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INTRODUCTION

The evolution of U.S. Supreme Court antitrust jurisprudence over the past fifty years is well known. As one of us has written, "[f]orty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases."[1] The Court interpreted the Sherman[2] and Clayton Acts[3] to reflect a hodgepodge of social and political goals, many with an explicitly anticompetitive bent, such as protecting small traders from more efficient rivals.[4] The failure of antitrust law to promote competition and further consumer welfare over this period is unsurprising and inevitable, for the courts and agencies were operating without a coherent answer to the question: "What are the goals of antitrust?"

The economic revolution in antitrust that took hold in the Supreme Court in the late 1970s and the 1980s was brought on at least in part by Robert Bork's analysis of the original understanding of the Sherman Act.[5] In

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1. Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217 (2010).

2. 15 U.S.C. §§ 1–7 (2006).

3. 15 U.S.C. §§ 12–27; 29 U.S.C. § 52–53 (2006).

4. *See* Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 703 (1967) (condemning rivals' attempts to compete with Utah Pie by lowering prices because "each of the respondents also bore responsibility for the downward pressure on the price structure" and the "[Clayton] Act reaches . . . price discrimination that is intended to have immediate destructive impact"); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men").

5. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); *see also* Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449 (2008) (excerpted from Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L, Spring 2006, at 225).

Continental T.V., Inc. v. GTE Sylvania Inc.,[6] the Court, shifting its focus from this mix of economic, social, and political goals to the overall market impact of an alleged restraint of trade, recognized the potential for vertical nonprice restrictions to promote interbrand competition and declared interbrand competition "the primary concern of antitrust law."[7] It is difficult to overstate the importance of *GTE Sylvania* as the foundation of the economic approach to antitrust analysis: antitrust would no longer serve multiple masters; economic goals would be exclusive. Soon the Court would determine more specifically that the "Congress designed the Sherman Act as a 'consumer welfare prescription,'"[8] and that "[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law."[9]

The promotion of economic welfare[10] as the lodestar of antitrust laws—to the exclusion of social, political, and protectionist goals—transformed the state of the law and restored intellectual coherence to a body of law Robert Bork had famously described as paradoxical.[11] Indeed, there is now widespread agreement that this evolution toward welfare and away from noneconomic considerations has benefitted consumers and the economy more broadly.[12] Welfare-based standards have led to greater predictability

6. 433 U.S. 36 (1977).

7. *Id.* at 52–56.

8. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

9. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984).

10. We put to the side issues of whether the appropriate standard is aggregate economic efficiency, often referred to as the total welfare standard or "true" consumer welfare (in the economic sense of a consumer surplus) standard. *See generally* Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL'Y INT'L, Autumn 2006, at 29; Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010). Our focus is upon the desirability of welfare standards over alternative non-welfare antitrust objectives, and more specifically, over the proposed "consumer choice" standard.

11. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7 (1978) (demonstrating "[c]ertain of its doctrines preserve competition, while others suppress it, resulting in a policy at war with itself").

12. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 110 (3d ed. 2006) ("The biggest advantages conferred by the use of relatively traditional microeconomics as the guiding principle for antitrust are two: coherence and welfare. . . . [P]opulist goals should be given little or no independent weight in formulating antitrust rules and presumptions. As far as antitrust is concerned, they are substantially served by a procompetitive policy framed in economic terms. . . . [I]njection of populist goals, by broadening the proscriptions of business conduct, would multiply legal uncertainties and threaten inefficiencies not easily recognized or proved. . . . [Despite some inadequacies,] economics gives a focus to antitrust interpretation and is critical to any formulation of rational rules."); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 35 ("Both [the Chicago School and Harvard School] generally embrace an economic efficiency orientation that emphasizes reliance on economic theory in the formulation of antitrust rules. Although Chicago School and Harvard School scholars do not define efficiency identically, the two schools discourage consideration of non-efficiency objectives such as the dispersion of political power and the preservation of opportunities for smaller enterprises to compete."); Donald F. Turner, *The Durability, Relevance, and Future*

in judicial and agency decision making. They also rule out theories of liability (e.g., a transaction will tend to reduce the number of small businesses in a market) and defenses (e.g., the restraint upon trade is necessary to save consumers from the consequences of competition) that would significantly harm consumers. Further, the focus upon economic welfare has led the Court to reject per se prohibitions of conduct once thought anticompetitive but now, owing to advances in our economic knowledge, understood to be efficient.[13] Untethered from an economic welfare standard, it is difficult to imagine a rationale for eliminating those per se prohibitions.

The "consumer choice" standard is the latest challenge to the welfarist understanding of antitrust.[14] In a series of articles, Neil Averitt and Robert Lande present the consumer choice standard as an alternative to efficiency or welfare standards[15]—including not only the "consumer welfare" and

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of American Antitrust Policy, 75 CALIF. L. REV. 797, 798 (1987) ("Antitrust law is a pro-competition policy. The economic goal of such a policy is to promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use. . . . The legislative history of the Sherman Act and other antitrust laws also suggests 'populist' goals—social and political reasons for limiting business size and preserving large numbers of small businesses and business opportunities. However, economics-based antitrust law serves those goals to a substantial extent by preventing agreements, mergers, and monopolizing conduct that tend to eliminate or reduce competition without yielding economic benefits. . . . [T]here is no reasonable basis for presuming that courts must give priority or even weight to populist goals where the pursuit of such goals might injure consumer welfare by interfering with competitive pricing, efficiency, or innovation. Indeed, even where there is no such apparent conflict, it is questionable whether populist goals are appropriate factors to consider when formulating antitrust rules. The pursuit of these goals would broaden antitrust's proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved.").

13. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007) (lifting per se prohibition of minimum resale price maintenance (RPM)); State Oil Co. v. Khan, 522 U.S. 3, 19 (1997) (lifting per se prohibition of maximum RPM); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) (lifting the per se prohibition against vertical nonprice restraints).

