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CONSUMER SOVEREIGNTY: A UNIFIED THEORY OF ANTITRUST AND CONSUMER PROTECTION LAW

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This article is about the relationship between antitrust and consumer protection law. Its purpose is to define each area of law, to delineate the boundary between them, to show how they interact with each other, and to show how they ultimately support one another as the two component parts of an overarching unity.

That overarching unity is consumer sovereignty. Antitrust and consumer protection law share a common purpose in that both are intended to facilitate the exercise of consumer sovereignty or effective consumer choice. Consumer sovereignty exists when two fundamental conditions are present. There must be a range of consumer options made possible through competition, and consumers must be able to choose effectively among these options.

The boundary between antitrust and consumer protection is best defined by reference to these two elements of consumer sovereignty. The antitrust laws are intended to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers, unimpaired by practices such as price fixing or anticompetitive mergers.[1] The consumer protection laws are then intended to ensure

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[1] Not every activity that unreasonably distorts or restricts the options that otherwise would be open to consumers is an antitrust violation, however. The activity in question must also be within the jurisdiction of a specific antitrust statute. Similarly, not everything

that consumers can choose effectively from among those options, with their critical faculties unimpaired by such violations as deception or the withholding of material information. Protection at both levels is needed in order to ensure that a market economy can continue to operate effectively.[2]

Legal protection of this sort is required, as a practical matter, only when the free market is not working properly. "Market failures" can arise, however, which may create or permit competition or consumer protection problems. This article will demonstrate that antitrust violations (which impair the menu of options) stem from market failures in the general marketplace *external* to consumers, whereas consumer protection violations (which impair the individual's ability to choose) flow from *internal* market failures that take place, in a sense, "inside the consumer's head."[3]

While this approach appears on its face to be of almost Doric simplicity, it provides a coherent theoretical platform from which antitrust and consumer protection law may be better understood and applied.

The development of a unified theory of consumer sovereignty not only is of conceptual interest, but also has significant practical consequences. First, it can explain why the Federal Trade Commission was created to have responsibility for both antitrust and consumer protection issues and why it should retain this dual jurisdiction. An awareness of this relationship between the two halves of the FTC's statutory charter also may be useful in identifying specific categories of cases that it, rather than the Department of Justice, is better suited to handle. Second, a unified theory of antitrust and consumer protection law will assist the FTC in determining when particular conduct or transactions should be pursued on antitrust, as opposed to consumer protection, grounds.[4]

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that unreasonably interferes with consumers' ability to choose among the available options is a consumer protection violation. The activity also must come within the scope of a specific consumer protection statute.

[2] This formulation is a synthesis that builds upon and extends the authors' earlier work in the area. *See* Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 281–84 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 123–26 (1982).

[3] Not every market failure is or should be illegal. Certain market failures lead to specific activities that society has made illegal, however, including cartels and deceptive advertising.

[4] Many concrete aspects and effects of a litigation vary according to whether it is classified as an antitrust or a consumer protection matter. Only antitrust violations give rise to criminal sanctions and automatic treble damages, for example, and only in consumer protection cases is the Federal Trade Commission required to use certain rulemaking and investigatory procedures. A unified theory will make clear which is the proper approach.

Third, the consumer sovereignty model we propose can help to determine when borderline business practices contravene the underlying purposes of the consumer protection or antitrust statutes to such a degree that they warrant prosecution. Fourth, the broad importance of marketplace options in the consumer sovereignty model suggests that antitrust should devote more attention than it now does to the role of nonprice competition. In certain sectors of the economy—for example, high-tech or media-related industries—diversity of options may be far more important to consumers than price competition. Finally, by defining the elements of consumer sovereignty in an intuitively understandable way, this framework should be useful to those countries that are establishing or reorganizing trade regulation programs for the first time.

This article is divided into five principal sections. Part I introduces and defines the concept of consumer sovereignty, and shows that it requires both the availability of consumer options and the ability to choose among them. Part II reviews the antitrust and consumer protection case law and shows that it is consistent with (and explicable by) this option-oriented model of consumer sovereignty. Part III identifies and discusses the market failures that may tend to prevent the exercise of consumer sovereignty by impairing either the menu of options or consumers' capacity to select among them. Part IV then considers more complex applications of our proposed theory in which the two types of protection interact in simultaneous or sequential ways. Finally, Part V explores the practical implications and consequences of the proposed theoretical framework.

I. AN OPTION-ORIENTED CONCEPT OF CONSUMER SOVEREIGNTY

Simply put, consumer sovereignty is the state of affairs that prevails or should prevail in a modern free-market economy. It is the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses.[5] It is the state of affairs in which the consumers are truly "sovereign," in the

[5] We do not address the question of whether consumer sovereignty is better thought of as the description of a result or as a process. In either event, the overall goal of the trade regulation statutes should be to prevent restraints on competition or other factors that interfere with full and free competition from harming any aspect of consumer welfare. Optimal consumer welfare has both a short-term component, consisting of the product prices, quality, and variety that free competition delivers, and a long-term component that includes optimal levels of innovation and a more efficient economy. Consumer sovereignty thus tends to maximize consumer wealth and consumer surplus, but not producer surplus, as these concepts are defined and distinguished in Lande, *supra* note 2, at 71–77.

sense of having the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods and services.[6] The concept of consumer sovereignty goes so far as to embody at least some implicit notions about the proper relationship between the individual and the state. It is part of the Western world's answers to the prescriptions of Marxism.

The essence of consumer sovereignty is the exercise of *choice.* It is by choosing some goods or some options over others that consumers satisfy their own wants and send their signals to the economy. It is, therefore, critical that the exercise of consumer choice be protected.

We have already seen that effective consumer choice requires two things: options in the marketplace, and the ability to choose freely among them. In order to turn this conceptual paradigm into operational policy, however, at least some rough degree of quantification is required. Just how many options must be present in the market? Just how free from external influences must consumers be? In an imperfect world, of course, the answers to these questions must be standards of sufficiency rather than standards of perfection.[7]

Thus, we do not simply require the maximum number of options. Antitrust law does not prevent all conduct or transactions that have the effect of reducing the number of options available to consumers. Nor does the law affirmatively require the creation of options. Rather, it prevents business conduct that artificially limits the natural range of options in the marketplace.[8] Indeed, the law permits even some artificial reductions, such as some mergers, if the benefits of the action appear to outweigh the costs. Through these means, the antitrust laws aim to preserve a sufficient, although not a perfect, array of choices for consumers.

Consumer protection laws are similar in the sense that they seek to protect the ability of consumers to make informed choices among

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[6] Moreover, each product has a cluster of other attributes, such as quality and availability of related services. The free market will decide the mix of price, quality, and related attributes that consumers value most.

[7] We look for enough options and enough freedom to ensure that the choices are right (i.e., welfare-maximizing) most of the time. That approach does not prevent unsatisfactory outcomes in some individual cases, but it should ensure that unsatisfactory options are weeded out fairly quickly.

[8] Some products are withdrawn from the market because not enough consumers desire to purchase them; some firms exit the market because they are not as innovative or efficient as rival firms; and some firms disappear through merger because they had not attained a minimum efficient scale. These processes reflect the ordinary workings of the marketplace.

competing options, but the laws do not necessarily strive to ensure that consumers have absolutely perfect information or that they act with absolutely perfect rationality.[9] Probably no consumer is a perfect reasoning machine, existentially free from all the extraneous influences of early upbringing, cultural values, or half-remembered advertising campaigns from years ago.[10] What we ask of consumer protection law is, therefore, something relatively modest. We ask that consumers be enabled to make rational choices to the extent that they wish to concentrate on doing so. Consumer protection law ensures that buyers are protected from coercion, deception, and other influences that are difficult to evade or to guard against, but it does not protect buyers from the milder, knowable influences of things like "image" advertising, which consumers could set aside if they desire.

As protected by these two principles, the exercise of consumer sovereignty should be beneficial to society in a number of concrete ways. It will support and lead to an efficient economic market.[11] That, in turn, will tend to produce an environment offering the lowest prices, the best product quality and variety, the highest degree of consumer surplus, and all the other benefits of a competitive economy.[12]

What antitrust forbids is conduct that artificially reduces the number of options directly and without the mediating agency of consumer choice.

[9] The Commission has the authority to require that certain fundamental information be made available to consumers for such purposes as correcting statements that would otherwise be misleading or correcting "pure omissions" in circumstances where doing so would deliver a net benefit to consumers. The scope of this authority is limited by several factors, however. There are practical limits on how much affirmative disclosure can be made and constitutional limits on how much can be required. *See* International Harvester Co., 104 F.T.C. 949 (1984).

[10] Nor would we necessarily wish consumers to be "rational" to this degree. Some "irrational" associations of a product, such as its connection with a catchy jingle or a prestigious endorser, are real, if intangible, attributes of the product that the consumers are entitled to value if they wish.

[11] Both antitrust and consumer protection statutes have the goal of enhancing economic efficiency. *See* Lande, *supra* note 2, at 106–26. The statutes serve other economic goals as well. The primary goal of these statutes is to prevent unfair transfers of wealth from consumers to firms with market power (the antitrust statutes) or to firms unfairly acting against consumer interests (the consumer protection statutes).

