California Law Review

VOL. 74 OCTOBER 1986 NO. 5

The "New Learning" and the Euthanasia of Antitrust

By Walter Adams
and James W. Brock

TABLE OF CONTENTS

The "New Learning" and the Euthanasia of Antitrust

By Walter Adams†
and James W. Brock‡

In the face of continuing declines in the international competitiveness of American firms, with the nation confronting a succession of record foreign trade deficits, and in an intellectual atmosphere crowded with calls for "industrial policy" on the one hand, and recrudescent economic Darwinism on the other, American antitrust is under renewed fire. Cast as an economic anachronism in the "new" age of global competition, it is attacked by critics all along the political spectrum—left and right, liberal and conservative, neoliberal and neoconservative. The critics' avowed motivation is to "modernize" the antimerger law so as to facilitate the restructuring of American industry. This, they believe, is imperative if the United States is to regain its erstwhile competitiveness in international markets.

For example, Lester C. Thurow, a self-styled neoliberal, recommends that America abolish its antitrust laws. "The time has come," he says, "to recognize that the techniques of the 19th century are not applicable in getting ready for the 21st. An economy where growth is stopped and living standards are falling behind those of its competitors cannot afford a legal system that cripples its industrial future."[1] Thurow is not alone. Many prominent new-style Democratic representatives and senators are reported to "have a more jaundiced view of the traditional concepts of monopoly and restraint of trade than do their liberal counterparts."[2]

Businesspeople have jumped on the band wagon. "With the vast changes that have taken place in the marketplace," contends John J. Murphy, chairman of Dresser Industries, "the antitrust laws that were written all those years ago are counterproductive today."[3]

---

† Distinguished University Professor and Past President, Michigan State University; erstwhile member of Attorney General Brownell's National Committee to Study the Antitrust Laws. B.A. 1942, Brooklyn College; M.A. 1946, Yale University; Ph.D. 1947, Yale University.

‡ Associate Professor of Economics, Miami University (Ohio). B.S. 1973, University of Wyoming; M.A. 1975, University of Wyoming; Ph.D. 1981, Michigan State University. Professors Adams and Brock are co-authors of a book, *The Bigness Complex.*

1. Thurow, *Let's Abolish the Antitrust Laws,* N.Y. Times, Oct. 19, 1980, § 3, at 2, col. 3.

2. *The Neo-Liberals Push Their Own Brand of Reform,* BUS. WK., Jan. 31, 1983, at 96, 97.

3. Greenhouse, *Making Mergers Even Easier,* N.Y. Times, Nov. 10, 1985, § 3, at 1, col. 2, at 26, col. 1.

The prestigious Commission on Industrial Competitiveness agrees. The Commission—composed of representatives of major American companies (including Hewlett-Packard, Rockwell, Owens-Illinois, Deere, Westinghouse, B.F. Goodrich, AT&T), financial concerns (Morgan Stanley), trade unions (United Auto Workers, AFL-CIO), and universities (University of Wisconsin, Harvard)—called in early 1985 for changes in U.S. antitrust law "to reflect the new global markets within which American firms operate."[4]

Indeed, the attack emanates from the very highest levels of government. Secretary of Commerce Malcolm Baldrige has stated that antitrust can no longer be based "on economic theories with no relation to the present and future."[5] "The world economy has changed, trade patterns have changed, but the antitrust laws have not. It is not just that some parts of those laws are irrelevant today; it is the fact that they place additional and unnecessary burdens on the ability of U.S. firms to compete."[6] High-ranking officials in the Reagan administration, led by Secretary Baldrige, have launched a formal assanlt on the antitrust laws. They seek to relax significantly, or abolish completely, the antitrust statutes as they apply to two areas in particnlar: joint ventures between corporations, and mergers and acquisitions. Joint ventures "will play a vital role in promoting the growth and international competitiveness of the American economy," according to Paul McGrath, former chief of the Justice Department's antitrust division. An "awareness of the role these valuable business arrangements play in creating efficiencies and bringing forth new products and technologies," he reports, is replacing what he calls "an attitude of suspicion born of ignorance."[7]

The Reagan administration's *bête noire*, however, is section 7 of the Clayton Act, prohibiting mergers and acquisitions that may substantially lessen competition or tend to create monopolies. The administration significantly reduced the effectiveness of the statute with its merger enforcement guidelines in 1982,[8] and once again in 1984.[9] It now aims to emasculate the merger law that Secretary Baldrige condemns for "stopping the kinds of efficiency-creating mergers we need to be internation-

4. *Report of the President's Commission on Industrial Competitiveness: Hearing Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. 109 (1985).

5. Baldrige, *RX for Export Woes: Antitrust Relief*, Wall St. J., Oct. 15, 1985, at 28, col. 3.

6. *Id.*

7. Taylor, *Joint Ventures Likely to Be Encouraged by Friendlier Attitude of U.S. Officials*, Wall St. J., Nov. 5, 1984, at 8, col. 1.

8. See *Symposium: 1982 Merger Guidelines*, 71 CALIF. L. REV. 281-794 (1983), especially the articles by Joseph P. Bauer, Louis B. Schwartz, and Lawrence A. Sullivan.

9. *See Merger Guidelines of Department of Justice—1984*, 2 Trade Reg. Rep. (CCH) (Trade Cas.) 4490 (June 14, 1984); *see also Now the Antitrust Guidelines Are Clearer—and Looser*, BUS. WK., June 25, 1984, at 38.

ally competitive."[10] Backed by the Attorney General, Mr. Baldrige proposes to correct this perceived problem with a package of legislative amendments that, if enacted by Congress, would effectively repeal the Clayton Act's merger proscriptions.[11] "Modernization" of the merger statutes, he argues, is essential not only to enhance industrial efficiency but also to safeguard employment in U.S. manufacturing industries.[12]

Robert A. Katzmann accurately summarizes the current state of affairs. It is, he writes, an age of the attenuation of antitrust, where "concerns about the increasing rigors of international competition have led conservatives and liberals alike to argue that domestic constraints on firm size and industry concentration may weaken the ability of American companies to go toe-to-toe with foreigu competitors in world markets"[13]—a development the *Wall Street Journal* eulogizes as "Closing the Antitrust Century."[14]

These charges and policy prescriptions are an important part of the rhetoric of our day. Appealingly packaged and promoted in a drumfire of repetition, they have become the conventional wisdom—an acid test for right-thinking men and women. But are they valid? Are the premises from which they proceed congruent with reality? Is the euthanasia of antitrust likely in practice to produce the cure promised by the critics?

Stripped to its essentials, the current attack on antitrust, and the "foreign competition" garb in which it is clothed, can be reduced to four major assertions.

First, as portrayed by the antitrust critics, foreign competition is an all-encompassing, overpowering, and—most importantly—a self-sustaining and self-sufficient force for controlling corporate behavior, for neutralizing market power, and for compelling good economic performance in the public interest. It is an automatic, self-regulating mechanism which operates irrespective of the structure of domestic industry—whether competitive, oligopolistic, or even monopolistic. It thus renders antitrust obsolete. As Thurow puts it,

> I don't care whether General Motors is the only American car manufacturing company. It's still in a competitive fight for its life with the Japanese and the Germans. And it doesn't make sense to hamstring General Motors or anybody else with antitrust laws since they must operate in an international competitive environment, whether or not there are

10. *Reagan Turns a Cold Eye on Antitrust*, FORTUNE, Oct. 14, 1985, at 31.

11. *Id.*; *see also* Adams & Brock, *The Proposed Emasculation of Section 7 of the Clayton Act*, 65 NEB. L. REV. 813 (1986) (criticizing the Reagan administration's proposals for legislative antitrust reform).

12. Baldrige, *supra* note 5, at 28, col. 3.

13. Katzmann, *The Attenuation of Antitrust*, 2 BROOKINGS REV. No. 4, at 23, 26 (1984).

14. *Closing the Antitrust Century*, Wall St. J., Jan. 21, 1986, at 28, col. 1.

other domestic producers.[15]

Foreign competition is pictured as an immutable fixture of the universe—immune to subversion, either from within the global market, or from without. Therefore, government efforts to maintain competition are redundant and unnecessary.

Second, according to the critics, the antitrust statutes have been so rigidly and oppressively enforced as to hobble American companies and cripple their international competitive capacity. According to Professor J. Fred Weston, strict enforcement of antitrust is "reducing efficiency, destroying U.S. international competitiveness."[16] According to Secretary Baldrige, economically productive mergers "never get out of the chute because companies can't take the chance that the government will turn them down."[17] As a result, the critics contend, "our antitrust laws have straitjacketed U.S. manufacturers in international trade."[18]

Third, the critics conceive corporate giantism to be the touchstone for production efficiency, technological advance, and international competitiveness in the modern era. Bigness, especially when induced by mergers and acquisitions, marks the path to world-class economic performance. It promotes efficiency and economies of scale in production. It fosters technological invention and innovation. According to the President's Council of Economic Advisers, mergers, takeovers, and the generalized "market for corporate control" discipline errant managements, transfer resources to higher-valued uses, and substitute good management for bad.[19] The critics accept the teachings of Oliver Williamson that in the private sector, centralized administrative planning and hierarchical control eliminate wasteful "transactions costs" and, therefore, produce better economic results than does decentralized decisionmaking in competitively structured capital and product markets.[20] Above all, the current attack on antitrust proceeds from a root premise that Professor (now Judge) Robert H. Bork calls an "obvious point"—that "larger size shows greater efficiency."[21] Corporate giantism and mega-mergers thus

15. Thurow, *Abolish the Antitrust Laws*, DUN'S REV., Feb. 1981, at 72.

16. *The Joint Venture: Panel Discussion*, 53 ANTITRUST L.J. 97, 98 (1984).

17. Crock & Dwyer, *Looser Antitrust Laws Won't Trim America's Trade Gap*, BUS. WK., Feb. 3, 1986, at 32.

18. *To Establish a Commission on the International Application of Antitrust Laws: Hearings Before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 12 (1980) (statement of Sen. Mathias).

19. COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 187-216 (1985).

20. *See* Williamson, *Transforming Merger Policy: The Pound of New Perspectives*, 76 AM. ECON. REV. 114-18 (1986).

21. Bork, *Antitrust and the Theory of Concentrated Markets*, in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM 81, 86 (E. Fox & J. Halverson eds. 1979); *see also* R. BORK, THE ANTITRUST PARADOX (1978).

are central building blocks in the critics' blueprint for revitalizing America's industries.

Fourth, according to the critics, the concentration of power resulting from mergers and acquisitions poses neither economic nor political problems for society. The competitive global market, they implicitly posit, neutralizes problems in the political economy of power and renders them obsolete. The press of foreign competition will force corporate giants to perform in the public interest according to the rules of the competitive market. The competitive global market, they implicitly assume, will gnard against any abuse of power, both in the political arena and in the economic realm.

* * * *

In the following pages, this Article will evaluate the empirical validity of these propositions. In Part I, it will examine the proposition that foreign competition is sufficiently self-sustaining to obviate the need for domestic antitrust policy. In Part II, this Article will evaluate the contention that the existing antitrust laws—particularly as they apply to mergers and joint ventures—have handicapped American companies vis-a-vis their foreign rivals. In Part III, it will examine the mythology of bigness promulgated by the critics and the belief that mergers and corporate giantism are conducive to good economic performance. In Part IV, it will analyze the implied premise that in a modern society the political economy of bigness is no longer a relevant subject for social concern. This Article concludes with Part V where, on the basis of the facts, it proposes a workable public policy for promoting good economic performance and the international competitiveness of American industry.

I
THE FRAGILITY OF GLOBAL COMPETITION

One important premise of current attacks on antitrust is that foreign competition negates the need for an antitrust policy. The relevant market, the critics contend, is not domestic, but global in scope. It comprises a multitude of rivals from a myriad of locations around the world. The steel industry, they would say, is not composed of American firms alone; instead, it encompasses competitors from Europe, Great Britain, Japan, South Korea, and South American nations. They reason that this global competition more than compensates for noncompetitive industry structure in the domestic market. Hence, domestic industry structure is irrelevant, and the maintenance of domestic competition unnecessary.[22]

22. *See, e.g.*, Baldrige, *How to Ruin an Entire Industry*, N.Y. Times, Mar. 11, 1984, § 3, at 2, col. 2 (Justice Department erred in initially challenging LTV-Republic steel merger by failing to give

Admittedly, this assertion contains an element of validity. After all, economists have often pointed to the protective tariff as the mother of the trust.[23] They have long taught that free foreign trade is an essential component of domestic competition policy.[24]

Nevertheless, the argument is flawed in a fundamental respect. It mistakenly presumes global competition to be an automatic, self-sustaining, and self-regulating mechanism—a natural phenomenon, immune to subversion and control, to which international rivals passively submit. The argument fails to recognize that, in reality, global markets, like domestic markets, are susceptible to control. International rivals do not submissively subject themselves to the discipline of global competition for long. Instead, they come to recognize that collusion and cooperation, not competition, are most conducive to their mutual profitability, group security, and collective stability. They strive to elude the rigors of global competition and to control the international marketplace through a variety of devices, including international cartels, joint ventures and other cooperative arrangements, as well as through mergers and acquisitions. They may attain global control privately through their own efforts. Or, as is frequently the case, they may manipulate governments to aid them in achieving their anticompetitive ends.

This is not a matter of idle speculation. As long ago as 1928, Sir Alfred Mond, organizer of the giant British chemical combine Imperial Chemical Industries Ltd., brilliantly articulated these tenets of international business relations between ostensible rivals. "The old idea of the heads of great businesses meeting each other with scowls and shaking each other's fists in each other's faces and . . . trying to destroy each other's business may be very good on the films," he intimated, "but it does not accord with any given facts." The preferred state of affairs, he understood, is an "alliance of great companies" capable of "working in harmonious co-operation."[25]

This world view is not just a peculiarity of the British gentry. Explaining his corporation's stance toward its major international rivals,

---

sufficient weight to Japanese imports as well as potential import growth from developing nations); Thurow, *supra* note 1, at 2, col. 3 ("Regardless of its share of domestic auto production, the General Motors Corporation is in a competitive fight for its life with the Japanese and West Germans."); *President's News Conference on Foreign and Domestic Issues,* N.Y. Times, Feb. 12, 1986, at A12, col. 1, col. 5 ("We have to recognize now that we're not just dealing with competition within our own borders but competition with firms from outside the borders.").

23. *See* H.B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 72 (1955). As Henry O. Havemeyer, the father of the Sugar Trust, put it: "Without the tariff I doubt if we should have dared to take the risk of forming the trust. It could have been done; but I certainly should not have risked all I had, which was then embarked in the sugar business, in a trust unless the business had been protected *as it was* by the tariff." *Id.*

24. *See, e.g.,* C. MCCONNELL, ECONOMICS 668 (8th ed. 1981).

25. G. STOCKING & M. WATKINS, CARTELS IN ACTION 429 (1946).

a DuPont vice president wrote in 1923: "It is not good business sense to attempt an expansion in certain directions if such an act is bound to result as a boomerang of retaliation."[26] The firm adopted a deliberate policy of restraint and circumspection "on the broad theory that cooperation is wiser than antagonism and that in the matter of detail the chances in the long run were that the boot was just as likely to be on one leg as on the other."[27] As a representative of Germany's IG Farben explained to one of its American rivals in 1934, international rivals are fully cognizant that "a price war is of benefit only to the consumer, and the maintaining of a certain price level would be to the advantage of all competitive companies."[28] Rivals are well aware, as Irenee du Pont confided to a Farben official, that "in any field of manufacture where it appears that the situation makes it desirable to enter each others' market," economic self-interest dictates "we get together and see if we cannot negotiate an arrangement for cooperation."[29]

Those who today counsel an abandonment of antitrust on the grounds that foreign competition provides adequate safeguards betray a collective amnesia. They seem unaware of the extensively documented record of international cartels forged by world producers to control global markets and ignore the corollary anticompetitive role of transnational joint ventures and mergers. A review of the evidence is enlightening.

A. International Cartels and Global Market Control

As defined by Professor Machlup, international cartels are business "arrangements which have the purpose or effect of reducing or regulating competition in international trade."[30] Arrayed in terms of tightness of organization, they include "loose association memberships; informal understandings; straight agreements; patent license agreements; trademark arrangements; joint selling agencies; strict association memberships (with provisions for fines and penalties); and arrangements with government participation."[31] As Corwin Edwards has shown, regardless of form, all international cartels share the common objective of eliminating global competition "by direct price fixing; allocation of production, sales,

26. *Economic Concentration: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 462 (1969).

27. *Id.*

28. C. EDWARDS, SUBCOMM. ON WAR MOBILIZATION OF THE SENATE COMM. ON MILITARY AFFAIRS, 78TH CONG., 2D SESS., ECONOMIC AND POLITICAL ASPECTS OF INTERNATIONAL CARTELS 12 (Comm. Print 1944 & Arno Press photo. reprint 1976).

29. *Id.* at 8.

30. Machlup, *The Nature of the International Cartel Problem,* in A CARTEL POLICY FOR THE UNITED NATIONS 5 (1945).

31. *Id.* at 7.

shipments, or trade territories, in order to destroy incentives toward price cutting; limitation of output in order to keep prices from falling; and measures intended to exclude nonparticipants from the market."[32]

The international cartel movement of the interwar years—an era of business *haute politique* when the antitrust laws "gathered dust on the statute books"[33]—attests to the capacity and desire of international rivals to control world markets. In their seminal study, Stocking and Watkins estimated that, in 1939, international cartel controls affected 42% of manufactured products, 60% of agricultural products, and 87% of the mineral products sold in the United States.[34] Professor James A. Rahl estimates that international cartels controlled 30 to 50% of all world trade in the years preceding World War II.[35] At the outbreak of the war, a Justice Department study found that 179 world cartels were in operation, with American companies participating in 109 of them.[36] The extent of global cartel control was impressive.[37]

The case of the international steel cartel is illustrative:

> A general agreement regulated the export of all crude or semifinished steel, and six special agreements regulated the export of certain classes of steel products. The general agreement provided over-all quotas for each national group. The special agreements fixed specific quotas for particular classes of steel products—bars, rods, structural shapes, and the like—which might or might not correspond to the over-all quotas of the several national groups. In addition, each of these special agreements established a selling syndicate for a given class of products and made it the exclusive agency of members for export sales. The cartel supervised and coordinated the activities of the several syndicates.[38]

As the cartel became fully operational, it expanded its scope and tight-

32. C. EDWARDS, *supra* note 28, at 9.

33. Kreps, *Experience with Unilateral Action Toward International Cartels,* in A CARTEL POLICY FOR THE UNITED NATIONS 70, 78 (1945); *see* Kreps, *Cartels: A Phase of Business* Haute Politique, 35 AM. ECON. REV. 297 (1945).