14. Earlier such challenges include Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 874 (1999) (the "Congress was concerned principally with preventing 'unfair' transfers of wealth from consumers to firms with market power."); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) ("[I]f the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs."); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 624 (2012) (rejecting "[a]ntitrust's current objectives of promoting consumer welfare and efficiency" in favor of using antitrust to "secure political, economic, and individual freedoms").

15. *See* Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44 (1998) [hereinafter Averitt & Lande, *Consumer Choice*]; Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65

"total welfare" standards[16] but even the "consumer surplus" standard.[17] Perhaps the clearest articulation of the consumer choice standard is that "[a]n antitrust violation can . . . be understood as an activity that unreasonably restricts the totality of price and nonprice choices that would have otherwise been available."[18]

Averitt and Lande occasionally use their alternative model to highlight perceived weaknesses in the current approach to nonprice competition and to call for a greater focus upon that dimension of the competitive process.[19] That shift would be desirable to the extent it improves courts' and agencies' ability to understand the competitive consequences of some business arrangements. Still, they clearly have something more ambitious, even grandiose, in mind: "nothing less than a new paradigm of the antitrust laws."[20] They also point to the consumer choice standard as the starting point for understanding section 5 of the Federal Trade Commission (FTC) Act;[21] the gap between the European and the purportedly less well-targeted U.S. law of monopolization;[22] a unified theory of competition and consumer protection law;[23] and the role of behavioral economics in antitrust.[24]

Averitt and Lande correctly claim that adopting the central idea of the consumer choice framework, viz. that the loss of a "choice" (however defined) is a cognizable antitrust injury even when associated with a reduction in price or an increase in output, would represent a revolution in antitrust thinking. As we shall explain, that revolution would have seriously detrimental consequences for consumers.

ANTITRUST L.J. 713 (1997) [hereinafter Averitt & Lande, *Consumer Sovereignty*]; Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007) [hereinafter Averitt & Lande, *Using Consumer Choice*]; Robert H. Lande, *Consumer Choice As the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001).

16. Heyer, *supra* note 10.

17. Salop, *supra* note 10.

18. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 182.

19. *Id.* at 176 ("The current price and efficiency models can deal only awkwardly with nonprice competition. At best, they try to help consumers achieve nonprice objectives indirectly, by folding them into the price analysis in the form of quality adjusted prices, or by assuming that markets that are price competitive will also be competitive for nonprice preferences.").

20. *Id.* at 178.

21. Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 281–82 (1981). Section 5 makes unlawful, and authorizes the FTC to prohibit, "unfair methods of competition." 15 U.S.C. § 45(a)(1) (2006).

22. J. Thomas Rosch, Comm'r, FTC, Can Consumer Choice Promote Trans-Atlantic Convergence of Competition Law and Policy?, Remarks Before the Concurrences Conference on "Consumer Choice": An Emerging Standard for Competition Law (June 8, 2012), *available at* http://www.ftc.gov/speeches/rosch/120608consumerchoice.pdf.

23. Averitt & Lande, *Consumer Sovereignty*, *supra* note 15.

24. Maurice E. Stucke, *Behavioral Economics at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007).

The fatal flaw in the consumer choice standard is that it simply, indeed simplistically, rejects economic analysis of consumer preferences as the fundamental guiding principle of antitrust analysis, including the preferences consumers express in making unavoidable tradeoffs between price and nonprice values. The consumer choice standard rejects even the view that the role of antitrust is to protect the competitive process as one that produces desirable outputs (i.e., consumer welfare) in favor of an antitrust regime that analyzes nonprice competition as a standalone and inviolable virtue.

Part I of this Essay reviews the consumer choice standard as its proponents present it. We demonstrate that the consumer choice standard is necessarily a noneconomic approach to antitrust analysis; that is, it is inconsistent with not only the economic welfare standard but also with much of modern economic theory and practice, despite its authors occasionally restating it in economic terms as a call for greater attention to nonprice competition.

Part II demonstrates that the consumer choice standard, like other noneconomic objectives of antitrust that have been rejected in the past, would inevitably reduce both total and consumer welfare. Ironically, it would also diminish what the authors most value: nonprice competition, product variety, and innovation.

I. THE CONSUMER CHOICE STANDARD

The consumer choice standard was born out of a concern that the traditional welfare approach ignores the benefits that nonprice competition generates for consumers. Averitt and Lande occasionally promote a milder form of the choice standard, one based upon welfare but, they say, "fully attentive to empirical evidence on purchasers' nonprice, as well as price, preferences."[25] They point to supposed failures of the standard approach, which, owing to conceptual and technological shortcomings, they claim ignores or insufficiently takes account of nonprice competition.[26]

The primary flaw in the traditional welfare approach, according to Averitt and Lande, is economists' purported inability to quantify and incorporate qualitative considerations into the price dimension, with which they are more familiar, and their consequent failure to account fully for consumer welfare gains and losses associated with changes in nonprice competition.[27] For example, Averitt and Lande assert that "[o]nly rarely do economists make serious attempts" to evaluate the welfare consequences of innovations and, even when economists do so, Averitt and Lande are skeptical of the process by which they "somehow" generate quality-adjusted prices.[28]

25. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 184.
26. *Id.* at 184–86.
27. *Id.*
28. *Id.* at 178 n.7, 186 n.29.