[12] Some refinements and complexities should be added to our basic model of consumer sovereignty if the circumstances require them. In some cases, the "consumers" who need protection from misleading information are actually corporations, which may be buying an industrial input for use in their own operations. *See* discussion of Eastman Kodak v. Image Tech. Servs., 504 U.S. 451 (1992), *infra* part IV.A. In other cases, the direction in which market power is exercised may be reversed, and it may be the manufacturers who need help in finding a range of marketplace options. This may be the case, for example, if a manufacturer is confronting a single monopsonist, or is confronting a cartel of purchasers (or oligopsonists) that have agreed on a common policy to keep prices low. With appropriate adjustments, the concept of consumer sovereignty can accommodate these different circumstances. For the sake of simplicity, however, in the discussion that

II. HOW THE CASE LAW EMBODIES THIS OPTION-ORIENTED APPROACH TO CONSUMER SOVEREIGNTY

The case law in both the antitrust and consumer protection areas is consistent with the consumer sovereignty model we propose. The antitrust case law can be explained in terms of protecting the supply of options in the market, and the consumer protection case law can be explained in terms of protecting consumers' ability to choose among the available options. The model that we are presenting thus becomes a means of unifying, explaining, organizing, and interpreting a long line of legal precedents.[13]

A. ANTITRUST VIOLATIONS REDUCE OPTIONS

Traditional antitrust violations—such as price fixing, related horizontal restraints, predatory pricing, anticompetitive mergers, and unreasonable vertical restraints—fit well into our model of consumer sovereignty. The conduct at issue can distort the supply of options, in the sense of imposing restrictions on the variety of prices and products that the free market would offer. The antitrust laws, therefore, have banned that conduct.

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follows we will normally speak in terms of the most common situation, which is that of ultimate consumers purchasing from a limited number of manufacturers.

[13] The threshold goal of consumer sovereignty has been alluded to by the Supreme Court on several occasions. The formula used in *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958), is both striking and familiar:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

See also Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911). The Court has emphasized that the policy of free markets requires free consumer decision making as well as free competition among firms:

> So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); *see also* FTC v. Raladam Co., 283 U.S. 643, 647 (1931) (quoting with approval FTC v. Sinclair Ref. Co., 261 U.S. 463, 476 (1923)) (both Sherman Act and FTC Act advance public interest by furthering competitive processes). Thus, in both antitrust and consumer protection contexts the general national policy is one of reliance on consumer sovereignty.

For example, price fixing and other illegal horizontal restraints[14] artificially restrict the array of price options the competitive market would otherwise provide.[15] Price fixing prevents consumers from having access to the best price (or the best quality- or variety-adjusted price) that would otherwise have been available.[16]

Predatory pricing can similarly interfere with the array of choices that a competitive market would present.[17] Predatorially low prices are good for consumers only in the short run. In the long run,[18] such prices threaten to eliminate firms that are providing options that consumers would actually prefer.

Anticompetitive mergers provide yet another example of a traditional antitrust violation that has both direct short-run and indirect long-run effects on the range of options available to consumers. An anticompetitive horizontal merger can directly eliminate significant competition, as expressed in terms of diminished options on price, product quality, or product variety. It can also have the long-run or indirect effect of making industry-wide collusion easier or more probable,[19] thus leading to the elimination of still more options that consumers might prefer.

Resale price maintenance (RPM) and other vertical restraints can also have the effect of limiting consumer options. RPM directly restricts the price options open to consumers, limiting them to the manufacturer's preferred price.[20] Nonprice restraints, such as exclusive dealing and exclusive territories, have similar effects, often significantly restricting

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[14] Not every horizontal restraint is illegal. A joint venture that increases industry-wide innovation, for example, is generally procompetitive and legal. *See* ABA ANTITRUST LAW SECTION, ANTITRUST LAW DEVELOPMENTS 393 (4th ed. 1997); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 140–240 (1993).

[15] Although we condemn price fixing principally because it eliminates the option of price competition from the market, price fixing also can distort consumer choice. Consumers might not purchase a particular item, for instance, if they knew that prices on that item were fixed.

[16] Price fixing also has a number of indirect anticompetitive effects. It shields inefficient firms from hard competition. *See* Lande, *supra* note 2, at 78–79. It also causes allocative inefficiency and a transfer of wealth from consumers to producers. *Id.* at 72–77.

[17] *See* James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982) (discussing predatory pricing theory and case law); HOVENKAMP, *supra* note 14, at 298–328.

[18] This assumes the existence of effective barriers to entry and other market conditions conducive to monopoly power, for, absent such conditions, attempts at predation merely result in lower prices in the marketplace and thus are a boon to consumers.

[19] *See* HOVENKAMP, *supra* note 14, at 455–66, 479–88.

[20] For an overview of these effects, see Alan A. Fisher et al., *Do the DOJ Vertical Restraints Guidelines Provide Guidance?*, 32 ANTITRUST BULL. 609, 615–23 (1987).

downstream firms in the choices that they can offer to consumers.[21] Of course, each of these practices also can cause significant potentially offsetting procompetitive effects,[22] and if they are imposed by firms without market power the possibility that their anticompetitive effects (i.e., their option distortions) will be significant is probably quite small.[23] Nonetheless, it is the possibility of the loss of competitive options that makes these transactions of concern to antitrust.

A focus on options also explains why certain practices that raise rivals' costs are undesirable.[24] The rivals' higher costs force them to raise their prices (or reduce their investment in product improvement and innovation), which enables the predator to raise its own prices (or reduce option-enhancing investment in research and innovation).[25] The consumers thus lose the option of purchasing better or more competitively priced products.

In short, antitrust law can best be understood as a way of protecting the variety of consumer options in the marketplace.[26]

B. Consumer Protection Violations Impair Consumers' Ability to Choose Among Options

The consumer protection cases are explicable as means of safeguarding the ability of consumers[27] to choose among the options that the

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[21] *Id.*

[22] *Id.* at 615–16. Moreover, these offsetting efficiencies can sometimes be characterized as attempts to overcome market failures. *See, e.g., id.* (discussing the point of sale "free rider" problem).

[23] *See id.* For this reason nonprice vertical restraints are judged under a rule of reason standard. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 41 (1977). Many believe that RPM also should be judged under the rule of reason, or even that it should be deemed per se legal. *See* Fisher, *supra* note 20, at 615 n.18.

[24] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

[25] For a thorough explanation and discussion of the necessary prerequisites to this conduct, see Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 248–53, 265–69 (1987).

[26] Depending on the specific antitrust principle involved, improper restrictions on consumer options may occur either directly as a result of firms' actions vis-à-vis their customers, or indirectly as a result of firms' actions vis-à-vis their competitors. For example, if a firm with market power over a product will sell it only when packaged with a second product, consumers' choices are directly reduced and distorted. The firm's action vis-à-vis its customers may be condemned as an illegal tying arrangement. Alternatively, suppose that a firm merges with all of its competitors and then raises prices to a monopoly level. While neither monopoly pricing nor the production of only a single brand is illegal, the process by which the firm acquires this power to constrain options certainly can be. The firm's actions vis-à-vis its competitors then may be condemned as involving anticompetitive mergers.

[27] Actions that undercut the ability of competing firms to make free or informed decisions are properly considered antitrust violations, at least insofar as these actions ultimately

market provides.[28] Thus, for example, the Commission has found that false or misleading statements about objective product characteristics are deceptive. It has accordingly acted to prevent misrepresentation in claims involving such things as the materials from which a product is made,[29] the functions that it can perform,[30] or the effectiveness with which it can perform them.[31] Guarantees also must be described in a full and nondeceptive manner.[32] Misinformation on any of these basic points will, of course, tend to prevent a customer from making the most appropriate choice from among the options in the marketplace.

For similar reasons, the Commission has acted to ensure the accuracy of endorsements and testimonials. It has taken the position that statements made in the endorsements "must always reflect the honest opinions, findings, beliefs, or experience of the endorser."[33] Enforcement of this principle could not be justified by direct measures of consumer harm. Although endorsements do not directly affect the quality or characteristics of the product, however, they can be highly relevant to the exercise of consumer sovereignty. Ensuring the validity of endorsements protects consumers who may attach particular importance to the certification of a product by someone they perceive to be more knowledgeable about it than they. The law on testimonials is, therefore, best understood

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affect the range of choice that is made available to the marketplace. For example, predation may be accomplished through the use of false or deceptive information if an incumbent firm implements a "noisy" pricing strategy, which conceals the fact that its low prices are not based upon superior efficiency but instead are actually below cost. Alternatively, a firm could develop an undeserved reputation for predatory pricing. In both these cases, the false information is likely to affect the target firm's offerings to the marketplace rather than its purchases from the marketplace and, thus, raises antitrust more than consumer protection issues. *See infra* note 73.

[28] The FTC has been emphatic about this choice-oriented approach: "The Commission does not ordinarily seek to mandate specific conduct or specific social outcomes, but rather seeks to ensure simply that markets operate freely, so that consumers can make their own decisions." International Harvester Co., 104 F.T.C. 949, 1061 (1984).

