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Tacit Vertical Collusion and the Labor-Industrial Complex

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By Walter Adams* and James W. Brock**

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I. INTRODUCTION

In his classic book, *American Capitalism*,¹ John Kenneth Galbraith argued that concentrations of economic power are not the social evil that antitrust advocates had traditionally believed them to be. Countervailing power, not classical competition, he said, was the instrument for keeping concentrated power in check.²

The actual or real restraints on a firm's market power are, according to Galbraith, vested not in its competitors but in its customers and suppliers; they are imposed not from the same side, but from the opposite side of the market. Thus, "private economic power is held in check by the countervailing power of those who are subject to it. The first begets the second."³ A monopoly on one side of the market offers an inducement to both suppliers and customers to develop the power with which they can defend themselves against exploitation. Thesis gives rise to antithesis, and there emerges a system of checks and balances which makes the economy as a whole workable, a *modus operandi* which lends stability to American capitalism. Most importantly, this system of checks and balances relieves the government of its obligation—imposed by the now antiquated antitrust laws—to launch any frontal attack on concentrated economic power. No longer need the government be concerned about the decline of competition or the sparsity of sellers in a particular market. Countervailing power can be relied on to eliminate the danger of any long run exploitation by a private economic power bloc.

Put differently, countervailing power operates primarily through the creation of bilateral monopoly and/or oligopoly situations. A monopoly on one side of the market finds its power neutralized by the appearance of a monopoly on the other side of the market. Thus, a system of checks and balances is built on the foundation of bilateral power concentrations.

Galbraith cites the labor market as an area where the operation of countervailing power can be observed with the greatest clarity, for it is in the labor market that giant unions bargain on a national, industry-wide scale against groups of employers acting jointly either through a trade association or an informal ad hoc bargaining committee.⁴ Galbraith sees countervailing power at work in highly

1. J.K. GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1952).

2. For early critiques of Galbraith's theory, see generally Adams, *Competition, Monopoly, and Countervailing Power*, 67 Q.J. ECONS. 469 (1953); Schwartz, *Book Review*, 81 HARV. L. REV. 915 (1968); Stigler, *The Economist Plays With Blocs*, 44 A. ECON. REV. 7 (1954).

3. J. GALBRAITH, *supra* note 1, at 118.

4. *Id.* at 110.

concentrated industries like the steel, rubber, and automobile manufacturing industries, and points out that "[n]ot only has the strength of the corporations in these industries made it necessary for workers to develop the protection of countervailing power, it has provided unions with the opportunity for getting something more as well. If successful they could share in the fruits of the corporation's market power."⁵ Thus, Galbraith justifies bilateral monopoly in the labor market because it prevents unilateral exploitation, while simultaneously allowing one monopolist to share in whatever exorbitant gains may accrue to the other.

But bilateral monopoly in the labor market has further consequences. According to pure economic theory, this type of market structure is characterized by what Heinrich von Stackelberg aptly called *Gleichgewichtslosigkeit*—an incapacity to achieve a stable equilibrium.⁶ The inherent and irreconcilable conflict between the bilateral monopolists can be rationally resolved (in the best interest of both parties) only if they agree to enter into a vertical combination or conspiracy. Such coalescence, of course, represents a compromise—a case of mutual forbearance—in order to achieve joint profit maximization. And, says Stackelberg, profits will be maximized for the bilateral monopolists if, for example, in labor-management confrontations, the employer (a monopsonist in the labor market) enjoys a monopoly in the sale of his products.⁷ In other words, market control or market dominance in the product market serves not only the best interests of management but also the best interests of labor. Hence, a bilateral monopoly situation naturally militates toward coalescence of power between management and labor, not antagonism or countervailance of power.

Understandably, this insight (which is neither profound nor esoteric) was used by the exponents of industrial cartels as a prime argument to persuade workers that cartels were in labor's best interests. Robert Liefmann, for example, pointed out that cartels were in a better position than competitive firms to grant wage increases, because they could pass the resulting cost increases on to consumers in the form of higher prices:

5. *Id.* at 122. In fairness to Galbraith, it must be noted that he recognizes inflationary periods as special situations in which countervailing power tends to be ineffective.

6. H. STACKELBERG, *MARKTFORM UND GLEICHGEWICHT* (1934).

7. *Id.* at 100: ("Eine Erhöhung des gemeinsamen Gewinnes kommt hier nur dann zustande, wenn der Nachfrager des bilateralen Monopols zugleich über ein einfaches Angebotsmonopol auf dem Markte seiner Produkte verfügt." Translated, this passage states: an increase in the joint profit becomes possible only if the buyer in the bilateral monopoly situation also enjoys a monopoly over the product which he sells.).

Where the firms are in a cartel, they are more inclined to concede the workers higher wages than in a state of free competition, because they find it easier to pass the increased costs on to their customers by charging higher prices. The workers will therefore, generally speaking, find it easier to impose higher wages upon organized firms, and it is in their power, at least if they can form strong trade unions, to demand wages increasing with the cartel's prices, i.e., a "*sliding wage-scale*."⁸

Thus, said Liefmann, market dominance and market control (i.e., cartels and monopolies) were in the best interests of labor as well as management, because the greater the market control the more ample the fruits to be shared through a system of vertical cooperation.

The consequence of such cooperation from the viewpoint of the public interest is, of course, another matter. In a prescient article written in 1890, Alfred Marshall observed that traditionally the public was protected by labor-management antagonism.⁹ Employers and employed "have seldom worked together systematically to sacrifice the interests of the public to their own, by lessening the supply of their services or goods, and thus raising their price artificially. But," Marshall added:

there are signs of a desire to arrange firm compacts between combinations of employers on the one side and of employees on the other to restrict production. Such compacts may become a grievous danger to the public in those trades in which there is little effective competition from foreign producers; a danger so great that if these compacts cannot be bent by public opinion they may have to be broken up by public force.¹⁰

In short, the absence of effective competition in product markets, when combined with vertical collusion between management and labor—whether tacit or overt—poses a central problem for public policy. Countervailing power is not a worthy substitute for anti-trust policy, because countervailing power tends to be subverted by coalescing power and thus makes the problem of controlling market power more intractable than ever.

In this Article, we propose to test Galbraith's countervailing power thesis by examining labor-management conduct in four different market situations. Two of our case studies will deal with "regulated" industries and two with industries in the "private" sector. We shall demonstrate that in all four cases, coalescing power rather than countervailing power is systematically created and maintained; that this conduct constitutes a form of tacit vertical collusion; that a central objective of this collusion is the suppression of competition in relevant product markets in order to immunize cost-price escalation by labor and management from an autonomous, exogenous control mechanism; and that the result of

8. R. LIEFMANN, CARTELS, CONCERNS, AND TRUSTS 80 (1927).

9. MEMORIALS OF ALFRED MARSHALL (A.C. Pigou ed. 1956).

10. *Id.* at 288-89.

the exercise of this coalescing power has been to fuel a pervasive cost-price-cost spiral which has adversely affected macrostabilization policies in the United States—and, indeed, in the leading industrial nations of the western world.

II. THE REGULATED SECTOR

Governmental regulation of industry, as originally conceived, was to be both a supplement to and substitute for competition. It was to be applied in those industries where the cost of entry was so great or the duplication of facilities so wasteful that some degree of monopoly was considered unavoidable. Here, the visible hand of public regulation was to replace the invisible hand envisioned by Adam Smith in order to protect consumers against extortionate charges, restriction of output, deterioration of service, and unfair discrimination. This was the rationale of the Interstate Commerce Act of 1887.¹¹

This regulatory concept, however, was first eroded and then extended. The regulatees themselves came to recognize that the better part of wisdom was not to abolish regulation but to utilize it. Gradually, the public utility concept was transformed from consumer oriented, to industry oriented regulation. By a process so brilliantly analyzed by Horace Gray,

the policy of state-created, state-protected monopoly became firmly established over a significant portion of the economy and became the keystone of modern public utility regulation. Henceforth, the public utility status was to be the haven of refuge for all aspiring monopolists who found it too difficult, too costly, or too precarious to secure and maintain monopoly by private action alone. Their future prosperity would be assured if only they could induce government to grant them monopoly power and to protect them against interlopers, provided always, of course, that government did not exact too high a price for its favors in the form of restrictive regulation.¹²

Business interests gradually began to appreciate the virtues of public utility status and to embrace government regulation as an instrument of protection from competition. As early as 1892, five years after Congress had passed the Interstate Commerce Act, Richard Olney, a former director of several railroad companies and U.S. Attorney General, stated the proregulation position with Machiavellian clarity. In a letter to his old friend Charles E. Perkins, president of the Chicago, Burlington & Quincy Railroad, who had implored Olney to spearhead a drive to repeal the Interstate Commerce Act, Olney wrote as follows:

11. Ch. 104, 24 Stat. 379 (1887) (discussed in W. ADAMS & H.M. GRAY, *MONOPOLY IN AMERICA* 43-47 (1955)).

12. Gray, *The Passing of the Public Utility Concept*, 16 J. LAND & PUB. UTIL. ECON. 8 (1940).

My impression would be that looking at the matter from a railroad point of view exclusively it would not be a wise thing to undertake The attempt would not be likely to succeed; if it did not succeed, and were made on the ground of inefficiency and uselessness of the Commission, the result would very probably be giving it the power it now lacks. The Commission, as its functions have now been limited by the courts, is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests The part of wisdom is not to destroy the Commission, but to utilize it.¹³

By 1940, protectionism by regulation had become both a popular and respectable governmental control mechanism. Independent regulatory commissions had been entrusted with the oversight of motor carriers, inland waterways, airlines, communications, and natural gas — despite the fact that some of these industries hardly conformed to the structural prototype of “natural” monopolies.

-
13. Letter from Richard Olney to Charles E. Perkins (Feb. 16, 1893) *quoted in* M. JOSEPHSON, *THE POLITICOS* 526 (1938). Perceptive business leaders in the private sector also recognized that regulation was an admirable protectionist device which would guarantee an escape from competition. Thus, in 1911, when the U.S. Steel Corporation came under antitrust attack, its president, Elbert Gary, proposed governmental regulation of the industry as an alternative to the cruelty of control by competition. In testimony before a congressional committee, Judge Gary stated the case for regulation with undisguised candor:

I realize as fully, I think, as this committee that it is very important to consider how the people shall be protected against imposition or oppression as the possible result of great aggregations of capital, whether in the possession of corporations or individuals. I believe that is a very important question, and personally I believe that the Sherman Act does not meet and will never fully prevent that. I believe we must come to enforced publicity and governmental control, . . . even as to prices, and, so far as I am concerned, speaking for our company, so far as I have the right, I would be very glad if we had some place where we could go, to a responsible governmental authority, and say to them, “Here are our facts and figures, here is our property, here our cost of production; now you tell us what we have the right to do and what prices we have right to charge.” I know this is a very extreme view, and I know that the railroads objected to it for a long time; but whether the standpoint of making the most money is concerned or not, whether it is the wise thing, I believe it is the necessary thing, and it seems to me corporations have no right to disregard these public questions and these public interests.

U.S. STEEL CORPORATION: *HEARINGS BEFORE THE HOUSE COMM. ON THE INVESTIGATION OF THE U.S. STEEL CORPORATION*, vol. 3, at 79 (1911).

“Your position [then],” said Congressman Littleton of the committee, “[is] that cooperation is bound to take the place of competition and that cooperation requires strict governmental supervision?” *Id.*

“That is a very good statement,” replied the judge. *Id.*

"Public convenience and necessity," not the dictates of the competitive market, had become the standard for determining entry, rates, and quality of service. Most important, this great transformation had been accomplished—not over the objection of business interests, but with their approval and (sometimes enthusiastic) support.¹⁴

Eventually, experience with regulation revealed what public interest advocates had long ago predicted. An accumulation of empirical evidence indicated that regulation in some industries was not a device to protect consumers from exploitation but to protect vested interests from competition. At the hands of some regulatory commissions, the power to license had become the power to exclude; control over rates had turned into an instrument of price supports; and authority over mergers had become a mechanism for fostering industry concentration.¹⁵ The regulatory commissions, according to former chairman of the Federal Trade Commission (FTC), Lewis Engman (a republican appointee serving during the Nixon Administration), had transmuted the industries under their jurisdiction into "federal protectorates, living in the cozy world of cost-plus, safely protected from the ugly spectres of competition, efficiency, and innovation."¹⁶ In short, under the aegis of the "independent" commissions, regulation was essentially a neo-mercantilist device of protectionism in which industry, labor, and government regulators had an abiding interest—to the detriment of the general public.

When these criticisms reached crescendo proportions, the drive for deregulation—particularly, in airlines and trucking—gathered force and became a palatable political issue both in the White House and the Congress.¹⁷ Commissioners committed to administrative deregulation were appointed to the agencies, and deregulation bills found increasing support in Congress.¹⁸ And this set the

14. See, e.g., G. KOLKO, *RAILROADS AND REGULATION: 1877-1916* (1965); G. KOLKO, *THE TRIUMPH OF CONSERVATISM* (1963).

15. Adams, *The Role of Competition in the Regulated Industries*, 48 A. ECON. REV. 527 (1958). See also Schwartz, *Legal Restriction of Competition in the Regulated Industries* 67 HARV. L. REV. 436 (1954).

16. Address by L. Engman to the Financial Analysts Federation, in Detroit, Michigan (Oct. 7, 1974).

17. See, e.g., *Federal Restraints on Competition in the Trucking Industry: Anti-trust Immunity and Economic Regulations, Report of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Kennedy Report* (1980)]; *Civil Aeronautics Board Practices and Procedures: Report of Subcomm. on Administrative Practices and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Kennedy Report* (1975)].

18. See, e.g., *Aviation Regulatory Reform: Hearings on H.R. 11,145 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transport*, 95th

stage for the virulent opposition by business regulatees and organized labor to deregulation, demonstrating the operation of coalescing power and tacit vertical collusion chronicled in this section.

A. Airlines

The Civil Aeronautics Act of 1938¹⁹ was passed with the dual objective of promoting the growth of aviation while maintaining sufficiently low fares to allow the public access to air travel. The newly created Civil Aeronautics Board (CAB) was entrusted with the regulation of the airline industry and equipped with three basic powers: (1) the entry power: the power to grant or to deny "certificates of public convenience and necessity," which an airline would be required to obtain in order to fly interstate; (2) the rate power: the authority to suspend or to set air fares; and (3) the antitrust power: the power to approve (or disapprove) agreements among airlines, with approval conferring immunity from the anti-trust laws.²⁰ In addition, the Board was given certain subsidiary powers, including the power to authorize mergers, the power to administer a subsidy, the power to regulate certain peripheral matters of airline service (e.g., baggage liability, tariff quotations, discrimination), and the power to enforce its own regulations.²¹

In practice, however, regulation did not prove to be a felicitous experiment in economic statecraft and fell short of achieving the ostensible objectives of the 1938 legislation. Thus, the Senate Subcommittee on Administrative Practices and Procedures found that, under the CAB's control, "entry into the industry has been effectively blocked."²² According to the Committee:

The present 10 domestic trunk carriers directly descend from the 16 in business in 1938; the nine existing local service carriers descend from 19 airlines allowed to provide local service directly after World War II. No new domestic trunkline has ever been authorized, and only one new local-service carrier has been authorized since 1950.²³

Although the industry "is potentially highly competitive," the Committee further found that:

[R]egulation discourages the airlines from competing in price and virtually forecloses new firms from entering the industry. The result is high fares and security for existing firms. But the result does not mean high profits. Instead the airlines—prevented from competing in price—simply channel their competitive energies toward costlier service: more flights, more planes, more frills. Thus, the skies are filled with gourmet meals and

Cong., 2d Sess. 122-86 (1978) (testimony of Alfred E. Kahn, Chairman, Civil Aeronautics Board).

19. Ch. 601, 52 Stat. 973 (1938).

20. *Kennedy Report* (1975), *supra* note 17, at 2.

21. *Id.*

22. *Id.* at 6.

23. *Id.*

Polynesian pubs; scheduled air service is frequent. Yet planes fly across the continent more than half empty. And fares are "sky high."²⁴

The Committee concluded that "Board regulation has not effectively brought about the low-fare service that is technically feasible and that consumers desire," that "[a]ir service can be made available to the American public at significantly lower prices," and that "[i]ncreased competition is likely to bring about the provision of such service."²⁵

When a series of bills were introduced in the late 1970's to promote the public interest by deregulating the industry, airline management and organized labor launched a joint offensive to preserve the regulatory status quo and its immunity from effective competition. Their remarkably parallel, multipronged attack on deregulation was a dramatic illustration of coalescing power in action.

1. *Deterioration of Service for Smaller Communities*

A major argument made by airline management and labor against deregulation was that increased competition would cause severe deterioration of air service to small- and medium-sized communities across the country. They argued that with free entry and exit, airlines would concentrate on the most densely travelled (i.e., the most lucrative) routes between major metropolitan areas. Competition in these corridors, in turn, would eliminate the excess profits required to subsidize service to other smaller communities. Thus, they argued, hundreds of communities would suffer from a reduction in (or complete elimination of) air service along with an increase in fares, thereby creating bleak prospects for further economic growth and development, given the importance of air service in modern society.

As uncontrolled, profit-maximizing carriers focused upon the most lucrative, highest-density markets, Continental Airlines argued, their "marginal markets, namely shorter-haul and lower-density markets . . . are bound to suffer."²⁶ "In this trial by fire," a United spokesman added, "the small cities and marginal segments will be burned."²⁷ Nor would the victims of the portended mael-

24. *Id.* at 3.

25. *Id.* at 19.

26. *Aviation Regulatory Reform: Hearings on H.R. 8813 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess., pt. 2, 1835 (1977) (statement of Continental Airlines presented by Lee M. Hydeman, Counsel) [hereinafter cited as *Anderson Hearings* (1977)].

27. *Regulatory Reform in Air Transportation: Hearings on S. 2551, S. 3364, and S. 3536 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong., 2d Sess. 538 (1976) (statement of Edward E. Carlson, Chairman and Chief Executive Officer, United Airlines) [hereinafter cited as *Cannon*].

strom be limited to the smallest communities: "Any legislation that allows the more lucrative branches from the airline tree to be snipped off," Mr. Borman argued on behalf of Eastern Airlines, "is going to result in a severe impact on Nashville and Raleigh/Durham and in medium-sized cities in this country."²⁸ Speaking for all major airline carriers, the Air Transport Association (ATA) concluded that only a handful of major cities would continue to be served adequately. "Accordingly, the real choice to be made," the ATA warned, "is between either a continuation of the extensive air network we have today, with constantly improving service to all segments of the public, or a concentration of operations in the high density air markets, with an accompanying reduction of services to the smaller, less productive markets."²⁹

Organized labor was in complete agreement with the position taken by airline management. The Airline Pilots Association argued:

It doesn't take much imagination to visualize what profit-oriented airline managements would do in a liberalized entry environment. The opportunity to get into the more lucrative, high-population markets would be too much for most airline marketing executives to resist. . . . The unfortunate consequence of this development would be . . . a reduction or loss of service now enjoyed by the smaller cities of America whose traffic-generating potential is limited³⁰

Hearings (1976)]. United subsequently reversed its position on this and other points of opposition to deregulation by carriers. On the alleged small city problems, for example, United later testified as follows:

Some have said that carriers will tend to reduce service to some cities and shift airplanes to more lucrative markets. This argument is also disproven by the facts. The levels of service provided under current regulation to most communities is substantially above what regulation requires. Most service is provided because it is profitable. I can tell you that United Airlines will not reduce existing profitable operations to gamble on proposed operations that might be profitable.

...
We believe that fears of abandonment are generally exaggerated. Certainly, by way of comparison, existing law has not insulated small cities. According to our data, 143 small cities have lost scheduled service since 1967.

Anderson Hearings (1977) *supra* note 26, 1364-66 (statement of Richard J. Ferris, President, United Airlines).

28. *Reform of the Economic Regulation of Air Carriers: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 486 (1976) (testimony of Frank Borman, President and Chief Executive Officer, Eastern Airlines) [hereinafter cited as *Anderson Hearings* (1976)].
29. *Cannon Hearings* (1976) *supra* note 27, at 1009 (statement of Paul R. Ignatius, President, Air Transport Association).
30. Remarks by J. O'Donnell, President, Air Line Pilots Association, before the National Democratic Platform Committee 8 (1976) [hereinafter cited as *Democratic Platform Address*].

The Airline Clerks concurred: "It is obvious that airlines will have to concentrate on the major population centers in order to survive. If they direct their resources to these population centers, smaller communities which are not profitable will eventually be dropped or at the least, service to those cities will be greatly curtailed."³¹ Similarly, the Executive Council of the AFL-CIO concluded that deregulation would "threaten air service to many smaller cities."³²

Ultimately, as the Air Transport Association argued, the deregulation of air service would discourage economic development of small- and medium-sized communities while limiting the access of residents in these areas to the world.³³ The Airline Pilots concurred: "A city in today's world without adequate air service is in the same dire shape as one without rail service 50 years ago. It is isolated and dying."³⁴

2. Competition Would Be Wasteful and Inefficient

A second line of attack on deregulation was that it would encourage wasteful excess capacity and fuel consumption as more carriers competed for the same traffic. Paradoxically, management and labor argued, deregulation would result in higher—not lower—fares. In making this argument, each group impugned the relevance of *intrastate* airfares, which are considered to be beyond the reach of CAB authority and which are thirty-five to fifty percent lower than regulated fares on comparable interstate flights, as an index of "reasonableness."

"In our view," said a spokesman for Continental Airlines, merely letting existing carriers roam freely in the market place is likely to lead to wasteful competition, since we believe that new entry will be in medium-haul, high-density markets already well served and that new entry in those markets will simply result in unneeded capacity at times of day duplicating existing service . . . [S]uch excess capacity is bound to

31. *Regulatory Reform in Air Transportation: Hearings on S. 292 and S. 689 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess., pt. 3, 1324 (1977) (statement of Allen W. McCauley, Director, Air Transport Division, Brotherhood of Airline Clerks) [hereinafter cited as *Cannon Hearings* (1977)].

32. *Id.* at 1322 (statement of AFL-CIO Executive Council).

33. *Cannon Hearings* (1976), *supra* note 27, at 1014 (statement of Paul R. Ignatius, President, Air Transport Association). See also *Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 585 (1975) (prepared statement of Harvey J. Wexler, Senior Vice President, Continental Airlines) [hereinafter cited as *Kennedy Hearings* (1975)].

34. *Democratic Platform Address*, *supra* note 30, at 8. See also *Cannon Hearings* (1976), *supra* note 27, at 1271 (statement of Francis A. O'Connell, Legislative Director, Transport Workers Union).

be counterproductive. It will lead to pressure for higher, not lower, prices.³⁵

Or, as a TWA representative put it, "[t]he more competition that exists, the more capacity is brought into the market to slice the pie into smaller pieces."³⁶ Equally wasteful, according to Braniff, would be the impact upon fuel consumption: "If you are for free entry to add more airlines, you have to disregard fuel conservation. Fuel consumption will soar as more airlines burn up the skies fighting for shares of the existing travel market."³⁷

Likewise, labor spokesmen testified that "it is almost certain that load factors will not be increased to any significant extent;"³⁸ therefore, "wasteful excess capacity in major air travel markets" would be a likely consequence of free entry.³⁹ Also, the Airline Clerks asked, "how can we in good conscience propose legislation of this type which would promote additional consumption of precious energy[?]"⁴⁰

Both groups attacked the relevance of significantly lower fares charged by intrastate carriers free of CAB regulation as indicative of the likely effects of nationwide deregulation. The Air Transport Association claimed the intrastate and interstate systems to be "fundamentally different" and, therefore, incomparable on a number of grounds: intrastate carriers frequently operate under monopoly conditions; intrastate carriers concentrate on high density routes; California and Texas are uniquely blessed with favorable weather conditions; short hauls permit fewer cabin amenities and thus more seating; costly overnight crew arrangements are avoided; ticketing, reservation and baggage handling are simplified; and maximum utilization of equipment is possible.⁴¹ Similarly, a union spokesman argued that intrastate conditions

35. *Anderson Hearings* (1977), *supra* note 26, at 1835 (statement of Continental Airlines presented by Lee M. Hydeman, Counsel).

36. *Cannon Hearings* (1976), *supra* note 27, at 658 (statement of Charles C. Tillinghast, Jr., Chairman and Chief Executive Officer, Trans World Airlines). "If you want to get low fares," Mr. Maytag, the president of National Airlines, remarked, "the ideal way to do it is have one airline and you can schedule perfectly for the whole United States. You can schedule for peak periods. You can fill your airplanes up. Schedule them for the proper times. Please don't understand that I am suggesting this kind of thing," he hastened to add. *Cannon Hearings* (1977), *supra* note 31, at 1224.

37. *Cannon Hearings* (1977), *supra* note 31, at 1216 (statement of Harding L. Lawrence, Chairman and President, Braniff Airways).

38. *Cannon Hearings* (1976), *supra* note 27, at 839 (statement of John J. O'Donnell, President, Air Line Pilots Association).

39. *Anderson Hearings* (1977), *supra* note 26, at 1584 (statement of John J. O'Donnell, President, Air Line Pilots Association International).

40. *Cannon Hearings* (1977), *supra* note 31, pt. 3, at 1325 (statement of Allen W. McCauley, Director, Air Transport Division, Brotherhood of Airline Clerks).