This critique is at the least an overstatement. Quality-adjusted prices have been part of the industrial organization toolkit since the early 1900s.[29] The Bureau of Labor Statistics has used this tool for nearly a century.[30] Furthermore, quality-adjusted prices are frequently used in industrial organization economics[31] and in antitrust analysis.[32]

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29. BUREAU OF LABOR STATISTICS, BLS HANDBOOK OF METHODS, ch. 14, at 3–4 (1997), *available at* www.bls.gov/opub/hom/ ("When a company respondent reports a price that reflects a physical change in a product, the BLS uses one of several quality adjustment methods."); IRVING FISHER, THE MAKING OF INDEX NUMBERS: A STUDY OF THEIR VARIETIES, TESTS, AND RELIABILITY 459–60 (1922) ("The first index numbers were of wholesale prices and most index numbers are such today. For a long time it was thought that goods at retail were not sufficiently standardized as to quality to make retail index numbers practicable. This difficulty has not been fully overcome. But index numbers of retail prices of foods were begun in the United States in 1907, and today index numbers of retail prices are very common in most countries."); PRICE STATISTICS REVIEW COMM., NAT'L BUREAU OF ECON. RESEARCH, THE PRICE STATISTICS OF THE FEDERAL GOVERNMENT (1961), *available at* http://www.nber.org/books/repo61-1; FREDERICK V. WAUGH, QUALITY AS A DETERMINANT OF VEGETABLE PRICES 47 (1929) ("By making an adjustment to allow for the variation in these quality factors, the following estimate was made of the average price . . . .").

30. *See* WESLEY CLAIR MITCHELL, BULLETIN OF THE U.S. BUREAU OF LABOR STATISTICS: INDEX NUMBERS OF WHOLESALE PRICES IN THE UNITED STATES AND FOREIGN COUNTRIES 10 (1915) ("The grading and standardizing of commodities increased the number of articles which could be safely accepted as substantially uniform in quality from one year to the next.").

31. For representative examples in the economics literature, see Thomas W. Hazlett, *Prices and Outputs Under Cable TV Reregulation*, 12 J. REG. ECON. 173 (1997); Andrew Stewart Wise & Kiran Duwadi, *Competition Between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, 1 J. COMPETITION L. & ECON. 679, 679 (2005) ("We find that, when quality-adjusted prices for basic cable services increase substantially, subscribers will switch from cable to [direct broadcast satellite], presumably at the point at which the price change is larger than the cost of switching."). On modern approaches to generating quality-adjusted prices, see Robert J. Gordon & Zvi Griliches, *Quality Change & New Products*, 87 AM. ECON. REV. 84 (1997); Jerry Hausman, *Sources of Bias and Solutions to Bias in the Consumer Price Index*, 17 J. ECON. PERSP. 23 (2003). For examples of the economic approach to valuing the consumer welfare gains from the introduction of new products, adjusted for quality, see Jerry A. Hausman, *Valuation of New Goods Under Perfect and Imperfect Competition*, *in* THE ECONOMICS OF NEW GOODS 209 (Timothy F. Bresnahan & Robert J. Gordon eds., 1997); Amil Petrin, *Quantifying the Benefits of New Products: The Case of the Minivan*, 110 J. POL. ECON. 705 (2002).

32. Including antitrust analysis at the Federal Trade Commission and by Federal Trade Commission economists. *See, e.g.*, David J. Balan & George Deltas, *Better Product at Same Cost, Lower Sales and Lower Welfare* (FTC, Working Paper No. 312, 2012), *available at* http://www.ftc.gov/be/workpapers/wp312.pdf; Daniel P. Kessler, *Can Ranking Hospitals on the Basis of Patients' Travel Distances Improve Quality of Care?* (Nat'l Bureau of Econ. Research, Working Paper No. 11419, 2005), *available at* http://www.nber.org/papers/w11419.pdf. Merger simulation models also account for quality. Merger simulations estimate a choice model and then simulate consumer substitution patterns explicitly taking quality into account when the merged firms internalize price competition between them. *See* Steven Tenn et al., *Mergers When Firms Compete by Choosing Both Price and Promotion*, 28 INT'L J. INDUS. ORG. 695 (2010); Gregory J. Werden et al., *Merger Simulation*, *in* ECONOMETRICS: LEGAL, PRACTICAL, AND TECHNICAL ISSUES 269 (John D. Harkrider ed., 2005); Gregory J. Werden & Luke M. Froeb, *The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy*, 10 J.L. ECON. & ORG. 407 (1994); Gregory J. Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers*, *in* HANDBOOK OF ANTITRUST ECONOMICS 43 (Paolo Buccirossi ed., 2008). Courts have also

If the consumer choice standard were no more than an evidence-based approach to incorporating nonprice competition into the traditional welfare standard, it would be unobjectionable. Averitt and Lande, however, clearly contemplate a departure from the welfare standard in favor of a strong presumption of illegality for any business conduct that reduces the number of choices available to consumers.[33] The flaw in this approach is that both economic theory and empirical evidence are replete with examples of business conduct that simultaneously reduces choice and increases welfare in the form of lower prices, increased innovation, or higher quality products and services. Nonetheless, Averitt and Lande propose to define an antitrust violation as "an activity that unreasonably restricts the totality of price and nonprice choices that would otherwise have been available,"[34] or alternatively, as business conduct "that harmfully and significantly limits the range of choices that the free market, absent the restraints being challenged, would have provided."[35]

Understanding the business arrangements that restrict the number of price and nonprice choices facing consumers and would therefore violate the consumer choice standard, requires an economic model of the number of choices that would be available to consumers in the counterfactual scenario without the restraint. The types of conduct that would be illegal under the consumer choice standard, and the implications of that standard, are best illustrated with a series of examples drawn from Averitt and Lande's analyses. We present one example for each of the three major concerns of antitrust law: cartels, mergers, and monopolization.

