby control the allocation of society's scarce resources in accordance with producer—rather than consumer—preferences. Contrary to New Learning claims, the outcome seldom promotes social optimality.

The auto oligopoly maneuvered to eliminate mass transportation as a viable option in order to force consumer "preference" for private automobiles. It resisted providing smaller, more fuel-efficient automobiles in order to force consumer "preference" for large gas-guzzlers. It had the power to ignore consumer preferences and refuse to make safer cars available, or to deign to make them available (as it began to do in 1989-1990)[83]—but at its own discretion and at a time of its own choosing, rather than in response to consumer preference. In addition, the Big Three were able to withhold less-polluting automobiles from the market in order to tilt consumer "preference" toward the smog-producing models that the oligopoly preferred to provide.

However, the market power of the auto triopoly extends beyond even this impressive degree of control. For example, when confronted with the advent of foreign competition and considerable consumer preference for the offerings of foreign producers, the industry can mobilize its political clout in order to obtain government restrictions on foreign imports—as it has successfully done during the 1980s, resulting in artificially inflated new-car prices.[84]

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82. *Id.* at 15,633.

83. *See, e.g.*, White, *U.S. Auto Makers Decide Safety Sells*, Wall St. J., Aug. 24, 1988, at B17, col. 3.

84. Industry experts estimate that 1983 new-car prices (both foreign and domestic) rose $400 to $1,000 on average as a direct result of the import quotas. Crandall, *Import Quotas and the Automobile Industry: The Costs of Protectionism*, BROOKINGS REV., Summer, 1984, at 8, 13-15; *see also* Lehner & Pine, *Decision on Japanese Auto Quotas Will Affect Buyers' Choices, Costs*, Wall St. J., Dec. 3, 1984, § 2, at 37, col. 4 (discussing the impact of import quotas on the American auto industry and consumers); Wayne, *The Irony and Impact of*

Consumer preference, it seems, is a fine thing—but only so long as consumers prefer what market power wants them to prefer, and only so long as their preferences are exercised within the confines of the choices which market power wants to make available.[85] It is a problem that the New Learning conspicuously fails to confront.

IV. THE REVISIONIST VIEW: THE "TRADE-OFF" QUESTION

A final argument in the New Learning litany requires attention: the claim that mergers and concentration may be welfare-enhancing even when they result in the loss of allocative efficiency. Here the contention is that a laissez-faire policy toward mergers and concentration is desirable, because the gains in production and technological efficiency associated with corporate bigness more than offset the welfare loss associated with a lessening of competition (and the allocative inefficiency resulting therefrom).[86]

Auto Quotas, N.Y. Times, Apr. 8, 1984, § 3, at 1, col. 2 (same). In the aggregate, the cost to consumers of import restrictions has been estimated at $15.7 billion in artificially inflated new car prices. U.S. INT'L TRADE COMM., A REVIEW OF RECENT DEVELOPMENTS IN THE U.S. AUTOMOBILE INDUSTRY INCLUDING AN ASSESSMENT OF THE JAPANESE VOLUNTARY RESTRAINT AGREEMENTS at ix (1985).

For a related analysis of the adverse effects of the industry's pricing power on macroeconomic stability and the severity of business cycles, see Adams & Brock, *Corporate Power and Economic Sabotage*, 20 J. ECON. ISSUES 919, 931-35 (1986).

It also is noteworthy that while the domestic oligopoly has restricted consumers' freedom to choose foreign cars, the Big Three have defended and freely exercised their own freedom to procure foreign-produced parts and components. *See* White, *Big Auto Makers Boosted Parts Imports While Assailing Trade Gap*, Wall St. J., Jan. 15, 1988, at A5, col. 1.

Finally, as an alternative to industry-demanded import quotas, the Big Three can further remove the threat of foreign competition and wider consumer choice, by linking up with their major foreign rivals in joint ventures, thereby transmuting their relationship from one of rivalry to one of global partnership. *See generally* Adams & Brock, *supra* note 31.