41. *Cannon Hearings* (1976), *supra* note 27, at 1011-12 (statement of Paul R. Ignatius, Air Transport Association).

"are not and cannot be duplicated" in interstate markets owing to unique circumstances.⁴²

3. *Industry Chaos*

A third argument against deregulation was that it would usher in a state of abject chaos. Absent the stability of route and rate regulations, labor and management argued, the frequency, price, and availability of service would fluctuate violently and unpredictably.

Would the country be prepared, the president of TWA asked rhetorically, "for the rise and fall of airline prices, depending on variances in supply/demand relationships at different times in various markets?"⁴³ "The public," according to Continental Airlines, "would be left with great uncertainty as to the availability of air service by any particular carrier or in any given market."⁴⁴ In short, Continental concluded, "[t]he situation for the travelling public and shippers is likely to be chaotic."⁴⁵

Spokesmen for organized labor agreed with the assessment made by Continental. The Transport Workers Union, for example, warned of the widespread confusion that would follow in the advent of governmental deregulation: "Fares will fluctuate wildly, schedules can and will be altered on whim or with changing demand, thereby stranding business passengers and shippers' goods. Airline flight crews will not know one day to the next when they will fly, to where and for whom."⁴⁶ The Machinists were content in their testimony to rely upon remarks by management that deregulation

42. *Id.* at 838 (statement of John J. O'Donnell, President, Air Line Pilots Association International); *Anderson Hearings* (1977), *supra* note 26, at 1572 (statement of William G. Mahoney, Counsel for Brotherhood of Railway and Airline Clerks, International Association of Machinists, and Transport Workers Union); *id.*, pt. 1, at 334 (testimony of William Scheri, Assistant General Chairman, International Association of Machinists and Aerospace Workers).

In reaching these conclusions, labor groups unabashedly relied, *inter alia*, on discussions with and the testimony of airline management. Thus, Mr. Scheri, speaking for the Machinists, rested his conclusions in this regard on talks with his colleagues "plus many management people across this country." *Id.* The airlines pilots' representative, Mr. O'Donnell, cited analyses of intrastate carriers conducted and presented by Continental and Texas International. *Cannon Hearings* (1976), *supra* note 27, at 840.

43. *Cannon Hearings* (1976), *supra* note 27, at 661 (statement of Charles C. Tillinghast, Jr., Chairman and Chief Executive Officer, Trans World Airlines).

44. *Id.* at 442 (statement of Robert F. Six, Chairman and Chief Executive Officer, Continental Airlines).

45. *Kennedy Hearings* (1975), *supra* note 33, at 585 (statement of Harvey J. Wexler). See also *Cannon Hearings* (1976), *supra* note 27, at 1015 (statement of Paul R. Ignatius, President, Air Transport Association).

46. *Cannon Hearings* (1976), *supra* note 27, at 1271 (statement of Francis A. O'Connell, Legislative Director, Transport Workers Union).

lation would be tantamount to "anarchy" and would cause "chaos instead of an orderly system of air service,"⁴⁷ while the Airline Pilots Association warned that regulatory control "is the glue which holds the network of interconnecting air transport services together so it can function in the public interest."⁴⁸

4. Predation, Concentration, and Control

A fourth argument against deregulation was that it would permit the largest airlines to predatorily price other carriers out of the industry. This, it was claimed, would lead to increased concentration and control in the hands of a few, powerful firms which would then be able to raise rates. The paradox, management and labor once again argued, was that deregulation would result in less competition, higher fares, and would eventually lead to demands for re-regulation—or worse, nationalization—of the industry.

"In my view," the president of one carrier testified, "freedom of entry, exit and pricing would enable the major carriers to dominate all of the larger lucrative air transportation markets. Their substantially greater capital resources alone would bring this about in the absence of the route protection afforded by the existing certificate of public convenience and necessity."⁴⁹ "If you eliminate differences between airlines in routes and prices as well as equipment," according to another airline president, "then marketing success becomes a simple question of size. The small airlines will not have the market identity, route strength and financial power. I repeat marketing success will simply become a function of size."⁵⁰ Not only is aviation "a highly predatory business," a spokesman for Western Airlines testified, it is surrounded by "a group of predatory opportunists."⁵¹ Another carrier saw concentration evolving from mergers between carriers:

The efficient medium-sized trunk and regional carriers will be stripped of all security in the markets they have developed and serve. They will be forced to merge with the larger carriers on terms dictated by the giants.

As a result, within a few years, the United States will have fewer

47. *Anderson Hearings* (1977), *supra* note 26, pt. 1, at 1017 (testimony of Louis Schroeder, Assistant General Chairman, District Lodge 141, International Association of Machinists).

48. *Id.* at 1584 (statement of John J. O'Donnell, President, Air Line Pilots Association International).

49. *Cannon Hearings* (1976), *supra* note 27, at 792 (statement of Edwin I. Colodny, President and Chief Executive Officer, Allegheny Airlines).

50. *Anderson Hearings* (1977), *supra* note 26, at 1636 (statement of Harding L. Lawrence, Chairman of the Board and Chief Executive Officer, Braniff Airways).

51. *Cannon Hearings* (1977), *supra* note 31, pt. 2, at 533-34 (testimony of Arthur F. Kelly, Chairman of the Board and Chief Executive Officer, Western Airlines).

trunklines than today. Those carriers will be so large and powerful that they will each dominate certain U.S. markets.

Rather than creating a more competitive and healthy environment, this legislation will produce a climate designed to favor big airlines. The disappearance of smaller carriers—considered to be the industry's most efficient—will only lead to increasing concentration.⁵²

Inexorably, then, carriers argued that deregulation would eventually lead to a "weak 'controlled' competition that usually goes with oligopoly resulting in less emphasis on service and low fares,"⁵³ an increased "[a]bility of a few airlines to dictate the timing and direction of new aircraft technology resulting in a tendency to limit technological innovation,"⁵⁴ "higher fares and less service,"⁵⁵ and, again paradoxically, the need "for more regulation, rather than less."⁵⁶

Representatives of organized labor foresaw the same serious oligopolistic consequences. The AFL-CIO, for example, warned that deregulation would "encourage cut-throat pricing practices."⁵⁷ And, like their managerial counterparts, union spokesmen argued that any reduction in fares following deregulation would be a temporary phenomenon and a prelude to increased concentration.⁵⁸ One labor representative cited the remarks of the former president of United Airlines that "[a]fter the dust settled, the big carriers would be bigger and the little carriers absent."⁵⁹ The Machinists

52. *Id.* pt. 3, at 1220 (statement of L.B. Maytag, Chairman of the Board and Chief Executive Officer, National Airlines).

53. *Id.* pt. 2, at 1013 (statement of Francisco A. Lorenzo, Chairman, Association of Local Transport Airlines, and President, Texas International Airlines).

54. *Id.*

55. *Cannon Hearings* (1976), *supra* note 27, at 437 (statement of Robert F. Six, Chairman and Chief Executive Officer, Continental Airlines).

56. *Cannon Hearings* (1977), *supra* note 31, pt. 1, at 472 (statement of C.E. Meyer, Jr., President and Chief Executive Officer, Trans World Airlines). *See also Cannon Hearings* (1976) *supra* note 27, at 661 (statement of Charles C. Tillinghast, Jr., Chairman and Chief Executive Officer, Trans World Airlines).

57. *Cannon Hearings* (1977), *supra* note 31, at 1322 (statement by AFL-CIO Executive Council).

58. *Democratic Platform Address*, *supra* note 30, at 9.

59. *Anderson Hearings* (1977), *supra* note 26, pt. 1, at 1017 (statement of Louis Schroeder, Assistant General Chairman, District Lodge 141, International Association of Machinists). Labor's reliance on United's initial position proved premature when the carrier subsequently recanted:

Could [deregulation] lead to concentration or domination by United or any other carrier? There is little evidence of economy of scale in U.S. air transportation. Smaller trunks — and widely recognized intrastate commuters — have efficiencies and marketing skills. Nimble and smart smaller carriers could really do well in this new environment.

Id. pt. 2, at 1364 (statement of Richard J. Ferris, President, United Airlines). United's "about-face" drew the following response from the vice president of TWA, W.D. Slattery:

predicted that the eventual result of deregulation would be "anywhere in the neighborhood of two to three, at the most four, carriers left in the United States," "a monopolistic airline system unable and unwilling to meet the public need or convenience," and "the Federal Government being compelled to nationalize the industry".⁶⁰

5. *Inability to Obtain Capital*

A fifth line of attack against deregulation was that it would cripple the industry's ability to obtain capital. The security of protected route certificates, labor and management contended, was crucial to the airlines' ability to raise funds on favorable terms. Absent such security, the industry would be unable to obtain needed capital in private markets. Hence, deregulation could well lead to increased dependence upon the public sector and, in the extreme, to nationalization.

"The foundation of the financial credit of the airlines," National Airlines warned, "has been the route certificate system. If you remove this credit keystone, the enormous financial resources needed by the airlines will be diverted to better risks."⁶¹ "If we impair the value of [route certificates] in an industry which is cyclical by nature," United Airlines claimed early in the hearings, "we will create a high degree of risk for financial institutions which could bring new investment in the industry to a halt."⁶² The even-

We have heard testimony and apparently this is to ease the minds of those who are against deregulation, that there are certain airlines who have come out for deregulation, and indeed United Airlines has testified in favor of deregulation.

I would suggest that if General Motors were in favor of some change in the automotive industry, every other automotive company were against it, we would not find the Government so widely behind that particular act. I think the fact that United Airlines is the largest airline in the industry, in fact the GM of the airline industry, the fact that they are for it should raise caution in everyone's mind.

Id. pt. 1, at 308. Labor, of course, immediately took up the shibboleth. As one spokesman for the Machinists stated:

[O]ut of all the carriers there is only one carrier, to my knowledge, that is backing deregulation, and that is United Airlines. And, like Mr. Slattery said, from TWA, beware if United Airlines is backing it. And I have to agree with that statement, even though I represent the people on that carrier.

Id. at 335 (testimony of William Scheri, Assistant General Chairman, International Association of Machinists and Aerospace Workers).

60. *Anderson Hearings* (1977), *supra* note 26, pt. 1, at 330-31 (testimony of William Scheri, Assistant General Chairman, International Association of Machinists and Aerospace Workers).

61. *Id.* pt. 2, at 2055 (testimony of E.F. Dolanskey, President and Chief Operating Officer, National Airlines).

62. *Cannon Hearings* (1976), *supra* note 27, at 535 (statement of Edward E. Carl-

tual outcome, according to Eastern Airlines, would find carriers increasingly dependent upon the public sector, i.e., nationalization.⁶³

Labor's position on this issue closely tracked that taken by management. "Free entry and exit," the Airline Pilots Association warned, "would have a serious adverse effect on the ability of the industry to attract capital necessary to finance the development of new technology"⁶⁴ "New equipment and new technology," as a spokesman for the Airline Clerks explained, "require steady, reliable sources of capital To introduce the insecurity of unregulated competition into this equation would cause our sources of

son, Chairman and Chief Executive Officer, United Airlines). Upon reflection, however, United concluded that the adverse effects of continued regulation outweighed any negative impact of deregulation:

Industry profits experienced over the past 20 years are no longer adequate to keep the system going. For almost two years, United's senior officers have engaged in painstaking examination and discussion of this paramount issue. We have attempted, to the best of our ability, to find a solution within the limits of present regulation. My competent associates, who built this large and respected airline, could find only partial remedies among all the options available today. Our examination showed us many avenues that are available to managements of other American firms to restore adequate earnings levels. Since these solutions are not open to us under current regulation, we began to consider regulatory change as the instrument to improve the outlook for our customers, our shareholders and our employees.

What is wrong with present regulations? In our view, it is the way our regulators have handled the two key questions of pricing and entry. Under existing regulation there is no . . . reasonable prospect that earnings could improve to the point where carriers can earn a rate of return that will restore the credit of our industry and enable it to attract much needed capital.

Anderson Hearings (1977), *supra* note 26, at 1362 (statement of Richard J. Ferris, President, United Airlines).

63. *Cannon Hearings* (1976), *supra* note 27, at 598 (statement of Frank Borman, President and Chief Executive Officer, Eastern Air Lines). Alternatively, Delta argued that oligopolistic concentration would result from the uncertainty of deregulation and its impact on the supply of capital:

If airline routes were insecure, either in the sense that the airline were not obligated as it is today by the certificate to serve the routes over which its operations have been found to be needed or, even more importantly, in the sense that the degree of expected competition were largely unpredictable, the airline business would be highly insecure. *Ipsa facto*, the sources of borrowed funds would dry up for all but the few very strongest carriers. This is but one of many ways in which any significant weakening of the certificate process would foster a drive toward concentration of the industry in the hands of only a few, large, strong air carriers—the very antithesis of what the reformers ostensibly seek.

Cannon Hearings (1977), *supra* note 31, pt. 2, at 895 (statement of R.S. Maurer, Senior Vice President and General Counsel, Delta Airlines).

64. *Cannon Hearings* (1976), *supra* note 27, at 840 (statement of John J. O'Donnell, President, Air Line Pilots Association).

badly needed funds to disappear"⁶⁵ Like management, labor portrayed the eventual outcome as an "airline system resembling that of Europe where carriers are owned by the central governments."⁶⁶ "Deregulation", in other words, "could well be the first step toward nationalization of the airline industry."⁶⁷

6. *Threat to Labor*

Management and labor also opposed deregulation on the grounds that it would directly and severely harm labor. The threat, both groups warned, was two-fold: (1) a massive dislocation and unemployment of relatively immobile employees as routes between smaller communities across the country were eliminated; and (2) the gains of organized labor would be seriously undermined as new, low-cost, nonunionized carriers entered the industry.

The president of Eastern Airlines warned that "thousands of jobs are at stake."⁶⁸ Similarly, a TWA spokesman feared a "severe" impact upon the industry's 300,000 employees and pointedly noted what he interpreted as "the contradiction of espousing fuller employment while supporting measures that would seriously jeopardize countless highly skilled jobs in a vital industry."⁶⁹ Particularly significant, according to one carrier, was the immobility of labor:

A large proportion of the jobs in our industry are associated with a high degree of specialized skill, acquired through complex training and long experience. The possibility of retraining workers with these skills for employment at a comparable level in other industries is minimal. In any meaningful sense, their career would be at an end.⁷⁰

65. *Cannon Hearings* (1977), *supra* note 31, pt. 4, at 1908 (statement of Ronald H. Stout, System Board 451, Brotherhood of Airline Clerks).

66. *Anderson Hearings* (1977), *supra* note 26, pt. 1, at 329 (statement of William Scheri, Assistant General Chairman, International Association of Machinists).

67. *Id.* See also *Cannon Hearings* (1976), *supra* note 27, at 1271 (statement of Francis A. O'Connell, Legislative Director, Transport Workers Union).

68. *Anderson Hearings* (1976), *supra* note 28, at 455 (statement of Frank Borman).

69. *Cannon Hearings* (1977), *supra* note 31, pt. 1, at 468, 471 (statement of C.E. Meyer, Jr., President and Chief Executive Officer, Trans World Airlines).

70. *Id.* at 468. See also *Cannon Hearings* (1976), *supra* note 27, at 1014 (statement of Paul R. Ignatius, President, Air Transport Association). Here, too, United subsequently reversed course:

Abandonment has also been equated with job loss and is loosely used as an argument against regulatory reform. Here, again, we find that the argument has no merit, and the facts demonstrate otherwise. Under the Federal Aviation Act and existing regulation our certificated industry has been shrinking, not growing. There are now almost 10,000 fewer jobs than there were in 1969. Under those

Deregulation, management representatives foreboded, constituted a mortal challenge to the very existence of organized labor and the gains it had painstakingly made in the past. Said the president and chairman of the board of American Airlines: "The pending proposals would encourage the organization of new airlines free from many of the constraints contained in current airlines collective bargaining agreements. The proposals thus threaten the job security of thousands of airline employees."⁷¹ The president and chief operating officer of National Airlines agreed that "[l]egislative changes would thereby revoke union gains made over the years,"⁷² and the president of Texas International Airlines asserted that deregulation "would be an attack on the labor movement in this country."⁷³

Labor, of course, concurred with management's assessment. "[A]irline deregulation," the Teamsters warned, "will lead to long-term unemployment, employee dislocation and hardship, lower wages, reduced benefits and poorer working conditions for those workers lucky enough to retain their jobs in the air transportation industry."⁷⁴ The Machinists were convinced that deregulation would "throw thousands of skilled and dedicated workers out on the streets."⁷⁵ "As a result of rate wars that would rage in an atmosphere of unrestricted competition," the Airline Clerks concluded, "there would be fewer airlines surviving and fewer airline members."⁷⁶ And, like the presidents of air carriers, labor spokesmen feared a direct threat to their organizations:

[Deregulation] would involve the very real threat of lower wages and reduced earnings potential as some carriers would eventually be replaced by new or unorganized carriers who by the payment of substandard wages and benefits and poorer service would . . . [wipe] out the gains gained over many years by union members.⁷⁷

circumstances we find it difficult to understand how an expansionary bill would result in job loss in a business which has already shrunk!

Anderson Hearings (1977), *supra* note 26, at 1366 (statement of Richard J. Ferris, President, United Airlines).

71. *Cannon Hearings* (1977), *supra* note 31, at 1396 (statement of Albert V. Casey).

72. *Anderson Hearings* (1977), *supra* note 26, at 2054 (testimony of E.F. Dolanskey).

73. *Cannon Hearings* (1976), *supra* note 27, at 510 (statement of Francisco A. Lorenzo).

74. *Cannon Hearings* (1977), *supra* note 31, pt. 2, at 711 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

75. *Id.* at 1324 (statement of John F. Peterpaul, General Vice President, International Association of Machinists and Aerospace Workers).

76. *Id.* at 1325 (statement of Allen W. McCauley, Director, Air Transport Division, Brotherhood of Airline Clerks).

77. *Id.* at 1324-25 (statement of Allen W. McCauley, Director, Air Transport Division, Brotherhood of Airline Clerks). *See also id.* at 1333 (statement of John J. O'Donnell, President, Air Line Pilots Association).

7. *Adverse Impact Upon Related Industries*

Management and labor further attacked deregulation on the grounds that it would adversely affect such related fields as aircraft manufacturing and airport construction, operation, and financing. The financial health of these industries, management and labor claimed, depended on the financial well-being of the airline industry. The instability and financial uncertainty generated by deregulation of airlines, they argued, would undermine the economic viability of aircraft production and airport operations.

"A healthy airline industry is absolutely essential to the aircraft airframe and engine manufacturers," TWA asserted, "[a]nd these manufacturers are absolutely essential to our basic economy and to our national defense."⁷⁸ United, prior to reversing its position on deregulation, stated:

Today United is working closely with Boeing and United Aircraft in the design specifications of a new version of the highly successful 727 jet, the dash 300, which promises greater fuel efficiency and quieter operations — both clearly in the interest of airline passengers and communities. Who would afford the sort of long range study effort and massive capital commitment associated with this sort of activity if the air transportation industry is placed in a highly uncertain transitional posture by deregulation? Would aerospace manufacturers invest in R&D efforts to sell to a fragmented and unstable market?⁷⁹

The effect on employment would be disastrous, the carriers contended. "[W]hat happens," the president of TWA agonized, "to the hundreds of thousands of employees who are involved in supporting the airline industry in the production of aircraft and related equipment if the industry cannot attract the capital necessary[?]"⁸⁰

Labor spokesmen also pointed to the allegedly severe consequences for aircraft manufacturers. Deregulation of air transport service would "discourage modernization of aging airline fleets" according to the Executive Council of the AFL-CIO.⁸¹ The Transport Workers Union also warned that "aircraft development and manufacturing will be seriously hampered by lack of funding."⁸² "Not only is [impaired capital raising ability] an unfortunate situation for the airlines who must begin now to plan for future equipment," the Airline Pilots concluded, "it also threatens aeronautical

78. *Cannon Hearings* (1976), *supra* note 27, at 663 (statement of Charles C. Tillinghast, Jr., Chairman and Chief Executive Officer, Trans World Airlines).

79. *Kennedy Hearings* (1975), *supra* note 33, at 633 (prepared statement of Andrew De Voursney, United Airlines).

80. *Cannon Hearings* (1977), *supra* note 31, pt. 1, at 468 (statement of C.E. Meyer, Jr.).

81. *Id.* pt. 3, at 1322.

82. *Id.* at 1326 (statement of Francis A. O'Connell, Legislative Director, Transport Workers Union).

research and development of new technology aircraft and engines."⁸³

Air carriers and labor pointed to airport construction and improvement as another field whose economic viability would be jeopardized by the elimination of route certification and control. An American Airlines spokesman explained:

Most runway and terminal improvements are financed through the sale of airport revenue bonds. Long-term airline commitments set forth in airport use agreements and terminal leases provide the basis under which cities issues [sic] these securities.

With the uncertainties created by deregulation, airlines will be less willing to make these long-term commitments, since they will be unable to forecast whether and to what extent they will still be operating by long-term commitments.⁸⁴

Deregulation, Delta predicted, would "disrupt current and committed airport financing," "precipitate a series of financial crises for cities," and "make it virtually impossible to finance airport improvements and future development."⁸⁵

Union representatives also focused on the perilous consequences for airport construction and improvement. "Planning for airport improvements and development," the Airline Pilots Association argued, "would be significantly disrupted. Airport operators rely heavily on long term commitments from the airlines to underwrite the financing of terminal and other related development. The uncertainties posed by the liberal entry and exit provisions of the various deregulation bills would discourage airlines from entering into extended contractual arrangements."⁸⁶ The AFL-CIO's Executive Council stated that airport construction and improvements would be "jeopardized,"⁸⁷ while the Transport Workers Union contended that free entry and exit would "all but destroy airport management's ability to plan and finance their facilities."⁸⁸

8. *Threat to Safety*

Management and labor also jointly fought deregulation on the grounds that it would threaten the safety of the flying public. Both claimed that competition would pressure carriers—particularly new entrants—to cut corners on safety. Although routes and fares,

83. *Democratic Platform Address*, *supra* note 30, at 11.

84. *Cannon Hearings* (1976), *supra* note 27, at 521 (statement of Albert V. Casey, Chairman and President, American Airlines).

85. *Id.* at 699 (statement of R.S. Maurer, Senior Vice President, General Counsel and Secretary, Delta Airlines).

86. *Id.* at 840 (statement of John J. O'Donnell, President, Air Line Pilots Association).

87. *Cannon Hearings* (1977), *supra* note 31, at 1322.

88. *Id.* at 1326 (statement of Francis A. O'Connell, Legislative Director, Transport Workers Union).

on the one hand, and safety, on the other, traditionally have been regulated by different government agencies, carriers and unions agreed that economic and safety regulations were inseparable.

Western Airlines, for example, testified that "those who live on the fringe of the business will always have a tendency to cut corners" with regard to safety.⁸⁹ United Airlines initially warned that "marginal, or cutrate, operators may be tempted to cut corners on safety when under economic pressure."⁹⁰

Graphic treatment of the issue, however, was left to labor. As the Airlines Pilots Association warned:

[N]ew entrepreneurs, anxious to be successful in the airlines business, would not have the commitment or the financial resources to achieve the margin of safety which must be maintained in today's sophisticated air transport environment. The FAA, with its limited resources, would be hard pressed to handle their certification, monitoring and enforcement responsibilities to insure compliance by new operators in a manner consistent with the traveling public's expectations.⁹¹

Other labor groups were less restrained. The Machinists claimed⁹² that "Fly-by-night airlines will become a reality," while the Transport Workers Union castigated deregulation as "a cruel experiment with passenger safety."⁹³

89. *Id.* pt. 2, at 550 (statement of Arthur F. Kelly, Chairman and Chief Executive Officer, Western Airlines).

90. *Kennedy Hearings* (1975), *supra* note 33, at 632 (statement of Andrew De Voursney, United Airlines). Two years later, however, United reversed its stance on the safety issue:

United doesn't share these concerns. We do not believe that regulatory reform will create an environment in which carriers will shave costs by compromising safety. If the dynamics of the market place cause some carriers to decline or fail, we do not believe that maintenance or safety will be compromised from existing standards. In past periods of economic difficulties, safety was not compromised. There is simply no evidence that carrier management or the FAA has in the past or will in the future hold safety hostage to economics.

New carriers, managed by people found to be fit, willing and able to participate in air transportation, should pose no threat to safety. These firms will typically employ experienced airline operating employees. They will be subject to all safety rules and regulations of the act as administered by FAA.

Anderson Hearings (1977), *supra* note 26, at 1368-69 (statement of Richard J. Ferris, President, United Airlines).

91. *Anderson Hearings* (1977), *supra* note 26, at 1586 (statement of John J. O'Donnell, President, Air Line Pilots Association International).

92. *Id.* pt. 1, at 406 (testimony of Edward Imondi, Legislative Committee, International Association of Machinists and Aerospace Workers).

93. *Id.* pt. 2, at 1579 (statement of Francis A. O'Connell, Legislative Director, Transport Workers Union). See also *id.* at 1573 (statement of William G. Mahoney, Counsel, Brotherhood of Railway and Airline Clerks, International Association of Machinists, and Transport Workers Union); *Cannon Hearings* (1977), *supra* note 31, pt. 2, at 711 (statement of Frank E. Fitzsimmons, Gen-

9. *Favorable Evaluation of Performance Under Regulation*

Finally, management and labor attacked deregulation legislation on the grounds that the industry had performed admirably under CAB regulation. To support their argument, management and labor compared the secular trend of airfares with that of consumer prices generally; compared airfares for equivalent routes in the United States and abroad; and pointed to discount fares as evidence of effective price competition. They concluded that regulatory theory and legislation were sound; whatever problems remained were merely those of administrative fine-tuning.

