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USING THE “CONSUMER CHOICE” APPROACH TO ANTITRUST LAW

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The current paradigms of antitrust law—price and efficiency—do not work well enough. True, they were an immense improvement over their predecessors, and they have served the field competently for a generation, producing reasonably accurate results in most circumstances. Accumulated experience has also revealed their shortcomings, however. The price and efficiency paradigms are hard to fully understand and are not particularly transparent in their application. Moreover, in a disturbingly large number of circumstances they are unable to handle the important issue of nonprice competition. In this article we suggest replacing the older paradigms with the somewhat broader approach of “consumer choice.”¹ The choice framework has several advantages. It takes full account of all the things that are actually important to consumers—price, of course, but also variety, innovation, quality, and other forms of nonprice competition. It is also far more transparent, which is an important administrative virtue even where, as in the great majority of cases, it will reach the same result. And in some important real-world situations it will lead to better substantive outcomes. There are a number of variety-valuing industries and circumstances that can be assessed correctly only by including an effective analysis of nonprice factors. We identify several of those in the article. To illustrate their importance we

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¹ We refer to this as the “consumer choice,” or sometimes, for linguistic ease, as simply the “choice” model.

go on to identify eight noteworthy recent cases that would probably have been decided differently under a choice approach. Throughout the article the focus is on the practical issues of day-to-day management, and we show how the choice approach can be made as predictable and administrable as the other paradigms.

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. That surrogate analysis usually produces reasonable results, but it is not particularly intuitive. In some cases, moreover, it does not work properly. In those cases the choice factors will have to be addressed directly if they are to be considered at all.

Antitrust encounters at least three common situations in which a simple price analysis is inadequate. First, in some markets there is little or no price competition to begin with, as a result of regulation, joint ventures, or third-party insurance payors. There is no good way to assess consumer welfare in those markets without considering the nonprice choice issues. Second, some conduct—such as horizontal agreements to limit advertising—will increase consumers' search costs or otherwise impair their decision-making ability. This will cause consumers to select products that are less desirable or less well-suited to their particular needs. A complete rule of reason analysis must take account of these adverse effects on suitability and satisfaction as well as the adverse price effects of the conduct. Finally, in some markets the firms compete not primarily on price but rather through independent product development or creativity. These efforts may involve areas, such as high-tech innovation, delivery of new patient-friendly hospital services, or editorial independence in the news media. Effective innovation in these markets may sometimes require more providers than are required to ensure price competition. Thus market concentration principles taken from a price context may not ensure robust competition in the respects most relevant to consumers of these kinds of products. In all three situations, the explicit use of a choice approach to antitrust is likely to lead to enforcement decisions that better reflect consumer concerns and preferences.

Our proposal for dealing with these issues attempts to combine the virtues of narrowness and breadth—to offer both relatively cautious substantive reform and relatively broad conceptual change.

To begin with, the proposal accepts that the price and efficiency models have brought some much-needed discipline and rigor into anti-

trust analysis, and it advocates new consideration for choice in only a limited number of cases on the margin. The choice model is anchored in current practice in at least five different ways. First, in over 95 percent of cases either the relevant choice is still going to be based on price, or price competition will ensure effective nonprice competition. In these circumstances enforcement will simply continue along familiar lines. Second, even where the antitrust analysis should focus on nonprice effects, we propose only a more explicit and rigorous consideration of those factors than before, not a fundamental break with the past. Third, our approach would not condemn practices that result in only trivial reductions in the range of options. A reduction from ten to nine providers would not normally be an antitrust concern, even though there has been, in principle, some loss of variety.² Fourth, the choice approach will not condemn practices that limit options through ordinary market competition. It asks only whether a particular business practice has resulted in some unreasonable and significant limitation on consumer choice, unmediated by a marketplace test. And fifth, a 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.³

A consumer choice theory based on these principles can operate in as disciplined and predictable a way as any other model of the antitrust laws. At first glance, the choice approach may seem to have less scientific objectivity and rigor than the efficiency or price models. Those older models, however, are based not only on science, but also on long experience and seasoned judgment. In this article we will demonstrate that a choice model, carefully developed through case-by-case analysis and supplemented by retrospective case studies and experimental economics, can build the same kind of empirical foundation for itself. Such a foundation will identify the relevant standards and thresholds, which can then be expressed and applied in administrable and predictable ways. For example, the enforcement agencies might announce that they will apply the Herfindahl (HHI)⁴ figures in the Horizontal Merger Guidelines more

² This is true by analogy to the price model, which does not condemn a practice likely to result in only a trivial increase in price.

³ The social-political paradigm rested on an underlying suspicion of or even hostility toward big business, and this animus is not present in an approach that merely tries to factor consumers' nonprice desires into the analysis.

⁴ The Herfindahl-Hirschman Index (HHI) is a measure of market concentration used in the antitrust agencies' merger guidelines, calculated by summing the squares of the individual market shares of all the participants. See U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), 4 Trade Reg. Rep. (CCH) ¶ 13,104 at n.17, available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

strictly in particular markets where choice is likely to be important, or choice might be identified as an explicit additional factor for a rule of reason analysis.

Although making only moderate changes in practice, our proposed choice model is also broadly and essentially new in principle. It represents nothing less than a new paradigm of the antitrust laws, one that will be helpful throughout the antitrust field. The consumer choice approach is fundamentally superior to the price and efficiency paradigms *because it asks the right question*. It recognizes that consumers do not just want competitive prices—they want options.⁵ Framing the issue in this way starts the analysis on the right foot, presents the questions in a desirably transparent way, ensures that important long-term factors like innovation receive their full due,⁶ and helps to guard against circumstances in which enforcers inadvertently neglect important choice factors that are simply hard to translate into terms of price.⁷ Competitive prices will then become just one of the choices that are relevant to consumers—the controlling choice and the focus of analysis in the vast majority of cases, to be sure, but conceptually still a subset of choice.⁸

Most important, use of the new paradigm should result in better substantive outcomes in some important situations. A key section of the article reviews eight recent cases that would probably have come out differently under our proposed approach. Consider, for example, a merger that efficiently combines the last two defense contractors making air-to-air missiles—a product using cutting-edge technology. If the merger were accompanied by circumstances guaranteeing lower prices,

⁵ Consumers want books that reflect their interests, not just cheap books; and they want pharmaceuticals that will cure their illness, not just cheap pharmaceuticals.

⁶ Innovation is the key to having future choices. The choice formulation thus brings to antitrust analysis an increased emphasis on two related elements: the short-term importance of nonprice options and the long-term importance of innovation. This can work either for or against an enforcement action. Sometimes the greater emphasis on innovation might make an innovation defense more likely to prevail, so that the new model could result in certain cases not being brought. In any event, we would see a somewhat different menu of cases.

⁷ This may be a more frequent shortcoming than is commonly realized. The price or efficiency approach typically defines “price” as price that is adjusted, somehow, for quality, variety, and innovation. *See infra* note 28. It is not clear how often these adjustments are actually made in reality.

⁸ This would parallel the structure on the consumer protection side of the FTC Act, where the largest single group of cases, involving deception, are conceptually a subset of the broader authority over “unfair practices.” *See Int’l Harvester Co.*, 104 F.T.C. 949, 1060 (1984).

it might be acceptable under conventional analysis, but choice analysis would call attention to the benefits of maintaining a variety of competitive approaches in a high-tech product like this one, where the best path to future improvements is inherently impossible to predict.⁹ Or consider a hospital merger that does not threaten price competition but that brings all the hospitals in a market under the control of institutions that are unwilling, on religious grounds, to provide certain reproductive services, such as tubal ligations. Conventional price analysis might well permit this merger, but a choice analysis would highlight the importance of protecting the particular services that are at risk.¹⁰ Or consider a set of strong incentives to engage in exclusive dealing in a pharmaceutical product. Conventional analysis might have seen the incentives as involving only benign or even beneficial price discounts, but choice analysis would ask whether the excluded alternatives would have been therapeutically better for some patients or if they might have been a useful starting point for future innovation.¹¹

Approaching such cases in choice terms helps call attention to the relevant kinds of market failures. The industries in which variety and choice are most important tend also to be industries that are especially susceptible to information-related market failures. Among producers, it is sometimes hard to know what kinds of creative products a novelty-craving public or a rapidly evolving technology will demand. Among consumers, it is hard to know what kinds of innovations their suppliers could have offered but did not, and so it is hard for them to demand corrections from the marketplace. For both these reasons it may be important to have additional independent centers of innovation in such markets.

In addition to its primary substantive advantages, the consumer choice model also confers a number of practical administrative and managerial benefits. These include its ability to communicate antitrust policy in broadly acceptable terms to other governments in both the developed and the developing worlds, and to explain that policy in intuitive terms to important nonspecialist audiences, such as juries, Congress, and the

⁹ Cf. Press Release, U.S. Dep't of Justice, Justice Department Requires Raytheon to Sell Key Electronics Businesses in Order to Go Forward with Its Hughes Aircraft Deal (Oct. 2, 1997) [hereinafter *Raytheon* Press Release], available at <http://www.usdoj.gov/opa/pr/1997/October97/415at.html>, discussed *infra* note 172.

¹⁰ Cf. *Dominican Santa Cruz Hosp.*, 118 F.T.C. 382 (1994), discussed *infra* Part IV.C.

¹¹ Cf. *J.B.D.L. Corp. v. Wyeth-Ayerst Labs.*, No. 01-00704, 2005 U.S. Dist. LEXIS 11676 (S. D. Ohio 2005), *appeal docketed*, No. 05-3988 (6th Cir. Aug. 5, 2005), discussed *infra* Part IV.E.

general public. The model may also help to highlight possible synergies between antitrust and consumer protection theories in Federal Trade Commission (FTC) activities. And it may help to rationalize the allocation of cases between the FTC and the Department of Justice (DOJ).

Because the consumer choice model can lead to better analysis and results, and has no significant drawbacks, it deserves to be—and it is in fact—emerging as the new paradigm of antitrust.

We elaborate this thesis in the remainder of this article, which is divided into six principal sections. Part I introduces the idea of consumer choice by defining the term, contrasting it with other plausible approaches to antitrust, and showing how it is not merely consistent with the decided body of antitrust case law, but actually the best way of explaining it. Part II starts the process of operationalizing these concepts, by reviewing the economics literature that sheds light on the optimal level of consumer choice. Part III discusses the particular industries and business circumstances for which an efficiency or price model is inadequate. Part IV shows that the discussion in the previous section has practical consequences, by identifying eight significant recent cases that were handled one way under a price or efficiency theory, but probably would have come out differently under a choice theory. Part V shows that a consumer choice approach can be made at least as administrable and predictable as any other. Part VI identifies some of the further administrative and managerial advantages of the choice approach. Finally, a brief conclusion explains why the shift to a new paradigm would have many precedents and, far from disrupting day-to-day administration of antitrust law, is instead the next logical step in its evolution.

I. DEFINING THE CONSUMER CHOICE APPROACH TO ANTITRUST

The concept of “choice” pervades trade regulation law, at both the general and the particular levels. We begin with an introduction to the broad “consumer choice theory” used to explain trade regulation law as a whole—antitrust and consumer protection laws collectively—and then from this we derive a narrower “choice” interpretation of antitrust law in particular. We then explain how this choice-oriented approach to the goals of antitrust is broadly consistent with case law and the existing consensus on antitrust policy.¹²

¹² We have addressed these background issues in a number of earlier theoretical papers. See Neil Averitt & Robert Lande, *Consumer Sovereignty: A Unified Theory of Antitrust*

A. NONPRICE COMPETITION AND THE GENERAL CONCEPT OF CONSUMER CHOICE

The proposed choice paradigm of antitrust law arises from a long experience with the operation and interpretation of the Federal Trade Commission Act. In particular, it arises from a general theory of consumer choice that has been developed over the last 20 years as a way of harmonizing the two functions of antitrust and consumer protection, as they have been presented by the two halves of that agency's statute.

This general consumer choice theory suggests that antitrust and consumer protection laws perform different but complementary tasks.¹³ Operating together, these two bodies of law ensure that consumers have the two ingredients needed to exercise effective consumer choice¹⁴—options, and the ability to choose among them. Antitrust law protects a competitive array of options in the marketplace, undiminished by artificial restrictions, such as price fixing or anticompetitive mergers. Consumer protection law then guards against other market failures by ensuring that consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints,

and Consumer Protection Law, 65 ANTITRUST L.J. 713 (1997) [hereinafter *Consumer Sovereignty*]. For a more concise statement 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). For a discussion of choice theory in an antitrust context, see Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001) [hereinafter *Choice as Ultimate Goal*]. See also Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 124 (1982) [hereinafter *Wealth Transfers*] (antitrust violation requires a market failure external to consumers that “restrict or distort consumers’ available options”); 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) [hereinafter *Unfair Acts or Practices*] (effective marketplace requires two elements: “a reasonable number of options” and ability “to make a free and rational choice from among those options”); Neil Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980) [hereinafter *Unfair Methods of Competition*] (reviewing various theories by which marketplace options can be protected).

¹³ For a full elaboration of this thesis, see Averitt & Lande, *Consumer Sovereignty*, *supra* note 12. Each of these bodies of law is aimed at, and limited to, correcting the consequences of market failures.

¹⁴ In our earlier writings we have sometimes referred to this type of consumer choice as “consumer sovereignty.” The two terms have the same meaning. See *Int’l Harvester Co.*, 104 F.T.C. 949, 1061 n.47 (1984) (referring collectively to “consumer choice or consumer sovereignty”).

such as deception or the withholding of material information.¹⁵ Together the laws function to protect a free market economy.¹⁶

B. THE PARADIGM OF ANTITRUST WITHIN THE CHOICE MODEL

Antitrust fits very comfortably within this framework. Its mission is to protect the array of options in the marketplace.¹⁷ The setting of antitrust policy within the more general "choice" framework has several implications for its proper construction, however. It suggests that the role of antitrust should be broadly conceived to protect all the types of options that are significantly important to consumers. An antitrust violation can, therefore, be understood as an activity that unreasonably restricts the totality of price and nonprice choices that would otherwise have been available.

¹⁵ This interpretation was not changed by the passage of 15 U.S.C. § 45(n), which requires, among other things, that an unfair consumer practice be one that "is not reasonably avoidable by consumers themselves." Section 45(n) is an additional screen, not a complete definition of unfairness. Consumers normally avoid injury through the exercise of choice in the marketplace. This view underlay the Commission's 1980 Unfairness Policy Statement, 4 Trade Reg. Rep. (CCH) ¶ 13,203 (1980). Section 45(n) was intended to provide a rational, empirical means of determining when the conduct has impaired consumers' ability to make choices. See *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 & n.13 (11th Cir. 1988); Timothy Muris, Chairman, Federal Trade Comm'n, The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy, Remarks Before the Aspen Summit on Cyberspace and the American Dream at n.29 (Aug. 19, 2003), available at <http://www.ftc.gov/speeches/muris/030819aspen.htm>. It is the effect on choices that is the ultimate test of legality. See *infra* note 16.

¹⁶ Thus the agency ultimately defines its mission in fairly specific economic terms: Some commentators have interpreted our policy statement as involving essentially a general balancing of interests, with all the imprecision of that course, rather than a definable economic rule. In fact, however, the principal focus of our unfairness policy is on the maintenance of consumer choice or consumer sovereignty, an economic concept that permits relatively specific identification of conduct harmful to that objective.

International Harvester, 104 F.T.C. at 1061 n.47 (citing Averitt, *Unfair Acts or Practices*, *supra* note 12). The FTC has elsewhere described the necessary conditions for consumer choice in slightly more elaborate terms, making a further distinction between deception and unfairness in its consumer protection function:

The various components of the statute form an integrated whole, allowing the Commission to promote the diverse benefits of a free and open economy. Thus the ban on unfair competition prevents exclusionary or anti-competitive behavior and helps preserve a full variety of marketplace options for consumers to choose among; the ban on deception helps ensure that consumers will not make that choice on the basis of misleading information; and the ban on unfair practices ensures that the choice is not distorted by coercion, the withholding of important information, or similar practices. Safeguards at all three levels are needed to ensure that substantial consumer injury is adequately addressed.

Companion Statement on the Commission's Consumer Unfairness Jurisdiction, 4 Trade Reg. Rep. (CCH) ¶ 13,203 at 20,909-03 (1980).

¹⁷ For an elaboration of this thesis, see Lande, *Choice as Ultimate Goal*, *supra* note 12.

Market power remains central to this analysis; antitrust conceived in these terms will still focus on preventing firms from improperly acquiring or exercising such power. However, the concept of “market power” should now be specified in a way that ensures we are capturing all its relevant aspects. Instead of just the power to cause a deviation from the prices that would be set by competition,¹⁸ market power will mean the power to significantly change the mix of price/quality/variety choices that would arise from competition.¹⁹ The power to produce adverse changes in these respects could be improper even if it is not deliberately sought or knowingly held by the firms involved.²⁰

Putting this concept into more operational terms will require answers to two practical questions: What particular choices are protected by choice-based antitrust law? How great must the reduction in choice be in order to justify government intervention?

Identifying the protected options is relatively simple. Antitrust should protect any type of choice that is of practical importance to consumers. The “consumers” at issue are normally individual ultimate consumers, but the model protects all entities engaged in purchase transactions, including corporations buying intermediate industrial goods.²¹ The options that they value are identified by their preferences as expressed

¹⁸ This has traditionally been the focus of the definition. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.38 (1984) (“market power” is “the ability to raise prices above those that would be charged in a competitive market”); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (monopoly power is “the power to control prices or exclude competition”). See generally Thomas G. Krattenmaker, Robert Lande & Steven Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 *Geo. L.J.* 241 (1987).

¹⁹ Although market power in this expanded sense is a thoroughly conventional economic concept, we do not recommend demonstrating it through conventional economic analysis in all circumstances; often the calculations of quality-adjusted price will be too complicated for that. In those cases variety will be better demonstrated through other means. In about 95% of cases, however, the standard approach to market power, focusing upon price, and the choice-based approach, focusing on price/quality/variety options, will produce identical results. For the European Union’s treatment of this issue, see *infra* note 270.

²⁰ Just as antitrust has always sought to prevent even an unexercised power to control prices, it should equally be concerned about acquisition of a power to unreasonably restrict nonprice options, even if the firms intend to compete vigorously. A firm possessing such power might not always realize it. Its employees might be doing their best to satisfy consumer demand, but may be unable to do so optimally because they are limited by the uncertainties of high-tech research paths or by their firms’ accustomed ways of doing business. One may need to preserve one or two additional firms in certain markets in order to ensure competition. See *infra* notes 92–102.

²¹ The vocabulary of trade regulation is not accustomed to thinking of corporations as “consumers,” perhaps because they are not usually subject to the same kinds of decision-making difficulties that can harm individual persons. Still, they are consumers for choice purposes whenever they make a purchase. See *infra* note 281.

in the marketplace. Thus, a choice-based theory of antitrust is fundamentally just one that is fully attentive to empirical evidence on purchasers' nonprice, as well as price, preferences. It will continue to protect price competition and other activities likely to result in cost savings because competitive prices are one of the options most highly valued by consumers. But it also recognizes and protects the main additional aspects of nonprice competition, such as innovation, variety, quality, safety, and other product attributes, because consumers base their decisions on these features as well.²²

Identifying the degree of diminution in choice against which antitrust will protect consumers is more subtle. Antitrust law does not require that the number of options be maximized,²³ and it does not affirmatively require the creation of new options.²⁴ What choice theory does do is prohibit business conduct that harmfully and significantly limits the range of choices that the free market, absent the restraints being challenged, would have provided.

The actual importance to consumers of any particular nonprice attribute can be measured here as it is elsewhere in antitrust. For example, it can be tested by predicting the response to a small but significant and nontransitory falloff in that quality.²⁵ If we can succeed in isolating one particular attribute as a variable, then the number of consumers who would switch to another supplier gives some indication of the importance of the attribute and, therefore, of the strength of antitrust concerns. However, certain free-market transactions, such as efficient joint ventures, might also result in some affirmative loss of variety but still be permissible if the consumer benefits of the action appear to outweigh

²² These other attributes have become increasingly important as the economy has moved away from producing and providing relatively simple goods at the lowest possible price towards producing more complex and specialized items.

²³ Maximum consumer choice is not necessarily good, because it may be accompanied by production inefficiencies and higher prices. In extreme cases it can cause unduly high consumer search costs and confusion. See *infra* notes 50–54 and accompanying text.

²⁴ A policy aimed at affirmatively increasing choice goes beyond the requirements of the antitrust statutes, which address conduct that results in a substantial *reduction* of competition. See, e.g., 15 U.S.C. § 18 (forbidding acquisitions whose effect “may be substantially to lessen competition”). Moreover, since nonprice product attributes are limited only by entrepreneurs' imaginations, an infinite variety of options is potentially available, and the law could not and should not require all of them to be created.

²⁵ A test of some kind is important because antitrust has long been worried about the risks of “false positives”—mistaken condemnations that will chill vigorous competition. See, e.g., *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). We share that concern, although we also note that, with the increasing concentration of many sectors, the risks associated with false positives and false negatives may be converging.

the costs. Applying the antitrust laws with this kind of awareness of both costs and benefits will help ensure consumers a sufficient—but not infinite—array of options from which to choose.

C. CONTRASTING THE CHOICE PARADIGM WITH EARLIER APPROACHES TO ANTITRUST

We can also define the choice-based concept of antitrust by contrasting it with the earlier price and efficiency models. It does not differ too greatly from those models, because they have generally served the economy well. However, it does differ in that it includes, and is broader than, either of them.

1. *Contrast with the Price Paradigm*

First, the consumer choice approach to antitrust includes, and goes beyond, the considerations inherent in a price model. It agrees with the price model that consumers should be able to choose from among the price options that the competitive market would provide to them. Choice-based antitrust is, therefore, fully concerned about any activity (such as cartel behavior) that artificially fixes prices, because this distorts or eliminates certain price options that consumers value and it unfairly transfers consumer wealth²⁶ to firms with market power.²⁷ However, the choice model posits that consumers are also entitled to the mixed price/quality and price/variety levels that the competitive market would provide. This represents not necessarily an advance in theory, but certainly an advance in practice and realism over the price model.

In theory, a price model could still adequately encompass these factors by working with “prices” that have been adjusted for quality, safety, variety, service, and so on.²⁸ If two cars are mechanically identical and are offered at the identical price, but one is painted in a popular color, and the other in an unappealing color, we can, in theory, explain the greater difficulty in selling the unattractive car on the grounds that it has a higher quality-adjusted price.

²⁶ This is usually called “consumer surplus.” For a discussion, see sources cited *infra* notes 43–44.

²⁷ See generally Lande, *Wealth Transfers*, *supra* note 12.

²⁸ Economists commonly say that when they use the term “price,” it is a shorthand for the relevant price/quality and price/variety combinations. See, e.g., GEORGE STIGLER, *THE THEORY OF PRICE* 22–23 (3d ed. 1966); see also European Union, DG Competition, *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* ¶ 24 (Dec. 2005), available at <http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf> (“In this paper, the expression ‘increase prices’ is often used as a shorthand for the various ways these parameters of competition [innovation, variety, etc.] can be influenced to the harm of consumers.”).

In practice, however, nonprice attributes often are extremely difficult to measure and translate into price equivalents.²⁹ As a result, the relatively quantifiable price issues draw all of the attention at the expense of the relatively unquantifiable nonprice issues. Price effects are discussed in the text, while nonprice considerations are relegated, either figuratively or literally, to the footnotes, which usually are forgotten.³⁰ A choice model of antitrust does not attempt the difficult task of translating these choices into price terms and, thus, is able to keep them squarely in the analysis where they belong.³¹

2. Contrast with the Efficiency Paradigm

A choice approach to antitrust also includes but goes beyond the efficiency model. The efficiency model has three concerns: minimizing allocative inefficiency, minimizing the costs of production, and encouraging innovation.³² First of all, it looks at the harms to allocative efficiency stemming from higher prices, as the flow of resources is distorted in response to distorted price signals. The resulting deadweight welfare loss is the reason the higher prices resulting from illegally acquired market power—an anticompetitive effect in itself under the price model—are generally condemned under an efficiency model as well. Second, the efficiency model looks at productive efficiency, and it values any cost savings associated with the practices at issue. Because efficiencies that affect marginal cost of production also tend to affect ultimate price,³³ many of the effects of productive efficiency will also feed back into the consumer price analysis.³⁴ Third, the efficiency model considers innovative efficiency, and it assesses the effects of the practices on future product development.

The choice approach to antitrust furthers (and, thus, includes) all three of these goals. First, because it is concerned with protecting price

²⁹ Only rarely do economists make serious attempts to compare the value of existing products to hypothetical products that might exist if firms were allowed to make innovations optimally. For example, it is hard to know how much most consumers would pay for a computer operating system that crashes only 20% as often as the best existing otherwise equivalent system.

³⁰ For illustrations from the history of the Horizontal Merger Guidelines, see *infra* notes 39–42.

³¹ In other words, rather than use the term “price” and then engage in long and complex discussions to explain that this term really means “price and nonprice variety and quality,” we propose that antitrust law choose a label that simply and directly takes account of choice.

³² See Lande, *Wealth Transfers*, *supra* note 12, at 71–80.

³³ See I PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 106–07 (2000).

³⁴ See Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1654–56 (1983); Alan Fisher, Frederick Johnson & Robert Lande, *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777, 809–10 (1989).

options and price competition, the choice model necessarily shares the efficiency model's distaste for the allocative inefficiency that results from supracompetitive pricing.³⁵ Second, the choice model cares about productive efficiency because it recognizes that cost savings can result in lower consumer prices (or can prevent price increases that would otherwise occur), thus resulting in a wider and more desirable set of price options. Among other consequences of this view, choice-based antitrust would continue to recognize an efficiency defense to antitrust violations. And third, a choice model is concerned with innovation at least as much as the efficiency model because it recognizes that in the long run innovation—in production techniques and services—is the source of future³⁶ marketplace options.³⁷

Despite these many similarities, however, the choice model differs from and goes beyond the efficiency paradigm in three other ways: in its true emphasis on innovation, its focus on consumer effects, and its more transparent methodology.

First of all, the choice model truly values innovation. The efficiency model purports to value all three types of efficiencies. As a practical matter, however, it gives only limited attention to the factor of innovation. Efficiency defenses are almost always cast in terms of whether the practice will lower costs. Whether the practice might raise or lower the rate of innovation in products or services is usually only an afterthought.³⁸ For

³⁵ Supracompetitive prices resulting from activities like price fixing are a problem under the efficiency approach only insofar as they lead to allocative inefficiency, however. Under the choice approach, on the other hand, they are undesirable in themselves. Prices fixed at an artificial level rob consumers of the competing price options to which they are entitled.

³⁶ See Michael Porter, *Competition and Antitrust: Toward a Productivity-Based Approach to Evaluating Mergers and Joint Ventures*, 46 ANTITRUST BULL. 919, 958 (2001) (the most important issue involving a merger or joint venture is not static efficiency but its "impact on productivity growth and on the health of competition").

³⁷ Even though the choice model values innovation, innovation should not be considered the ultimate goal, but only the means to the goal of providing optimal consumer choice. Some have argued that recent antitrust has been too much focused on "innovation markets." See *infra* note 137. However, Landman shows that the purported innovation market cases are really about future products and that the innovation market label is just a way of focusing on expected future competition. See Lawrence B. Landman, *Innovation and the Structure of Competition: Future Markets in European and American Law* (pt. 3), 81 J. PAT. & TRADEMARK OFF. SOC'Y 838, 850–51 (1999).