[29] *See* FTC v. Algoma Lumber Co., 291 U.S. 67, 77–79 (1934) (inferior "yellow pine" could not be sold as "white pine"); FTC v. Winsted Hosiery Co., 258 U.S. 483, 490 (1922) (clothing made from a part-wool mixture could not be sold as "wool").

[30] *See* Carter Prods., Inc. v. FTC, 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959); Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

[31] *See* Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964); Warner-Lambert Co., 86 F.T.C. 1398 (1975), *aff'd as modified*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

[32] The authority for this proposition differs depending on the type of guarantee involved. The required disclosure standards for written consumer product warranties against defect or malfunction are set out in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312. More general guidance is set out in the Guides for the Advertising of Warranties and Guarantees, 16 C.F.R. § 239.

[33] Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1(a) (1996).

as protecting the process of consumer choice rather than protecting any particular result.

The importance of choice in consumer protection matters is particularly well illustrated by a third class of cases. These involve misrepresentations as to the collateral social or business attributes of a firm. Some cases of this sort may involve false or misleading claims that a particular product is environmentally benign or was produced in an environmentally friendly manner.[34] Other cases involve the improper use of the "Made in U.S.A." designation. Information on these points is important to many consumers, even though it too does not bear directly on operational product characteristics. For example, some consumers regard the fact that a product was domestically manufactured as an indirect indication of product quality, while other consumers may prefer to purchase domestic products with the patriotic goal of supporting the American economy. By making misrepresentations on such subjects improper, the Commission has made it clear that impairment of consumers' ability to choose among options (in accordance with their own preferences and tastes) is a harm in itself and that no more concrete harm needs to be shown.[35]

The consumer protection case law thus can be understood as addressing concern over the impairment of the buyer's ability to select from among the options that the market has provided.[36] The centrality of this element is underscored by the Commission's Policy Statement on Deception.[37] This states that one prerequisite to liability for deception is that the alleged misrepresentation is "material," meaning that it "is likely to affect a consumer's choice of or conduct regarding a product."[38]

III. THE MARKET FAILURES THAT CAN THREATEN CONSUMER SOVEREIGNTY

Consumer sovereignty, as we have seen, can be described as the state of affairs in which consumers have an unimpaired ability to make deci-

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[34] *See* Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 (1996).

[35] The specifics of the law may continue to evolve, of course, in terms of the amount of domestic content that is found to be implied by an unqualified "Made in U.S.A." claim. The FTC recently sponsored a workshop to consider this and related issues. *See* Meeting Notice, 60 Fed. Reg. 65,327 (1995). Proposed new guidelines have been published for public comment. *See* 62 Fed. Reg. 25,020 (May 7, 1997).

[36] The FTC cases cited in the paragraphs immediately above each involved circumstances of deception. Matters involving the Commission's less frequently invoked consumer unfairness authority also involve the ability to make free choices. *See infra* discussion accompanying note 81.

[37] FTC Policy Statement on Deceptive Acts and Practices, 4 Trade Reg. Rep. (CCH) ¶ 13,205 (1983).

[38] *Id.* at 20,916. Although the consumer's "conduct regarding a product" is treated separately from the initial purchase decision, the two concepts are clearly related in that

sions in their individual interests and markets operate efficiently in responding to the collective effect of those decisions. These market mechanisms can fail to work optimally for a variety of reasons, however, leading to an impairment of consumer sovereignty. Market failures take one of two forms. Some are external to the consumer, or "outside the head," leading to an inability of the market to provide sufficient options. Other failures are internal to the consumer, or "inside the head," in the sense that they make the consumer unable to effectively choose among the available options.

Antitrust and consumer protection laws may be viewed, in economic terms, as intended to identify and compensate for these two types of market failures.[39] By so doing, they are again seen, this time through the lens of economics, as helping to attain the ultimate goal of consumer sovereignty.

In the discussion that follows, we will first explain what is meant by a "market failure" generally and will then discuss the specific market failures that are of concern to antitrust and consumer protection.

A. Market Failures Defined

It is axiomatic that perfect competition, the perfect functioning of a competitive market, will maximize the welfare of consumers.[40] Markets that diverge significantly from perfect competition may not do so. If a market's characteristics differ dramatically from those required for perfect competition, a condition termed "market failure" can exist. The overall level of consumer welfare may then be far below what it otherwise would be, and wealth that Congress assigned to consumers may be "unfairly" acquired by firms with market power.[41]

Although economists generally agree on the fundamental concept of perfect competition, there is no universally agreed upon list of factors

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they both bear on the desirability and utility of the product and, hence, on the choice among options.

[39] This should not be taken to imply that every practice that has the adverse economic effects of taking advantage of market failures, distorting options, or restricting consumer choice is or should be a law violation. Often these effects are insignificant or are outweighed by offsetting procompetitive benefits. At other times, practical considerations may suggest that the most appropriate rule is one that is relatively inexpensive, predictable, and easy to administer, even if it does not halt all instances of anticompetitive behavior. For a discussion of these jurisprudential issues, see Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1652–59, 1670–77 (1983); *see also* Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 960 (1987) ("[a]ntitrust law cannot feasibly address every deviation from perfect competition").

[40] *See, e.g.*, F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 15–29 (3d ed. 1990).

[41] *See* Lande, *supra* note 2.

that define perfect competition or whose absence may lead to market failure. But the disagreements generally arise only over taxonomic matters—views of which concepts are implicit in others, which are assumed as necessary predicates or subsets of one another and are caused by other factors that themselves prevent markets from functioning optimally.

A leading scholar of the subject, Edwin Mansfield, believes that perfect competition requires four conditions: product homogeneity,[42] relatively small buyers and sellers,[43] mobile resources,[44] and perfect information.[45] Jack Hirshleifer has considered the converse situation and provided a list of three possible imperfections that can prevent a market from functioning perfectly: imperfect information,[46] time lags,[47] and transac-

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[42] Mansfield describes product homogeneity as follows:

> [P]erfect competition requires that the product of any one seller be the same as the product of any other seller. This is an important condition because it makes sure that buyers do not care whether they purchase the product from one seller or another, as long as the price is the same. Note that the product may be defined by a great deal more than the physical characteristics of the good.

EDWIN MANSFIELD, MICROECONOMICS: THEORY & APPLICATIONS 232 (5th ed. 1985).

[43] According to Mansfield:

> [P]erfect competition requires each participant in the market, whether buyer or seller, to be so small, in relation to the entire market, that he or she cannot affect the product's price. . . . Of course, if all producers act together, changes in output will certainly affect price, but any producer acting alone cannot do so.

Id.

[44] In this regard, Mansfield states:

> [P]erfect competition requires that all resources be completely mobile. In other words, each resource must be able to enter or leave the market, and switch from one use to another, very readily. More specifically, it means that labor must be able to move from region to region and from job to job; it means that raw materials must not be monopolized; and it means that new firms can enter and leave an industry.

Id. at 233 (footnote omitted). "Sunk costs," a key feature of barriers to entry, are best included within this category.

[45] Mansfield describes perfect information as follows:

> [P]erfect competition requires that consumers, firms, and resource owners have perfect knowledge of the relevant economic and technological data. Consumers must be aware of all prices. Laborers and owners of capital must be aware of how much their resources will bring in all possible uses. Firms must know the prices of all inputs and the characteristics of all relevant technologies. Moreover, in its purest sense, perfect competition requires that all of these economic decision-making units have an accurate knowledge of the future together with the past and present.

Id.

[46] JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 418 (3d ed. 1984).

[47] According to Hirshleifer:

> A perfect market would instantaneously digest the inputs and proclaim the correct market-clearing price. But no such magic machine exists in the real world. So

tion costs.[48] Significant problems in any of these areas can cause competition to be suboptimal.

Additional market failures are added to some other lists. These further potential problems include coerced decisionmaking,[49] barriers to the entry of new firms,[50] circumstances of natural monopoly,[51] positive or negative externalities,[52] and situations involving "public goods,"[53] "free

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> a farmer bringing vegetables to a city produce market may by cleverness or chance realize a sale at a price higher than the (unknown) true equilibrium. Or, unluckily, the farmer may accept a price lower than might have been obtained.

Id. at 418–19.

[48] On the subject of transaction costs, Hirshleifer states:

> Markets that are perfect would also be costless. In the real world, market "middlemen" such as wholesalers and retailers, brokers, dealers, and jobbers exist, and obviously must be paid for their services. While these middlemen improve the perfection of the market in other respects, the fees and payments they receive constitute a burden on the process of exchange. Transaction taxes, in which *government* collects "middleman" payments (possibly reflecting actual services to taxpayers, but possibly not), are another important factor.

Id. at 419.

[49] SCHERER & ROSS, *supra* note 40, at 574–80. For a critical assessment of whether the concept of coercion adds to the analysis, see *infra* note 61.

[50] *Id.* at 17.

[51] *Id.* at 30.

[52] Robert Cooter and Thomas Ulen have defined the problem of externalities as follows:

> Exchange inside a market is voluntary and mutually beneficial; in contrast, an economic effect *external* to a market exchange may be involuntary and harmful. So, a harmful externality is defined as a cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent. An example of an external cost is pollution . . . . The reason the market fails in the presence of external costs is that the generator of the externality does not have to pay for harming others, and so exercises too little self-restraint . . . . We would like the firm to take into account *all* the costs of production, including the costs imposed on others, in choosing its profit-maximizing output . . . . When this is accomplished, the externality is said to have been "internalized" in the sense that the private firm now takes it into consideration.

ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 45–46 (1988) (emphasis added).

[53] According to Cooter and Ulen:

> A public good is a commodity with two very closely related characteristics: first, consumption of the good by one person does not leave less for any other consumer . . . and second, the costs of excluding non-paying beneficiaries who consume the good are so high that no private profit-maximizing firm is willing to supply the good. Consider the conventional example of a public good: national defense. The fact that one citizen is secure from the threat of invasion by a foreign army does not leave any less security for other citizens. Furthermore, it is difficult to exclude any citizen from enjoying the security provided to others. Because of these two characteristics, public goods are not likely to be provided at all by the market, or if they are privately provided, provided in less than socially optimal amounts.

Id. at 46.

riders,"[54] "prisoner's dilemmas,"[55] "lemons,"[56] and adverse selection.[57]

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[54] Cooter and Ulen provide a classic example of the free-rider problem:

> [T]here is a strong inducement for consumers of the privately-provided public good to try to be "free riders": they hope to benefit at no cost to themselves from the payment of others. The related problem for the private supplier of a public good like national defense is that it is very costly to exclude nonpaying beneficiaries of the service. The attempt to distinguish those who have from those who have not subscribed to the private defense company is almost certain to fail. . . . As a result . . . , it is not likely that the private company will be able to induce many people to purchase defense services. If private profit-maximizing firms are the only providers of national defense, too little of that good will be provided.

Id. at 47–48. For a different type of "free rider" problem, see Jerry Green & Jean-Jacques Laffont, *Characterization of Satisfactory Mechanisms for the Revelation of Preferences for Public Goods*, 45 ECONOMETRICA 427 (1977). These authors are concerned with "free riders" who are willing to pay something, but less than others. This situation might arise, for example, if many people would wish to use a bridge, but would be willing to pay significantly different prices for this service. If those deciding whether to construct the bridge could not price discriminate among potential users, they might not be able to collect enough revenue to make the project profitable. Thus, it is possible that the relevant decision makers will decide not to build the bridge, even though it would be socially desirable to do so.

[55] Cooter and Ulen explain how a prisoner's dilemma situation, in which the two participants seek to coordinate their actions, while at the same time being uncertain and to some degree distrustful of the other's course of action, can result in a suboptimal outcome for each affected party.

> In this two person, non-cooperative game two suspects in a crime are taken into custody, put in separate cells, and not allowed to communicate. The authorities offer each prisoner the opportunity to confess to the crime. Suppose that if either prisoner confesses and his partner does not, the confessor will receive half a year in prison and the non-confessor will receive 10 years. If they both confess, they will each receive 5 years in prison. And if neither confesses, they will each receive 1 year in prison. The prisoners will be best off if neither of them confesses. But if either prisoner adopts the strategy of not confessing, he might be left open to a long prison sentence if his partner confesses. In these circumstances, the best strategy is for each prisoner to confess. Thus, each will spend 5 years in prison. Note how different the solution to this game would have been if the participants could have communicated. Presumably, they would have coordinated their strategies so that each would have refused to confess, with the result that each would have spent only 1 year in prison.

COOTER & ULEN, *supra* note 52, at 93 n.3.

[56] George Akerlof identified an interesting market failure that might be caused by imperfect consumer information. In certain markets, consumers might not be able to easily obtain sufficient information regarding the quality of specific goods and might confuse the quality of particular goods with the quality of most goods on the market. Over time, competition from inferior goods (which can sell at a lower price due to their lower cost) could drive goods of higher quality (which have higher costs and, therefore, higher prices) from the market. Eventually, only low quality "lemons" might be left on the market. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

[57] For an example of adverse selection problems, see *infra* note 122. For an excellent discussion of adverse selection problems and citations to the relevant literature, see Richard Craswell, Freedom of Contract 13–18 (Chicago Law & Economics Working Paper No. 33, 1994).

Despite disputes over taxonomy,[58] this basic list of factors that can plausibly cause competition to become suboptimal is relatively noncontroversial.

Far more controversial is the question of just how often market failures occur and, therefore, how often remedial action under the antitrust or consumer protection statutes might be appropriate.[59] This controversy may be illustrated by the role of imperfect information, perhaps the most important single market failure. Even Chicago School adherents concede that information often is imperfect. Much of what separates "post-Chicago" antitrust from Chicago School antitrust,[60] however, are differing beliefs concerning the frequency and degree to which information is imperfect, the implications this has for competition, and whether government intervention is likely to correct the situation more optimally or more rapidly than the market.

Proponents of post-Chicago views are perhaps more inclined than the Chicago School to believe that important informational and other[61]

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[58] For example, a market with difficult entry and with sellers or buyers large enough to affect price could be said to experience a "physical" market failure. We also could ask how these firms were able to become so large, and to characterize the causes (e.g., the imperfect information or transaction costs) themselves as "market failures."

[59] A market failure is necessary for an anticompetitive violation, but the government should act only if doing so is likely to materially improve market conditions to the benefit of consumers.

[60] This distinction can be understood in the following terms:

> [T]he Chicago School tends to believe that businesses should protect themselves by obtaining any needed information, while the post-Chicago School believes that businesses cannot always do so effectively because of unanticipated needs or overly costly information. The Chicago School believes that the market will almost always supply any needed information, while post-Chicagoists demand evidence this will occur. The Chicago School believes that suboptimal effects from imperfect information are relatively rare, while the post-Chicago School believes that they often are common enough to affect competition in a market. The Chicago School believes that attempts to cure alleged information-based problems are usually worse than the problems themselves, while the post-Chicago School is more optimistic. The Chicago School would leave these situations to contract law and believes that businesses should protect themselves through contracts. Post-Chicagoists are more likely to conclude that, because imperfect information can affect competition and markets, those considerations should be part of antitrust.

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); *see also* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

[61] Another much-debated market failure involves coercion. While non-Chicago scholars believe that both consumers and businesses are often vulnerable to coercion, Chicago School scholars "do not normally speak in terms of coercion." William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 45 (1995). Professor Page explains:

> Wesley Liebeler has suggested, for example, that coercion "has no operative economic meaning" because all bargaining involves trade-offs on both sides. If they use the term at all, Chicagoans equate coercion with the exercise of monopoly

market failures may exist because they have come to believe that there are a number of ways in which such failures, perhaps small in themselves, can interact with and reinforce each other. In the final analysis, there is no substitute for close study of the facts of individual cases.

Even though the legislative history of the FTC Act does not explicitly refer to the market failure concept, with the advantage of hindsight one might well conclude that Congress had something like it in mind. The FTC may have been established because of a congressional belief that such factors as false information,[62] imperfect or incomplete information,[63] transaction cost problems,[64] or insufficient resources[65] explain the failure of the free market to adequately protect consumer welfare. Congress apparently believed that in these circumstances government intervention, if performed prudently, would be likely to improve consumer welfare.

> power. Coercion, in Chicago terms, is thus at best a redundant concept and should drop from the analysis. . . . Consumers are not seen to be controlled by advertising, for example, even if it changes their preferences, and entry barriers or market imperfections are rarely seen as preventing competitors and new entrants from offering alternatives to monopolistic proposals. The assumption of greater individual autonomy implies that Chicago analysis will see few proposals as lacking reasonable alternatives.

Id. at 45–46 (citations omitted).

[62] *See* REPORT OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, H.R. REP. NO. 533, 63d Cong., 2d Sess. at 4 (1914) ("The publicity secured by the governmental agency should be such as will prevent the deception of the public through secrecy in the organization and management of industrial combinations or through false information") (quoting the Final Report of the Industrial Commission, submitted to Congress in 1902, vol. 19, at 650–51).

[63] Congress believed that if the FTC provided the necessary information, imperfect markets would often correct themselves. The House Report on the bill that later became the FTC Act suggested that publication of excessively high business profits would encourage other firms to enter the industry, thus lowering prices. H.R. REP. NO. 533 at 3. One businessman testified that the publication of profit levels would cause businesses to keep prices low in order to avoid attracting new competition. *Id.* at 52. Other members of Congress also stated their belief that the publication of profit information would invite entry, thereby obviating the need for antitrust enforcement. *Id.* at 65, 204–05, 220. It was also stated that the publication of the "special privileges or discriminations" used to gain monopolies would ensure private actions which would bring them an end. *See id.* at 3–5; *see also* 51 CONG. REC. 8843, 8858, 8980–81, 8983, 8985 (1914).

[64] In *FTC v. Klesner*, 280 U.S. 19, 28 (1929), the Court held:

> Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.

For support of this view in the legislative history of the Sherman Act, see 21 CONG. REC. 3150 (1890) (remarks of Senator George).

[65] Senator Newlands, for example, stated his belief that private antitrust suits would not eliminate unfair competition because "[t]he suit of an individual against a strong combination is the contest of a Lilliputian against a giant." 51 CONG. REC. 11,083 (1914).