We begin with the least controversial of business arrangements under the antitrust laws: naked price-fixing arrangements are per se illegal under the current welfare standard and also would be under the choice standard. Averitt and Lande, however, object to more than just the allocative inefficiency of price-fixing. "Under the choice approach," they say, "[cartels] are undesirable" because "[p]rices fixed at an artificial level rob consumers of the competing price options to which they are entitled."[36]

There is no debating that cartels restrict output and increase price; they also reduce the variance of prices within a market.[37] Averitt and Lande

recognized the impact of business conduct upon quality-adjusted prices. *See, e.g.*, Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984) ("If, as [Defendant] argues, exclusive dealing leads dealers to promote each manufacturer's brand more vigorously than would be the case under nonexclusive dealing, the quality-adjusted price to the consumer (where quality includes the information and other services that dealers render to their customers) may be lower with exclusive dealing than without, even though a collateral effect of exclusive dealing is to slow the pace at which new brands . . . are introduced.").

33. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 184.

34. *Id.* at 182.

35. *Id.* at 184.

36. *Id.* at 187 n.35.

37. *See, e.g.*, Rosa M. Abrantes-Metz et al., *A Variance Screen for Collusion*, 24 INT'L J. INDUS. ORG. 467, 473 (2006) (case study showed price-rigging "conspiracy not only increased the price level but reduced its variance as well."); John M. Connor, *Collusion and*

make clear that under the choice standard, pricing arrangements that restrict the availability of price options would be unlawful even if they do not increase average prices.[38] Such a rule would amount to harmless error in the case of naked price-fixing cartels, but it exposes some troublesome implications of the consumer choice approach in the area of horizontal restraints that involve prices as well as pricing practices more generally.

Consider *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*,[39] which involved the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), joint ventures by which thousands of owners of copyrighted music established blanket licensing agreements for use of their music on network television programs.[40] The Supreme Court analyzed the restraint and concluded it was unlikely to reduce welfare.[41] In fact, the Court found the restraint necessary to the distribution of the music, which would not otherwise have been practical because it would have required thousands of individual transactions between composers and consumers (here represented by broadcasters).[42] All the same, the blanket license was the product of an agreement among competitors to reduce dramatically the number of pricing options that might have been available to consumers but for the restraint.[43] This welfare-increasing arrangement necessarily violates the consumer choice standard.

The economic logic of the choice framework is also problematic for the many business practices that involve price discrimination. Price discrimination is generally efficient and welfare increasing.[44] For simplicity, imagine a monopolist able to engage in perfect price discrimination (i.e., charging each individual the maximum price that consumer is willing to pay instead of offering a single, uniform price to all). (This is what colleges and universities with market power are doing when they set a high price and then give scholarships based upon "ability to pay.") Price discrimination reduces the availability of pricing options in the marketplace because the pricing arrangement deprives some consumers of

Price Dispersion, 12 APPLIED ECON. LETTERS 335, 336 (2005) ("[C]artelization suggest[s] a reduction in price variance.").

38. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 187 n.35.

39. 441 U.S. 1 (1979).

40. *Id.* at 4–5.

41. *See id.* at 20–21.

42. *Id.* at 21.

43. *Id.* at 32–33 (Stevens, J., dissenting).

44. This is true in the static economic welfare case. The welfare case in favor of price discrimination becomes stronger when one considers the role of price discrimination in intensifying upstream competition and dynamic efficiencies such as the incentive to innovate. *See* James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327 (2005); Benjamin Klein & John Shepard Wiley, Jr., *Competitive Price Discrimination As an Antitrust Justification for Intellectual Property Refusals To Deal*, 70 ANTITRUST L.J. 599 (2003). This economic logic highlights a relationship entirely ignored in the choice analysis between business arrangements restricting choice and simultaneously increasing incentives to innovate or to improve quality, thus increasing choice. The choice model provides no method, in the absence of welfare analysis, of analyzing these tradeoffs.

their preferred option—namely, the option to pay a uniform and lower price—that would be available in the absence of discriminatory pricing. Although each consumer is still offered a single price, and thus, the number of pricing options available to each consumer remains unchanged, it is clear that the choice standard would condemn this practice.[45] Recall that for Averitt and Lande, price-fixing is condemned not because it reduces the total number of prices available in the market—and it need not do so, for example, when a single competitive price is replaced by a single cartel price—but because consumers are deprived of pricing options. Price discrimination necessarily results in higher prices for some consumers than they would otherwise be offered. Price discrimination in the case of our example of a perfectly price-discriminating monopolist is efficient; but price discrimination is also a common feature of competitive markets. The ubiquity of price discrimination in the modern economy renders troublesome the implication that the choice model would condemn it.

Averitt and Lande also posit a merger between two firms—call them *A* and *B*—in a market with five firms (also including *C*, *D*, and *E*).[46] We are asked to assume that *A*, *B*, and *C* have the capacity to compete by innovating; that "three firms are enough to have effective price competition in this industry; and that three firms are also enough for effective choice or innovation competition."[47] They conclude that such a merger would likely be lawful under a welfare approach because enough firms remain for the market to be competitive but unlawful under their choice analysis because it would reduce the number of independent sources of choice or of innovation to less than the optimal number.[48]

Ignoring for a moment that we are very unlikely ever to know the optimal number of firms for innovation in a given market,[49] and certainly cannot do so with the current set of economic tools,[50] the merger example sheds additional light upon problems with the choice model. The critical point is that the choice model assumes a strong relationship between market structure and innovation, the latter under the rubric of choice: in short, fewer firms generate less innovation and therefore fewer choices. That strong presumption simply is not warranted by the evidence. Not surprisingly, therefore, it is also inconsistent with modern merger analysis, which has retreated from structural presumptions because they are not

45. The choice standard would also condemn a variety of other discriminatory pricing arrangements, not limited to perfect price discrimination, for the reasons described in the text.

46. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 246.

47. *Id.*

48. *Id.*

49. *See, e.g.*, Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 22 (2007) ("The literature addressing how market structure affects innovation (and vice versa) in the end reveals an ambiguous relationship in which factors unrelated to competition play an important role.").