34. G. STOCKING & M. WATKINS, *supra* note 25, at 4-5.

35. Rahl, *International Application of American Antitrust Laws: Issues and Proposals,* 2 NW. J. INT'L L. & BUS. 336, 353 (1980).

36. *See id.*

37. Cartels affected international trade in the following fields: aluminum, cement, coal and coke, copper, iron and steel, lead, rubber, sugar, tin, wheat, zinc, antimony, bismuth, ferromanganese, ferrosilicon, magnesite, magnesium, mercury, titanium, uranium, calcium carbide, cellulose, chlorine, citric acid, cobalt, dyestuffs, fertilizer, iodine, lead oxide, nitrogen, paraffin, phosphates, potash, quinine, saccharine, sulfur, sulfuric acid, bottles, ceramics, enameled ware, plate glass, porcelain, sulfite pulp, newsprint, packing and other paper, fiax, rayon, wool textiles, felt clothing, linoleum, buttons, leather, glue, oils, fats and greases, ball bearings, cables, plates, rails, rivets, screws, sheets, wires, dental supplies, electric lamps, gas mantles, household appliances, matches, machinery, phonographs and records, railway cars, tobacco, transoceanic shipping, cable and radio communieation, marine insurance, and the distribution of motion picture films. C. WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 219 (TNEC Monograph No. 21, 1940).

38. G. STOCKING & M. WATKINS, *supra* note 25, at 186-87.

ened its controls. In addition to the original organizing groups of Germany, France, Belgium, and Luxembourg, it eventually embraced the major steel-producing groups of Czechoslovakia, Poland, Austria, the United Kingdom, and the United States. By 1937, it included ninety percent of all the iron and steel traded in international markets.[39]

In aluminum, all of the world's major aluminum-exporting companies in 1931 signed the Foundation Agreement—an international cartel constructed in large part by the brother of Arthur V. Davis, chairman of the board of Alcoa. By the terms of this agreement, the Alliance Aluminum Compagnie was incorporated in Switzerland. Besides fixing minimum prices for aluminum, the Alliance bought and sold metal so that if a member could not sell his full quota in the marketplace at the current minimum price, the Alliance would purchase the unsold portion at that price. "Thus the Alliance 'buying price' became an actual minimum price, since no member could have any incentive to sell aluminum in the market for a lower price than the cartel offered to purchase it—as long as the member's output was within his quota limits."[40] Although the agreement did not expressly include Alcoa and the U.S. market, it was implicit "in this voluntary mutual curtailment of output by every important producer outside the United States . . . that cartel members would 'respect' Alcoa's dominant position in the United States market."[41]

In magnesium, "the conference table superseded the market as the arena for decision making"[42] when the world's major producers—Alcoa, Dow Chemical, and IG Farben—forged a world cartel. Faced with the imminent entry of Farben into the U.S. market, an Alcoa official wrote to Farben acknowledging "the desirability of an entente cordiale between our respective companies."[43] As summarized in one company memorandum, the firms were well aware that their business "will thrive best in a noncompetitive situation."[44]

Led by General Electric, manufacturers of electric light bulbs also organized a cartel to supplant market forces. The cartel has been described as an "international planning agency for the control of the

39. *Id.* at 187. Said one steelman, "[O]f course, under the cartels the prices were good, otherwise there wouldn't be any good reason to have a cartel." *Id.* at 206-07. Noncompetitive steel prices were not the only adverse consequence of the cartel, however; owing to the cartel's compensation-bonus system, world steel producers—including those in America—served to subsidize the Nazi rearmament program. *Id.* at 214.

40. *Id.* at 264.

41. *Id.* at 265. As a consequence of the cartelization of aluminum, the United States found itself seriously short of this critical material at the outbreak of World War II. *Id.* at 272.

42. *Id.* at 286.

43. *Id.* at 285.

44. *Id.* at 289.

[world] lamp industry."[45] Foreign producers agreed not to enter the electric lamp business in the United States in exchange for GE's promise not to encroach on the foreign producers' markets. In addition to providing what a GE official described as "such satisfactory profits to those engaged in the business,"[46] the cartel strove to *shorten* bulb lives and to suppress more efficient fluorescent lighting as a further means for enhancing "satisfactory profits"—both in the sale of more bulbs and, perhaps equally important, in the sale of electric power generating equipment produced by GE and Westinghouse.[47]

In chemicals, the world's leading producers, capped by the "Grand Alliance" between DuPont in the United States, Imperial Chemical Industries (ICI) in Great Britain, and IG Farben in Germany, also forged an elaborate system of private market controls. "They divided markets; they marked off industrial fields; they established export quotas; they exploited specified fields and markets cooperatively. Joint control of the market became the general rule; free competition, the exception."[48] As it evolved, the world chemical cartel came to encompass specific commodity agreements covering a large number of products.[49]

Cartel controls in the chemical industry embraced far more than a seemingly inexhaustible list of particular products. More broadly, they encompassed "a whole series of tangible and intangible [intercompany] relationships, nebulous and specific arrangements, amorphous and settled conventions . . . which have had a real and potent influence in shaping the development of the world's chemical industries and in regulating chemical markets."[50] In this field, the world's major producers

> made free use of the whole range of cartel techniques for controlling markets. By informal understandings, international alliances, communities of financial interest, joint enterprises, and "patents and processes" agreements, all woven into a coherent pattern, they . . . established "orderly" markets for chemicals, abated competitive risks, and maintained a high rate of profits.[51]

For them, the outbreak of war was a temporary disruption; their general understanding was "that they would take up again at the close of the war where they had left off, in an atmosphere of mutual concord and

45. *Id.* at 342.

46. *Id.* at 328 n.75.

47. *Id.* at 353-62.

48. *Id.* at 418.

49. *Id.* at 419. At one time or another, these cartels covered explosives, cellulose derivatives (plastics, film, and lacquers), paints and varnishes, pigments and colors, acids, fertilizers, synthetic ammonia, synthetic products of the hydrogenation of coal and oil, dyestuffs and other organic chemicals, alcohols, insecticides, fungicides, disinfectants, chlorine products, antiknock compounds, synthetic resins and plastics, pharmaceuticals, synthetic rubber, and nylon. *Id.* at 451, 454.

50. *Id.* at 419.

51. *Id.* at 11.

cooperation."[52]

In petroleum, a painstakingly researched report prepared by the staff of the Federal Trade Commission in 1952 found that the world's seven largest petroleum giants "through the high degree of concentration of control, through direct ownership, through joint ownership, through purchase and sales contracts, and through production and marketing agreements, have been able to limit production, divide up markets, share territories, and carry on other activities designed to stabilize markets and control production" around the globe.[53]

Further, the staff reported that restrictive oil agreements, beginning with the Achnacarry (or "as is") agreement of 1928, "constitute a series of steps by which the major international companies sought to establish more effective control over distribution and prices throughout the world."[54] By 1934, a relatively simple set of arrangements had evolved into an international agreement encompassing "detailed restriction of production, division of markets, price fixing, restriction on the number and kind of distribution outlets, and the elimination of competitive expenditures for market facilities and sales promotion in local markets."[55] The world cartel in oil was completed with the enactment by Congress of the "Interstate Compact to Conserve Oil and Gas" in 1935. The Act, spearheaded by the American Petroleum Institute, mandated government control of U.S. petroleum production levels and cemented the majors' global control by precluding domestic U.S. production from disrupting cartelized world markets.[56]

The history of the international cartel movement graphically demonstrates the fragility of foreign competition as a surrogate for structurally viable domestic competition. Furthermore, it is important to note that these and other international cartels did not disappear of their own accord; the government filed about sixty antitrnst cases against world cartels during the 1940's alone.[57] Although a number of forces combined to undermine these cartels, one expert concludes that "no factor had such a direct bearing as did enforcement of American antitrust laws."[58]

But the will to control persists, and collusion between American firms and their foreign rivals is not a relic of some bygone age. In 1972,

52. *Id.* at 423.

53. STAFF OF FEDERAL TRADE COMM'N, THE INTERNATIONAL PETROLEUM CARTEL 349 (Comm. Print 1952) [hereinafter INT'L PETROLEUM CARTEL REPORT] (Report to Subcomm. on Monopoly of the Senate Select Comm. on Small Business, 82d Cong., 2d Sess.).

54. *Id.* at 197.

55. *Id.* at 273.

56. *Id.* at 137, 210-18; *see also* J. BLAIR, THE CONTROL OF OIL 163 (1976) (discussing the Interstate Compact to Conserve Oil and Gas).

57. Rahl, *supra* note 35, at 353.

58. *Id.*

for example, eighteen of the world's leading producers of uranium yellowcake—representing France, Canada, Great Britain, South Africa, and Australia, and including subsidiaries controlled by two American firms (Gulf Oil and Getty Oil)—joined together to create a world cartel.[59] They devised an intricate scheme for determining company sales shares. They forged an elaborate mechanism for apportioning quotas between firms. And, as Gulf Oil's representative to the cartel admitted in 1977 before a Congressional committee, they erected a system of sanctions and penalties for member infractions—all to the end of fixing uranium prices around the globe.[60]

B. Joint Ventures and Global Market Control

A "joint venture" is formed when two or more firms elect to cooperate, rather than compete, with one another in one or more chosen fields of endeavor. The joint venture thus constitutes a *partial* consolidation between the participants. Proponents of such ventures offer a panoply of justifications for them:

> They reduce duplication, promote the efficient use of scarce technical personnel, and help to achieve desirable economies of scale. Small firms are able to collaborate in joint research and development projects, which because of prohibitive costs, they could not do by themselves. Large firms are jointly able to tackle today's large and complex technological problems, which are often beyond the ability of single firms.[61]

According to United Technologies, "The way to greater [international] market presence is through sharing technologies, entering into joint ventures and co-production agreements, and forging partnerships that cross

59. For a list of the members of "The Club," as it came to be known, see J. TAYLOR & M. YOKELL, YELLOWCAKE: THE INTERNATIONAL URANIUM CARTEL 71-72 (1979). A statement contained in one Gulf document is particularly revealing: "It is at least as important for Gulf to become a sophisticated and substantial participant in worldwide uranium matters as it was for us to undertake similar efforts with respect of [sic] oil and gas 30 or 40 years ago." *International Uranium Cartel: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 96th Cong., 1st Sess. 542 (1977) [hereinafter *Int'l Uranium Cartel Hearings*].

60. *Int'l Uranium Cartel Hearings, supra* note 59, at 256-57, 264, 278. The cartel achieved no small measure of success: uranium prices skyrocketed from $5.95 per pound at the cartel's inauguration in 1972, to $41.00 by September 1976—an increase of nearly 600%. J. TAYLOR & M. YOKELL, *supra* note 59, at 102. *See also* Rothwell, *Market Coordination by the Uranium Oxide Industry,* 25 ANTITRUST BULL. 233 (1980). For additional evidence on a recent international cartel, see *Cartel Restriction Act: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce,* 96th Cong., 2d Sess. 72-104 (1980).

61. *Japanese Technological Advances and Possible United States Responses Using Research Joint Ventures: Hearings Before the Subcomm. on Investigations and Oversight and the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology,* 98th Cong., 1st Sess. 197 (1983) (statement of Dr. D. Bruce Merrifield, Assistant Secretary of Commerce for Productivity, Technology, and Innovation, U.S. Dept. of Commerce).

national borders."[62]

Nevertheless, as Justice Clark observed, the "joint venture, like the 'merger'. . . , often creates anticompetitive dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with one another. The result is 'a triumvirate of associated corporations.' "[63]

The record shows that transnational joint ventures, which bind together U.S. firms with their major foreign rivals, are often tainted with anticompetitive consequences. "Technology sharing" can be a subterfuge for market sharing, "co-production" a euphemism for market control. A proliferation of transnational joint ventures institutionalizes an attitude of circumspection and *bonhomie* between ostensible world rivals. More seriously, the evidence shows, an intricate network of organizational interlinkages between world rivals can serve as the institutional glue for an existing cartel, or as the organizational superstructure on which to hang a new one. At a minimum, the existence of transnational joint ventures contradicts the critics' contention that a plethora of international rivals assures fierce global competition when, in fact, those rivals may be intimately intertwined with one another as partners rather than competitors.

Irenee du Pont explicated the anticompetitiveness of transnational joint ventures in a 1928 letter to his German counterpart at the IG Farben chemical concern:

> Our suggestion in the ammonia field and the high pressure synthetic field in general, or in dyestuffs or pharmaceuticals, *or in any field of manufacture* where it appears that the situation makes it desirable to enter each others' market, is that we get together . . . . It appears to us that the most logical form in any of these cases would be to form a domestic company, to be jointly owned . . . .[64]

International rivals understand that competition in one sphere tends to spread to others. As another DuPont official once noted, "satisfactory relations on the commercial side would follow automatically, as [it is] unlikely that the companies would compete with one another commercially in a senseless fashion, while cooperating technically."[65]

The petroleum industry illustrates the role of transnational joint ventures as integral components of cartelized control of world markets. Similarly, the automobile industry illustrates how a proliferation of such ventures can be used as the building blocks for a new world cartel, espe-

62. N.Y. Times, Oct. 9, 1985, at A23, col. 6 (advertisement).

63. United States v. Penn-Olin Chem. Co., 378 U.S. 158, 169 (1964) (citation omitted).

64. C. EDWARDS, *supra* note 28, at 8 (emphasis added).

65. *Id.* at 33.

cially when bolstered by quantitative government controls on imports and exports.

1. The Petroleum Industry

The world's major petroleum companies are not autonomous centers of initiative who passively submit to the discipline of the global marketplace. Instead, they have long striven to spin a complex web of carteloid controls in order to eliminate the threat of global competition. Joint ventures encompassing every major stage of production in the industry and extending around the globe are a traditional manifestation of the symbiotic interrelationship between the world's largest oil companies. Joint ventures establish—and sustain—an intimate community of interest among the "Seven Sisters." They have been a key instrument in the worldwide control of oil.

In his monumental study of the industry, John Blair reported:

> In the Middle East, and indeed in most other oil-producing areas as well, the instrument traditionally used to control production and distribute income therefrom was the jointly owned operating company. In the form that came to be adopted elsewhere, the joint venture made its first appearance in 1928 with the formation, principally by [British Petroleum] and Shell, of the Iraq Petroleum Co., into which Exxon and Mobil were later admitted. To these four, Aramco added [Standard Oil of California, or Chevron] and Texaco, while the Kuwait Oil Co. added Gulf, bringing to seven the number of international majors accounting for the great bulk of the area's production. Most of this output was controlled through joint operating companies, which performed the functions of exploration, development, and production; distributed income to the parent companies in accordance with their ownership shares; and effected sales or transfers (also based on ownership shares) only to their companies' owners, except under specific contracts with other members of the seven, covering very long periods of time and containing highly restrictive provisions.[66]

Blair found that "as late as 1972 the seven international majors were still producing 91 percent of the Middle East's crude oil and 77 percent of the Free World's supply outside the United States."[67]

In bidding for offshore leases in the United States, the world's petroleum giants rely extensively on joint ventures in the form of joint bidding. The high degree of joint-venture bidding is evident in Table 1, which depicts the results of the government's record $3.5 billion sale of lease rights in 1983.[68] The anticompetitiveness of this brand of joint venture is

66. J. BLAIR, *supra* note 56, at 50-52.

67. *Id.* at 52.

68. Table 1 understates the extent of joint-venture bidding involving the petroleum majors because it contains only winning bids, rather than all bids submitted. The degree of joint-venture

Table 1
Joint Bidding: Gulf of Mexico
Offshore Leases
May 1983

Company	Number of Independent Bids	Number of Joint Bids
Exxon	19	16
Mobil	3	31
Texaco	8	29
Standard Oil of Calif. (Chevron)	12	24
Amoco	36	32
Atlantic Richfield (ARCO)	15	41
Shell	8	52
Phillips	0	17
Sun	0	17
Standard Oil of Ohio (Sohio)*	19	32
Union Oil of Calif. (Unocal)	2	32

* Majority owned by British Petroleum.

Source: Wall St. J., May 27, 1983, at 30, col. 1.

apparent. According to Professor Walter Mead:

> In any given sale, it is obvious that when four firms . . . , each able to bid independently, combine to submit a single bid, three interested, potential bidders have been eliminated; i.e., the combination has restrained trade. This situation does not differ materially from one of explicit collusion in which four firms meet in advance of a given sale and decide who among them should bid (which three should refrain from bidding) for specific leases and, instead of competing among themselves, attempt to rotate the winning bids.[69]

Further, as the Senate Committee on the Judiciary has found, "Joint bidding for leases almost invariably leads to joint *production* arrangements."[70] In an in-depth examination of Louisiana offshore leases, 46% of the nearly 300 leases surveyed—accounting for 41% of total outer continental shelf production—were found to be jointly held by two or more oil companies.[71] "Even onshore," the Committee reported, "a large amount of crude oil is produced jointly."[72]

---

bidding shown is in line with that found in other, earlier studies. *See The Natural Gas Industry: Hearing Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. 481 (1973).