³⁸ See Porter, *supra* note 36, at 933 ("The effect of mergers or competitive practices on the overall rate of innovation is usually only paid lip service."); see also Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 420 (1980) (emphasizing cost savings with scant mention of innovation); Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 29 (1968) (briefly touching on "technological progress" but stating that "it is at least arguable that the prevailing uncertainties are too great to give any effect to . . . [this factor]. They are, nevertheless, potentially of such significance that to dismiss them may run the risk of

example, in the 1982 Merger Guidelines there were four references to cost-savings efficiencies and no references to non-cost efficiencies.³⁹ In the 1984 Guidelines there were nine references to cost savings and, again, none to non-cost.⁴⁰ The current Guidelines have an Efficiencies section that expresses some concern for innovation, but its primary concern is still with the cost and subsequent price effects of mergers.⁴¹ The emphasis is similar in the 2006 agency commentaries on the Guidelines.⁴²

The choice model also differs in that it focuses on the benefits and consequences of conduct as they appear to consumers. Under the efficiency approach, a cost saving will count as a social benefit even if it is retained by a firm with market power, and the additional money paid by consumers as a result of supracompetitive prices does not count as a negative factor.⁴³ By contrast, a choice model recognizes cost savings or innovation as benefits only insofar as they lead to new marketplace

serious error"). See also Fisher, Johnson & Lande, *supra* note 34. Sometimes, of course, the effects on innovation do receive more extended discussion. See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 722–24 (D.C. Cir 2001) (discounting alleged innovation in baby food recipes).

³⁹ The key passage is from Section V(A), note 53: "At a minimum, the Department will require clear and convincing evidence that the merger will produce substantial cost savings resulting from the realization of scale economies, integration of production facilities, or multi-plant operations . . ." U.S. Dep't of Justice, *Horizontal Merger Guidelines* (1982), 4 Trade Reg. Rep. (CCH) ¶ 13,102, available at <http://www.usdoj.gov/atr/hmerger/11248.htm>.

⁴⁰ The key passage is from Section 3.5: "Cognizable efficiencies include, but are not limited to, achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms. The Department may also consider claimed efficiencies resulting from reductions in general selling, administrative, and overhead expenses, or that otherwise do not relate to specific manufacturing, servicing, or distribution operations of the merging firms, although, as a practical matter, these types of efficiencies may be difficult to demonstrate." U.S. Dep't of Justice, *Horizontal Merger Guidelines* (1984), 4 Trade Reg. Rep. (CCH) ¶ 13,103, available at <http://www.usdoj.gov/atr/hmerger/11249.pdf>.

⁴¹ Section 4 of the Horizontal Merger Guidelines observes:

[M]ergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.

Horizontal Merger Guidelines, *supra* note 4, § 4.

⁴² The commentary certainly recognizes the relevance of efficiencies in both cost and innovation, but the great majority of the discussion and examples deals with cost effects. See Federal Trade Comm'n & U.S. Dep't of Justice, *Commentary on the Horizontal Merger Guidelines* 49–59 (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

⁴³ See *Muris*, *supra* note 38; Fisher, Johnson & Lande, *supra* note 34.

options—and, thus, it recognizes only those financial savings that are likely to be passed on to consumers in the form of lower prices.⁴⁴

Finally, the choice model values marketplace options in a way that is uniquely simple, transparent, and understandable. The term “efficiency” is vague, and to most people it simply means cost savings. It can be translated into a concern with price only through a careful explanation of the difficult concept of the allocative efficiency effects of supracompetitive pricing. It can be further translated into product variety and choice only through additional manipulations. Again, however, rather than attempting the difficult explanation of how “efficiency” really means “choice,” we propose using a much simpler vocabulary that takes account of choice directly.

D. CONSISTENCY WITH ANTITRUST POLICY AND CASE LAW

The proposed choice paradigm fits squarely within the existing policy categories and case law of the field. Thus, it can be adopted without greatly straining the vocabulary or consensus of antitrust law.

1. *Consistency with Antitrust Policy*

The choice model fits within the existing set of antitrust policy concerns. The familiar categories of antitrust violations all involve conduct that restricts consumer choice: price fixing diminishes the number of distinct price (or price/quality) points; mergers diminish the potential sources of supply in the market; resale price maintenance limits price options; and nonprice vertical restraints can limit the way in which a product can be marketed. In short, each antitrust violation is of concern because it artificially and substantially diminishes the range of options that would otherwise have been present in the marketplace. A choice model is, thus, broadly consistent with accumulated antitrust policy.

2. *Consistency with Antitrust Case Law*

The consumer choice model is also consistent with the existing body of case law. In many cases the court’s language has been quite explicit in referring to “choice.” This term may be found in contexts ranging across the antitrust field from horizontal agreements, to mergers, to boycotts.⁴⁵ Typical of these decisions is *Dentsply*, where the court noted

⁴⁴ For an analysis of which cost savings are likely to be passed to consumers, see Fisher, Johnson & Lande, *supra* note 34.

⁴⁵ See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 102 (1984) (horizontal agreements among competitors may be desirable when the actions “widen consumer choice—not only the choices available to sports fans but also those available to athletes”); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 368 (1963) (merger might harm nonprice characteristics of bank, such as “variety of credit arrangements, convenience of location,

that an “additional anticompetitive effect is seen in the exclusionary practice here that limits the choices of products open to dental laboratories.”⁴⁶ Some other decisions are less explicit, but their outcomes are still best explained in terms of choice as well. Where the conduct involved is price fixing, for example, the court’s decision may speak only of effects on “price,” but even there the courts are implicitly treating the conduct as harmful because it eliminated the competing, perhaps less expensive, price choices that would otherwise have existed.⁴⁷ A highly visible recent matter in which choice was important is the *Microsoft* case, a monopolization matter that was not so much about the price of software as it was about protecting characteristics like innovation, reliability, and suitability for various purposes.⁴⁸ The consumer choice model presented in this

attractiveness of physical surroundings, credit information, investment advice”); Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 755 (10th Cir. 1999) (boycott eliminated a competitor, “thereby limiting consumer choice to the other source of output”); Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1384 (5th Cir. 1994) (tie-in likely to be illegal per se if it involves “a foreclosure of choice to an ultimate consumer”); Gowan Car Care Ctr. v. Murphy Oil USA, Inc., No. 99-5775. 2000 WL 1477789, at *8 (6th Cir. Sept. 26, 2000) (unpublished) (monopolization claim unfounded when plaintiffs “failed to suggest how [defendant’s] pricing practices have hindered consumer choices. In fact, it seems quite clear that consumers have benefited”); see generally Lande, *Choice as Ultimate Goal*, *supra* note 12, at 508–11.

⁴⁶ United States v. Dentsply, 399 F.3d 181, 194 (3d Cir. 2005).

⁴⁷ This is well illustrated by *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982). An agreement to limit maximum prices was improper, the Court held, because even high prices provide consumers with valuable points of variety, which can facilitate innovative service packages or provide incentives for practitioners to develop an unusually high level of skill.

⁴⁸ The goals of the case were described in terms of choice by all parties and at all stages of the litigation. The trial judge found that Microsoft had illegally maintained its monopoly power in the Windows operating systems by stifling competition that “would have conducted to consumer choice and nurtured innovation.” United States v. Microsoft Corp., 84 F. Supp. 2d 9, 112 (D.D.C. 1999). The appellate briefs of the parties supported and assailed these findings in light of the standard of consumer choice. See Microsoft Brief at 12 (the firm was an innovator, and consumers “have greatly benefited from Microsoft’s efforts to offer improved products at attractive prices”), available at <http://cyber.law.harvard.edu/msdoj/ms-appeal.html>; Government Brief at 121 (Microsoft’s exclusionary conduct “restricted consumer choice and deterred innovation”), available at <http://www.usdoj.gov/atr/cases/f7400/7425.htm>. The liability decision of the D.C. Circuit also is written in terms of choice, not price or efficiency: “Microsoft . . . violated Section 2 by engaging in a variety of exclusionary acts . . . to maintain its monopoly by preventing the effective distribution and use of products that might threaten that monopoly.” United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001). On the remedy issue the circuit court held that there should have been an evidentiary hearing, thus prompting a remand, but there, too, one key issue would be choice. See *id.* at 101–02. Microsoft Chairman Bill Gates had testified that the government’s originally proposed remedy would harm choice. “[Dividing Microsoft] along the arbitrary lines proposed by the Government” would limit the availability of products “that users could access from a wide range of devices.” *Id.* at 99. Finally, the government’s overall view of its case, set out in the Competitive Impact Statement, discussed how the remedy would improve consumer choice by “requiring Microsoft to provide the ability for computer manufacturers and consumers to customize, without interference or

article, therefore, does not require any fundamental rethinking of the case law. It instead is a compact, intuitive way of explaining, interpreting, and applying a long line of precedents.

E. CONCLUSION ON BACKGROUND ISSUES

Our argument that antitrust analysis should explicitly shift to consumer choice is more than just an academic suggestion based on the apparent utility of the new paradigm. It is also descriptive. There is reason to believe that the law is already evolving toward the choice model, as revealed through the underlying rationale of many decisions and the explicit methodology of the *Microsoft* litigation.

The next step is to explore how to take these theoretical insights and translate them into practical operational terms, including identifying where the new theory will be important and how it might be applied.

II. THE ECONOMICS OF OPTIMAL CONSUMER CHOICE

If antitrust is about protecting consumer choice, what level of choices or options should our enforcement principles aim to preserve? We have seen that choice theory tries to preserve the number of options that the competitive market would have provided, but how do we estimate that optimal number when the market may have already been distorted by improper conduct? Economic analysis provides some initial answers to these questions. Four principles emerge: (1) consumers benefit from a reasonable range of choice; (2) there are nonetheless diminishing returns to variety, as there are to almost everything else; (3) we should take account of long-term variety in innovation as well as short-term variety in immediate consumption; and (4) because of uncertainties about the general relationship between concentration and beneficial variety, it will be fruitful for antitrust policy to identify particular industries in which lower concentration and greater variety are especially important to consumers. Taken together, these principles suggest the optimal amount of choice should be determined on an industry-by-industry basis, through the methodology that will be described later in Part IV.

reversal, their personal computers as to the middleware they install, use and feature, and by . . . [e]nsuring that software and hardware developers are free to develop, distribute, or write to software that competes with Microsoft middleware or operating system software" Competitive Impact Statement 4, *United States v. Microsoft Corp.*, Nos. 98-1232 & 98-1233 (D.D.C. Nov. 15, 2001), available at <http://www.usdoj.gov/atr/cases/f9500/9549.pdf>. For a further discussion, see Lande, *Choice as Ultimate Goal*, *supra* note 12, at 511-14.

A. THE GENERAL BENEFITS OF VARIETY

Consumer tastes vary widely. As a result, variety of supply is generally beneficial, and competitive markets typically offer this variety in response to consumer demands. Consumers are able to satisfy their desires more closely to the extent the market contains different types, prices, locations, and qualities of products and services.⁴⁹

B. DIMINISHING RETURNS TO VARIETY

This does not mean simply that more choices are better, however. At least three other factors limit the benefits of increasing variety. First, to the extent that goods are differentiated, there is less room for economies of scale, so product differentiation tends to lead to higher prices.⁵⁰ Second, to the extent that products are highly differentiated, there is an increased possibility that each maker will have some degree of market power, with the accompanying ability to raise prices.⁵¹ At some extremes this might give rise to problems of monopolistic competition.⁵² Third, although it might seem counterintuitive, there is evidence that too much choice can be detrimental to consumers.⁵³ Research shows that additional choice tends to lead to increased satisfaction only up to a point. Beyond that point, choice overload can lead to stress, decision-making paralysis, and “buyers’ remorse,” in the sense that consumers become concerned that they did not find the one perfect choice among the fully stocked range of options.⁵⁴

For all these reasons there is an optimal level of consumer choice. This is identified through a complex tradeoff that seeks to achieve most of the benefits of choice while not sacrificing economies of scale, producing market power, or causing excessive consumer confusion. This tradeoff is best performed by the free market, with antitrust being limited to

⁴⁹ See DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 201 (4th ed. 2005).

⁵⁰ F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 601 (3d ed. 1990); CARLTON & PERLOFF, *supra* note 49, at 201 (“Which would you prefer: a choice of three different-flavored soft drinks at 50 cents per drink or only one flavor at 25 cents? The answers to such questions determine the optimal variety-price combination.”).

⁵¹ SCHERER & ROSS, *supra* note 50, at 601.

⁵² See *id.* at 32–34, 575–76.

⁵³ See BARRY SCHWARTZ, *THE PARADOX OF CHOICE* (2004); see also Kirstin Downey, *Buried in Choices*, WASH. POST, June 4, 2005, at F1 (quoting Schwartz’s example that home buyers “find it harder to choose when many options are available, and after they do, they are apt to second-guess themselves . . .”).

⁵⁴ See SCHWARTZ, *supra* note 53, at 86; JON ELSTER, *ULYSSES UNBOUND* (2000).

ensuring that anticompetitive activity does not interfere with the market's ability to make these calculations.

C. SHORT-TERM VARIETY AND LONG-TERM INNOVATION

Optimal consumer choice has two components: a short-term aspect that focuses on removing immediate restrictions on marketplace variety, and a long-term aspect that focuses on removing impediments to future innovation. Both are important. Consumers desire not only a competitive range of options, but also an optimal amount of innovation because only innovation will lead to new choices.⁵⁵ Again, the market will normally find the equilibrium point for the various desires, but here too antitrust has a role in ensuring that mergers and other actions do not distort the market's ability to do so.

How to take account of innovation in antitrust analysis is a difficult issue. There is much disagreement about how to reach the optimal level.⁵⁶ Some argue that innovation is typically spurred by competition

⁵⁵ This may actually be more important than short-term variety. Professor Michael Porter puts the point this way:

While protecting short-run consumer welfare measured by price cost margins is undeniably important, the benefits of healthy competition are in fact broader and more essential to consumers and to society. The fundamental benefit of competition is to drive productivity growth through innovation, where innovation is defined broadly to include not only products, but also processes and methods of management. Productivity growth is central because it is the single most important determinant of long-term consumer welfare and a nation's standard of living.

Porter, *Competition and Antitrust*, *supra* note 36, at 922–23; see also *Interview with Professor Porter*, ANTITRUST, Spring 1991, at 5 (“I believe that a merger that improves static efficiency but that threatens dynamism is a poor tradeoff.”). These principles apply to the global economy as well as in local markets:

International competitiveness increasingly depends on innovation. With continued operational improvement in education and infrastructure now a given, and with local companies able to rapidly acquire and deploy technology from around the world, producing standard products using standard methods no longer sustains competitiveness. Among high income countries, differences in prosperity are closely related to differences in the intensity of innovation. For developing nations, low-cost inputs by themselves are no longer sufficient to maintain competitiveness. Companies must increasingly be able to access and ultimately develop global technology.

Michael Porter & Scott Stern, *Ranking National Innovative Capacity*, in *UNIQUE VALUE: COMPETITION BASED ON INNOVATION CREATING UNIQUE VALUE* 111 (Charles Weller ed., 2004).

⁵⁶ Here too the optimal level is not the simple maximum. No one suggests that all of society's resources should be devoted to innovation; consumers also should be able to enjoy the fruits of past innovations. Similarly, it is not always desirable to have a huge number of attempts to achieve each specific innovation. It might sometimes be enough to have a small number of attempts; any more would not be significantly more likely to be successful and would be likely to waste resources that could have been employed elsewhere.

in general,⁵⁷ and specifically by races to innovate.⁵⁸ Others assert that innovation is instead often or normally accomplished by “large and often monopolistic enterprises” that have more resources.⁵⁹ Still others believe that the weight of economic theory shows that there is a non-linear, inverted-U-shaped relationship between concentration and innovation, with innovation being greatest at moderate levels of concentration and tending to diminish at very high and very low levels.⁶⁰

Important innovations are not limited to the technological sphere. Innovation also includes new developments in formulating and delivering services. These service innovations may flourish in different market conditions from technical ones. They may not require high levels of concentration to achieve because they often require only attentiveness to one’s customers, rather than more investment-heavy R&D in underlying technologies. Service innovation may, therefore, sometimes call for keeping markets at ordinary levels of competitive concentration, rather than providing an efficiency rationale that would permit them to consolidate further to achieve vital scale economies.

The one possible point of consensus to emerge from these models is that exceptionally high concentration is probably not good for innovation and future options: “[V]ery high concentration has a positive effect only in rare cases, and more often it is apt to retard progress by restricting the number of independent sources of initiative and by dampening firms’ incentives to gain market position through accelerated R & D.”⁶¹

⁵⁷ “Competition can stimulate innovation. Competition among firms can spur the invention of new or better products or more efficient processes.” FEDERAL TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 1 (2003) [hereinafter TO PROMOTE INNOVATION], available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

⁵⁸ *Id.* at 10. See also Philip Nelson et al., *The Economics of Innovation: A Survey*, ABA Section of Antitrust Law Task Force Report 25–26 (2002), available at <http://www.abanet.org/antitrust/at-comments/2002/reports/economicssurvey.pdf> [hereinafter *ABA Report*].

⁵⁹ TO PROMOTE INNOVATION, *supra* note 57, at 12 (quoting JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942)).

⁶⁰ *Id.* at 13 (quoting SCHERER & ROSS, *supra* note 50, at 660). This last school of thought holds that “innovation increases with concentration up to some point and then declines.” *ABA Report*, *supra* note 58, at 34.

⁶¹ SCHERER & ROSS, *supra* note 50, at 660. The Department of Defense conducted a study of the nation’s defense industrial base and concluded that 35–45% of the critical new technology was being supplied by firms with fewer than 100 employees. See Suzanne Patrick, Deputy Under Secretary of Defense for Industrial Policy, Options for Maintaining a Robust, Adequate and Efficient Industrial Base, Remarks to the Heritage Foundation 8 (Feb. 23, 2005). An FTC study has reached a similar conclusion: “What is needed for rapid technical progress is a subtle blend of competition and monopoly, with more emphasis in general on the former than the latter” TO PROMOTE INNOVATION, *supra*

Uncertainties remain, however. There is no uniform correlation between market structure and innovation, and "industries probably vary too much for one theory to fit all."⁶² Even the widely accepted inverted-U relationship between industry concentration and innovation depends upon a multitude of industry characteristics.⁶³ Because optimal overall consumer choice depends upon short-term considerations (involving the current array of choices on the market) as well as long-term goals (involving the optimal level of innovation), the task of formulating a single antitrust rule for all circumstances would be difficult indeed.

D. NEED TO FOCUS ON PARTICULAR INDUSTRIES

Given these difficulties in formulating a single general antitrust rule, it makes sense to proceed instead on an industry-by-industry basis. This approach would gain insight from the general studies, but its focus would be on particular markets. Antitrust practitioners will seek to understand in which industries variety is particularly important to consumers; in which ones the necessary variety must be created by independent competitors; and what particular number of competitors are required.⁶⁴ These are complex questions,⁶⁵ but the profession's long experience with merger analysis shows that it is possible to consider even quite complex economic questions effectively when they are presented by the empirical facts of a specific market.⁶⁶

note 57, at 34 (quoting SCHERER & ROSS, *supra* note 50, at 660). The *ABA Report* notes that well-funded corporate research is not necessarily the key to discovery: "Jewkes, Sawyers, and Stillerman (1969) reviews seventy important Twentieth Century innovations and finds that only 24 had their origins in industrial research laboratories." *ABA Report*, *supra* note 58, at 31.

⁶² *Id.* at 14 (quoting Dennis Carlton & Robert Gertner, *Intellectual Property, Antitrust and Strategic Behavior* 14 (Nat'l Bureau of Econ. Research, Working Paper No. 8976, 2002)); *accord id.* at 35.

⁶³ See *ABA Report*, *supra* note 58, at 34. The report lists among the relevant variables the characteristics of demand for the products, the institutional framework, and the firms' strategic interaction. See *id.* at 34-35 (economists "have recognized that both concentration and R&D efforts may be simultaneously determined by other market characteristics").

⁶⁴ These are all questions of degree, of course, as is the extent of the market failure that is the prerequisite to any real antitrust problem. But antitrust necessarily deals with questions of degree.

⁶⁵ Even for particular industries the relationship is likely to be complex. See Dror Ben-Asher, *In Need of Treatment? Merger Control, Pharmaceutical Innovation and Consumer Welfare*, 21 J. LEGAL MED. 271, 305 (2000) ("In summary, the rapid growth of the biomedical R&D sector suggests that scientific creativity in drug development is likely, perhaps even more likely, to be found in proportionally smaller and more informal organizations." (citation omitted)).

⁶⁶ See Robert Lande & James Langenfeld, *From Surrogates to Stories: The Evolution of Federal Merger Policy*, ANTITRUST, Spring 1997, at 5.

III. CIRCUMSTANCES WHERE THE CHOICE APPROACH WOULD BE SUPERIOR

The next step is to identify the specific places where a choice-oriented antitrust theory would be most useful. The broad conclusions are simple: The areas better assessed under a choice paradigm all involve markets in which nonprice competition is particularly important, or situations with other important nonprice issues. Three such areas are particularly significant: (1) where there is little or no price competition as a result of regulation, industrywide joint ventures, or third-party payors; (2) where market-specific conduct has increased consumers' search costs or impaired their decision-making ability, thus impeding the effectiveness of price competition; or (3) where independent decision making and creativity, rather than price, are the main forms of competition.

A. MARKETS WITH LITTLE OR NO PRICE COMPETITION

There is no good way for a price or efficiency model to analyze antitrust issues in markets that do not have price competition to start with. The choice model is, therefore, superior in dealing with markets, like certain regulated industries, that lack such competition. In these circumstances the price paradigm is essentially useless unless we resort to the awkward notion of quality- and variety-adjusted price, which is analytically sound but not very practical. Framing the issue in terms of efficiency is no better. To the extent that prices in these markets are regulated, there is little risk of allocative inefficiency, and the kinds of qualitative inefficiencies that might arise (such as subpar design or service) involve value-laden consumer preferences that are hard to quantify. The best way to take account of qualitative factors is through a direct focus on consumer choice.

Industries with regulated or quasi-regulated prices occur (1) in markets where prices are explicitly regulated; (2) in markets dominated by legal joint ventures; and (3) in markets dominated by third-party payors, where consumers might not be price-sensitive.

1. *Markets Where Prices Are Explicitly Regulated*

Price competition can be completely absent in markets where the government simply sets the rates. Competition itself has not been lost in such markets, however, but has merely taken other forms. It is particularly important to protect that nonprice competition when regulation has closed the other paths of rivalry.

Recent history provides several instances of this transformed competition. In the years before deregulation, for example, airlines all charged

the same regulated prices.⁶⁷ Nonetheless, antitrust policy quite properly prevented them from merging because keeping them separate ensured that they would engage in competition to provide higher service.⁶⁸ This led to such phenomena as the “piano bars” and other indicia of luxury service designed to attract customers to certain American Airlines flights.⁶⁹ In this way consumers continued to receive the benefits of at least some limited competition.

2. Cases Involving Industrywide Joint Ventures

Price competition may be similarly attenuated in markets dominated by a single joint venture embracing most or all of the market participants. There too it becomes important to preserve nonprice competition among the venture partners. A case of this sort was *Aspen Skiing*,⁷⁰ which involved a joint venture encompassing the entirety of what the Supreme Court accepted as a relevant market—downhill skiing on the four mountains of Aspen, Colorado.⁷¹ The two firms owning these mountains formed a joint venture to offer consumers a lift ticket good at all four areas. Although the two firms were, thus, no longer competing on the basis of price in this particular respect, the Court found the joint venture permissible because it offered the important efficiency of a combined product that a large percentage of consumers valued highly.⁷² Important for our present purposes, the arrangement was structured in a way that fostered continued nonprice competition because the joint venture partners shared the revenue from the four-mountain tickets on the basis of how often skiers used each area. This arrangement, thus, “allowed consumers to make their own choice on . . . matters of quality”⁷³ and it gave each partner a strong incentive to make its facilities attractive in order to maximize its share of the joint revenue.

⁶⁷ Prior to the Airline Deregulation Act of 1976, *codified as amended* at 49 U.S.C. § 41713(b)(1) (Supp. 2005), the Civil Aeronautics Board (CAB) specified ticket prices, discouraged competition, and restricted entry into the airline market. Jonathan Ogur, *The Deregulated Airline Industry: A Review of the Evidence*, ECON. ISSUES, Jan. 1988, at 3–5.

⁶⁸ See, e.g., *United States v. Civil Aeronautics Bd.*, 511 F.2d 1315, 1317 (D.C. Cir. 1975) (refusing to allow CAB approval of a multilateral capacity reduction agreement on the grounds that it would have anticompetitive effects).

⁶⁹ See Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 *FORDHAM INT’L L.J.* 7, 17 (2000).

⁷⁰ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁷¹ The Court referred to a jury verdict that the relevant market was “[d]ownhill skiing at destination ski resorts,” *id.* at n.20, and that the “Aspen area” was a relevant geographic market. We express no view on the correctness of these markets.

⁷² The firms also continued to offer tickets for their own mountains only. See *id.* at 591.

⁷³ *Id.* at 610.

In other words, the continuing presence of nonprice competition among the joint venture partners was an important factor in making the venture itself permissible.⁷⁴ Antitrust law should be alert to this kind of nonprice competition when judging other marketwide joint ventures.⁷⁵

3. Cases Involving Third-Party Payors

Finally, price competition will exist in only an attenuated form in markets dominated by third-party payors. This situation can arise whenever a consumer's bills are paid by someone else,⁷⁶ such as in the case of students who choose a college while being supported by their parents, or business travelers on expense accounts. The most familiar example, however, is insurance coverage. If a person knows that the insurance company will pay medical or car repair bills, he or she is not likely to be price sensitive. The customer will instead choose on the basis of a nonprice attribute, such as quality, service, or location.⁷⁷

Insurance company programs have reduced, but not eliminated, this price indifference. Because insurers and government payors are aware of the incentive problem, they often impose requirements that force consumers to engage in some price comparisons. These may include a requirement that the consumer obtain multiple estimates, a threat of rate increases if excessive claims are made, or a requirement of a consumer co-payment. These mechanisms are only partial solutions, however, because they seldom reimpose all the costs on the consumer.⁷⁸ Other insurance

⁷⁴ *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), involved similar facts. There two joint ventures encompassed the music-licensing industry. Owners of copyrighted music formed the ventures to sell blanket licensing agreements to media outlets. The outlets compiled data on the number of times individual songs were played and paid royalties accordingly. This joint venture, with its price-fixing aspects, was permitted because it was necessary for the very existence of the product. Without it, songwriters could not, as a practical matter, be compensated for their music because individual transactions between composers and users would be unduly expensive. Yet, within this price-fixed venture, the songwriters continued to compete with one another on what was probably the more important aspect of their work—the quality and variety of their songs.

⁷⁵ For a recent example of such a joint venture, see Press Release, Federal Trade Comm'n, FTC Intervenes in Formation of ULA [United Launch Alliance] Joint Venture by Boeing and Lockheed Martin (Oct. 3, 2006) [hereinafter *ULA Press Release*], available at <http://www.ftc.gov/opa/2006/10/ula.htm>, discussed *infra* note 165.

⁷⁶ Price competition may still exist in the form of competition to obtain business from those actually paying the bill. Our focus here, however, is on the competition to make the sale to the ultimate consumer.

⁷⁷ Still more specialized nonprice considerations may sometimes be controlling. Among business travelers, flyers may select particular airlines in order to maximize their frequent-flyer benefits, rather than to obtain the least-expensive flight.

⁷⁸ If they did, they could hardly be called insurance plans. The effectiveness of such claim-limiting arrangements is further limited by the fact that they may sometimes be

companies may designate a panel of preferred suppliers who promise to charge no more than a certain price and require all their customers to use those suppliers. Once consumers are steered to that panel, however, their bills are still paid by the insurance company and they again become likely to choose among the designated suppliers on the basis of nonprice factors. Thus, regardless of the payors' efforts to introduce partial market mechanisms in these situations, nonprice competition will continue to be important, and a choice model will be particularly useful in safeguarding that competition.