85. Senator Daniel J. Evans (R., Wash.) identified the precarious place of consumer preference in the face of this economic and political power. In 1985, in the midst of the industry's recurring campaign against imports and government fuel-economy standards, he observed that the auto firms' "response to competition from Japan was to cry out for import restrictions. Now they are saying let the market decide whether fuel efficiency standards are required." Schlesinger, *Auto Companies' Lobbying Drive Aims to Poke Widest Loophole Yet in U.S. Fuel-Economy Law*, Wall St. J., Oct. 1, 1986, § 2, at 68, col. 1.

Chrysler's recent television advertising campaign, berating consumers for "irrationally" preferring Japanese imports, affords additional evidence of the industry's attitude toward consumer "preference." Or as GM's Boss Kettering once put it: "It isn't that we build such bad cars. It's that they are such lousy customers." B. YATES, *supra* note 50, at 282.

86. *See, e.g.*, R. BORK, *supra* note 11, at 109.

Whether or not such a trade-off indeed exists is, of course, a question that is not susceptible to theoretical resolution. It is an empirical problem which, strangely enough, the New Learning protagonists refuse to confront. Although they make "efficient" performance the centerpiece of their public-policy position, they concede that such performance is difficult, if not impossible, to measure scientifically. Bork, for example, states that

> the real objection to performance tests and efficiency defenses in antitrust law is that they are spurious. They cannot measure the factors relevant to consumer welfare, so that after the economic extravaganza was completed we should know no more than before it began. In saying this I am taking issue with some highly qualified authorities. . . . Their idea, essentially, is that a court or agency determine, through a litigation process, whether there exists in a particular industry a persistent divergence between price and marginal cost; the approximate size of the divergence; whether breaking up, say, eight firms into sixteen would reduce or eliminate the divergence; and whether any significant efficiencies would be destroyed by the dissolution.[87]

Such empirical inquiry, says Bork, would be both fruitless and superfluous.[88] Without such an inquiry, however, it should be obvious that no "correct" public-policy conclusions can be formulated.

Once again, we turn to the automobile industry as a laboratory for testing the empirically unsubstantiated claims of the New Learning. In this typical oligopoly, is there a trade-off between concentration and production/innovation efficiency, on the one hand, and industrial decentralization and increased competition, on the other? Are the size and market power of the Big Three the inevitable response to the technological imperatives of a modern industrial economy? Is oligopoloid giantism essential in order to enable ever-better automobiles to be produced at ever-lower cost? Do corporate bigness and market control thus constitute the price that society must pay for a world-class automobile industry? The empirical evidence indicates otherwise.

A. *Production Efficiency*

Rather than a sleek engine of production efficiency, the American auto oligopoly has long exhibited the debilities and diseconomies of excessive organizational size, and the bureaucratic bloat that accompanies it. Six

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87. *Id.* at 124-125.

88. *See id.* at 129 ("performance tests and efficiency tests would multiply the costs of antitrust enforcement and defense without conferring any compensating advantage").

decades ago, GM Chairman Alfred Sloan bemoaned the production inefficiencies of GM's size:

> In practically all our activities we seem to suffer from the inertia resulting from our great size. It seems to be hard for us to get action when it comes to a matter of putting our ideas across. There are so many people involved and it requires such a tremendous effort to put something new into effect that a new idea is likely to be considered insignificant in comparison with the effort that it takes to put it across. . . . I can't help but feel that General Motors has missed a lot by reason of this inertia. . . . Sometimes I am almost forced to the conclusion that General Motors is so large and its inertia so great that it is impossible for us to be leaders.[89]

In a candid moment, former GM President Pete Estes later corroborated this conclusion: "Chevrolet is such a big monster that you twist its tail and nothing happens at the other end for months and months. It is so gigantic that there isn't any way to really run it. You just sort of try to keep track of it."[90]

The problem persists in the present day. Although GM is by far the world's largest automobile producer, with dollar sales equal to those of the three largest Japanese auto producers combined,[91] it suffers the highest per-unit production cost disadvantage in the industry, a disadvantage variously estimated at $200-$800 per car.[92] By the early 1980s, the American oligopoly's production costs exceeded those of its smaller Japanese rivals by an estimated $1,700 per car, with the bulk of the difference due to inefficient management and organization, rather than "slave" wages paid abroad.[93] After reviewing the Big Three's efforts

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89. TEMPORARY NAT'L ECON. COMM., U.S. CONG., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, MONOGRAPH NO. 13, 76th Cong., 3d Sess. 130-31 (1941).