69. Mead, *The Competitive Significance of Joint Ventures,* 12 ANTITRUST BULL. 819, 839 (1967).

70. SEN. COMM. ON THE JUDICIARY, PETROLEUM INDUSTRY COMPETITION ACT OF 1976, S. REP. No. 1005, 94th Cong., 2d Sess. 29 (1976) (emphasis added).

71. *Id.* at 32.

72. *Id.*

In addition, the international petroleum majors control, more often than not through joint ventures, most of the world's major petroleum pipelines. A 1952 report found that "outside of the United States, every important pipe line in existence or even proposed is controlled by the seven principal international oil companies, individually or jointly."[73] In the United States, the majors have banded together since the 1950's to construct and operate jointly crude and petroleum product pipelines, including the Colonial pipeline (the largest product line in the country, stretching from the Gulf Coast, through the southeastern United States, and terminating in New York), the Olympic, the Explorer, and the Capline pipelines, and the Trans-Alaska Pipeline System.[74] Leonard L. Coburn of the Department of Energy's Office of Competition describes the significant market share of pipelines jointly owned by the major petroleum companies: "Of the twenty largest systems, eleven are jointly owned and operated; these eleven account for 62.86 percent of total [pipeline] barrel-miles. If all jointly owned lines are considered, this total would be increased to 75.09 percent of total barrel-miles."[75]

Finally, joint ventures in oil not only tie together private petroleum giants, but also have come in recent years to include links between the international oil majors and state-owned producers in the Middle East. Examples of this trend are the Pemref joint refining venture between Mobil Oil and the Saudi government, the Yanbu petrochemical joint venture between Mobil Oil and the Saudi government,[76] and the Al-Jubail petrochemical joint venture between Exxon and the Saudi government.[77]

In the world oil industry, then, "joint ventures"—joint-bidding, joint-production, joint-ownership, joint-pipelining—organizationally con-

join the world's major producers. Encompassing virtually every major stage of the industry, joint ventures reach virtually every corner of the globe. The existence of these joint ventures in oil casts serious doubt on the independence and competitiveness of global rivals claimed by the critics of antitrust. Indeed, as industry expert Walter Measday observes,

---

73. INT'L PETROLEUM CARTEL REPORT, *supra* note 53, at 28.

74. For a detailed analysis of the structure of petroleum pipelines in the United States, and the anticompetitive problems posed because of their control by vertically integrated oil companies, see Adams & Brock, *Deregulation or Divestiture: The Case of Petroleum Pipelines,* 19 WAKE FOREST L. REV. 705 (1983).

75. *Petroleum Pipeline Regulatory Reform Bill: Hearings on S. 1626 Before the Subcomm. on Energy Regulation of the Senate Comm. on Energy and Natural Resources,* 97th Cong., 2d Sess. 31 (1982) (report of Leonard L. Coburn, Acting Director, Office of Competition, Assistant Secretary for Congressional, Intergovernmental and Public Affairs, U.S. Dept. of Energy).

76. MOBIL CORP., ANNUAL REPORT 8 (1985).

77. EXXON CORP., ANNUAL REPORT 19 (1984); *see also* Measday & Martin, *The Petroleum Industry,* in THE STRUCTURE OF AMERICAN INDUSTRY 38 (W. Adams 7th ed. 1986) (describing the structure of the international petroleum industry).

"a reasonable man may wonder as to just what degree the major oil companies are partners rather than competitors."[78]

2. *The Automobile Industry*

The automobile industry has long been one of the most concentrated of all major U.S. industries. In the post-World War II era, the Big Three—General Motors, Ford, and Chrysler—have generally accounted for ninety percent or more of U.S. auto production, and until recently, they controlled an approximately equivalent share of U.S. auto sales.[79] It was, in *Forbes'* words, "jump when the dominating partner, GM, said jump. . . . In the end, then, it was a one-sided oligopoly, with Ford and Chrysler surviving—but on GM's terms."[80] Predictably, the industry exhibited the unmistakable traits of oligopolistic mutual interdependence and competitive forebearance: prices were uniformly rigid except in an upward direction, price competition nonexistent, production inefficiency and bureaucratic red tape rampant, and technological progress moribund.[81]

The advent of foreign competition—particularly Japanese producers offering innovative and fuel-efficient models in the 1970's—disrupted this cozy noncompetitive milieu. The domestic oligopoly's initial "creative" response to foreign competition, of course, was to join with organized labor to lobby government for the imposition of "voluntary" import quotas—that is, to restrain and eliminate global competition rather than adjust to it. The industry's pressure politics were crowned with success: "voluntary" quotas imposing quantitative restrictions on imports of Japanese cars have been in effect continuously since 1981.[82]

The domestic oligopoly appears to have utilized the "breathing

78. Measday, *The Petroleum Industry,* in THE STRUCTURE OF AMERICAN INDUSTRY 36, 63 (W. Adams 6th ed. 1982). Recent events in the industry, including the nationalization of oil fields by a number of foreign governments in the Middle East and elsewhere, as well as Saudi Arabia's most recent effort to force the world's producers into a new cartel agreement by cutting prices to ruinously low levels, do not necessarily signal the demise of market control in world oil. The industry—companies and governments alike—has traditionally demonstrated an unmatched capacity for eliminating temporary competition and for reestablishing cartelized control. For discussions of the successful cartelization of the world petroleum industry, see generally J. BLAIR, *supra* note 56; F. COOK, THE GREAT ENERGY SCAM: PRIVATE BILLIONS VS. PUBLIC GOOD (1982); R. ENGLER, THE BROTHERHOOD OF OIL: ENERGY POLICY & THE PUBLIC INTEREST (1977).

79. *See* Adams & Brock, *The Automobile Industry,* in THE STRUCTURE OF AMERICAN INDUSTRY 131 (W. Adams 7th ed. 1986) (discussing the structure of the U.S. auto industry).

80. Flint, *"Best Car Wins,"* FORBES, Jan. 27, 1986, at 73, 75-76.

81. *See generally* Adams & Brock, *supra* note 79 (discussing the price policy of the U.S. auto industry).

82. The "voluntary" quotas have inflated new car prices in the U.S. market by as much as $2,000, and collectively have cost consumers roughly $5 billion per year since their imposition. Wayne, *The Irony and Impact of Auto Quotas,* N.Y. Times, Apr. 8, 1984, § 3, at 1, col. 3; *see also* A Review of Recent Developments in the U.S. Automobile Industry Including an Assessment of the Japanese Voluntary Restraint Agreements, USITC Pub. 1648, Inv. No. 332-188 (Feb. 1985);

space" afforded by import restraints to devise a more permanent resolution of its foreign competition "problem," however. Its better idea seems to be to coopt foreign competition through the instrumentality of a rapidly proliferating network of transnational joint ventures, including joint production agreements, joint supply arrangements, and jointly owned subsidiaries. The intricacy and breadth of this form of consolidation in the auto industry is evident in Figure 1.

General Motors, by far the world's largest automobile producer, is interlinked with its foreign rivals in a complex latticework of joint venture arrangements. In addition to its joint production arrangement in California with Toyota—linking the world's largest auto producer with the leading importer of cars into the American market—General Motors has entered into a long-term agreement with, and holds a 34% ownership interest in, the Japanese Isuzu firm for the supply of parts and upwards of 200,000 automobiles for annual import into the U.S.[83] GM holds a substantial financial interest in the Japanese Suzuki firm and has agreed with Suzuki and Isuzu jointly to develop and import mini-cars into the United States.[84] GM also owns 50% of Daewoo, an emerging South Korean auto maker,[85] and agreed in 1984 to invest $427 million in a venture with the firm to produce and export jointly small front-wheel-drive cars.[86] Early in 1986, GM purchased a 60% stake in the British Lotus firm (in which Toyota holds a 22% ownership interest).[87] Finally, GM reportedly is negotiating a broad range of partnership pacts with the Italian Fiat firm.[88]

Ford Motor Company owns 24% of the Japanese Mazda firm (Toyo Kogyo), has entered into purchase agreements with Mazda for a variety of automotive parts and components,[89] is jointly constructing an automobile factory with Mazda in Mexico,[90] and will purchase 40 to 60% of the cars that Mazda plans to build in a Michigan plant scheduled to begin

---

Crandall, *Import Quotas and the Automobile Industry: The Costs of Protectionism*, 2 BROOKINGS REV. No. 4, at 8 (1984).

83. *Industrial Policy: Hearings Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 1st Sess. Part 3, at 164 (1983) (appendix to statement of Sheldon Friedman, Research Director, International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, UAW) [hereinafter *Industrial Policy Hearings*].

84. *Id; see also* Holusha, *Detroit's New Japan Strategy*, N.Y. Times, Apr. 1, 1985, at D4, col. 4.

85. Wall St. J., Jan. 3, 1986, at 4, col. 4.

86. Guiles, *GM and Daewoo Plan Venture for Small Cars*, Wall St. J., June 15, 1984, at 8, col. 2.

87. Darlin & Forman, *GM Purchases 59.7% of Britain's Lotus, Bids for Rest, Revamps European Lines*, Wall St. J., Jan. 23, 1986, at 6, col. 2.

88. Nag & Cohen, *General Motors, Fiat Considering Partnerships*, Wall St. J., Oct. 11, 1985, at 3, col. 4.

89. *Industrial Policy Hearings*, *supra* note 83, at 164.

90. Holusha, *supra* note 84, at D4, col. 5.

FIGURE 1

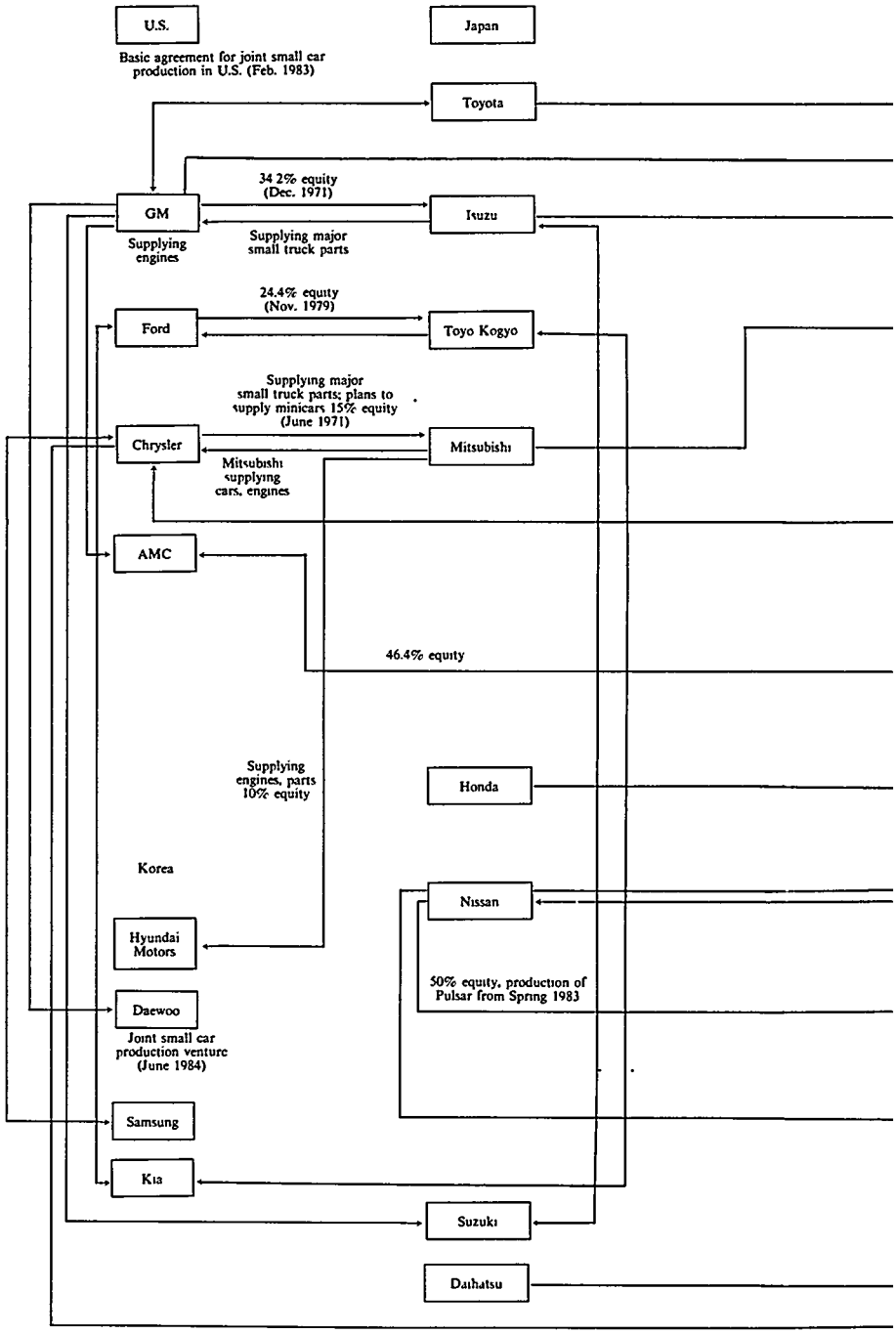
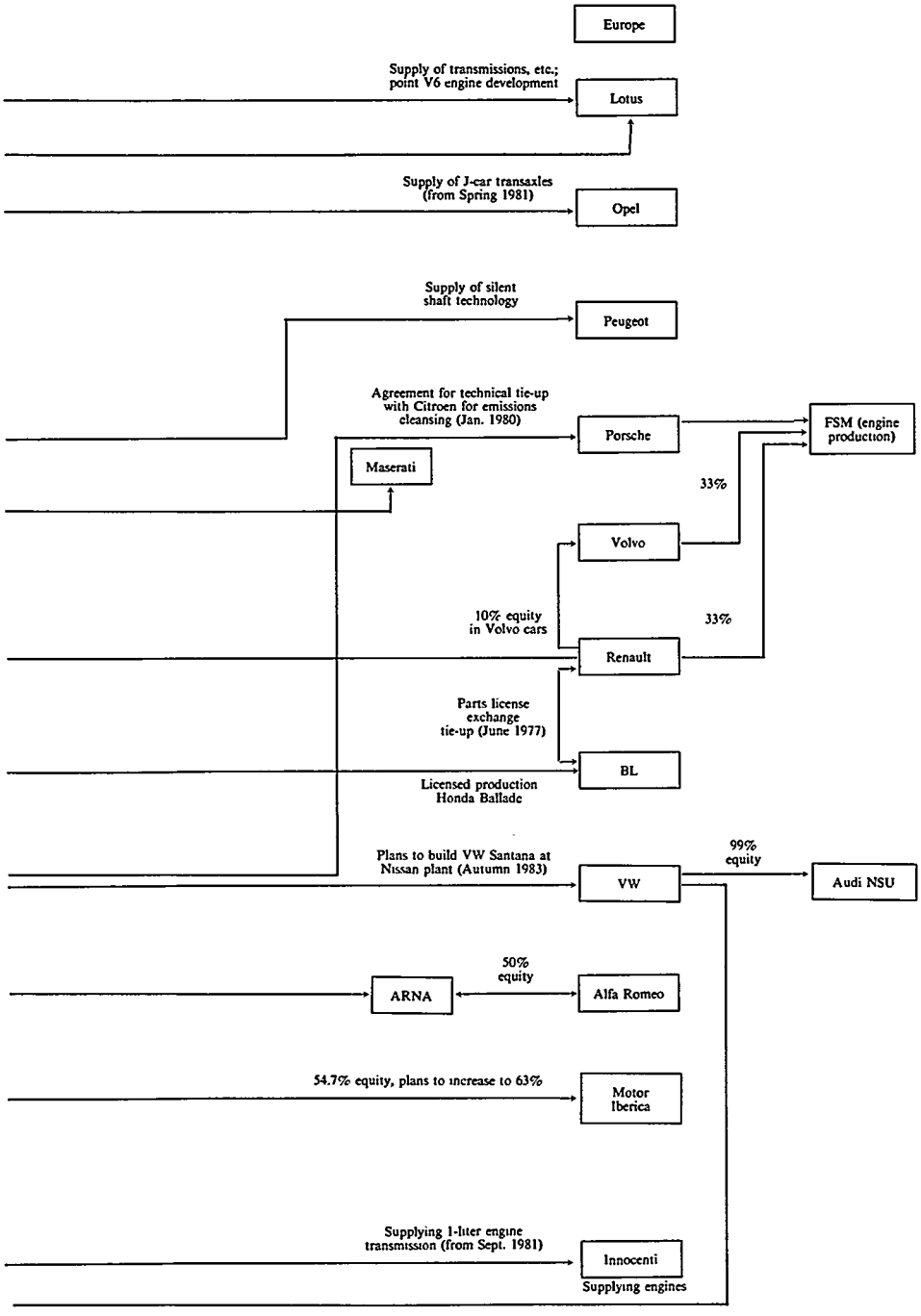


FIGURE 1. *Cooperation between World Auto Manufacturers. Sources:* WARD'S AUTOMOTIVE YEARBOOK 52 (1984); N.Y. Times, Jan. 6, 1986, at D9, col. 2; Wall St. J., Oct. 28, 1985, at 15, col. 2; N.Y. Times, Aug. 19, 1985, at D4, col. 6; Wall St. J., June 15, 1984, at 8, col. 2.