Eastern Airlines, for example, argued that average revenues per air passenger mile increased 37 percent from 1950 to 1975, while the consumer price index rose 73 percent over the same period.⁹⁴ In like vein, a spokesman for the Machinists pointed to a 24 percent increase in airfares between 1948 and 1977 as compared with a 146 percent rise in the consumer price index.⁹⁵

Representatives of both groups presented similar comparisons of United States and foreign airfares. The president of American Airlines testified that "U.S. airfares are also a bargain when compared with fares elsewhere in the world. For example, a ticket between Dallas and Detroit costs \$94 (including a \$7 tax), while the fare between London and Lisbon, a comparable distance, is about \$165."⁹⁶ A spokesman for the Transport Workers Union agreed: "We also have the lowest domestic fares when compared with foreign fares."⁹⁷

As evidence of effective competition, management and labor alike cited the availability of discount fares in the industry. According to Delta:

An extensive assortment of excursion fares, military discounts, and the like are also offered by the scheduled carriers, as are a selection of charter fares. This form of airline price competition has led to hundreds of varying combinations of fares offered by different carriers, with pricing differences based on such factors as time of day, season of the year, length of stay, and length of haul.⁹⁸

eral President, Brotherhood of Teamsters); *id.* pt. 3, at 1322 (statement by AFL-CIO Executive Council).

94. *Cannon Hearings* (1976), *supra* note 27, at 590 (testimony of Frank Borman President and Chief Executive Officer, Eastern Airlines).

95. *Anderson Hearings* (1977), *supra* note 26, pt. 1, at 332 (testimony of William Scheri, Assistant General Chairman, International Association of Machinists and Aerospace Workers).

96. *Cannon Hearings* (1976), *supra* note 27, at 517 (statement of Albert V. Casey).

97. *Id.* at 1272 (statement of Francis A. O'Connell, Legislative Director, Transport Workers Union).

98. *Id.* at 694 (statement of R.S. Maurer, Senior Vice President and General Counsel, Delta Airlines).

Likewise, the Airline Pilots Association argued that "deregulators refuse to take account of the wide range of discount fares which the airlines now offer to the price-sensitive air traveler."⁹⁹

Finally, management and labor (with the eventual exception of United) agreed in their assessment of the overall soundness of the legislation under which the industry had been regulated. An Eastern spokesman, for example, concluded that "we have a good system that needs to be improved, not a bad system that needs to be abandoned."¹⁰⁰ Labor agreed. "[T]he problem," according to the Airlines Pilots Association, "does not lie with the Federal Aviation Act, but rather with the administration of that law."¹⁰¹ Or, as a spokesman for the Machinists put it:

I know that we have all, including labor, complained about the CAB and other regulatory reforms in the agency, and the carriers [have] likewise. But I would suggest that we also complain about our relatives, mothers-in-law and what not, but we don't intend to throw them away to get a new one, we just suggest that they correct some of their own faults.¹⁰²

10. *Summary: Airlines*

Having beneficially accommodated itself to a cost-plus climate of governmentally-created and governmentally-enforced cartelism, vertical power thus coalesced in tacitly collusive fashion so as to shield itself from deregulation and competitive encroachment. The arguments relied upon by management and organized labor in this collective effort were strikingly, if not suspiciously parallel, and at times well-nigh indistinguishable.

Despite labor-management's protestations, the Airline Deregulation Act—calling for phased reductions of CAB control over routes, rates, entry, mergers, and, indeed, for the "sunsetting" of the CAB itself—was enacted in 1978.¹⁰³ Given the severe economic recession which set in shortly thereafter, it is difficult, as the General Accounting Office has recently concluded, "to judge the industry's performance under deregulation until it has had more operating experience."¹⁰⁴ For their part, carriers have since agreed

99. *Id.* at 841 (statement of John J. O'Donnell, President, Air Line Pilots Association).

100. *Cannon Hearings* (1977), *supra* note 31, pt. 2, at 819 (statement of Frank Borman, President and Chief Executive Officer, Eastern Airlines). *See also id.* at 881 (statement of R.S. Maurer, Senior Vice President and General Counsel, Delta Airlines).

101. *Id.* pt. 3, at 1335 (statement of John J. O'Donnell, President, Air Line Pilots Association).

102. *Id.* pt. 4, at 1843-44 (statement of Charles Easley, President and District Chairman, Lodge No. 143, International Association of Machinists).

103. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

104. U.S. GENERAL ACCOUNTING OFFICE, *THE CHANGING AIRLINE INDUSTRY: A STATUS REPORT THROUGH 1980* at 1 (1981).

that the Deregulation Act has enabled them "to more effectively react and to better manage their resources in these extremely difficult circumstances."¹⁰⁵ Indeed, management's recent effort to repeal labor protection provisions in the Deregulation Act, and organized labor's opposition to such attempts, appears of late to have driven a wedge between these two power blocs.¹⁰⁶ However, as our discussion of trucking *infra* will demonstrate, facile conclusions as to the fragility of coalescing vertical power and its impotence in the face of legislative deregulation may be fraught with premature optimism.

B. Trucking

Regulation of the interstate trucking industry by the Interstate Commerce Commission (ICC) commenced in 1935 with passage of the Motor Carrier Act.¹⁰⁷ The ostensible goals were three-fold: (1) to promote safe, adequate, economical and efficient transportation; (2) to encourage sound economic conditions in transportation; and (3) to encourage reasonable rates without unreasonable discrimination or unfair destructive competition practices.¹⁰⁸ As would be the case in airlines, entry into trucking and the number of rivals

105. *Effects of Airline Deregulation and Legislation to Advance the Date for Sunset of the Civil Aeronautics Board: Hearings on H.R. 4065 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 189 (1981) (statement of Paul R. Ignatius, President, Air Transport Association).

106. *Cf. id.* at 222-24 (statement of Paul R. Ignatius, President, Air Transport Association); *id.* at 657-70 (testimony of Linda Puchala, President, Association of Flight Attendants); *id.* at 701-10 (joint statement of Brotherhood of Airline Clerks, Flight Engineers' International Association, International Association of Machinists, and Transport Workers Union); *id.* at 711-19 (statement of Air Line Pilots Association).

107. Ch. 498, 49 Stat. 543 (1935).

108. These objectives became part of "The National Transportation Policy" stated in the Transportation Act of 1940:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service and of the national defense. All of the provisions of this Act shall be

were controlled through certificates of operating authority issued by the Commission. Similarly, the Commission was empowered to control rates charged by regulated trucking firms. The rates presented for Commission review, however, were collectively arrived at between carriers acting in collegial fashion through rate bureaus—i.e., “trade associations of regulated carriers”¹⁰⁹ exempt from antitrust prosecution.

As proved to be the case in the airline industry, regulation of trucking in practice promoted the private interests of established and entrenched carriers rather than the public interest in efficient and economical transportation service. According to Professor Machlup, “The results of the restriction of entry and the regulation of rates in the trucking industry have been to reduce the number of trucking firms; to encourage the growth of larger size firms; to facilitate, nay, render necessary, collusive trade association activity, especially with regard to rate making; to restrict independent action on the part of smaller truckers; and to increase the level of rates.”¹¹⁰ “In this field,” he concluded, “it is public policy to restrain competition, to suppress it through thorough-going regulation by government agencies and private associations.”¹¹¹

Triggered by widespread criticism of what came to be considered a governmentally-created and governmentally-sanctioned cartel, a series of Congressional hearings were begun in the late 1970's to consider deregulation of the industry. These hearings provided a forum in which management and organized labor mounted their collective assault on deregulation in a joint effort to preserve and protect the regulatory status quo. Their arguments

administered and enforced with a view to carrying out the above declaration of policy.

Transportation Act ch. 722, 54 Stat. 899 (1940) (quoted in D. PEGRUM, *PUBLIC REGULATION OF BUSINESS* 603 (rev. ed. 1965)).

109. *Kennedy Report* (1980), *supra* note 17, at xvi. This report noted that

The ICC made virtually no effort to examine rate bureau operations until 1972, some 24 years after passage of the Reed-Bulwinkle Act. In that year, and later in 1976, the Commission examined the operating practices of a total of six general freight rate bureaus. Though limited in scope, these inquiries nonetheless revealed serious violations of the ratemaking agreements on the part of several of the bureaus. The results of these preliminary inquiries, together with congressional pressure for increased ICC scrutiny of rate bureau activities, led to the institution of a formal investigation of rate bureaus. This proceeding resulted in several procedural changes in rate bureau operations; but the Commission also concluded that antitrust immunity for collective ratemaking activities continued to be warranted.

Id. at xxii.

110. F. MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* 298 (1952).

111. *Id.* at 299.

were strikingly similar to those used earlier by their counterparts in the airline industry.

1. *Deterioration of Service for Smaller Communities*

Paralleling management and labor attacks on the deregulation of airlines, a major argument raised by management and organized labor against deregulation of the trucking industry was that it would decimate service to small- and medium-sized communities across the nation. Certificates of operating authority, both groups asserted, entailed a public responsibility to serve all areas regardless of their relative profitability, while high-density, high-profit routes provided the revenues necessary to underwrite less profitable service to small communities. With free entry and exit, management and labor argued, entrants would concentrate on the most lucrative routes, rates on these routes would decline, but carriers would be both unable and unwilling to subsidize service to small communities. Thus, service to the latter would be severely curtailed while rates would rise. As was the case with airlines, both groups pointed out the unfavorable consequences that such deterioration of service allegedly would work upon the economic viability of hundreds of afflicted communities.

"The carefully structured and controlled evolution of the cost of motor freight transportation," Interstate Motor Freight System argued, "has encouraged and helped foster the ability of every hamlet and every metropolis to reach the total markets of this country."¹¹² Specifically, the industry's trade group, the American Trucking Associations (ATA), explained:

Today's regulated for-hire motor carrier is carrying the full burden of the growing volume of small shipments. He is also the only transportation service available for many thousands of small communities that are now completely dependent upon truck transportation.

These operations, frequently consisting of small shipments to off-line points, are not the most profitable. In many cases, the traffic is marginal. But the carrier is able to maintain this service, and carry out the full obligations of his authority, because he can balance the less desirable operations with the more profitable traffic moving between major traffic centers.¹¹³

Without entry controls, Briggs Transportation Company warned:

112. *Oversight of Freight Rate Competition in the Motor Carrier Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st and 2d Sess., vol. 1, 165 (1978) (prepared statement of James T. Hite, III, Chief Executive Officer) [hereinafter cited as *Kennedy Hearings*].

113. *Economic Regulation of the Trucking Industry: Hearing on S. 1400 and S. 2245 Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess., pt. 1, 209 (1979) (statement of American Trucking Associations) [hereinafter cited as *Cannon Hearings*].

The larger companies would drop hundreds and thousands of the smaller communities if they had to be out there in the total free marketplace to try to support the profitability of their companies.

Right now, it is a part of a system, and they recognize their common carrier responsibility or their contract carrier responsibility, whichever it may be, in that this is part of what makes the system work. If it is all out in the free marketplace, you can bet your bottom dollar that they are not going to look twice at those little places that do not produce a profit on that particular stop.¹¹⁴

Heavily, if not exclusively, dependent upon motor freight service, the "primary casualties" of deregulation, regulated carriers concluded, "would be small communities."¹¹⁵

Labor spokesmen closed ranks behind management's argument that small and intermediate communities would be the main victims of deregulation. "In recent months," the president of the Teamsters, Mr. Fitzsimmons, explained to Congress:

[T]he Interstate Commerce Commission has administratively debased the value of adequate service in the area of entry. As a result, the quality and quantity of service provided by common carriers have been adversely affected. If a balanced approach to entry is not restored by Congress, smaller cities, towns and communities and shippers will not receive the service on which they have relied in the past. If Congress fails to include a meaningful entry requirement, economic self-restraint will force carriers to concentrate on transportation between the large city pairs where the greatest equipment utilization and balanced movements can be obtained. Much of the service presently provided to intermediate communities would be dropped because it is either unprofitable or less profitable.¹¹⁶

Higher transport rates, both management and labor predicted, would accompany the deterioration of service to thousands of afflicted communities. "Small communities," an official of the Wilson Trucking Company warned, "will have to bear a higher burden of transportation costs to replace revenues depleted by cutthroat competition in major traffic lanes."¹¹⁷ Thus, not only would small-town service be curtailed, according to the American Trucking As-

114. *Examining Current Conditions in the Trucking Industry and the Possible Necessity For Change in the Manner and Scope of Its Regulations: Hearings on H.R. 6418 and Related Bills Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 96th Cong., 2d Sess., pt. 3, 626 (1980) [hereinafter cited as *Howard Hearings*]. See also *Cannon Hearings*, *supra* note 113, at 210 (statement of American Trucking Associations).

115. *Cannon Hearings*, *supra* note 113, at 218 (statement of American Trucking Associations). See also *Kennedy Hearings*, *supra* note 112, at 248 (prepared statement of Samuel G. Herold, Executive Vice President, Middle Atlantic Conference).

116. *Howard Hearings*, *supra* note 114, at 762-63. See also *Cannon Hearings*, *supra* note 113, pt. 5, at 1621-28 (statement of James Jesinski, Secretary-Treasurer, Local No. 200, Brotherhood of Teamsters).

117. *Kennedy Hearings*, *supra* note 112, at 167 (prepared statement of William J. Jones, Vice President, Wilson Trucking Co.). See also *id.* at 165 (prepared

sociations, "even that service which is still available would certainly be at a higher rate than today."¹¹⁸ Again, organized labor's position tracked that of management. "Even degraded service to small- and medium-sized communities," one Teamster spokesman argued, "would become far more expensive in the absence of effective [i.e., restrictive] entry provisions."¹¹⁹ "If the medium- and small-size cities are to receive any service at all," the Machinists echoed, "it will be presented to them at almost prohibitive rates."¹²⁰

In addition, management and labor made a concerted effort to point out the broader economic significance of these portended developments. An official of Pacific Intermountain Express, for example, warned that deregulation would "further aggravate the competitive disadvantages of . . . small communities,"¹²¹ while a vice president of Consolidated Freightways remarked that "[t]he small producer or manufacturer who located his plant in a rural area, in reliance upon the availability of regulated truck service and a stable uniform rate structure, will not be comforted to know that the loss of transportation service which forces him out of business is a 'benefit of competition.'"¹²² Similarly, the Teamsters emphasized that "[s]hippers in the intermediate cities would be at a disadvantage competing with those located in the large metropolitan areas,"¹²³ while the Machinists, representing "tens of thousands of employees working in small manufacturing industries in rural areas that are highly dependent upon regulated carriers to move their products," warned that these jobs "could be seriously affected should deregulation result in loss of trucking for their particular communities."¹²⁴

2. *Competition Would be Wasteful and Inefficient*

A second argument made by both groups in their attack on de-

statement of James T. Hite, Chief Executive Officer, Interstate Motor Freight System).

118. *Cannon Hearings*, *supra* note 113, at 100 (testimony of Bennett C. Whitlock, Jr., President, American Trucking Associations).

119. *Id.* pt. 5, at 1621 (statement of James J. Jesinski, Secretary-Treasurer, Local No. 200, Brotherhood of Teamsters).

120. *Id.* pt. 1, at 244 (statement of John F. Peterpaul, Vice President, Transportation, International Association of Machinists and Aerospace Workers).

121. *Kennedy Hearings*, *supra* note 112, vol. 3, at 1465 (prepared statement of John G. Christy, President, IU International).

122. *Id.* at 162 (statement of Gene T. West, Vice President, Traffic, Consolidated Freightways).

123. *Cannon Hearings*, *supra* note 113, pt. 5, at 1621 (statement of James Jesinski, Secretary-Treasurer, Local No. 200, Brotherhood of Teamsters).

124. *Id.* at 1556 (statement of Andrew Kenopinsky, National Automotive Coordinator, International Association of Machinists).

regulation was the contention that competition would be wasteful and inefficient. In this, management and labor agreed with one another as well as with their colleagues in the airline industry. The argument comprised two elements. First, free entry, it was alleged, would merely lead to wasteful excess capacity and fuel consumption as more carriers competed to haul a fixed volume of traffic. Second, concentration of entry in the most lucrative routes would destroy the efficiencies of balanced freight hauling which management and labor claimed to have been engineered into the industry by the Interstate Commerce Commission (ICC). Ironically, they concluded, competition would impair—not promote—economic efficiency.

“Unlike potential volumes of passenger traffic,” the American Trucking Associations (ATA) opined:

Freight traffic is a pie of relatively fixed dimensions. Its size is controlled by the general level of the economy and not by the number of people willing to carry freight. The market for transportation is a derived demand. Carriers do not create freight. They can only carry what the economy produces.¹²⁵

The ATA continued:

The elimination of entry controls and the ensuing entry into the industry of thousands of new truck operations, the need for which had not been established through application of the test of “public convenience and necessity” would create excess capacity. The inevitable result would be a marked increase in empty truck mileage.¹²⁶

Moreover, Mr. Herold, speaking for the Middle Atlantic rate conference, stated: “[I]f entry was free to anyone . . . then the full service carriers who are trying to provide a full transportation service to all points in the country are going to have less traffic to handle and they are going to have higher costs and, therefore, higher rates.”¹²⁷ The outcome, according to the testimony of carrier representatives, would be “wasted mileage coming from too many trucks chasing a limited amount of traffic,”¹²⁸ presenting “the real danger of excess capacity with resulting inefficiencies, particularly in fuel usage.”¹²⁹

Organized labor’s position on this point was, at times, virtually indistinguishable from that of management. “The volume of traffic to be moved by motor carriers is relatively stable,” a Teamster spokesman claimed, “and, even if the rates were lowered, the vol-

125. *Id.* pt. 1, at 209 (statement of American Trucking Associations).

126. *Id.* at 218.

127. *Kennedy Hearings*, *supra* note 112, at 222.

128. *Cannon Hearings*, *supra* note 113, at 218 (statement of American Trucking Associations).

129. *Id.* pt. 5, at 1806 (statement of American Trucking Associations).

ume would not increase appreciably.”¹³⁰ “Because everybody and his brother is going to buy a truck,” another Teamster testified, “there will be more trucks running empty than Carter has pills.”¹³¹ The adverse effect of free entry upon the alleged balance of freight movement accomplished under regulation—an effect cited by management—was also emphasized by Teamster president Fitzsimmons:

Permitting the non-regulated carriers who do not have the obligation to serve all shippers and all communities, large or small, to take selected backhauls of commodities would disrupt the balanced movements that the regulated carriers have laboriously achieved, thereby making for-hire carrier service less efficient and more costly to the general public.¹³²

“And, in an energy-starved Nation,” another labor spokesman pointed out:

[D]eregulation would put thousands more trucks, all burning critically short fuel, out on the road chasing the same amount of freight and greatly increasing the empty truck miles. With the problems this Nation is going to have in meeting our basic needs with increasingly short energy supplies, the logic of that totally escapes me.¹³³

Thus, organized labor agreed with management that “[e]mpty mileage would increase, equipment would be underutilized and our scarce supplies of fuel would be wasted.”¹³⁴

3. *Industry Chaos*

Management and labor further argued that deregulation of trucking would usher in confusion and chaos. While the details varied, the thrust of the argument was once again remarkably similar to that utilized by airline carriers and unions. Rate bureaus and the ICC, it was claimed, jointly functioned as a clearinghouse in which rates were distilled into uniform, comprehensible categories which were stable and predictable. By eliminating this machinery, deregulation would result in a bewildering array of billions of individually-determined rates which would fluctuate wildly and unpredictably while generating blizzards of paperwork. Moreover, joint routes and rates between interconnecting carriers would disappear, and rate discrimination would become ram-

130. *Id.* pt. 1, at 120 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

131. *Id.* pt. 2, at 525 (testimony of Joe Pellicciotti, Secretary-Treasurer, Local No. 667, Brotherhood of Teamsters).

132. *Howard Hearings*, *supra* note 114, at 761.

133. *Cannon Hearings*, *supra* note 113, pt. 2, at 520 (statement of Walter Shea, Administrative Assistant to the General President, Brotherhood of Teamsters).

134. *Howard Hearings*, *supra* note 114, at 761 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

pant—with large, powerful shippers able to wrest more favorable rates from carriers.

“The collective ratemaking process and the rate bureaus,” Interstate Motor Freight System argued, “maintains and organizes in a structured and intelligent manner rate information that is a multiple of thousands of carriers, tens of thousands of geographic points, and literally billions of individual rates.”¹³⁵ “Collective ratemaking,” the American Trucking Associations added, “is the glue that holds the system together.”¹³⁶

Removal of this ratemaking function through deregulation, carriers argued, would result in an astronomical and intractably complex number of individual rates. “Without collective ratemaking,” the Middle Atlantic rate bureau claimed, “we would soon have a fragmented hodge-podge: Countless thousands upon thousands of endless combinations of rates. A shipper-carrier headache. A consumer nightmare.”¹³⁷ Elimination of rate regulation, then, “would create, without question, discriminatory chaos that would upset the shipping costs and retail pricing structure of the Nation”¹³⁸ while simultaneously placing “an impossible burden upon carriers and shippers to try to keep [rates] current, particularly on small carriers and shippers.”¹³⁹ Moreover, any degree of regulatory oversight would be impossible. “Finally, and perhaps most significant of all,” the H & W Motor Express Company concluded in this respect,

without bureau collective ratemaking, the ICC and state regulatory agencies would be swamped by a flood of paper—hundreds of filings for every one received now. The regulatory agencies, without staff additions many times greater than they can reasonably be expected to receive, simply could not cope with this situation.¹⁴⁰

The carriers predicted that unpredictable variability of rates in an unregulated environment would compound their sheer multiplicity. “With price competition as the only criterion,” according to one carrier, “the fluidity of rates would be governed solely by the

135. *Kennedy Hearings*, *supra* note 112, at 164 (statement of James T. Hite, Chief Executive Officer, Interstate Motor Freight System).

136. *Cannon Hearings*, *supra* note 113, at 98 (testimony of Bennett C. Whitlock, Jr., President, American Trucking Associations).

137. *Kennedy Hearings*, *supra* note 112, at 250 (statement of Samuel G. Herold, Executive Vice President, Middle Atlantic Conference). *See also id.* at 244 (statement of James C. Harkins, Executive Director, National Motor Freight Traffic Associations).

138. *Id.* at 152 (testimony of James T. Hite, Chief Executive Officer, Interstate Motor Freight System).

139. *Cannon Hearings*, *supra* note 113, pt. 2, at 673 (statement of M.J. Petrina, Auto Transporters Tariff Bureau).

140. *Id.* at 653 (statement of Urban R. Haas, President, H & W Motor Express Co.) (quoting Professor Roy J. Sampson).

auction block of expedience, and uncontrolled opportunistic price changes will result not only in a deterioration of service, but will effectively destroy any semblance of rate stability."¹⁴¹ According to the American Trucking Associations, there "would be such a high degree of uncertainty that businesses, small and large, would be severely hindered in the efficient planning, purchasing and marketing of goods."¹⁴²

Management cited joint through-route services provided by, and collectively arrived at between, carriers as a further victim of deregulation. "As a general proposition," Consolidated Freightways claimed,

joint through routes would most likely cease to exist, and shippers requiring joint service to accomplish needed transportation would have to work out their arrangements with the separate carriers and move their shipments at combinations of the carriers' separate rates. There could be no such thing as a fair, nondiscriminatory, nonpreferential rate structure under which shippers could receive equal treatment in the transportation of their supplies, materials, goods and products, and there would be no means by which the motor carriers could maintain the voluntary, integrated system of transportation which exists today.¹⁴³

Organized labor concurred with the carriers, albeit in summary fashion. "With widely fluctuating shipping rates," one Teamster asked, "would consumer prices fluctuate—or would they be 'stabilized' at a level high enough to hedge against fluctuations?"¹⁴⁴ Generally, however, the union was content to defer to management. "Because of the complexity of the industry," Teamster president Fitzsimmons stated laconically, "we believe collective rate making should be allowed with respect to all rates."¹⁴⁵

Compounding these chaotic effects, management and labor warned, would be the inequitable impact upon small shippers and producers, for the latter would be unable to obtain the rate reductions that larger shippers could command in a deregulated environment. "Every shipper," a spokesman for the H & W Motor Express Company claimed,

seeks every advantage which it can get in its competitive marketplace. To the extent that its size and market position permits it to exert strong economic pressure upon a carrier in order to secure a better deal on transportation every shipper exercises its power.

141. *Kennedy Hearings*, *supra* note 112, at 171 (prepared statement of Gerald Cole, Senior Vice President, Cole's Express).

142. *Cannon Hearings*, *supra* note 113, at 214 (statement of American Trucking Associations). See also *Kennedy Hearings*, *supra* note 112, at 260 (statement of Samuel G. Herold, Executive Vice President, Middle Atlantic Conference).

143. *Kennedy Hearings*, *supra* note 112, at 161 (statement of Gene T. West, Vice President, Traffic, Consolidated Freightways Corp.).

144. *Howard Hearings*, *supra* note 114, pt. 1, at 148 (statement of Edward R. Toliver, Coordinator, Joint Council 3, Teamsters).

145. *Id.* pt. 3, at 769.