90. J. WRIGHT, ON A CLEAR DAY YOU CAN SEE GENERAL MOTORS 100 (1979).

91. *See* Vella, *Auto Scoreboard*, BUS. WK., May 7, 1990, at 54.

92. *See* HARBOUR & ASSOCS., THE HARBOUR REPORT: A DECADE LATER 142 (1990); M. KELLER, RUDE AWAKENING: THE RISE, FALL, AND STRUGGLE FOR RECOVERY OF GENERAL MOTORS 83, 178 (1989); Fisher, *GM Is Tougher Than You Think*, FORTUNE, Nov. 10, 1986, at 56; Taylor, *The New Drive to Revive GM*, FORTUNE, Apr. 9, 1990, at 53; Kurtzman, *Prospects: What's Next for G.M.*, N.Y. Times, Feb. 14, 1988, § 3, at 1, col. 1.

93. U.S. DEP'T OF TRANSP., THE U.S. AUTOMOBILE INDUSTRY 15 (1982). Following their on-site investigation of Japanese automobile production, one team of researchers reported that

during the 1980s to improve their manufacturing efficiency, automotive analyst James Harbour found that

> none of the [Big Three] plants use their labor and machinery as effectively as the Japanese. Die changes still require six to ten times longer on average, downtime is more frequent, scrap is higher, and inventory is larger. Big Three manufacturers still use more presses, larger plants, more labor, more dies, and more production time to produce a comparable set of steel body panels for a car.[94]

Vertical integration in parts and components production in the industry generally, and at GM in particular, further exacerbates production inefficiency, and additionally inflates production costs.[95] Finally, despite their size and decades-long domination of the field, the Big Three's productivity significantly trails that of their Japanese rivals,[96] with GM's productivity ranking the worst among the Big Three, and continuing to suffer despite plant investments of billions of dollars during the 1980s.[97]

> the Japanese showed themselves to be doggedly persistent in their efforts to master operational detail. We had been half-prepared to find them using process technology far more advanced than anything available to the American counterparts. What we saw about us at every turn, however, was not newer technology but better management of the technology in place—not the exotic gimmickry of wide-eyed public expectation but a sober mastery of manufacturing.

W. ABERNATHY, K. CLARK & A. KANTROW, INDUSTRIAL RENAISSANCE 76 (1983).

94. HARBOUR & ASSOCS., *supra* note 92, at 221.

95. *See Punctured by Perot*, ECONOMIST, Dec. 13, 1986, at 15; *Survival of the Fattest*, ECONOMIST, Oct. 12, 1985, at 35; Holusha, *G.M.'s President Outlines a Strategy*, N.Y. Times, Sept. 2, 1987, at D1, col 3; Levin, *Groping Giant*, Wall St. J., July 22, 1986, at A1, col. 6.

96. Stokes, *Auto Glut*, 21 NAT'L J. 2310, 2313 (1989). In 1983, relative productivity among U.S. and Japanese automotive firms was as follows:

Company	Vehicles Produced Per Worker
GM	11
Ford	15
Chrysler	16
Nissan	42
Toyota	58

See Adams & Brock, *supra* note 26, at 118.

97. Of General Motors, James Harbour reports: "Labor productivity improvement in assembly, stamping and powertrain during the 1980s was negligible. The performance of new and modernized assembly plants is pitiable. It boggles the mind when one considers that GM's new assembly plants are less productive than the old ones they replaced." HARBOUR & ASSOCS., *supra* note 92, at 269.