Europe
Supply of transmissions, etc.; joint V6 engine development
Lotus
Supply of J-car transaxles (from Spring 1981)
Opel
Supply of silent shaft technology
Peugeot
Agreement for technical tie-up with Citroen for emissions cleansing (Jan. 1980)
Porsche
FSM (engine production)
Maserati
33%
Volvo
10% equity in Volvo cars
33%
Renault
Parts license exchange tie-up (June 1977)
BL
Licensed production Honda Ballade
Plans to build VW Santana at Nissan plant (Autumn 1983)
99% equity
VW
Audi NSU
50% equity
ARNA
Alfa Romeo
54.7% equity, plans to increase to 63%
Motor Iberica
Supplying 1-liter engine transmission (from Sept. 1981)
Innocenti
Supplying engines

production in 1987.[91] Ford and Mazda, in turn, have collectively entered into joint production and purchase agreements with the South Korean automotive firm Kia (a company in which Mazda holds a 25% equity interest), and Ford has disclosed plans to import into the United States mini-cars manufactured by Kia beginning in 1987.[92]

Similarly, Chrysler has forged an elaborate network of joint ventures with its foreign rivals. It holds a 24% ownership stake in the Japanese Mitsubishi firm, which supplies Chrysler with parts and more than 140,000 assembled automobiles for import annually into the U.S. market.[93] Chrysler and Mitsubishi have disclosed plans to produce jointly automobiles in Illinois.[94] Mitsubishi, in turn, has taken a 15% equity share in South Korea's newly emerging Hyundai Motor Company and supplies engine technology for Hyundai's "Pony" car.[95] Chrysler has entered into a parts-buying venture with the South Korean Samsung Group; Samsung will eventually produce complete automobiles for Chrysler.[96] Chrysler has undertaken to produce automobiles with Maserati, an Italian subsidiary of De Tomaso,[97] and the firm has engine purchase agreements with Volkswagen[98] and the French firm Peugeot.[99]

Considered en masse, the reach and density of automotive joint ventures is staggering.[100] The proliferation of joint ventures interlinking the

91. *Ford Will Buy 50% of Cars Mazda Makes at New U.S. Plant,* Wall St. J., Aug. 27, 1985, at 18, col. 1.

92. *Ford Korean Import Is Seen,* N.Y. Times, Aug. 19, 1985, at D4, col. 6. Ford has also recently disclosed a planned joint production venture with Volkswagen, and is reportedly seeking control of the Italian Alfa Romeo firm. *Latin touches,* ECONOMIST, June 21, 1986, at 74.

93. *Free Trade—Myth or Reality: The Auto Industry, A Case Study: Hearing Before the Subcomm. on International Economic Policy of the Senate Comm. on Foreign Relations,* 98th Cong., 2d Sess. 23 (1984) (appendix to statement of Stephen P. Yokich, Vice President, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW); *Going Global: Despite Pleas for Curbs on Imports, U.S. Auto Makers Rapidly Expand Foreign Ties,* Wall St. J., Oct. 28, 1985, at 15, col. 2 [hereinafter *Going Global*].

94. *Going Global, supra* note 93, at 15, col. 2.

95. Kanabayashi, *Japan Is Wooing Auto Concerns in South Korea,* Wall St. J., July 17, 1985, at 34, col. 1.

96. *Industrial Policy Hearings, supra* note 83, at 164; *Going Global, supra* note 93, at 15, col. 2.

97. *Chrysler Pact with Maserati,* N.Y. Times, Jan. 6, 1986, at D9, col. 2; *Chrysler, De Tomaso to Make Sport Coupe in Italy for Sale in U.S.,* Wall St. J., Feb. 7, 1985, at 35, col. 5.

98. Certain Motor Vehicles and Certain Chassis and Bodies Therefor, USITC Pub. 1110, Inv. No. TA-201-44, at A-20 (Dec. 1980).

99. *Industrial Policy Hearings, supra* note 83, at 164.

100. As the International Trade Commission was compelled to remark in 1980, even before the joint venture movement reached its more recent crescendo:

> In Australia . . . Renault assembles Ford vehicles and GM and Toyota produce engines for each other. While Renault supplies cabs for Ford H series trucks and Peugeot supplies diesel engines for Ford's European Granada, Ford has jointly developed industrial diesels with Fiat. Volkswagen provides Chrysler with 4-cylinder engines, and Chrysler assembles Volkswagen products in Australia. Intercompany ownership is widespread. GM, Ford, and Chrysler, for example, own substantial shares of Isuzu, Toyo Kogyo [Mazda], and Mitsubishi, respectively, and jointly produce, develop, and market vehicles and components.

U.S. oligopoly with its major foreign rivals casts doubt on the alleged effectiveness of global competition in disciplining domestic oligopolies. It calls into question the alleged pervasiveness of competition between "independent" world rivals, as well as the proclaimed obsolescence of antitrust in the modern global economy. Congressman Richard Durbin (D., Ill.) has best stated the public policy problem of transnational joint ventures in autos: "It used to be 'us' vs. 'them.'. . . Now . . . [w]e don't know who is 'us' and who is 'them.' "[101] Indeed, when buttressed by intergovernmentally negotiated trade restraints like the "voluntary" import restrictions, the quasi-consolidation movement underway in the world auto industry is reminiscent of the international cartels of the interwar years—a system of mutually acceptable accords arrived at not to nurture global competition, but to smother it.[102]

C. Mergers and Global Market Control

Mergers and acquisitions constitute a further stratagem for subverting foreign competition. Indeed, they represent the joint venture carried to its ultimate extreme. Mergers and acquisitions can undermine global competition in at least four important ways.

First, a merger between a domestic producer and one or more of its foreign rivals immediately eliminates competition between the combining firms and can exacerbate noncompetitive industry structure in an already overly concentrated field.[103] This proved to be the case when the West German Bayer firm, whose Rhinechem-Harmon subsidiary ranked as the eighth largest manufacturer of organic pigments in the United States, attempted to acquire the pigments division of Chemetron Corporation, the nation's third largest producer of organic pigments.[104] The Federal Trade Commission found that "Rhinechem and Chemetron are and have been for many years actual competitors of each other in the manufacture and sale of organic pigments and submarkets thereof"; that the field was a concentrated one wherein the four largest firms collectively accounted

Certain Motor Vehicles and Certain Chassis and Bodies Therefor, USITC Pub. 1110, Inv. No. TA-201-44, at A-20 (Dec. 1980).

101. Shribman & Pine, *Auto-Industry Lobbying to Retain Japan Quotas Hasn't Been as Intense, or Successful, as in 1984,* Wall St. J., Feb. 25, 1985, at 54, col. 1.

102. The Japanese Government's decision in early 1986 to continue controls on auto exports to the U.S. market is significant. In recent years, Japanese producers have had little to learn from America about production efficiency and technical innovation. However, the voluntary restraints first put into place at the behest of the Reagan administration seem to have demonstrated to the Japanese the profitability of international market controls, as Japanese car companies take home record profits from their sales in the American market. *See* Nag, *Import Limits Don't Restrain Japanese Profits,* Wall St. J., Apr. 28, 1983, at 30, col. 3.

103. *See generally* Graham, Hermann & Marcus, *Section 7 of the Clayton Act and Mergers Involving Foreign Interests,* 23 STAN. L. REV. 205 (1971) (discussing transnational mergers).

104. *In re* Rhinechem Corp., 93 F.T.C. 883, 884-85 (1979).

for one-half of all sales; and that "[b]arriers to entry into the manufacture and sale of organic pigments are substantial."[105] Said Judge Flaum on appeal: "Not one firm has made a successful *de novo* entry in this market in the last twenty years." Moreover, he reported, "there is considerable trustworthy evidence before the court that indicates that, if not for this purchase, Harmon and Chemetron had planned on increasing their head-to-head competition . . . . Obviously," he concluded, the merger, if permitted, would significantly lessen competition.[106]

Second, mergers can be a convenient means for forestalling *potential* competitive entry into and expansion within the domestic market by foreign firms possessing the technical acumen and financial capacity to overcome barriers to entry. For example, when the Schlitz Brewing Company sought to acquire control of Labatt, a Canadian brewer, Schlitz ranked as the nation's second largest brewer. The district court hearing the antitrust action against Schlitz found that mergers and acquisitions "played an important part" in the "strong trend toward concentration" in the beer industry. A "substantial number of these acquisitions and mergers involved the largest brewers," and "Schlitz has made many of these acquisitions."[107] Moreover, the court found brewing

105. *Id.* at 885.

106. Federal Trade Comm'n v. Rhinechem Corp., 459 F. Supp. 785, 790 (N.D. Ill. 1978). It is significant in this regard to note that large foreign firms recently have joined in merger mania, and have made major acquisitions of their large American rivals.

For example, L'Air Liquide, a French firm and the world's largest producer of industrial gases, has acquired Big Three Industries, a leading American industrial gas producer. Frazier, *Air Liquide S.A. to Buy Concern for $1.05 Billion,* Wall St. J., Aug. 13, 1986, at 2, col. 2; Hayes, *French Buyer for U.S. Gas Producer,* N.Y. Times, Aug. 13, 1986, at 25, col. 2. Through its acquisition of Glidden (at the time, the third largest paint manufacturer in the United States), the British firm Imperial Chemical Industries has become the world's largest paint maker. Hemp, *Hanson Trust Agrees to Sell Paint Unit to ICI,* Wall St. J., Aug. 18, 1986, at 24, col. 4. Hoechst, a German chemical group, has made a $2.85 billion bid for the U.S. Celanese chemical concern, and if the merger is completed, Hoechst would become the world's largest chemical producer. *Only America Is Big Enough for West German Giants,* ECONOMIST, Nov. 8, 1986, at 77. Union Carbide has announced an agreement to sell its agricultural chemicals operations to Rhone-Poulenc, a leading French producer of, inter alia, agricultural chemicals. Prokesch, *French Concern to Buy Union Carbide Business,* N.Y. Times, Nov. 14, 1986, at D2, col. 1.

Other recent, large transnational consolidations combining together foreign and U.S. rivals include the acquisition of White Consolidated Industries (the third largest appliance maker in the United States) by Electrolux, the largest producer of appliances in Europe, Winter, *White Approves Sweetened Bid by Electrolux,* Wall St. J., Mar. 11, 1986, at 3, col. 1; the acquisition of Purina Mills (the largest commercial feed company in the United States) by BP Nutrition Ltd., Europe's largest feed company, Greenhouse, *British Concern to Buy Ralston Feed Business,* N.Y. Times, July 11, 1986, at D1, col. 1; Unilever's $3.1 billion acquisition of Chesebrough-Ponds (a merger between leading British and Ameriean consumer products companies), Crudele, *Unilever Sets Deal for Pond's,* N.Y. Times, Dec. 2, 1986, at D1, col. 6; and Nestle's acquisition of Carnation, a consolidation between two of the world's largest food processing concerns, *The Top 300 Deals,* BUS. WK., Apr. 18, 1986, at 272.

107. United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, 136 (N.D. Cal.), *aff'd,* 385 U.S. 37 (1966).

to be an extremely difficult industry for a new firm to enter, "due to the great expense of buying or building a plant and acquiring sufficient business to support it."[108] As a result, "the large established Canadian brewers represent the most probable sources of potential substantial competition in the United States markets."[109] In this case, then, merger would remove a prime source of potential competition. In fact, the court found that at "the time of its acquisition of Labatt stock, Schlitz attempted to eliminate potential competition of Labatt by attempting to halt the introduction of Labatt beer into the United States"[110]—a less than stirring testimonial to the alleged immunity of foreign competition from erosion and subversion.

Third, transnational mergers can undermine competition by triggering defensive combinations and consolidations, especially when the acquiring foreign firm is large and powerful, and the acquired firm already occupies a leading position in the domestic market. As economist Richard E. Caves reports, the British tobacco market illustrates this anticompetitive consequence of transnational mergers:

> American [Tobacco Co.] purchased a leading British producer. That event caused 13 dismayed British rivals to merge into Imperial Tobacco. After a year of duopolistic rivalry, a peace treaty gave Imperial a monopoly of the British and Irish markets, and American got a guarantee that Imperial would not sell in the United States or its dependencies. British-American Tobacco was organized as a joint venture to handle business in the rest of the world.[111]

Caves reports that transnational mergers have produced similar anticompetitive effects in the explosives, metal-container, and automobile industries.[112]

Fourth, mergers and acquisitions facilitate international cartels by concentrating control of national industries into the few hands needed to negotiate global controls mutually acceptable to the group. Sir Alfred Mond of Imperial Chemicals Industries long ago articulated the importance of this aspect of national consolidation:

> You cannot discuss big problems of industry with other countries until your own industries are organized first. Only recently I had occasion to talk with the leaders of big organized industries on the Continent, in Germany and in America, and I discussed this subject. These people want to talk to one or two men who represent industry in England, and if I heard one complaint made it was the impossibility of carrying on any negotia-

108. *Id.*

109. *Id.* at 148.

110. *Id.* at 138.

111. R. CAVES, MULTINATIONAL ENTERPRISE AND ECONOMIC ANALYSIS 104-05 (1982) (footnote omitted).

112. *Id.* at 105.

> tions with some great English industries, because they have not yet solved this problem and there is nobody to talk to.[113]

Or as Corwin D. Edwards put it, "Unless domestic business enterprises effectively control the market in each country . . . international agreement becomes impossible because of the certainty of local competition sufficient to nullify cartel policies."[114]

Mergers and acquisitions, of course, are a prime instrument for obtaining such national consolidation (in Sir Alfred's terms, for "organizing" industry). Members of the international petroleum cartel understood this when, as part of their "as is" agreement dividing up world markets, they agreed that "purchase by the 'as is' members of going distributing concerns outside 'as is' is to be recommended as tending to improve the stability of the markets."[115] Seen in this light, domestic combination and consolidation may *not* foretell more vigorous international rivalry, as current antitrust critics argue. Instead, merger-induced concentration may be an essential first step to global market control.

Thus, we find that, in reality, competition is no more immutable or self-sustaining in global markets than it is within national markets. It is no more immune to deliberate erosion in the international arena than it is in domestic markets. Instead, global competition is susceptible to short-circuiting by producers who understand that their collective private interest in market control far outweighs differences in the national flags under which they sail. International rivals do not sacrifice themselves on the altar of the public interest. Instead, they reach out to control global markets through international cartels, transnational joint ventures, and national and transnational mergers—supported, where necessary, by the aid of the compliant state. In reality, Adam Smith's aphorism—"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public"[116]—is as applicable to international markets in the late twentieth century as it was to England's economy in 1776.

II

THE MYTH OF OPPRESSIVE ANTITRUST ENFORCEMENT

A second major plank of the current attack on antitrust is the assertion that the antitrust laws are so oppressively and so vigilantly enforced as to hamstring American firms and cripple their capacity to compete in

113. C. EDWARDS, *supra* note 28, at 2.

114. *Id.* at 1-2.

115. INT'L PETROLEUM CARTEL REPORT, *supra* note 53, at 245 (emphasis omitted).

116. A. SMITH, THE WEALTH OF NATIONS 128 (Modern Library ed. 1937) (5th ed. 1789).

world markets.[117] This, the evidence shows, is an exercise in fancy.

First, the mega-merger mania engulfing the nation since the 1970's hardly suggests burdensome antitrust interference. In 1984 *alone*, mergers and acquisitions totalled 2,543. The total value of all acquisitions in the United States reached a record $82.6 billion in 1981, and new records of $122.2 billion in 1984 and $179.8 billion in 1985; since 1970, more than a half *trillion* dollars has been expended on mergers and acquisitions. Combinations of firms valued at $100 million (or more) have increased steadily—from ninety-four in 1980, to 200 in 1984.[118]

In fact, the 200 largest industrial corporations in the country have been in the forefront of the mega-merger movement and the consolidation of American industry. They not only have bought "small" and "medium-sized" companies, but—increasingly— they have merged with one another. In recent years, DuPont (fifteenth largest industrial firm in the nation) has acquired Conoco (fourteenth largest in the nation at the time of the acquisition); United States Steel (nineteenth largest) has acquired Marathon Oil (thirty-ninth largest); Occidental Petroleum (twentieth largest) has acquired Iowa Beef Processors (eighty-first largest); Allied Corporation (fifty-fifth largest) has acquired Bendix (eighty-sixth largest) and Signal Companies (sixty-first largest); Standard Brands (128th largest) and Nabisco (152nd largest) merged, and the resulting firm, Nabisco Brands (fifty-fourth largest) was merged into R.J. Reynolds (twenty-third largest); Philip Morris (thirty-second largest) and General Foods (thirty-ninth largest) have merged; and General Electric (ninth largest) has acquired RCA (second largest diversified service company).[119]

Particularly dramatic—and virtually untrammelled—has been the merger spree in the petroleum industry, summarized in Table 2. Recent mega-mergers in oil have featured consolidations between Occidental Petroleum and Cities Service, Texaco and Getty Oil, Standard Oil of Cal-

117. *See supra* notes 16-18 and accompanying text.

118. W.T. GRIMM & Co., MERGERSTAT REVIEW 6, 9 (1985); Vartan, *New Climate for Mergers*, N.Y. Times, Mar. 13, 1986, at D10, col. 2.

119. Mergers were reported in W.T. GRIMM & Co., *supra* note 118, at 24-27; N.Y. Times, Dec. 29, 1985, § 3, at 6, col. 5. For a more detailed analysis of acquisitions by corporate giants, see W. MUELLER, THE CELLER-KEFAUVER ACT: THE FIRST 27 YEARS, H.R. DOC. No. 243, 96th Cong., 1st Sess. 71-87 (1979). Information on company rank is contained in *Alphabetical Index of the 500 Largest Industrials*, FORTUNE, May 4, 1981, at 348, 348-49 [*Fortune 500—1981*], *Alphabetical Index of the 500 Largest Industrials*, FORTUNE, May 3, 1982, at 285, 285 [*Fortune 500—1982*], *Alphabetical Index to the 500*, FORTUNE, Apr. 29, 1985, at 314, 314-15 [*Fortune 500—1985*], and *The 100 Largest Diversified Service Companies Ranked By Sales*, FORTUNE, June 9, 1986, at 122.