One of the fundamental purposes of transportation regulation is to try to neutralize that power among shippers to protect the opportunity for the small businesses to compete with the giants. The provision in the present system of collective ratemaking for secret ballots on rate proposals is in direct furtherance of that purpose of regulation. Public disclosures of carrier votes will inevitably result in a restoration to large shippers of the power to force carriers to give them unjustified rate treatment. In today's diversified, complex economy, the resultant effect of favoritism and rate discrimination, would be to further narrow the ability of small- and medium-sized enterprises to continue in competition with industrial giants.¹⁴⁶

"Under collective ratemaking," the American Trucking Associations added, "the larger shipper is no better off than the small."¹⁴⁷ Hence, one effect of deregulation (including removal of the anti-trust immunity applied to collective ratemaking), an ATA spokesman concluded, would be a rate structure that discriminated against the small producer and shipper.¹⁴⁸ Indeed, he suggested that such an outcome was a prime motive underlying the support by powerful shippers for the deregulation movement.¹⁴⁹

Organized labor joined with management in this line of defense of the status quo. Rate regulation, the Teamsters argued, "provides carriers with a certain amount of protection from their customers' large shippers"; thus, "[w]ithout collective ratemaking, many carriers would be at the mercy of large shippers."¹⁵⁰ Like management, labor spokesmen alluded to the alleged anticompetitive advantages which would accrue to large shippers: "They will get their lower rates. But the poor small shipper that is dependent upon the regulated carrier, he will not get his service—he will not get his commodities shipped because he can't get a carrier to do it."¹⁵¹

4. Predation, Concentration, and Control

A fourth argument against deregulation, also voiced by the management and labor of airlines, was that freedom of pricing would permit the largest carriers to drive others from the field, thereby resulting in increased concentration and control. The surviving oligopolists would then wield sufficient market power to

146. *Cannon Hearings*, *supra* note 113, pt. 2, at 645 (statement of Urban R. Haas, President, H & W Motor Express Co.).

147. *Id.* pt. 1, at 212 (statement of American Trucking Associations).

148. *Id.* pt. 2, at 495-96 (statement of James C. McCormick, American Trucking Associations).

149. *Howard Hearings*, *supra* note 114, pt. 3, at 626 (testimony of C. James McCormick, Senior Vice President, Briggs Transportation Co.).

150. *Kennedy Hearings*, *supra* note 112, at 181 (statement of Robert Schlieve, Secretary-Treasurer, Local 563, Brotherhood of Teamsters).

151. *Cannon Hearings*, *supra* note 113, pt. 2, at 526 (testimony of Joe Burkhard, Eastern Conference of Teamsters).

raise rates. Paradoxically, management and labor agreed, deregulation of trucking would result in less—not more—competition and higher—not lower—rates.

The American Trucking Associations argued that regulation preserved—not eliminated—competition in the industry:

There are 16,600 ICC-regulated motor carriers. Of these, 12,453 gross \$500,000 or less. Deregulation would promote concentration not competition. In the regulated motor carrier industry, the top four carriers account for 10 percent of the total revenues; the top eight, 14 percent. Compare this with other American industries, industries which are "regulated" by the general antitrust laws which deregulationists advocate as better regulators of the trucking industry than the Interstate Commerce Act.¹⁵²

Consolidated Freightways, one of the largest carriers in the nation, expressed solicitude for the fate of its smaller rivals:

[R]epeal of collective ratemaking would not mean the demise of CF. We would survive. But small companies would not. Were carriers unable to cooperate with one another in making rates, were it a case of every man for himself and the devil take the hindmost, the small carriers would go the way of small businesses, such as the "mom and pop" grocery stores, which do not have the resources to wage full scale economic warfare against the giants.¹⁵³

The representative of one carrier rate bureau warned that concentration would follow a short-term period of predatory pricing: "Without regulation, I believe one could anticipate the following scenario[:]. . . predatory pricing which will eliminate the smaller and weaker carriers, resulting in a high degree of concentration."¹⁵⁴ "As weaker carriers are killed off," according to Mr. Jones of the Wilson Trucking Company, "there will be less restraint on rates in major traffic lanes, allowing rates to begin moving upward."¹⁵⁵ Thus, the American Trucking Associations concluded that "following the misleading attempt to get more competition, we will begin to get less and less."¹⁵⁶

Organized labor embraced management's stance on this issue. The Machinists, for example, framed the argument against deregulation in terms virtually identical to those of management. Like company spokesmen, they drew comparisons with the structure of the automobile industry:

We will jeopardize more smaller carriers. The American Trucking Association testified that there were 16,000 regulated carriers in America. Statistically, 80 percent are under half a million dollars. We are not talking

152. *Id.* pt. 1, at 104 (statement of Bennett C. Whitlock, Jr., President, American Trucking Associations).

153. *Kennedy Hearings, supra* note 112, at 162 (statement of Gene T. West, Vice President, Traffic, Consolidated Freightways Corp.).

154. *Id.* at 248 (statement of Samuel G. Herold, Executive Vice President, Middle Atlantic Conference).

155. *Id.* at 167.

156. *Id.* vol. 3, at 1516 (statement of American Trucking Associations).

about large corporations. One of our concerns is that if we open up this regulation and ratemaking and so on, I am convinced that the larger ones are going to survive. Temporarily they will reduce prices just to put the smaller carriers out of business. When they eliminate their competition, they can charge whatever they want to. Look at the auto industry. How much competition do we have there?¹⁵⁷

"How," as one Teamster exclaimed, "will competition flourish when most of the competitors are gone?"¹⁵⁸

5. *Inability to Obtain Capital*

Management and organized labor further attacked deregulation on the grounds that it would severely damage the industry's ability to obtain the capital needed for investment and growth. A mirror image of the argument against airline deregulation, each power bloc claimed that regulatory protection provided the requisite security necessary to attract capital on favorable terms. Absent such protection, the industry would be unable to obtain adequate funding, its financial viability would deteriorate, and it could well be forced to turn to public subsidies or, worse, public ownership.

"Deregulation," the American Trucking Associations claimed, would have an adverse effect on the financial condition of the industry and its ability to attract the capital necessary for future growth. Modern motor carrier transportation is much more than a truck on the road with a driver behind the wheel. It is a complex business involving the latest business techniques and most modern types of equipment. The industry has generally been able to attract investment on an equal basis with other major industries. Uncertainty as to the industry's future, however, because of deregulation, would cause equity financing to become less attractive. There would be greater reliance on debt financing, and this would be at much higher levels, and not competitive with that provided other industries.¹⁵⁹

Again, labor concurred: "Present efficient and well-managed carriers," the Teamsters asserted, "would have their earnings so reduced as a result of loss of backhauls and the cutthroat competition of independent owner-operators who would flood onto the highways that they would be unable to earn adequate profits, to

157. *Howard Hearings*, *supra* note 114, pt. 3, at 1241 (testimony of Andrew Kenopensky, National Automotive Coordinator, International Association of Machinists).

158. *Id.* pt. 1, at 147 (statement of Edward R. Toliver, Coordinator, Joint Council 3, Teamsters). *See also id.* pt. 3, at 763 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

159. *Cannon Hearings*, *supra* note 113, at 221 (statement of American Trucking Associations). *See also Kennedy Hearings*, *supra* note 112, vol. 3, at 1531 (statement of American Trucking Associations).

attract capital and to pay fair wages and maintain good working conditions."¹⁶⁰

Escalating the rhetoric, carriers and labor alike raised the specter of nationalization. "(T)he motor carrier industry," according to the American Trucking Associations,

is dedicated to the concept that the country needs and should have a privately-owned transportation system Other nations throughout the world have nationalized, or semi-nationalized, their systems. Regulation in the public interest has not been tried in these countries; instead, private ownership has been abandoned in favor of nationalization.¹⁶¹

The Teamsters were more abrupt: "The movement toward nationalization of the surface transportation industry would be advanced by deregulation of truckload traffic."¹⁶²

6. *Threat to Labor*

Trucking deregulation was also fought on the grounds that it would result in a deterioration of wages and working conditions. Regulated collective rate control, it was claimed, served as a shield permitting organized labor to bargain for reasonable pay and work standards. Elimination of this protective umbrella under deregulation would adversely affect labor because competition would force carriers to reduce their expenses by lowering their labor costs.

An officer of one of the largest carriers, Consolidated Freightways, for example, worried whether free entry would "encourage fair wages and equitable working conditions."¹⁶³ The Teamsters were not in doubt, said Teamster president Fitzsimmons: "What we are saying, and what we have been saying to deregulation is this: Unless there is some form of rate regulation, our members in the trucking industry will not have the opportunity to bargain for decent wages, hours and working conditions."¹⁶⁴ In such a situation, he added, "newly-formed non-union carriers would have a substantial advantage over union carriers and fair wages would become a thing of the past."¹⁶⁵ Hence, the Teamsters were "committed to retaining a regulated motor carrier industry because without

160. *Howard Hearings*, *supra* note 114, pt. 3, at 761-62 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

161. *Kennedy Hearings*, *supra* note 112, vol. 3, at 1528-29 (statement of American Trucking Associations).

162. *Howard Hearings*, *supra* note 114, pt. 2, at 51 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

163. *Kennedy Hearings*, *supra* note 112, vol. 3, at 1464 (statement of Gene T. West, Senior Vice President, Consolidated Freightways Corp.).

164. *Id.* vol. 1, at 184. *See also id.* at 181 (statement of Robert Schlieve, Secretary-Treasurer, Local 563, Brotherhood of Teamsters); *Cannon Hearings*, *supra* note 113, pt. 4, at 1229 (statement of Chuck Mack, Secretary-Treasurer, Local 70, Brotherhood of Teamsters).

165. *Cannon Hearings*, *supra* note 113, pt. 5, at 1850 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

such regulation our members, over a period of time, would be reduced to working for minimum wages.”¹⁶⁶

7. *Adverse Impact Upon Related Industries*

Surprisingly, a seventh line of attack taken by management and labor against deregulation was that it would hasten the demise of an already weak rival — the railroad industry. Here, both groups demonstrated the same concern for a related industry which their counterparts had shown in arguing against airline deregulation.

“Deregulation of the motor carrier industry,” the American Trucking Associations warned,

would have repercussions in transportation far beyond the obvious effect on the motor common carrier and the services to small shippers and small communities.

....

There is convincing evidence that, faced with hordes of individual truck operators free to pick and choose the most profitable truckload traffic at rates below those which existing carriers, rail or motor, could meet, the railroads could easily be in a far worse financial condition than that which prompted passage of the Railroad Revitalization and Regulatory Reform Act of 1976.¹⁶⁷

The Teamsters followed management’s lead:

As everyone knows, rail rates already are depressed and many railroads are either in bankruptcy or subsidized by the Federal Government. If there is deregulation of truckload traffic, cutthroat competition would take further traffic from the railroads.¹⁶⁸

8. *Threat to Safety*

Deregulation was also attacked on the grounds that it would pose a serious threat to the safety of both truck drivers and the motoring public. The threat of revoking route certificates, it was claimed, provided the only effective means for enforcing safety standards. Deregulation and the elimination of such certificates would remove this “handle” for safety enforcement, while competition would pressure companies and workers alike to cut corners recklessly. As was asserted by the airlines in their fight against deregulation, the management and labor of the trucking industry argued that deregulation would jeopardize public safety.

“Highway safety,” an American Trucking Associations representative explained, “has always been a matter of prime concern in

166. *Kennedy Hearings*, *supra* note 112, at 181 (statement of Robert Schlieve, Secretary-Treasurer, Local 563, Brotherhood of Teamsters).

167. *Id.* vol. 3, at 1526-27 (statement of American Trucking Associations).

168. *Cannon Hearings*, *supra* note 113, pt. 2, at 521 (statement of Walter Shea, Administrative Assistant to the General President, Brotherhood of Teamsters).

motor carrier operations. The regulated industry takes pride in its highway safety record and its efforts to improve this record."¹⁶⁹ "But . . . deregulation," the ATA's spokesman, Mr. Whitlock, emphasized, "would mean that anybody, anybody, could go out and buy a truck and get on the highway."¹⁷⁰ This could have frightening results:

The motor carrier who is the prime violator of safety regulations and who has denounced the 55 m.p.h. limit, as well as present hours-of-service requirements, is the type that would be unleashed upon the public highways if we had deregulation. There would be no effective safety enforcement. He would have no operating authority to revoke for consistent violations and the depressed rate structure under which he would operate would not permit the type of effective safety programs that have become the hallmark of the regulated carrier.¹⁷¹

"Highway safety," the president of Southeastern Freight Lines concluded, "will be one of the first casualties if entry controls are eliminated."¹⁷²

In broad outline, organized labor's position on the safety issue was indistinguishable from that adopted by management. "Union drivers and regulated companies have a better [safety] record," the Teamsters argued, "primarily because the regulated carriers must maintain good safety records in order to obtain additional operating authority from the Commission or, for that matter, to preserve the authority they already possess."¹⁷³ The Machinists added that "regulated carriers are also required by present law to keep maintenance records, conduct safety inspections on vehicles, required [sic] driver 'vehicle condition reports' daily and many other safety related activities which non-regulated carriers are not required to perform."¹⁷⁴ Labor representatives described the adverse consequences of deregulation with respect to safety:

We cannot be cavalier about highway safety and methods other than deregulation for achieving it. Tens of thousands of our members face the possibility of having to get up one morning and drive an 18 wheel rig over a highway newly flooded by deregulation with drivers who either don't care

169. *Id.* pt. 1, at 219-20 (statement of American Trucking Associations).

170. *Id.* at 101 (testimony of Bennett C. Whitlock, Jr., President, American Trucking Associations).

171. *Kennedy Hearings, supra* note 112, vol. 3, at 1521-22 (statement of American Trucking Associations).

172. *Id.* at 1459 (statement of W.T. Cassels, Jr.), *See also Howard Hearings, supra* note 114, at 622 (testimony of C. James McCormick, Senior Vice President, Briggs Transportation Co.).

173. *Cannon Hearings, supra* note 113, pt. 1, at 119 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

174. *Id.* at 244 (statement of John F. Peterpaul, Vice President, Transportation, International Association of Machinists).

or are driven by economic necessity to violate the Federal and State safety rules.¹⁷⁵

Another Teamster warned of the effect "of flooding highways with tens of thousands of independent truckers, responsible to no one, and under extreme economic pressure to disregard highway speed limits and hours of service regulations."¹⁷⁶ Mr. Jesinski, also speaking for the Teamsters, alleged that deregulation, and its attendant competitive pressures "to us means loss of jobs, loss of life or serious injury."¹⁷⁷ The risk, Teamster president Fitzsimmons concluded, "is so great that deregulation by legislation should be rejected and deregulation by administrative action should be rolled back."¹⁷⁸

9. *Favorable Evaluation of Performance Under Regulation*

Finally both groups argued—as did their counterparts in the airlines industry—that the industry had performed admirably under regulation. Management and labor agreed that the trucking industry was vigorously competitive both between and within the various modes of transportation; that the option of independently filing rates assured price competition despite the existence of collective ratemaking bureaus; that the trend of motor carrier rates compared favorably with broader price indices; that shippers were satisfied with the service they received; that shippers participated in the collective ratemaking process; and that claims of wasteful empty mileage due to regulation were distorted. Deregulation, in short, was quite unnecessary.

"There is an abundance of competition in transportation," Mr. West of Consolidated Freightways stated, offering as evidence the rivalry "between modes of carriage, between types of carriers within the motor carrier industry, and between carriers of the same type."¹⁷⁹ "We have the force of private carriage," the American Trucking Associations added, arguing that "that in itself is an economic break on the rates which a common carrier can charge."¹⁸⁰ The Teamsters agreed: "There are 17,000 regulated carriers, and an even greater number of private and exempt carri-

175. *Id.* at 119 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters).

176. *Id.* pt. 2, at 518 (statement of Walter Shea, Administrative Assistant to the General President, Brotherhood of Teamsters).

177. *Id.* pt. 5, at 1622-23 (statement of James Jesinski, Secretary-Treasurer, Local 200, Brotherhood of Teamsters).

178. *Id.* pt. 1, at 120.

179. *Kennedy Hearings*, *supra* note 112, at 162.

180. *Cannon Hearings*, *supra* note 113, at 95 (testimony of Bennett C. Whitlock, Jr., President, American Trucking Associations).

ers. They compete with railroads, water carriers, and pipelines."¹⁸¹ "It is obvious," the Teamsters concluded, "that there is abundant competition for shippers' business."¹⁸²

Management and labor alike cited as evidence of competitiveness the option for carriers to file independent rates with collective rate bureaus. "One of the important elements that we seem to forget in collective ratemaking," the American Trucking Associations contended, "is that there is complete freedom of independent action by the motor carriers. If they would like to file a different rate, they have the right to do so."¹⁸³ "So long as that right remains," another carrier added, "the shipping public is protected from any arbitrary collective action."¹⁸⁴ Teamster president Fitzsimmons agreed that "[t]he law also has built-in safeguards which permit a carrier to take action independent from other members who participate in the collective rate."¹⁸⁵

Remarkably, management and labor seized on identical evidence as proof of the industry's satisfactory performance under regulation, citing, *inter alia*, the trend in motor carrier rates as compared to that of prices generally. "Motor carrier regulation," Mr. Whitlock of the American Trucking Associations argued,

has been an effective tool in combating inflation.

....

From a base of 100 in 1967, the revenue per ton-mile of regulated motor common carriers of general freight rose to 166.2 in 1977. In contrast, the Consumer Price Index of 1977 rose to 181.5 or 15 points higher than the price of most carrier service.¹⁸⁶

Said the Teamsters: "Taking 1967 as the base year equal to 100%, the wholesale price index had risen to 194.2%, the consumer price index to 181.5%, while the revenue per ton-mile of general freight carriers to 166.2% for 1977."¹⁸⁷

Both groups claimed that shippers were satisfied with service under regulation. "The best test of adequacy of competition," the American Trucking Associations argued,

lies with the users of motor truck service—the shippers. In 1975, the Department of Transportation released the results of a nationwide survey of 193 manufacturing plants covering 19 major urban areas. The survey was

181. *Id.* pt. 2, at 520 (statement of Walter Shea, Administrative Assistant to the General President, Brotherhood of Teamsters).

182. *Id.*

183. *Id.* pt. 1, at 98 (statement of Bennett C. Whitlock, Jr., President, American Trucking Associations).

184. *Kennedy Hearings*, *supra* note 112, at 167 (statement of William J. Jones, Vice President, Traffic, Wilson Trucking Co.).

185. *Id.* at 185.

186. *Cannon Hearings*, *supra* note 113, at 102.

187. *Kennedy Hearings*, *supra* note 112, vol. 2, at 1025 (letter from Frank E. Fitzsimmons to Senator Kennedy, 3 May 1978).

designed to elicit responses as to a general evaluation of motor carrier services. More than two-thirds of the surveyed companies rated motor carriers service as quite good (65.5%) or excellent (10.4%). On the other end of the scale, less than 3 percent rated it as minimally acceptable and less than 1 percent (0.52%) rated it as unsatisfactory.¹⁸⁸

The Teamsters agreed that "the services offered by [truckload] carriers have been satisfactory to shippers."¹⁸⁹

Finally, both groups attacked the claim that regulation resulted in inefficiency and waste. According to the American Trucking Associations: "There is, of course, empty mileage, of the true 'backhaul' variety that naturally results from the operation of specialized trucks designed to carry specific cargos. . . . Other empty mileage results from the material imbalance of freight from one section of the country as compared to another."¹⁹⁰ The ATA concluded that empty mileage "comes from regional, geographic, demographic and industrial factors, not transportation regulatory policy."¹⁹¹ Labor representatives agreed. Empty mileage, a Teamster spokesman argued, "is due to regional traffic imbalances and to specialized equipment that logically can haul only the freight it is designed for—for example, autos, gasoline, milk, or refrigerated foods."¹⁹² "Obviously," the Teamsters concluded, "deregulation won't affect either of these factors."¹⁹³

10. Summary: Trucking

So comfortably had management and organized labor come to coexist within a governmentally-cartelized environment, that they unabashedly embraced one another in a collective fight to deflect deregulation. The arguments made by each were uncannily parallel both to one another as well as to those of their counterparts in airlines.

Their collaborative efforts, however, appeared at first to have

188. *Id.* vol. 3, at 1512 (statement of American Trucking Associations).

189. *Cannon Hearings*, *supra* note 113, pt. 2, at 521 (statement of Walter Shea, Administrative Assistant to the General President, Brotherhood of Teamsters). See also *Howard Hearings*, *supra* note 114, pt. 3, at 769 (statement of Frank E. Fitzsimmons, General President, Brotherhood of Teamsters); *Kennedy Hearings*, *supra* note 112, at 160 (statement of Gene T. West, Vice President, Consolidated Freightways Corp.); *id.* at 170 (statement of Gerald Cole, Senior Vice President, Cole's Express); *id.* at 262 (statement of Vernon Farriba, Executive Vice President, Southern Motor Carriers Rate Conference).

190. *Cannon Hearings*, *supra* note 113, pt. 3, at 217 (statement of American Trucking Associations).

191. *Id.* at 218.

192. *Howard Hearings*, *supra* note 114, pt. 1, at 147 (statement of Edward R. Toliver, Coordinator, Joint Council 3, Teamsters).

193. *Id.*

been in vain, for passage of the Motor Carrier Act of 1980¹⁹⁴—calling for a shift in the burden of proof from applicants seeking operating authority to those protesting such competitive entry, narrowing the class of protestants, broadening existing operating authorities, and establishing zones of freedom within which rates could be varied without Commission hearings and sanction—seemed to presage phased deregulation of the industry. Indeed, under the liberalized administration of Chairman Gaskins, competition began to emerge as grants of operating authority increased, certificates of authority were loosened, and rate discounts of five to twenty percent were quickly established.¹⁹⁵ Nor, it appeared, could organized labor continue with effortless regularity to obtain magnanimous pay increases from companies previously able to automatically pass higher costs onto shippers.¹⁹⁶

Companies and labor reacted to these developments in predictable—i.e., parallel, fashion. The American Trucking Associations, for example, denounced “an economist-oriented, self-destructive Commission” acting with “wanton disregard for congressional directives,”¹⁹⁷ while the Teamsters decried the Commission’s “headlong plunge toward administrative deregulation.”¹⁹⁸

This continuing labor-management pressure has dampened prospects for sympathetic implementation of the deregulation statute—in part, because the Motor Carrier Act of 1980 permits what the Joint Economic Committee found to be “a broad degree of discretion in its enforcement by the ICC,”¹⁹⁹ and, in part, because the Reagan administration has shown pronounced receptivity to the industry’s complaints regarding competition. Thus, it is noteworthy that the President appointed Reese Taylor as chairman of the Commission, thereby making good a campaign promise to the industry to “pick commissioners with practical experience who

194. Pub. L. No. 96-296.

195. Miller, *First Report Card on Trucking Deregulation*, Wall St. J., March 8, 1982, at 18, col. 4.

196. N.Y. Times, Jan. 24, 1982, at 1, col. 3. While unemployment rates in trucking subsequently increased, the General Accounting Office concluded that the severe recession of 1981-1982, not deregulation, has been primarily responsible for this development. See U.S. GENERAL ACCOUNTING OFFICE, EFFECTS OF REGULATORY REFORM ON UNEMPLOYMENT IN THE TRUCKING INDUSTRY 2 (1982).

197. *Motor Carrier Reform Act of 1980: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 1st Sess. 51, 54 (1981) (statement of American Trucking Associations) [hereinafter cited as *Motor Carrier Reform Act*].

198. *Id.* at 83 (statement of R.V. Durham, Director, Safety and Health Department, Brotherhood of Teamsters).

199. *Retreat from Competition: Trucking Regulation at the ICC, Report of the Joint Economic Comm.*, 97th Cong., 2nd Sess. 5 (1982).

would show caution" in applying the statute.²⁰⁰ Like management and labor, Mr. Taylor found deregulation distinctly distasteful: "I really don't like to use the word," he told a Congressional committee, adding that the 1980 Act, in his opinion, had been misinterpreted as a "trucking deregulation" bill.²⁰¹ Since then, he has effectively translated theory into practice. As the Joint Economic Committee recently noted, "the ICC under Chairman Taylor has abandoned the goal of a freely competitive trucking market and has moved to reverse the progress toward deregulation which has recently been made." "This policy," the Committee concluded, "contradicts the intent of Congress embodied in its passage of the 1980 Motor Carrier Act."²⁰²

Thus, coalescing vertical power may yet succeed in achieving "re-regulation" of the trucking industry by administrative subversion.

III. THE PRIVATE SECTOR

In the typical oligopoly, economic theory tells us, a noncompetitive industry structure militates toward noncompetitive conduct and tends to yield noncompetitive performance. Entry is at a minimum or nonexistent. A close-knit, co-fraternal group of producers can achieve a relative degree of safety by establishing concerted, tacitly collusive, and consciously parallel market strategies. Occasional mavericks may from time to time disturb the status quo of forbearing co-existence, but they eventually tend to be integrated into the system and become members of the club. Price policy, in particular, tends to be directed toward uniformity and inflexibility, except in the case of upward movement; and, while the leadership role may rotate sometimes among the oligopolists, the level of product prices is anything but market-determined. Moreover, a "civilized" relationship, animated by a live-and-let-live spirit, tends to be established between companies and organized labor under which the fruits of the oligopoly are shared through an institutionalized mechanism of price-cost-price escalation. Innovation tends to be slow and lethargic, hampered by the bureaucratic dry rot which afflicts monopoloid giantism. So long as the oligopoly can protect itself from entry, it can luxuriate in the rewards of power which consist not of exorbitant profits but the quiet life.²⁰³

200. Wall St. J., August 5, 1981, at 46, col. 4.

201. *Trucking Deregulation: Is It Happening? Hearing Before the Joint Economic Comm.*, 97th Cong., 1st Sess. 70 (1981).