B. *Technological Innovation*

The oligopoly's performance in the area of technological innovation is no more enviable. With the demise of a vigorous independent sector in the post-World War II era, and the steady consolidation of the industry into an ever-tighter oligopoly, the pace of genuine product innovation slackened. Innovations like front-wheel drive, disc brakes, fuel injection, four-wheel steering, and fuel economy languished in the hands of the Big Three. "Since competition within the industry was mild," David Halberstam explains in his monumental study,

> there was no impulse to innovate; to the finance people, innovation not only was expensive but seemed unnecessary. . . . Why bother, after all? In America's rush to become a middle-class society, there was an almost insatiable demand for cars. It was impossible not to make money, and there was a conviction that no matter what sales were this year, they would be even greater the next. So there was little stress on improving the cars. From 1949, when the automatic transmission was introduced, to the late seventies, the cars remained remarkably the same. What innovation there was came almost reluctantly.[98]

The post-World War II era was, according to one former GM executive, "a quarter-century of technical hibernation"—an era when the domestic oligopoly "went on a two-decade marketing binge which generally served up the same old product under the guise of something new and useful."[99]

Thus, while the Big Three luxuriated in a cozy, noncompetitive domestic milieu, foreign producers took the lead in aggressively exploiting the frontiers of automotive technology. According to veteran observer Brock Yates, foreign producers "continued to move ahead with fuel injection, disc brakes, rack and pinion steering, radial tires, quartz headlights, stalk-mounted windshield wiper and dimmer controls, ergonomically adjustable bucket seats, five-speed manual transmissions, high-efficiency overhead camshaft engines, independently sprung

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Contrasting the construction of GM's Saturn plant at Spring Hill, Tennessee, with the construction of Honda's plant in Marysville, Ohio, the *Wall Street Journal* points out that "[f]or roughly what GM spent at Spring Hill, Honda got not one but two assembly plants with total annual capacity of 510,000 cars—more than double Saturn's." White & Guiles, *Rough Launch*, Wall St. J., July 9, 1990, at A1, col. 6.

98. D. HALBERSTAM, THE RECKONING 244-45 (1986).

99. J. WRIGHT, *supra* note 90, at 4.

suspensions, advanced shock absorbers, and strict crash-worthiness standards."[100]

The Big Three continue to lag behind. Foreign producers, particularly those in Japan, have recently commercialized such innovations as four-wheel steering and electronically controlled "active" suspensions,[101] continuously variable automatic transmissions,[102] multivalve engines,[103] rotationally mounted engine-placement design,[104] and ceramic engine componentry.[105] At the same time, a team of researchers recently found that the Big Three typically require forty-five percent longer lead times than their Japanese rivals to bring new projects to market (61.9 versus 42.6 months on average), and that they expend nearly triple the engineering time in the process.[106]

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100. B. YATES, *supra* note 50, at 149.

101. *See* Beauchamp, *Here They Come Again,* FORBES, Feb. 8, 1988, at 76; Hampton, *Just Ahead: Four-Wheel Steering,* BUS. WK., Sept. 14, 1987, at 160; Schuon, *Honda Is First on the Block to Flaunt 4-Wheel Steering,* N.Y. Times, Aug. 30, 1987, § 5, at 9, col. 1.

102. By eliminating separate gears, the continuously variable transmission combines the greater fuel economy of a manual shift with the convenience of an automatic transmission. *See* Stertz, *Japan's Transmissions Take Technology Lead,* Wall St. J., Aug. 3, 1989, at B1, col. 1; Ingrassia, *Subaru Hopes to Get Sales Back into Gear with Switch to Unorthodox Transmission,* Wall St. J., Nov. 18, 1988, at B1, col. 3.

103. Advanced multivalve engines are smaller and more compact, burn fuel more efficiently, and produce more power. But "[w]hile Japanese car companies have pushed hard to bring the multivalve engine to the marketplace, Detroit has lagged." Levin, *New Japan Car War Weapon: "A Little Engine That Could",* N.Y. Times, Nov. 26, 1989, § 1, at 1, col. 1. A recent study reports that every Honda car sold in the U.S. has multivalve technology, as do 70% of Toyotas, and 54% of Nissans. *Id.* at 16, col. 1.

104. *See* Keebler, *Toyota Puts a Spin on Previa Engine's Central Placement,* AUTOMOTIVE NEWS, June 11, 1990, at 18. On innovation in automobile design more generally, see Sanger, *Japan, Land of Look-Alike Cars, Goes Offbeat,* N.Y. Times, Feb. 13, 1989, at A1, col. 4.