Table 2
Selected Acquisitions and Mergers Involving Major Oil Companies, 1955-1986
(Assets in millions of dollars)

Year	Acquiring Company	Assets	Acquired Company	Assets
1955	Sunray Oil	$ 300.0	Mid Continent Pet.	$ 186.3
1956	Gulf Oil	2,160.00	Warren Pet.	163.9
1960	Standard (N.J.)	9,894.7	Monterey Oil	102.2
1961	Standard (Calif.)	2,782.3	Standard (Ky.)	141.9
1963	Gulf Oil	4,243.6	Spencer Chem.	123.3
1963	Cities Service	1,505.8	Tennessee Corp.	100.0
1965	Union Oil	916.5	Pure Oil	766.1
1966	Conoco	1,679.5	Consolidation Coal	446.1
1966	Atlantic Ref.	960.4	Richfield Oil	499.6
1967	Kerr McGee	383.3	Amer. Potash	117.7
1967	Tenneco	3,756.8	Kern County Land	435.3
1967	Signel Oil	678.1	Mack Trucks	303.0
1967	Diamond Alkali	275.6	Shamrock Oil	173.7
1968	Occidental Pet.	779.1	Hooker Chem.	366.5
1968	Occidental Pet.	779.1	Island Creek Coal	115.2
1968	Tenneco	1,911.4	Newport News Ship.	139.3
1968	Sun Oil	1,598.5	Sunray DX Oil	749.0
1969	Atlantic Richfield	2,450.9	Sinclair Oil	1,851.3
1970	Standard (Ohio)	772.7	British Pet.	657.3
1974	Burmah Oil	2,590.9	Signal Oil	340.1
1976	Marathon Oil	2,005.4	Pan Ocean Oil	139.5
1976	Mobil	18,767.5	Montgomery Ward	1,500.9*
1977	Atlantic Richfield	8,853.3	Anaconda	2,050.9
1977	Gulf Oil	13,449.0	Kewanee Ind.	389.0
1977	Union Oil	4,226.8	Molycorp Inc.	163.6
1977	Tenneco	7,177.1	Monroe Auto Equip.	190.3
1977	Standard (Ind.)	14,109.3	Cyprus Mines	733.9
1979	Exxon	41,530.8	Reliance Elec.	613.3
1979	Shell Oil	16,127.0	Belridge Oil	3,660.0*
1979	Getty Oil	6,031.9	ESPN	
1979	Mobil Oil	27,505.8	General Crude Oil	792.0*
1980	Mobil Oil	32,705.0	Vickers Energy/Transocean	715.0*
1980	Getty Oil	8,266.7	Reserve Oil & Gas	628.0*
1980	Getty Oil	8,266.7	ERC Corp.	536.0*
1981	Occidental Pet.	8,074.5	Iowa Beef Proc.	795.0*
1981	Standard (Ohio)	15,743.3	Kennecott	1,800.0*
1981	Gulf Oil	20,429.0	Kemmerer Coal	325.0*
1981	DuPont	23,829.0	Conoco	7,600.0*
1981	Tenneco	16,808.0	Houston Oil & Min.	400.0*
1981	U.S. Steel	13,316.0	Marathon	6,500.0*
1982	Occidental Pet.	15,772.5	Cities Service	4,000.0*
1984	Texaco	27,000.0	Getty Oil	10,100.0*
1984	Socal	23,500.0	Gulf	13,200.0*
1984	Mobil	36,000.0	Superior	5,700.0*
1986	U.S. Steel/Marathon	18,446.0	Texas Oil & Gas	3,560.0*
1986	Occidental Pet.	11,585.9	Midcon	3,000.0*

* Reported Purchase Price

Sources: *Oil Industry Mergers: Hearings on H.R. 5153, H.R. 5175, and H.R. 5452 Before the Subcomm. on Fossil and Synthetic Fuels and the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy & Commerce*, 98th Cong., 2d Sess. 99 (1984) (testimony of Dr. Walter Adams); Crudele, *Occidental Sets a Deal for Midcon*, N.Y. Times, Jan. 2, 1986, at D1, col. 6; O'Boyle, *U.S. Steel, in Bid to Expand Energy Business, Agrees to Acquire Texas Oil for Stock Valued at $3.56 Billion*, Wall St. J., Oct. 31, 1985, at 3, col. 1; *The 500 Largest U.S. Industrial Corporations*, FORTUNE, Apr. 28, 1986, at 182 (asset figures for U.S. Steel and Occidental Petroleum).

ifornia (Chevron) and Gulf;[120] these represent combinations between the industry's twelfth and nineteenth, third and thirteenth, and fifth and sixth largest firms, respectively.[121] Also notable have been the merger in 1984 between Mobil, the second largest integrated oil company, and Superior, the nation's largest independent explorer and producer of oil and natural gas, and Occidental Petroleum's announced intention to acquire Midcon Corporation, one of the nation's largest natural gas pipeline companies.[122] All told, the top twenty oil companies spent $26.6 billion on mergers and acquisitions in the short period 1978-81;[123] for the years 1981-83, members of the oil and gas industry spent an additional $44.2 billion on mergers and acquisitions.[124]

Overall, according to one count, the Justice Department has challenged only twenty-six of the 10,000 merger applications it has received in the 1980's,[125] while, at the same time, Justice has approved most of the largest mergers in American history—hardly a record of oppressive government intervention.

Second, contrary to current mythology, joint ventures have also proceeded virtually unmolested. A prime example of government laissez faire on this front is the automobile industry generally, and the GM-Toyota venture in particular. As we have seen in the preceding section, the GM-Toyota joint production venture represents a partial combination between the first and third largest auto companies in the world—firms that, between them, sell one of every four cars produced on the planet. Its anticompetitive effects are obvious: (1) it eliminates the direct competition that would have occurred between GM and Toyota in the absence of their quasi-consolidation; (2) it undermines both product and production innovations that GM otherwise would have been forced to make in order to compete in the small car segment of the market; (3) it facilitates an intimate familiarity between GM and its most important foreign rival through the sharing of information about pricing and product plans, strategies, and tactics, thereby reducing the important measure of uncertainty which makes foreign producers like Toyota potent sources of competition for the domestic oligopoly; and (4) it has acted as a pow-

120. W.T. GRIMM & CO., *supra* note 118, at 24.

121. *See The 500 Largest Industrial Corporations,* FORTUNE, May 3, 1982, at 260.

122. *See The 500 Largest Industrial Corporations,* FORTUNE, Apr. 30, 1984, at 276; Metz & Williams, *Mobil Agrees to Buy Superior Oil for $45 a Share, or $5.7 Billion Total,* Wall St. J., Mar. 12, 1984, at 3, col. 1; Crudele, *Occidental Sets a Deal for Midcon,* N.Y. Times, Jan. 2, 1986, at D1, col. 6.

123. STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY & COMMERCE, 97TH CONG., 2D SESS., MERGERS AND ACQUISITIONS OF THE TOP 20 OIL COMPANIES, 1978-81, at 23 (Comm. Print 1982).

124. COUNCIL OF ECONOMIC ADVISERS, *supra* note 19, at 194.

125. Solomon, *Administration Hopes to Extend the Reagan Revolution to Antitrust Law,* NAT'L J., Jan. 18, 1986, at 144.

erful inducement to additional joint ventures involving other leading U.S., Japanese, and South Korean producers, and thereby encouraged further concentration in an already excessively concentrated field.[126] Untoward consequences notwithstanding, however, the government has permitted GM-Toyota and the spate of other joint ventures which has followed in its wake, including GM-Daewoo, GM-Isuzu, GM-Suzuki, GM-Lotus, Ford-Mazda-Kia, Chrysler-Mitsubishi-Hyundai, Chrysler-Samsung, and Chrysler-Maserati.[127]

The record of general nonintervention in the auto industry is not unique. Reviewing its history of policy toward joint ventures in 1980, the Department of Justice reported: "A pure research joint venture without ancillary restraints has never been challenged by the Antitrust Division. Even cases challenging restrictive conditions in such ventures have been rare."[128]

Third, the few joint ventures that the Justice Department did challenge were, in reality, bald subterfuges for eliminating competition and, at times, for *suppressing* innovation. For example, in an antitrust suit filed in 1969 against a research joint venture comprising the domestic auto oligopoly (a suit that the industry did not contest), the Justice Department found that the auto giants "conspired not to compete in research, development, manufacture, and installation of [auto pollution] control devices, and collectively did all in their power to delay such research, development, manufacturing, and installation."[129] Under the guise of a joint venture, the auto oligopoly iguored promising advances, refused to purchase pollution controls developed by others, delayed installing smog controls already available and known to them, and disciplined those among them whose team "loyalty" flagged temporarily.[130]

In amateur flash photography, research joint ventures involving Kodak and flashbulb manufacturers proved an effective means for retarding technological advancement and the commercialization of flash innovations.[131] In roller bearings, joint ventures masked a scheme for allocating trade territories, fixing prices, protecting markets, eliminating

126. *See Future of the Automobile Industry: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce,* 98th Cong., 2d Sess. 277-91 (1984) [hereinafter *Auto Industry Hearings*]; *see also Acquisitions and Joint Ventures Among Large Corporations: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary,* 98th Cong., 1st and 2d Sess. 128-36 (1985) [hereinafter *Acquisitions Hearings*].

127. *See supra* text accompanying notes 83-102.

128. ANTITRUST DIVISION OF THE DEPT. OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES 2 (1980).

129. Smog Control Antitrust Case, 117 CONG. REC. 15,626, 15,627 (1971).

130. *Id.* at 15,626-27.

131. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 299-304 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980).

outside competition, and restricting imports to and exports from the United States.[132] And in outboard motors, an attempted joint venture between Brunswick and the Japanese Yamaha firm would have deftly removed the competitive threat of new entry by Yamaha into a U.S. market where the top four firms (including Brunswick, the second largest) collectively control 98.6% of total dollar sales.[133]

Fourth, and more generally, while it is true that the number of antitrust cases filed by the Justice Department has increased somewhat since 1980, the bulk of these have addressed price-fixing conspiracies in the highway paving industry[134]—a field in which foreign competition is scarcely a relevant consideration.

Fifth, there is a final consideration that appears to elude those antitrust critics who claim to champion the cause of American competitiveness in world markets. They forget that privately erected global market control schemes are, in a very real sense, private trading systems, replete with privately imposed trade quotas, market shares, territorial restraints, and tariff duties. They forget that international cartels are designed to regulate, to restrain, and, when necessary, to *exclude* U.S. exports abroad—especially exports by American producers not party to global cartel arrangements. They seem unaware that when antitrust actions break up international cartels, world trade is liberated from artificial restraints and American exports are actually promoted. Here, as elsewhere, the record is enlightening.

In the case of electrical equipment, for example, the Federal Trade Commission found that an international cartel that included General Electric and Westinghouse "made regulations governing sales made by the members of said Association and by the parties to said agreements designed to prevent, and which did prevent, domestic nonmember exporters of electrical apparatus from the United States from making sales of electrical apparatus in foreign nations."[135] In steel, the Commission found that "instead of stimulating exports from the United States the Steel Export Association of America was attempting to have export sales taken from American noncartel members."[136] In the case of the international titanium cartel, Judge Rifkind found "there is no free com-

132. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

133. *See* Yamaha Motor Co. v. Federal Trade Comm'n, 657 F.2d 971, 974 (8th Cir. 1981), *cert. denied,* 456 U.S. 915 (1982).

134. Greenhouse, *supra* note 3, at 26, col. 6.

135. FEDERAL TRADE COMM'N, REPORT ON INTERNATIONAL ELECTRICAL EQUIPMENT CARTELS 56 (1948).

136. FEDERAL TRADE COMM'N, REPORT ON INTERNATIONAL STEEL CARTELS 105 (1948) (footnote omitted). Referring to independent U.S. steel firms not party to the cartel, an official of the American steel export cartel said, "the sooner these mills are eliminated from taking business the better our chances will be of bringing them under control in our own group." C. EDWARDS, *supra* note 28, at 39.

merce in titanium. Every pound of it is trammelled by privately imposed regulation. The channels of this commerce . . . are, in large measure, artificial canals privately constructed."[137] He concluded: "It was more difficult for the independent outsider to enter this business than for the camel to make its proverbial passage through the eye of a needle."[138] And in the case of cartel agreements among the world's largest chemical companies, Judge Ryan found that DuPont and Imperial Chemical Industries (ICI) sought to prevent other American firms from exporting abroad[139] and, in one instance, that "DuPont had protected ICI from the competition of American cartridge companies by withdrawing discounts and rebates on [sporting powder and ammunition] sold to them for export sale."[140]

Those who purport to promote American international competitiveness by dismantling antitrust thus might ponder Professor Rahl's observation that the

> main impact of American antitrust law on foreign trade, including exports, has been decidedly beneficial to that trade. . . .
>
> . . . This is because almost all international cartels follow a pattern of dividing world markets among themselves. Such divisions customarily not only excluded foreign competitors from the U.S. market, but as a quid pro quo kept American firms out of designated foreign markets, thus directly excluding or limiting U.S. exports. . . .
>
> Removal of most of these cartels [through antitrust action] undoubtedly contributed greatly to the surge in American exports and direct foreign investment which followed the war. There is no basis for thinking that antitrust laws are no longer needed to continue to provide such important protection.[141]

III
THE MYTHOLOGY OF BIGNESS

The third major premise of the current attack on antitrust is the belief that big is better, that mega-mergers are desirable, and, more generally, that corporate giantism and high domestic industrial concentration are the handmaidens of efficiency in production and technological advance. To survive global competition, believes Professor Joseph L. Bower of the Harvard Business School, "our companies need the low

137. United States v. National Lead Co., 63 F. Supp. 513, 521 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

138. *Id.*

139. United States v. Imperial Chem. Indus., 100 F. Supp. 504, 564 (S.D.N.Y. 1951).

140. *Id.* at 580.

141. *Foreign Trade Antitrust Improvements Act: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 45 (1983) (testimony of James Rahl).

operating costs of large-scale operations and the resources for continual development that only regular profits can provide."[142] As the critics see it, "we ought to think about how to get more I.B.M.'s. Instead of attacking the one we have, how can we encourage an intelligent combination of some of the second rank and smaller companies so that we might have a second successful giant?"[143] Espousing the dogma of the day, the critics celebrate mega-mergers and the consolidation of American industry as a "healthy trend."[144] In short, according to high-ranking Justice Department officials, "big is not necessarily bad," and it is "important we don't stop mergers based on some ephemeral fear of cost to society, when we might be forgoing substantial efficiencies."[145]

This "new learning" is stale wine in musty bottles. In essence, it harks back to the Mercantilist Era, when monopolies at home and abroad were believed to be essential to the wealth of the state (if not, as Adam Smith showed, to the well-being of the citizenry[146]). It is substantively the same as Professor Sidney Sherwood's assurance to the public in 1900, in the midst of the trust movement that produced many now-tottering giants (like U.S. Steel), that giantism "is the natural and spontaneous effort of a progressive industrial organization to get undertaking genius at its head" and "a process of natural selection of the very highest order."[147]

More than thirty years ago, John Kenneth Galbraith announced that

> a benign Providence . . . has made the modern industry of a few large firms an excellent instrument for inducing technical change. It is admirably equipped for financing technical development. Its organization provides strong incentives for undertaking development and for putting it into use.
>
> . . . Not only is development now sophisticated and costly but it must be on a sufficient scale so that successes and failures will in some measure average out. Few can afford it if they must expect all projects to pay off.[148]

Today, as then, however, these panegyrics are not supported by sub-

142. Bower, *Revising the Antitrust Laws: The Case for Building More IBM's,* N.Y. Times, Feb. 16, 1986, § 3, at 2, col. 3, col. 4.

143. *Id.* at col. 6.

144. *Id.* at col. 3.

145. Greenhouse, *supra* note 3, at 26, col. 4.

146. A. SMITH, *supra* note 116, at 607-26, *especially* at 626.

147. Sherwood, *Influence of the Trust in the Development of Undertaking Genius,* 8 YALE REV. 362, 363-64 (1900).

148. J. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 86 (2d rev. ed. 1956); *see also* D. LILIENTHAL, BIG BUSINESS: A NEW ERA (1953) (supporting Galbraith thesis). In fairness to Galbraith, it should be noted that, of late, he appears to have reconsidered his earlier position. *See Corporate Initiative: Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. 3-25

stantial or persuasive empirical documentation. Reality is *not* in accord with ideology. Instead, the weight of the available evidence shows that bigness and industrial concentration are neither guarantors of, nor prerequisites for, production efficiency and technological progress. The evidence shows that, more often than not, mergers and corporate giantism undermine the kind of economic performance necessary to reindustrialize the American economy and compete on a world-class basis.

A. Bigness and Reality in Operating Efficiency

Countless studies and analyses, for specific industries as well as for manufacturing generally, for specialized firms as well as for conglomerates, have demonstrated that mergers, giant firm size, and high industry concentration are not conducive to greater operating efficiency and production at lowest cost.

1. Mergers and Acquisitions

An impressive body of evidence shows that mergers and acquisitions are *not* the magical elixir for efficiency proclaimed by the apostles of bigness.

On the conglomerate merger front, for example, diversified giantism has not streamlined American industry into a sleek machine of operating efficiency. Instead, conglomerate mega-mergers and diversified giantism have enmeshed American industry in a snare of organizational disorder and ill-fitted bureaucracy. "Our major corporations have blossomed into multiproduct, multidivisional, multi-locational hydras," *Business Week* recently reported in an issue devoted to the reindustrialization of America.[149]

> They became far too diverse for any one corporate leader to embrace. So one formerly monolithic company after another decentralized into such things as profit centers, strategic business units, and the like. Every profit center had to have a general manager or a divisional president. Corporate headquarters had to have new staff people to whom the divisional people would report. Layer upon layer of management jobs were added to the structure.[150]

Not surprisingly, after a massive review of the evidence, economist Dennis C. Mueller concluded that conglomerate mergers have not on average resulted in increased economic efficiency.[151]

The recent and largely unnoticed wave of voluntary divestitures of

(1982) (testimony of J. Galbraith) (noting that over time, corporations acquire too many bureaucratic layers; performance becomes mediocre as less innovation occurs).