202. *Motor Carrier Reform Act*, *supra* note 197, at 3. See also *Re-regulating at the ICC: "The Congress Made Me Do It!"* REGULATION, Nov./Dec. 1981, at 5.

203. See, e.g., W. ADAMS, *THE STRUCTURE OF AMERICAN INDUSTRY* 73-135 (6th ed. 1982).

Foreign competition, of course, is an unwelcome challenge to the existence and exercise of oligopoly power. It disrupts the well-ordered functioning of a private domain, where the rules of the game are understood and observed by all parties. It injects uncertainty and instability into the very foundations of the oligopoly structure by undermining the recognition of mutual interdependence and the price policies concomitant therewith. Foreign competition—the nemesis of price maintenance schemes and “orderly” market arrangements—becomes an obvious target for both labor and management groups striving for survival and growth by immunizing themselves from effective competition.²⁰⁴

The following discussion of the efforts to protect the entrenched oligopolies in the U.S. automobile and steel industries illustrates the coalescence of labor-management power in the private sector of the economy.

A. Automobiles

The first formal attempt by the automobile industry to immunize itself from foreign competition—the only real competition it has encountered since World War II—dates back to the last recession. On July 11, 1975, the United Auto Workers (UAW) (with the tacit support of the industry) filed a complaint with the United States Treasury, charging that “new, on-the-highway, four-wheeled, passenger automobiles from Belgium, Canada, France, Italy, Japan, Sweden, the United Kingdom, and West Germany” were being sold in the United States at less-than-fair value in violation of Section 201(c) of the Antidumping Act of 1921,²⁰⁵ thereby causing injury to the domestic auto industry.²⁰⁶ Specifically, the complaint charged that the increased market share of imported automobiles—up from 15.2 percent in 1970 to 15.9 percent in 1974 to 20.3 percent in the first half of 1975—was “at the expense of domestic sales”; that, discounting the effects of the United States recession, there was still a loss of domestic sales to imports; and that the pricing of imported cars *caused* the resulting injury to the American automobile industry and its workers. The union demanded the imposition of dumping penalties and simultaneously asked Congress for quota protection against the imports of compacts and

204. See, e.g., Adams and Dirlam, “Import Quotas and Industrial Performance” contained in *WELFARE ASPECTS OF INDUSTRIAL PERFORMANCE* 153-81 (Jacquemin & De Jong ed. 1977).

205. Ch. 14, 42 Stat. 11 (1921) (repealed Pub. L. No. 96-39, tit. I, § 106(a), 93 Stat. 193 (1979)).

206. New, On-the-highway, Four-wheeled, Passenger Automobiles: Notice of 30-day Inquiry and Hearing, 40 Fed. Reg. 34,027 (1975).

subcompacts from Europe and Japan.²⁰⁷

In its comments on the UAW complaint, the United States Council on Wage and Price Stability informed the International Trade Commission that the most important factors explaining the increased market share of foreign automobiles "are the pricing policies of domestic producers and the inability of domestic manufacturers to respond rapidly to changing market conditions."²⁰⁸ The Council cautioned that the imposition of special dumping penalties "would likely result in an immediate increase in the price of automobiles to the American consumer. Moreover, such penalties, or even the threat of penalties, could substantially check what has been perhaps the single most effective spur to competition in this highly concentrated industry. This, in turn, could lead to less competitive prices and a reduced level of innovation."²⁰⁹

Ultimately, the Union's complaint was resolved by a bizarre consent settlement arranged by the United States Treasury Department. Under the settlement, five foreign manufacturers agreed to *raise* their prices in the United States market, and fourteen other foreign manufacturers agreed to have their prices monitored by the Treasury for the next two years. With respect to five foreign firms, the Treasury took no action at all.²¹⁰

During the current recession, which started in 1979, the industry again demanded protection against the depredations of import competition. In parallel petitions filed with the International Trade Commission by the United Auto Workers and Ford Motor Company—formally supported by Chrysler and tacitly endorsed by General Motors—industry spokesmen correctly contended that, between the first half of 1979 and the first half of 1980, there occurred a significant decline in production, sales, capacity utilization, and employment in the domestic automobile industry as a whole.²¹¹ They also contended that, during the same period, there occurred a significant increase in the import penetration of the United States market for passenger automobiles and light trucks.²¹² Concluding that the growing volume and increased market share of imports constituted an "important" or "primary"

207. U.S. INTERNATIONAL TRADE COMMISSION, Pub. No. 739, DOMESTIC SALES REPORT (1975).

208. Comments of the Staff of the Council on Wage and Price Stability: Before the U.S. International Trade Commission 5 (Sept. 5, 1975) (In the Matter of the Importation of Passenger Automobiles from Europe, Canada and Japan (Inv. No. AA1921-INQ2)).

209. *Id.* at 4.

210. U.S. INTERNATIONAL TRADE COMMISSION, Pub. No. 1110, CERTAIN MOTOR VEHICLES AND CERTAIN CHASSIS THEREFOR A-98 to -100 (1980).

211. *Id.* at A-27 to -42.

212. *Id.* at A-47 to -51, 49-52.

cause of serious injury to the domestic auto manufacturers, they asked the Commission to impose mandatory controls on future imports, specifically from Japan.²¹³

The Commission rejected the UAW-Ford petitions, finding that the industry's malaise was primarily attributable to: (1) the impact of the recession on the overall demand for cars and trucks, and (2) the failure of U.S. manufacturers to adjust their product mix to shifts in consumer demand.²¹⁴ Undeterred by this reversal, the industry—again with active labor support and the benevolent intermediation of government—persuaded the Japanese to accept a “voluntary” quota on their auto exports to the United States.²¹⁵ Under the provisions of the agreement, Japan promised, starting in April, 1981, and for two years thereafter, to reduce its exports from 1.82 million vehicles (1980) to 1.68 million annually, and to take no more than 16 percent of the *growth* (if any) in United States domestic consumption in subsequent years.²¹⁶ This was not the ideal solution that the wielders of coalescing power had wanted, but it served, at least temporarily, as an acceptable “second best.”

Throughout the campaign for import restraints—before administrative tribunals, Congressional committees, and in public opinion forums—the auto companies and the United Auto Workers presented an array of uncannily parallel arguments as rationales for increased protection.

1. *Symbiotic Government-Business Relationship in Exporting Countries*

According to both management and labor, a symbiosis characterizes the relationship between foreign governments and their automobile industries. The Japanese government, in particular, is said to protect and nourish its auto industry; to help the industry target export markets for invasion; and to rely on auto exports to maintain domestic employment as well as to generate foreign exchange earnings with which to finance energy imports. Therefore, it is argued, the United States must protect itself and its basic industries from the adverse consequences of this mercantilist policy.

Petitioning the United States International Trade Commission

213. *Id.* at 161-65, 176-77. See Pearson & Takacs, *Should the U.S. Restrict Auto Imports?* 24 CHALLENGE 47-49 (1981).

214. See *supra* note 210, at 1, 134-42.

215. BUS. WK., Oct. 20, 1980, at 43, col. 1; WALL ST. J., Oct. 28, 1980, at 3, col. 1; WALL ST. J., Nov. 11, 1980, at 3, col. 4. See also, N.Y. Times, Dec. 8, 1982, at 47, col. 1.

216. *Issues Relating to the Domestic Auto Industry: Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 97th Cong., 1st Sess. 9-10 (1982) (prepared statement of David MacDonald, Deputy U.S. Trade Representative).

for import protection in August of 1980, Ford Motor Company argued:

For decades while industry in Japan was developing, the Japanese government was supporting its domestic producers by forbidding significant competition from foreign manufacturers and by providing access to credit on favorable terms and providing important tax and export subsidies. The objective of these deliberate policies of the Government of Japan was to develop a large, modern, world-class industry. In large part, the Japanese auto manufacturers' ability to compete so well in export markets today can be traced to this historical pattern of government protection and incentives.²¹⁷

"[T]his past pattern of strong support by the Japanese Government," Ford insisted, "makes intervention by the U.S. Government to redress the balance appropriate today."²¹⁸ It makes it incumbent on us, as Ford told the Senate International Trade Subcommittee, to "recognize the realities of world trade where nations use their auto industries to promote national goals such as generating employment, industrial development and foreign exchange earnings."²¹⁹

The United Auto Workers echoed these sentiments. In its prepared statement filed with the House Subcommittee on Trade in March, 1980, the UAW argued:

The Japanese government decided in the 1950s to cultivate a powerful auto industry. As it carried out effective industrial planning, the government carefully nurtured the auto industry. Its program included effective barriers against imports, favorable tax laws and outright subsidies, consolidation of the industry into a few assemblers cooperating with affiliated parts companies, and assistance in obtaining foreign technology without direct investment control by foreigners. With such hothouse treatment, the Japanese industry mushroomed from production of 715,400 vehicles in 1960 to 5.3 million vehicles in 1970, 10.0 million in 1979 and 11.0 million vehicles predicted for 1980.²²⁰

217. *Ford Motor Co., Petition For Relief From Increased Imports of Passenger Cars, Light Trucks, Vans, and Utility Vehicles Under Section 201 of the Trade Act of 1974*, U.S. International Trade Commission 37 (1980) [hereinafter cited as *Ford ITC Petition*].

218. *Id.*

219. *Issues Relating to the Domestic Auto Industry: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 97th Cong., 1st Sess., pt. 1, 133 (1981) (statement of Will Scott, Vice President, Government Relations, Ford Motor Co.) [hereinafter cited as *Danforth Hearings*]. See also *United States-Japan Economic Relations: Hearings and Markup on H. Con. Res. 363 Before the Subcomms. on Asian and Pacific Affairs, and on International Economic Policy and Trade, of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 3-5 (1981) (statement of Will Scott, Vice President, Government Relations, Ford Motor Co.) [hereinafter cited as *Wolff Hearings*]; *id.* at 11 (statement of Wendell Larsen, Vice President, Chrysler Corp.).

220. *World Auto Trade: Current Trends and Structural Problems: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 72 (1980) (statement of Douglas A. Fraser, President, UAW) [hereinafter cited as *Vanik Hearings* (Mar. 1980)]. See also *U.S. Trade Investment*

The UAW told Congress that "one of the ways we are getting . . . outcompeted is that in other countries of the world, government is giving more assistance to industry than we are"; that "the U.S. auto industry must now be included in the list of industries 'incisively targeted' by Japan"; that "we cannot stand idly by while the successful industrial planning and the highly coordinated export strategy of another country—combined with the lack of planning in the U.S.—has the effect of unfairly disrupting our industries and workers and their communities"; that "[b]y refusing to devise and implement planning for ourselves we are subjected to the influences of other countries' plans"; and, finally, that "refusal to take a firmer hold of our economic destiny is becoming tragically anachronistic."²²¹

2. *Diversion of World Exports to the Unprotected U.S. Market*

Management and labor further justified their demands for restriction of Japanese competition on the grounds that rampant protectionism in the world's major markets diverted Japanese exports to an unprotected United States market and thus focused the full brunt of Japanese expansionism on American companies and their workers. Import restriction, they agreed, was a necessary offset and belated defense to an ostensibly ubiquitous protectionism abroad.

In its petition for protection before the International Trade Commission, Ford Motor Company contended that "the size of the U.S. market, the unusually low U.S. auto tariffs, and high import barriers in Europe and elsewhere made it clear that the United States would be the primary target for a surge of Japanese exports."²²² The following month, this argument was repeated before the House Committee on Foreign Affairs:

It's likely that the United States will remain the primary target of exports because: First, most of the major countries in the rest of the world have already acted to restrict Japanese imports in some way or another; second, the United States is the largest market in the world, and even small percentage increases translate into large numbers of vehicles; and third, the U.S. tariff structure for cars is among the world's lowest and

Policy; Imports and the Future of the American Automobile Industry: Hearing Before the Congressional Joint Economic Comm., 96th Cong., 2d Sess. 4-5 (1980) (statement of Douglas A. Fraser) [hereinafter cited as *Bentsen Hearings*].

221. *Bentsen Hearings*, *supra* note 220, at 11, 17 (statement of Douglas A. Fraser, President, UAW). See also *Danforth Hearings*, *supra* note 219, at 83 (statement of Douglas A. Fraser); *id.* at 59 (statement of Stephen I. Schlossberg, Director of Government and Public Affairs, UAW); *id.* pt. 3, at 108-09 (statement of Sheldon Friedman, Research Director, UAW).
222. *Ford ITC Petition*, *supra* note 217, at iii.

without any formal or informal local content or other rules that generally restrain imports in other parts of the world.²²³

A Ford spokesman, commenting on the necessity of U.S. import restrictions on Japanese products, exclaimed: "Everyone else has done it."²²⁴ "The other countries of the world have already set up barriers against more Japanese products," Chrysler added; "[t]here is no place those products can go but in here."²²⁵ Both firms decried the "open trading conditions in the U.S. auto market which act as a magnet for Japanese exports because every other important world market imposes substantial tariff and nontariff barriers to imports of Japanese autos."²²⁶

Here, too, the Union was in complete agreement with management. Appearing before the House Subcommittee on Trade, UAW president Fraser charged that "[p]ractically every country exercises import restraint on autos in one form or another— through high tariffs, outright quotas, orderly marketing arrangements, 'gentlemen's agreements,' and various forms of non-tariff barriers."²²⁷ "As the biggest, most open market in the world," he insisted, "the U.S. auto market has been targeted by the Japanese for the lion's share of its exports."²²⁸ "In contrast to U.S. policy," explained Mr. Fraser, "when Japanese autos have threatened to take a significant segment of the market in various European countries, they have been frozen at levels by gentlemen's agreements."²²⁹ According to the Union, "[o]ther countries have dealt with similar trade problems in a more sophisticated [sic] manner," while the United States receives "the leftovers from other countries' plans."²³⁰ "Given the auto policies of the rest of the world and the present disarray of the industry in North America," the Union reasoned,

223. *Wolff Hearings*, *supra* note 219, at 5 (statement of Will Scott, Vice President, Government Relations, Ford Motor Co.). See also *Vanik Hearings* (Mar. 1980), *supra* note 220, at 100 (statement of Fred G. Secrest, Executive Vice President, Ford Motor Co.).

224. *Wolff Hearings*, *supra* note 219, at 27 (statement of Will Scott, Vice President, Government Relations, Ford Motor Co.).

225. *Id.* at 34 (statement of Wendell Larsen, Vice President, Chrysler Corp.).

226. *Auto Situation, Autumn 1980: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 60 (1980) (statement of Ford Motor Co.) [hereinafter cited as *Vanik Hearings* (Nov. 1980)]. "[I]t might be helpful," Ford suggested, "to look at other countries. In the European Community, for example, governments seem determined to limit Japanese cars to an overall share of 10%. We see no reason why Japan's share of our car market should be more than Europe's 10%." *Danforth Hearings*, *supra* note 219, pt. 2, at 173 (statement of D.N. McCammon, Vice President, Ford Motor Co.).

227. *Vanik Hearings* (Mar. 1980), *supra* note 220, at 72.

228. *Id.* at 73.

229. *Id.*

230. *Id.*

"immediate measures to redress the balance are required,"²³¹ warning that "[t]he U.S. can no longer afford to be the lone sitting duck in this situation."²³²

3. *Need for Breathing Space to Make Adjustments*

A third argument jointly pressed by management and organized labor in calling for protection from import competition was that the industry vitally needed breathing space to adjust to the sharp, unforeseen—and, they argued, unforeseeable—revolution in the preferences of American car buyers. Only protection from imports could provide the increased production volume and cash flow which, they claimed, were essential if the industry were to convert its products and production facilities to meet this revolution in market demand. Moreover, they fully agreed that only quantitative restrictions could break the buyer loyalty that threatened to bind American car buyers to Japanese auto producers.

In its petition to the United States International Trade Commission, Ford elaborated on the contention that market demand had radically shifted:

In cooperating fully with the Government's goal of achieving a doubling of miles-per-gallon in the U.S. new car fleet between 1975 and 1985 to reduce dependence on imported oil, the automobile industry was already committed to an extremely ambitious conversion to more fuel efficient cars and trucks.

This conversion program was targeted at achieving substantial across-the-board improvements in fuel economy for all sizes of U.S. cars This approach became insufficient, however, when the unforeseen events last year in Iran, the gasoline shortages and resulting lines at gas stations resulting from the Government's fuel allocation system, and the sudden reversal in U.S. energy policy (decontrolling domestic oil prices) produced a wholly unexpected shift and acceleration in U.S. consumer demand for smaller cars.²³³

Hence, "[t]he U.S. industry was not—could not have been—prepared for this quick switch."²³⁴

231. *Id.*

232. *Danforth Hearings*, *supra* note 219, pt. 2, at 147-48 (statement of Douglas A. Fraser, President, UAW). See also *Bentsen Hearings*, *supra* note 220, 2-10 (statement of Douglas A. Fraser); *United Auto Workers, Petition For Relief Under Section 201 of the Trade Act of 1974 From Import Competition From Imported Passenger Cars, Light Trucks, Vans, and Utility Vehicles*, U.S. International Trade Commission 178 (1980) [hereinafter cited as *UAW ITC Petition*]; *Danforth Hearings*, *supra* note 219, at 58-68 (statement of Stephen I. Schlossberg, Director of Government and Public Affairs, UAW); *Vanik Hearings* (Nov. 1980), *supra* note 226, at 50 (statement of Douglas A. Fraser).

233. *Ford ITC Petition*, *supra* note 217, at 3.

234. *Id.*

"In these last 2 years," a Ford spokesman reasserted before the House Foreign Affairs Committee in September of 1980,

the Japanese have taken a windfall advantage of the extremely abrupt U.S. market shift that occurred when gasoline prices—held at artificially low levels for years—suddenly doubled. Although U.S. producers were well along the way to doubling the fuel efficiency of their fleets, we were not yet equipped to meet the sudden change in U.S. consumer buying habits.²³⁵

The industry confronted "a situation where an abrupt change in the market has occurred with the suddenness that makes it impossible for a long lead industry to convert so quickly."²³⁶ Or, as Chrysler's Mr. Iacocca put it, "imports are having a field day because our market changed faster than anyone could anticipate."²³⁷

Union spokesmen concurred with management's contention that the U.S. market had suffered sharp shifts in consumer preferences.²³⁸ Thus, one UAW representative testified:

[C]learly the market took a very sharp turn. The auto companies were not adequately prepared for that sharp a turn. This is an industry that doesn't turn around very rapidly. It takes a fair amount of leadtime to get everything into place. I believe that while the auto companies are selling better cars now, or cars better adapted to the needs of the market than they were before, they are not there fully yet. They don't have the models fully developed that everyone wants. They don't have the ones that everyone wants in full supply. We are simply working toward that solution.²³⁹

"[T]he legally mandated [fuel efficiency] transition has not kept up with the massive, abrupt shift in consumer demand," Mr. Fraser argued before the Joint Economic Committee in early 1980, "and imports, largely from Japan, took a record 22 percent share of the U.S. car market last year."²⁴⁰ "What happened when the gas crunch came in 1979," another union member asserted, "was that the consumer panicked and record numbers of foreign cars, sup-

235. *Wolff Hearings*, *supra* note 219, at 4.

236. *Id.* at 12-13 (statement of Will Scott, Vice President, Government Relations, Ford Motor Co.). See also *Vanik Hearings* (Mar. 1980), *supra* note 220, at 107 (testimony of Fred G. Secrest, Executive Vice President, Ford Motor Co.).

237. *Bentsen Hearings*, *supra* note 220, at 144.

238. Yet, Union representatives were unwilling to completely absolve management of all responsibility. For example, Mr. Fraser disclosed that "[o]ur industry has been horribly negligent in not producing small cars before [foreign producers] did. Our union advocated that the industry build small cars as early as 1974 and they procrastinated and procrastinated and now we find ourselves in this dilemma." *Vanik Hearings* (Mar. 1980), *supra* note 220, at 66. Senator Javits put the following question to Mr. Fraser: "[I]s it a fact that this situation has been brought on by a great management failure on the part of the American automobile industry?" "That is true," Mr. Fraser answered. *Bentsen Hearings*, *supra* note 220, at 23.

239. *Danforth Hearings*, *supra* note 219, pt. 2, at 133 (testimony of Howard Young, Special Consultant to the President, UAW).

240. *Bentsen Hearings*, *supra* note 220, at 9.

posedly fuel efficient, were sold"²⁴¹

Management and labor wholeheartedly agreed that, because of such shifts, import reduction and restriction were essential to provide the "breathing space," the production volumes, and the cash flow which the industry needed to retool, reconvert, and recover. "Unless restrained," Ford argued in its petition to the International Trade Commission, "further growth of import penetration will adversely affect the ability of the domestic producers to finance their conversion to the new types of cars needed for the future."²⁴² A Chrysler spokesman dispatched to the House Foreign Affairs Committee testified: "We need a year or two to get our feet on the ground," and import restraints would provide the industry with "breathing space in which to accomplish the very costly and time-consuming transition to an entirely new generation of automobiles that are responsive to consumer demand."²⁴³ Ford's representative, Mr. Scott, declared before the House Subcommittee on Trade that "[a]ction by the Congress and the Administration to effect such temporary restraint will get the auto industry back on its feet, and get the auto workers back on the job."²⁴⁴ "U.S. producers," he added, "need the increased volume that import restraint will bring to complete the job of converting products and facilities to produce more fuel-efficient fleets."²⁴⁵

Organized labor spokesmen fully supported management on this score, too. UAW president Fraser testified before the House Subcommittee on Trade that restricting Japanese imports would "give us a breathing space that we need to convert our industry."²⁴⁶ Appearing before the Joint Economic Committee, Mr. Fraser again called for restraints on Japanese imports "to give the American automobile industry the time to convert and compete."²⁴⁷ In testimony before the Senate Subcommittee on International Trade, the Union once more urged that "Japanese export restraint is needed in the short term to provide the American industry with the breathing space it needs in order to retool and recover from the ills that have afflicted it in the last couple of years,"

241. *Wolff Hearings*, *supra* note 219, at 294 (statement of Frank LoCascio, Secretary-Treasurer, Local 259, UAW).

242. *Ford ITC Petition*, *supra* note 217, at 4.

243. *Wolff Hearings*, *supra* note 219, at 12-14 (testimony of Wendell Larsen, Vice President, Chrysler Corp.).

244. *Vanik Hearings* (Nov. 1980), *supra* note 226, at 60.

245. *Id.* at 62. See also *Danforth Hearings*, *supra* note 219, at 134 (statement of Will Scott, Vice President, Government Affairs, Ford Motor Co.); *id.* at 136 (statement of Pierre H. Gagnier, Financial Liaison Executive, Chrysler Corp.).

246. *Vanik Hearings* (Mar. 1980), *supra* note 220, at 66.

247. *Bentsen Hearings*, *supra* note 220, at 4. See also *UAW ITC Petition*, *supra* note 232, at 275.

and warned that "[c]ontinued unbridled expansion of the import share threatens . . . [a] remarkable five-year transition program."²⁴⁸ And, returning before the Subcommittee two months later, the UAW praised Senate Bill 396—entitled "A Bill To Impose Quotas on the Importation of Automobiles From Japan"—as legislation that "goes a long way toward providing [breathing space for the industry]."²⁴⁹

Management and labor also joined in arguing that quantitative barriers to foreign competition were crucial to break the bonds of buyer loyalty that both groups warned were arising between American consumers and Japanese producers. "[A] consumer who purchases a Japanese car now," Ford Motor Company claimed in its petition to the International Trade Commission, "is more likely to purchase another imported car in the future than [sic] he is to buy any U.S. produced car."²⁵⁰ The result, Ford contended, was menacing: "sales lost by a domestic producer to imports today carry with them the assurance that more sales will be lost in the future."²⁵¹ "The momentum of Japanese imports must be stopped," Ford demanded before the House Subcommittee on Trade, "or we will face a major, if not insurmountable, problem in recapturing lost consumers"²⁵² Restricting imports, Chrysler argued before the House Foreign Affairs Committee in 1980, and again in 1981, before the Senate Subcommittee on International Trade, was essential "to maintain necessary standards of customer loyalty to U.S. products,"²⁵³ and thereby prevent "serious permanent erosion in . . . customer loyalties."²⁵⁴

The Union echoed management's position on this point. Mr. Fraser told Senator Bentsen during the Joint Economic Committee's hearings:

248. *Danforth Hearings*, *supra* note 219, pt. 1, at 84 (statement of Douglas A. Fraser, President, UAW).

249. *Id.* pt. 2, at 143 (statement of Douglas A. Fraser, President, UAW).

250. *Ford ITC Petition*, *supra* note 217, at 38-39.

251. *Id.*

252. *Vanik Hearings* (Nov. 1980), *supra* note 226, at 62 (statement of Ford Motor Co.).

253. *Wolff Hearings*, *supra* note 219, at 12 (statement of Wendell Larsen, Vice President, Chrysler Corp.).

