A CRITIQUE OF AB 132:
EXECUTIVE SUMMARY

RICHARD A. EPSTEIN

Assembly Bill 132 proposes to make by legislation major modifications of key elements of the relationship between automobile manufacturers (including distributors and importers) and their dealers. All of the proposed changes will apply to both existing and future contracts. All of these provisions—dealing with such critical issues as site control, investments in dealer improvements, exclusivity and reimbursement rates provide tangible benefits exclusively to dealers at the expense of manufacturers and the public at large. In all cases AB 132 purports to impose by fiat restrictions that have not been negotiated in the market place.

As a general economic matter, it is not possible to identify a particular market failure that these provisions are intended to correct. At bottom their adoption, even if prospective, will tend to reduce overall social welfare as measure by the benefits generates to manufacturers, dealers and consumers.

To make matters worse many of these key provisions are justified by an appeal to a broad notion of "coerce" that has no parallel at common law. Any effort to discriminate among dealers could be regarded as tainted with coercion. The same is said with respect to individual contract provisions, taken out of their business context, that cut against dealers. In effect, this broad account of coercion could pave the way for dealers, after the fact, to set aside any agreements that they make with manufacturers on these provisions.

When these changes are prospective only, manufacturers are in a position to mitigate their losses: they alter other terms of the contract or decline to do business altogether. Those advantages are not available with respect to the legislative modification of existing contracts, which increases the level of wealth transfers that dealers can extract from manufacturers.

The Wisconsin law, most notably in the case of *Wipperfurth v. U-Haul* (1981) has held that this risk of expropriation makes any legislative changes in existing contracts subject to attack under both the Wisconsin and United States Constitutions for an "impairment of contract." For example, Section 12 of the Wisconsin Constitution reads, "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed…." In essence any substantial changes in existing contracts violates the constitution in the absence of some strong reason for its adoption, of which none has been offered here.

To be sure, the Seventh Circuit decision in *Chrysler v. Kolosso* (1998) looks with greater toleration of preexisting doctrine, but does so in a way that is arguably

inconsistent with much United States Supreme Court authority on the contracts clause and that is flatly inconsistent with *Wipperfurth.*

The key difference between the two approaches is this. *Wipperfurth* well understood that political pressures could exert an untoward influence on legislative behavior and erected a strong barrier against tampering with existing contracts to guard against just that eventuality. *Kolosso* turns that sensible proposition on its head and insists that no person has protection against state manipulation of contracts that it can foreseen, which leads to this serious difficulty: The greater the level of abuse by government actors, the greater the constitutional latitude they have to alter existing contracts. That broad position essentially turns the both the state and federals constitution upside down.

In light of these arguments, two major changes are needed for AB 132. First, all references to its broad definition of coercion should be removed so as to facilitate private bargaining between manufacturers and dealers. Second, AB 132 should not be applied retroactively to existing contracts.