149. *Managers Who Are No Longer Entrepreneurs,* BUS. WK., June 30, 1980, at 74, 81.

150. *Id.*

151. Mueller, *The Effects of Conglomerate Mergers: A Survey of the Empirical Evidence,* 1 J. BANKING & FIN. 315, 344 (1977).

operating companies acquired by conglomerates during the 1960's and 1970's casts further doubt on the proposition that conglomerate giants are particularly astute controllers and allocators of capital. Arthur Burck, a specialist in corporate mergers and acquisitions, points out that in recent years "35% of acquisition announcements reflected divestitures, almost all companies that had once been acquired."[152] For example, ITT, one of the nation's largest conglomerates, grew to massive proportions over the years 1961-68 by acquiring 47 firms variously engaged in electronics, consumer financing, car rentals, hotels, baking, and lumber. In 1982, however, ITT disclosed a vast divestiture program involving more than forty subsidiaries—a program described by one Wall Street analyst as potentially "the biggest sell-off of assets in corporate history."[153] Evaluating ITT's lackluster performance, one financial analyst concluded that ITT chairman Harold Geneen "was an absolute disaster as an operating manager . . . . You have only to look at the record—he could acquire companies but not manage them."[154]

Gulf & Western, another hyperactive conglomerateur, whose more than 100 acquisitions constitute what *Fortune* describes as a "conceptually messy agglutination," has disclosed large-scale divestiture plans.[155] And Big Oil is struggling to divest itself of conglomerate acquisitions: Texaco has sold ESPN (the cable TV sports network);[156] Arco has disposed of its ill-fated investment in the giant Anaconda Minerals Company;[157] Mobil is attempting to find a buyer for its unsuccessful Montgomery Ward subsidiary, as well as for its paperboard packaging subsidiary;[158] Exxon has written off both Reliance Electric and its office systems subsidiary;[159] Standard Oil of Indiana (Amoco) has spun off

152. Burck, *The Hidden Trauma of Merger Mania,* BUS. WK., Dec. 6, 1982, at 14.

153. Colvin, *The De-Geneening of ITT,* FORTUNE, Jan. 11, 1982, at 34, 35. A detailed analysis of acquisitions by ITT and other giant conglomerates is contained in STAFF OF THE ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 92D CONG., 1ST SESS., INVESTIGATION OF CONGLOMERATE CORPORATIONS 69-392 (Comm. Print 1971). On the ITT sell-off, see generally *Why ITT Is Healthier Without Continental Baking,* BUS. WK., Sept. 17, 1984, at 43; Smith, *ITT's Stock Has Outpaced the Market Lately, and Some See More Gains as Firm Pares Lines,* Wall St. J., June 5, 1986, at 57, col. 3.

154. Colvin, *supra* note 153, at 34.

155. Kinkead, *Uncomfortable Options for Gulf & Western,* FORTUNE, Apr. 4, 1983, at 141; *Gulf & Western Unloads a Grab Bag,* BUS. WK., June 24, 1985, at 44; Landro, *Reversing Course: Davis Reshapes G & W into an Entertainment and Financial Concern,* Wall St. J., June 10, 1985, at 1, col. 6; Landro, *G & W Approves Large Program of Divestitures,* Wall St. J., Aug. 15, 1983, at 3, col. 1.

156. Williams, *Big Oil Starts Thinking Smaller,* N.Y. Times, Mar. 17, 1985, § 3, at 1, col. 2.

157. *See* Hayes, *Arco Sets Charge of $785 Million,* N.Y. Times, Aug. 28, 1984, at D1, col. 5.

158. Leib, *Mobil Plans to Divest Ward Unit,* N.Y. Times, May 7, 1985, at D1, col. 6; *see also* Sullivan, *Mobil Will Sell Packaging Unit for $700 Million,* Wall St. J., July 28, 1986, at 2, col. 2; *cf.* Williams, *supra* note 156, at 12, col. 1.

159. Williams, *supra* note 156, at 12, col. 1; *see also* Schmitt & Cohen, *Humbled Giant: Exxon's Flop in Field of Office Gear Shows Diversification Perils,* Wall St. J., Sept. 3, 1985, at 1, col. 6.

Cyprus Mines (an acquired copper company);[160] and Standard Oil of Ohio has divested non-oil acquisitions.[161]

The postmortem on conglomerate mega-mergers and conglomerate giantism and their impact on operating efficiency has been delivered by Donald P. Jacobs, dean of Northwestern University's Kellogg School of Management. "The thinking used to be that once a conglomerate was put together, the whole was more valuable than its parts," he concludes. "Now the parts seem more valuable than the whole."[162]

Disappointing marriages, and the concomitant operating inefficiencies, are not limited to conglomerate acquisitions, however. They are characteristic of mergers and acquisitions generally—whether horizontal, vertical, or conglomerate. "When one looks at the real effects of mergers on operating profitability, growth in sales or market shares," Mueller concludes, "one finds no evidence . . . that mergers have improved internal efficiency."[163] As *Forbes* puts it, the multi-million dollar mint of fees flowing to the financial houses who broker mega-mergers "may do more to explain current merger mania than all the blather about synergy and diversification."[164]

---

160. Cuff, *Indiana Standard's Strategy,* N.Y. Times, Jan. 28, 1985, at D1, col. 2.

161. Winter, *Standard Oil Agrees to Sell 2 Copper Mines,* Wall St. J., Sept. 12, 1986, at 4, col. 1.

162. *A Growing Disillusion with Conglomerates,* N.Y. Times, Jan. 27, 1985, § 3, at 4, col. 4.

163. *Acquisitions Hearings, supra* note 126, at 265.

164. Phalon, *Fuel for the Flames?,* FORBES, Nov. 18, 1985, at 122. For additional evidence that mergers and acquisitions do not promote operating efficiency, see *Structuring American Industry for Global Competition, 1986: Hearing Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance, and Urban Affairs,* 99th Cong., 2d Sess. 42 (1986) (testimony of F. M. Scherer, Professor of Economics, Swarthmore College); J. BLAIR, ECONOMIC CONCENTRATION 185-95 (1972); THE DETERMINANTS AND EFFECTS OF MERGERS: AN INTERNATIONAL COMPARISON (D. Mueller ed. 1980); M. FRANKENA & P. PAUTLER, ANTITRUST POLICY FOR DECLINING INDUSTRIES (Bureau of Economics, Federal Trade Comm'n Oct. 1985); E. HERMAN & L. LOWENSTEIN, THE EFFICIENCY EFFECTS OF HOSTILE TAKEOVERS: AN EMPIRICAL STUDY (Center for Law and Economic Studies, Columbia University School of Law Working Paper No. 20, Jan. 1986); G. MEEKS, DISAPPOINTING MARRIAGE: A STUDY OF THE GAINS FROM MERGER (1977); D. MUELLER, MERGERS AND MANAGERIAL PERFORMANCE (Federal Trade Comm'n Working Paper No. 137, Jan. 1986); D. RAVENSCRAFT & F. SCHERER, THE PROFITABILITY OF MERGERS (Federal Trade Comm'n Working Paper No. 136, Jan. 1986); S. REID, THE NEW INDUSTRIAL ORDER 101-19 (1976); S. RHOADES, POWER, EMPIRE BUILDING, AND MERGERS 89-118 (1983); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 459-74 (2d ed. 1980); Laiken, *Financial Performance of Merging Firms in a Virtually Unconstrained Legal Environment,* 18 ANTITRUST BULL. 827 (1973); Langetieg, Haugen & Wichern, *Merger and Stockholder Risk,* 15 J. FIN. & QUANTITATIVE ANALYSIS 689 (1980); Mason & Goudzwaard, *Performance of Conglomerate Firms: A Portfolio Approach,* 31 J. FIN. 39 (1976); Mueller, *supra* note 151, at 315; Mueller, *Mergers and Market Share,* 67 REV. OF ECON. & STATISTICS 259 (1985); Beman, *Exxon's $600-Million Mistake,* FORTUNE, Oct. 19, 1981, at 68; *Do Mergers Really Work?,* BUS. WK., June 3, 1985 at 88; Fisher, *The Decade's Worst Mergers,* FORTUNE, Apr. 30, 1984, at 262; Louis, *The Bottom Line on Ten Big Mergers,* FORTUNE, May 3, 1982, at 84; Pittel, *Smaller Can Be Prettier,* FORBES, June 17, 1985, at 206; *Splitting Up: The Other Side of Merger Mania,* BUS. WK., July 1, 1985, at 50; Nordhaus, *The Vanity of the Takeover Game,* N.Y. Times, Oct. 3, 1982, § 3, at 3, col. 1; Chavez, *The Acquisitions That Haven't Paid Off,* N.Y. Times, Mar. 28, 1982, § 3, at 1, col. 2.

The failure of mergers to enhance operating efficiency found by the studies just cited is not a

But there is a further, and, in the longer run, possibly greater social cost of the currently hyperactive merger movement. In economic parlance, it is the "opportunity cost" of the merger binge—the things critical to international competitiveness that are *not* done as corporate America plays the consolidation game. For society, as for individuals, there is no such thing as a free lunch. Two decades of managerial energy devoted to "paper entrepreneurialism" and the quick-growth merger game are, at the same time, two decades during which management attention has been diverted from investing in new plants, new products, and new manufacturing techniques. The billions of dollars spent on exchanging paper claims are, at the same time, billions of dollars *not* spent on productivity-enhancing plants and equipment or research and development.[165] Millions of dollars absorbed by legal fees and investment banking commissions in consummating mergers and acquisitions are, at the same time, funds *not* directly invested in the nuts and bolts of the nation's productive base. These opportunity costs are real. And they bode ill for the world-class competitiveness of American industry.[166]

---

recent phenomenon. Although Livermore sought to defend mergers, his analysis of the turn-of-the-century merger movement in the United States revealed that nearly one-half of the consolidations that occurred in the period 1888-1905 subsequently failed; if "successes" attributable primarily to patents or monopoly power are excluded, the failure rate rises to above 50%. Livermore, *The Success of Industrial Mergers,* 50 Q.J. ECON. 68, 87-88 (1935).

The impact of mergers on economic performance is no more prepossessing in the United Kingdom than it has been in the United States. One authoritative study, for example, found:

> Taking a broad sweep of the results the picture is one in which it is difficult to sustain the view that merger is in fact a necessary or sufficient condition for efficiency gain. In many cases efficiency has not improved, in some cases it has declined, in other cases it has improved but no faster than one would have expected in the absence of merger.

K. COWLING, P. STONEMAN, J. CUBBIN, J. CABLE, G. HALL, S. DOMBERGER & P. DUTTON, MERGERS AND ECONOMIC PERFORMANCE 370 (1980). "More generally we have various pieces of evidence from our investigations that merger has led to no apparent improvement in international competitiveness or export performance . . . ." *Id.* at 371.

165. The priorities of corporate America become evident by comparing private industry spending for mergers and acquisitions, on the one hand, and expenditures for new plants and equipment, and research and development, on the other. For 1984, the breakdown is as follows: mergers and acquisitions, $122 billion; net private domestic investment (nonresidential), $107 billion; privately financed corporate research and development, $49 billion. In other words, private industry spent 2-1/2 times more on acquiring other companies than on researching new products and production processes. W.T. GRIMM & Co., *supra* note 118, at 6; COUNCIL OF ECONOMIC ADVISERS, *supra* note 19, at 250; DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 574 (1985).

166. For example, *Business Week* sees the recent acquisition of RCA by General Electric as symptomatic of what the magazine calls "the distressing failure of imagination that besets many of today's major corporate players" because GE "could find no better way to spend $6 billion than to buy a major rival that it partly owned more than 50 years ago." *GE-RCA: A Failure of Imagination,* BUS. WK., Dec. 30, 1985, at 190. Instead of directly confronting Japanese and other competitors, the magazine concludes, corporate America is "increasingly seeking shelter in niches of the domestic economy relatively free from foreign competition—defense and services." Nussbaum, *The Case Against GE's Megamerger with RCA,* BUS. WK., Dec. 30, 1985, at 50.

2. Corporate Giantism Generally

The belief that corporate giantism, however attained, is a vehicle for operating efficiency is equally mythological.

In steel, for example, elephantine mass has hardly signified superior efficiency in production. Over fifty years ago, a management consulting firm retained by U.S. Steel reported the nation's largest steel maker to be

> a big sprawling inert giant, whose production operations were improperly coordinated; suffering from a lack of a long-run planning agency; relying on an antiquated system of cost accounting; with an inadequate knowledge of the costs or of the relative profitability of the many thousands of items it sold; with production and cost standards generally below those considered everyday practice in other industries; with inadequate knowledge of its domestic markets and no clear appreciation of its opportunities in foreign markets; with less efficient production facilities than its rivals had . . . .[167]

Today, more than a half-century later, U.S. Steel has been described as "one of corporate America's most hierarchical, bureaucratic managements . . . an inbred, centralized, autocratic bureaucracy that stifle[s] change."[168]

In sharp contrast to Big Steel, vastly smaller, nonintegrated "minimill" producers, utilizing ultramodern plants incorporating state-of-the-art technology, operate far more efficiently than do the industry giants. In the production of such products as wire rods, bars, and light structurals, for example, International Trade Commissioner Paula Stern found it obvious "why the integrated producers lost so much of the market to the mini-mills. The latter are modern and efficient mills dedicated to the production of one or two products. The efficiency of their technology, management, and cost control techniques enable [sic] mini-mills to keep their prices low."[169] Not only do the minimills outperform and underprice domestic steel giants, but, as Commissioner Stern pointed out, small efficient minimills are able to *undersell foreign producers in the U.S. product markets in which they compete.* That is, "Little Steel" has prevailed in the market, not only against domestic giants, but against such "awesome" rivals as "Japan Inc."[170]

---

167. *Study of Monopoly Power: Hearings Before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary,* 81st Cong., 2d Sess. 967 (1950) (report summarized in testimony of George W. Stocking, Professor of Economics, Vanderbilt University).

168. *The Toughest Job in Business,* BUS. WK., Feb. 25, 1985, at 50-51.

169. Carbon and Certain Alloy Steel Products, Report to the President, USITC Pub. 1553, Inv. No. TA-201-51, at 110 (July 1984).

170. *Id.* On the West Coast, for example, one minimill "has cut the Japanese share of California's rod and bar market from 50% to 10%." O'Boyle, *Forging Ahead: Laid Low By Recession, Big Steel Companies Consider Major Changes,* Wall St. J., May 27, 1983, at 16, col. 2. For a more detailed analysis of bigness and inefficiency in steel, see W. ADAMS & J. BROCK, THE BIGNESS COMPLEX 34-38 (1986).

In steel, then, small is beautiful. A spate of mega-mergers that bloats firm size by proliferating the number of outmoded, anachronistic plants under Big Steel's bureaucratic control will not cure the steel giants' inability to operate efficiently—as the disastrous 1983 merger between LTV and Republic, the industry's third and fourth largest producers, amply attests.[171]

171. The *Wall Street Journal* characterizes the LTV-Republic consolidation an "ill-fated merger" whose problems "call into question the premise behind some large mergers—that the combined resources of two ailing companies can create more strength than either could muster alone." Cohen & O'Boyle, *Ill-Fated Merger: LTV, Dragged Down by Steel Subsidiary, Struggles to Survive*, Wall St. J., Jan. 6, 1986, at 1, col. 6, at 12, col. 3. Of course, LTV's declaration of bankruptcy in July 1986 merely confirms the point. *See* Hayes, *LTV Corp. Files for Bankruptcy: Debt Is $4 Billion*, N.Y. Times, July 18, 1986, at A1, col. 1.

Indeed, if merger-induced giantism were really the guarantor of efficiency claimed by its advocates, then the American steel industry should be the efficiency marvel of the world.

The United States Steel Corporation was created in 1901 as the "combination of combinations"—the nation's first billion dollar corporation. It was the product of a simultaneous consolidation of the Carnegie Co., Federal Steel Co., National Tube Co., American Steel & Wire Co., National Steel Co., American Steel Hoop Co., American Sheet Steel Metal Co., American Tin Plate Co., American Bridge Co., Lake Superior Consolidated Iron Mines, and the Shelby Steel Tube Co. But these constituent companies had themselves also grown through merger and acquisition. Thus, all told, the U.S. Steel Corporation in its genesis represented the cumulative consolidation of 170 formerly independent steel companies.

Bethlehem Steel was incorporated in 1904 as a combination of ten producers: Bethlehem Steel Co., United States Shipbuilding Co., Harlan & Hollingsworth Corp., Union Iron Works Co., Samuel L. Moore & Sons Corp., Cartaret Improvement Co., Eastern Shipbuilding Corp., Crescent Ship Yard Corp., Bath Iron Works Co., and Hyde Windlass Co. Bethlehem subsequently acquired 33 other companies over the years 1916-1945, including Pennsylvania Steel Co., American Iron & Steel Manufacturing Co., Lackawanna Iron & Steel Co., Cornwall Iron Co., Midvale Steel and Ordnance Co., Cambria Steel Co., Pacific Coast Steel Co., Southern California Iron & Steel Co., Danville Structural Steel Co., Hay Foundry & Machine Co., Kalman Steel Corp., Seneca Iron & Steel Co., Atlas Steel Barrel Corp., and Buffalo Tank Corp.

Republic Steel was incorporated in 1930 as a consolidation of Republic Iron & Steel Co., Central Alloy Steel Corp., Donner Steel Co., Inc., and the Bourne-Fuller Co. Republic subsequently acquired the Corrigan-McKinney Steel Co., Truscon Steel Co., Canton Tin Plate Corp., Niles Steel Products Co., Gulf States Steel Co., and the Stevens Metal Products Co.

Jones & Laughlin Steel was originally incorporated in 1902, and subsequently acquired Frick-Reid Supply Corp., Roehn and Davison, Lukens Steel Co., Louisiana Erecting Co., Inc., National Bridge Works, McKeesport Tin Plate Corp., Otis Steel Co., Wackman Welded Ware Co., and the Electricweld Tube Division of Talon, Inc., among others.