254. *Danforth Hearings*, *supra* note 219, at 138 (statement of Pierre H. Gagnier, Vice President, Chrysler Corp.). Ford's Mr. McCammon insisted that American car buyers were less than rational:

Well, part of the problem right now, as I indicated, was a matter of perception among the public exactly what the situation is. In fact, some people are willing now to spend \$900 more for an Accord, for example, than a Fairmont in order to save a nickel a day of gas It isn't always a rational decision that is going on out in the world of car buying.

Id. pt. 2, at 211.

I might say in this connection, Senator, that one of the things that concerns me is that without that restraint, and if the imports keep increasing during the span of time when the American automobile industry is getting their house in order . . . there's likely to be a longer term problem due to a thing in the auto industry known as consumer loyalty. It is a very, very logical process. If you buy a product and you are satisfied with that product, why risk the chance of changing? And you are apt to go back.

And I think if we just stand idly by and let this matter develop naturally and normally, I don't know how we can ever turn it back.²⁵⁵

Testifying before the House Committee on Foreign Affairs, the Autoworkers warned that such consumer loyalty and repeat buying behavior portended more ominous, long-run effects:

The continuing surge of imports into the U.S. threatens to have a lasting detrimental effect. In the auto industry, a company's market share tends to be somewhat self-perpetuating because of the prevalence of repeat buying. Moreover, as a company boosts its current sales, its network of dealerships expands and future car buyers become more familiar with its products. This lays the basis for higher sales in the not too distant future.²⁵⁶

Like management, the UAW repeatedly emphasized that brand loyalty—as opposed to price—was an important key to Japan's success in the American car market.²⁵⁷

4. *Cost of Protection Less Than the Cost of Inaction*

Finally, management and labor agreed that the costs of import protection were negligible and were far outweighed by the costs which would result from a failure to protect the industry. The argument was two-fold. First, there was no risk of triggering retaliatory trade reaction because quantitative restrictions imposed by the United States would merely reduce Japanese *overtime* production. Second, increased production and employment in the U.S. auto industry would generate increased government tax revenues while, at the same time, reducing public unemployment and associated welfare expenditures.

Curtailling Japanese exports to the United States by one million units per year, Chrysler alleged, "will not threaten the jobs of Japanese workers. . . . The Japanese workers who have been working on overtime would not be laid off. There would be no need for any kind of retribution in trade."²⁵⁸ Mr. Iacocca's proposed National Automotive Recovery Act—calling, *inter alia*, for import re-

255. *Bentsen Hearings*, *supra* note 220, at 6.

256. *Wolff Hearings*, *supra* note 219, at 57 (statement of UAW).

257. See *Danforth Hearings*, *supra* note 219, pt. 3, at 127 (testimony of Sheldon Friedman, Director of Research, UAW); *Vanik Hearings* (Nov. 1980), *supra* note 226, at 57 (testimony of Douglas A. Fraser, President, UAW).

258. *Wolff Hearings*, *supra* note 219, at 12, 16 (statement of Wendell Larsen, Vice President, Chrysler Corp.).

ductions—"would not cause the layoff of a single Japanese worker, and it would not cause a trade war with Japan."²⁵⁹

The UAW endorsed management's position. It told the Senate Subcommittee on International Trade:

Some have expressed the fear that actions to restrict imports from Japan would lead to retaliation. We don't think so. Restraint would not significantly increase the Japanese unemployment rate, . . . a reduction in exports to the U.S. might simply lead to reduced use of overtime work, now running 12-14 hours per week in Japan.²⁶⁰

In sum, the effects of import restrictions on Japanese production and employment would be only marginally significant.²⁶¹

On the other hand, the benefits of import restrictions for the United States would far outweigh the costs. A Ford spokesman assured the Senate Subcommittee on International Trade:

This temporary restraint will not be inflationary. Even assuming as much as 15% higher prices for Japanese cars, the effect would be more than offset by savings in unemployment costs and by the added tax revenues which will follow automatically as gains in U.S. car sales put our plants and people back to work. American taxpayers already are bearing the \$3 billion cost of auto-related unemployment and tax revenues lost to federal, state, and local governments. This really amounts to a subsidy to support extraordinary levels of car imports from Japan—hardly in keeping with the spirit of scrutinizing every dollar of taxpayer expense with great care.²⁶²

The UAW made precisely the same point. Mr. Fraser testified:

Some have argued that it is costly to limit imports and to prop up the domestic industry. We argue that—with the high-mileage domestic small cars now available—the cost is not nearly as high as that of *not* saving the auto sector.

Consider the costs of inaction. First, there are staggering losses in corporate tax revenues at all levels of governments. For example, in 1978, the Big Three paid some \$2.5 billion in federal income taxes alone. The Big

259. *Danforth Hearings*, *supra* note 219, at 136.

260. *Id.* at 85 (statement of Douglas A. Fraser, President, UAW).

261. *See Bentsen Hearings*, *supra* note 220, at 13 (statement of Douglas A. Fraser); *Vanik Hearings* (Mar. 1980), *supra* note 220, at 75 (statement of Douglas A. Fraser, President, UAW); *Wolff Hearings*, *supra* note 219, at 57 (statement of UAW).

262. *Danforth Hearings*, *supra* note 219, pt. 2, at 173-74 (statement of D.N. McCammon, Vice President, Ford Motor Co.). The companies further embellished this argument by warning that accession to what—in the industry's estimation—were "modest" claims would deflect calls for more extreme protectionist measures (from unidentified sources) which *would* touch off retaliatory trade wars. General Motors, for example, boldly declared its support for "immediate and substantial reduction in passenger car exports to the United States for a meaningful period of time" as a means of *stemming* "protectionist pressures, both here and abroad, which could result in lasting harm to important world trading relationships." *Id.* at 243-44 (statement of General Motors).

Three's 1980 losses will make them eligible for some \$3 billion in credits and refunds — a swing of over \$5 billion in federal tax receipts.

Second, the difference between a healthy and a sick auto industry in government-financed unemployment insurance, welfare, TRA, food stamps, and foregone personal income tax receipts comes to about \$6 billion.

Compared to these public sector losses of some \$11 billion for a year such as 1980, not to mention the immeasurable cost in human suffering, the cost of our proposals to temporarily limit imported cars . . . is small.²⁶³

In short, according to both management and labor, protecting the auto industry from foreign competition was less costly to the nation than a policy of inaction and nonintervention.

5. *Summary: Automobiles*

In the foregoing study of the automobile industry, vertical power was found to coalesce around a demand for protection from foreign competition for a lethargic and unresponsive domestic automobile oligopoly. As was the case in the airline and trucking industries' fight against deregulation, auto companies and the UAW presented a remarkably unified front on a number of issues, on a number of occasions, and in a number of forums.

The exercise of coalescing power initially appeared to be only partially successful. While, as indicated, Japanese producers agreed in 1981 to restrict their exports to the U.S., this restraint was to be strictly limited to provide a breathing space of two years' duration. However, whether or not the restraint will indeed be "temporary" is open to question; as the expiration date of spring 1983 approached, the industry successfully urged that current import restraints be extended in time and tightened in impact.²⁶⁴

Domestic content legislation currently before the Congress at the UAW's behest poses what may be the greatest challenge to the post-war, "civilized" relationship between management and organized labor in this industry.²⁶⁵ If enacted, this legislation would institute domestic content requirements—calculated as U.S. value added as a percentage of wholesale price—applicable to all auto manufacturers, foreign and domestic, producing more than 100,000 units for sale in the United States.²⁶⁶ Steeply graduated by sales volume, these requirements would reach as high as 90 percent for

263. *Danforth Hearings*, *supra* note 219, at 88-89.

264. *Wall St. J.*, Oct. 18, 1982, at 2, col. 1.

265. Domestic content requirements designate the percentage of American-made parts which must be contained in vehicles sold in the United States. *Domestic Content Legislation and the U.S. Automobile Industry: Analyses of H.R. 5133 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong., 2nd Sess. 1-2 (1982) (Congressional Budget Office study).

266. *Id.* at 7-8.

manufacturers with sales exceeding 500,000 units.²⁶⁷ Their practical effect, according to the Congressional Budget Office, "would be the imposition of a rigid import quota of 100,000 units per year on each foreign auto producer"—a 65 percent reduction from current import levels.²⁶⁸ The potential divisiveness of this proposed legislation—urgently classified as a "top legislative priority" by both the UAW and the AFL-CIO—stems, of course, from the restrictive impact which it would work upon the expanding internationalization of American auto companies and their increased reliance on offshore sourcing for components.²⁶⁹ Not surprisingly, therefore, the "Big Three" have so far refrained from either endorsing or opposing local content legislation, doubtless in an effort to avoid, by resort to diplomatic vagueness, a crucial test of the durability of the "civilized relationship" between management and labor.

B. Steel

In steel, the drive for protection antedates the campaign in automobiles. Faced with what the industry viewed as a mounting import tide in the early 1960's, and after filing unsuccessful "countervailing duty" and "antidumping" complaints with the United States Tariff Commission, it shifted its protectionist efforts to the legislative and public relations front. This strategy, supported from 1967 onward by the United Steelworkers, eventually paid off with the signing of the Voluntary Restraint Agreement (VRA) that went into effect on January 1, 1969.²⁷⁰

Under the Voluntary Restraint Agreement, annual steel im-

267. *Id.*

268. *Id.* at 9, 62.

269. Wall St. J., Sept. 3, 1982, at 6, col. 4. Despite the potential divisiveness of such domestic content requirements, the coalescing, tacitly collusive relationship between companies and the Union has to date bred a remarkable degree of solicitude. Thus, rather than outrightly declaring their opposition to such proposals, management has followed a more diplomatic tack, characterizing such legislation as constituting a distinctly "second-best" option. "The proposed legislation should be viewed as an instrument of last resort," Ford Motor Company suggested, "to be considered when other measures to correct trade inequities and imbalances have been tried and have failed . . ." *Fair Practices in Automotive Products Act: Hearings on H.R. 5133 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong., 2d Sess. 306 (1982) (statement of Philip Caldwell, Chairman of the Board, Ford Motor Co.). As an example of what a "more effective" policy might comprise, Mr. Caldwell intimated that "voluntary" import restraints might be extended into "the mid-1980s." *Id.* at 341. While likewise sympathetic to the objectives of domestic content requirements, the Chairman of the Board of General Motors, Roger B. Smith, did not believe that such legislation was "the best way to achieve the objectives we all seek." *Id.* at 432.

270. Adams, *Import Restraints and Industrial Performance*, MICH. Y.B. INT'L LEGAL STUD. 38 (1979).

ports from Japan and the European Community were limited to 5.8 million tons each, compared to their then current levels of 7.5 million and 7.3 million tons, respectively. The Agreement also provided for an annual growth of 5 percent in the allowable quotas.²⁷¹ It was described approvingly by the Chairman of the Ways and Means Committee of the United States House of Representatives as a "welcome and realistic step."²⁷²

Within three years, however the domestic industry found the VRA unsatisfactory; quotas had not been established, either for specific products or for individual exporting countries (other than Japan). Moreover, both the Japanese and Europeans claimed that fabricated structural steel and cold finished bars were not included in the VRA quotas, since the quotas were expressed in terms of tonnage. Therefore, they rapidly expanded their shipments of stainless steel and other high-value products to the United States market—despite their promise to "try to maintain approximately the same product mix and pattern of distribution" as before the accord was signed.²⁷³ The effect of this upgrading in imports, combined with the inevitable increase in the price of imported steel, was that the total value of steel imports was as high in 1970 as in 1968, notwithstanding a 25 percent decline in the volume of imports during the same period.²⁷⁴

As a result, the three-year extension of the Agreement—announced by the White House on May 6, 1972—contained specific tonnage limitations on three categories of specialty steels (stainless, tool, and other alloys) and set the quotas at less than their 1971 import level. In addition, fabricated structural steel and cold-finished bars were specifically included in the Agreement. Also, the participants agreed to maintain their product mix and their customary geographic distribution pattern. Finally, a 2.5 percent (instead of the former 5 percent) annual increase in the allowable imports was to be applied to the global tonnage allocated to Japan and the European Economic Community (EEC).²⁷⁵

Unfortunately (for the protectionists), the connivance between the domestic industry, the State Department, and foreign steel producers to limit imports triggered an antitrust suit by Consumers Union which charged that the VRA constituted a *prima facie* conspiracy under the Sherman Antitrust Act.²⁷⁶ While the Court

271. *Id.* at 38-39.

272. *Id.* at 39.

273. *Id.*

274. L. WEISS, CASE STUDIES IN AMERICAN INDUSTRY (2d ed. 1971).

275. Adams, *supra* note 270, at 39.

276. Consumers Union of United States, Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd sub nom.* Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

eventually ruled only on the State Department's authority to insulate the agreement from the antitrust laws, it left little doubt that the foreign signatories to the pact could be held accountable for participation in any trade restraints.²⁷⁷ In any event, the decision was clear enough to persuade all concerned that the VRA should not be renewed when it expired in May, 1975.

After the passage of the Trade Act of 1974 which loosened the standards of proof in antidumping actions,²⁷⁸ renewed pressure for import restraints was crowned with success—at first, in the industry's stainless and specialty steel sector. Following lengthy proceedings, the International Trade Commission ruled, in 1976, that the domestic firms were indeed injured by rising imports, and recommended to the President the imposition of quotas on four categories of specialty steel products.²⁷⁹

Stating that quotas are an inflexible and relatively undesirable remedy for the supposed injury, the President gave Japan, the EEC, and Sweden ninety days to enter, voluntarily, into "orderly marketing agreements" with the United States negotiators before approving the Commission's recommendations.²⁸⁰ Under the threat, the Japanese gave in, signing a VRA on the final day of the ultimatum. Quotas were imposed, as threatened, with the Japanese benefiting and the EEC losing, as compared to the original Commission recommendations.²⁸¹

This arrangement for stainless and specialty steel producers was soon followed in January, 1978, by a comprehensive protection plan for the industry's much larger carbon steel sector. The mainstay of the plan was the Trigger Price Mechanism (TPM)²⁸² which established a thinly veiled price floor for nearly all imported steel, and was calculated quarterly on the basis of Japanese production costs, plus all exporting costs from Japan, plus an arbitrary percentage mark-up for "profits." Its avowed objective was to raise steel prices in the U.S. market in order to give domestic producers a "breathing spell" from import competition.²⁸³

Here, as with the automobile industry, the protectionist cam-

277. *Id.*

278. See ADAMS & DIRLAM, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and its Interpretation by the International Trade Commission*, 52 IND. L.J. 535 (1977).

279. STAINLESS STEEL AND ALLOY TOOL STEEL, TA201-5, U.S.I.T.C. PUB. No. 756 (1976).

280. See 41 Fed. Reg. 11,269 (1976).

281. *Id.* at 24,101 (to be codified at 3 C.F.R. § 4445).

282. 42 Fed. Reg. 65,214 (1977) (to be codified at 19 C.F.R. § 141).

283. Findings of the Department of Treasury with Regard to the Coverage of Wire Rod, Wire and Wire Products under the Trigger Price Mechanism 30 (April 13, 1978) reprinted in Adams, *supra* note 270, at 41.

paigned jointly waged by the steel industry and organized labor rested on lines of argument characterized by an unmistakable trace of conscious parallelism.²⁸⁴

284. The pattern in steel, however, did differ from that of other industries in at least one procedural respect. Steel evidenced explicit and outright collusion between management and organized labor; pretenses of independence, in other words, were immodestly dispensed with.

For example, while addressing the Economic Club of Detroit in 1968, the president of the American Iron and Steel Institute, Mr. John P. Roche, was asked "Is Labor supporting the steel industry's quota position in a beneficial way?" "Happily," he responded, the Union had abandoned its free trade stance to join with management:

I think most of you know that the United Steelworkers have had a long-standing philosophical approach to the question of trade that is very close to the free trade position of the government.

.
The Steelworkers last spring and summer could see that this was no longer just a matter for pleasant academic discussion, that there had to be some halt to imports, and happily as far as we're concerned, they joined with us last October in our support of the bills that are before the Congress asking for a quota on steel imports. We think their support is absolutely essential and it is not a perfunctory support. The union's Washington office is working very closely with the steel companies in attempting to get increasing support from the Congress.

Address by J.P. Roche, President, American Iron and Steel Institute, before the Economic Club of Detroit at 16-17 (1968) [hereinafter cited as Detroit Economic Club Address].

Such collusion was formally acknowledged by I.W. Abel, president of the Steelworkers, at a 1972 conference:

[I]t traditionally had been the policy of the American labor movement to be great and staunch free traders. For some reason or other we prided ourselves on being able to expound that slogan. But in view of that tradition and that policy, it was the decision of your officers to join with the leaders of the Steel Industry to try to cope with this problem, and we jointly went to the leaders of Congress, and to the Administration.

Press Release by I.W. Abel, President of United Steelworkers of America, given at a News Conference at the Joint Conference on Imports and Productivity, Washington, D.C. (Dec. 1, 1972) (available at United Steelworkers of America, AFL-CIO/CLC, Int'l. Hdq.).

Thus, management and labor "jointly petitioned the office of the Special Trade Representative" in protesting an alleged bilateral agreement covering steel flows between Japan and the Common Market. *Vanik Hearings* (1977), *infra* note 295, at 313 (statement of Lloyd McBride, President, United Steelworkers). In another instance, Steelworker president McBride testified that the "industry and the union have both advocated that there be an international mechanism to monitor steel flow and to provide safeguard relief against market disruption." *Id.* at 314. In July of 1977, Mr. McBride and the president of Jones & Laughlin Steel, Thomas C. Graham, convened a joint news conference on imports. "Lloyd and I are here today to speak with you about one of the most serious problems facing the American steel industry," Mr. Graham began, "[that being] the flood of steel imports into the U.S. marketplace." *Id.* at 393.

In 1975, the tool and stainless steel industry and the Union jointly peti-

1. *Symbiotic Government-Business Relationship in Exporting Countries*

Like their counterparts in the auto industry, spokesmen for steel companies and steel workers justified their demand for protection from import competition by pointing to what they alleged was the symbiotic relationship between virtually all foreign governments and their respective steel industries. With the exception of the United States Government, both power blocs contended that foreign nations relied on their steel industries as instruments of national policy in pursuing such objectives as maintaining full employment, increasing foreign exchange earnings, and shoring up their balance of payments. Because foreign steel producers were immune from profit and loss considerations, management and organized labor insisted that protection of the United States steel industry was both essential and equitable.

In hearings before the Senate Finance Committee in 1966, Mr. John P. Roche, president of the American Iron and Steel Institute (AISI), charged the world's principal steel-producing nations with "using the great United States market as a means to further their own social, political, and economic aspirations at our expense" through the export of large tonnages to the United States "at whatever price is necessary to get an order."²⁸⁵ "The foreign steel

tioned the International Trade Commission to restrain foreign competition in specialty steels. See Statement of Allegheny Ludlum before the International Trade Commission (1977). Appearing before the House subcommittee in 1978, the Union's Mr. Sheehan declared that "President McBride of the Steelworkers, and Mr. Speer, of the American Iron and Steel Institute, are jointly seeking from the Committee legislative support for an international steel sector arrangement." *Vanik Hearings* (1978), *infra* note 290, at 107. "We have recently submitted to the Department of Labor's Steel Sector Advisory Committee the joint union-industry proposal that there be no reduction of steel tariffs unless an international safeguard mechanism be developed," Mr. Sheehan explained. *Id.*

A statement jointly issued by the Union and the American Iron and Steel Institute in 1978 cited "the serious nature of the worldwide steel crisis and the need for sector negotiations leading to the establishment of an international mechanism providing prompt and effective relief from market disruption," while urging that "tariff cuts be made contingent upon the achievement of a multilateral agreement leading to long-term resolution of world steel problems"—a proposal that compelled Congressman Gibbons to remark that "that translates into a world cartel on steel." *Vanik Hearings* (1978), *infra* note 290, at 113, 119. Similarly, the Labor-Management Committee for Fair Foreign Competition—comprising "24 companies and unions having offices or facilities in the Western steel market"—was established in 1970 and, in 1977, "brought to the attention of the [International Trade Commission] the critical conditions of the western steel industry" in calling for restraint of foreign competition. *Vanik Hearings* (1980), *infra* note 291, at 71-72.

285. *Steel Imports: Hearings Before the Senate Comm. on Finance*, 89th Cong., 2d Sess. 269 (1966) [hereinafter cited as *Long Hearings* (1966)].

producer," Mr. Roche asserted, "functions under an economic system in which he feels obligated to maintain the highest practicable operating level regardless of his home market conditions."²⁸⁶

The chairman of Armco Steel, Mr. C. William Verity, argued in 1973 before the House Ways and Means Committee that "production costs are not the determining factor in steel export prices of foreign producers." Mr. Verity also asserted that foreign producers frequently "price the product to get into our market in order to achieve domestic economic objectives, such as inflow of dollars, improved balance of payments, or maintenance of full employment of their steel mills."²⁸⁷ Said Mr. Roger S. Ahlbrandt, spokesman for the specialty metals industry and chairman of Allegheny Ludlum:

Politico-economic policies of Western Europe, as a whole, and Japan have been designed to achieve continuous investment; dependability of raw material supply, and a maximization of foreign currency earnings for the industry by public subsidy or ownership; trade protection and export incentives; cartelization under public guidance; maintenance of undervalued currencies; and prohibition or effective disincentives, via non-tariff barriers, to hinder significant investment or import penetration of their domestic steel markets by American producers.²⁸⁸

"Consequently," Mr. Ahlbrandt concluded, "they are better armed to 'go for the jugular' . . . as their national policies dictate . . ."²⁸⁹

"We operate in a world market where over 70 percent of the output is produced in facilities which are government owned or controlled," the chairman of the American Iron and Steel Institute reiterated before the Senate Finance Committee in 1974. Therefore, "we must have adequate safeguards against floods of imports coming in at very low prices supported by other governments to further their own political and economic policies."²⁹⁰

286. *Id.* at 271. See also *Import Quotas Legislation: Hearings Before the Senate Comm. on Finance*, 90th Cong., 2d Sess., pt. 2, 839 (1967) [hereinafter cited as *Long Hearings* (1967)]; American Iron and Steel Institute, Background Memorandum on American Iron and Steel Institute Steel Import Policy, 5, 7 (1967) [hereinafter cited as *AISI Background Memo*].

287. *Trade Reform: Hearings Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess., pt. 12, 3965 (1973) [hereinafter cited as *Mills Hearings* (1973)].

288. *Id.* at 3974.

289. *Id.*

290. *Trade Reform Act of 1973: Hearings on H.R. 10710 Before the Senate Comm. on Finance*, 93d Cong., 2d Sess., pt. 4, 1081-82 (1974) [hereinafter cited as *Long Hearings* (1974)]. See also *Administration's Comprehensive Program For the Steel Industry: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 78 (1978) (statement of Edgar B. Speer, Chairman, American Iron and Steel Institute); *id.* at 172 (statement of William H. Knoell, President, Cyclops Corp.); *id.* at 177 (testimony of Roger Regelbrugge, President, Korf Industries) [hereinafter cited as *Vanik Hearings* (1978)].

In 1979, the American Iron and Steel Institute retraced what had become a well-worn path. Testifying before the House Subcommittee on Trade, the president of the AISI, Mr. Robert Peabody, argued once more that "[i]n most foreign steel producing countries, the steel industry is an instrument of national and social policy. Steel has been exported at almost any price in order to maintain employment."²⁹¹ "The facts are clear," the president of Allegheny Ludlum, Mr. Richard P. Simmons, asserted before the House Subcommittee on Economic Development in late 1981; "[w]e are unwilling combatants in a trade war, initiated by other nations to serve their own political, social, and economic purposes." "The losers," Mr. Simmons warned, "will be all of us."²⁹²

Spokesmen for the United Steelworkers wholeheartedly supported management. "[M]ost of these [steel exporting] countries," the Union asserted in congressional testimony on steel imports in 1966, "have social practices which forbid or hinder lay-offs in times of reduced demands. So production schedules must be maintained. And the excess must be disposed of somehow, even at distress prices."²⁹³ Foreign producers, Union officials insisted, "are propelled by a compulsive urge to maintain production by expanding their share of the export market through drastic price sacrifices."²⁹⁴

The Union reiterated this argument in its 1977 testimony before the House Subcommittee on Trade: "Imports are not only a function of productivity, wage rates, and technological innovation. To a growing extent they are also a function of social policies in foreign producing nations which are designed to insulate the foreign producers from the trauma of economic fluctuations."²⁹⁵ "Social obli-

291. *Problems in U.S. Steel Market: Field Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 110 (1980) [hereinafter cited as *Vanik Hearings* (1980)].

292. *Economic Health of the Steel Industry and the Relationship of Steel to Other Sectors of the Economy: Hearing Before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 99 (1982) [hereinafter cited as *Oberstar Hearings*].

293. *Impact of Imports and Exports on American Labor: Hearings on H.R. 16,831 and H.R. 17,248 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 2d Sess. 201 (1967) (statement of United Steelworkers) [hereinafter cited as *Dent Hearings*]. The Union recognized that unilateral restriction of steel imports by the United States would invite corresponding exclusion of U.S. steel abroad. Thus, the Steelworkers called for an international, multilateral agreement on dumping. "Dumping," according to the Union's suggested definition, would occur whenever exports were priced below "going prices" in the markets receiving them—a definition which, if adopted, would effectively eliminate price competition. *Id.* at 201-02.

294. *Long Hearings* (1967), *supra* note 286, at 890 (statement of Joseph P. Molony, Vice President, United Steelworkers).