These observations suggest that antitrust should pay close attention to the role of nonprice competition in specific industries dominated by insurance payors. These include auto-glass repair, replacement auto parts, medical services in general, and hospital services in particular.

B. CIRCUMSTANCES WHERE CONSUMERS HAVE BEEN LED TO PURCHASE AN UNSUITABLE PRODUCT

A second broad area in which the choice paradigm confers significant advantages involves search costs. Increased search costs have the effect of degrading consumers' ability to make effective judgments in some particular market, causing them to become less-effective shoppers. One consequence of such conduct is a rise in prices—an anticompetitive effect that can be and is captured by a price model. Another consequence, however, is that consumers can end up choosing products that suit their needs less well than they otherwise would. Because only the choice paradigm provides a suitable means of accounting for this second adverse effect, the choice model should be employed for all cases involving harm to consumer decision-making abilities. This approach is useful in assessing advertising-restraint cases in particular and restrictions that increase consumer search costs in general.

1. *Advertising Restrictions*

Impaired consumer decision-making ability is an important part of the rule of reason analysis in antitrust cases involving restrictions on advertising. The price consequences of this impairment have been

subject to antitrust charges themselves. *See, e.g., Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (involving maximum fees that physicians could claim as part of certain health care plans); *O'Halloran*, 5 Trade Reg. Rep. (CCH) ¶ 22,543 (1988) (consent order against obstetricians alleged to be colluding to obtain additional Medicare revenue).

important in assessing bans adopted by lawyers,⁷⁹ dentists,⁸⁰ and optometrists.⁸¹ Restricted advertising will lead not only to price increases, however, but also, in some cases, to the selection of a doctor, lawyer, or other professional who may not optimally suit the client's preferences. Under these circumstances, for example, the patient may not locate the doctor who specializes in the particular condition the patient has, or the one that emphasizes gentler or reassuring treatment approaches that may be important to a particular individual. The ultimate assessment of a particular advertising ban may be different depending on whether these nonprice harms to choice are also considered.⁸²

2. Other Practices that Impede Consumer Decision Making

Beyond advertising restraints, the case law records efforts to impede consumer decision making in a number of other ways. In many of these cases the firms inhibited comparison shopping by making it harder for customers to obtain competing bids. This was the effect of the agreement in *National Society of Professional Engineers v. United States*,⁸³ where the rules of a professional association explicitly restricted upfront competitive bidding for engineering services. The conduct in *Detroit Auto Dealers*—

⁷⁹ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (rule forbidding most attorney advertising overturned on First Amendment grounds). For more detailed descriptions of the cases discussed in this subsection, see Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 Wis. L. Rev. 941; 953–84 (2000).

⁸⁰ *California Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999) (ethical rule against misleading ads was applied to prohibit many truthful ads involving discounts and quality; case returned to appellate court to assess whether there was a sufficient basis for this application).

⁸¹ *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988) (board regulations impeding advertising by corporate providers, and prohibiting advertising of discounts, were unauthorized by statute, and condemned as antitrust violations).

⁸² The Supreme Court's decision in *California Dental Association* suggests that it is not merely permissible but mandatory to conduct a rule of reason analysis that considers all the relevant nonprice effects. See *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). In that case the FTC had condemned advertising restraints under both the per se and the "quick look" or abbreviated rule of reason approach. The Supreme Court was concerned, however, that in a professional advertising context the restrictions may have had significant benefits in preventing consumer confusion, and it held that the FTC should have used a more extended rule of reason analysis to be sure of considering these potentially important factors. See *id.* at 781 (Breyer, J., concurring) (situation did not necessarily call for the fullest market analysis, but at least "an enquiry meet for the case"; put differently, "a less quick look was required"). *Id.* at 758. An extended rule of reason analysis is particularly inclusive in the context of professional advertising. It requires consideration of cost savings, prevention of deception, and other consumer benefits on one side, and price increases and impaired substantive selection of the desired product or service on the other side.

⁸³ 435 U.S. 679, 681 (1978).

an agreement among competing car dealers to restrict their hours of operation—also made competitive offers harder to find.⁸⁴

A complete rule of reason analysis in such cases needs to take account of all the harms that flow from this conduct, including the adverse effects on choice and suitability. In the *Detroit Auto Dealers* case, for example, the restricted hours may not have left consumers with enough time to locate the car best suited to their needs in terms of styling, size, horsepower, accessories, and mechanical features.⁸⁵ These are bona fide economic costs, which should be identified and included in the analysis.⁸⁶ Even more serious nonprice consequences were threatened in *Indiana Federation of Dentists*, which involved an agreement among dentists to restrict insurance companies' access to diagnostic x-rays.⁸⁷ This agreement did not merely raise prices by impeding the insurance companies' ability to conduct a cost-containing review of proposed treatments; it also may have physically harmed consumers by impeding their access to independent advice from their insurers and subjecting them to increased risk of unnecessary or fraudulent dental work.⁸⁸

C. MARKETS IN WHICH INDEPENDENT DECISION MAKING OR CREATIVITY ARE CRUCIAL

Finally, the consumer choice paradigm will produce superior results when assessing markets where creativity or innovation—not price—are

⁸⁴ *Detroit Auto Dealers Ass'n*, 111 F.T.C. 417, 681 (1989). For additional cases, see Lande & Marvel, *supra* note 79.

⁸⁵ *Detroit Auto Dealers*, 111 F.T.C. 417.

⁸⁶ Potential purchasers commonly see and test drive a number of cars before choosing one. If consumers must shop at times they find undesirable, the added costs of this inconvenience should be counted as a real loss for them. Other real losses are those due to settling for the suboptimal selection. For example, if a consumer pays \$20,000 for a particular car, but would have been willing to pay \$22,000 for a mechanically comparable car available for the same price at another dealer, which would have been a better choice in terms of styling and adaptation to small children, and if the consumer would have reached that dealer if not for the agreement to restrict hours of operation, then the losses need to include this unrealized \$2,000 in potential consumer surplus, less whatever additional search costs would have been incurred.

⁸⁷ *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 448–49 (1986).

⁸⁸ *Id.* at 462. Of course, if the more familiar price-related antitrust factors are sufficiently clear, a particular case might still be decided without reaching choice factors. For example, if a court finds that the efficiencies are strong while the price increases are trivial or highly speculative, it might resolve the case on that basis alone. See, e.g., *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 604 (7th Cir. 1984). Conversely, if the court finds that the proffered efficiency claims are pretextual and that prices increased significantly, it might also not need to reach the practices' effects on choice.

the most important tools of competition. For example, people usually choose a movie based on whether they think they will enjoy it; they choose a newspaper based on whether they find it entertaining and informative; they value particular vaccines based on whether they are likely to be effective.⁸⁹ In these situations the decision is made with much less attention to price than is normally the case;⁹⁰ indeed, it may be that prices are uniform and that there is no price competition at all.⁹¹ If creative qualities are the dominant means for competing in such a market, however, and if market failures⁹² result in a situation where these creative qualities can flourish only in an atmosphere of organizational independence, then more than the usual, price-determined number of firms may be required to ensure a sufficient range of consumer choice.

Creativity and innovation are, of course, important to some degree in every market. The matter of degree is crucial, however. Markets naturally fall along a continuum, with one end being products that are sold primarily on the basis of price and the other end being products that are sold primarily on their nonprice attributes. Creativity will rise to the level of special antitrust relevance only for products on the latter end of the spectrum.

Indeed, special antitrust concern is appropriate for only one subset of the products at the creative end of the spectrum—products for which the necessary level of creativity and variety can only be achieved in an environment of organizational independence. Such products will be limited in number because they are a subset of a subset. But they do

⁸⁹ See Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, 68 ANTITRUST L.J. 545, 555 (2000) (“Attention to individual tastes will become more and more important as exploding technology provides the means to satisfy them in ways heretofore unknown.”).

⁹⁰ Price might count in an extreme case, of course, but it is unlikely that many people would attend one movie rather than another just to save a dollar. Illustrating this, a recent edition of the *Washington Post* entertainment section contained a seven-page listing of the movies currently playing, with capsule reviews of each. Nowhere in this comparative shopping guide was there any mention of price.

⁹¹ Movies all tend to have similar prices citywide. Even where they do not, the owner of a multiplex theater complex will typically price all of its own films identically. The multiplex might compete against other theater chains on the basis of price, but, from the consumer's perspective, the different movies in the complex compete with one another only on a nonprice basis. Similarly, all over-the-air television is free and so may be said to have identical prices of zero (or of the viewers' opportunity costs, which are also identical across different programs).

⁹² For a discussion of the relationship between market failure and organizational independence, see *infra* notes 95–98. Graham Allison has explored some of the organizational characteristics that may contribute to these problems. See discussion *infra* note 96.

exist and are important. This can be illustrated through a contrast of two familiar industries: cookie baking and book publishing.

In many industries, such as cookie baking, the price model will work reasonably well, even for assessing effects on choice as well as on prices. This is true because firms that are engaged in effective price competition are usually also competing vigorously in terms of variety, service, quality, and other elements of nonprice competition. For example, suppose that there are four bakeries making cookies, but three would be enough for effective price competition.⁹³ Two of these firms could then merge without any harmful effect. Being competitive, as measured by price competition, each of the three surviving firms will still have an incentive to make every type of cookie for which there is a significant demand. And being competent bakers, each of the firms will be able to act on that incentive; a new line of cookies would not require a separate corporation. In this situation, there is no advantage to using a choice standard over a price or efficiency standard. Price competition would be the proxy for all the other issues that concern us.

In other industries, however, the price model is clearly less satisfactory. Consider book publishing. There too, let us assume, three firms are sufficient to ensure price competition, and those three firms are motivated to compete intensely in the nonprice arenas of creativity, variety, and willingness to bring forward promising new authors. Does this mean that the publishing industry should be allowed to consolidate to three firms with no harmful consumer effects?⁹⁴ Not at all. Even if the publishing firms are motivated to supply a full range of consumer options, and they compete in the most perfect good faith, they may simply be unable to do so. A bakery may be able to make every kind of cookie, but a publisher is not necessarily able to publish every kind of book. The options brought out by a particular publisher may be constrained by subconscious habits of mind or by an imperfect connection with popular tastes. In this industry the price model is not necessarily an adequate surrogate for effects on consumer choices. Those issues can be captured only by a model that focuses explicitly on choice.

⁹³ This is, of course, a stylized example. We are not asserting that three firms are always enough for effective price competition. This hypothetical requires the existence of substantial barriers to new entry into a well-defined cookie market and other factors. We are further supposing that three firms could make cookies as efficiently as four and that each firm can make all different kinds of cookies.

⁹⁴ Here, too, we assume a market with entry barriers, so that we can focus just on the mechanisms of competition among the firms already in the market.

Some kind of market failure must be present before an industry will fail to respond to the full range of consumer demand in this way.⁹⁵ However, there are a particularly wide range of information-based market failures that may affect the creative industries. Some failures are due to imperfect information on the part of suppliers. It is hard to know just what a fickle public will demand or to know just which research avenues will result in popular products. And in the absence of objective performance measures on these points, firms in the creative industries may have a particular tendency to follow intellectual and cultural fashions that will narrow the range of marketplace options.⁹⁶ Some other market failures are due to imperfect information on the part of customers. Buyers of books and newspapers, for example, may not recognize that their options have been distorted and, therefore, may not demand corrections. Similarly, purchasers of high-tech products, such as pharmaceuticals and defense equipment, may not easily recognize situations where innovations could have been made but were not.⁹⁷ Some suppliers

⁹⁵ The existence of any real competition problem requires a market failure of some sort. See Averitt & Lande, *Consumer Sovereignty*, *supra* note 12, at 722-33.

⁹⁶ This can lead to risk-avoiding consensus views on the kinds of news stories to cover, the kinds of television shows to produce, or the proper height of hemlines. Personal incentives, in other words, can sometimes prevail over corporate purposes. See generally GRAHAM ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971). Allison postulated that many complex government decisions could be classified as following one of three models. Model I decisions are made by the classical "rational actor" and seek to advance the organization's logical goals rationally achieved. To understand this method of decision making, an outside observer can simply understand the organization's goals and resources and does not need to look inside the entity for its particular decision-making characteristics. By contrast, Model II decisions are determined by the organization's internal process. They are caused by (or influenced by) such factors as standard operating procedures, factored problems, fractionated power within the organization, parochial interests of different divisions, and the pursuit of sequential goals. Model III decisions emerge as a result of the personalities of the individual decision makers, who may have individualized goals, stands, stakes, interests, and attitudes towards risk that can heavily affect outcomes. Although Allison developed his insights to explain governmental decision making, others have applied these or similar ideas to business decisions as well. See, e.g., F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 225-27 (2d ed. 1980). The presence of "irrational" Model II and Model III decision making means that business conduct cannot always be predicted by a "black box" analysis of what a profit-making firm would be likely to do. Of course, if a business does not earn a sufficient profit it will go bankrupt. But within some range of sufficient profitability, organizational and personality-driven issues can affect decision making and outcomes. Economists have developed these insights into a number of proposed qualifications to the theory of the firm. See, e.g., Herbert A. Simon, *Theories of Decision Making in Economics and Behavioral Science*, 49 AM. ECON. REV. 253, 263 (1959) (firms with target rates of return will try to reach "satisfactory" profits rather than maximum profits).

⁹⁷ Departures from perfect market conditions are of course ubiquitous. Determining when a particular shortfall results in a cognizable market failure is a matter of degree—but matters of degree are relevant and recur throughout the antitrust field. See Averitt & Lande, *Consumer Sovereignty*, *supra* note 12, at 722-33.

may anticipate these kinds of market failures and, in the absence of antitrust enforcement, may make anticompetitive acquisitions in the hopes of enjoying sufficient profits combined with a quiet life of limited innovation.⁹⁸

Even casual observation of the world suggests that there are industries that act more like our hypothetical book publisher example than like our bakery example. When General Motors was a member of the “Big Three” and imports were not a major factor in the marketplace, GM had every incentive to extend its product line to cover the full range of consumer demand and, apparently, it had a deliberate corporate strategy of doing so.⁹⁹ But somehow all its products ended up looking like “GM cars” nonetheless. The product line did not include economy cars, small sports cars, or true luxury cars. This may have been due to a number of reasons: a desire to economize on design resources, a hope of discouraging the movement of consumers into a market segment with traditionally smaller markups,¹⁰⁰ a failure to anticipate future consumer preferences correctly,¹⁰¹ or simply the numbing hand of corporate orthodoxy as to what a car “should” look like. But for whatever reason, GM did not act like our theoretical cookie company, and it did not extend its product line to satisfy the full range of consumer demand that it could reasonably have served.

The stunning success of small imports in the 1960s and 1970s showed how deficient the domestic carmakers had become at creating diverse vehicle types.¹⁰² If in 1959 the auto industry had experienced a merger wave in which the Big Three had been allowed to purchase every other carmaker in the world on the grounds that the industry still would be

⁹⁸ Enforcement actions, therefore, do not necessarily involve the government agencies in second-guessing good-faith determinations about the best innovation strategy to pursue in the companies’ own areas of expertise. In the situation posited in the text, the company is aware of its market power. Even where there is an element of good-faith disagreement, moreover, it occurs in circumstances of market failure that keep either party from perfect knowledge. And as we will discuss below, any enforcement policy will be developed to reflect the consensus from a broad and prolonged experience and not just the views of any single official.

⁹⁹ In the 1920s, “General Motors . . . decided to provide cars to satisfy the tastes of every consumer and . . . offered variety in styling, as well as comfort, accessories, and power.” Mira Wilkins, *Multinational Automobile Enterprises and Regulation: An Historical Overview*, in GOVERNMENT, TECHNOLOGY, AND THE FUTURE OF THE AUTOMOBILE 227 (Douglas Ginsburg & William Abernathy eds., 1980).

¹⁰⁰ See LAWRENCE WHITE, *THE AUTOMOBILE INDUSTRY SINCE 1945* (1971).

¹⁰¹ See JEFFREY O’CONNELL & ARTHUR B. MYERS, *SAFETY LAST* 155 (1966) (reporting on an industry consensus in 1950s and 1960s that “safety doesn’t sell”).

¹⁰² See Michael Pearce, *International Competition in the World Automotive Industry*, in GOVERNMENT, TECHNOLOGY, AND THE FUTURE OF THE AUTOMOBILE, *supra* note 99, at 259–60.

sufficiently price competitive, these imports might have never entered the market and the current variety in the automobile marketplace might never have come into being, or might have been significantly delayed. It was far better for consumer welfare that the market remained unconcentrated enough for innovation to flourish.

There are at least three industries in which effective competition may require the kind of organizational independence that can only flourish in a relatively unconcentrated market: (1) communications media; (2) hospitals; and (3) certain types of innovative high-technology businesses.

1. *Media*

The media industry provides the most familiar example of the need for nonprice competition. A healthy democracy benefits from having a range of opinions in the marketplace for ideas.¹⁰³ Congruent with that social need, the marketplace also demands a range of opinion to satisfy the diverse preferences of individual readers and listeners. It is possible, however, for mergers among media firms to threaten that beneficial competition. Acquisition by a single parent corporation may tend to result in uniformity of views within the various parts of the conglomerate, and special antitrust rules calling for more than the usual number of firms in media markets, therefore, seem to be appropriate.

First of all, ownership by a single parent corporation can threaten the diversity of content presented by the individual firms within that

¹⁰³ Public policy has always recognized the value of diverse voices in a democracy. The Supreme Court has repeatedly emphasized the importance of free political communications, noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 264–65, 270 (1964) (ability to publish a national newspaper without undue concern for local libel actions). *See also* *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution . . ."); *Roth v. United States*, 354 U.S. 476, 484 (1957) (First Amendment gives broad protection to political expression "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). The Court has gone on to protect diversity in this respect by protecting the right of outsiders to use various suitable forms of communications. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (statements of substantive views in judicial elections); *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 357 (1995) (anonymous leaflets on issues); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (boycott of town merchants for civil rights purposes); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Political scientists have concurred on the benefits of diverse sources of information. *See* Bureau of Competition, Federal Trade Comm'n, Proceedings of the Symposium on Media Concentration (Dec. 1978). New information technologies may have displaced some of the ones involved above. The underlying principle expressed in these cases, however, that the nation benefits from variety and diversity in its media, surely remains valid. *See* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 270 (2001).

corporate family. Newspapers within a publishing family sometimes pursue a similar editorial policy;¹⁰⁴ insiders with media firms have admitted to the existence of such a thing as a corporate viewpoint;¹⁰⁵ and op-ed columnists familiar with the phenomenon of increasing concentration have expressed concern about it.¹⁰⁶

A particular market failure contributes to this problem. Newspapers, and other types of information-heavy media, are what consumer protection specialists refer to as “credence goods.”¹⁰⁷ Their actual quality is difficult to determine even after they have been bought and consumed, and it must to some degree be taken on faith. A newspaper claims that it is fair and balanced, but a consumer is not well equipped to check on that fact and generally does not know what things have not been reported. This means that, within limits, an editor has some range of discretion to spin stories or coverage. This, in turn, means that the editor of a subsidiary publication will have the latitude to track the editorial policies of its corporate parent, with only limited concern about corrective pressures from the market.

Some may argue that special antitrust rules are not needed to deal with this situation because a media conglomerate has ample incentives

¹⁰⁴ This kind of family uniformity can occur regardless of whether the parent organization leans left or right, of course. On the one hand, the *Washington Post* and *The New York Times* are both basically liberal papers, and their corporate affiliates, *Newsweek* and the *Boston Globe*, respectively, do not pursue observably different editorial policies. On the other hand, a former political reporter at the newspaper *The Australian* recounted how all of the Murdoch-owned papers in that country were ordered to support a particular conservative candidate for prime minister. See *Frontline: Who's Afraid of Rupert Murdoch?* (PBS television broadcast, Nov. 7, 1995) (remarks of Mungo MacCallum) (Journalists “were given specific instructions on what they could write and what they couldn't write. And where the instructions weren't specific, they learnt pretty bloody quickly because nothing appeared in the paper if it didn't follow the line.”), available at <http://www.pbs.org/wgbh/pages/frontline/programs/transcripts/1404.html>. Another journalist has said that Murdoch “put all his newspapers behind Mrs. Thatcher . . .” *Id.* (remarks of Michael Grade, Chief Executive, Channel 4, U.K.).

¹⁰⁵ For example, the “Public Editor” or ombudsman at *The New York Times* posed the question, “Is the New York Times a Liberal Newspaper?” and then answered the question with the topic sentence, “Of course it is.” Daniel Okrent, *The Public Editor: Is the New York Times a Liberal Newspaper?*, N.Y. TIMES, July 24, 2004, § 4, at 2, available at <http://query.nytimes.com/gst/fullpage.html?res=9D01E7D8173DF936A15754C0A9629C8B63>.

¹⁰⁶ See, e.g., William Safire, *The Five Sisters*, N.Y. TIMES, Feb. 16, 2004, at A19 (“You don't have to be a populist to want to stop this rush by ever-fewer entities to dominate both the content and the conduit of what we see and hear and write and say.”).

¹⁰⁷ Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973) (“Credence qualities are those which, although worthwhile, cannot be evaluated in normal use. Instead the assessment of their value requires additional costly information The line between experience and credence qualities of a good may not always be sharp, particularly if the quality will be discerned in use, but only after the lapse of a considerable period of time.”).

to encourage internal diversity, as this is the path to serving the greatest number of customers and maximizing profits.¹⁰⁸ While this point is worth considering seriously, there seem to be three persuasive responses to it. First, a media conglomerate may squeeze out diversity accidentally, even if not as a deliberate policy. No monopolist monopolizes unconscious of what it is doing,¹⁰⁹ and presumably no firm unconsciously fixes prices either, but a firm may easily diminish editorial competition through the unconscious process of promoting those people who have demonstrated sound judgment by sharing the basic worldview of the promoting executives.¹¹⁰ Second, some media owners may have causes to advance and may value that power more than the marginal revenue that they might lose.¹¹¹ Third, the merger laws are intended to prevent the creation of potential market power, and enforcers are not swayed by the argument that a particular acquirer will not exercise that power. It is no defense to an otherwise anticompetitive conventional merger that the parent

¹⁰⁸ See, e.g., Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 212–17 (1952) (arguing that a monopolist is more likely to offer a broad array of programming than independently owned outlets because it can afford to develop more specialized material for its broader base of outlets). The Benton Foundation has produced empirical studies arguing the contrary, reporting that radio groups at or above the FCC's local ownership cap actually have less variety in programming formats than station groups that are under the cap. The studies are available at <http://www.benton.org/index.php?q=node/3800>.

¹⁰⁹ Cf. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) (L. Hand, J.).

¹¹⁰ The ombudsman at *The New York Times* has noted the paper's consistently left-leaning treatment of social issues like gay marriage and gun control: "I don't think it's intentional when The Times does this. But negligence doesn't have to be intentional." He went on to note, "This has not occurred because of management fiat, but because getting outside one's own value system takes a great deal of self-questioning." Okrent, *supra* note 105. See Ted Turner, *My Beef with Big Media*, WASH. MONTHLY, July/Aug 2004, available at <http://www.washingtonmonthly.com/features/2004/0407.turner.html> (salaried local managers of a media conglomerate are unlikely to be the kinds of people who will take risks and innovate).

¹¹¹ The causes they pursue can, again, be either of a liberal or a conservative bent. On the one hand, some critics charged that the Sinclair Broadcast Group was pursuing explicitly non-economic goals when it planned to air an anti-Kerry film on the eve of the 2004 Presidential election, even though doing so appeared likely to have a negative effect on advertising revenue and stock prices. See Bill Carter, *Broadcaster's Stock Picks up After Change on Kerry Film*, N.Y. TIMES, Oct. 21, 2004, at A27. On the other hand, other critics charged that CBS News had similar motives in planning to break the story of missing ammunition stocks in Iraq, embarrassing to the Administration, just on the eve of the same election. See Howard Kurtz, *Leaks Hastened Report on Missing Explosives*, WASH. POST, Oct. 28, 2004, at A7. Some recent economic analysis has proceeded from the premise that media outlet owners may be "willing to sacrifice some profit in order to engage in ideological persuasion." See generally David Balan, Patrick DeGraba & Abraham Wickelgren, *Media Mergers and the Ideological Content of Programming* (preliminary draft) (Feb. 2004) (copy on file with authors).

company promises to let its subsidiaries price independently.¹¹² It should, therefore, be no defense to an otherwise anticompetitive media merger that the parent promises to let its outlets frame their editorial policies independently.¹¹³

Some media markets are already sufficiently concentrated to make this additional uniformity a problem. This is not true of all markets, of course. Some, like book and magazine publishing, are still very diverse. However, other markets are already relatively concentrated as a result of high capital costs (cable systems) or the need for proprietary content (Internet gateways, such as Yahoo and Google), or status as niche markets serving a limited audience. The concentration levels in some of these markets are already problematic even in a conventional price analysis, and the addition of choice analysis might be enough to raise real questions about recent mergers. For example, the mergers of the three main supermarket tabloids might raise concern as impairing the range of consumer choices in that specialized market.¹¹⁴ Or one might have been concerned about the \$3 billion transaction to bring together the largest Spanish-language television network and the largest Hispanic-audience radio chain.¹¹⁵ Where such

¹¹² See, e.g., Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, Initial Decision of Administrative Law Judge 204 (Oct. 21, 2005) (hospital merger), available at <http://www.ftc.gov/os/adjpro/d9315/051021idtextversion.pdf>.

¹¹³ Cf. Turner, *supra* note 110 ("Naturally, corporations say they would never suppress speech. But it's not their intentions that matter; it's their capabilities. Consolidation gives them more power to tilt the news and cut important issues out of the public debate. And it's precisely that power that the rules should prevent.").

¹¹⁴ See Paul Farhi, *Three-Headed Baby? Rival Tabloids Joined in Corporate Deal*, WASH. POST, Nov. 3, 1999, at C1. Rather than continuing to compete with one another, each publication reportedly will specialize in one niche of the tabloid market. The *National Enquirer* reportedly will focus on Hollywood news; the *Sun* will use health and religious stories to appeal to the 55-plus audience; and the *Weekly World News* will concentrate on paranormal stories involving aliens, UFOs, and Elvis. See C. Eugene Emery, *Sensationalism Six Pack: One Company Owns All the U.S. Supermarket Tabloids*, SKEPTICAL ENQUIRER, Jan./Feb. 2001, at 8 (quoting the *American Journalism Review*), available at http://www.findarticles.com/p/articles/mi_m2843/is_1_25/ai_68966510. One might be forgiven for asking whether it is possible for headlines to become any more varied in a world with even more tabloid choices, but the market should be given the opportunity to put that to the test. One issue in any such case would be whether supermarket tabloids in fact remain a relevant market or whether more traditional media are now starting to overlap with it.