The case for government intervention can be expressed in different terms by recharacterizing possible market failures in terms of transaction costs,[66] which are, of course, ubiquitous. Sometimes these transaction costs are so great that they cause a market to "fail." For example, a cartel may hold together for an extended period before new entry can be organized, or a deceptive advertiser may succeed in fooling many consumers before correct information reaches them. In other contexts, however, the transaction costs are relatively minor and the market will efficiently correct itself. The speed and reliability of the correction are, of course, crucial.

B. MARKET FAILURES SUBDIVIDED INTO THOSE INTERNAL AND EXTERNAL TO CONSUMERS

The market failures identified above generally can be divided into two types. Some take place "outside the head" of the ultimate consumer of the product or service at issue and involve imperfections in the external market. These failures can lead to a reduced choice of options and to antitrust problems. Other market failures take place "inside the consumer's head." These failures involve the consumer's imperfect ability to process information and to distinguish the true from the false. They can lead to a reduced ability to select among options and to consumer protection problems.[67]

A consumer is affected to different degrees by these two kinds of market failures. The model economic consumer—all-knowing, all-rational, and supremely intelligent—is not vulnerable to consumer protection violations. But even this hypothetical "perfect" consumer could be vulnerable to antitrust violations. No consumers, no matter how astute, experienced, or well-informed, can protect themselves against a cartel or illegally acquired monopoly. Except on rare occasions, ultimate consumers have no choice but to deal with a widget cartel or monopoly (or

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[66] *See* Richard O. Zerbe, Jr. & Howard E. McCurdy, The Failure of Market Failure (June 21, 1996) (unpublished manuscript).

[67] The underlying economics also reveals another distinction between antitrust and consumer protection law. Antitrust violations involve rent seeking over "consumer surplus," which usually is defined as the difference between the price a consumer pays for a product and its value to that consumer. *See* SCHERER & ROSS, *supra* note 40, at 24 (citing ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 124, 467 (8th ed. 1920)). Consumer protection law, by contrast, is not limited to disputes over consumer surplus. When someone fraudulently sells a fake gold watch, more than just consumer surplus is unfairly transferred from the consumer to the seller. Some of the consumers' non-surplus wealth also is taken by the fraudulent vendor.

else to move to a less-desirable substitute); it generally is not cost effective for an individual consumer to build his or her own widget factory.[68]

By thus subdividing market failures into those taking place "inside" and "outside" the head of ultimate consumers, we make the categories of our economic analysis most nearly congruent with the two kinds of consumer sovereignty problems that are of concern to enforcement agencies.

C. ANTITRUST VIOLATIONS REQUIRE MARKET FAILURES EXTERNAL TO CONSUMERS

The market failures that permit antitrust violations all take place in the world external to the consumer. Without such market failures, as this term was broadly defined above, there could be no antitrust violations that significantly harm consumer welfare.

In a perfect, frictionless world, businesses could still meet and fix prices. This would result in a technical violation of the antitrust laws, and even in criminal penalties.[69] But it could not substantially harm consumer welfare because perfect information among businesses would allow some to quickly enter the price-fixed markets and compete away supracompetitive margins. In fact, if other businesses in the industry possessed information that truly was perfect, they would know that prices were about to rise due to a price-fixing scheme and would have an incentive to enter quickly to obtain a share of the monopoly profits. This competition, if it occurred quickly and perfectly, would soon drive prices down to only an insignificant fraction above the competitive level. Consumer welfare would not be significantly lowered.

What makes antitrust injury possible in these circumstances is the presence of external market failures. Market imperfections, such as search costs, faulty information, time lags, and sunk costs, can enable a cartel to keep prices elevated for a significant period.

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[68] If we posit hyper-rationality, an individual consumer will sometimes be able to anticipate that a cartel or monopoly will be formed sometime in the future, and to purchase in advance of this occurrence. Only exceptional consumers, however, would be able to do this. To illustrate the difficulties, assume that Microsoft gradually becomes a monopolist with respect to PC operating system software and raises the price of its software to a monopoly level. Were this to happen, even the most astute consumers would be hard pressed to devise a strategy that would enable them to purchase competitively priced software.

[69] *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 14, at 244–93.

External market failures may be necessary for the existence of anticompetitively low pricing as well as for anticompetitively high prices.[70] The most straightforward form of predatory pricing—deep-pocket predation—requires that there be a flaw in the capital market, for without such a flaw, the victim would be able to secure a loan and ride out the period of below-cost pricing.[71] Reputation predation[72] and noisy pricing predation[73] also depend upon an important information failure external

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[70] *See* Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 658 (1982). The authors explain: "Predatory pricing is a strategy for creating or changing expectations and can only occur when expectations are different or imperfect, or when information is imperfect." *Id.* The authors elaborate on their reasoning as follows:

> Predation can occur when information is perfect, but actual price cuts would not occur in that case. With perfect information, a simple threat would be sufficient, and the predator would never need to cut prices actually. Hence, the predator and the prey would immediately strike a bargain, agreeing to a merger, a buy-out, or some other settlement, for all future action and reaction would be known.
>
> In the more realistic situation in which information is imperfect, predatory pricing can be used as a means of conveying information in order to change expectations. Once the predatory cut is completed, the victim would only change his behavior if the cut changed his expectation about the possibility of future cuts. Predatory price cuts will therefore only occur when the predator expects to change the target's expectations about the predator's intention of continuing or engaging in further price cuts. From this perspective, predatory pricing is effective only insofar as it threatens further predatory activity.

Id. at 715.

[71] If information is perfect and a would-be predator lowers price, an equally efficient competitor will have an incentive to mothball its plant and reopen it after the predation ends. If the intended victim runs out of money in the short run, it can get a loan and repay it out of its expected future monopoly profits. Because this mothballing can happen, the antecedent predation will not happen often. In *Matshushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986), the Supreme Court cited Judge Bork and other Chicago School analysts extensively, and essentially embraced the view that predatory pricing was an extremely rare phenomenon. The antipredation scenario might not work, however, if information is imperfect. Suppose the owner of the mothballed factory goes to a bank for a loan. The bankers probably would say that—due to imperfect information—they were not certain that the victim was as efficient as the monopolist. The bankers, therefore, would either deny the loan or would loan only at an extremely high rate. Thus, if information is imperfect, even old-fashioned deep-pocket predation might be possible.

[72] A number of antitrust scholars have recognized the possibility of a firm developing a reputation for engaging in predatory conduct and using that reputation to stifle competition. *See* James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 73 (1982); *see also infra* note 75.

[73] Hurwitz and Kovacic explain how a firm might be able to predate by convincing its victims that their failure is due to natural market forces, such as the predator's supposed superior efficiency, rather than to predatory pricing. If the victims realized that the predator was engaging in below-cost pricing, they might well resist because predatory pricing schemes often do not work. If they were made to believe that the predator was significantly more efficient than they were, however, the victims would be much less likely to resist or retaliate because so doing would appear to be futile. *Id.* at 74.

to ultimate consumers.[74] Indeed, for every possible predation strategy, a counter-strategy could probably be devised by a sufficiently informed and astute competitor, customer, lender, or potential victim.[75]

Other antitrust cases involve practices that take advantage of, even if they do not cause or exacerbate, market imperfections. For example, a study of the Federal Trade Commission's industrial gases cases concluded that the industrial gases market was changing and that gas manufacturers became aware of this change before their distributors did. The manufacturers then sought to protect themselves by locking their retailers in with exclusive dealing contracts. The retailers realized too late that the exclusive dealing arrangements had disadvantaged them in a way that harmed competition. An asymmetry of information thus explained both how the exclusive dealing could be imposed and why it was anticompetitive.[76] Robert Steiner and Sharon Oster similarly concluded that it was imperfect information that led to the anticompetitive use of resale price maintenance in the *Levi Strauss* case.[77]

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[74] While information often is imperfect, only substantial impairments can lead to successful predation.

[75] *See* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981). We often assume that certain antitrust offenses are highly improbable in a market where competition is present because potential victims could simply shift to another supplier. This shift will not occur, however, if potential victims are unaware of the supracompetitive pricing and the consequent need to take defensive measures. For example, if pricing and other terms are as complex as the life-cycle pricing involved in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), a firm may not realize that it is being targeted by predation. A firm might not take counter-measures because it would instead believe that it was going bankrupt due to the normal workings of the marketplace.

Even reputation predation probably is not possible without a market failure. A firm that operated in 25 geographic markets could, for example, lose money by "illogically" engaging in predation in 5 markets to develop a reputation for being so tough (or insane) that no firm would want to tangle with it. It might more than make up its losses in the other 20 markets because no firm in those markets would want to resist its schemes. This type of predation could occur, however, only if there is an inability on the part of potential victims to mount a collective defense, itself a type of market failure.

[76] Gerald Brock, *Vertical Restraints in Industrial Cases*, *in* IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINT CASES 386 (Ronald N. Lafferty et al. eds., 1984) [hereinafter IMPACT EVALUATIONS].

[77] Levi Strauss & Co., 92 F.T.C. 171 (1978). When jeans were a relatively new product for middle-class consumers, Levi Strauss had to use resale price maintenance to guarantee retailer margin and, in effect, buy shelf space. During this period, consumers' imperfect information concerning this relatively new product led to the procompetitive imposition of resale price maintenance. After the product was well established, however, resale price maintenance was no longer needed and Levi Strauss anticompetitively kept prices at too high a level. Imperfect information on the part of Levi Strauss caused the company to fail to realize that it should have changed marketing strategies. It maintained a resale price maintenance strategy longer than was optimal for society, or for Levi Strauss. *See* Sharon Oster, *The FTC v. Levi Strauss: An Analysis of the Economic Issues*, *in* IMPACT EVALUATIONS, *supra* note 76, at 48. This study also contains citations to Robert Steiner's unpublished analysis of the case.