Similarly, Armco Steel grew to an important degree through mergers and acquisitions, including the Columbus Iron & Steel Co., Ashland Iron & Mining Co., Forged Steel Wheel Co., Norton Iron Works Co., Sheffield Steel Corp., Belfont Steel & Wire Co., East Works of Scullin Steel Co., Sand Springs Steel Plant, Hamilton Coke & Iron Co., and Rustless Iron & Steel Corp., among others.

Moreover, consolidation in steel has continued down to the present day. In 1968, Wheeling Steel (then the industry's 10th largest producer) merged with Pittsburgh Steel (the industry's 16th largest producer at the time). In 1971, National Steel (4th largest) acquired Granite City Steel (13th largest). In 1978, Jones & Laughlin (the nation's 7th largest steel company at the time) was merged with Youngstown Sheet & Tube (the 8th largest producer). And most recently, in 1983, LTV (the owner of the combined Youngstown—Jones & Laughlin operations) acquired control of Republic Steel, thereby rendering LTV the nation's 2nd largest steel concern. *See* FEDERAL TRADE COMM'N, THE MERGER MOVEMENT, A SUMMARY REPORT 70-134 (app. I) (1948); *Steel—Acquisitions,*

In automobiles, no disinterested observer would have the temerity to suggest that Brobdingnagian size and high industry concentration have unleashed efficiency gains. Instead, the operating disabilities of bigness in autos, as in steel, have long been in evidence. In 1925, Alfred Sloan, General Motors' legendary board chairman, confided:

> 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. You have no idea how many things come up for consideration in the technical committee and elsewhere that are discussed and agreed upon as to principle well in advance, but too frequently we fail to put the ideas into effect . . . .[172]

Decades later, GM president Elliott M. Estes was reported to have observed: "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."[173]

For GM, the conservative *Economist* reports, "sheer size is a disadvantage,"[174] and knowledgeable analysts estimate that its production costs "are higher than any other domestic auto maker."[175] Recent efforts by the domestic oligopoly to pare down the extent to which the Big Three internally manufacture parts and components attest to the operating infirmities of vertical giantism.[176] The very fact that General Motors—long the world's very largest auto producer—is by its own admission forced to turn to joint ventures with smaller foreign rivals to learn how to make cars efficiently is particularly telling in this regard.[177] So, too, is the firm's recently unveiled "Saturn" project, a new small-car manufacturing subsidiary to be built, organized, and operated as inde-

---

Mergers and Expansion of 12 Major Companies, 1900 to 1950: Hearings Before the House Select Comm. on Small Business, 81st Cong., 2d Sess. (1950). However, in light of the industry's chronic performance problems, eight decades of consolidation in steel have, it seems, marked a rather less than productive path.

172. *Quoted in* FEDERAL TRADE COMM'N, RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED, AND SMALL BUSINESS 130-31 (TNEC Monograph No. 13, 1941).

173. J. WRIGHT, ON A CLEAR DAY YOU CAN SEE GENERAL MOTORS: JOHN Z. DE LOREAN'S LOOK INSIDE THE AUTOMOTIVE GIANT 119 (1979).

174. *General Motors: Survival of the Fattest,* ECONOMIST, Oct. 12, 1985, at 35, 38.

175. *G.M.'s Shuffle: The Calm Before a Slaughter?,* BUS. WK., Feb. 17, 1986, at 35. *See also* Holusha, *Roger Smith's Troubled Second Act,* N.Y. Times, Jan. 12, 1986, § 3, at 1, col. 2 (discussing the continuing decline in GM's economic performance).

176. *See, e.g.,* Simison & Koten, *High Gear Profits,* Wall St. J., Dec. 19, 1983, at 1, col. 6.

177. GM vice president and chief economist, Marina V.N. Whitman, has testified that GM's joint production venture with Toyota "will provide a valuable learning experience which will lead to more efficient U.S. small-car production." *Auto Industry Hearings, supra* note 126, at 237.

pendently of its parent as possible—for the important purpose of freeing "Saturn from the inefficiencies and overstaffing of the current GM bureaucracy."[178] A realist might ask, as some financial analysts are now doing, how great the efficiency gains would be if each of GM's major divisions (Chevrolet, Oldsmobile, Buick, Pontiac, and Cadillac) were similarly freed from the burden of bigness.[179]

Cross-sectional statistical studies confirm the debilitating impact of bigness on operating efficiency across American industry generally. In his classic 1956 study of twenty representative industries, Joe S. Bain found that, in eleven of twenty cases, the most efficient size plant would account for less than 2.5% of the industry's total national sales; in fifteen of twenty cases, for less than 7.5%; and in only one case, for more than 15%.[180] Moreover, in estimating economies obtained by a single firm operating multiple plants, Bain concluded that in six of twenty industries, the cost advantages of multiplant firms "were either negligible or totally absent"; in another six industries, the advantages were "perceptible" but fairly small; and in the remaining eight industries, no estimates could be obtained.[181]

More recent studies of twelve industries in seven nations carried out by economist F.M. Scherer generally corroborate Bain's earlier findings. After analyzing minimum optimal scale (MOS) plants required for least-cost production, Scherer reports three major findings. First, with only one exception, "the optimal plant sizes tend to be quite small relative to the national market—too small to warrant high levels of concentration, assuming that each leading firm is large enough to operate only one MOS plant."[182] Second, the loss of production efficiencies in plants vastly smaller than those of optimal scale are surprisingly small; for half of the industries studied, a plant one-third the scale at which unit costs are minimized would suffer cost disadvantages of only five percent or less.[183]

178. Nag & Buss, *GM Creates Saturn Unit to Make Low Cost Cars to Compete Better with Japanese Firms by 1989,* Wall St. J., Jan. 9, 1985, at 3, col. 1.

179. *See* Marcial, *Is GM Planning to Split Itself Up?,* BUS. WK., Mar. 4, 1985, at 94.

Recent events make it clear that even more bigness, especially when induced by merger and acquisition, will *not* resolve GM's serious economic performance problems. Commenting on the debacle flowing from GM's acquisition of EDS, an information processing concern the purchase of which was supposed to computerize GM back into world class contention, the *Economist* points out:

> Mastery of a business requires a constant search for ways to bring new technologies and techniques into it. But usually it is better to hire new skills, and to buy innovative components, than to acquire the companies that provide them. The technology of the motor car and its manufacture is evolving so fast that the sensible carmaker keeps its options open. The security and exclusivity of the "tied supplier" often prove a trap.

Punctured by Perot, ECONOMIST, Dec. 13, 1986, at 15.

180. J. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 73 (1956).

181. *Id.* at 87.

182. F. SCHERER, *supra* note 164, at 94.

183. *Id.*

Third, even after explicitly allowing for production efficiencies that might be achieved by a single firm operating multiple plants, actual firm sizes and market concentration levels significantly exceed those required by economies of scale: market shares held by the top three producers exceeded scale-dictated shares by a factor of ten in two industries; by four to six times in four industries; and by two to three times in three industries.[184] Thus, Scherer's analysis reveals that "actual concentration in U.S. manufacturing industry appears to be considerably higher than the imperatives of scale economies require"[185] and, further, "that in more than half the industries covered by our research, substantial deconcentration could be effected while forcing at most slight scale economy sacrifices."[186]

On the grounds of production efficiency, then, empirical evidence does not support the proposition that bigger is better. Indeed, practical businesspeople in the real world are today recognizing the new "new learning"—that where operating efficiency is concerned, small is beautiful. Today, *Business Week* reports, "in a rebellion against the conventional wisdom, dozens of manufacturers . . . are embracing a new philosophy. Their managers are suddenly talking about 'diseconomies of scale.' They are replacing huge manufacturing complexes with new, smaller plants. . . . From telecommunications to steel, companies are turning away from bigness to find efficiency."[187] Given the stakes involved, can public policy makers afford to be any less attuned to the facts?

B. Bigness and Technological Advancement

The belief that bigness is the new Promethieus, bringing technology down from its heavenly abode and placing it in the service of mankind, is equally at odds with the evidence. Corporate giantism is *not* an indefatigable engine of innovation and technogical derring-do. Bigness and noncompetitive industry structures are *not* instruments for inducing technical experimentation and advance.

First, contrary to the presuppositions of received orthodoxy, the independent inventor is *not* an anachronism, nor has he or she been displaced by the mammoth, bureaucratic corporate organization as a superior source of technical invention. Rather, independent inventors—garage mechanics and backyard tinkerers, toiling on their own, with limited funds and simple equipment—are responsible for a surprisingly large

184. F. SCHERER, A. BECKENSTEIN, E. KAUFER & R. MURPHY, THE ECONOMICS OF MULTI-PLANT OPERATION: AN INTERNATIONAL COMPARISONS STUDY 339 (1975).

185. F. SCHERER, *supra* note 164, at 118.

186. F. SCHERER, A. BECKENSTEIN, E. KAUFER & R. MURPHY, *supra* note 184, at 393.

187. *Small is Beautiful Now in Manufacturing*, BUS. WK., Oct. 22, 1984, at 152.

share of major modern inventions. For example, one landmark study found independent inventors to be primarily responsible for more than one-half of the seventy inventions considered by experts to be among the most important of the twentieth century.[188] Conversely, the record is replete with large companies that "frequently missed or overlooked important new departures or remained unconvinced of the merits of an invention which, it might have been thought, would have appealed strongly to them."[189]

Second, small firms are superior to giant corporations in their capacity to generate technological innovations. In iron and steel, bituminous coal, petroleum, and pharmaceuticals, for example, "the largest few firms did *not* do the most innovating (relative to their size)."[190] For the chemical industry in particular, "there is no evidence that the biggest chemical firms did any more innovating (or developing) [of new manufacturing techniques], relative to their size, than somewhat smaller firms."[191]

Third, smaller firms exert greater inventive and innovative "effort" by spending a proportionately larger share of their revenues on research and development—a phenomenon that, in turn, may partly explain why small companies are so much more prolific inventors. Statistical studies conducted by a variety of researchers, in a variety of ways, and over a variety of time periods and industry samples, reveal that the proportion of revenues devoted to research and development usually declines beyond a relatively modest level of firm size. Concluding his encyclopedic review of the evidence, F.M. Scherer reports: "A little bit of bigness—up to sales levels of $250 to $400 million at 1978 price levels—is good for invention and innovation. But beyond the threshold further bigness adds little or nothing, and it carries the danger of diminishing the effectiveness of inventive and innovative performance."[192] For purposes of comparison, Exxon—which devoted 0.8% of its revenues to R&D compared to an all-industry average of 2.9%—had sales in 1984 of $90,854 million, or 227 times the threshold for maximum research effort estimated by

188. J. JEWKES, D. SAWERS & R. STILLERMAN, THE SOURCES OF INVENTION 73-77 (2d ed. 1969). *See also Economic Concentration: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 1078, 1081, 1086 (1965) (testimony of R. Stillerman) [hereinafter *Economic Concentration Hearings*]; *id.* at 1103-06 (testimony of Daniel V. DeSimone, Director, Office of Invention & Innovation, Nat'l Bureau of Standards, U.S. Dept. of Commerce); J. BLAIR, *supra* note 164, at 199-254; D. HAMBERG, R&D: ESSAYS ON THE ECONOMICS OF RESEARCH AND DEVELOPMENT 16-20 (1966) (discussing contributions of independent inventors).

189. J. JEWKES, D. SAWERS & R. STILLERMAN, *supra* note 188, at 144.

190. E. MANSFIELD, THE PRODUCTION AND APPLICATION OF NEW INDUSTRIAL TECHNOLOGY 45 (1977) (emphasis added).

191. *Id.* at 204-05.

192. F. SCHERER, *supra* note 164, at 422.

Scherer.[193] And contrary to the myth that corporate giantism fosters daring risk taking, expert Edwin Mansfield reports no statistically significant tendency for corporate behemoths to conduct a "disproportionately large share of the relatively risky R and D or of the R and D aimed at entirely new products and processes. On the contrary, they generally seem to carry out a *disproportionately small share* of the R and D aimed at entirely new products and processes."[194]

Fourth, smaller companies conceive and commercialize inventions at substantially lower cost than do corporate giants. Smaller firms are thus more effective *and* more efficient innovators. For example, in a study of more than 300 major technological innovations in the United States, the National Science Board found: "For the whole 1953-73 period, the smallest firms produced about 4 times as many major innovations per R&D dollar as the middle-sized firms and *24 times as many as the largest firms.*"[195] In a revealing study involving new-product development managers who had served in both small and large firms, and who were noted for their skill in the field, Professor Arnold C. Cooper found that "large companies tend to spend substantially more to develop particular products than do small firms. . . . a magnitude possibly as great as several hundred percent."[196]

Fifth, the available evidence refutes the belief that oligopolistic giantism is a blueprint for technical progress. The domestic steel oligopoly has persistently lagged, not led, technological advance. Big Steel was the last, not the first, to adopt the oxygen furnace and, instead, poured millions of dollars into open hearth technology, which *Fortune* found was "obsolete when it was built."[197] In state-of-the-art continuous casting technology, Big Steel lags substantially behind producers in other industrialized nations, including the Japanese, as well as small American minimills.[198] The postwar record of the American auto oligopoly is hardly more reassuring. "I believe that the amount of product innovation

193. *R & D Scoreboard,* BUS. WK., July 8, 1985, at 94, 104. Exxon actually exceeds the 0.7% R&D average in the fuel industry. *Id.* Nevertheless, the corporate behemoths in the fuel industry fall far, far below the research effort (measured as R&D expenditures relative to total sales revenue) exerted by incomparably smaller firms such as Telesciensces (revenues of $52 million; R&D effort of 31.6%), Policy Management Systems (revenues of $62 million; R&D effort of 26.6%), and ADAC Laboratories (revenues of $59 million; R&D effort of 26.4%). W. ADAMS & J. BROCK, *supra* note 170, at 53. Compare these figures with Exxon (revenues of $88,561 million; R&D effort of 0.8%), Mobil (revenues of $54,607 million; R&D effort of 0.3%), Standard Oil of Indiana (revenues of $27,635 million; R&D effort of 0.5%). *Id.*

194. Mansfield, *Composition of Research and Development Expenditures: Relationship to Size of Firm, Concentration, and Innovation Output,* 63 REV. OF ECON. & STATISTICS 610, 612 (1981) (emphasis added).

195. NATIONAL SCIENCE BOARD, SCIENCE INDICATORS 1976, at 118 (1977) (emphasis added).

196. *Economic Concentration Hearings, supra* note 188, at 1296.

197. McDonald, *Steel is Rebuilding for a New Era,* FORTUNE, Oct. 1966, at 130, 135.

198. W. ADAMS & J. BROCK, *supra* note 170, at 57-59.

successfully introduced into the automobile is smaller today than in previous times and is still falling," a Ford vice president told a gathering of automotive engineers in 1964, adding that the "automatic transmission was the last major innovation of the industry."[199] As characterized by one knowledgeable insider, the domestic oligopoly's postwar record marked "a quarter-century of technical hibernation."[200] More generally, and after surveying a plethora of cross-sectional industry studies, Scherer concludes that "very high concentration has a favorable effect only in rare cases, and more often it is apt to retard progress by restricting the number of independent sources of initiative and by dampening firms' incentive to gain market position through accelerated research and development."[201]

Sixth, corporate giantism, and the drive for mutually negotiated "spheres of influence" between large international rivals, operates to retard technical advance. International rivals understand that a suitable "living arrangement" may necessitate suppression of innovation, among themselves as well as on the part of independents not party to cartels and global commercial treaties. They know that unilateral efforts to use technological advance for individual advantage can seriously undermine the collective stability of the group.

For example, in the 1920's the giant German chemical firm Farben made a spectacular breakthrough enabling it to produce gasoline synthetically from coal. As the world's largest oil company, Standard Oil of New Jersey (now Exxon) had an immediate, intense interest in this development. A Standard executive dispatched to Germany reported back: "Based upon my observations and discussion today, I think that this matter is the most important which has ever faced the [Standard Oil] company . . . . [Farben] can make high grade motor fuel from lignite and other low quality coals . . . ."[202] The ultimate threat, he foresaw, was that "[s]traight price competition is all that is left."[203] Cooler heads prevailed, however, and in 1929-30, pursuant to a "marriage" agreement between Standard and Farben, Standard obtained worldwide ownership and control (except for Germany) of Farben's "hydrogenation processes and any future [Farben] processes for making synthetically products having similar uses to those of customary petroleum refinery products."[204]

199. *Quoted in Federal Role in Traffic Safety: Hearings Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations,* 89th Cong., 2d Sess. 1266 (1966).

200. WRIGHT, *supra* note 173, at 4. *See generally* W. ADAMS & J. BROCK, *supra* note 170 (discussing technological backwardness in the U.S. steel and automobile industries).

201. F. SCHERER, *supra* note 164, at 438. For additional evidence, see J. BLAIR, *supra* note 164, at 199-254, and W. ADAMS & J. BROCK, *supra* note 170.

202. *Quoted in* G. STOCKING & M. WATKINS, *supra* note 25, at 92 n.67 (emphasis omitted).