50. *See* Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 12 (2012).

probative of likely competitive effects, including competitive effects associated with nonprice dimensions of competition.[51]

The merger example highlights another problem with application of the choice standard. The authors' example, in which it is known how many firms are "sufficient" for nonprice and price competition, not only assumes knowledge of facts that are not ordinarily known and in most cases are unknowable, it also obfuscates the key economic tradeoff at issue in analyzing a horizontal merger. *A* and *B* might be merging to achieve economies of scale or other efficiencies that would reduce costs and put downward pressure on prices, and might increase innovation. The key question is whether that downward pricing pressure yields welfare gains (under a consumer welfare standard rather than a total welfare standard) sufficient to offset potential consumer welfare losses insofar as the merger reduces price or nonprice competition. The welfare approach immediately highlights the right question and provides a framework for the answer. The choice standard avoids the relevant economic questions—how does the merger change the incentives to compete, and what implications do those changed incentives, if any, have for welfare?—and instead presumes a loss to consumers based upon market structure. In this way, the choice standard imposes a presumption that operates much like the now discredited presumptions of pre-modern merger analysis reflected in the 1968 Horizontal Merger Guidelines.[52]

One further example underscores the tendency of the choice standard to distract from the key economic questions and to avoid analysis of the relevant tradeoffs. Most exclusive dealing arrangements reduce choice in the sense relevant to the choice standard. An exclusive dealing arrangement between a manufacturer and retailer or set of retailers necessarily reduces the choices available to the consumer at the retailer's store(s). For the sake of simplicity, assume the manufacturer's exclusive dealing arrangements with its retailers and distributors also generate a net reduction in consumer choice, expressed as a loss of product variety in the marketplace. Under the choice standard, nearly all exclusive dealing contracts will be deemed unlawful because they restrict the number of nonprice choices (e.g., other brands) available to consumers compared to the number that would be available but for the exclusive dealing contracts.

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51. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (2010) ("The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects."); *see also* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 707–08 (2010) ("Many observers have noted specifically that the 2010 Guidelines place less weight on market shares and market concentration than did predecessors. . . . The revised Guidelines emphasize that merger analysis ultimately is about competitive effects."); Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241 (2012).

52. U.S. DEP'T OF JUSTICE, 1968 MERGER GUIDELINES (1968), *available at* http://www.justice.gov/atr/hmerger/11247.pdf.

Though exclusive dealing arrangements can and do pose competitive risks, they are generally efficient.[53] There are a number of well-known efficiency justifications for exclusive dealing. For example, some exclusive arrangements involve intensifying competition for scarce shelf space or distribution and therefore result in lower prices for consumers.[54] The various efficiency justifications for exclusives pose the same types of problems discussed above in the merger example, because the choice framework applies a presumption of illegality to conduct that is likely to improve consumer welfare, accounting for both the gains to consumers in the form of lower prices and any losses attributable to some consumers substituting a less- for a more-preferred brand.[55] The exclusive dealing example also exposes a more serious problem with the internal consistency of the choice paradigm. Many exclusive dealing arrangements do not just increase price competition; they are intended to align the incentives of manufacturers with those of distributors to supply nonprice, promotional services[56] or to induce asset specific investments that might facilitate innovation.[57] These nonprice efficiencies may simultaneously reduce present choices but increase future choices by providing incentives to invest and to innovate. The choice standard provides no analytical framework with which to assess these tradeoffs. Indeed, while Averitt and Lande pay lip service to the importance of taking seriously the tradeoffs between various forms of competition—including price, nonprice, innovation, quality, and others—the examples betray a structural presumption of illegality to be imposed upon a broad range of business conduct that is generally thought to be efficient under conventional welfare analysis, including welfare analysis incorporating nonprice effects.[58]

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53. *See generally* Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, *in* ANTITRUST LAW AND ECONOMICS 183 (Keith N. Hylton ed., 2010).

54. *See, e.g.*, Cooper et al., *supra* note 44, at 342–43; Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433, 443 (2008).

55. Klein & Murphy, *supra* note 54, at 436.

56. *See* Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421, 432–33 (2007); *see also* Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473, 489–90 (2007); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints As Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265, 266 (1988).

57. Klein & Murphy, *supra* note 54, at 443–44 (describing the role of exclusive dealing in facilitating asset-specific investments); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 302–07 (1978) (discussing contractual solutions to opportunistic firm behavior).

58. Federal Trade Commissioner Rosch has endorsed the choice standard. It is unclear whether the endorsement is anything more than a call for greater attention to nonprice competition in the application of welfare standards. Commissioner Rosch agrees the goal of antitrust should be to promote consumer welfare, but he first endorsed the consumer choice approach as consistent with that goal because it focuses upon harms that result when a "firm's conduct impairs the choices that free competition brings to the marketplace." J. Thomas Rosch, Comm'r, FTC, Rewriting History: Antitrust Not As We Know It . . . Yet,

II. WELFARE TRUMPS CHOICE

The shift from myriad social, political, and protectionist goals to welfare has produced significant benefits for consumers and brought coherence to antitrust law. Put simply, the welfare approach has served antitrust well; Averitt and Lande acknowledge as much.[59] They are not alone. The Antitrust Modernization Commission observed that "[f]or the last few decades courts, agencies, and antitrust practitioners have recognized consumer welfare as the unifying goal of antitrust law."[60]

The choice standard, as noted in Part I, is not designed to sharpen the welfare paradigm but to replace it with "nothing less than a new paradigm of the antitrust laws."[61] Averitt and Lande take pains to comfort readers that the choice approach is "not a return to the 'social and political values' paradigm of the 1960s and 1970s, which proved standardless and unduly hostile to business."[62] As we have demonstrated, however, the defect with the choice standard is that it is inconsistent with the modern economic approach to antitrust analysis that focuses courts and agencies not just upon the right outcomes (i.e., prices, quantities, innovation, quality), but also upon understanding the relationship between the restraint at issue and those outcomes and the tradeoffs between different and sometimes inversely related dimensions of competition.