Some of these market failures had their direct impact on individuals and some on business entities. Regardless of who the ultimate consumers were, however, the failures in all these antitrust cases were external to those consumers.

D. Consumer Protection Violations Require Market Failures Internal to Consumers

Consumer protection problems cannot occur absent market failures occurring "inside the head" of ultimate consumers. Hypothetical consumers who are perfectly informed, rational, and intelligent can never be subject to consumer protection abuses. Ordinary consumers, however, can have greater difficulties.

The most common internal market failures fall into five categories: (1) overt coercion; (2) undue influence; (3) deception; (4) incomplete information; or (5) confusing information.

First, some consumers are subject to coercion and cannot act with free will. This situation can arise most obviously when individuals have been subjected to overt coercion. One case involving this situation arose when a furnace company adopted the practice of instructing its salesmen to disassemble a homeowner's heating unit and then refuse to reassemble it until the homeowner agreed to buy additional parts or services.[78]

A second type of market failure involves situations in which consumers are members of vulnerable groups and thus are susceptible to undue influence by sellers. For example, certain lottery techniques for selling candy have been found improper, in part because they were aimed at "children, too young to be capable of exercising an intelligent judgment of the transaction . . . ."[79]

By far the most important type of consumer protection market failure involves consumers who are capable of rational decisions, but whose decisionmaking abilities have been impaired by incorrect information. A manufacturer's use of false or misleading information is perhaps the greatest single threat to the free exercise of consumer choice. Deception is, accordingly, separately and specifically banned in the FTC Act, as well as being barred through the more general prohibition against unfair consumer practices.[80]

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[78] *See* Holland Furnace Co., 55 F.T.C. 55 (1958), *aff'd*, 295 F.2d 302 (7th Cir. 1961).

[79] FTC v. R.F. Keppel & Bro., 291 U.S. 304, 309 (1934).

[80] Deception cases, an integral part of the larger effort to protect consumer sovereignty, are one specific application of the broad prohibition against "unfair" consumer practices embodied in § 5 of the FTC Act. *See generally* Averitt, *supra* note 2, at 265.

A related type of "inside the head" market failure can arise if certain important information is not readily available except from the seller. Sellers may withhold such information even though consumers need it in order to make informed comparisons. The Commission has issued several rules addressing such problems. These have required manufacturers to disclose the most basic functional characteristics of their products, such as the R-value of insulation and the octane rating of gasoline.[81]

The fifth class of market failures can be thought of as a specialized subset of the fourth. Both Congress and the Federal Trade Commission seek to protect consumers against information disclosures that are presented in a way that is too complex for consumers to use effectively. Credit reporting laws, for example, mandate disclosure that $100 per month for four years really equals a 22 percent rate of interest. These laws make it easier for consumers of credit to engage in comparison shopping.

All five of these categories of market failures are consistent with the consumer sovereignty model of the consumer protection laws, in that the market failures are ones that occur "inside the consumer's head" and that impede the consumer's ability to choose from among the available options.

IV. HOW THE TWO LEVELS OF PROTECTION CONVERGE AND INTERACT

For most practices that violate the antitrust or consumer protection laws, the dichotomy identified in this article will neatly separate and distinguish the two fields. Predatory pricing and price fixing, for example, overwhelmingly affect the supply of options rather than the choice among them. They therefore are antitrust violations. Fraud and deception, on the other hand, do not directly affect the supply of options, but the ability to choose among them. They therefore are consumer protection violations. Some situations, however, do not fit so neatly into our model.

Our proposed dichotomy only deals with relatively direct effects of the practices in question. In the long run the effects may interact in more complex ways. Market failures internal to consumers may eventually lead to market failures external to consumers, and vice-versa.[82] Similarly,

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[81] *See* Labeling and Advertising of Home Insulation, 16 C.F.R. § 460.5 (1996) (requiring disclosure of R-values); Automotive Fuel Ratings, Certification and Posting, 16 C.F.R. § 306.5 (1996) (requiring disclosure of octane ratings of automotive gasoline).

[82] It also is possible that many market failures internal to consumers depend upon the existence of external market failures. In an ultimate sense, if a consumer cannot freely choose among the available options, the net effect may be the same as having only one option from which to choose. For example, consumer deception through fraudulent

practices that affect the market's menu of options can also, in time, affect consumers' ability to choose among options, which in turn could lead to further restrictions, or distortions, in the options made available through the marketplace. These complexities must be factored into the enforcer's decisions regarding whether to prosecute and, if so, what remedy to seek.[83]

Our analysis of these issues will begin by considering ways in which the enforcement agencies might use antitrust remedies to ultimately enhance consumers' ability to choose among options. We will then consider the situations in which they might use consumer protection remedies to create new options in the market.

A. USE OF ANTITRUST REMEDIES TO ENHANCE CHOICE AMONG OPTIONS

Some cases, although primarily addressing antitrust concerns, can also indirectly enhance consumers' ability to choose among options. This may occur, for instance, through (1) the elimination of horizontal agreements that raise consumers' search costs;[84] (2) the elimination of vertical price restraints that create an incentive to engage in consumer deception; or (3) the elimination of tying arrangements that make it difficult for consumers to evaluate or price either of the two tied products separately. On other occasions, however, the causal relationship will run in the opposite direction and the beneficial effects of a practice on consumer choice will justify what might otherwise be an antitrust violation.

Certain horizontal restraints, by increasing consumers' search costs, can impede consumers' ability to choose among existing options to such a degree that they have the effect of ultimately distorting the options available in the market. Antitrust actions addressing these situations therefore can have beneficial effects on consumer choice as well.

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advertising can best succeed if the advertiser has some degree of market power caused or supported by an external market failure. If the advertiser had no market power, firms competing with the fraudulent advertiser would generally have an incentive to run truthful advertisements, simultaneously selling their own products and exposing the fraud.

[83] For example, it is possible that a market failure at one level can create a market failure at the other level that will harm consumers at the second level. An entry barrier might protect a monopolist from competition, for example, and thereby permit it to deceive consumers with little fear of exposure or loss of market share. In some sense, it may even be the case that all such internal consumer market failures are due to preexisting external competitive market failures.

[84] *See* Robert H. Lande, Raising Consumers' Search Costs: A Theory of Anticompetitive Behavior (1997) (unpublished manuscript, on file with author).

One very familiar example of this category of cases is *National Society of Professional Engineers v. United States*,[85] which involved a group of restrictions promulgated by the engineers' professional association. These restrictions applied to the engineers who helped to design buildings and other structures. Their "canons of ethics" banned competitive bidding and prevented the engineers from individually discussing "prices with potential customers until after negotiations . . . resulted in the initial selection of an engineer."[86] Customers thus had to work with an engineer for some time to make it clear just what the project entailed before fees could be mentioned. These restrictions made it extremely difficult to shop for an engineer on the basis of price.[87] While customers could, in theory, start over with a second engineer if the first engineer's price quote was too high, the restrictions raised consumer search costs so much that starting over was frequently impractical. Elimination of an option (the option of easily checking prices) significantly interfered with the customer's ability to choose among the options provided by the market, which effectively deprived consumers of the option of competitive prices. Thus, when the Supreme Court eliminated a restriction on the price-information options that the free market would have provided, this in turn gave consumers a more effective ability to choose among the available providers.

FTC v. Indiana Federation of Dentists[88] involved a similar effect. In this case, an association of dentists collectively refused to provide patient x-rays requested by insurance companies that wanted to evaluate the necessity of certain dental procedures. Although the insurance companies remained free to send their own inspector to the dentists' offices to examine films, this was prohibitively expensive, and the increased costs meant that it became harder for the insurers to effectively police the dentists' work. The dentists' agreement thus directly eliminated an option from the marketplace (the option of sending x-rays to insurance companies), which in turn directly impaired one aspect of the ability to choose among options (the insurance companies' ability to compare the quality of the dentists' work), thereby indirectly impairing the ability of patients (no longer informed by their insurance company's reaction) to select a careful, prudent dentist who would only perform necessary procedures. The Commission's action, by helping a competitive array of options to emerge, also helped consumers choose effectively among these options.

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[85] 435 U.S. 679 (1978).

[86] *Id.* at 692.

[87] *Id.* at 692–93.

[88] 476 U.S. 447 (1986).