¹¹⁵ The parties were Univision Communications, Inc. and Hispanic Broadcasting Corporation, which combined reached an estimated 97% of all Spanish-speaking households, with as much as 80% of the television and radio audience in many top Hispanic markets. The principal issue in antitrust review was whether there was a general Spanish media broadcast market, combining both radio and television. See Hispanic Broadcasting Corp., Docket No. MB 02-235, FCC File Nos. BTC-20020723ABL et al., Memorandum Opinion and Order 4 (Sept. 22, 2003), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-218A1.pdf

an issue does exist, the presence of fringe media suppliers will not necessarily be sufficient to cure it.¹¹⁶

With such concerns in mind, antitrust enforcement has been as vigilant to maintain competition in the media industry as in any other. Cases have been brought involving newspapers, radio stations, television stations, and cable networks.¹¹⁷ The problem with those cases, however, is precisely that they did treat the media industry as any other industry. They aimed to achieve the levels of concentration that had been shown, in previous antitrust matters, to be sufficient to protect price competition. It is not clear that they went beyond those levels to separately protect editorial diversity.¹¹⁸

There are some indications that antitrust is starting to change in these respects, however. A new respect for media diversity may have been on display in the consent order the FTC negotiated with AOL and Time Warner.¹¹⁹ This complex merger had resulted in, among other things,

¹¹⁶ At first glance one might think that the presence of fringe suppliers will solve any problems in media markets. The fringe suppliers in a conventional, price-driven market may not be able to constrain the prices of the primary firms, and so they are largely irrelevant. But the fringe suppliers in a media market might appear capable of supplying whatever demand for diversity exists. The customer who wants more varied sources of information can turn to specialty publications and Internet Web sites and fully satisfy his or her demand, even though these fringe suppliers may account for only a small percentage of the market. On reflection, however, it is clear that in *neither* the price nor the media cases do the fringe suppliers resolve the competitive concerns because in neither case are they sufficiently effective substitutes for the primary suppliers. In a price-competitive market the fringe suppliers are imperfect substitutes because of inconvenient locations, subtle product distinctions, and similar factors. We know that such differences are important because they keep these products from constraining the prices of the dominant firms in the first place. In the media market the fringe suppliers can be imperfect substitutes for similar reasons. They may provide fully functional alternative sources of information but fall short in collateral respects that are important to consumers: the alternative newspapers may not offer home delivery; the magazines may not offer advertisements for familiar products; the information source of whatever kind may not offer the social reassurance of having a large circulation. *See, e.g.*, C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 889 (2002) (arguing that fringe operators, and even non-fringe market actors, do not provide substitutes for consumers seeking a particular type of news source, such as a mainstream paper or a local paper). Hence, a merger that brings too many of the "respectable mainstream" publications under common control will not be cured by the availability of alternative publications on the margins.

¹¹⁷ *See, e.g.*, *Lorain Journal Co. v. United States*, 342 U.S. 143, 149–50 (1951) (newspaper required exclusive dealing by advertisers in effort to injure competing radio station); *United States v. R.C.A.*, 358 U.S. 334, 336, 351 (1959) (possible antitrust violation where network threatened to cancel affiliation unless a firm agreed to exchange of stations).

¹¹⁸ *Cf. Stucke & Grunes, supra* note 103, at 271 (antitrust courts have protected editorial competition among newspapers as a form of economic competition, but not necessarily one requiring additional actors).

¹¹⁹ America Online and Time Warner, FTC Docket No. C-3989. *See* Federal Trade Comm'n, Press Release, FTC Approves AOL/Time Warner Merger with Conditions (Dec. 14, 2000), available at <http://www.ftc.gov/opa/2000/12/aol.htm>.

a vertical integration of the Time Warner cable systems, which served about 20 percent of U.S. cable households, and AOL, which was the nation's largest Internet service provider (ISP). To address the resulting concerns about vertical exclusion, the order required that for five years the merged firm offer three other non-affiliated cable broadband ISP services to its subscribers.¹²⁰ The order, thus, protected a four-firm market structure. The order and the accompanying analysis do not refer explicitly to special standards for a media context, and litigation to protect a four-firm market in other contexts is not unprecedented. Nonetheless, it is relatively uncommon for the Commission to challenge four-to-three mergers,¹²¹ and the individual comments of the Commissioners indicate that considerations of variety and diversity were much on their minds.¹²² The case might, therefore, be understood as a first attempt to make some special allowances for a media context.

It is worth emphasizing that our proposed analysis of media competition is framed solely in conventional antitrust terms and not in terms of the Constitution. Some have argued that consideration of First Amendment values should persuade antitrust law to seek a higher than usual level of competition in media markets.¹²³ We are not making that

¹²⁰ One of these ISP alternatives had to be offered before AOL itself began offering service, and the other two within 90 days thereafter. Various other provisions of the order kept Time Warner from interfering with or discriminating against the content of these independent services.

¹²¹ The FTC reports only about three enforcement actions per year involving challenges to four-to-three mergers or in less concentrated markets, out of an average total of 16 merger challenges per year. See Federal Trade Comm'n, Staff Report, *Horizontal Merger Investigation Data, Fiscal Years 1996–2003* at 1, 25–26, Tables 6.1–6.2 (2004), available at <http://www.ftc.gov/opa/2004/02/horizmerger.htm>. Interpreting these statistics involves some implicit questions about the definitions of “challenges” and the treatment of market definition over time, but it is clear that four-to-three merger cases are relatively uncommon under any measure.

¹²² See, e.g., *FTC Backs AOL-Time Warner Merger*, JOURNAL RECORD, Dec. 15, 2000, available at 2000 WL 14300520 (quoting Chairman Robert Pitofsky) (“Our concern here was with access, that these two powerful companies would create barriers that would injure competitors”); Alec Klein, *AOL Merger Clears Last Big Hurdle*, WASH. POST, Dec. 15, 2000, at A1 (quoting Commissioner Leary saying: “I had and I continue to have concerns about these content issues.”); AOL/Time Warner, *supra* note 119 (concurring statement of Commissioner Thompson) (the consent agreement will “send an important message to the market that high speed internet should continue to provide consumers with choice of service and diversity of content”). While suggestive, however, these quotes are not conclusive. They show that the Commissioners recognized that firms in this industry compete in large part through innovation and variety. They do not necessarily show that the Commissioners believed that this variety required lower concentration levels here than in other industries.

¹²³ See, e.g., Wilfrid C. Rumble, Comment, *The FCC's Reliance on Market Incentives to Provide Diverse Viewpoints on Critical Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F. L. REV. 793 (1994). For a general review of such arguments, see Federal Trade Comm'n, *Proceedings of the Symposium on Media Concentration*,

argument. We believe that it is appropriate—and sufficient—to frame the analysis in terms of the ordinary level of competition that antitrust works to protect in any market. We are arguing that, in order to achieve this ordinary level of nonprice competition in the particular factual circumstances of a media market—where jointly owned producers are likely to encounter special obstacles to the production of genuinely diverse product lines—it may be necessary to have more than the usual number of producing firms.¹²⁴

2. Hospitals

Diverse sources of supply would also be valuable in the hospital industry. Hospitals, like media, are an industry in which consumers desire a wide diversity in types of service but are hindered by various market failures in their ability to demand it. As a result, it may be appropriate to call for the preservation of a few more firms in antitrust markets here than in most others.

The need for variety in hospital services arises from several sources. One factor is the widely varied preferences of particular local communities. These may call for specialized innovations, such as operation of storefront clinics, or accommodation of nontraditional medical assistants, or research into locally important industrial diseases. Another factor involves the wide variety in patients' personal values. The hospital industry is associated with many events that raise what are fundamentally values questions: Should fathers be present for the birth of their children? Should spouses be present for treatment of potentially critical conditions in their husbands or wives? Should adult children be present for efforts to resuscitate elderly parents? Individual preferences on such basic questions will surely vary widely—both as a result of personal disposition and as a consequence of cultural norms—and will tend to be relatively inelastic. All these factors suggest that there will be a strong demand for

Dec. 14–15, 1978, at 22 et seq. (remarks of Professor Monroe Price, UCLA Law School). See also James N. Dertouzos & William B. Trautman, *Economic Effects of Media Concentration: Estimates from a Model of the Newspaper Firm*, 39 J. INDUS. ECON. 1, 13 (1990) (FCC rules restricting newspaper-broadcast cross-ownership do not have an economic basis, although they may make sense if one is concerned about media diversity).

¹²⁴ The fashion industries provide an additional, related example of a sector where independent centers of innovation and creativity are crucial. Many of their products compete primarily through the excitement and imagination of new styles, and price can be distinctly secondary. The importance of this nonprice competition makes an unconcentrated structure important in these markets as well. The market failure of imperfect information—the imperfect ability to predict the future—would make it difficult for any small number of firms to anticipate the full range of consumer demand. Nevertheless, these industries have not been a traditional subject for antitrust attention because they are generally unconcentrated and have low barriers to entry. However, choice and variety are important and should be considered if they appear in jeopardy in any particular market.

diversity both in the substance of hospital services and in the ways of providing them.¹²⁵

Numerous market failures, however, hinder consumers' ability to assert these preferences. One set of failures is intrinsic to the patient population. Hospital patients tend to be old, very sick, and worried. They purchase hospital services only occasionally and under unexpected or trying circumstances, none of which is conducive to effective bargaining.¹²⁶ Moreover, they are represented in some respects by their doctors, Medicare, or insurance carriers, who may not be perfect agents for their interests. Another set of market distortions can be found on the hospital side of the equation. Hospitals deal in some respects with insurance carriers rather than with patients; they produce uniform industrywide "standards of care"; and they are regulated by government agencies that may have been wholly or partially captured by the nominal subjects of this oversight. Custom, inertia, and the unfortunately short distance between caring and paternalism may be factors as well. For all these reasons the hospital industry may not fully respond to consumer desire for choice and creative innovations in the delivery of care.¹²⁷

Hospitals' limited responsiveness shows up in historical ways, such as the uniform ban on husbands in delivery rooms until a new generation of parents-to-be forced the issue.¹²⁸ It shows up today in forms, such as undignified gowns, that are trivial in themselves but suggest more deep-seated issues.¹²⁹ And it shows up in some larger ways, suggesting that

¹²⁵ Cf. *Hosp. Corp. of Am.*, 106 F.T.C. 361, 478-79 (1985) (nonprice or quality competition in health care has historically been more important than price), *aff'd*, 807 F.2d 381 (7th Cir. 1986).

¹²⁶ Hospitals may sometimes contribute to these market failures by withholding important information from consumers. For example, hospitals frequently offer surgical patients a premedication called Versed, explaining in their background materials that it is a sedative that will help them relax, which it does. Often unmentioned, however, is the fact that this drug also produces amnesia. See AMERICAN HOSPITAL FORMULARY SERVICE, DRUG INFORMATION 2478 (2006) (drug "provides sedation . . . and anterograde amnesia of perioperative events").

¹²⁷ Hospitals are perhaps the only place in the economy where someone can set out to make a semi-discretionary purchase of several tens of thousands of dollars worth of services and not find a supplier willing, and even eager, to meet a variety of desires. It is true that hospital services must sometimes be purchased on an emergency basis from the nearest facility and that insurance plans also restrict hospital selection. Most often, however, patients and their doctors have some discretion over where and when the services are bought.

¹²⁸ The swift changeover to admitting husbands suggests that a latent consumer demand for their presence was there to some degree in earlier years and was simply not known because the marketplace provided no ready avenue for expressing it.

¹²⁹ That practical alternative gowns exist is suggested by the fact that at least a few institutions make a point of offering them. See Lindy Washburn, *Hospital Adds Stylish Touch*

there are other demands, like that for husbands in delivery rooms, that are still latent. For example, parents generally cannot accompany children into the operating room, even though this is routinely done in a few institutions without ill effect,¹³⁰ and even though "practically all" parents elect to use this procedure when it is offered.¹³¹ Parents are present at fewer than 5 percent of pediatric anesthesia inductions in the United States, but they are present at 75 percent of cases in Great Britain.¹³² Family members are similarly excluded from resuscitation efforts in most emergency rooms, even though, when it is offered, they almost always value the experience and the psychological closure it provides,¹³³ and the Emergency Nurses Association has taken the position that this procedure is workable and should be a right of patients and their families.¹³⁴

Any tendency toward rigid procedures in these respects is undoubtedly reinforced by other, unrelated factors. These include doctors' fear of tort exposure,¹³⁵ or quality of care standards that may be written with

to Help Its Patients Recover, THE RECORD (NORTHERN NEW JERSEY), June 30, 1999, at A1. The obvious question is why all institutions do not offer them.

¹³⁰ See Mary Fennell, *Parents in the OR? You Bet!*, RN MAGAZINE, Dec. 1999, at 38; Jitka Zobal-Ratner et al., *Parents in the Operating Room and Post Anesthesia Care Unit*, Conference Poster, American Association for Pediatric Ophthalmology and Strabismus (1996). For a statement by a hospital using the procedure, see, e.g., the Web site of Children's Hospital Boston, available at <http://www.childrenshospital.org/clinicalservices/Site1864/mainpageS1864P17.html>.

¹³¹ Michael W. Gauderer et al., *Is There a Place for Parents in the Operating Room?*, 24 J. PEDIATRIC SURG. 705, 705-06 (1989). See also Ellen Kavee, *Parents in the Operating Room*, MONITOR: NEWSL. OF THE N.Y. STATE SOC'Y OF ANESTHESIOLOGISTS, Fall 2000, available at <http://www.nyssa-pga.org/fall-2000.html> ("98% of parents questioned said they would like to be present if their child ever needed surgery in the future"); Josephine McGann, *Parental Presence During Induction: The Role Parents Play: Is It Valid?*, CANADIAN NURSING J., Mar./Apr. 1999 (parental presence "can help decrease the stress and anxiety of both the patient and parents"); Patricia A. LaRosa-Nash & Jane M. Murphy, *A Clinical Case Study: Parent-Present Induction of Anesthesia in Children*, PEDIATRIC NURSING, Mar. 1996, at 109 (in one survey of parents, "99% who chose to be present at induction believed that their presence helped their child").

¹³² See Jerrold Lerman, *Anxiolysis—By the Parent or for the Parent?*, 92 ANESTHESIOLOGY, Apr. 2000, at 925.

¹³³ See Theresa Meyers et al., *Family Presence During Invasive Procedures and Resuscitation*, AM. J. NURSING, Feb. 2000, at 32. Within the universe of family members that were offered and accepted the visitation option, 97.5% thought they had a right to be present, and 100% thought that it was important and helpful to them to be with their loved one at a time of crisis. *Id.* at 36.

¹³⁴ See Ben Harder, *Opening the Curtain*, U.S. NEWS & WORLD REP., Sept. 10, 2001, at 64.

¹³⁵ See Meyers, *supra* note 133, at 39 (29% of ER providers worried that family members might initiate litigation); Fennell, *supra* note 130, at 40 ("Liability is . . . probably the strongest and most widely heard argument against having a parent present . . . Administrators and providers alike may worry about being sued if a parent observes an adverse event involving the patient or is injured while observing his or her child in the OR.").

the doctors' convenience in mind and may be more restrictive than warranted.¹³⁶ But the lessening in the number of competitors surely contributes to any problem that exists. To ensure a sufficient level of competition in these respects it may be helpful to maintain an industry structure that is slightly less concentrated than would be needed for purely price competition.

3. *High Technology*

Imagination and creativity are also important in high technology, where leaps of science are the stuff of new products. To preserve future competition in such products it can be important to protect a variety of different research approaches. In markets using truly cutting-edge technology, manufacturers do not necessarily know which research avenues are going to work out, and they, therefore, do not know what particular products consumers are going to demand. To maintain competition in the face of this potential market failure it may again be useful to keep a larger number of independent firms in the market.¹³⁷

This is obviously a proposition in need of a limiting principle. We do not intend to suggest that any industry that uses technology in a form more advanced than an ox cart is subject to special choice-based antitrust rules. Rather, we should focus on the particular subset of high-tech industries in which innovation is particularly important.¹³⁸ In order to

¹³⁶ Doctors advocating the conventional practices acknowledge that the majority of parents prefer to accompany their children, "[w]hen asked their opinion," but suggest using pre-operative sedative drugs to keep young patients calm. Lerman, *supra* note 132, at 925. This piece went on to make the decidedly non-market suggestion that doctors are under no obligation to respect the preferences of the people who hire them. Parental presence "is not an inalienable right but a therapeutic option to be used at the discretion of the anesthesiologist, not the parent, to facilitate induction of anesthesia." *Id.* at 926. There is a marked occupational and sociological split on this issue, with nurses supporting more open access to procedures and doctors opposing it.

¹³⁷ Antitrust already considers some aspects of future competition under the heading of "innovation markets." All commentators agree on the general importance of innovation, see the discussion in Porter, *supra* note 36, but have reached no consensus on whether the concept of innovation markets will help frame useful antitrust rules for dealing with it in the high-tech context. Some may also argue that the concept of the innovation market does not really address the issues of variety and choice at all. It provides a legal basis for considering, as a presently existing area of competition (the innovation market) the state of future competition in the industry. It does not necessarily provide a substantive analytical tool for assessing whether greater than normal numbers of firms should be required for satisfactory competitive results. That task can be pursued, however, through the more focused, market-specific methodology we discuss in this article.

¹³⁸ In appropriate cases courts have recognized the use of high-technology manufacturing techniques as a factor defining a distinctive market. See, e.g., *FTC v. PPG Industries*, 798 F.2d 1500, 1502 (D.C. Cir. 1986) (Bork, J.) (approving district court's definition of the relevant product market as "one of aircraft transparencies requiring, for want of a better term, 'high technology' to produce, without regard to the materials of which they are fabricated").

keep this set reasonably limited, industries would be included only if they satisfy three conditions: (1) the industry must have a history of continuous innovation; (2) the innovation must be cutting-edge; and (3) any successful innovation must have strong positive externalities for the public as a whole, in the sense of providing indirect benefits for those who were neither sellers nor users of the product.

Each of the three limiting principles is important. First, an established history of innovation is relevant because it provides an empirical basis for believing that innovation will be the main method of competing in the future. Second, the use of cutting-edge technology is a key marker because it identifies situations in which additional centers of innovation are especially needed. The defining characteristic of cutting-edge technology is that no one knows even approximately what the successful research avenues will be. It seems particularly useful to preserve a variety of institutionally independent approaches in that circumstance to ensure that avenues are not prematurely closed off.¹³⁹ And third, positive externalities deserve emphasis because they establish that the general public has a major stake in successful innovation, beyond just the participants' economic stakes, and there is a strong reason to avoid unnecessary delays in achieving it. Together, these three factors will mark out just a few industries in which innovation is so important that it is properly protected by special antitrust principles.

There are at least two industries that call for consideration under these criteria: pharmaceuticals and advanced defense products.

a. High-Technology: Pharmaceuticals

The pharmaceutical industry seems to meet all three of our limiting principles. First, it has a long history of innovation and of competition through new products.¹⁴⁰ Second, the relevant innovations are frequently cutting-edge, in the sense that the right avenues of inquiry are not known beforehand. Suggestions have been variously made, for example, that cancer might be attacked by inhibiting the cancer cells' ability to divide, or the creation of blood vessels to supply nutrients to them, or by bolstering the body's own defenses against them.¹⁴¹ No one knows for sure.

¹³⁹ Corporate culture may unduly inhibit the range of different research avenues that are tried within a single firm—certain avenues are thought to be uneconomical, to have been sufficiently explored before, or to be “obviously” wrong.

¹⁴⁰ The pharmaceutical product is actually a package consisting of the pharmaceutical itself plus information about how to dispense and use it most effectively. This provides an additional nonprice dimension in which suppliers can exercise innovation—in the techniques of dosage and use that are independently valuable to patients and their doctors.

¹⁴¹ See David Hamilton, *Genentech Wins FDA Approval for Cancer Drug*, WALL ST. J., Feb. 27, 2004, at B1. Similar uncertainty exists for many other ailments, of course. For example,

Only by providing a reasonable variety of these avenues can consumers be assured of the benefits of meaningful competition—that is, competition with a reasonable likelihood of producing effective products—among the research firms.¹⁴² Third, successful innovation in this industry has a high public externality. The benefits include not just better products at competitive prices, but health rather than illness, life rather than death. It is particularly important to safeguard innovation in such circumstances.

The relief in at least one decided matter seems to reflect an agency conclusion that additional innovating firms may sometimes be necessary. In 2000, the FTC approved the \$182 billion merger of SmithKline Beecham and Glaxo Wellcome, on the condition that there be divestitures in six particular markets,¹⁴³ including several markets where research and innovation appeared particularly important. In some of these markets the firms were present only through their research efforts, rather than through any available products, and the merger would have resulted in higher concentration than is normally accepted. The FTC-ordered divestitures, thus, confirmed the general proposition that innovation programs are a proper subject for antitrust analysis.¹⁴⁴

Most significantly, in one specific market—that for migraine treatment drugs—the FTC required that four independent firms be maintained,¹⁴⁵ apparently for special reasons related to protecting innovation. The press release accompanying the settlement noted that the single, merged entity would have been likely to delay or eliminate the inherited SmithKline research program because any resulting new drug would have competed with Glaxo's own existing products: "The result would be less product innovation, and, consequently, fewer product choices and higher prices

some researchers believe that brain plaques cause Alzheimer's Disease and others believe that they are a symptom of the disease.

¹⁴² In theory, one company could pursue a variety of different approaches. However, for the same behavioral reasons discussed earlier in connection with media conglomerates and GM cars, a firm may tend to concentrate on certain favored avenues and downplay other ones.

¹⁴³ See Press Release, Federal Trade Comm'n, Resolving Competitive Concerns, FTC Agreement Clears \$182 Billion Merger of SmithKline Beecham and Glaxo Wellcome (Dec. 18, 2000), available at <http://www.ftc.gov/opa/2000/12/skb.htm>.

¹⁴⁴ See Complaint ¶ 22, Glaxo Wellcome, FTC File No. 001-0088, FTC Docket No. C-3990 (Dec. 18, 2000) (prophylactic herpes vaccine market). At the time of the complaint there was no vaccine available to prevent or treat herpes vaccines, but the merging parties were two of the few firms developing such vaccines, and the other research programs were not as far advanced.

¹⁴⁵ Glaxo already was marketing two drugs of the triptan class for treating migraines; SmithKline had an interest in a competing triptan drug that was in its late development stages; and Merck and Astra Zeneca were selling the other approved drugs in the class. See *Glaxo Wellcome, Analysis to Aid Public Comment*.

for consumers.”¹⁴⁶ To resolve this problem, the merging firms agreed to assign all of SmithKline’s rights to its independent development partner, allowing that firm to pursue a fully separate effort. This stipulation was particularly suggestive because of the FTC’s record of not commonly challenging four-to-three mergers.¹⁴⁷ The outcome here, thus, suggests that more than the usual number of firms may be appropriate in the case of innovation-dependent pharmaceutical markets.¹⁴⁸ In a similar vein, former FTC Chairman Timothy Muris noted the existence of two cases from his tenure as Chairman that also resulted in pharmaceutical development programs being protected by ensuring a relatively large number of market participants.¹⁴⁹

b. High-Technology: Advanced Defense Industries

The field of advanced defense technology also appears to meet the three-part test for special solicitude. This part of the defense industry has been marked by continuous innovation involving cutting-edge technology, such as wholly new computer technologies or high-performance military aircraft.¹⁵⁰ And there is a strong external public benefit from

¹⁴⁶ Press Release, *supra* note 143.

¹⁴⁷ See *Horizontal Merger Investigation Data, Fiscal Years 1996–2003*, *supra* note 121, at tbl. 4.1.

¹⁴⁸ See Ben-Asher, *supra* note 65, at 348–49 (arguing that federal antitrust officials should investigate mergers in the pharmaceutical sector falling outside the premerger notification threshold in order to preserve competition in R&D).

¹⁴⁹ See Amgen, Inc., FTC Docket No. C-4053 (consent order) (Sept. 3, 2002) (R&D into cytokines that promote tissue inflammation and involving a 4-to-3 merger in one market, in which one of the merging parties was present only through a research program), available at <http://www.ftc.gov/os/2002/09/amgendo.pdf>; Cytoc Corp., FTC File No. 021-0098 (June 24, 2002) (staff authorized to seek preliminary injunction) (merger involving tests used to screen women for cervical cancer) (involving 5-to-4 merger in one market, with most firms present only through research programs or in FDA approval process). For a contrasting outcome see *Genzyme/Novazyme*, in which the Commission, on case-specific grounds, declined to challenge a merger to monopoly in research programs for the cure to a rare genetic disorder. *Genzyme*, FTC File No. 021-0026 (Jan. 13, 2004), available at <http://www.ftc.gov/opa/2004/01/genzyme.htm>, discussed *infra* Part IV.B. Chairman Muris noted that an important feature of all these cases was the presence of the regularized FDA approval process, which made it possible for the FTC to identify potential entrants, determine how many years away from market entry they were, and to conclude that other substitutable R&D programs could not enter without having to start at the beginning of the approval process. See Muris Statement, *Genzyme*, *id.* at 4 n.11. Muris did not specify whether the number of actors protected in the first two cases was greater than would have been called for under the usual antitrust principles, although it appears probable that it was.

¹⁵⁰ Here again there are likely to be technical problems whose solutions are not even approximately known. For example, is an economical, low-cost path to orbital flight best achieved through the Space Shuttle, air launches, single-stage-to-orbit technology, or by something else? We simply do not know. See, e.g., Graham Warwick, *Reusable Reality*, FLIGHT INT’L, July 8, 2003 at 29 (examining the technical hurdles to reusable spaceflight and the increase in costs and complexity since the Columbia crash).

successful innovation—not just a more cost-effective product, but more successful national military operations. For all these reasons, one expert in government contracts and antitrust has expressed concern that conventional analysis might permit excessive consolidation: “Distributing R&D funds to a wider range of firms, each with a different design philosophy and distinct technical strengths, may yield a superior range of options.”¹⁵¹

The Department of Defense (DoD) has found the subject of competition and innovation so important that it made this topic the principal focus of the Defense Industrial Base Capabilities Study.¹⁵² This study reviewed the technology areas that were important to the military and identified particular markets in which innovation is especially crucial.¹⁵³

¹⁵¹ William E. Kovacic, *Competition Policy in the Postconsolidation Defense Industry*, 44 ANTI-TRUST BULL. 421, 433 (1999). The FTC has taken a similar institutional view. Although then-Chairman Pitofsky favored some defense consolidation to reduce expensive overhead, he also noted that it was important to preserve competition in quality and innovation: “In the defense industry, these nonprice indicators may be as important as, or even more important than, price.” Robert Pitofsky, Chairman, Statement of the Federal Trade Commission Before the Senate Judiciary Committee, Subcomm. on Antitrust, Business Rights, and Competition (July 24, 1997), *available at* <http://www.ftc.gov/os/1997/07/defense4.htm>.

¹⁵² See generally Suzanne Patrick, Deputy Undersecretary of Defense for Indus. Policy, U.S. Dep’t of Defense, Defense Industrial Base Capabilities Study (DIBCS) Series, Presentation to the FTC Staff by the Deputy Undersecretary of Defense for Industrial Policy (2005) [hereinafter *Industrial Base Presentation*] (copy on file with the authors). This presentation introduced the FTC antitrust lawyers to the content and methodology of the DoD’s five-volume study of the nation’s defense-related industrial base.

¹⁵³ The DoD identified the critical areas of diversity fairly systematically. The Industrial Base Capabilities Study is a series of five reports, each one assessing a broad area of military activity—battlespace awareness, command and control, logistics, force application, and force protection. The five reports can be found on the DoD Web site at http://www.acq.osd.mil/ip/ip_products.html. A typical example is U.S. Dep’t of Defense, Defense Industrial Base Capabilities Study: Force Application (Oct. 2004), *available at* http://www.acq.osd.mil/ip/docs/dibcs_fa_10-29-04.pdf [hereinafter *Force Application Study*]. Each of these reports first identifies the most theoretically promising military capabilities, then breaks those down to the component technologies involved, and then reasons backward from the technologies to identify the kind and number of industrial facilities needed to perform the tasks of inventing and manufacturing them. *Id.* at 9. However, attaining the optimal level of performance is more important in some areas of innovation than in others. The DoD, therefore, identifies certain technological fields where it is desirable for the United States to be ahead of other countries by a technology generation or by an order of magnitude in performance—such as locating underground structures or recovering a signal from background noise. Suzanne Patrick, Deputy Undersecretary of Defense for Indus. Policy, U.S. Dep’t of Defense, Defense Industrial Base Capabilities Study: Relevance to Antitrust Reviews, Presentation to the FTC Staff by the Deputy Undersecretary of Defense for Industrial Policy 7–8 (May 3, 2005) (copy on file with the authors) [hereinafter *Antitrust Presentation*]. It also identifies still more critical fields where we want to be way ahead of rivals by several cycles of technology—such as the means of integrating various sensor inputs to depict the electromagnetic battlespace. *Id.* These fields are the ones in

The study concluded that the DoD should make a point of maintaining independent suppliers in some of those markets in order to ensure diverse approaches to emerging technologies. The DoD has said that it will sometimes seek to do so “even in face of apparent competitive sufficiency”¹⁵⁴—meaning even if the market would still be price competitive after further consolidation.