Without the discipline economic analysis provides by reducing the range of plausible outcomes in a given case and, thus, limiting the discretion of agencies and courts, it is unclear why Averitt and Lande think their new paradigm will not allow the same or other political and social values to trump welfare in the name of choice.[63] Further, the choice standard will certainly reduce welfare. To the extent the choice standard does indirectly focus upon economic welfare, Averitt and Lande's examples suggest their model embraces an effects-based analysis rooted in simple structural presumptions relating the number of firms or brands in a market to consumer welfare. These presumptions have no basis in modern economic

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Remarks at the ABA Antitrust Section 2010 Spring Meeting (Apr. 23, 2010), *available at* http://www.ftc.gov/speeches/rosch/100423rewritinghistory.pdf. As discussed above, however, the consumer choice standard is in significant tension with the consumer welfare standard. More recently Rosch has suggested a welfarist approach to consumer choice, which he observed may best be viewed as "a strand of consumer welfare that is promoted whenever we enforce the antitrust laws against unreasonable restraints on output." J. Thomas Rosch, *supra* note 22, at 13.

59. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 175 (describing the welfare goals of antitrust as "an immense improvement over their predecessors, and they have served the field competently for a generation, producing reasonably accurate results in most circumstances").

60. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 35 (2007).

61. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 178.

62. *Id.* at 177.

63. For one application of the choice framework to justify increased regulation of media mergers on social and political grounds, see Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101 (2009).

theory, are not supported by empirical evidence, and are likely to provide misleading answers to the very questions concerning nonprice competition and innovation that the choice standard was designed to address.[64]

Before we discuss resale price maintenance (RPM)—an example of the advantages of welfare analysis over the choice model—consider this basic but underappreciated point concerning the economic theory of consumer choice as it relates to antitrust welfare standards: nothing in the microeconomic theory of consumer choice and the associated concept of revealed preference[65] requires antitrust analysis to ignore or underweigh nonprice dimensions of competition. Economists consult consumers' revealed preferences, as expressed in their actual choices, in order to recover information about their welfare. The standard microeconomic framework requires the assumption that consumer preferences are relatively stable, but those preferences can and do incorporate various nonprice values. Within the standard model, consumers economize on tradeoffs by evaluating different bundles of goods and services with different price and nonprice attributes and make purchasing decisions subject to a budget constraint. Therefore, to incorporate nonprice elements into the standard model, as a conceptual matter, no revolution is required. Moreover, as a practical matter, nearly all merger simulation models, a variety of other applications in industrial organization, and antitrust analysis specifically contemplate consumers making decisions among products differentiated in both price and quality.[66]

We focus here upon two primary advantages of the welfare standard over the choice standard in cases involving nonprice competition and innovation. First, the welfare approach highlights tradeoffs between various forms of competition and their effects. This is critical because, contra Averitt and Lande, a marginal increase in the number of choices available in a market could increase, decrease, or have no effect upon nonprice competition. Second, the welfare approach highlights, rather than obfuscates, the relevant economic forces at work. Again, this advantage is critical to coherent and predictable antitrust analysis under the rule of reason[67] because economic

64. For critiques of the behavioral economics antitrust program, see Douglas H. Ginsburg & Derek Moore, *The Future of Behavioral Economics in Antitrust Jurisprudence*, 6 COMPETITION POL'Y INT'L 89 (2010); Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517 (2012).

65. HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 121 (8th ed. 2010) (describing revealed preference with the statement: "If a bundle *X* is chosen over a bundle *Y*, then *X* must be preferred to *Y*." (internal quotation marks omitted)).

66. *See supra* notes 31–32 and accompanying text. We are more sympathetic to the view that neither the theoretical relationship between competition and innovation nor the available empirical evidence provides sufficient economic knowledge for reliable predictions required for antitrust analysis. *See* Ginsburg & Wright, *supra* note 50, at 1. However, Averitt and Lande appear to endorse these presumptions and "innovation market" analysis. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 187.

67. Obviously, per se rules and de facto per se rules are quite predictable even if they are welfare decreasing and anticompetitive, as Justice Potter Stewart famously noted in his dissent in *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J.,

analysis illuminates how a business arrangement affects the incentives of firms and of consumers and which tradeoffs matter in any particular case, and can give a sense of the magnitudes of the competitive effects at issue. We explore these advantages with an example showing how welfare analysis focuses upon the right questions and avoids the errors the choice framework would bring to such cases.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[68] the Supreme Court held minimum resale price maintenance would be analyzed under the rule of reason.[69] The Court deemed the previously longstanding per se rule against RPM inappropriate because, although RPM could be anticompetitive, the economic theory and evidence simply did not demonstrate that the practice "always or almost always tend[s] to restrict competition and decrease output."[70]

The fundamental economic question concerning RPM—both minimum and maximum—especially in a competitive retail market with no free riding,[71] is whether retailers lack a sufficient incentive to promote the manufacturer's product adequately. In other words, why isn't competition at the retail level a sufficient incentive to provide the efficient level of promotional services? It is a question that has stumped many, including Justice Breyer, who dissented in *Leegin*.[72] Interestingly, the opinion of the Court provides an answer, citing Klein and Murphy's seminal article on the economics of vertical restraints, which analyzed this question more than twenty years ago.[73]

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dissenting) (criticizing the majority's analysis while observing "[t]he sole consistency that I can find is that in litigation under § 7, the Government always wins").

68. 551 U.S. 877 (2007).