295. *World Steel Trade: Current Trends and Structural Problems: Hearing Before*

gations to workers developed by legislation . . . and economic commitments to investments by foreign governments," the Union's representative, Mr. Sheehan, argued, "fuel their drive for exports."²⁹⁶ "American steelworkers and steel companies," the Union contended, "are, therefore, faced with a competing social policy in addition to market economic competition."²⁹⁷ "The consequences of such an economic-social policy cannot be counter-balanced by pure competition in the American marketplace," the steelworkers concluded.²⁹⁸

Union representatives returned to this argument again in 1978. A policy statement on jobs and steel imports declared:

We have not lost our markets to foreign producers who can sell in the American market at lower cost than American producers. Rather, we are losing our markets to steel dumped in the United States at prices far below what it costs to produce that steel in foreign mills. Foreign nations are exporting their unemployment to the United States by means of government loans, subsidies, and tax concessions which enable their steel mills to keep producing and selling to American consumers regardless of whether they make a profit, or even break even.²⁹⁹

"All too frequently," Steelworker president McBride lamented before the House Subcommittee on Economic Development in 1981, "our trading partners pursue social policies to protect employment and capital, to the detriment of our workers and businesses."³⁰⁰ "Unless we conduct ourselves in such a way as to deal with the problems other countries create for us," warned Mr. McBride, "it seems to me we are not going to be able to deal with the problems successfully."³⁰¹

2. *Diversion of World Exports to the Unprotected U.S. Market*

Steel companies and steel workers—like their colleagues in the automobile industry—also supported their demand for protection by pointing to allegedly ubiquitous protectionism abroad which, they charged, concentrated the full force of growing world steel exports on a large and unprotected American market. Underlying the problem of foreign steel exports to the United States, they contended, was a substantial, chronic, excess steel-making capacity

the Subcomm. on Trade of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 314 (1977) (statement of Lloyd McBride, President, United Steelworkers) [hereinafter cited as *Vanik Hearings* (1977)].

296. *Id.* at 307 (statement of Jack Sheehan, Legislative Director, United Steelworkers).

297. *Id.* at 312 (statement of Lloyd McBride, President, United Steelworkers).

298. *Id.*

299. *Vanik Hearings* (1978), *supra* note 290, at 109 (testimony of John J. Sheehan, Legislative Director, United Steelworkers).

300. *Oberstar Hearings*, *supra* note 292, at 27.

301. *Id.* at 40.

abroad. They claimed that this excessive capacity was due to two foreign governmental policies: industrialized nations have sought to maintain high levels of employment in their home markets; while developing countries have sought to invest in new steel capacity. Protection of the U.S. market, company and union spokesmen reasoned, not only would be equitable, but would also deter "reckless" capacity expansion abroad.

As early as 1966, AISI president Roche warned the Senate Finance Committee that "we should expect that imports will continue to be sold in increasing volume at whatever prices they will bring in the world's largest and freest market—the United States."³⁰² The following year, AISI Chairman Worthington pressed the argument at a congressional breakfast sponsored by his trade association: "America is a prime target for these exports because the steel market in the United States is not only the largest and most diversified in the world—it is also the most open and easily accessible in the world."³⁰³ As a result, he argued, "the United States market is thus being used by foreign mills as a kind of 'Bargain Basement' in which to dispose of their surplus production."³⁰⁴ AISI's president, Mr. Roche, reiterated the argument in a 1968 address to the Economic Club of Detroit, insisting that the "United States has been the nation most adversely affected by the growth in free world surplus capacity" because, *inter alia*, "this country has fewer restrictions on steel imports than any other country."³⁰⁵

In 1977, the chairman of Armco Steel, Mr. Verity, warned of "a secret arrangement whereby the Japanese agreed to limit exports to Europe. The result was a drastic steel trade diversion by the Japanese from Europe to the United States."³⁰⁶ The following year, Mr. Speer of the AISI, repeated charges "that a cartel arrangement between the European Community and Japan had

302. *Long Hearings* (1966), *supra* note 285, at 273.

303. Text of speech by L.B. Worthington, Chairman, American Iron and Steel Institute, at Second Annual AISI Public Affairs Conference Congressional Breakfast, Washington, at 7 (1967) [hereinafter cited as Congressional Breakfast Address].

304. *Id.* at 8. See also *Time For A New Look at Foreign Trade*, address by R. Blough, Chairman of the Board, United States Steel Corp., before joint dinner meeting of the Commerce and Industry Association of New York, and World Trade Club, at 10 (1967).

305. Detroit Economic Club Address, *supra* note 284, at 6. See also *Long Hearings* (1974), *supra* note 290, at 1081 (statement of Stewart S. Cort, Chairman, American Iron and Steel Institute); *Tariff and Trade Proposals: Hearings Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess., pt. 6, 1756 (1970) (statement of George A. Stinson, Chairman, American Iron and Steel Institute) [hereinafter cited as *Mills Hearings* (1970)].

306. *Vanik Hearings* (1977), *supra* note 295, at 317.

caused a substantial amount of Japanese steel to be directed into the United States, rather than to European markets."³⁰⁷ Again in 1979, the charge was trumpeted before yet another congressional committee:

Failure to deal adequately with the Japanese- European cartel has led, as predicted, to a proliferation of similar arrangements. Today, bilateral agreements exist between Europe and 18 different nations. The central feature of these agreements is a quantitative restriction on steel exports to the European Community. This limitation applies not just to overall deliveries in Europe, but on a product-by-product and region-by-region basis, with shipments being phased over time.

In addition, the signatories are committed to observe Community price lists, less a specified percentage. In the case of developing countries such as Brazil, South Africa, and South Korea, for instance, the delivered price may not be less than 6 percent below Community list prices for carbon steel products.

It should come as no surprise, therefore, that these same nations have significantly increased exports to the United States.³⁰⁸

While management was delegated the primary responsibility for making this argument, organized labor lent its support when needed. "With other markets thus insulated," Steelworker president McBride contended in 1977 before the House Subcommittee on Trade, "the relatively bare U.S. marketplace acts as a lightening rod and we are forced to absorb the displaced trauma."³⁰⁹ At a news conference jointly convened by the Steelworkers and Jones & Laughlin Steel in 1977, Steelworker president McBride agreed with management's charge of collusion between Japan and European producers: "[the Japanese] have agreed with the European Common Market nations to a quota system," asserted Mr. McBride; "[i]t leaves only one nation in the world for them to send their steel to and that is to the United States."³¹⁰ "While the EEC benefited," Mr. McBride once again charged in 1981 before a House subcommittee, "we in the U.S. bore the brunt of their restrictive policies."³¹¹ Instead of protecting our national interests, the Union president admonished committee members, "[o]ur government appears to be more interested in being an island of free trade in a sea of restrictions, protectionism, and subsidies."³¹²

Both management and union agreed that excess capacity was

307. *Vanik Hearings* (1978), *supra* note 290, at 80.

308. *Vanik Hearings* (1980), *supra* note 291, at 50 (statement of L. Frederick Gieg, Jr., Vice President and General Manager, Western Steel Division, United States Steel Corp.).

309. *Vanik Hearings* (1977), *supra* note 295, at 314. See also *Mills Hearings* (1970), *supra* note 305, at 1826 (statement of John J. Sheehan, Legislative Director, United Steelworkers).

310. *Vanik Hearings* (1977), *supra* note 295, at 314.

311. *Oberstar Hearings*, *supra* note 292, at 27.

312. *Id.*

the crux of the problem. "Steel mill products are not being imported into the United States primarily because there is a great need for them here," the president of the American Iron and Steel Institute contended before the Senate Finance Committee in 1966, "but rather because foreign production is in excess of home market needs."³¹³ Moreover, the problem was likely to worsen owing to the policies of developing nations:

The ever-growing excessive foreign steel capacity and production, the results of which plague the American steel industry, is augmented by the race in many less-developed countries to attain self-sufficiency in steel production. The less-developed countries have also built steel capacity at a rapid rate for the purpose of improving their own balance of payments situation and also as a status symbol irrespective of domestic demand.³¹⁴

The "excess capacity" theme was repeated in a 1967 background memorandum delineating AISI's import policy. "Present imbalances in world steel trade are caused primarily by the large excess of capacity," the memorandum declared:

What is more, planned expansion for the future will certainly not diminish and may, in fact, aggravate the problem. A major part of this new capacity was installed in Western Europe and Japan after World War II—much of it within the last five years—and some of it has been built expressly for export purposes.

The continually growing excess of steelmaking capacity in industrialized nations abroad is further complicated by the construction of steel-making plants in many developing countries. In the last decade some 20 countries have joined the ranks of the steel producers for the first time and more are coming.³¹⁵

Indeed, AISI supported its demand for steel tariffs by suggesting that they "would encourage other nations to fit their steelmaking plans more realistically to world requirements."³¹⁶

In 1973, the AISI chairman, Mr. Cort, again cited "[c]hronic excesses of foreign supply over foreign domestic requirements" as a major cause of the "steel import problems."³¹⁷ Another AISI spokesman, Armco's Mr. Verity, underscored what he construed as the ominous and economically irrational trends in developing countries. "They have been disruptive to the U.S. market," Mr.

313. *Long Hearings* (1966), *supra* note 285, at 269 (statement of John P. Roche). "Much of this new capacity was installed in Western Europe and Japan after World War II," Mr. Roche contended, charging "some of it admittedly has been installed for the express purpose of exploiting export markets, particularly the United States." *Id.* at 272.

314. *Id.* Mr. Roche warned that "planned expansion for the future will not diminish and may, in fact, aggravate the problem." *Id.* See also *Long Hearings* (1967), *supra* note 286, at 828 (statement of John P. Roche); Congressional Breakfast Address, *supra* note 303, at 7.

315. *AISI Background Memo*, *supra* note 286, at 7-8.

316. *Id.* at 2-3. See also Detroit Economic Club Address, *supra* note 284, at 6.

317. *Mills Hearings* (1973), *supra* note 287, at 3961-62.

Verity concluded, "and should not be encouraged."³¹⁸ Likewise, a spokesman for the specialty metals industry warned of "unregulated and unrestrained foreign investment which is producing over-capacity in specialty steels."³¹⁹ By 1978, the AISI characterized such alleged excess capacity as not merely chronic, but "deliberate."³²⁰ In 1981, the president of the Jones & Laughlin Steel Corporation opined that "as long as we have this tremendous European overcapacity that is largely government-owned and government-subsidized, it seems to me quotas against European steel are a peculiarly apt tactic."³²¹

Here, also, Steelworker officials concurred with management. "As world steelmaking capacity rose," the Union's Mr. Moloney told the Senate Finance Committee in 1967, "steel-producing nations, with insufficient domestic demand, turned to foreign markets to unload production from excess capacity."³²² "I emphasize again," Mr. Moloney said, "there is an extraordinary over-capacity in steel production . . . [and it is] precisely this acceleration of excess capacity, which has outstripped world demand, that has caused pronounced repercussions upon the American steel industry."³²³ Like management, he suggested that "limitations of access to the American market may decrease the tendency for overexpansion of world capacity."³²⁴

Even a boom market is not likely to solve, and may in fact exacerbate, the excess capacity problem, Steelworkers' Mr. Sheehan told the House Ways and Means Committee in 1970:

The overseas boom, which has given us brief relief from steel imports, will not last indefinitely. In fact, because part of this steel consumption boom has involved a vast expansion in overseas capacity, rising pressure from foreign imports is inevitable as the overseas boom subsides

Worse: Because of the high current demand, most foreign producers are expanding at a feverish rate.³²⁵

"So return to normalcy," Mr. Sheehan warned, "means return to excess capacity."³²⁶

318. *Id.* at 3968.

319. *Id.* at 3973 (statement of Roger S. Ahlbrandt).

320. *Vanik Hearings* (1978), *supra* note 290, at 80 (statement of Edgar B. Speer, Chairman, American Iron and Steel Institute).

321. *Oberstar Hearings*, *supra* note 292, at 12 (testimony of Thomas C. Graham).

322. *Long Hearings* (1967), *supra* note 286, at 888. *See also Dent Hearings*, *supra* note 293, at 201 (statement of United Steelworkers).

323. *Long Hearings* (1967), *supra* note 286, at 889-90.

324. *Id.* at 893.

325. *Mills Hearings* (1970), *supra* note 305, at 1826.

326. *Id.* In this respect, the Union radically reversed a position it had earlier adopted. Testifying before the Senate Finance Committee in 1966, the Union maintained that, "as far as employment in the steel industry is concerned, the rate of national industrial activity is much more important than the balance of imports and exports. A prosperous year will increase employment of

Throughout the 1970's, the Union held fast to the above diagnosis of the problem. In diverse forums, it repeatedly maintained that "unreasonable imports" result from "international excess steelmaking capacity"; that "excess steel capacity will overhang the world marketplace for several years"; and therefore, that an "international mechanism is needed to achieve quick relief under agreed upon rules as a long term solution to the problems of worldwide over-capacity" ³²⁷

3. *Need for Breathing Space to Make Adjustments*

Finally, steel companies and the Union argued that foreign competition deterred sorely-needed domestic investment. Only with suitable protection by the government, they warned, would modernization of the U.S. steel industry proceed. Once again, the argument paralleled that of the auto industry.

Testifying before the House Ways and Means Committee in 1973, the American Iron and Steel Institute declared that an "adequate guarantee against both continuing and spasmodic disruptive increases in imports stimulated by the domestic policies of other countries is essential to the health of both the economy and the industry" and warned committee members that the "threat of such increases is a serious deterrent to expansion of capacity in this country in view of the large sums of capital and the long planning and construction time involved."³²⁸ A spokesman for the specialty steel industry added that "American producers and U.S. capital markets are already reluctant to make future planned and required investments and this reluctance promises to continue."³²⁹

When next it resurfaced, the argument underscored the importance of "breathing space." "During the long lead time, 5 to 8 years, individual steel companies will need to plan and carry out the needed modernization of their plant and equipment," AISI president Peabody contended before the House Subcommittee on Trade, "the Government must take action to assure that imports do not continue to disrupt our domestic markets through either

steelworkers far greater than a surge of imports will reduce such employment." *Long Hearings* (1966), *supra* note 285, at 237 (statement of Meyer Bernstein, International Affairs Director, United Steelworkers).

327. *Vanik Hearings* (1978), *supra* note 290, at 106, 113-14.

328. *Mills Hearings* (1973), *supra* note 287, at 3963 (statement of Stewart S. Cort, Chairman, American Iron and Steel Institute).

329. *Id.* at 3973 (statement of Roger S. Ahlbrandt, American Specialty Metals Industry). See also *Long Hearings* (1974), *supra* note 290, at 1057 (statement of Mark T. Anthony, Vice President and General Manager, Kaiser Steel Corp.); *Id.* at 1081-82 (statement of Stewart S. Cort, Chairman, American Iron and Steel Institute).

quantity or price."³³⁰ "Only with assurances of this type," he warned, "will our competitive market system commit sufficient capital to steel on the scale required to maintain a modern industry in this country."³³¹ Similarly, a United States Steel Corporation spokesman urged "a limitation for some temporary period in which the domestic industry can regain its strength."³³²

Union officials, again, dutifully reiterated and re-emphasized management's arguments in a succession of public forums. In 1970, the Union called for an extension of voluntary restraint agreements "or for legislative protection to accomplish one of the stated purposes for the restraint, namely, to provide a lead period for the industry to modernize."³³³ Questioned about the conglomerate diversification of Big Steel, the Union's representative, Mr. Sheehan, argued that labor had joined with management on import protection in order to assure that steel earnings would be reinvested in steel facilities:

One of the reasons that industry gives for its need to diversify or to conglomerate is the fact that their share of our expanding market was being too rapidly seized by foreign imports. So the union joined with the industry and said, "Well let us guarantee or let us moderate that share of the market so as to keep investments of the steel industry in the steel industry, itself."³³⁴

330. *Vanik Hearings* (1980), *supra* note 291, at 110.

331. *Id.* at 111.

332. *Id.* at 54 (testimony of John Mangan, Counsel, Western Steel Division, United States Steel Corp.).

333. *Mills Hearings* (1970), *supra* note 305, at 1827 (statement of John J. Sheehan, Legislative Director, United Steelworkers).

334. *Id.* at 1829. Even the Union, however, could scarcely suppress its alarm at U.S. Steel's recent multi-billion dollar acquisition of Marathon Oil:

When reviewing the status of the steel industry, there is one matter that has drawn particular attention recently, both among those in the private and public sectors. Repeatedly, in these past two weeks, we have been asked for our comments on the efforts by U.S. Steel Corporation, the largest employer of our members, to merge with Marathon Oil. Corporate mergers are not new to the American scene. Conglomerate enterprise raises a host of public and private policy issues, and extends well beyond the mandate of this Subcommittee. We do not see such ventures as compatible with the need for reindustrializing the American enterprise system. Again, it is merely a transfer of wealth made possible by the liberalization of tax laws for corporations, and the willingness of corporations to use capital and debt to finance non-productive exchanges of assets.

With respect to U.S. Steel's multi-billion dollar venture, our own preference is obvious. There is a vital need for modernization of steel facilities. Through modernization we can improve efficiency and enhance the competitive structure of the U.S. steel industry. In this way jobs can be preserved and product markets can be saved or retrieved.

Not even U.S. Steel can boast of having a full range of modern technology in its mills. Unless or until the Corporation undertakes a

Mr. I.W. Abel, president of the Union, reiterated the argument in his testimony before the Senate Finance Committee in 1973:

You do not build a steel mill for \$1 million. It now runs \$500 million to build a modern integrated steel mill. This is just an awful lot of capital to raise and to invest and, when there is the danger of foreign competition taking all of the business from you, it is hard to raise that kind of money.³³⁵

Union spokesmen insisted, as had management, that import protection was essential if modernization was to occur. "We need immediate relief," USW president McBride urged in 1977, "so that the industry can undertake the task of modernization without having its domestic markets stolen during the process."³³⁶ Citing the "desperate need to modernize some of the older mills, particularly in older steel communities," a 1977 union policy statement argued that "imports have not only cost us jobs, they have caused so much idle capacity in our mills, in most of the last 15 years, that our industry has had no incentive to modernize and expand, and many companies have lacked the capital to modernize."³³⁷

Finally, in 1980, in testimony before the International Trade Commission, management and union agreed that "disruptive" steel imports have a deleterious effect on "the rate of modernization, the addition of new capacity, and the ability of our industry to generate necessary investment capital," and that such imports constitute "a significant discouragement to capital investment."³³⁸

full modernization program, it risks the goodwill and trust of its employees and of those outside the industry who are convinced that a revitalization of our steel base in the U.S. is feasible.

Oberstar Hearings, supra note 292, at 27 (statement of Lloyd McBride, President, United Steelworkers).

335. *Long Hearings* (1974), *supra* note 290, at 1340.

336. *Vanik Hearings* (1977), *supra* note 295, at 313.

337. *Vanik Hearings* (1978), *supra* note 290, at 109 (testimony of John J. Sheehan, Legislative Director, United Steelworkers).

338. UNITED STEEL WORKERS, THE IMPACT OF STEEL IMPORTS ON DOMESTIC EMPLOYMENT, U.S. INTERNATIONAL TRADE COMMISSION 4 (1980) (testimony of John J. Sheehan, Legislative Director). *See also Oberstar Hearings, supra* note 292, at 28 (statement of Lloyd McBride, President, United Steelworkers).

Two additional points should be mentioned in this context. First, Union concerns regarding investment and modernization are not limited solely to the alleged financial needs of the companies. Import competition, of course, undermines the Union's bargaining power—a phenomenon graphically attested in a 1967 position paper distributed by the Steelworkers:

[Imported steel] is resented all the more, because it is a kind of scab steel that is coming in. It's steel which weakened our collective bargaining position and interferes with our negotiation of satisfactory agreements. Foreign steel makes a breakdown in contract negotiation a kind of suicide pact, for a full-scale strike, such as we had in 1959, could easily turn the major part of the American market over to overseas producers.

4. *Summary: Steel*

As shown above, power wielded by firms in an oligopolistic output market conjoined with power of organized labor on the input side to demand governmental neutralization of foreign competition. This exercise of coalescing vertical power has been successful in obtaining a succession of "voluntary" restraints, orderly marketing agreements, and price floors to constrain and restrain imports.³³⁹

Most recently, the industry has seized upon a compliant administration and the threat of formal complaints before government agencies as the tools with which to forge a world steel cartel. In exchange for American producers' withdrawal of more than forty trade complaints, Common Market producers collectively consented in late 1982 to submit to detailed quantitative restrictions on their exports of a broad range of products to the United States. These restrictions include limiting their combined share of U.S. sales of carbon and alloy steel products to 5.44 percent; pipe and tube products, 5.9 percent; hot rolled sheet and strip, 6.81 percent; cold rolled sheet, 5.11 percent; plates, 5.36 percent; structurals, 9.91 percent; wire rod, 4.29 percent; hot rolled bars, 2.38 percent; coated sheet, 3.27 percent; tin plate, 2.2 percent; rails, 8.9 percent; and sheet piping, 21.85 percent.³⁴⁰ And, as the chairman of U.S. Steel was quick to point out, this agreement "addressed only 30% of our problems,"³⁴¹ thereby serving notice that the industry would soon demand similar arrangements with Japanese and other producers accounting for the remainder of U.S. imports.³⁴² In response, EEC countries announced that, in light of restraints on their exports to the U.S., they too would move to restrict their imports from other countries.³⁴³ Further, the Reagan administration—attuned to the dismay expressed by Steelworker president McBride at the exclusion of specialty steels from the EEC compact—recently negotiated a parallel, four-year arrangement in this field as well.³⁴⁴ With regard to this latter development, a prominent business periodical was moved to remark that "seldom does an ac-

United Steelworkers of America, *The Import Problem in Steel 4* (1970) (position paper distributed at AFL-CIO Emergency Trade Conference).

Second, the Union has not succeeded in squelching all dissent. "The American steel industry's sick because it has failed to modernize," Ron Wiesen of Local 1253 testified in 1981, concluding that "[i]mported steel may be a symptom, but it is not the disease." *Oberstar Hearings*, *supra* note 292, at 264.

339. Adams, *supra* note 270, at 38-46.

340. Wall St. J., Oct. 22, 1982, at 3, col. 1.

341. Bus. Wk., Nov. 8, 1982, at 42, col. 2.

342. Wall St. J., *supra* note 340, at 3, col. 1.

343. N. Y. Times, Oct. 22, 1982, at 32, col. 1.

344. *Id.* at 36, col. 1; Wall St. J., July 6, 1983, at 3, col. 1.

tion help so few, hurt so many, and anger nearly everyone."³⁴⁵

In this industry, then, coalescing vertical power has done more than achieve protection from competition for a domestic oligopoly. It may yet become the catalyst for cartelization of world trade in steel.³⁴⁶

IV. SOME ECONOMIC EFFECTS OF COALESCING POWER

The virulence with which management and labor have fought for protectionism in the public as well as private sector affords a striking illustration of tacit vertical collusion and coalescing power in action. It also reflects the common perception by both management and labor that immunity from competition confers private benefits on both groups and, therefore, that government protection from competition is in their rational—albeit, short-run—mutual self-interest. A brief review of the benefits derived by labor and management from protectionism explains the assiduity with which they have mobilized their coalescing power in the political arena. It also gives some indication of the social costs resulting from the exercise of coalescing power.

A. Airline Industry

In the airline industry, for example, Civil Aeronautics Board (CAB) regulation has given management protection against competitive entry and competitive price cutting.³⁴⁷ While that protection did not yield abnormal profits (because carrier energy was diverted into costlier service such as more flights, more planes, and more frills),³⁴⁸ it did give management the freedom to lead the quiet life and the discretion to charge exorbitant fares. This is underscored by a comparison of fares and service in California and Texas—where entry is possible and price competition permitted—with CAB controlled rates on interstate flights. Thus, Table 1 shows that in 1976 a traveler between Los Angeles and San Fran-

345. FORTUNE, Aug. 8, 1983, at 55.

346. This is not to say that the coalescence between management and organized labor is at all times perfectly complete. For example, the U.S. Steel Corporation's recent announcement of the possibility that it might import slab steel from abroad for final finishing domestically was denounced by the Steelworkers Union. Wall St. J., June 27, 1983, at 4, col. 1. Yet, by fanning the Union's protectionist fever, this development may very well serve to further solidify the management-labor bloc against import competition.

347. *Kennedy Report* (1975), *supra* note 17, at 77-141.

348. *Id.* at 3.

TABLE 1
COMPARISON BETWEEN INTERSTATE AND INTRASTATE FARES†

City-pair	Fare ¹	Miles ²	Passengers transported ³	Block time ⁴
*Los Angeles-San Francisco	\$18.75	338	57,483,419	:55
Chicago-Minneapolis	38.89	339	1,424,621	1:06
New York-Pittsburgh	37.96	335	975,344	1:05
*Los Angeles-San Diego	10.10	109	2,518,701	:30
*San Francisco-Sacramento	9.73	86	505,148	:30
Portland-Seattle	22.22	129	1,217,381	:35
*Los Angeles-Sacramento	20.47	373	915,077	1:00
Boston-Washington	41.67	399	981,456	1:07
Cleveland-New York	43.52	416	910,270	1:25
Chicago-Kansas City	37.96	404	813,235	1:10
Chicago-Pittsburgh	41.67	413	972,543	1:23
*San Francisco-San Diego	26.21	456	399,639	1:05
Detroit-Philadelphia	45.37	454	313,439	1:25
Dallas/Fort Worth-New Orleans	44.44	442	522,223	1:15
New York-Raleigh/Durham	44.44	423	267,272	1:15
Columbus-New York	47.22	478	294,682	1:18
*Dallas/Fort Worth-Houston	23.15/13.89	239	1,620,000	:50
*Dallas/Fort Worth-San Antonio . .	23.15/13.89	248	980,000	:50
Las Vegas-Los Angeles	28.70	236	1,181,466	:50
Chicago-St. Louis	29.63	258	953,604	:50
*Houston-San Antonio	23.15/13.89	191	490,000	:40
Boston-New York	24.07	191	2,493,882	:50
Reno-San Francisco	25.93	192	312,811	:46
Miami-Orlando	25.93	193	514,475	:40

† Reprinted from *Kennedy Report* (1975), *supra* note 17, at 41.