105. Ceramic composite materials are lighter, stronger and better able to withstand high temperatures than conventional materials. *See* Naj, *U.S. Loses Edge in Composite Materials,* Wall St. J., Dec. 26, 1989, at B2, col. 4.

> Robert Frosch, the head of General Motors Corp.'s research labs in Detroit, says GM has looked at the ceramics technology and isn't "making any major push" in the area. "We haven't been compelled by anything we see to rush into it. Maybe one day we'll say oops, but I doubt it". . . . In Japan—where some years ago ceramics makers began making fish hooks and chopsticks with the material in an attempt to gather production experience—Nissan Motor Co. is already selling cars with ceramic turbo chargers. Toyota Motor Corp. has more than two dozen ceramics parts in its cars. Isuszu Motors Corp. is testing an all ceramic engine.

Id.

106. Clark, Chew & Fujimoto, *Product Development in the World Auto Industry,* 3 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 729, 741 (1987). These statistics can not be

In reality, then, there is no painful trade-off between market power, on the one hand, and inferior production efficiency and innovativeness, on the other. To the contrary, disproportionate size and market power seem to have undermined economic performance in the industry, as an increasing number of analysts now recognize.[107] In its recent feature story on GM, for example, *Business Week* was compelled to conclude that the "basic question nagging this biggest, most diverse, and most integrated of car companies is whether it is just too big to compete in today's fast-changing car market."[108] The conservative London *Economist* is even more acerbic. After observing that "GM's committee-designed models are out of date years before they reach the streets," it offered its blunt recommendations for newly-appointed GM Chairman Robert Stempel:

> To save his firm, Mr. Stempel must break it up. He should sell off EDS and Hughes Aerospace, the costly high-tech distractions which have contributed little to cars. He should dismember GM's car division into two or three independent companies, freeing them to compete with one another and to handle their own designs.[109]

Nor can recourse be had to New Learning assertions of survival of the fittest as an automatic corrective for deficient performance. When Chrysler—then the nation's tenth largest industrial concern—teetered on the brink of bankruptcy in 1979-80, primarily as the result of a succession of improvident managerial decisions, the firm demanded (and obtained) a government bailout in the form of federal loan guarantees of $1.5 billion because, Chrysler argued, it was too big to be allowed to fail.[110] Chrysler survived, not because it was better, but because it was bigger—not because it was fitter, but because it was fatter. The Chrysler bailout obviously repudiates New Learning claims that only efficient firms survive, that bigness is proof of social fitness and desirability, and that laissez-faire is the optimal antitrust policy toward corporate size and mega-mergers.[111]

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interpreted as indicative of superior product design and quality, given the Big Three's generally poor showing in annual quality rankings of automobiles. *See, e.g.*, HARBOUR & ASSOCS., *supra* note 92, at 142-44; Stertz, *Big Three Boost Car Quality But Still Lag*, Wall St. J., Mar. 27, 1990, at B1, col. 3.

107. For evidence of this trend in American industry generally, see W. ADAMS & J. BROCK, *supra* note 11, at 32-64.

108. Hampton & Norman, *General Motors: What Went Wrong?*, BUS. WK., Mar. 16, 1987, at 102, 110.

109. *Detroit Under Siege*, ECONOMIST, Apr. 14, 1990, at 13, 13.

110. *See* W. ADAMS & J. BROCK, *supra* note 11, at 297-303.

111. For a more general treatment of this problem and its implications, see Adams &

V. CONCLUSION

The life of the law, Mr. Justice Holmes wrote, is not logic but experience: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[112] By that test, the vision of the Sherman Act is as valid today as it was 100 years ago. Massive empirical evidence indicates that a decentralized power structure—the root principle of antitrust—does not have to be sacrificed to attain either allocative efficiency, or efficiency in production and innovation, or a "Pareto-optimal" maximization of consumer welfare. If that be so, what justification remains for the toleration of concentrated economic power or for a policy of untrammeled laissez-faire which would insulate such power from antitrust challenge?

Brock, *Corporate Size and the Bailout Factor*, 21 J. ECON. ISSUES 61 (1987).

112. O.W. HOLMES, THE COMMON LAW 1 (1888).