Another case that demonstrates the interplay of internal and external market failures is *Detroit Auto Dealers' Association*,[89] in which more than ninety auto dealers agreed to keep their showrooms closed on Saturdays and on three weekday evenings. The FTC challenged this provision solely as a conspiracy in restraint of trade—that is, solely on an antitrust theory—on the grounds that reduced shopping hours resulted in higher consumer prices. While the case certainly involved these antitrust-type price effects, the path by which they came about was somewhat complex. The dealers' agreement eliminated a nonprice option (convenient shopping hours) that consumers desired. The agreement also impeded consumers' ability to choose among other options because the restrictions on convenient times made it more difficult for them to comparison shop for prices, quality, variety, and features of cars. This, in turn, had the indirect effect of diminishing the amount of price competition in the market. The FTC's action, therefore, eliminated a restraint on nonprice options, which increased consumer choice, in turn increasing price competition.[90]

Resale price maintenance is another area in which antitrust remedies can have beneficial effects from the standpoint of consumer protection. Resale price maintenance can directly and substantially restrict the pricing options open to dealers, and thus may raise antitrust concerns. Under certain circumstances, however, it can also lead to distortions of consumer choice among the options presented. Warren Grimes has shown how retailers can use resale price maintenance to take advantage of consumers' information deficiencies. RPM can be used to guarantee large retail margins, which will give salespeople an incentive to "push" certain brands of products, even if those brands are not superior (and indeed may be inferior) to competing products in the same price range. This sales conduct may not rise to the level of actionable consumer deception, but it is certainly quite different from the beneficial "consumer information" made possible by RPM under other circumstances. The efficacy of this strategy hinges on imperfect consumer information because the scheme will not work if consumers know the extent to which sales clerks are pushing particular brands only to obtain a higher commission.[91] A case against the underlying RPM, applying the per se antitrust prohibition, may reduce the incentives to capitalize on con-

[89] 955 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992).

[90] More generally, while any horizontal conspiracy to restrict advertising certainly raises antitrust issues, it also impairs consumer choice among options.

[91] Warren S. Grimes, *Spiff, Polish and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 815, 834–36 (1992).

sumer misinformation in this way and may therefore enhance consumers' ability to make effective choices among options.[92]

Tying arrangements involve a particularly complex mix between antitrust and consumer protection factors. When they are illegal at all, tying arrangements are traditionally thought of as antitrust violations.[93] And, in fact, all tying cases fit on the competition side of our proposed dichotomy. Tying arrangements require that two products be sold together, thereby eliminating the option, which some consumers prefer, of purchasing the products separately. Because the firm tying the two products together must have market power in the tying market before the rule of per se illegality applies, an illegal tie-in can generally be said to substantially restrict the range of consumer options.[94]

Tie-ins can impair the consumer's ability to choose among options, however, and therefore also meet our definition of consumer protection violations. For example, if two products are available only as a package a consumer might not be able to know or evaluate the cost of either.[95] Similarly, some consumers may have difficulty calculating the net discounted cost of both an initial purchase price and a tie-in of later service or maintenance expenditures.[96]

The consumer protection aspects of tie-ins are well illustrated by *Eastman Kodak Co. v. Image Technical Services, Inc.*[97] Before 1985, potential purchasers of Kodak machines understood (according to the plaintiff

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[92] An enforcement action is most likely to be beneficial in consumer protection terms to the extent that the following conditions are present: (1) competing brands of the product are strongly differentiated in price and performance characteristics; (2) the relevant product characteristics cannot be directly observed by the consumer before purchase; (3) the product is purchased too infrequently for the consumer to rapidly gain experience with it; (4) the product is not expensive enough to motivate consumers to become independently knowledgeable about its characteristics; and (5) beneficial presale services are not sufficient to explain the RPM.

[93] Such cases have been brought by the Justice Department and by private litigants under the Sherman Act, *see, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12–13 (1984), and by the FTC under a theory of "unfair methods of competition." *See also* Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. REV. 661 (1982).

[94] For a traditional example of a tying violation, see IBM Corp. v. United States, 298 U.S. 131, 137 (1936).

[95] *See* Sandoz Pharmaceutical, FTC File No. C-3385, July 30, 1992 (consent order). Similar concerns may underlie portions of the Funeral Rule, which prohibits, as consumer protection offenses, tie-ins between most kinds of funeral goods and services, including tie-ins between the purchase of a casket and the provision of burial services. *See* Funeral Industry Practices, 16 C.F.R. § 453.4 (1996).

[96] *See* Craswell, *supra* note 57, at 9–13.

[97] 504 U.S. 451 (1992). This article's discussion of the *Kodak* decision is more fully developed in Lande, *supra* note 57, at 194.

in Kodak[98]) that after purchasing their machines they could go to an independent service organization (ISO) for parts and service.[99] In 1985 or 1986 Kodak changed its policy, and any customer wishing to purchase Kodak's patented spare parts thereafter had to purchase a Kodak service contract as well. Kodak had thus instituted an "after-tie" between parts and service, effectively eliminating consumers' ability to use ISOs. Customers could be exploited by this after-tie[100] because their information was imperfect in two respects. Those customers who bought their equipment before Kodak instituted its new policy may have underestimated the risk that the policy would change,[101] and those customers who bought their equipment after the new policy had been announced may not have been able to fully assess its impact because they may have had difficulty in estimating actual life-cycle service costs.[102] Because these features of the case involved consumers' ability to choose, *Kodak* in these respects raised consumer protection issues.[103] The Supreme Court did not speak to these issues, but did not reject them either. It only decided that the practices alleged in the case could be antitrust violations. Thus, tying

[98] The following discussion of *Kodak* reflects the facts of the case as stated in the plaintiff's complaint.

[99] Frequently, these ISOs charged significantly less for service than Kodak. 504 U.S. at 457.

[100] For four ways in which this exploitation could occur, see the discussion in Lande, *supra* note 60, at 196.

[101] If the information possessed by customers before 1985 had been perfect, they would have anticipated that Kodak might change its policy after the customers purchased their machines and were locked in to purchasing spare parts from Kodak. Customers who purchased a copying machine from Kodak before 1985 probably do not have a successful contract claim because Kodak's pre-1985 policy of selling spare parts to customers who purchased their service from ISOs was not a term of the contract between Kodak and the purchasers of its machines. It was merely a collateral, although important, policy. In the real and imperfect world, however, the change in this policy was unexpected. As a result, prior competition involving the machine's initial purchase could not have protected these consumers effectively because Kodak's switch was expected by neither Kodak's customers nor its competitors. Thus, even if a traditional structural analysis might suggest that competition in a market should protect consumers, *Kodak* holds that firms with small market shares may be able to unfairly harm consumers by taking advantage of the imperfect information of locked-in customers. 504 U.S. at 476.

[102] The second information failure involved customers' inability to perform relatively complex life-cycle pricing comparisons. The *Kodak* Court stressed that, as a factual matter, life-cycle pricing is extremely difficult to perform accurately. Customers would have to perform this calculation for all brands on the market before they could compare costs intelligently. The Court pointed out that this information was not available to consumers from their own experience, and Kodak's competitors would not necessarily supply it. *Id.* at 473–75. When individual consumers are involved it is often obvious that imperfect information can prevent them from making optimal purchasing decisions, but a noteworthy aspect of this case is that all of the victimized purchasers were businesses. *Id.* at 475.

[103] The Supreme Court decided only that the practices involved in the case could be antitrust violations, and therefore that the district court erred in entering summary judgment for *Kodak.*

arrangements are an anomalous area of the law. They can significantly restrict the available options and, therefore, can violate the antitrust laws. Certain tying situations,[104] like the one presented in *Kodak*, can also raise consumer protection concerns.[105] While anomalous, this overlap at the margin should not be entirely surprising, considering that the two areas of law have such a close functional relationship.

The cases that we have discussed thus far have all involved situations in which an antitrust remedy can indirectly lead to a consumer protection benefit. Conversely, however, practices that might otherwise violate the antitrust laws will sometimes be upheld because of the benefits they provide in consumer protection terms.

For example, nonprice vertical restraints can impair competition to some degree, but can nonetheless survive a rule of reason challenge if they provide offsetting efficiencies. Sufficient efficiencies are often found in consumers' imperfect information and in the inability of the market to supply this information absent the restraints. Vertical restraints may be one way to ensure that this information is supplied without concern about free riding.[106] These option-limiting restraints may thus enhance the consumer's ability to choose among the options that remain and may therefore pass muster under the rule of reason balancing test.[107]

Sometimes a practice that eliminates an option can have the counter-intuitive effect of enhancing consumers' ability to choose accurately. *Chicago Board of Trade v. United States*[108] involved restrictions promulgated by the Chicago commodities exchange that forced member dealers who wished to make grain purchases after the exchange was closed to do so at the price that prevailed when trading on the exchange ended. The

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[104] Professor Marvel analyzed a technological tie between hearing aids and batteries and concluded that its purpose might well have been to impose price discrimination against heavy users of hearing aids. Consumers could theoretically have engaged in life-cycle pricing (they could have calculated the discounted present value of both the hearing aid and the batteries they were likely to buy). Because as a practical matter they were often unable to do this correctly, consumers could be exploited through the tie. *See* Howard P. Marvel, *Vertical Restraints in the Hearing Aids Industry, in* IMPACT EVALUATIONS, *supra* note 76, at 271, 328–29.

[105] An explicit discussion of imperfect information would be unremarkable in a consumer fraud case, but it is a relatively new idea for antitrust.

[106] *See* Lester Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 89 (1960).

[107] *See, e.g.*, United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 560–61 (1960) (tie between television antennas and service contracts was justified because consumers might not know whether the television's failure to work was due to a problem with the antenna or a problem with its servicing; if information had been perfect, the tie would not have been needed), *aff'd*, 365 U.S. 567 (1961).