69. The Court had overruled the per se rule against maximum RPM ten years earlier in *State Oil Co. v. Khan*, 522 U.S. 3 (1997). *See* Benjamin Klein, *Distribution Restrictions Operate by Creating Dealer Profits: Explaining the Use of Maximum Resale Price Maintenance in* State Oil v. Kahn, 7 SUP. CT. ECON. REV. 1 (1999).

70. *Leegin*, 551 U.S. at 894 (quoting Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)); *see* Brief of Amici Curiae Economists in Support of Petitioner at 16, *Leegin*, 551 U.S. 877 (No. 06-480), 2007 WL 173681 ("In the theoretical literature, it is essentially undisputed that minimum RPM can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects"). The best estimate of the prevalence of collusion in RPM cases is no greater than 15 percent. *See* Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & ECON. 263, 270 (1991).

71. For an efficiency explanation of RPM in the presence of interdealer free riding on promotional services, see Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 91–93 (1960).

72. 551 U.S. at 921 (Breyer, J., dissenting) ("I do not understand how, in the absence of free riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not 'expand' its 'market share' as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it.").

73. *See id.* at 892 (majority opinion) (citing Klein & Murphy, *supra* note 56). For a recent restatement and extension of Klein & Murphy's analysis, see Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, 76 ANTITRUST L.J. 431 (2009).

Klein and Murphy demonstrate that retailers will undersupply promotional services because manufacturers do not take into account the incremental profit margin the manufacturer earns on promotional sales when some, but not all, consumers value the promotional service. Manufacturers and retailers have divergent interests with respect to the retailers supplying presale promotional effort. The conflict derives from two economic factors common in markets where RPM is observed. First, a manufacturer's profit margin (the difference between the wholesale price and the marginal cost of production) on an incremental sale induced by retailer promotion is generally larger than the retailer's profit margin (the difference between the retail and wholesale prices).[74] Second, the manufacturer's incremental sales owing to the retailer's brand-specific efforts are often greater than the retailer's incremental sales. When a retailer provides services to promote a specific manufacturer's product, the increase in total retail sales is not generally sufficient to offset the lower retail profit margin. In fact, when a multiproduct retailer promotes a particular brand, for example Coca-Cola, the primary effect is to shift demand among brands, not to increase the aggregate quantity demanded for all brands.[75]

When these conditions obtain, we expect to observe manufacturers compensate retailers for providing promotional services. One such method of compensation involves RPM; others involve per-unit time payments, such as slotting contracts, cooperating marketing arrangements, or a reduction in the wholesale price. The fundamental objective of all such payments is to provide a premium stream of revenue to retailers as an inducement to provide promotional services. These promotional services are valuable to some consumers but not others; their provision is efficient, however, in the sense that they increase output. Indeed, despite claims to the contrary,[76] understanding RPM as facilitating the supply of nonprice

74. This is highly likely to be the case where manufacturers produce branded, differentiated goods and face substantially less elastic demand than do retailers. Because retailers do not take into account the additional profit margin the manufacturer earns on promotional sales, their incentive to provide promotion will be insufficient from the manufacturer's point of view. For a more complete analysis of the incentive conflict-based interretailer demand effects, see Klein & Wright, *supra* note 56; Ralph A. Winter, *Vertical Control and Price Versus Nonprice Competition*, 108 Q.J. ECON. 61 (1993).

75. In other words, promotion-induced sales of Coca-Cola are likely to be at least partially offset by a decrease in the sales of other soda products.

76. Critics of RPM claim that RPM either cannot or does not prevent some retailers from free riding on the promotional services provided by other retailers and therefore infer an anticompetitive effect from any increase in retail prices. *See* Warren S. Grimes, *The Path Forward After* Leegin*: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467 (2008); Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 196 (Robert Pitofsky ed., 2008).

promotional services implies that RPM can both increase output and reduce retail prices.[77]

The welfare approach not only accounts for the nonprice amenities associated with RPM; it also answers the fundamental question why firms adopt RPM arrangements. We are therefore equipped with a better understanding of the competitive effects of RPM on both price and nonprice dimensions. An important implication is that antitrust agencies and courts should evaluate RPM by its effects not upon price but upon output. The welfare approach thus illuminates the correct questions, deepens our understanding of the business practice, and can identify for courts and agencies what types of evidence are useful in determining its actual impact and role in the competitive process.

The choice framework, on the other hand, approaches RPM without regard to its welfare effects. Averitt and Lande briefly mention RPM as potentially harmful because it tends to decrease the number of price options available in the marketplace.[78] RPM restricts the pricing freedom of retailers and, thus, inevitably restricts the pricing options available to consumers; it is therefore presumably suspect under the choice framework.

Commissioner Rosch agrees and claims that, after *Leegin*, evidence of a reduction in consumer choice is sufficient to make out a prima facie case that a defendant's RPM arrangement violates section 1 of the Sherman Act.[79] Rosch argues this is the law because *Leegin* permits consumers to choose between buying from a "no frills" discounter and buying at a higher price from a reseller offering pre- or postsale services along with the product.[80] "Or, to put it in economic terms, a higher resale price may be justified by evidence that, despite the higher price, there has been an increase in output."[81]

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77. Those who claim RPM always increases the retail price contemplate a manufacturer increasing the retailer's margin by holding the wholesale price constant, increasing the retail price above competitive levels, and imposing RPM to ensure that price competition does not dissipate the additional profit margin. A manufacturer can achieve the same effect by reducing both the wholesale price by an amount greater than it reduces the retail price—thus, still increasing the retailer's profit margin and inducing provision of the presale services. Consequently, RPM does not necessarily result in higher retail prices as a matter of economic theory. Rather, one should think of the provision of presale services as reducing the "effective price" paid by the consumers who value those services; that is, a reduction in price to marginal consumers moving the manufacturer along the demand curve. Similarly, this well-accepted analysis of RPM implies that evaluating only the price effects of RPM is an error. Because retail prices might increase under both the anticompetitive cartel explanation of RPM as well under the efficiency explanation, a better test is to evaluate the effects of the restraint upon output.

78. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 189.

79. J. Thomas Rosch, Comm'r, FTC, Convergence and Comity: Still Improbable?, Remarks Before the Friends of Europe Roundtable on New Transatlantic Trends in Competition Policy 7 (June 10, 2010), *available at* http://www.ftc.gov/speeches/rosch/100710transatlanticremarks.pdf ("[A]fter the Supreme Court's *Leegin* decision, injury to consumer choice (as well as an increase in price) is now recognized as injury to consumer welfare in the United States.").

80. *Id.*

81. *Id.*

Leegin neither holds nor says that. The Court abandoned the per se rule against minimum RPM and, in so doing, gave manufacturers the legal ability, by contract, to prevent retailers from discounting the price of their product. Although the Court acknowledged that RPM might result in a greater diversity of price and quality options for consumers,[82] nowhere did the Court suggest that merely demonstrating a reduction in choice is sufficient to shift to the defendant the burden of justifying its RPM policy with evidence of increased output. On the contrary, the Court rejected arguments that isolate a single dimension of competition, including price, to demonstrate that RPM is likely to have had an anticompetitive effect in a particular case precisely because an increase in price is not inconsistent with RPM having increased consumer welfare when nonprice benefits are taken into account.[83] The Court is not as easily moved off the welfarist foundation of modern antitrust law as Commissioner Rosch seems to think or to wish.

There are, to be sure, modern antitrust decisions in which the Court generally discusses choice or product variety as they relate to competitive effects, which Averitt and Lande cite in support of their argument that the choice standard is consistent with prevailing law.[84] That there are such cases is not surprising, however: holding price, output, and quality constant, eliminating a choice valued by at least some consumers does reduce welfare. That does not make choice rather than welfare a goal of antitrust law, much less an adequate guide to antitrust decision making. The very point of analyzing the economics of business arrangements, and a point that has not escaped the Court, is that those arrangements arise not randomly but rather because of their effects upon prices, output, quality, and innovation. Economic analysis allows a better understanding of how business arrangements affect incentives to compete along different margins, how to assess those tradeoffs in theory and in practice, and how to analyze the ultimate effect of those restraints upon welfare.

RPM also provides an excellent example of the benefits of a welfare standard informed by the empirical evidence that has been accumulated over the last thirty years. A few recent surveys summarize the existing empirical literature on vertical restraints generally and on RPM in particular. The first, by a group of economists at the Federal Trade Commission and the Antitrust Division, reviewed twenty-four empirical

82. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) ("Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.").

83. *Id.* at 895 ("Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct.").

84. Averitt & Lande, *Using Consumer Choice*, *supra* note 15, at 189–91. For example, Averitt and Lande point to *United States v. Dentsply International, Inc.*, 399 F.3d 181, 194 (3d Cir. 2005), where the Third Circuit observed "[a]n additional anti-competitive effect is seen in the exclusionary practice here that limits the choices of products open to dental laboratories." *Id.* at 194.

papers published between 1984 and 2005, focusing upon the effects of vertical restraints and vertical integration (which substitutes managerial for contractual imposition of vertical restraints). They concluded, "[e]mpirical analyses of vertical integration and control have failed to find compelling evidence that these practices have harmed competition, and numerous studies find otherwise."[85]

The second study reviewed a similar and overlapping set of papers and reached similar conclusions.[86] A more recent analysis of the theoretical and empirical literature on vertical restraints, including RPM, by an economist at the Federal Trade Commission, concluded that "[w]ith few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons," and that the evidence "supports a fairly strong prior belief that these practices are unlikely to be anti-competitive in most cases."[87]

The RPM example not only illustrates the advantages of the welfare standard in cases involving nonprice elements, it also shows that the errors induced by Averitt and Lande's choice standard are not harmless but are likely to be harmful to consumers on both price and nonprice dimensions.

CONCLUSION

The choice standard, if adopted, would inevitably reduce consumer and total welfare by shifting the focus of antitrust analysis from efficiency to more easily observed but misleading proxies for consumer welfare, to wit, the number of firms on offer in a market. While incorporating product variety, quality, and innovation into the standard welfare analysis is desirable when done correctly, no "new paradigm of the antitrust laws" is required to do that; modern antitrust analysis quite comfortably incorporates the tradeoffs between price and quality that consumers face. The flaw of the choice standard is that it altogether rejects the economic approach to dealing with these tradeoffs and instead imposes a structural presumption that the number of firms or brands in competition is directly correlated with consumer welfare. This involves two major errors: by rejecting the economic approach, the choice standard forgoes illumination as to why certain restraints arise in a particular market *and*, by imposing a structural presumption, it implicitly depends upon conclusions about welfare that are not justified either by theory or by evidence. In sum, the choice standard

85. James C. Cooper et al., *Vertical Antitrust Policy As a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 658 (2005).

86. Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS, *supra* note 32, at 391.

87. Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 76 (2008), *available at* http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_vertical_restraints.pdf.

would produce antitrust decisions uninformed by the contributions of modern industrial organization economics.

The ultimate question is whether the consumer choice standard offers any offsetting benefit in exchange for the loss of welfare it entails. If not, as we think we have shown, then shifting to defendants the burden of justifying any reduction in consumer choice would be merely a revival of the long ago repudiated inhospitality tradition in antitrust[88] that should and likely will be rejected by the enforcement agencies and the courts.

88. The phrase "inhospitality tradition" seems to have originated with Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B. ASS'N ANTITRUST L. SYMP. 1, 12 ("I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust law."). On the inhospitality tradition today, see Alan J. Meese, *Reframing Antitrust in Light of Scientific Revolution: Accounting for Transaction Costs in Rule of Reason Analysis*, 62 HASTINGS L.J. 457, 466 (2010).