The Industrial Base Study gave several examples to illustrate possible applications of this policy. Oxygen-iodine lasers, which can be developed for high-power weapons uses, are currently produced at two-to-five U.S. firms, and additional R&D is being conducted at other companies. Nonetheless, the DoD indicates that any further consolidation would face the strong possibility of Department of Defense objection.¹⁵⁵ A similar situation prevails in supercavitating/supersonic projectiles, which can penetrate long distances into water. There are presently three domestic sources, and one can speculate that consolidation among them might bring cost savings.¹⁵⁶ The DoD still suggests that there is a strong possibility that it will oppose joint ventures and mergers “that limit competition” in this market, and it has established a goal to “sustain sufficient suppliers.”¹⁵⁷

In cases where the technology is so truly cutting-edge that even the right general avenues of research cannot be known in advance, the DoD has explicitly called for the preservation of numerous suppliers. “Swarming control tools,” for example, which are still at the R&D stage, would be used for the futuristic task of enabling a group of unmanned vehicles, such as pilotless aircraft, to coordinate and conduct autonomous attacks, without need for ground control. The DoD says there are “many” firms working on this technology.¹⁵⁸ The Department is nonetheless worried about acquisitions among them and has cited its sensitivity to this issue as one of the major insights coming out of the Industrial Base Study.¹⁵⁹

which it is most important to have diverse suppliers. For a more extensive breakout of fields in these terms see *Force Application Study*, *supra*, at app. A.

¹⁵⁴ *Antitrust Presentation*, *supra* note 153, at 18.

¹⁵⁵ See *Industrial Base Presentation*, *supra* note 152, at 17; see also *Force Application Study*, *supra* note 153, at 55 (“Deny teaming that limits innovation; maintain present number of sources at minimum.”).

¹⁵⁶ The DoD is not indifferent to the cost of maintaining alternative approaches, particularly when that requires expensive production facilities. See *Force Application Study*, *supra* note 153, at 26 (the limited market for hypersonic weapon propulsion systems is “not likely able to support more than one supplier at this time”).

¹⁵⁷ *Industrial Base Presentation*, *supra* note 152, at 18.

¹⁵⁸ *Id.* at 16.

¹⁵⁹ *Id.* at 16, 21. Other insights include beliefs that (1) important breakthroughs commonly come from small suppliers with fewer than 100 employees; (2) variety is often more

Case law suggests that the antitrust enforcers have accepted these principles,¹⁶⁰ at least as a general proposition. One example is the Justice Department's successful opposition to the merger between Lockheed Martin and Northrop Grumman,¹⁶¹ which would have reduced from four to three (along with Boeing and Raytheon Hughes) the number of prime contractors with "broad-based capability to design, develop, and produce complex weapons systems."¹⁶² More importantly, the merger would have reduced the suppliers in the critical market for high-performance fixed-wing military aircraft from three to two.¹⁶³ These are high levels of concentration, but in many other markets the DoD had already permitted mergers to such levels, suggesting it believes that two firms are ordinarily enough to secure price competition in the major products it buys.¹⁶⁴ A year after the Lockheed challenge there were only two suppliers of such important weapons systems as nonreusable space launch vehicles (Boeing and Lockheed Martin);¹⁶⁵ certain kinds of surface combat ships, such as destroyers and cruisers (General Dynamics and Litton); and tracked vehicles (General Dynamics and United Defense Systems).¹⁶⁶ It is likely

important in early R&D than in later development; (3) separate companies may be useful in applying new technology to different fields; and (4) acquisition of a small innovator by a large parent is likely to trigger a round of defensive sales of other companies. For these reasons, the DoD has expressed concern about further consolidation in certain relatively unconcentrated markets, such as those involving active hyperspectral imagers, which are used for assessing the composition of debris clouds, where there are presently four domestic R&D programs; and infantrymen's helmet-mounted displays, where there are presently five programs. *Id.*

¹⁶⁰ For practical purposes, the "enforcers" in the defense field include the Pentagon officials who decide whether to recommend a challenge to a merger. The DoD has substantial influence over antitrust decisions because it would be very difficult for the antitrust agencies to win cases without its supporting testimony as the sole purchaser of these products and as the primary voice for national security considerations.

¹⁶¹ See Press Release, U.S. Dep't of Justice, Justice Department Goes to Court to Block Lockheed Martin's Purchase of Northrop Grumman (Mar. 23, 1998) [hereinafter *Lockheed* Press Release], available at http://www.usdoj.gov/atr/public/press_releases/1998/212681.htm; see generally Complaint, United States v. Lockheed Martin Corp., 6 Trade Reg. Rep. (CCH) ¶ 45,098 (D.D.C. Mar 23, 1998), available at <http://www.usdoj.gov/atr/cases/f212600/212680.pdf>.

¹⁶² Kovacic, *Competition Policy*, *supra* note 151, at 422.

¹⁶³ See *Lockheed* Complaint, *supra* note 161, ¶ 2. The merger would also have reduced from two to one the suppliers of directed infrared countermeasures systems and of airborne early warning radar. These seem like more specialized areas of concern, however.

¹⁶⁴ The DoD might have several reasons for accepting two suppliers rather than seeking to preserve the more common number of three. It might believe that the minimum efficient scale for producing complex products will permit only two producers. It might also have confidence—perhaps undue confidence—in its own powers as a large and sole institutional buyer.

¹⁶⁵ The market for medium- to heavy-lift government vehicles was subsequently allowed to consolidate to a single joint venture. This caused concern, but was ultimately thought to be justified by qualitative efficiencies in reliability. See *ULA* Press Release, *supra* note 75.

¹⁶⁶ See Kovacic, *supra* note 151, at 423.

that the different result in Lockheed/Northrop—the antitrust challenge—was due to concern for maintaining innovation in the more rapidly evolving, less mature aerospace sector. The complaint and the press release both highlighted this factor. The complaint noted that increased interdependence among the remaining firms “may lead to reduced competition among aircraft platforms, less price competition, and reduced innovation in the high-performance fixed-wing military aircraft market.”¹⁶⁷ Because it appears that similar concentration levels had been accepted in other defense industries, the decision here seems to reflect a judgment that protecting innovation in more cutting-edge technological applications calls for somewhat more diversity—perhaps one additional effective center of innovation—than antitrust would ordinarily require.¹⁶⁸

D. CONCLUSION ON THE AREAS OF ADVANTAGE FOR CHOICE THEORY

Further study may identify additional industries that call for more than the usual number of competitors. Such industries are not likely to be numerous, however. The three limiting principles that we have proposed should allow the exclusion of most candidates from consideration fairly promptly. For example, the introduction of shelf-stable canned foods was a striking innovation, but the grocery industry does not have a recent history of competing primarily through such innovations. The development of video games and other electronic consumer entertainment may involve cutting-edge technology, but it does not involve public externalities that greatly exceed the price of the products themselves. Devices to increase automobile safety may involve that kind of broad externality benefit to public health and welfare, but many of the available techniques seem to be generally known and certainly do not depend entirely on cutting-edge technology. The few industries that

¹⁶⁷ See *Lockheed Complaint*, *supra* note 161, ¶ 4. In this respect the complaint was expressing the views of the DoD management, if not necessarily those of the individual services. See *id.* ¶ 7 (quoting letter from William S. Cohen, Secretary of Defense, to Janet Reno, Attorney General (Mar. 23, 1998)). The press release quoted Janet Reno as saying that the merger, unless blocked, “would cost the taxpayer and take the competitive wind out of the sails of innovation in the production of many critical systems . . .” *Lockheed Press Release*, *supra* note 161.

¹⁶⁸ In order to be a truly effective center of innovation, however, several specific things are required. These include staff, research facilities, patents, and institutional culture. That, in turn, leads to a series of practical questions about minimum efficient scale: How many such centers are possible; how many are necessary; and how does that number compare with the result expected from the proposed actions? These questions call for careful industry-specific inquiry. See, e.g., JOHN BIRKLER ET AL., *COMPETITION AND INNOVATION IN THE U.S. FIXED-WING MILITARY AIRCRAFT INDUSTRY* (RAND 2003).

satisfy all three tests should, therefore, be ones in which there is a truly strong case for drawing on choice theory.

We have identified some choice-sensitive industries in this section. But it is important to be clear about what this fact implies: It is not that antitrust should automatically require a larger number of market participants in those industries than it now does, but simply that antitrust should be attuned to the possibility that such a result is necessary. Making that determination in an individual case will call for a careful market-specific analysis. We now turn to some concrete examples of how that process could have worked.

IV. EIGHT RECENT CASES THAT WOULD PROBABLY HAVE COME OUT DIFFERENTLY UNDER A CHOICE ANALYSIS

A more vigorous use of consumer choice principles in antitrust enforcement will involve more than just a change of vocabulary or methods. It will also make a practical difference in outcomes. This can be seen from a review of eight recent matters that would probably have come out differently. We draw these examples from most of the major areas of advantage discussed in the previous section: defense, pharmaceuticals, two hospital matters, a vertical restraint case, a regulated industry, a media joint venture, and real estate brokerage practices.

A. RAYTHEON/HUGHES AIRCRAFT

This was a merger to monopoly, narrowly and controversially justified by price considerations, in the market for supplying air-to-air missiles to the Defense Department. Between the two of them, Raytheon and Hughes manufactured virtually all the air-to-air missiles used by the U.S. military, including the AMRAAM, a medium-range missile that was the Department's most advanced. Raytheon was a longtime leader in this field, supplying the AMRAAM, Sidewinder, and Sparrow.¹⁶⁹ Hughes competed with Raytheon to supply the AMRAAM. The competition between the firms had reportedly been beneficial to the government, both improving the product and reducing its cost.¹⁷⁰

¹⁶⁹ See <http://www.af.mil/factsheets> (links to AMRAAM, Sparrow, and Sidewinder systems can be found under the "Weapons" tab).

¹⁷⁰ See Center for Security Policy, Decision Brief No. 97-D 87 (June 24, 1997) (the DoD deliberately invested to ensure that two firms could produce the AMRAAM missile; the competition between them "has saved taxpayers hundreds of millions of dollars") (attributing this view to Paul Kaminski, Under Secretary of Defense for Acquisition), available at http://www.centerforsecuritypolicy.org/index.jsp?section=papers&code=97-D_87; Lawrence Korb, *Defense Mega-Mergers Weaken the U.S.*, NEWSDAY, Apr. 28, 1998, at A33 (competition had brought "improvement in the technology" and a 20% drop in unit cost).

In approving a merger that would eliminate this competition, the DoD and the Department of Justice were swayed—perhaps too much—by the prospect of short-term price benefits. Some consideration of scale economies was inescapable, because production runs were shrinking in the post-Cold War environment.¹⁷¹ However, the Department of Justice also used the merger negotiations as a price-bargaining chip, announcing that it would hold up filing an agreed-upon settlement involving other aspects of the merger so that it could “continue to monitor negotiations” between Raytheon and the DoD “regarding the benefits that will be passed along to the government because of the substantial efficiencies the parties expect to achieve by combining the production of their AMRAAM missiles.”¹⁷² Two weeks later, when those negotiations were completed, the DOJ emphasized the price effects of the merger: “Raytheon and Hughes have been competing bidders for the AMRAAM missile and, although the acquisition eliminates further competition between the two, the setting of a firm price will save the Air Force \$180 million over the next four years.”¹⁷³

Those reviewing the merger were also aware of the importance of innovation, but they thought they could protect it by encouraging new or potential entry into the air-to-air missile market.¹⁷⁴ The DoD concluded that the technology used in all anti-aircraft missiles was fundamentally similar, so that manufacturers of sea- or land-based missiles could enter the air-to-air market if need be.¹⁷⁵ Other industry

¹⁷¹ See *Force Application Study*, *supra* note 153, at 36.

¹⁷² “Although the Department expects that these [AMRAAM price] negotiations will be concluded successfully, it will not file its complaint and proposed settlement with the court until that happens.” *Raytheon* Press Release, *supra* note 9 (provisionally announcing agreement that required sale of two electronics businesses and construction of a firewall involving an anti-tank missile).

¹⁷³ *Id.* Other divestitures were required as part of the contemporaneous purchase of Texas Instruments.

¹⁷⁴ A second factor might also have eased the DoD’s concerns. Some important sources of innovation can be found not in the missile manufacturer, but rather in the subcontractors who make critical components, such as sensors and guidance systems. These firms were not involved in the merger and their ability to innovate was unimpaired. This does not necessarily remove all concerns, however, because any prime contractor still needs to be competitively motivated to encourage, seek out, use, and pay for innovative technology.

¹⁷⁵ “The review found that the components and characteristics of these missiles are shared by all air-intercept missiles and that the strengths of other companies in this market will ensure robust competition for any future programs.” Press Release, U.S. Dep’t of Defense, DoD Completes Review of Raytheon-Hughes (Oct. 2, 1997), available at http://www.defenselink.mil/releases/1997/b10021997_bt527-97.html. It is not clear if the DoD study specifically assessed whether such entry would be induced by a 5% price rise, the usual merger methodology. See Horizontal Merger Guidelines, *supra* note 4, § 1.11; see also *infra* note 244.

observers suggested that foreign manufacturers could license designs here as well.¹⁷⁶

While the possibility of new entry is always helpful, impediments and barriers may significantly limit its impact in this particular market. It is not clear how transferrable the skills are between air-launched and ground-launched products; nor is it clear that the Pentagon would be comfortable relying on foreign designs for this crucial technology. Raytheon apparently remains the sole supplier of air-to-air missiles to the U.S. government today. Presumably for these reasons, the Raytheon/Hughes merger was strongly questioned at the time.¹⁷⁷

While the decision to permit the merger on price and cost grounds may have been defensible, a choice model of antitrust law would have placed greater emphasis on maintaining diversity and innovation in this key technology. Given that the transaction was problematic even when viewed in price terms alone—recall the beneficial price effects of the earlier competition—the addition of choice considerations might well have tipped the DoD and the DOJ in the direction of challenging it.

B. GENZYME/NOVAZYME

A second matter that might have come out differently under the choice approach is the FTC's 2004 decision to close its investigation of Genzyme Corporation's acquisition of Novazyme Pharmaceuticals.¹⁷⁸

The two firms had the world's only two known research programs aimed at finding a cure for Pompe disease, a rare and often fatal genetic disorder that affects about 10,000 people, mainly infants and children. In the years between 1998 and 2001, Genzyme had made acquisitions or

¹⁷⁶ See DEFENSE MERGERS & ACQUISITIONS NEWSL., Nov. 2001 ("the 'monopoly' which Raytheon gained in the air-to-missile market was of short duration, as both Lockheed Martin and Boeing scrambled to bring home foreign designs for the Pentagon's consideration").

¹⁷⁷ Lawrence Korb was Assistant Secretary of Defense in the Reagan Administration and, more recently, a Senior Fellow at the Brookings Institution. He noted that Washington was "correct" to question the Lockheed-Northrop merger, but "it should have used the same criteria to halt . . . Hughes-Raytheon . . ." Korb, *supra* note 170, at A33. William Kovacic noted soon after the merger was announced that the combined Raytheon-Hughes would be "truly dominant" in air-to-air missiles, and that "[t]heir challenge is to argue to antitrust officials that there's another plausible company the government can turn to . . . One potential danger in the deal is losing the benefit of different corporations' different technological solutions." See John Mintz, *Raytheon Deals Raise Antitrust Concerns*, WASH. POST, Jan. 28, 1997, at C1 (quoting Kovacic).

¹⁷⁸ FTC File No. 021-0026 (Jan. 13, 2004). The Commission vote was 3–1–1. The closing letter, statement of Chairman Muris, dissenting statement of Commissioner Thompson, and separate statement of Commissioner Harbour are available at <http://www.ftc.gov/opa/2004/01/genzyme.htm>.

joint ventures that gave it control over two other Pompe R&D programs,¹⁷⁹ which were subsequently closed due to anticipated manufacturing difficulties.¹⁸⁰ The market was, thus, already narrowed. The Commission nonetheless decided not to challenge the final merger to monopoly between Genzyme and Novazyme, reasoning that the merger would accelerate the pace of research and might increase its probability of success through the combination of the two research programs.¹⁸¹ The agency also noted that the combined firm would still have ample incentives to bring both its products to market, to serve differentiated patient requirements, and to respond to various contractual incentives.¹⁸² The argument of the FTC majority, thus, focused on the benign research synergies and economic incentives facing the firm.

What the majority did not seem to consider was the possibility that the merged firms, although still having the means and motivation to engage in vigorous innovation, might have a diminished managerial ability actually to do so. The majority assumed that both the Genzyme and Novazyme approaches could continue to be pursued effectively. However, after the merger Genzyme could name the people to head the Novazyme program. Although the longstanding head of that program remained for a time,¹⁸³ he left after a year, in frustration, some have suggested, over his inability to control the new owner's research agenda.¹⁸⁴ The manager's departure raises concerns about whether the emergence of a single corporate viewpoint could cause a merged program not to pursue all the research avenues theoretically open to it.¹⁸⁵ In short, this merger presented enforcers with a mix of good and troublesome features—efficiencies in the conduct of research versus a potential lessening of research diversity.

In balancing these factors, the FTC majority chose to emphasize the provable, short-term economic benefits and accept the merger. By con-

¹⁷⁹ See Thompson *Genzyme Statement*, *supra* note 178, at 4.

¹⁸⁰ See Muris *Genzyme Statement*, *supra* note 178, at 6–7.

¹⁸¹ See *id.* at 17.

¹⁸² See *id.* at 14.

¹⁸³ See *id.* at 16.

¹⁸⁴ See Thompson *Genzyme Statement*, *supra* note 178, at 10. See generally Geeta Anand, *For His Sick Kids, a Father Struggled to Develop a Cure*, WALL ST. J., Aug. 26, 2003, at A1. The dispute between Genzyme and the manager appears to have involved a personal divergence of interest rather than a dispute over research strategy. The manager wanted to enroll his own children—who suffered from the disease themselves—in early clinical trials. But the underlying point illustrated here is that corporate control over personnel implies control over policy.

¹⁸⁵ There was also evidence that, after the merger, the schedule for the introduction of Novazyme products was delayed by several years, although the reasons for this delay are unclear. See Muris *Genzyme Statement*, *supra* note 178, at 17.

trast, people employing a choice theory would emphasize the loss of diversity and long-term innovative potential and would view the transaction with more concern.¹⁸⁶ Under either a conventional or a choice approach, the individual facts have to be carefully studied. The facts and special circumstances of this case—including the fact that the merger was already consummated—might still have counseled against a complaint here.¹⁸⁷ But under a choice theory the investigation would at least have included a more detailed inquiry into the practical ability of the merged firm to maintain competing research programs, and it would have led to an antitrust challenge if this revealed real risks that could be avoided by keeping the firms separate.

C. DOMINICAN SANTA CRUZ/COMMUNITY HOSPITALS

This merger resulted in church-affiliated organizations controlling approximately three-quarters of local hospital capacity in Santa Cruz, California.¹⁸⁸ On religious grounds, the hospitals were reluctant to provide tubal ligations because these were a form of voluntary sterilization.¹⁸⁹ The range of consumer choice was, therefore, significantly threatened in an important nonprice dimension, which should have been considered in the consent decree as carefully as the price considerations.

The merger brought together Dominican Santa Cruz Hospital and the AMI-Community Hospital, both located in Santa Cruz. There was only one other hospital in the county, located in a more rural area 15

¹⁸⁶ Michael Porter appears to be such a person. Speaking about mergers generally, he concluded that if there is a probability “greater than . . . 0.2” that a merger will lead to a “bad outcome”—by which he means a loss of future innovative potential—then he would block the merger absent “a pretty compelling counterargument in terms of the [short term cost savings].” Jonathan B. Baker & Steven C. Salop, *Should Concentration Be Dropped from the Merger Guidelines?*, 33 UWLAW L. REV. 3, 15 (2001) (quoting Porter’s comments from an ABA Roundtable Conference). See also SCHERER & ROSS, *supra* note 50, at 32–34, 575–76.

¹⁸⁷ Several other special factors also weighed against a complaint. The Commission had two years of post-acquisition evidence that tended to show continuing robust research. In addition, a post-acquisition divestiture might have been especially disruptive to the ongoing combined research efforts in a way that would ultimately have harmed the public interest. Finally, the small size of the potential market here meant that any treatment would be subject to the terms of the Orphan Drug Act. See Muris *Genzyme* Statement, *supra* note 178, at 11. That act gives the initial therapy a seven-year period of exclusivity, unless a later drug can affirmatively demonstrate that it is superior. These provisions tended to affect the likelihood of having two therapies available even if an antitrust action were taken.

¹⁸⁸ Dominican Santa Cruz Hosp., 118 F.T.C. 382 (1994).

¹⁸⁹ The separate and difficult subject of abortions was not a significant issue in this case. In this county, as in many areas, abortions were generally performed in freestanding clinics and were, therefore, not directly affected by the hospital merger.

miles away.¹⁹⁰ After the merger, the combined firm had 76 percent of an alleged county market as measured by patient days, and 73 percent as measured by beds. The surviving hospital—Dominican—was run by an order of nuns, and, at the time the acquisition was first planned, it apparently had a policy of not performing tubal ligations.¹⁹¹ Dominican initially indicated that this restriction would be extended to the acquired hospital, and the range of important marketplace options, thus, appeared at risk. The merged hospital subsequently ameliorated that policy and may have taken steps to offer the procedure in some circumstances.¹⁹² There remained some grounds for concern, however, that the continued availability of the procedure was uncertain. Antitrust concern under the choice framework would therefore have been warranted.¹⁹³

The FTC's consent decree addressed the main price effects of the merger, but it was relatively limited and its chief provision was simply a requirement that the respondents notify the agency before acquiring any additional hospitals.¹⁹⁴ Some of the FTC's restraint was inevitable.

¹⁹⁰ That hospital may not have been a fully effective substitute for the others because some insurance plans might not have included it and some doctors might not have had privileges there.

¹⁹¹ An article in the area newspaper quoted doctors expressing concern that the procedure would no longer be available when it needed to take place in a hospital setting. See Bob Levy, *Hospital Offer Raises Concerns*, SAN JOSE MERCURY NEWS, Feb. 28, 1990.

¹⁹² At the time the acquisition was actually consummated, Dominican informed obstetricians that it would allow completion of some tubal ligations that had already been scheduled, although no further procedures of this kind would be booked. Thereafter the procedure apparently would be unavailable at the Dominican hospitals. See Lee Quarnstrom, *Sterilization Services Limited but Santa Cruz Clinics Closed for Tubal Ligations*, SAN JOSE MERCURY NEWS, Nov. 5, 1991, at 1B. Two years later, however, at the time the consent decree was becoming final, the hospital had obtained authorization from the local bishop to perform ligations under some defined circumstances. See Lee Quarnstrom, *Birth Control Ban Is Eased at Dominican*, SAN JOSE MERCURY NEWS, Sept. 11, 1992, at 1B.

¹⁹³ The hospital might have made two arguments against an enforcement action. Each has some merit, but neither should have prevented a successful challenge. First, Dominican might have argued that it would have been legal if Community Hospital had been bought by an unrelated out-of-state Catholic hospital, and tubal ligations would have been equally eliminated under that merger. Thus, it could not be said that the loss of this service flowed uniquely from the acquisition by Dominican. This observation, however, even if it could be proven factually correct, is legally irrelevant. The antitrust laws may not reach every loss of consumer options that flows from an acquisition, but that does not mean they cannot reach those losses that are the consequence of a legally relevant horizontal merger. Second, the hospital might have argued that any remedy here would involve the government in requiring the hospital to offer a service that is contrary to its religious values, and this would violate its freedom of religion under the First Amendment. This argument is also unpersuasive because any remedy is imposed as a result of a voluntary act by the hospital and, thus, is easily avoidable. If the hospital cannot make an acquisition without violating the antitrust laws, if it is not willing to be subject to an order that violates its religious beliefs, and if a satisfactory compromise cannot be negotiated, then it can simply forgo that particular transaction.

¹⁹⁴ See *Dominican Santa Cruz Hosp.*, 118 F.T.C. 382, 389 (1994).

Because this acquisition had not been reportable under the HSR Act, the agency's ability to obtain complete relief was necessarily limited.¹⁹⁵ It would have been better, however, to recognize that the nonprice option of tubal ligations would not necessarily be preserved by measures aimed at protecting marketwide price competition and to have instead included an order provision specifically designed to protect it.¹⁹⁶

D. BUTTERWORTH/BLODGETT HOSPITALS

Another hospital case that might have come out differently under choice analysis is the Butterworth/Blodgett merger, which a district judge declined to enjoin in spite of the high concentration that resulted.¹⁹⁷ The judge carefully examined the probable price effects in hospital services, and perhaps implicitly considered some nonprice competition, but failed to consider the possible need for additional competitors to respond to the full range of consumer preferences implicit in the selection of medical treatments.

Butterworth and Blodgett were the two largest of the four hospitals in Grand Rapids, Michigan, and between them accounted for 65–70 percent of the city's capacity.¹⁹⁸ Concentration was clearly high by any measure, and the judge acknowledged that this made out a prima facie case for the government. He nonetheless held that the defendants had successfully rebutted that case by showing that a price increase was unlikely: nonprofit hospitals charge lower prices than for-profit ones in concentrated markets; the hospital board members represented the

¹⁹⁵ The acquisition was consummated before the staff could open an investigation or consider seeking an injunction against it. By the time the consent order was negotiated, the acquired hospital had been converted to a skilled nursing and rehabilitative care facility and no longer operated as a hospital; reconversion would clearly have been difficult. In addition, another hospital chain had announced plans to enter the market, an action that would restore a third competitor. See *Dominican Hospital*, 118 F.T.C. at 390–91 (statement of Chairman Steiger). Notwithstanding these considerations, Commissioners Azcuenaga and Yao dissented and suggested that the consent order did not provide an adequate remedy. In 1996, subsequent to this discussion, and six years after the acquisition itself, the Sutter system opened the Sutter Maternity and Surgery Center, a small specialty hospital focusing on women's issues. This seems to have solved most problems of access. It is still worth considering whether antitrust policy should ordinarily be content with new entry that is subject to this many delays and uncertainties.

¹⁹⁶ It would be desirable to keep any such order provision as non-regulatory as possible, perhaps by permitting delegation of the management of any specifically protected medical service to an independent entity.

¹⁹⁷ *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1303 (W.D. Mich. 1996), *aff'd without opinion*, 121 F.3d 708 (6th Cir. 1997).

¹⁹⁸ When they merged, the HHIs increased by between 1064 and 2001 points, to a level between 2767 and 5079, depending on the particular markets and units of measurement used. See *id.* at 1294.

interests of the patient community and desired competitive prices; there were capital and operating efficiencies in the merger; and the hospitals had issued a public “Community Commitment” statement and were willing to sign a formal order limiting their prices and profits to specified levels.¹⁹⁹

It is striking how the court’s analysis focused almost entirely on price effects.²⁰⁰ Nonprice competition—even on the core value of quality of care—was mentioned only in passing.²⁰¹ Not mentioned at all were the more subtle forms of nonprice competition, through which all hospitals respond, more or less aggressively, to varied patient and community preferences on issues of health care.