203. *Id.*

204. *Id.* at 491. Standard Oil described the nub of its "marriage" agreement with I.G. Farben in

Rather than vigorously promoting its rights to this new technology at the expense of the value of its vast crude oil holdings, the evidence "shows clearly that [Standard's] main object in acquiring them was to strengthen its control over the oil industry."[205] A former Standard Oil president conceded as much in an internal company document: "There is little doubt in our minds but what, if other than oil companies had dominated the situation, the management's conduct of the business would have been along lines better calculated to secure the maximum return on the capital invested."[206] The history of international cartels is replete with instances of restraint of technological advance, including innovation in U.S. markets, by global corporate giants.[207] Indeed, world cartel agreements retarded the development of entire strategic industries—outside Nazi Germany—in the years leading up to World War II, including synthetic rubber, magnesium, aluminum, and diesel engines.[208]

Thus, contrary to mythology, we find that in technical innovation, as in operating efficiency, bigness *undermines* good economic performance. Indeed, it is highly significant that some business leaders today are beginning to reject the bigness mystique. For example, when he was questioned on March 19, 1985 about the information processing systems for the Saturn small-car project, the Chairman of General Motors, Roger B. Smith, confided, "Where is all this great stuff coming from? It's not really coming out of IBM . . . but it's coming out of little two- and three-man companies, because they're finding out that 40 guys can't do something that three people can do. It's just the law of human nature."[209] Here, too, reality is overtaking dogma as corporate leaders—increasingly attuned to the inventive infirmities of giantism—are launching small, organizationally distinct "startup" subsidiaries which, they anticipate, will be more inventive and entrepreneurial in spirit.[210]

IV

BIGNESS AND THE POLITICAL ECONOMY OF POWER

The fourth, and final, major premise of the current attack on antitrust is the unstated presumption that corporate giantism poses no problems in the political economy of power.

---

the following terms: "The I.G. are going to stay out of the oil business proper and we are going to stay out of the chemical business insofar as that has no bearing on the oil business." C. EDWARDS, *supra* note 28, at 27.

205. G. STOCKING & M. WATKINS, *supra* note 25, at 492.

206. *Id.* at 493.

207. *See id.* at 354-59, 426-29; C. EDWARDS, *supra* note 28, at 15-19, 32-37.

208. C. EDWARDS, *supra* note 28, at 58-62.

209. *At GM, We're Building the Factory of the Future,* Detroit Free Press, Mar. 19, 1985, at 9A, col. 2.

210. *See Big Business Tries to Imitate the Entrepreneurial Spirit,* BUS. WK., Apr. 18, 1983, at 84.

In the world as it is perceived by the apostles of bigness, power is a nullity—a nonentity, really. Corporate giants abstain from exerting influence on government to obtain private privilege and succor, and dutifully obey neatly drawn boundaries between "economics" and "politics." They do not retain high-powered lobbyists, nor do they exert undue financial pressure on members of Congress. (Congress presumably heeds only disinterested, scientific economic advice—provided, of course, that it is congruent with orthodox doctrine.) In this mythical world, corporate giants silently suffer the competitive market's penalties for poor economic performance. Seeking neither protection nor preferment, they play according to the rules of the competitive market game.

Of course, this vision bears no discernible resemblance to reality. The apostles of bigness seem oblivious to the fact that economic concentration and disproportionate size inevitably have political consequences—that in the real world, politics and economic organization are not hermetically sealed spheres. They seem incognizant of the fundamental principle of political economy, articulated long ago by Richard T. Ely, that it is "a necessary outcome of human nature that those persons who are to be controlled should enter politics in order that they may either escape the control, or shape it to their own ends."[211] They do not recognize the important corollary to this principle—that the giant corporation is inevitably as much a political institution as it is an economic organization.[212]

---

211. R. ELY, STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY 231 (1912).

212. *See generally* A. SAMPSON, THE SOVEREIGN STATE OF ITT (1973). This study of ITT's activities demonstrates that no bright line can be drawn to distinguish an economic from a political organization once a company reaches a great size. ITT boasts of being "constantly at work around the international clock—in 67 nations on six continents. . . . [in] activities, extending from the Arctic to the Antarctic and quite literally from the bottom of the sea to the moon . . . ." ITT, ANNUAL REPORT 7 (1968). As the scope of ITT's affairs rivals those of nations, it is not surprising that its officers and directors have included a former secretary general of the United Nations, a former premier of Belgium, two members of the British House of Lords, a member of the French National Assembly, and a former director of the Central Intelligence Agency. Mueller, *Conglomerates: A "Nonindustry,"* in THE STRUCTURE OF AMERICAN INDUSTRY 347, 352 (W. Adams ed. 7th ed. 1986).

ITT curried the favor of politicians by offering them access to its immense resources. For example, during a four-day period in 1971, two members of President Nixon's cabinet, three senators, five representatives, and two presidential candidates used ITT aircraft, which ITT had placed at their disposal. A. SAMPSON, *supra*, at 234. ITT also offered $1 million to the CIA and the National Security Council for the purpose of preventing the Chilean Congress from electing Salvador Allende as president. *See* SUBCOMM. ON MULTINATIONAL CORPORATIONS OF THE SENATE COMM. ON FOREIGN RELATIONS, 93D CONG., 1ST SESS., THE INTERNATIONAL TELEPHONE AND TELEGRAPH COMPANY AND CHILE, 1970-71, at 1-5 (Comm. Print 1973). ITT may also have used its political power to influence its treatment in the courts. Faced with government challenges to three attempted conglomerate acquisitions, the firm brought to bear "a massive assault on every relevant area of government," A. SAMPSON, *supra*, at 254, including a donation of $400,000 to help finance the Republican National Convention. The government subsequently dropped its antitrust cases against the firm. *See* Blake, *Beyond the ITT Case,*

Contrary to current apologetics, bigness does not meekly submit to the rules of the global competitive game when confronted with the consequences of delinquent economic performance. Instead, giant corporations—often in concert with allied interest groups—reach out to manipulate the state in order to change the rules of the game, to avoid the competitive market's sanctions for poor performance, and to shift them onto society. In reality, bigness mobilizes the vast political resources at its command—funds, employees, executives, labor unions, subcontractors, suppliers, governors and mayors, senators and representatives, Republicans and Democrats—to neutralize global competition through government-imposed import quotas, tariffs, "voluntary" export restraints, "orderly" marketing agreements, and the like.

The labor-industrial complex in automobiles is a case in point. Confronted with a deluge of innovative, fuel-efficient foreign cars induced by a deplorable postwar performance record, the auto giants joined with the United Auto Workers to mobilize an all-out assault on government—the International Trade Commission, the Congress, the President—in order to restrain foreign competition and restrict imports. These coalescing power blocs seized on the calculus of catastrophe that had earlier succeeded in obtaining a government bailout for Chrysler. They threatened that the nation's economic health was inextricably bound up with the health of the Big Three auto companies. Their not-so-subtle efforts at economic extortion succeeded: "voluntary" Japanese export quotas have been in effect continuously since 1981—at an exorbitant cost to American consumers.[213] The story in steel is similar.[214]

In their ideological zeal, the fuglemen of bigness forget that a competitively structured economic system is not just a means for compelling good economic performance. They forget that the decentralized, competitively structured market is, at the same time, a power-control system of built-in checks and balances—a system for neutralizing power, for dispersing it into many hands and, thus, for safeguarding society from the abuse of power, both economic and political.

Because they take no account of the political economy of power, today's antitrust critics are like Henry David Thoreau's neighbors, who, he said, "invite the devil in at every angle and then prate about the gar-

---

HARPER'S, June 1972, at 74-78; Mueller, *The ITT Settlement: A Deal with Justice*, 1 INDUS. ORGANIZATION REV. 67 (1973).

213. *See* A Review of Recent Developments in the U.S. Automobile Industry Including An Assessment of the Japanese Voluntary Restraint Agreements, USITC Pub. 1648, Inv. No. 332-188, at 39-41 (Feb. 1985); Crandall, *supra* note 82. For a case study of the power of bigness in autos, see Adams & Brock, *Bigness and Social Efficiency: A Case Study of the U.S. Auto Industry*, in CORPORATIONS AND SOCIETY (W. Samuels & A. Miller eds., forthcoming 1987).

214. *See* W. ADAMS & J. BROCK, *supra* note 170, at 263-73.

den of Eden and the fall of man."[215] Pledging their allegiance to free international trade, devotees of bigness inveigh against protectionist government policies. But for all their dithyrambics, they fail to face up to the crucial questions of political economy: Does not oligopolistic and monopolistic giantism render protectionism *more* likely by facilitating the assemblage and exertion of disproportionate pressure on the state? Is not protectionism *more* likely because these corporate power blocs find it easier to coalesce with organized labor, and thus to exert even more concentrated pressure on the state?[216] In an advanced economy with an intricate division of labor and interdependence, is bigness not able to threaten shutdowns and layoffs—what Henry Simons called economic sabotage—on a grand scale in order to attain anticompetitive ends? Can the competitive system prevail if society must continuously bribe coalitions of power groups to forego exercise of the power they possess?[217] Is import competition really a credible regulatory force in light of these realities of political economy? On these questions the apostles of bigness are conspicuously silent.[218]

Unlike his institutional successors, Professor Simons of the University of Chicago did not blithely dismiss the economic power problem as irrelevant or "unscientific." For Simons, the control of power poses the core challenge in a free society. "Effectively organized functional groups possess tremendous power for exploiting the community at large and even for sabotaging the system," he wrote in a masterful passage:

> The existence of competition within such groups, on the other hand, serves to protect the community as a whole and to give an essential flexibility to the economy. The disappearance of competition would almost assure the wrecking of the system in the economic struggle of organized minorities; on the political side, it would present a hopeless dilemma. If the organized economic groups were left to exercise their monopoly powers without political restraint, the result would be a usurpation of sovereignty by these groups—and, perhaps, a domination of the state by them. On the other hand, if the state undertakes to tolerate (instead of destroying) such organizations and to regulate their regulations, it will have assumed tasks and responsibilities incompatible with its enduring in a democratic form.[219]

---

215. H. THOREAU, THE JOURNAL OF HENRY D. THOREAU, vol. VIII, at 8 (Nov. 5, 1855) (B. Torrey & F. Allen eds. 1962).

216. For a detailed analysis of the problems of coalescing power, see Adams & Brock, *Tacit Vertical Collusion and the Labor-Industrial Complex*, 62 NEB. L. REV. 621 (1983).

217. *See* H. SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 122, 218 (1948).

218. Although Lester Thurow senses that the real problem of protectionism "is not the trade laws themselves, but the political power of troubled industries like steel and textiles," Thurow, *supra* note 15, at 73, he fails to recognize that the political power problem he decries would expand and become even more intractable if mergers, consolidations, and giantism were to be formally sanctioned, as he advocates.

219. H. SIMONS, *supra* note 217, at 43-44.

For those who prize political liberty, Simons concluded, "there can be no sanguine view as to where the proliferation of organization leads."[220] It is a lesson that the apostles of bigness have failed to comprehend.

CONCLUSION

"The present," historian C. Vann Woodward observes, "always proceeds, consciously or unconsciously, on some theory about the past, very often a false one."[221] This Article has reviewed the current attack on American antitrust policy by isolating its major premises and subjecting them to the test of empirical validity. Current attacks on antitrust, and their theoretical underpinnings, are seriously at odds with the weight of the evidence; they are the false theories of the past guiding public policy in the present.

Global competition alone is *not* a self-sustaining control mechanism. Instead, it is susceptible to erosion and subversion from within by international rivals acting through international cartels, joint ventures, and quasi-consolidations, as well as by outright mergers. Assertions to the contrary notwithstanding, antitrust has been and continues to be somnolent in the midst of the nation's most virulent merger movement, and in the face of a rash of joint ventures between American firms and their foreign rivals. Mega-mergers and corporate giantism more often than not are burdens, not boons, to good economic performance. The ability of corporate leviathans to exert disproportionate pressure on the state and to obtain government protection from global market competition poses serious problems in the political economy of bigness and power.

The implications of our findings for public policy are fourfold.

First, public policy must be guided by an explicit recognition that competitiveness, not bigness, is the key to the reindustrialization of the American economy. Corporate giantism per se does not guarantee success in the world marketplace. It is *not* a felicitous instrument for inducing efficiency in production, nor is it an aid to technological advance.[222] As Martin S. Davis summarizes the new insight spreading among practi-

220. *Id.* at 44.

221. Woodward, *Between Little Rock and a Hard Place,* NEW REPUBLIC, Feb. 3, 1986, at 29, 33.

222. The miraculous performance of the Japanese economy since World War II offers a valuable lesson in this respect—a lesson hitherto overlooked. The Japanese "miracle," we submit, did not result because Japan is populated by giant firms, nor because it is immune from stringent antitrust inhibitions, nor because it benefits from any allegedly symbiotic relationship between government and business, nor because of peculiar cultural traits. Rather, we submit that the Japanese "miracle" is largely attributable to the fact that Japanese industries were compelled to compete their way into world markets abroad—markets in which they held no established position, and which acting alone they could neither manipulate nor control. Significantly, Japanese industry typically was aided in this effort by structurally competitive industries at home. As one expert points out, "in almost every industry where Japanese companies have done well in export markets, they have honed their teeth in

cal businesspeople, "Bigness is not a sign of strength. In fact, just the opposite is true."[223]

Second, the guideposts for public policy must be shaped with a recognition that merger mania is a costly, economically wasteful, and, ultimately, futile exercise—a diversion of entrepreneurial energy the nation can no longer afford. Merger madness has provided a new vocabulary of white knights, poison pills, pac-man strategies, and golden parachutes. It generates millions of dollars in new fees for Wall Street law offices and investment banking houses. But it does not contribute to resolving the crucial challenges confronting the nation: the development and investment in new production techniques, new plant and equipment, new products. Nor is merger madness merely benign. It diverts management and investor attention from the critical tasks at hand, and dissipates scarce talents and resources in an economically barren paper chase. Rather than tolerating or encouraging mega-mergers, shapers of public policy would be well advised to arrest the trend. An admittedly drastic measure would be an outright ban on mergers among the Fortune 500. Alternatively, firms might be prohibited from financing mergers with borrowed funds, especially with so-called "junk bonds." Or, legislation might be enacted banning giant mergers unless the firms could demonstrate—and the burden of proof would be on the firms, not the government—that the

---

fierce domestic competition." Ohmae, *Japan vs. Japan: Only the Strong Survive*, Wall St. J., Jan. 26, 1981, at 20, col. 3. "A generation ago," the Wall Street Journal recently explained,

> Mr. Honda wanted to expand his motorcycle company by making cars. But the planners at Japan's Ministry of International Trade and Industry (MITI) didn't like that idea. They wanted only two companies—Toyota and Nissan . . . . But Japan is a free country, so Mr. Honda went ahead. . . . What's more, other upstarts followed Mr. Honda and Japan now has nine successful and hotly competitive automakers.

Korea's Car-tel, Wall St. J., Dec. 11, 1984, at 28, col. 1. For a devastating empirical critique of the "Japan Inc." myth, see Saxonhouse, *What Is All This About 'Industrial Targeting' in Japan?*, 6 WORLD ECON. 253 (1983).

Indeed, the conservative *Economist* argues that the competitive success of the Japanese and West German economies over the post-World War II era is attributable in important part to vigorous antitrust actions taken by the Allies during occupation of those countries:

> The one successful sort of government intervention in industry since the war has been trustbusting by mistake. The foundations for Japanese and German miracles were laid by the victorious allies' 'punitive' action in splitting the old zaibatsus into more and originally smaller groups; they thought they were limiting German industrial power for the future, but were instead increasing it, when they broke up I.G. Farben into three smaller and therefore more efficient firms.

Big Won't Work, ECONOMIST, Dec. 25, 1976, at 60-61.

223. *Splitting Up: The Other Side of Merger Mania*, BUS. WK., July 1, 1985, at 50, 53. The reality of this new "new learning" has been recognized recently by one prominent public policy official. Richard G. Darman, Deputy Secretary of the Treasury, points to what he characterizes as "corpocracy"—"large-scale corporate America's tendency to be like the government bureaucracy that corporate executives love to malign: bloated, risk-averse, inefficient, and unimaginative"—as a problem of rising national interest and concern. Looking Inward, Looking Outward: Beyond Tax Populism, remarks by Richard G. Darman before the Japan Society's Conference on Tax Reform in Japan and the United States: A Stimulus to New Economic Vitality? New York City (Nov. 7, 1986).

merger (1) would not substantially lessen competition or tend to create a monopoly in any line of commerce; (2) would enhance the operating efficiency of the merging firms; and (3) would promote technological innovations not otherwise obtainable. Such steps as these would force large corporations to eschew artificial merger-induced growth, and would encourage them to expand internally by building new plants and developing new products. They would force managements to meet the test of success where it really counts—in value rendered in the marketplace.

Third, public policy must be guided by an appreciation for the positive role that antitrust must play in promoting world-class competitiveness for American industry. It must be grounded in the reality that antitrust, particularly in its orientation toward maintaining competitive industry structure, is as relevant today as ever. It must be informed by a recognition that economic performance can be enhanced by arresting helter-skelter consolidations, and that limitations on "paper entrepreneurialism" promote genuine entrepreneurship productive of the kind of economic performance tailored to an era of global competition. The steel industry provides a case in point. In 1958, when the government prevented Bethlehem Steel, the industry's second largest firm, from acquiring Youngstown Sheet & Tube, then the industry's fifth largest firm, this did not precipitate economic catastrophe. Instead, and this is highly significant, the outcome was remarkably beneficial: once the avenue of expansion via acquisition was blocked, Bethlehem proceeded to do what it earlier had pleaded was impossible—it constructed a completely new facility at Burns Harbor, Indiana, "the *only* integrated green-field blast furnace-oxygen converter rolling mill complex built during the 1960's and 1970's to provide a U.S. counterpart to the modern steel-making capacity growing by leaps and bounds abroad."[224] One can only wonder what the state of the steel industry might be today if the antitrust agencies had blocked the spate of mergers and acquisitions that produced Big Steel, beginning with the United States Steel Corporation in 1901. More generally, one can wonder what levels of productivity, growth, efficiency, innovation, and international competitiveness might obtain if the billions now spent on mergers were instead invested in new plants, new manufacturing technologies, and new-product research and development.

Above all else, public policy must be congruent with the facts. If efficiency, innovation, and world-class competitiveness are the goals, then the time has come at last, not for a euthanasia of antitrust, but for its revitalization to combat the backwardness of bigness.

224. F. SCHERER, *supra* note 164, at 546.