* Intrastate market.

¹ Interstate markets: Coach fare, Intrastate markets; Economy fare. Source: "Official Airline Guide," Feb. 1, 1975.

² Source: Book of Official CAB Route Maps and Airport-to-Airport Mileages. Most entries are volume-weighted averages of two or more airport-to-airport mileages.

³ Source: Interstate markets—CAB service segment data, special computer tabulation, reporting period from July 1, 1973 to June 30, 1974. Intrastate markets—California PUC form 1504 report, reporting period from Apr. 1, 1973 to Mar. 31, 1974.

⁴ Average scheduled flight time. Source: Official Airline Guide, Feb. 1, 1975.

⁵ California markets include traffic to and from suburban airports. Los Angeles-San Francisco includes 12 airport-pairs for example:

LAX-SFO	18.75	338	2,984,985	59.0	:55
ONT-SFO	20.47	363	334,208	60.2	:55

cisco (an intrastate, unregulated route) could fly 338 miles for \$18.75 while a traveler between Chicago and Minneapolis (a CAB regulated route) had to pay \$38.89 for roughly the same distance. Similarly, a traveler between Dallas and Houston (an intrastate, unregulated route) had to pay a maximum of \$23.15 for 239 miles while a traveler between Las Vegas and Los Angeles (a CAB regulated route) paid \$28.70 for 236 miles.

As Table 1 shows, fares charged in Texas and California in the absence of regulation were approximately 50 to 70 percent of the CAB controlled fares for similar distances and kinds of routes. As the Senate Subcommittee on Administrative Practice and Procedures observed, "[e]xperience in California and Texas suggests that less regulation and more open competition would bring about safe air service with substantially lower fares, more frequent flights, and fewer frills."³⁴⁹ Obviously airline management saw that prospect as a threat to its vested interests.

Also threatened by the prospect of deregulation was organized labor which found security under the protective umbrella that CAB regulation provided for the airlines. Regulation permitted the carriers not only to charge exorbitant fares but to accede to persistent wage escalation for various categories of airline employees represented by the Airline Pilots Association, the Transport Workers Union, and the Machinists. In 1963, as Table 2 shows, airline employees as a group received an average salary of \$7,781, i.e., 1.7 times more than the \$4,625 average earned by all workers in the economy. By 1976, the average salary for airline employees had risen to \$21,500, or more than double the level of workers generally. The rate of increase over the 1963-1976 period ranged from 168 to 217 percent for airline workers in contrast to 117 percent for workers generally.

TABLE 2

LEVEL AND TRENDS IN DOMESTIC AIRLINE WAGES†

	All Workers ^a	All Airline Employees	Pilots and Copilots	Mechanics
Average annual salary				
1963	\$ 4,625	\$ 7,781	\$18,272	\$ 7,434
1976	10,027	21,500	49,000	23,600
Increase, 1963-1976	117%	176%	168%	217%

† Sources: *Economic Report of the President* 256, 268 (1982) (all workers); *Statistical Abstracts of the U.S.* (1965 & 1978) (airline data).

^a Total wage income divided by total employment.

Clearly, collective bargaining in a government regulated industry, protected from "unbridled" competition, yielded succulent fruits for labor—as well as for management.

B. Trucking Industry

In trucking, the same pattern is observable. Interstate Commerce Commission (ICC) regulation has given management protection against competitive entry and competitive price cutting. As a result, the ICC granted new operating authority only where the proposed service would not divert traffic from existing carriers.³⁵⁰ Also, the ICC permitted and, indeed, encouraged trucking firms to join rate bureaus to fix rates on particular shipments, and frequently suspended the lower rates filed by independent truckers.³⁵¹ Not surprisingly, the net effect of ICC regulation has been to raise rates above the level which would prevail in the absence of regulation.

A number of recent studies document this conclusion.³⁵² One study, for example, found that average revenue per ton-mile was 6.73 percent lower in "unregulated" Canadian provinces than in regulated provinces and in the United States.³⁵³ Another study—in what can be considered a controlled "before and after" experiment—compared trucking rates for frozen fruits and vegetables when they were classified as "regulated" commodities to trucking rates for the same commodities after they were reclassified by the courts as having "exempt" status. Deregulating the carriage of these commodities resulted in a dramatic price decline: 12 to 59 percent in particular markets for fresh and frozen poultry and a weighted average of 19 percent for frozen fruits and vegetables.³⁵⁴ Yet a third study, based on a survey by the National Broiler Council, compared the rates on fresh poultry shipped by exempt carri-

350. *Kennedy Report* (1980), *supra* note 17, at 30-31.

351. *Id.* at 80-88.

352. *See, e.g.*, Moore, *The Beneficiaries of Trucking Regulation*, 21 J. L. & ECON. 32 (1978) [hereinafter cited as Moore (1978)]; *Transportation Act of 1972: Hearings Before the Subcomm. on Transportation of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess., pts. 1-3 (1972) [hereinafter cited as *Transportation Hearings*]. *See also* T. MOORE, *TRUCKING REGULATION: LESSONS FROM EUROPE* (American Enterprise Institute-Hoover Policy Studies, 1975).

353. Sloss, *Regulation of Motor Freight Transportation*, 1 BELL J. ECON. & MGMT. SCI. 327 (1970).

354. SNITZLER AND BYRNES, *INTERSTATE TRUCKING OF FROZEN FRUITS AND VEGETABLES UNDER AGRICULTURAL EXEMPTION* (U.S.D.A. Marketing Research Rep. No. 316 (1959)); SNITZLER AND BYRNES, *INTERSTATE TRUCKING OF FRESH AND FROZEN POULTRY UNDER AGRICULTURAL EXEMPTION* (U.S.D.A. Marketing Research Rep. No. 224 (1958)).

ers with rates on cooked poultry shipped by regulated carriers.³⁵⁵ Over the same routes and between the same points, the unregulated rates were found to be some 33 percent less than the regulated rates.³⁵⁶ In short, cartelization under the aegis of government regulation had achieved predictable results.

Also predictable was the impact of trucking regulation on organized labor. Aside from the benefits derived by drivers from the additional mileage covered as a result of "deadhead" hauls and circuitous routes, regulation-unionization seems to have resulted in significant wage increases in the industry. Thus, according to one study summarized in Table 3, compensation paid to drivers was more than 30 percent higher than that of their unregulated counterparts.³⁵⁷

TABLE 3

AVERAGE ANNUAL EMPLOYEES COMPENSATION IN REGULATED AND UNREGULATED TRUCKING (1972)†

	Regulated	Unregulated	Percentage of Regulated over Unregulated
All Class I—Property	\$12,299	\$8,504	44.6
Class I—Property (Revenue \$1 million—\$5 billion)	11,099	8,504	30.5
Class II—Property	10,033	7,566	32.6

† Table reprinted from Moore (1978), *supra* note 352, at 333.

Source: 1 U.S. Bureau of the Census, SC 72-S-7, 1972 Census of Selected Service Industries, tab. 3, at 17 (1973); ICC Transport Statistics in the United States, releases 8 & A (pt. 7, released: Sept. 7, 1972).

A 1973 study indicated that the typical owner-operator (unregulated and not represented by a union) would earn about \$11,125 for a 250-day work year, while the average compensation received by the unionized driver for a regulated Class I intercity hauler of general freight was \$17,249.³⁵⁸ After surveying these and other studies, Thomas G. Moore concluded that:

A conservative estimate of the impact regulation-unionization has on wages of truckers, helpers, and platform workers would therefore be about 50 percent. Some of the evidence suggests the gain could be as large as 55 percent; the most conservative estimate is 37 percent. This implies that

355. *Transportation Hearings*, *supra* note 352.

356. *Id.* at 170.

357. Moore (1978), *supra* note 352, at 32 (quoting U.S. Bureau of Census 1972).

358. D. WYCHOFF & D. MAISTER, *THE OWNER-OPERATOR: INDEPENDENT TRUCKER* 36 (1975) quoted in Moore (1978), *supra* note 352, at 337.

the gains to Teamster members would have been between \$1 billion and \$1.3 billion in 1972.³⁵⁹

When the "rents" received by the owners of ICC certificates and permits (\$1.5 to \$2 billion in 1972) are added to the above figures, it becomes obvious that the stake that management and labor had in continued regulation of the trucking was substantial.³⁶⁰ It meant excess revenues for the industry of about \$3.4 billion in 1972, of which, according to Moore, between 74 and 97 percent constituted monopoly "rents" accruing to capital and labor.³⁶¹

C. Automobile Industry

Since the end of World War II, automobile prices have followed a typical oligopoly pattern—their outstanding characteristics being uniformity and upward rigidity.³⁶² As Table 4 shows, the average retail price of new cars, including imports, increased from \$3,200 in

TABLE 4

NEW CAR PRICES, IMPORT PENETRATION IN THE U.S. AUTOMOBILE MARKET, AND CONSUMER PRICE INDEX†

Year	Average Yearly Retail Prices (dollars)*	Index of Average Retail Prices for New Cars	Market Share of Imported Cars (percent)
1967	\$3,200	100.0	9.3
68	3,240	101.3	10.3
69	3,400	106.3	11.6
70	3,430	107.3	15.2
71	3,730	116.6	15.3
72	3,690	115.3	14.8
73	3,930	122.8	15.4
74	4,390	137.2	15.9
75	4,750	148.4	18.3
76	5,470	170.9	14.8
77	6,120	191.3	18.6
78	6,470	202.2	17.7
79	6,950	217.2	21.9
80	7,530	235.3	26.7
81	8,850	276.6	27.3
82	9,750**	304.7	28.1***

† Price statistics available from National Automobile Dealers Associations; import statistics available from Ward's Automotive Reports.

* includes price of imported cars

** average for first 8 months

*** average for first 10 months

359. Moore (1978), *supra* note 352, at 339.

360. *Id.* at 342.

361. *Id.*

362. See Senate Judiciary Subcomm. on Antitrust and Monopoly, *Administered Prices of Automobiles*, S. Rep. No. 351, 85th Cong., 2d Sess. (1958).

1967 to \$9,750 in the first eight months of 1982, or more than 200 percent.³⁶³ Apparently management was loath to abandon its policy of persistent price escalation in spite of the 1974/75 recession, the 1980/82 depression, and the 200 percent increase of the import share in the U.S. domestic market. Management's belief was that if foreign competition constituted a threat to its market control, the most efficacious cure would be mandatory or "voluntary" import quotas negotiated under the protective benevolence of the federal government. In other words, the preferred solution was protection in the form of governmental restraints on competition.

Organized labor's compensation policy during this period was strikingly parallel to management's pricing policy. Between 1967 and 1980, as Table 5 shows,³⁶⁴ hourly compensation in the motor vehicle industry increased 214 percent compared to a 179 percent increase in manufacturing as a whole; output per worker increased 39 percent compared to 35 percent in manufacturing; unit labor costs increased 127 percent compared to 107 percent in manufacturing.

Charles L. Schultze, a former Chairman of the President's Council of Economic Advisors, summarized the implications of this wage escalation record, stating:

In the mid-1960s hourly employment costs (wages and fringe benefits) in the major auto companies were about 20% above the average for manufacturing industries. Every three years since, the labor contract negotiated between industry and the union has widened the gap. By 1978 wages and fringes at the major auto companies had risen to almost 50% above the all-manufacturing average. Those extra costs were passed on in higher prices.

Finally, in 1979—faced with mounting interest rates, an incipient recession, sharply higher gasoline prices, growing resistance to large American cars and increased imports from Japan—what did the industry do? It negotiated a contract that by 1980 put auto wages and fringes about 60% above the manufacturing average.³⁶⁵

Obviously, the exercise of coalescing power brought consistent short-run gains to both management and labor. But, as one might have predicted, these gains were tenable in the long-run only so long as effective competition could be successfully restrained in the final product market. Hence, as Schultze ruefully observed, "the UAW and the auto industry, calling attention to what is undoubtedly a serious problem of import penetration, are urging the government to validate these gains, and to make possible the price

363. See *supra* Table 4.

364. MICHIGAN FISCAL AND ECONOMIC STRUCTURE 170 (H.E. Brazer ed. 1982) [hereinafter cited as Brazer].

365. Wall St. J., March 20, 1981, at 24, col. 4.

TABLE 5

INDICES OF HOURLY LABOR COMPENSATION, OUTPUT PER EMPLOYEE AND UNIT LABOR COST IN THE MOTOR VEHICLES INDUSTRY AND IN ALL MANUFACTURING IN THE UNITED STATES (1967=100)[†]

YEAR	Compensation		Output Per Worker		Unit Labor Cost	
	Motor Vehicles	All Mfgs.	Motor Vehicles	All Mfgs.	Motor Vehicles	All Mfgs.
1967	100	100	100	100	100	100
1968	107	107	106	104	101	103
1969	113	115	105	105	108	109
1970	122	122	103	105	119	117
1971	139	130	117	112	119	117
1972	148	137	120	117	123	117
1973	159	147	122	123	130	119
1974	178	162	121	121	148	135
1975	200	182	128	124	156	147
1976	218	196	134	129	162	151
1977	243	212	143	133	170	160
1978	265	230	142	134	187	172
1979	284	252	139	135	205	187
1980	314	279	139 ¹	135	227	207

[†] Table reprinted from Brazer, *supra* note 364 at 170.

Notes ¹The statistic in this cell was missing. It was conservatively assumed to remain the same as in 1979 (in line with all manufacturing although by reason of the severe depression in the industry there is reason to believe that it might have been lower.

All figures are rounded, but calculations were made at the first decimal level.

Because of data constraints, the series for all manufacturing applies to all employees, while that for Motor Vehicles applies only to production workers. However, it was possible to compare the output per hour series for all employees and for production workers in the auto industry throughout the entire period: they are almost identical. Likewise, it was possible to compare the hourly compensation series for all employees and for production workers in "all manufacturing" for the last six years: they are very similar.

Sources: The *all manufacturing data* are from the BLS. "International Comparisons of Manufacturing Productivity and Labor Costs," May 20, 1981. For autos, the data are from the BLS. Indices of Output Per Employee (1967=100) in Motor Vehicles and Equipment" and "Estimated Hourly Compensation of Production Workers in the Motor Vehicles and Equipment Industry, 14 countries, 1975-1980." With an adjusted census of manufacturing series going back to 1967.

increases necessary to pay for them, with import protection."³⁶⁶

In short, price/wage escalation, effectuated through the exercise of coalescing power, is possible only in protected markets artificially shielded from the impact of competition.

366. *Id.*

D. Steel Industry

Prior to the burgeoning of steel imports of the 1960's, and the long strike of 1959, the domestic steel industry used its formidable oligopoly power to engineer a persistent increase in steel prices.³⁶⁷ According to the Council of Economic Advisers, these price increases were a principal feature of successive cost-push inflations in the post-World War II period:

Steel prices played an important role in the general price increases of the 1950s. Between 1947 and 1951, the average increase in the price of basic steel products was 9 percent per year, twice the average increase of all wholesale prices. The unique behavior of steel prices was most pronounced in the mid-1950's. While the wholesale price index was falling an average of 0.9 percent annually from 1951 to 1955, the price index for steel was rising an average of 4.8 percent per year. From 1955 to 1958, steel prices were increasing 7.1 percent annually, or almost three times as fast as wholesale prices generally. No other major sector shows a similar record.³⁶⁸

During the 1960's, largely because of significantly intensifying import competition, the upward pressure of steel prices was somewhat attenuated. Between January, 1960 and December, 1968, a period of nine years, the composite steel price index increased 4.1 points—or .45 points per year.³⁶⁹ Starting in January, 1969, however, after the State Department had successfully persuaded the Europeans and Japanese to accept "voluntary" quotas on their sales to the United States (that is, to enter into an informal international steel cartel), imports were cut back drastically and domestic steel prices resumed their pre-1960 climb. In the four years between January, 1969 and December, 1972, the steel price index rose 26.7 points—or 6.67 points per year.³⁷⁰ Stated differently, after the import quotas went into effect, the annual rate of increase in steel prices was fourteen times greater than it had been in the nine years prior thereto. Once again, through the use of coalescing power, management and labor have achieved their foreseeable goal: that is, the development of a protectionist economic climate under which both can thrive at an annual cost to the United States economy variously estimated at between 338 million and 1 billion

367. W. ADAMS, *supra* note 203, at 92-99.

368. COUNCIL OF ECONOMIC ADVISORS, REPORT TO THE PRESIDENT ON STEEL PRICES 8-9 (April 1975).

369. See COMPTROLLER GENERAL OF THE UNITED STATES, ECONOMIC AND FOREIGN POLICY EFFECTS OF VOLUNTARY RESTRAINT AGREEMENTS ON TEXTILES AND STEEL, REPORT B-179, 342 at 23 (1974) [hereinafter cited as COMPTROLLER GENERAL].

370. *Id.*

dollars.³⁷¹

The Trigger Price Mechanism had similar consequences. Its quantitative impact was substantial. On December 7, 1977, one day after the concept of trigger pricing was announced by President Carter, a steel company executive stated that United States steel prices would be increased in the first quarter of 1978. Shortly thereafter, a 5.5 percent increase—reduced from an original 10.5 percent increase—in the domestic price of basic steel products was posted. This was followed by a further price rise of 1.1 percent in April, 1978.³⁷²

On May 10, 1978, the United States Treasury Department announced that it was raising trigger prices by 5.5 percent on sheet, plate, wire, and cold-finished bars; 13.9 percent on angles; 14 percent on reinforcing bars; and 14.5 percent on flat bars.³⁷³ On August 2, the Treasury Department raised the trigger prices by another 4.86 percent, effective October 1, 1978;³⁷⁴ trigger price increases for the calendar year 1978 totalled 10.6 percent.

While domestic steelmakers had raised their list prices by some 9.5 percent as of October 1, 1978, steel buyers reported that the prices they actually had to pay increased by as much as 15 percent because, as the *Wall Street Journal* noted, "last fall's widespread discounting . . . evaporated."³⁷⁵

The inflationary impact on the United States economy was, of course, profound. Considering only the original trigger prices announced by the Treasury in January, 1978, the Federal Trade Commission, for instance, estimated the direct cost increase to steel consumers at \$1 billion.³⁷⁶ An official of the Brookings Institute estimated that the direct price effect could be as much as \$1.5 billion.³⁷⁷ Kurt Orban, a steel importer and international expert on steel markets, found that the trigger price system had resulted in a veritable price explosion and estimated the increased steel costs to consumers at \$4 billion.³⁷⁸ Finally, if the domestic steel industry is to be believed in its claim that imports have caused transaction prices to be \$60 per ton below list prices, then estimates of increased steel costs could range up to \$6 billion. These estimates, it should be noted, were based on the trigger prices of January, 1978,

371. Magee, *The Welfare Effects of Restrictions on U.S. Trade*, BROOKINGS PAPERS 645-701 (1972); COMPTROLLER GENERAL, *supra* note 369, at 23.

372. Adams, *supra* note 270, at 42.

373. 43 Fed. Reg. 20,020 (1978) (to be codified at 26 C.F.R. § 31).

374. 43 Fed. Reg. 33,993 (1978).

375. Wall St. J., Sept. 26, 1978, at 1, col. 1.

376. FEDERAL TRADE COMMISSION, *THE UNITED STATES STEEL INDUSTRY AND ITS INTERNATIONAL RIVALS* 559-65 (1977).

377. Wall St. J., *supra* note 375, at 1, col. 1.

378. American Metal Market, March 29, 1978, at 1, col. 3.

and do not, therefore, take account of their 10.63 percent increase the following year.

Organized labor, of course, derived short-run gains from this protectionism, which permitted the steel industry to play its price escalation game with virtual impunity. Between 1964 and 1980, as Table 6 shows, hourly compensation in iron and steel increased by 282 percent compared to 212 percent in manufacturing as a whole; output per hour increased 19 percent and 40 percent, respectively; and unit labor cost increased 221 percent and 123 percent, respectively.³⁷⁹

TABLE 6

INDICES OF LABOR COMPENSATION, PRODUCTIVITY, AND UNIT LABOR COST IN IRON AND STEEL AND ALL MANUFACTURING FOR 1972-80 (1964=100) IN THE UNITED STATES†

YEAR	Hourly Compensation		Output Per Hour		Unit Labor Cost	
	Iron and Steel	All Mfgs.	Iron and Steel	All Mfgs.	Iron and Steel	All Mfgs.
1964	100	100	100	100	100	100
1972	161	153	116	122	138	125
1973	176	165	121	129	145	128
1974	202	182	124	126	163	145
1975	239	204	116	129	206	157
1976	257	220	120	134	215	163
1977	277	238	116	138	239	172
1978	308	258	125	139	246	185
1979	341	283	124	141	276	201
1980	382	312	119	140	321	223

† Brazer, *supra* note 364, at 166.

As was found to be the case in the automobile industry, the gap between hourly employment costs in the steel industry and manufacturing as a whole widened; according to Charles Schultze, the cost differential rose from 25 percent in the mid-1960's to 60 percent in 1980.³⁸⁰ This record, when superimposed on constantly escalating prices, meant declining competitiveness for the steel industry, and militated toward protectionist governmental restraints on foreign competition—a bailout from the self-inflicted injury wrought by the exercise of coalescing power.

379. Brazer, *supra* note 364, at 166.

380. Wall St. J., *supra* note 365, at 24, col. 4.

V. CONCLUSION

The foregoing case studies document the efforts of a labor-management coalition in four major industries to secure governmental restraints on competition. The coalition partners advocated positions that were uncannily parallel and substantively indistinguishable. They advanced and endlessly reiterated arguments that were couched in virtually identical rhetoric.

Unless these case studies are egregiously unrepresentative of American industrial structure, some general conclusions and public policy implications are *a propos*:

1. In industries where producers possess monopoly (or oligopoly) power in the product market, and where powerful trade unions dominate the relevant labor markets, there is an almost irresistible tendency toward tacit (if not, overt) vertical collusion. Countervailing power—ostensibly a structural safeguard of the public interest—is transmuted into coalescing power—a ready instrument for subverting the public interest.

2. Tacit vertical collusion and coalescing power are sustainable only where product markets are immune from effective competition. Hence, a paramount objective of the labor-industrial complex is to obtain and/or preserve governmental protection from competition in the form of entry controls, minimum rate regulation, immunity from the antitrust laws, import restraints, etc.

3. The exercise of tacit vertical collusion and coalescing power has both micro-economic and macro-economic consequences. On the micro-economic level, it militates toward noncompetitive structure in the affected industries which, in turn, leads to noncompetitive conduct which, ultimately, produces deficient industrial performance.

4. On the macro-economic level, the most serious consequence of tacit vertical collusion is a seemingly uncontrollable process of cumulative price-wage-price escalation—an engine of cost-push inflation that undermines the effectiveness of macro-stabilization policies. As Professor Henry C. Simons of the University of Chicago recognized over three decades ago, the efficacy of such macro-economic tools as monetary and fiscal policy vitally hinges upon an economy's underlying micro-economic market structure. "No amount of monetary or fiscal stimulation," he wrote,

will give us adequate employment or investment, if strategically situated unions and enterpriser monopolists insist upon utilizing improved demand conditions to increase their wages and prices rather than to increase employment, investment, and output—or to hold up prices where improved technology is markedly reducing costs. And there is no reason why organized producer groups, holding adequate organizational and political power, should, acting in their separate interest, forego the opportunity to improve their relative position in such circumstances. They may,

to be sure, injure themselves along with the community, all or most of them being worse off by virtue of their restrictive measures than if none had practiced them. But each group may be better off than if it alone had behaved less monopolistically; and, short of dictatorship at one extreme and real competition at the other, there would appear to be no means for getting co-ordinated or co-operative action from such groups as a whole.³⁸¹

Simons concluded that "[t]he inherent conflict of interest between each producer group and the community . . . must be reconciled or avoided, either by the discipline of effective intragroup competition or by the dictation of absolute authority from above."³⁸²

The only viable policy option, we suggest, lies in vigorous enforcement of the nation's antitrust statutes to obtain and maintain structurally competitive markets—for the sake of industry-specific performance, for macro-economic stability, and, perhaps not insignificantly, for freedom from dictation of absolute authority from above.

381. H. SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 115 (1948).

382. *Id.* at 120. Professor Olson recently arrived at a similar conclusion. "The most important macroeconomic policy implication," to be drawn from his exhaustive examination of stagflation, unemployment, and business cycles, he states, "is that the best macroeconomic policy is a good microeconomic policy If combinations dominate markets throughout the economy and the government is always intervening on behalf of special interests, there is no macroeconomic policy that can put things right." M. OLSON, *THE RISE AND DECLINE OF NATIONS* 233 (1982).