Nonprice preferences should be crucial to hospital competition, however. That competition needs to be able to respond to the wide range of individual preferences that exist—and that may, in turn, require a number of independent decision makers. Many hospital markets, however, including the Grand Rapids market, may be like the car companies of the 1950s. The Big Three automakers may have appeared intensely competitive in both price and design terms, but the later rise of imports revealed that they had not in fact been anticipating and supplying the full range of latent consumer preferences. As we discussed previously, there is evidence suggesting the possibility of similar unsatisfied demands for variety in the provision of hospital services.²⁰²

Just how important consumer preferences in hospital mergers are remains to be determined. We do not know enough about the consumer demand for particular medical services to rely on that factor alone in reaching an antitrust judgment. Moreover, a desire to protect overall nonprice competition, as presented in this case, would require maintaining a market structure in which hospitals will be responsive to consumer demand for choice in general, which is a less focused and, therefore, more challenging remedial assessment than would have been involved in protecting one known and particular choice, as was presented by the Santa Cruz hospital merger. Nonetheless, when a merger is already far over the line in terms of concentration—as it was here—then the probable consumer demand for variety should be included as part of a

¹⁹⁹ See *id.* at 1295–98. The judge was apparently untroubled by the price-regulatory features of this undertaking.

²⁰⁰ See *id.* at 1298 (hospitals’ proffered price guarantee “corroborates other evidence that nonprofit hospitals may be treated differently under the antitrust laws, and further undermines the predictive value of the FTC’s *prima facie* case).

²⁰¹ *Id.* at 1297 (hospital directors “testified convincingly that the proposed merger is motivated by a common desire to lower health care costs and improve the quality of care”).

²⁰² See *supra* notes 125–136 and accompanying text.

complete analysis and should have been enough here to call for a different result.

E. J.B.D.L. CORP. V. WYETH-AYERST LABORATORIES

Many of the examples in this section involve acquisitions, but the use of choice theory does not change outcomes solely by giving the government an additional theory of liability in merger cases. It can also change the outcomes of cases in which private corporate plaintiffs have challenged vertical restraints. *Wyeth Labs* was one such matter, involving an exclusive dealing requirement.²⁰³

Wyeth manufactures Premarin, an estrogen product approved for a number of uses, including primarily the treatment of symptoms associated with menopause. While there are other oral estrogen replacement therapy drugs on the market, only one other competitor's then-recently approved drug, Duramed's drug Cenestin, was also a conjugated estrogen product.²⁰⁴ The relevant market for antitrust purposes is uncertain, but is dominated by Wyeth under almost any definition. Premarin's share of the oral estrogen replacement therapy market had been approximately 70 percent during the relevant period, and Wyeth conceded for summary judgment purposes that it had monopoly power in that market.²⁰⁵ If conjugated estrogen products were considered the relevant market instead, Premarin's share would have been approximately 98 percent.²⁰⁶

Wyeth sought to protect the dominant market position of Premarin.²⁰⁷ A key part of its strategy was to prevent Duramed from entering into contracts for its competing Cenestin product with third-party payors, such as insurance plans, and with pharmacy benefits managers (PBMs), which manage formularies for health plans. Wyeth made many of those entities sign "sole conjugated estrogen" clauses if they wanted to get any of the rebates that it paid on sales of Premarin and other Wyeth products. A group of buyers challenged this and similar practices under both Sections 1 and 2 of the Sherman Act. They reasoned that the bundled

²⁰³ *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No. 01-00704, 2005 U.S. Dist. LEXIS 11676 (S.D. Ohio June 13, 2005), *appeal docketed*, No. 05-3988 (6th Cir. Aug. 5, 2005). The problematic restraints in *Wyeth* might be characterized as involving incentives toward de facto exclusive dealing or, alternatively and more generally, as anticompetitive exclusionary contracts.

²⁰⁴ A conjugated estrogen differs chemically from other estrogen products. There are no generic equivalents of Premarin approved by the FDA. *Id.* at *4.

²⁰⁵ *Id.* at *14, *32.

²⁰⁶ *Id.* at *26.

²⁰⁷ One goal was to hold Cenestin "to less than two percent of prescription market share in 1999, approximately \$20 million in assumed sales." *Id.* at *6.

discounts were sufficiently important to amount, in practical terms, to exclusive dealing requirements, and that the exclusive dealing improperly permitted Wyeth to maintain its monopoly in the oral estrogen replacement market: “[T]he synergistic effects of Wyeth’s sole conjugated estrogen clauses together with Wyeth’s formulas for rebates to PBMs, effectively foreclosed competition from Duramed’s Cenestin.”²⁰⁸ Moreover, Wyeth “attempted to include these sole conjugated estrogen clauses . . . in most of its PBM contracts.”²⁰⁹

The district court nonetheless granted Wyeth’s motion for summary judgment. The judge gave a number of reasons for this: foreclosure was not complete;²¹⁰ the “sole conjugated estrogen” clauses were only 30–60 days in duration;²¹¹ the PBMs allegedly benefited financially from Wyeth’s discounts;²¹² bundled discounts were said to be common in the pharmaceutical industry;²¹³ and the court stated that it wanted to minimize the uncertainty, which could chill beneficial conduct, that arises when such complex issues go to jury trial.²¹⁴

This summary termination of the case would be considered an error under our proposed choice analysis. Wyeth’s practices created the potential for both types of decreases in consumer choice that we have discussed—significant short-term restrictions on the availability of the choices that consumers might like to have, and a long-term diminution in consumer choice due to decreased incentives to invest in innovation.

In the short term, Wyeth’s use of its monopoly power to impose bundled multi-product discounts may have deprived consumers of the ability to make a free choice from among the products that an undistorted market would have presented to them (i.e., their ability to choose from among a number of oral estrogen replacement drugs). Such effects on consumer choice commonly call for examination whenever a dominant firm is involved in imposing them. They raise particular questions, however, when applied in the context of a pharmaceutical market. Patients respond differently to different medicines, and individual medicines

²⁰⁸ *Id.* at *8. Financial incentives to exclusivity can sometimes limit choice as effectively as contractual provisions do. See Willard Tom, David Balto & Neil Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615 (2000).

²⁰⁹ *Id.* at *11; Wyeth’s index of its PBM contracts indicates that, as of January 1, 2000, 31 out of 74 contracts contained a “sole conjugated estrogen” clause. *Id.*

²¹⁰ *Id.* at *30.

²¹¹ *Id.* at *22.

²¹² *Id.* at *8.

²¹³ *Id.* at *7.

²¹⁴ *Id.* at *48.

frequently give rise to different side effects in different patients. A reduction in variety may, therefore, have special weight in a rule of reason analysis in this setting.

In the long run, moreover, this type of exclusionary conduct can deter entry, thus making innovation more difficult, eventually hampering consumer choice even more. As discussed in an earlier section, independent centers of innovation are especially valuable in cutting-edge technologies like pharmaceuticals. Wyeth's bundled discounts, with their potential for significantly discouraging new entry, could have the long-term effect of inhibiting this important form of competition.

Because this case was dismissed on a summary judgment motion, and because the record is sealed, the significance of these potential losses in consumer choice cannot be properly evaluated. For example, we do not know the extent to which the entities impeded by the allegedly exclusionary distribution contracts were the true, *de facto* centers of innovation in this industry.²¹⁵ Nor can we evaluate Wyeth's potentially offsetting efficiency arguments. Bundled discounts, even by firms with monopoly power, might be justified by efficiencies or by lower prices overall. However, the adverse effects on consumer choice here (as well as possible adverse price effects) might also have been enough to outweigh any alleged efficiencies. To have adequately explored these issues the court should not have granted summary judgment when it did.

F. MONTGOMERY COUNTY TAXICAB REGULATION

This matter involved a county's decision to allow one taxicab firm to grow to dominant status, protecting consumers from price effects through price regulation but nonetheless leaving them vulnerable to poor service.²¹⁶

²¹⁵ On the present publicly available record it is not clear whether the effective unit of innovation is the FDA-approved product or the broader manufacturing firm. Nor is it clear to what degree the excluded firm here is one that competes by innovation, as distinct from some generic firms that compete primarily on price. But the point is that these issues should have been explored.

²¹⁶ See Matthew Mosk, *Taxicab Firm's Influence Flagged*, WASH. POST, Nov. 18, 2003, at A1. Similar situations appear to have occurred in other cities around the country. See, e.g., Robert Hardaway, *Taxi and Limousines: The Last Bastion of Economic Regulation*, 21 HAMLINE J. PUB. L. & POL'Y 319, 324 (2000) (experience suggests that unregulated markets provide better service at lower prices); Ross D. Eckert, *The Los Angeles Taxi Monopoly: An Economic Inquiry*, 43 S. CAL. L. REV. 407, 426, n.80 (1970) ("The Board has apparently been unconcerned that the Yellow Cab Company immediately upon its consolidation of competitors in 1934, reduced its number of operating cabs by approximately 30 per cent . . . and that the quantity of service offered has declined steadily over the past fifteen years." By 1952, Yellow Cab operated "about 900 cabs out of a total of 975" (footnotes omitted)); see also Edmund Kitch, Mark Isaacson & Daniel Kasper, *The Regulation of Taxicabs in Chicago*, 14

Barwood, Inc., serves the suburban Washington jurisdiction of Montgomery County, Maryland: "Of the 580 licensed cabs in the county, 433 use the Barwood name, . . . [and] 360 are [directly] owned by the company."²¹⁷ As early as 1988, Barwood came to a position of dominance, with about 80 percent of the market,²¹⁸ through purchases of five other firms and about 40 individual licenses.²¹⁹ Later, in 1992, Barwood bought Silver Spring Taxi, with another 70 licenses.²²⁰ More recent regulatory actions have helped to maintain Barwood's position by waiving the usual requirement that unused licenses be revoked.²²¹ The regulatory authority permitted concentration to increase over the years without objection, perhaps on the presumption that because prices were regulated there was no significant risk of consumer harm.²²²

The regulators failed to take account of the nonprice effects, however. In the absence of competition, service appears to have deteriorated. Montgomery County has about 15 times as many complaints about cab service as neighboring Fairfax County, Virginia, which issues about the same number of licenses.²²³ A consultant's report in 2001 concluded that "greater competition could rectify problems such as long customer waiting times and cab no-shows. Customers dissatisfied with one company should be able to turn to other companies for better service."²²⁴ A choice model of competition would have anticipated these kinds of problems

J.L. & ECON. 285, 286 (1971) (80% share of Chicago's market was held by two companies that came to be controlled by one person).

²¹⁷ See Matthew Mosk, *Duncan Pushes Cab Competition*, WASH. POST, Dec. 16, 2003, at B1.

²¹⁸ See Sue Anne Pressley, *Montgomery to Add 150 Cabs Over 3 Years*, WASH. POST, July 6, 1988, at B3.

²¹⁹ See Claudia Levy, *Upper County Has Few Easy Cab Riders*, WASH. POST, Feb. 25, 1988, at D1.

²²⁰ E-mail from Nancy Kutz, Office of Medicaid and Taxicab Regulation, Montgomery County, Md., to Thomas Werthman, Research Assistant, University of Baltimore School of Law (Nov. 29, 2005) (on file with authors).

²²¹ Mosk, *Taxicab Firm's Influence Flagged*, *supra* note 216, at A1. Until 2004, the Montgomery County Code gave regulators considerable discretion in how to treat cab operations. See, e.g., Montgomery County, Md., Code § 53-48(e) (provisions on transferability) ("The director may waive any prohibition against transferability if the director is satisfied that granting a waiver is likely to produce: (1) More effective competition; and (2) Based on the business plan of the transferee, an improved level of taxicab service for consumers in the County").

²²² See *id.* § 53-106(a) (County Executive is to set the rates for all cabs and cab companies).

²²³ Mosk, *Taxicab Firm's Influence Flagged*, *supra* note 216, at A1.

²²⁴ Mosk, *Duncan Pushes Cab Competition*, *supra* note 217, at B1. The county administrator reached a similar conclusion: "Right now, you have one big player. If we can create competition, we'll see service improve." *Id.*

and would not have allowed this level of concentration to arise, even in a regulated industry.²²⁵

G. THE VOTER NEWS SERVICE JOINT VENTURE

A choice-centered approach would also have challenged the formation of the Voter News Service (VNS) joint venture that gradually took over the exit polling and election-prediction operations of six major television news operations. VNS grew between 1964 and 1990 and eventually included ABC, CBS, NBC, Fox, CNN, and the Associated Press.²²⁶ Thereafter, while there may have appeared to be many networks forecasting the election results, only one underlying organization provided the raw data on which the networks relied, and, thus, consumer choice was limited to that one firm. The consequences of this limited choice were vividly displayed in the 2000 Presidential election. All the networks wrongly called the Bush/Gore race in Florida, withdrew their predictions, called it again, and only then settled on the correct assessment that it was too close to call.²²⁷ The uniform series of errors sprang from the fact that all the networks relied on the same underlying information and methodology from VNS.

Conventional price-oriented analysis would probably still have upheld the formation of VNS, however, for several reasons. The venture did result in cost savings because duplicate staffs of interviewers and analysts were no longer maintained. It had no power to raise prices²²⁸ or to reduce the output of election night programming. And it was apparently

²²⁵ The current taxicab code provides: "The Director must not approve the transfer of any license if the transferee already holds, or would then hold, more than 40% of the total of licenses then in effect." Montgomery County, Md., Code § 53-204(e), available at http://www.montgomerycountymd.gov/content/DPWT/transit/taxi_reg/testfile/chapter53taxicabsrevised12.06.pdf. We believe that such a market share cap is wise in light of the historic domination of the Montgomery County taxicab market by one company. We also believe that the optimal level of nonprice competition is much more likely to result from competition than from rate regulation and administrative oversight of a firm with market power. The difficulties of oversight are especially worrisome in jurisdictions where the dominant firm has historically had a strong influence over its own regulation.

²²⁶ See Jeremy Gerard, *TV Networks May Approve a Pool of Election Exit Polls*, N.Y. TIMES, Oct. 31, 1989, at C26; James A. Barnes, *The Polling Business*, 5 PUBLIC PERSP., Nov./Dec. 1993, No. 1, at 17; Frank Reuven, *Election Night*, 75 NEW LEADER, Oct. 5, 1992, at 20; see also Moshe Adler, *Bungled Election Projection? Blame the Feds!*, SALON.COM, Dec. 7, 2000, <http://archive.salon.com/tech/feature/2000/12/07/antitrust/index.html>.

²²⁷ See James Grimaldi, *Battle of the Titans*, WASH. POST, Nov. 27, 2000, at E8; Kathy Chen, *Election 2000: Antitrust Advocacy Group Seeks Breakup of Voter News Service, Citing Florida*, WALL ST. J., Nov. 28, 2000, at A12.

²²⁸ It could have raised neither advertising rates nor the price at which it sold its information to its client networks, because it was owned by the networks.

supported by the Supreme Court's ruling that it was proper for a number of newspapers to combine to form and operate the Associated Press.²²⁹

Choice analysis would have pointed the way toward distinguishing *Associated Press*, however. The AP organization provided a unique efficiency in that papers could collectively carry out important tasks that were beyond the resources of any individual paper, and it therefore resulted in an increase in the market options available to newspaper readers. By contrast, in the case of VNS each network had provided its own analysis before the venture was created and could have continued to do so. The consumer-choice benefits from creating the VNS joint venture were, therefore, smaller or nonexistent, and the costs, in the form of diminished competition among networks to provide accurate and insightful analysis, were greater. The venture would therefore have been banned under a choice version of antitrust.²³⁰

H. REALCOMP II

One final matter is still in litigation, and so the facts are not yet fully known, but it is likely to be an instance where choice theory has already made a difference in outcome. The matter involves the alleged exclusion of the low-price, low-service option from a real estate brokerage market.²³¹ On October 12, 2006, the FTC filed an administrative complaint against a multiple listing service (MLS) used by about 2100 brokerage offices in the metropolitan Detroit area. The complaint alleged that the MLS discriminated against nontraditional, limited-service, discount brokers by refusing to permit their listings to be transferred from the MLS to Internet-based Web sites accessible to consumers. Because many house-hunters now begin their search on such Web sites, the disadvantage to discount brokers is commercially important.

This case might have been difficult to bring under conventional price theory—not impossible, but harder. The full-service brokers could then have argued that their quality-adjusted price was no higher than that of the discounters, so that even those consumers who were forced to use them would still have suffered no adverse price effects. Disproving those claims through an assessment of quality-adjusted prices would have been complex. In choice terms, however, the complaint was easy. Customers

²²⁹ *Associated Press v. United States*, 326 U.S. 1 (1945).

²³⁰ For a more detailed description of this Voter News Service matter see Lande, *Choice as Ultimate Goal*, *supra* note 12, at 519–21.

²³¹ *Realcomp II*, FTC Docket No. 9320; FTC File No. 061-0088 (Oct. 12, 2006), available at <http://www.ftc.gov/opa/2006/10/realestatesweep.htm>. A second, similar complaint was announced at the same time, along with five proposed consent agreements. *Id.*

of the brokerage services were forced to buy a comprehensive package of services even though they might not want all the elements in that package. For example, some homeowners might want to conduct the open house themselves, or to do their own price negotiations, and those customers were forced to buy unnecessary services if they wanted any realtor assistance at all. Thus, home sellers and buyers were both deprived of the option of having lower-service, lower-cost brokerage. The agency described the case primarily in these choice terms in a press release announcing the complaint.²³²

V. IMPLEMENTATION AND METHODOLOGY OF THE CONSUMER CHOICE PARADIGM

To adopt consumer choice as a new paradigm, antitrust policy must also find that it can be implemented in a relatively simple, objective, and predictable manner.²³³ And the challenges in these respects are certainly real enough. Choice theory is somewhat more complex than the alternatives, and it is less tied to objective metrics, such as prices and elasticities. Perhaps most difficult, it is something novel, so there is some uncertainty about its application. All these factors may raise concerns about the risks of unpredictable or overly aggressive enforcement.

The choice approach does require somewhat more analytical complexity. Fortunately, however, there are mechanisms to avoid or minimize this problem, which are elaborated through a discussion of five main points: (1) the Merger Guidelines could be amended to state explicitly that these additional choice issues are relevant to its analysis; (2) there are a variety of reasonable and practical sources of information to draw upon in deciding the new issues; (3) the conclusions from this process could be expressed without too much difficulty in revised HHI thresholds for an otherwise standard merger analysis; (4) alternatively, choice considerations could be brought into the rule of reason analysis of mergers that are above the current thresholds of the Guidelines even if the thresholds themselves are left unchanged; and (5) various safeguards are available to prevent any undue exercise of prosecutorial discretion.

²³² See Press Release, Federal Trade Comm'n, FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services (Oct. 12, 2006), available at <http://www.ftc.gov/opa/2006/10/realestatesweep.htm>.

²³³ It is likely that the efficiency paradigm succeeded in replacing the social/political paradigm, even though it actually has little foundation in the antitrust laws' legislative history, because its proponents successfully argued that it was the more objective and predictable approach. See Robert Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 430-38 (1988).

Though some difficulties in the analysis of nonprice competition will surely remain, the analysis must nonetheless be undertaken: “[F]acts cannot be ignored simply because present methods do not permit them to be described and measured with full scientific rigor.”²³⁴

A. COMPARING THE COMPLEXITY OF THE DIFFERENT PARADIGMS

In assessing the administrability of different approaches, the first thing to consider is how complicated an analysis each will require. Here the choice paradigm admittedly requires a more complex analysis than its alternatives, although we will see in later sections that the resulting problems are modest and can be surmounted.²³⁵

Of the price, efficiency, and choice models, the price paradigm remains the simplest to implement. It requires the least information to apply and is the most predictable in its outcomes for many reasons.²³⁶ Perhaps the most important reason is that the price model simply eliminates some relevant areas of inquiry altogether, such as future innovation. It also assumes that consumer preferences with respect to nonprice values are fully captured in the concept of “quality-adjusted price.” As we have seen above, however, although both these conventions may simplify matters, the results are frequently inaccurate.

An efficiency model is substantially more complex. Because it begins with a price analysis, it has the same analytical burden as a price paradigm. The efficiency model also adds another layer of inquiry, assessing the significance of the price changes in terms of the three basic categories of efficiencies—allocative, productive, and innovative.²³⁷

A choice model would, in theory, be no more complicated than an efficiency model, but in actual practice would probably be one step more elaborate. In theory, the elements of choice will already all be captured in the various types of efficiency.²³⁸ In practice, however, the efficiency model usually focuses on cost savings and shortchanges the factors of

²³⁴ Leary, *supra* note 89, at 556.

²³⁵ And, of course, we should always remember that choice analysis will make a difference only in a limited number of cases; most will continue to be assessed as they are now.

²³⁶ See Fisher, Johnson & Lande, *supra* note 34, at 809–13.

²³⁷ *Id.*

²³⁸ One important formal difference is that a choice model would count the transfer effects of the higher prices, in addition to the inefficiency effects. See Averitt & Lande, *Consumer Sovereignty*, *supra* note 12, at 717 n.11. Because the transfer effects of market power can easily be calculated if the allocative inefficiency effects are known, however, this would not require the antitrust decision makers to obtain any additional information. See Fisher, Johnson & Lande, *supra* note 34, at 809–10; Fisher & Lande, *supra* note 34, at 1653–59.

variety and innovation. A choice approach would always treat these as important. Adding these elements to the analysis will necessarily make the choice approach somewhat more complex. Nevertheless, it should not be unduly difficult to apply, as the next sections will demonstrate.

B. INCREASING THE EMPHASIS ON CHOICE IN THE MERGER GUIDELINES

To provide an institutional foundation for considering the various issues related to choice, it may be useful, first of all, to amend the Horizontal Merger Guidelines to acknowledge the importance of choice explicitly. One can certainly construe even the current Guidelines to support choice as a factor, and, of course, merger cases can be brought even if they do not come within the Guidelines. However, two amendments could help remove any uncertainties.

The first change would amend the Guidelines' discussion of its "policy assumptions," in which the "unifying theme of the Guidelines" is now presented almost entirely in price terms.²³⁹ The discussion focuses on market power as it might be exercised by the seller, not on choice as presented to the buyer, except for a single footnote.²⁴⁰ Choice theory deserves higher visibility than this. We suggest including in the text some language along the following lines: "Sometimes reduced competition will result in fewer short-term consumer choices in terms of product quality, variety, or service; or in less innovation in the long term. These harms can occur even in markets that are price competitive." Elevating this idea to text will inform the Guidelines' users that this is a more important concept.

²³⁹ Section 0.1, Purpose and Underlying Policy Assumptions, states:

The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.[note 6] In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly coordinating their actions. Circumstances also may permit a single firm, not a monopolist, to exercise market power through unilateral or non-coordinated conduct—conduct the success of which does not rely on the concurrence of other firms in the market or on coordinated responses by those firms. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.

Horizontal Merger Guidelines, *supra* note 4.

²⁴⁰ *Id.* at n.6 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.").

It would also be useful to amend the later section of the Guidelines that discusses particular theories of litigation. Section 2 of the Guidelines identifies two particular adverse competitive effects that mergers can have: the lessening of competition through coordinated interaction (Section 2.1), and the lessening of competition through unilateral effects (section 2.2). Although it is possible to fit choice theory within one or both of these categories,²⁴¹ it does not fit easily. The harm from a choice-related merger does not come only from collusion to raise price among the firms in the market, but could also come from the diminished range of options offered. Nor does a choice-related merger obviously threaten to permit a conventional unilateral exercise of market power; the unilateral harm does not lie in a conventional price increase, but rather in the innovations that are not made. We, therefore, propose adding a new Section 2.3 to explain how mergers can, in the circumstances previously identified in Part III of this article, lead to consumer harm even though price may not necessarily be affected.²⁴²

The analysis under the new section would not all run in the direction of enabling the antitrust agencies to more easily show anticompetitive effects, of course. Although choice can sometimes lead to a merger being blocked even if it is unlikely to have detrimental price effects, it can also lead to situations in which the merging parties show beneficial effects on choice and innovation sufficient to outweigh the possibility of somewhat higher prices.²⁴³

C. WHERE TO FIND THE INFORMATION NEEDED FOR CHOICE ANALYSIS

With or without clarifications in the Guidelines, the antitrust agencies can begin to deal with choice cases. Some practitioners may be concerned that suitably precise information will not be available once we move beyond price. In fact, however, a variety of techniques are available for gathering, organizing, and digesting the appropriate data. Some techniques will give the agencies information needed to make decisions in immediate cases, and others will help acquire information that will be useful in future cases.

Antitrust has always been a common-law discipline, and a movement into choice theory should not call for any change in that approach. In

²⁴¹ This is particularly true because note 6 referred to the existence of nonprice competition, so we know that topic must be covered *somewhere* in the Horizontal Merger Guidelines. *Id.*

²⁴² Alternatively, one could make smaller additions to §§ 2.1 and 2.3.

²⁴³ In other words, there can be an efficiencies defense in the innovation context, a possibility that we will discuss below.

assessing individual cases, enforcers might draw upon any of several sources. First, they can make a point of asking about choice issues in their interviews with firm managers and other market participants. Second, they can look creatively to identify particular aspects of a case that lend themselves to quantitative assessments in choice terms, even if the case as a whole may still require other techniques. In some investigations, for example, quantitative data on consumer choices may be helpful in defining the boundaries of the relevant product or geographic market,²⁴⁴ even though such data may not yet be sufficiently developed to quantify the ultimate consumer harm that results from a loss of variety. Third, they can turn to the FTC's Bureau of Consumer Protection for assistance and use some of that bureau's techniques, such as focus groups and polling,²⁴⁵ to gain insight into the extent to which the consumers of a particular product value nonprice options. Fourth, economists assigned to a case can begin to develop quantitative methods for assessing the value that consumers put on variety in that particular factual context. These might usefully include some instances of experimental economics, among other techniques, on the theory that the preference variables identified in an investigation may still be so complex that a laboratory setting will be helpful in isolating their individual effects.²⁴⁶

In addition, the agencies may begin to collect information from a number of more general, less case-specific sources, not for immediate use, but rather to build up a base of knowledge that will help in the assessment of future matters. There are several possible sources of this material. First, when enforcers conduct post hoc retrospectives of consummated mergers, they should attempt to ascertain the effects of the

²⁴⁴ Markets are currently defined through a "thought experiment" keyed to price. We ask whether a hypothetical monopolist could profitably raise prices by a small but significant amount, such as 5–10%, for a significant period of time. See Horizontal Merger Guidelines, *supra* note 4, § 1.11. In markets where nonprice competition is the most important kind, however, the boundary-defining test might better be conducted in nonprice terms instead. The issue then would be whether a hypothetical monopolist could make the product less desirable in some "significant and non-transitory" nonprice way, without prompting market shifts that would frustrate the step. In a hospital context, for example, the question might be whether a monopoly institution could successfully cut corners to the point where its rate of complications rose by 5%. Giving choice considerations more emphasis might cause the markets for certain choice-sensitive products to become defined more narrowly, as the analysis is shifted to a new metric to which consumers are more responsive. This will tend to show market power in a larger number of cases. We cannot, however, predict how great any changes would be in practice.

²⁴⁵ Using this technique will take advantage of the FTC's unique asset in having both antitrust and consumer protection expertise under one roof.

²⁴⁶ For example, results from economic laboratory tests show that "four firms seem to be enough to approach a competitive equilibrium in most (but not all) experimental markets." Paul Pautler, *Evidence on Mergers and Acquisitions*, 48 ANTITRUST BULL. 119, 207 (2003).

merger on innovation, quality, and variety, as well as on prices. Second, and similarly, when enforcers have encountered an industry in which variety competition was at risk, and have obtained a corrective measure increasing consumer information or otherwise facilitating enlargement of the range of marketplace options,²⁴⁷ they can conduct retrospectives to determine how consumers in fact responded to the new environment. Third, they can study the business and sociological literature about specific industries, focusing on information about the factors thought to affect variety, creativity, and innovation in that industry, such as the structural conditions most conducive to it.²⁴⁸ Fourth, they can review the economics literature on similar issues and, with the assistance of the antitrust agencies' economics bureaus, can work to expand that literature.²⁴⁹ Fifth, they can give speeches and write articles identifying quality and variety competition as areas of interest and inviting members of the bar to come forward with relevant problems or examples.

Then, when (and if) the enforcers have gained enough experience from these ad hoc, situation-specific applications, they could consider translating these insights into more formal general rules. The agencies have already announced one such general rule in the Competitor Collaboration Guidelines; one of the two safe harbors there was declared for situations in which there were at least four centers of innovation.²⁵⁰ Thus, there is precedent for articulating antitrust rules involving even so difficult a topic as concentration and innovation. We discuss possible ways of expressing more general conclusions in the choice area under the next two headings. One approach involves changing the numerical criteria for challenge in choice-related industries, and the second approach involves a less structured incorporation of choice factors into the general rule of reason analysis.

²⁴⁷ The FTC's R-value rule, mandating disclosures on the effectiveness of home insulation, was, in part, an attempt to help the market provide better insulation products. See Labeling and Advertising of Home Insulation, 16 C.F.R. pt. 460 (2005). For an interpretation, see Averitt, *Unfair Acts or Practices*, *supra* note 12, at 260, 263. This may also have been a factor behind the Green Guides. *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. pt. 260 (1992).

²⁴⁸ Relevant topics might include such things as the degree of actual control that parent media companies typically exercise over their subsidiaries and information about the effects of newspaper joint operating agreements.

²⁴⁹ For example, the number of firms that will maximize innovation under various types of market conditions remains in dispute. Further studies that help to resolve these issues—or even just narrow the range of disagreement—would obviously be useful for antitrust purposes.

²⁵⁰ See U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors, Safety Zone for Research and Development Competition Analyzed in Terms of Innovation Markets § 4.3 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>. It could be argued that this rule is aimed primarily at

D. INCORPORATING CHOICE CONSIDERATIONS INTO THE HERFINDAHL'S

First of all, the accumulated conclusions of choice analysis could be formalized as bright lines in the Horizontal Merger Guidelines, with special levels of concentration announced as the thresholds for concern in particular markets where choice is known to be especially relevant.²⁵¹ Choice considerations might actually be expressed in the HHI in either of two general ways: The agencies could designate choice-based lines on an industry-by-industry basis, or they could identify a larger (although still limited) group of industries in which choice is particularly important and apply the alternative HHI measure to all members of that group.

1. *On an Industry-by-Industry Basis*

The simplest step is to designate individual industries for special standards. After having handled a number of specific cases in an industry, the agency may develop a sense for the role of choice on competition in that industry as a whole. For example, after looking at enough media mergers the agency may conclude that three media firms are likely to generate price competition as robust as the price competition that 5 or 50 firms would produce. But they might also conclude that some larger number of media firms might, on average, be needed to produce the level of variety that consumers require to feel that the market has provided them with a competitive range of options. When this learning becomes sufficiently developed, the Merger Guidelines could reflect it.²⁵²

Antitrust might stop at this point and never generalize beyond the industry level. Alternatively, one more stage of generalization may be both possible and useful.

defending against charges of traditional collusion, but the underlying concept of critical concentration levels may be useful in other contexts as well.

²⁵¹ This new approach would have some real consequences for merger enforcement. Admittedly, the measurement of changes in the HHI index now plays only a small role in enforcement agency and court decisions. So many other factors are involved that, despite what some of the language in the Guidelines appears to suggest, modern merger analysis is close to following a full rule of reason for all cases that are not within the Guidelines' safe harbors. "[M]erger policy has been moving away from reliance on surrogates [such as the HHI] and towards an approach that instead tells a story of anticompetitive harm—an approach that directly asks and answers the ultimate question: are prices to consumers likely to increase as a result of a merger?" Lande & Langenfeld, *From Surrogates to Stories*, *supra* note 66. The HHI provides a starting point for the analysis, however, and starting points often have an effect on conclusions.

²⁵² Even when stated in the Horizontal Merger Guidelines, of course, this number would merely be a presumptive starting point for analysis. It would not establish an absolute bar to above-threshold mergers.

2. For Choice-Valuing Industries as a Group

Over time, antitrust policymakers could develop similar assessments for other industries. When enough of these estimates accumulate, it may become possible to generalize from them and announce appropriate HHI thresholds for certain choice-valuing industries as a group.

While each of these approaches may sound worrisomely imprecise, what will make those new alternative thresholds persuasive is the variety of experiences on which they are based—not only the variety of industries, but also the variety of inquiries and methods used in the assessment of each industry. It is important to realize that this is *exactly* the same process that led to the selection of the current HHI thresholds for price competition. The current Guidelines state that mergers leading to HHI increases of more than 100 can give rise to market power issues.²⁵³ Why did the Guidelines pick 100 as the critical number instead of 200 or 400? The economics literature shows that there is no rigorously derived, dispositive scientific basis for any of the numbers.²⁵⁴ The thresholds in the Guidelines are in some respects unproven and unprovable. They are further complicated by the fact that the underlying definitions of product and geographic markets—necessary for calculation of the HHIs—are themselves riddled with uncertainties. Notwithstanding these uncertainties, the Guidelines are accepted because people recognize that complete certainty in this field is neither possible nor desirable and because the Guidelines reflect an accumulated body of experience and wisdom from a variety of sources.

The Guidelines have been further refined over time through their application by Administrations of different political beliefs. As a result, they have evolved over decades into something very much like the “right” answer.²⁵⁵ If antitrust made a point of conducting this same kind of inquiry in the area of nonprice competition, it could eventually arrive at results in which we could have approximately equal confidence.²⁵⁶

²⁵³ Some have argued that there is an element of imperfect communication in the Horizontal Merger Guidelines, in the sense that analysis actually begins with presumptions at HHI levels different from those formally announced. We do not address that issue in this article, however.

²⁵⁴ See Barry Harris & David Smith, *The Merger Guidelines vs. Economics: A Survey of Economic Studies*, ANTITRUST REP., Sept. 1999, at 23; see also Paul Pautler, *Evidence on Mergers and Acquisitions*, 48 ANTITRUST BULL. 119 (2003).

²⁵⁵ In other words, a rough bipartisan consensus has emerged as to both the formally announced and the actually enforced thresholds, whatever those latter might be.

²⁵⁶ Indeed, the outcome of cases may become more predictable than they are now because the relevant choice considerations will have been openly identified and articulated, rather than left to work behind the scenes as unannounced “fudge” factors.

E. ACCOUNTING FOR CHOICE WITHOUT CHANGING THE HERFINDAHL'S

If amending the HHIs seems too abrupt, however, there is an alternative. Choice considerations could simply be incorporated into merger analysis as one more enumerated factor to be considered in a rule of reason assessment under the current HHIs. Under this approach, choice would be treated like other important second-level factors, such as ease of entry,²⁵⁷ effects on coordinated behavior,²⁵⁸ or efficiencies.²⁵⁹

Choice considerations could be brought into the Guidelines' analysis in any of four secondary ways: (1) as a tie-breaking factor; (2) as a guide to when the stated thresholds of the Guidelines will be more rigorously enforced; (3) as an explicit, equal form of harm to competition; or (4) as an affirmative efficiencies defense.

1. *Tie-Breaking Factor*

Choice considerations could be used as a tie-breaking factor. If enforcers were deciding whether to challenge a merger in a choice-sensitive industry like advanced aerospace, and if they were exactly on the margin after considering the likely effect on price, then choice considerations could be used to nudge the decision in one direction or the other.

2. *Increasing the Probability of Challenge*

Choice considerations could also be used as an implicit interpretive factor that would increase the probability of challenge under the Guidelines. Assume that for normal industries where price competition is most important, the enforcers challenge 20 percent of above-Guidelines mergers. For those industries where consumer choice issues are especially crucial, it might be appropriate for the enforcers to apply the current elements of the Guidelines somewhat more strictly, in a way that would lead them to challenge 40 percent of above-Guidelines mergers.

3. *Express Factor in Rule of Reason Analysis*

Choice could be elevated to the status of a briefly mentioned but explicit substantive factor in the rule of reason analysis of the Guidelines.²⁶⁰ Under this approach, a merger could be challenged if it were

²⁵⁷ Horizontal Merger Guidelines, *supra* note 4, § 3.

²⁵⁸ *Id.* § 2.

²⁵⁹ *Id.* § 4.

²⁶⁰ See, e.g., Memorandum from Jonathan Baker, Professor of Law, American Univ. Washington Coll. of Law, to the FTC/DOJ Joint Workshop on Merger Enforcement, Comments on Applying the Horizontal Merger Guidelines 18 (Mar. 18, 2004), available at <http://>

sufficiently likely to lead either to higher prices *or* to significantly fewer consumer choices, assessing this broadened field of effects with the tools of the existing HHI presumptions and starting points. This will lead to a greater focus on variety and innovation because those factors will have been identified as primary, rather than footnote, considerations.

Making the choice factor explicit will further change enforcement results by refining our notions of which firms are the closest substitutes for each other. This can be seen in the way that antitrust would come to treat a merger among firms that compete in some particular nonprice dimension—for example, in innovation. Not every company within an industry competes in such terms. Some will compete by making existing products less expensively, by superior marketing, or by superior service. A choice-based analysis would distinguish the innovator and the non-innovator companies and would assign different competitive consequences to mergers between firms that compete in the same way and those that compete in different ways.

Suppose, for example, that a market consists of five firms—A, B, C, D, and E; 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. But suppose that only firms A, B, and C have large R&D budgets and a history of making significant innovations, and only they compete significantly by engaging in innovation. Firms D and E compete by making existing products less expensively instead. Suppose, finally, that firms A and B (two of the firms that compete by innovating) want to merge.

Under a price-centered analysis, the decision makers should permit this merger because afterwards there will still be four firms left in the market, which is enough for effective price competition. Under choice analysis, however, decision makers might block the merger because it is likely to result in only two independent sources of choice or innovation,²⁶¹ while optimal choice or innovation would require three independent suppliers.²⁶²

www.ftc.gov/bc/mergerenforce/comments/bakerjon.pdf (federal enforcers should “consider adding a new section making explicit their approach to analyzing innovation competition,” and can do so “without altering any existing Guidelines text”). An alternative method for explicitly considering the effects of a merger on innovation was suggested by Michael Porter. See Porter, *supra* note 36, at 936–42 (using “five forces” analysis).

²⁶¹ This is analogous to unilateral effects analysis, except that instead of more carefully scrutinizing a merger between two firms that are active within the same market-space niche of a market, choice analysis could be said to focus on a niche consisting of innovators. It is also similar to the “innovation market” idea. See *supra* note 37.

²⁶² We need not take this idea further by extending it to additional or less important dimensions of nonprice competition. Suppose that only three of the five firms in a market

4. *Innovation as an Efficiency Defense*

Just as choice considerations can lead to some mergers being blocked even if they are unlikely to have detrimental price effects, it can also lead to some mergers being approved even if they pose a risk of a short-term price rise. This could happen if the mergers are likely to lead to increased innovation sufficiently valuable to offset this risk. This is a specialized type of efficiency defense,²⁶³ focused on innovation as the most valuable of the relevant efficiencies.²⁶⁴

Merging firms can present such a defense today, but do not commonly do so in convincing detail.²⁶⁵ Choice analysis would more explicitly invite such evidence. Merging firms would be encouraged to demonstrate that their merger would lead to a greater incentive towards, and capability and likelihood of, significant innovations that would enhance consumer choice. The range of relevant innovation should be defined broadly for these purposes. It should include not only technological innovations, but also innovative new services, new service delivery techniques,²⁶⁶ and higher-quality products. Just as with cost-oriented efficiencies, however, efficiencies in innovation are much easier to claim than to demonstrate. The burden of persuasion for a choice or innovation defense, like the current burden for a cost-savings defense,²⁶⁷ should be on the merging parties because they are most likely to have access to the relevant information. They should also have to show that the innovation could not be accomplished in any other way, such as through a joint venture.

compete by offering high levels of sponsorship of local sports teams (or high-quality advertising, or any other significant but secondary dimension of competition) and that two of the sponsorship-oriented firms want to merge. Should we prevent this merger? Not necessarily, because those other arenas are not, in most cases, as important for consumers as choice and innovation. This proposition can be tested by imagining the consumer response to a 5% diminution in the relevant conduct.

²⁶³ This assumes that the merger enforcement or liability decision properly permits an efficiency defense in the first place. The Clayton Act does not contain an explicit exception for an efficiency-enhancing merger. It prohibits mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. However, competition could be enhanced in the long run if a merger leads to increased innovation that helps the innovating firm challenge an established monopolist, so an innovation defense might still be implicitly justified under the statute. For an analysis of the relevant policy considerations see Fisher & Lande, *supra* note 34, at 1651–77.

²⁶⁴ See Porter, *supra* note 55.

²⁶⁵ See generally Malcolm Coate, *Twenty Years of Federal Trade Commission Merger Enforcement Activity (1985–2004)*, at 17–18 (Potomac Law and Econ. Working Paper No. 05-02, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=708503.

²⁶⁶ The importance of innovation in services is illustrated by the growth of Internet-based shopping options.

²⁶⁷ See Horizontal Merger Guidelines, *supra* note 4, § 4.

F. PREVENTING EXCESSIVE PROSECUTORIAL DISCRETION

Any explicit incorporation of choice considerations into antitrust analysis could lead to overbroad enforcement. The choice model is analytically more complete than the other models and, thus, provides more avenues of attack and, thus, is more susceptible to abuse. Improper enforcement could occur, for example, if the choice approach were misconstrued as a quest for the maximum number of choices, rather than as a way to preserve the number and variety of choices that competition would bring. We believe that the antitrust community and the courts will understand the proper role of choice analysis and will enforce those limits through the appointment of sensible enforcement officials and through appellate review. It seems better to rely on these kinds of checks and balances than to deliberately continue to use an incomplete legal theory.

If one still fears the risks, however, antitrust could compensate by formally limiting the range of prosecutorial discretion under a choice model. Choice considerations could be permitted only as a tiebreaker or weighting factor, for example, or as a separate analytical screen only after a price or efficiency analysis has been completed. By following those approaches it would be possible to achieve at least some of the benefits of the choice model rather than forgoing it altogether.

G. CONCLUSION ON IMPLEMENTATION ISSUES

The question is not whether the choice model can be implemented perfectly or without difficulty, but rather whether the greater relevance of the choice theory, combined with the relatively modest incremental complexity of its application, will allow antitrust decision makers to make those decisions better than they currently do. We believe that it will. Applied with care, the choice approach can do more or less as practical a job in answering the right questions as the other models can do in answering the wrong questions.

VI. ADMINISTRATIVE ADVANTAGES OF THE CHOICE PARADIGM

Adopting the choice paradigm does not just ensure that particular cases will be decided more correctly. It also has important practical administrative advantages for external communication and internal case management. The new paradigm will: (1) facilitate dialogue and convergence with foreign antitrust regimes; (2) make it easier to explain antitrust policy to non-specialists in the media and the American public; (3) lead to greater enforcement efficiency because it draws attention to

the right issues; (4) make it easier to identify useful synergies between competition and consumer protection matters; and (5) suggest a more rational allocation of cases between the FTC and the Justice Department.

A. FACILITATES DIALOGUE AND CONVERGENCE WITH FOREIGN GOVERNMENTS

First, the choice paradigm will help to smooth our interactions with the antitrust officials of foreign countries. This model may be particularly useful for presentation to the European Union as a mutually-acceptable midpoint around which the ongoing convergence of national policies in the industrialized nations can continue. The European Union is less completely committed than we are to the efficiency-centered antitrust paradigm. European laws and enforcement patterns currently embrace a variety of values,²⁶⁸ and, although efficiency is high among these values,²⁶⁹ it seems unlikely that the European enforcers would be comfortable relying on efficiency alone.²⁷⁰ But they might agree to rely

²⁶⁸ The Preamble to the EU Merger Control Regulation states that the Commission must assess competition and market concentration “within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community” Council Regulation (EC) No. 4064/89, art. 3, 1989 O.J. (L 257) ¶ 23, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R4064:EN:HTML>. Article 2 of the Treaty then provides:

The Community shall have as its task . . . to promote . . . a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Treaty Establishing the European Community (Consolidated Text) art. 2, 2002 O.J. (C 325) 8, available at http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

²⁶⁹ Former EU Competition Commissioner Mario Monti observed that most people commenting on proposed revisions to the merger regulations “consider that there should be an ‘efficiency defense’ that could mitigate a finding of dominance.” He further noted that “I share this approach,” and that only “a small minority” of commentators advocated “for the introduction of other policy considerations in the assessment of mergers, like . . . their social consequences.” Mario Monti, Review of the EC Merger Regulation—Roadmap for the Reform Project, Remarks Before the British Chamber of Commerce, Brussels (June 4, 2002), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/252&format=HTML&aged=0&language=EN&guiLanguage=en>.

²⁷⁰ The Europeans have defined their areas of concern more broadly. “Market power is the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time.” DG Competition, *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* ¶ 24 (Dec. 2005), available at <http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf>. See EUROPEAN COMM’N, EU COMPETITION POLICY AND THE CONSUMER 8 (2004), available at http://ec.europa.eu/comm/competition/publications/consumer_en.pdf (an anticompetitive merger “is likely to harm consumers through higher prices, reduced choice or less innovation”); see also Mario Monti, *Preface*, EUROPEAN

on a choice model. In fact, some EU statements on competition policy are already framed in terms very similar to our proposed choice approach.²⁷¹ If U.S. and European enforcers were able to converge on the choice model, there would be greater prospects for international harmonization of law, to the benefit of all participants in the world economy.

For somewhat different reasons, the choice model may also be useful when dealing with the governments of developing economies. The concept of choice is readily communicated across the barriers of different language, culture, and experience. It is much more transparent and straightforward than the language of efficiency. This makes it suitable for presentation to the regulators and enforcers in emerging economies, who may not have large numbers of experienced market-oriented economists to consult.²⁷² The vocabulary of choice may also be a useful corrective to some prior habits of mind. Especially if they have come out of a system of price regulation, foreign competition officials might tend to attach undue importance to price considerations at the expense of quality, innovation, or service.²⁷³

B. EASIER TO EXPLAIN TO CONGRESS AND THE PUBLIC

It is not enough for a nation to have a sound antitrust policy that is understood by its specialist practitioners. The policy also has to be communicated effectively to non-specialists, such as business executives who must comply with the law, judges and juries who enforce the law, the senators and representatives who appropriate the enforcement budgets, the media, and ultimately the general public. The choice model is particularly useful in this regard because there is something simple and

COMM'N, COMPETITION POLICY IN EUROPE AND THE CITIZEN 4 (2000), available at http://ec.europa.eu/comm/competition/publications/competition_policy_and_the_citizen/en.pdf (merger policy ensures "a diversity of mass-market consumer goods" as well as "low prices"). Moreover, "ensuring that consumers are able to make choices which affect the conduct of firms" is also a means of "guaranteeing that markets function on a competitive basis." *Id.* at 5.

²⁷¹ See *supra* note 270. However, even if American and EU competition policies, as applied in recent years, have produced "broadly convergent outcomes," particularly with respect to cartels and horizontal mergers, Monti, *supra* note 269, they have not yet fully converged, particularly with respect to other issues like abuse of dominance.

²⁷² See, e.g., Russell Pittman, Chief, Competition Policy Section, Antitrust Division, U.S. Dep't of Justice, The Heart of Antimonopoly Investigation: The Choices of Consumers, Remarks to Staff Members of Antimonopoly Offices of Central and Eastern Europe at FTC/DOJ Conference, Investigating Competition Cases (Mar. 7, 1994).

²⁷³ At the same time, we would not want national administrators to fall into the opposite error by using a choice theory to systematically oppose any reduction in the number of options, perhaps by protecting incumbent firms. A careful discussion of the limits on the theory would also be necessary.

intuitively obvious about the basic concept of protecting a range of options and the ability to choose among them.²⁷⁴ By contrast, an efficiency model is exceedingly difficult to communicate to non-specialists. It leads them to think that the law considers only simple changes in the cost of production, or else that it considers a bewildering, impenetrable variety of technical economic concepts, in which almost everything is relevant and nothing is determinative.²⁷⁵

C. GREATER ENFORCEMENT EFFICIENCY

Another administrative benefit of the new paradigm is that it will direct enforcers' attention to the most relevant considerations in the mass of facts that makes up an antitrust case. This will reduce the risk of focusing on secondary facts, which can waste resources and lead to erroneous conclusions requiring later correction.

The case of vertical restraints illustrates these benefits. The investigator who approaches such a constraint with a price model in mind is immediately at a loss because price evidence in that context is inherently ambiguous. A price rise may be due to the harmful stifling of intrabrand competition or to the beneficial elimination of short-term free riders, and the observed price behavior alone will not indicate which explanation is correct.²⁷⁶ Nor is a shift to the more elaborate efficiency model of much help. It simply tells the investigator to "consider all relevant considerations," which, while perfectly true, fails to provide practical guidance.

But a choice model will immediately direct the investigator to the right question, by asking whether the net consumer options (including both price and nonprice options) have been enriched or diminished as a result of the vertical restraint. Thus, the choice model provides some generally valid and useful rules of thumb—"more consumer choice is

²⁷⁴ See Barbara Swain, *Consumer Choice: A Theme Jurors Find Compelling*, ANTITRUST REP., Aug. 2000, at 8, 16 ("When structuring case themes, it is important to keep in mind that jurors today are concerned about consumer choice in the marketplace. They want assurances that consumers have price and product alternatives. Thus, it is important to establish choice, or lack thereof, in order to prevail.").

²⁷⁵ On several occasions one of the authors, Professor Lande, has discussed the efficiency approach with business journalists. He has tried to explain that under this approach the only problem with supracompetitive pricing is that it causes allocative inefficiency, and he also has tried to help journalists understand the underlying concept of the deadweight loss welfare triangle. On no occasion did the reporters seem to intuitively grasp the concept of allocative inefficiency, or to accept that the only problem efficiency adherents have with anticompetitive mergers or cartels is that they cause such inefficiency.

²⁷⁶ Compare *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), with *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

probably good"—and provides a quick test that can help people avoid gross error.²⁷⁷

D. BETTER SYNERGIES BETWEEN COMPETITION AND CONSUMER PROTECTION THEORIES

The choice approach will also help practitioners more readily identify possible synergies between antitrust and consumer protection theories. The choice model puts both those theories on the table at the same time, as the two essential components of a market transaction. In so doing, it makes it easier to recognize two potentially powerful synergies between them.

The first is the synergy of coordination. If an agency, such as the FTC, that has jurisdiction over both antitrust and consumer protection, is contemplating a broad approach to some troublesome sector of the economy, it might consider how its work under one of its responsibilities can sometimes help advance its goals under the other, and take advantage of that reinforcement wherever possible.²⁷⁸ For example, the provision of better, more transparent consumer information about health-care providers (a consumer protection concern) might result in better and more rational competition among them (an antitrust concern).²⁷⁹

The second synergy involves the possibility of substitution. Sometimes it may turn out that a particular issue, long addressed on one side of the line between antitrust and consumer protection, is actually better

²⁷⁷ If the restraint will produce more choices for consumers, it is presumably beneficial because it probably helps overcome a free rider or other problem. By contrast, if all the restraint does is to reduce consumers' price choices, it is likely to be anticompetitive. Some other situations will have mixed effects that must be more carefully examined.

²⁷⁸ Cf. Note from the FTC and the U.S. DOJ Antitrust Division to the OECD Global Forum on Competition, *The United States Experience in Competition Law Technical Assistance: A Ten Year Perspective* (Feb. 6, 2002) ¶ 24, available at <http://www.oecd.org/dataoecd/37/61/1833990.pdf>:

A competition agency cannot function in a vacuum. For it to do its job, there must be other institutions in place that understand the role of competition in a market economy. . . . The linkages between competition and consumer protection are well understood in the United States, and if the competition agency does not itself handle this function (as the FTC does in the U.S.), a competition agency should have a healthy relationship with the consumer protection agency and should be able to help it understand that consumer protection should complement, not replace, competition in a market economy.

²⁷⁹ The same synergy of coordination can sometimes also be achieved on a smaller scale by combining different categories within the single discipline of antitrust law. For example, it may sometimes be useful to use structural remedies to cure a conduct violation. See generally Neil W. Averitt, *Structural Remedies in Competition Cases Under the Federal Trade Commission Act*, 40 OHIO ST. L.J. 781 (1979).

sued to handling on the other side. For example, if a firm has an exclusionary strategy that relies on misleading consumers or competitors, this might be challenged by the FTC's Bureau of Competition, but under a consumer protection theory that focuses on the firm's use of the particular tactics of deception or coercion.²⁸⁰ There are at least three types of antitrust matters that might sometimes be reframed in consumer protection terms.²⁸¹ These are cases involving: (1) deception of standard-setting organizations; (2) strike suits or other forms of nuisance litigation; and (3) exploitation of locked-in customers.

1. *Deception of Standard-Setting Organizations*

A choice between antitrust and consumer protection theories will be possible in cases involving the deception of standard-setting organizations. Standardization agreements ensure that different brands of

²⁸⁰ The use of consumer protection laws in a business context should not be troublesome, in principle. Business corporations can certainly be "consumers" in their role as purchasers of inputs. *See, e.g.,* *McGregor v. Chierico*, 206 F.3d 1378, 1380–81, 1388 n.11 (11th Cir. 2000) (deceptive acts by telemarketers to induce businesses to pay for unordered photocopier toner); *FTC v. Certified Merchant Servs.*, Civ. Action No. 4:02cv44, Complaint ¶¶ 28–31 (E.D. Tex. Feb. 11, 2002), available at <http://www.ftc.gov/os/2002/02/cmssmplnt.pdf> (allegedly unfair to subject small businesses to unfavorable terms that had been improperly added to credit card processing contracts after signature); Press Release, Federal Trade Comm'n, Three California Telemarketers Banned from Telemarketing as Part of FTC Settlement (Feb. 5, 2001), available at <http://www.ftc.gov/opa/2001/02/datadist.htm> (including consent order in *FTC v. National Supply & Dist. Center, Inc.*, No. CV-99-12828 (C.D. Cal. filed Dec. 7, 1999) involving misrepresentation of the existence of prior business relationship when selling toner to small businesses). Management textbooks have long recognized that businesses can be subject to the same imperfect decision-making processes as individual consumers. *See supra* note 96.

²⁸¹ The issues of definition and limiting principles will naturally be important when it comes to extending consumer protection law to these new antitrust contexts. Developing a formal list of limiting principles is outside the scope of this article, but a number of possibilities—which at this point we neither endorse nor reject—can be identified. Enforcement through consumer-protection theories could be limited to: (1) particular areas of the law (such as patent infringement suits) in which there is a heightened risk that private parties can engage in abusive litigation; (2) cases presenting objective proof that private defenses are ineffective; (3) cases presenting objective proof that the aggressor is not pursuing bona fide economic goals; (4) cases involving conduct that deviates substantially from industry-standard methods to which purchasers have already grown accustomed; (5) situations where at least a substantial minority of consumers have had their decisions adversely swayed; and (6) cases involving particularly large economic harm. All these enforcement actions could concentrate on situations affecting initial purchase decisions, thus also excluding many forms of business torts, contract breaches, and other post-purchase opportunistic conduct. However, the list of limiting principles does not include a notion that consumer protection theories can be used in an antitrust context only to protect individuals and small businesses. To be sure, as a matter of resource allocation and prosecutorial discretion, those situations may account for virtually all FTC actions. As a matter of legal theory, however, the FTC Act covers unreasonable impairments of a purchaser's ability to choose, regardless of the size or nature of the purchaser; the law does not withdraw its equal protection from large entities merely because they are large.

technical devices, such as computers or audio systems, can be operated together and their individual components can compete with one another. This is a clear efficiency, and such agreements generally pass antitrust muster. Sometimes, however, one party to the agreement has secured a patent on the intellectual property covered by a standard; misrepresented (either expressly or by silence) to the association that no such patent exists; waited until the industry has committed itself to the standard and has become locked in; and then asserted its patent rights. The FTC's case in *Rambus* involved essentially these facts.²⁸²

The complaint there was framed in antitrust terms, charging "unfair methods of competition,"²⁸³ which in that context were acts of monopolization. The Commission ultimately determined that the central act of monopolization was the respondent's deception. The case might also have been brought in explicitly consumer protection terms, however. The standard-setting group "purchased" the intellectual property needed for the joint standard, and "paid" for it with their reciprocal agreements to follow the standard; and this purchase process was disrupted by the deceptive failure of Rambus to disclose its own patent rights.

The consumer protection approach would be advantageous in some circumstances. Deception of this sort can take place even without market power—because consumers are injured through other mechanisms instead.²⁸⁴ The consumer protection approach will, therefore, be the better theory to use in situations when market power or market defini-

²⁸² See Press Release, Federal Trade Comm'n, FTC Finds Rambus Unlawfully Obtained Monopoly Power (Aug. 2, 2006) [hereinafter *Rambus* Press Release], available at <http://www.ftc.gov/opa/2006/08/rambus.htm>. The Commission pursued a somewhat similar theory against Unocal. See generally Complaint, Union Oil Co., FTC Docket No. 9305 (Mar. 4, 2003) [hereinafter *Union Oil Complaint*], available at <http://www.ftc.gov/os/2003/03/unocalcmp.htm>. *Unocal* involved charges that the patent-holding firm deceived a unit of the California state government as well as other industry participants. Unocal eventually agreed to release the relevant patents to the public as part of a settlement with the FTC, in the context of the firm's acquisition by Chevron. See Press Release, Federal Trade Comm'n, Dual Consent Orders Resolve Competitive Concerns About Chevron's \$18 Billion Purchase of Unocal, FTC's 2003 Complaint Against Unocal (June 10, 2005), available at <http://www.ftc.gov/opa/2005/06/chevronunocal.htm>.

²⁸³ Complaint at ¶¶ 122–124, *Rambus, Inc.*, FTC Docket No. 9302 (June 18, 2002), available at <http://www.ftc.gov/os/adjpro/d9302/020618admincmp.pdf>.

²⁸⁴ Antitrust violations involve conduct that takes place "outside the head" of the consumer and so they imply the existence of market power, whereas consumer protection violations take place "inside the head" of the consumer and so they do not require any particular market context. See Averitt & Lande, *Consumer Sovereignty*, *supra* note 12, at 730, 733.

tions are unclear, as, for example, some thought they had been in the earlier *Dell Computer* case.²⁸⁵

2. *Strike Suits and Extortionate Litigation*

A choice of competition and consumer protection approaches is also available for dealing with strike suits and extortionate litigation. This kind of conduct is usually approached as an antitrust matter. The aggressor firm may be engaged in an act of monopolization, such as a plan to drive all others from the market through specious patent litigation, or a strategy designed to raise its rivals' costs through burdensome legal proceedings. The same facts can also be viewed in consumer protection terms, however. The target firm in these cases is, in a sense, being coerced by the threat of unwarranted litigation expenses into "buying" a license or some other indulgence from the aggressor. Because consumer protection law prohibits coerced purchases, a violation on that theory may be present.²⁸⁶ Coercion, like deception, does not necessarily require market power. Consumer protection will, therefore, provide the more appropriate legal theory in situations where the aggressor firm does not have a high market share, as patent predators frequently do not.²⁸⁷

²⁸⁵ See *Dell Computer Co.*, 121 F.T.C. 616, 632 (1996) (Azcuenaga, Comm'r, dissenting) ("the majority fails to identify the relevant market in which market power assertedly was 'conferred'").

²⁸⁶ See, e.g., *Holland Furnace Co. v. FTC*, 295 F.2d 302, 303 (7th Cir. 1961) (salesmen disassembled home furnaces for inspection and then refused to reassemble them until the customer agreed to buy additional parts or services); see also *Arthur Murray Studio of Washington, Inc. v. FTC*, 458 F.2d 622, 625 (5th Cir. 1972) (high-pressure, closed-door sales pitches for dance lessons); *Door-to-Door Sales Rule*, 16 C.F.R. pt. 429 (1972) (establishing a cooling-off period out of concern for the effects on consumers who are cornered in their own homes). See generally Averitt, *Unfair Acts or Practices*, *supra* note 12, at 252–55.

²⁸⁷ There is also a second advantage to use of consumer protection theories in strike-suit cases—the conduct then does not appear to be protected by the *Noerr* petitioning immunity that normally shields even ill-founded litigation from antitrust challenge. Compare *Prof'l. Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 64 (1993) (setting strict test for bad-faith antitrust litigation), with *Spiegel v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976), and *J.C. Penney Co.*, 109 F.T.C. 54 (1987) (consent order) (challenging as unfair the practice of suing consumers for unpaid debts in distant or inconvenient fora). There appears to be a principled basis for this distinction. Consumers with shallow pockets are more readily intimidated and abused by bad-faith litigation than businesses would be and, thus, predators' freedom to institute such litigation under the protection of *Noerr* should be more restricted on the consumer protection side of the statute. This principle might apply even where the targets of the abusive lawsuits are businesses, at least where they are small businesses that may have many of the behavioral and resource characteristics of an individual consumer. It is also possible that the *Noerr* immunity should be more restricted for FTC actions in general, and not just consumer protection actions in particular. See generally *Union Oil Complaint*, *supra* note 282 (raising although not resolving this issue).

3. *Exploitation of Locked-In Consumers*

Finally, there can be a significant consumer protection component to antitrust cases that involve the exploitation of locked-in consumers. Such cases may first present themselves to the antitrust bar as tying arrangements—that is, as potential competition violations. That was the situation in the Supreme Court's *Kodak* case, where customers had to buy the firm's maintenance services in order to obtain its spare parts.²⁸⁸ There are actually a great many consumer protection attributes to this kind of case, however. What made the Kodak tie-in of concern is not a long-announced program requiring manufacturer service, but rather an unanticipated shift in the supplier's policy. The problem was a breach of the implicit (or explicit) understanding that users would be allowed to handle maintenance in a certain way over the lifetime of the product, thus making the initial, unfulfilled promise a deceptive one. The FTC has brought a number of consumer protection cases involving post-hoc contract breaches.²⁸⁹ Pursuing a tie-in matter in these terms will be appropriate in cases where consumers have been injured by the faulty information about policy changes rather than by an exercise of market power.

E. BETTER ALLOCATION OF CASES BETWEEN FTC AND THE JUSTICE DEPARTMENT

Finally, the consumer choice paradigm can help to allocate antitrust cases more appropriately between the Federal Trade Commission and the Department of Justice.²⁹⁰ Choice theory implies that antitrust should

²⁸⁸ See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 458 (1992). Kodak had changed its photocopier service policies around 1985, in a effort to limit the growth of independent service organizations. Customers who had bought copiers before the policy change were forced against their expectations to pay higher prices as a result of this new tie-in because they were already locked in to using Kodak machines. See Averitt & Lande, *Consumer Sovereignty*, *supra* note 12, at 738–40. For a more detailed discussion of this case, see Robert H. Lande, *Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 ANTITRUST L.J. 193 (1993).

²⁸⁹ See *Orkin Exterminating Co.*, 108 F.T.C. 263, 347, 368 (1986) (company breached "lifetime" service contract by raising annual renewal fees when it had promised not to do so); *cf. FTC v. Certified Merchant Services*, Civ. Action No. 4:02cv44, Complaint ¶¶ 28–31 (E.D. Tex.), available at <http://www.ftc.gov/os/2002/02/cmcsmplnt.pdf> (unfairness authority invoked to keep small businesses from being held subject to contracts for credit card processing services on unfavorable terms, when the adverse terms had been improperly added to the contracts after signature). Of course, if there is merely a policy change, but no reasonable understanding of any promise that the policy would not be changed, then there is no violation at all.

²⁹⁰ This has long been a concern. See Ernest Gellhorn, *Two's a Crowd: The FTC's Redundant Antitrust Powers*, 5 REGULATION, Nov./Dec. 1981, at 32; Miles W. Kirkpatrick et al., *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 113–24 (1989).

always be construed with an awareness of how it will mesh with consumer protection. The FTC's special expertise in consumer protection means that it will be uniquely suited to handle those antitrust cases in which consumer protection considerations are particularly important. Because this division would more fully take advantage of each agency's methodological expertise, it is likely to produce better results than the current allocation criteria that look to industry experience only. This change is probably also modest enough to be instituted without disruption. It would affect the allocation of only about 5 percent of antitrust cases, an impact sufficiently large to distinguish the agencies' missions but still small enough to let most cases proceed routinely. Moreover, the division of authority would be only a presumption that could be set aside in favor of compelling industry experience in any particular case.

Competition matters range from those that should presumptively go to the FTC, to those (the great majority) that can be handled equally well by either agency, to those that should presumptively go to DOJ, and they include some others that are specifically allocated by statute.

1. *Cases that Should Presumptively Go to the FTC*

Antitrust cases that would usually go to the FTC are those in which the most important and complex element in the antitrust theory is the assessment of the effects of certain conduct on consumers' decision-making abilities. At least four general types of antitrust cases can present this circumstance: (1) where a firm monopolizes through consumer protection-type offenses like deception;²⁹¹ (2) where market power is achieved by deception of a standard-setting group;²⁹² (3) where tying arrangements may harm consumer decision making;²⁹³ and (4) where

²⁹¹ See *Allied Tube & Conduit v. Indian Head, Inc.*, 486 U.S. 492, 499, 511 (1988) (abuse of standard-setting process in way that effectively misrepresented the state of professional opinion on safety issues); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 775-76 (6th Cir. 2002) (among other acts of monopolization in market for moist snuff, U.S. Tobacco misrepresented its sales figures to retail purchasers).

²⁹² See *Rambus* Press Release, *supra* note 282 and accompanying text; cf. *Dell Computer Co.*, 121 F.T.C. 616 (1996).

²⁹³ Tying arrangements frequently present this situation. A tie can be a technical antitrust violation because it restricts the choices available to consumers. See Lande, *Choice as Ultimate Goal*, *supra* note 12, at 510 n.33. What often makes a tie of actual enforcement concern, however, is that it can also enable a firm to harm consumers' decision-making abilities, perhaps through some exploitation of particular vulnerabilities. For example, a tie between two related products may make it more difficult for consumers to determine the price of either of the products in the package, thus making price competition less effective. See *Sandoz Pharm. Corp.*, 115 F.T.C. 625 (1992) (consent order) (tie between drug and services to monitor for adverse reactions). Or a tie between a product and a service can take advantage of those consumers who have difficulty calculating lifetime service costs. Cf. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 475-76 (1992) (presenting, but not deciding, these issues). Conversely, other ties can be justified on

the main effect of a horizontal agreement is to restrict advertising or otherwise raise consumer search costs.²⁹⁴

Two additional groups of cases have consumer protection elements that, although not the single most important issue in the theory of violation, are sufficiently important that there are benefits to using consumer protection expertise and that justify adding them to the list of matters that should usually go to the FTC. These are: (5) cases in which a harm to consumer decision-making ability must be considered as one part of a full rule of reason analysis;²⁹⁵ and (6) merger cases where consumer preferences for creativity and variety require a relatively wide range of independent suppliers. A key question in this last group of cases is ascertaining just how many suppliers of newspaper and television services, for example, are needed for individual consumers to feel that they have a satisfactory range of options.²⁹⁶

2. *Matters that Can Be Handled by Either Agency*

At the center of the spectrum are the great majority of antitrust matters, which can be handled with equal facility by either the FTC or the DOJ. These include the familiar mix of merger, horizontal agreement, and vertical restraints matters. To be sure, handling such matters may sometimes benefit from a careful assessment of consumer behavior. A merger is best judged, for example, when one has a sense of how readily consumers will substitute away from the affected products in response to a price increase, or how quickly consumers will find out

consumer protection grounds, as when they assign responsibility for the performance of multi-part systems to a single visible party. *Cf.* *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 560 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). Similarly, some other nonprice vertical restraints might be justified on consumer protection grounds because they preclude a certain mode of doing business—that is, a certain marketplace option—that presents an exceptionally high risk of consumer abuse. *See Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 240 (1918) (upholding restrictions on after-hours commodity trading because such trading could lead to abuse of less-well-informed parties). Whatever the specifics of these varied tying cases, they all involve an integral balancing of competition and consumer protection goals and thus should go to the FTC.

²⁹⁴ What makes such a horizontal agreement either bad or good is its underlying consumer protection impact. The standards may burden advertising with so many disclosures that the firms can no longer communicate effectively to potential customers, which would make the standards impermissibly anticompetitive. Or the standards could actually protect consumers from false or misleading information, in which case the defendants would have an efficiency defense. *See, e.g., Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 603–04 (7th Cir. 1984).

²⁹⁵ *See supra* Part III.B, notes 79–88.

²⁹⁶ To answer this question the agency will have to draw, in part, on consumer protection methodologies, using polling, focus groups, opinion surveys, advertising studies, and other techniques to understand the consumer demand for variety. *See supra* Part IV.C, notes 244–49.

about a new product or price discount.²⁹⁷ Nonetheless, the consumer behavior involved in these mid-range cases is relatively straightforward and familiar, does not call for specialized agency expertise, and would not call for any specialized consumer protection input. For this reason these cases are traditionally and properly allocated between the FTC and DOJ on the basis of an agency's familiarity with particular industries,²⁹⁸ rather than on its ability to handle particular legal theories.²⁹⁹

3. *Matters that Should Presumptively go to the Department of Justice*

Some matters should presumptively go to the Department of Justice. The most important of these are cases involving price fixing and other per se horizontal violations.

Department of Justice matters will also include one subset in a larger class of cases that ordinarily go to the FTC. The FTC will normally handle cases in which impaired consumer decision making must be included in a full rule of reason analysis. These cases typically involve horizontal agreements on nonprice matters, such as restrictions on advertising that, in turn, diminish the useful information available to consumers. In some cases, however, the horizontal agreements on marketing arrangements may also include more hard-core agreements on price, or divisions of customers or territories. Even those agreements are not automatically improper, because the total package may still include enough efficiencies to put it into the realm of rule of reason analysis. Where this price-fixing component is an important part of the equation, however—as it was in cases like *Broadcast Music*—the matter should presumptively go to the

²⁹⁷ This is, of course, the basis for the market definition section of the Horizontal Merger Guidelines, which ask the likely effect on supply and demand in response to a small but significant and non-transitory increase in price. See Horizontal Merger Guidelines, *supra* note 4, § 1.11.

²⁹⁸ See FTC-DOJ Clearance Agreement (1993, as amended 1995), summarized at <http://www.ftc.gov/opa/prehawn/F95/h-s-r-reform.htm>. The result of this process is that certain industries are generally handled by the FTC (e.g., supermarkets, pharmaceuticals, petroleum); others are generally handled by the Antitrust Division (e.g., steel, beer, telecommunications); and still others are handled by both agencies (e.g., computers, defense, hospitals).

²⁹⁹ Another group that can be handled by either agency involves cases in which creativity and organizational independence may be important to institutional buyers, such as corporations and governments. These cases involve purchases in such fields as pharmaceuticals, defense contracting, and other high-tech areas. The FTC may be particularly well suited to identifying the necessary number of competitors in markets serving individual consumers, such as media and fashion, since it has tools for assessing individual consumer preferences. (Just how many news sources does it take to make people feel comfortably well informed?) The DOJ would not have any disadvantage in assessing how many suppliers are needed to satisfy business organizations seeking to buy technical innovation, however, because that task is more likely to involve stated organizational policy rather than half-hidden individual preferences.

DOJ for decision.³⁰⁰ Price fixing, in other words, with the associated need to consider criminal prosecution, something that only the DOJ can undertake, should be a more important consideration in allocating cases than FTC-type burdens on decision making would be.

4. *Matters Allocated by Statute*

Some other matters are allocated between the agencies by statute and are, as a result, outside this scheme of allocation on the basis of choice theory. They can instead be thought of as anchoring the two ends of the spectrum—matters that should always be allocated to the FTC at one end of the spectrum and to the Department of Justice at the other. At the FTC end, that agency should handle all those matters that are outside the letter of the Sherman Act but are nonetheless within the “gap-filling” purposes of the FTC Act.³⁰¹ These specialized cases include such things as invitations to collude³⁰² and noncollusive but potentially anticompetitive conduct of the sort considered in *Ethyl*.³⁰³ At the DOJ’s end of the spectrum, that agency should handle all matters involving industries specially committed to its jurisdiction³⁰⁴ and all per se offenses sufficiently serious that they are best pursued criminally. On a related although somewhat discretionary note, the DOJ should also handle most matters in which it is appropriate to pave the way for private treble-damage actions.

³⁰⁰ In *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), composers had agreed on prices as part of the process of packaging and marketing blanket licenses for musical compositions. Under prior law, this conduct might have been challenged on a per se theory. However, the Court held that a full analysis should entertain the argument that the restraints were essential if the product were to be marketed at all. *Id.* at 24–25.

³⁰¹ For a discussion of those purposes, see Averitt, *Unfair Methods of Competition*, *supra* note 12, at 251–71.

³⁰² The Sherman Act reaches attempts to monopolize but not attempts to collude, unless that collusion would result in a monopoly if successful. For FTC Act cases in these circumstances, see Valassis Communications, FTC File No. 051-0008 (Mar. 14, 2006) (consent order); Stone Container Corp., 125 F.T.C. 853 (1998) (consent order); Precision Moulding Co., 122 F.T.C. 104 (1996) (consent order); YKK (U.S.A.), Inc., 116 F.T.C. 628 (1993) (consent order); AE Clevite, Inc., 116 F.T.C. 389 (1993) (consent order); Trailer Prods. Corp., 115 F.T.C. 944 (1992) (consent order).

³⁰³ See *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 142 (2d Cir. 1984). In that opinion the Second Circuit rejected an FTC attempt to establish such a violation. That outcome appears to have been due to a failure to prove actual anticompetitive effects, however, rather than to any fatal flaw in the theory itself.

³⁰⁴ Airline mergers, for example, are handled by the DOJ. See Anne Bingaman, Ass’t Att’y Gen., U.S. Dep’t of Justice, Consolidation and Code Sharing: Antitrust Enforcement in the Airline Industry, Address Before the ABA Forum on Air and Space Law (Jan. 25, 1996), available at <http://www.usdoj.gov/atr/public/speeches/speech.akb.htm>. Cf. 15 U.S.C. § 45(a)(2) (FTC lacks jurisdiction over banks and common carriers).

5. *Conclusion on Allocation Between Agencies*

The two agencies divide their work in an atmosphere marked by a high volume of cases, tight deadlines on merger matters, legitimate differences of opinion as to which agency should handle a particular matter, and many other demands on their leaders' time. The allocation of cases, therefore, needs to be tempered by a sensitivity to the practical needs of day-to-day administration. Two further principles may help attain this goal. First, the rules relating to the recognition of consumer protection-type factors should become progressively streamlined over time, trading off some subtlety in the characterization of legal theories for the sake of establishing a few clear general categories of cases that should be assigned to the FTC. This would parallel the streamlined way in which per se horizontal restraints are normally assigned to the DOJ. Second, the principles of allocation should be applied so as to leave each agency with roughly the same workload it now has, avoiding any suggestion of a winner or a loser in the process.³⁰⁵

We do not want to overstate the weight that choice theory should have in case allocation. It is a significant factor, but only one factor among many. Other factors include the specialized statutes, DOJ criminal authority, and a sense that novel or complex matters are better suited to the FTC's administrative process.³⁰⁶ Most important, the two agencies historically have agreed to allocate cases among themselves on the basis of which agency is most familiar with the particular industry involved.³⁰⁷ This usually remains the most compelling consideration. The choice paradigm should, therefore, be relevant in allocating only about 5 percent of cases, and, even there, it should be seen as creating only a presumptive inclination, not an irrebuttable rule.

VII. CONCLUSION

Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give.³⁰⁸

³⁰⁵ Although we have written at greater length about cases that should go to the FTC, this does not imply that the FTC's cases should be more numerous or more important. It is instead an attempt to provide an introduction to some relatively unfamiliar consumer protection theory.

³⁰⁶ The FTC conducts its proceedings before a specialized and expert body; there is no private right of action; and remedies are prospective and injunctive only, rather than involving damages, and they do not automatically give rise to private treble damages actions. *But cf.* FTC v. Mylan Labs., 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (supporting redress remedy). For these reasons many commentators have suggested that unfamiliar theories might, in fairness, be preferentially tried before the FTC.

³⁰⁷ See FTC-DOJ Clearance Agreement, *supra* note 298.

³⁰⁸ ROBERT BORK, *THE ANTITRUST PARADOX* 50 (1978).

Any attempt to improve the overall course of antitrust must begin by asking the right question. Even if we cannot answer it perfectly today, focusing the attention and formidable analytic powers of the legal community in the right direction will cause the right answer to emerge through a process of evolution here, as it has in so many other areas of antitrust.³⁰⁹ Doing this is especially necessary now in light of the overwhelming importance to our economy of innovation and the consumer choices it brings.

The consumer choice model of antitrust is being used with increasing frequency because, fundamentally, it asks the right questions and identifies the right goals. It explains accurately, simply, and intuitively, better than the price or efficiency models can, why antitrust is good for consumer welfare. It is more transparent and provides a better initial rule of thumb for what antitrust is all about. It should lead to a better final analysis of several important types of antitrust situations and should not lead to an inferior analysis of any type of situation. And it can be implemented in at least as administrable and predictable a manner as other models.

By contrast, the price and efficiency models of antitrust should be restricted for the same reasons that we have restricted the flat-earth model of geography. It is not that the older models lack utility; they will produce the correct result under most day-to-day working conditions. The problem is that their underlying premises are seriously flawed. The flat-earth model is off by only about eight inches per mile, so an architect surveying a building, for example, can assume the earth is flat and usually experience no problems. But under some important conditions—say, when planning a long journey—the small errors inherent in the flat-earth model add up and lead to wrong conclusions. The price or efficiency models can lead to similar errors.

On its face, the notion of shifting to a new paradigm sounds alarming and disruptive, a leap into the unknown at the very least, and perhaps something fraught with the dangers of erroneous decisions in an area of the economy where it is important to avoid mistakes. The actual facts are much more nearly routine, however. The paradigm shift proposed

³⁰⁹ Sometimes antitrust cannot as a practical matter grapple with the right questions and so must use surrogates, at least for a while. For example, some 25 years ago Landes and Posner argued that the only things we need to know to make correct enforcement decisions in merger cases are elasticity of demand and elasticity of supply. They then conceded that because we can rarely measure these things reliably in a merger context we should instead continue to use the surrogates of market definition, market share, etc. See William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 938, 944 (1981). Since then, however, merger analysis has been moving closer to an approach that ignores the surrogates and instead tries to ascertain the relevant elasticity questions directly. For a discussion, see Lande & Langenfeld, *supra* note 66, at 6–8.

here is intended to make antitrust law easier to understand and apply, and to bring about some useful changes in outcome on the margins,³¹⁰ but it is also meant to preserve the basic methodology and outcomes in the vast majority of cases. Price and efficiency would remain the centerpiece of analysis in most matters. The substantive changes would affect less than 5 percent of cases.

Antitrust jurisprudence is easily capable of absorbing a paradigm shift of this magnitude. The law has never been fixed, but rather has redefined the statement of its fundamental mission every few decades for over 100 years,³¹¹ in response to accumulating practical experience and changes in the nature of the problems that it addresses. In the years before World War I, the main point of antitrust was literally an opposition to trusts—an attack on the industrywide price-fixing cartels that were organized through trusts of voting stock. In the 1930s, in a world shaken by depression and the rise of fascism, the role of antitrust was redefined to include a strong element of protecting social stability by protecting small businesses.³¹² In the 1960s and 1970s, antitrust expressed a fear of corporate bigness and sought to advance a variety of social and political goals associated with deconcentration, as well as purely economic goals.³¹³ In the 1980s, with the elections of Presidents Ronald Reagan and George H.W. Bush, antitrust took up the only alternative that was available, the one used by the economists, and it came to be dominated by a sensitivity to economic efficiencies of all kinds.³¹⁴ From the mid-1990s and until

³¹⁰ Since 1890, most changes in antitrust have been slight and gradual. Naked price fixing is prosecuted in any administration, and most mergers will be evaluated in a similar fashion (in light of the general acceptance of the Horizontal Merger Guidelines) under any view of antitrust. Many of the other core issues within antitrust enforcement show stability and usually do not involve wide pendulum swings from one administration to the next. See Timothy Muris, Chairman, Federal Trade Comm'n, *How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy*, Remarks to the ABA Section of Antitrust Law Fall Forum (Nov. 19, 2003), available at <http://www.ftc.gov/speeches/muris/murisfallaba.pdf>; William Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003).

³¹¹ Although antitrust existed in limited form at common law, its modern incarnation started with the Sherman Act of 1890.

³¹² The Robinson-Patman Act, for example, can be understood as a response of independent grocery stores to the rise of the more efficient A&P chain supermarkets. See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011 (2005).

³¹³ The field was not blind to issues of productivity, however, and tried to balance social and political concerns with other concerns for consumer welfare and corporate productivity. See John J. Flynn, *Introduction, Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977).

³¹⁴ The efficiency revolution can be traced to a single article. See Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966). For the history of the ascendancy of the efficiency perspective, see Lande, *Efficiency as the Ruler of Antitrust*, *supra* note 233.

the present time, under both Presidents Clinton and George W. Bush, antitrust enforcement has become more nuanced, with efficiency goals being tempered by a concern for prices to ultimate consumers and, increasingly, with a nascent purpose of using antitrust as a way of ensuring optimal levels of consumer choice.³¹⁵ The full shift to a choice and options framework would, therefore, be neither a large nor unprecedented step.

This limited paradigm shift is still important and worth making. Even if the shift does not greatly affect the numbers of cases brought, it will affect the vocabulary of the enterprise and the kind of analysis that is brought to bear, and will introduce analytical pathways that are more nearly predisposed toward reaching accurate conclusions. We believe that the choice model asks the right questions and assigns antitrust to its proper context in the larger mission of protecting consumer choice, and so is likely to begin the process in an understandable, readily implemented way.

³¹⁵ See, e.g., Timothy Muris, Chairman, Federal Trade Comm'n, The Interface of Competition and Consumer Protection, Remarks at the Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law & Policy 3-4 (Oct. 31, 2002) ("Competition presses producers to offer the most attractive array of price and quality options. In competitive industries, the imperative to gain new sales by satisfying consumer needs increases the spectrum of choices available. . . . competition does more than simply increase the choices available to consumers, however."). The growing role of choice analysis is illustrated by such varied and important matters as *Microsoft*, *supra* note 48; *AOL/Time Warner*, *supra* note 119; and *Lockheed/Northrop*, *supra* note 161.