[108] 246 U.S. 231 (1918).

rule was upheld, however, because without it farmers and other relatively inexperienced customers who might not be fully informed about the value of their goods could become the prey of sharp buyers. Thus, the antitrust practice (one that eliminated the option of negotiated prices after the exchange was closed) actually improved sellers' ability to protect themselves from fraud or monopoly (or oligopsony) power, and thereby improved their ability to choose from among the options provided by the market.

B. USE OF CONSUMER PROTECTION REMEDIES TO CREATE NEW OPTIONS

Consumer protection laws are designed primarily to increase the amount and accuracy of information available to consumers, thereby facilitating the exercise of consumer choice. The enforcement of consumer protection laws, however, may also indirectly affect the mix of options that the market supplies. Consumers given access to new information may begin to value new kinds of products, and the market may respond by supplying more of such products.[109]

This option-enhancing effect is a secondary, but nonetheless apparently deliberate, purpose underlying several consumer protection rules. The R-Value Rule, for example, requires that home insulation be labeled to show its quantitative insulating capacity, thus facilitating informed comparisons.[110] The Commission believed that this rule would have an indirect but beneficial effect on the supply of options:

> Market imperfections that impede the process of providing such material information in the regular flow of commerce discourage consumer consideration of salient product features, diminish comparison shopping, and create unwarranted competitive parity or advantage for inferior products. Thus, a market that functions in this way not only harms consumers but also lessens fair and open competition.[111]

In other words, a market functioning under the new rule, by avoiding this advantage for "inferior products," presumably would tend to weed them out, thus improving the menu of options.

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[109] The effects on the supply of marketplace options may also be defensive, preserving the existing array of options against threatened diminution but not necessarily increasing the array. By preventing deception, for example, the Commission helps to prevent the improper diversion of trade from honest firms and, thus, may help them remain in business. *Cf.* FTC Policy Statement on Deceptive Acts and Practices, 4 Trade Reg. Rep. (CCH) ¶ 13,205 at 20,917 n.58 (1983).

[110] Labeling and Advertising of Home Insulation, 16 C.F.R. § 460.12 (1996).

[111] Statement of Basis and Purpose, 44 Fed. Reg. 50,218, 50,223 (1979).

The Commission appears to have had a similar motivation for the Franchise Rule, which requires that prospective franchisees be given certain information relevant to the wisdom of entering into such a business relationship, including information on the identity and experience of the particular franchisor, the support services offered to the franchisee, any initial and recurring fees, and the names and addresses of the ten nearest existing franchises.[112] The Commission began its analysis of the need for this rule by observing that outright fraud was not uncommon in the franchising business: "such 'get rich quick' claims frequently either are unsubstantiated by the franchisor, or they misrepresent material facts with regard to the 'potential earnings' of a particular franchise business."[113] The Commission concluded that more complete information would permit consumers to make better decisions. In addition, it would appear that the Commission hoped the improved ability of potential franchisees to choose among options would help to drive the fraudulent franchisors from the market: "[B]y establishing a uniform, minimal set of required information, disclosure requirements enhance the efficiency of markets by facilitating comparison of competing franchise offerings."[114]

The rules discussed in the two previous paragraphs were ones in which a consumer protection type of remedy, improving the ability to choose among options, would also have a longer-term beneficial effect on the availability of options. Sometimes this approach can be used in more extreme situations and a direct violation of one half of the FTC Act may be cured by a remedy under the other. For example, suppose we believe that numerous and widespread instances of fraud exist in door-to-door sales of consumer products. One might try to remedy this problem by requiring greater honesty from such salesmen, but such an approach would be hard to monitor and enforce. An alternative approach might be a rule requiring sellers to provide consumers some period of time in which they can change their minds and ask for a refund. This rule, motivated by a consumer protection issue, would cure the problem

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[112] Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. § 436.1 (1996).

[113] Statement of Basis and Purpose, 43 Fed. Reg. 59,614, 59,626 (1978).

[114] *Id.* at 59,638; *see also* 43 Fed. Reg. at 59,626. Similarly, in promulgating the Care Labeling Rule (which required the attachment of permanent labels in clothing to describe what cleaning methods they required), the Commission may have anticipated that it would have some effect in producing clothing that was easier to maintain. It noted that consumers required the new information in order, among other things, that they might "be able to select apparel on the basis that it can be cared for inexpensively yet effectively." Statement of Basis and Purpose, 36 Fed. Reg. 23,883, at 23,889 (1971). *See* Care Labeling of Textile Wearing Apparel and Certain Piece Goods, 16 C.F.R. § 423.6 (1996).

through what is basically an antitrust remedy,[115] in the sense that it would change the available consumer options (i.e., it would give consumers a return option, or would eliminate the no-return option from the marketplace).[116]

The interplay between the two sides of the statute is not invariably beneficial, of course. In some situations, an order that successfully addresses one type of market failure may inadvertently worsen the problems created by the other type of failure. This result appears to have occurred in a series of cases involving vertical restraints in the sale of hearing aids.[117] Hearing aid manufacturers had imposed exclusive dealing arrangements and, although the evidence was weak, had allegedly imposed maximum resale price maintenance upon their dealers.[118] A series of successful cases by the FTC ordered the manufacturers to end these practices. Because the FTC orders enabled hearing aid retailers to begin selling multiple brands at different prices, consumers' options increased. Unfortunately, many of the hearing aid dealers were unethical and, unlike the hearing aid manufacturers, had a short-term perspective. Fraud and coercive sales practices became common.[119] As a result, the FTC orders ending maximum RPM enabled unethical dealers to more easily overcharge relatively vulnerable immobile elderly consumers, thereby taking advantage of their internal market failures. On the other hand, inasmuch as they terminated the exclusive dealing arrangements, the FTC's orders probably also brought the dealers into greater competition with another segment of the industry—audiologists—who, on average, were both more ethical and more competent.[120] Thus, to the extent they ended the practice of exclusive dealing, the FTC's orders probably resulted in less consumer fraud; whereas to the extent the orders ended maximum RPM, they probably tended to produce more fraud.

In short, our basic dichotomy must be qualified to recognize that complicated legal matters are not always tidy. A case that is based primarily on one half of the FTC's jurisdiction may have some collateral effects in areas covered by the other half.[121] Notwithstanding these qualifications,

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[115] *See* Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429.1 (1996).

[116] The remedy also has a consumer protection aspect because the additional time would enable consumers to make a better choice among the options that the market provides.

[117] *See* Marvel, *supra* note 104, at 271.

[118] *Id.* at 282, 327.

[119] *Id.* at 349–51.

[120] *Id.*

[121] Still more anomalous situations may sometimes arise in which there is a market failure that might not be remedied by either the antitrust or consumer protection laws. This may

the dichotomy described is a useful general way of viewing the distinction between antitrust and consumer protection.

V. PRACTICAL CONSEQUENCES OF A UNIFIED THEORY

The view of the law outlined in the previous sections of the article is of more than theoretical interest. It also has a number of intensely practical implications. Five of those will be discussed in this section. A unified theory of consumer sovereignty: (1) shows why the FTC was created as a single agency; (2) helps ensure that the litigation theory in each case will follow the procedures and standards set out in the appropriate part of the statute; (3) enables close legal questions to be judged in light of a better understanding of the relevant statutory purposes; (4) reminds practitioners of the important role played by nonprice competition; and (5) suggests a conceptual framework to countries that are adopting and organizing fair competition laws for the first time.

A. THE FEDERAL TRADE COMMISSION SHOULD CONTINUE TO HAVE BOTH ANTITRUST AND CONSUMER PROTECTION AUTHORITY

The first consequence of our proposed construction of the law is that it explains why the FTC was created as a single agency and should remain as one. We have shown above that the functions of antitrust and consumer protection can and should work together to safeguard the exercise of

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occur, for example, due to adverse selection problems.

Assume for the sake of discussion that insurance companies have a difficult time ascertaining which people are likely to need more than the average amount of health care, so the firms initially sell insurance to everyone at a price based upon the cost of providing health insurance to the average person. At this price, the healthiest people might decide that, because their expected cost of health care expenditures is very low, it makes sense for them not to purchase health insurance at what is, for them, a relatively high price. They opt out of the market by self-insuring. As the comparatively healthy people drop out of the market, however, the average cost of providing health care to people still in the market increases, thus driving up the price of insurance. This causes additional relatively healthy people to decide that they can probably save money if they self-insure, so they too drop out of the market. Over time, this self-reinforcing cycle could eventually mean that insurance will only be sold to the individuals in the worst health at extremely high prices. It might not be possible for relatively healthy people to purchase insurance at a reasonable cost.

This example shows how imperfect information external to ultimate consumers (i.e., the sellers' inability to accurately distinguish healthy people from ailing people) might lead to the failure of the market to provide an option that many people want. Although this situation has many of the characteristics of antitrust concerns (because it involves external market failures and a reduction in options), no antitrust or consumer protection law has been violated. Moreover, even if society wanted to do something to help consumers in this market, it is difficult to see what kind of effective antitrust or consumer protection remedy could be devised.

consumer sovereignty. Three further things are true: (1) Congress consistently intended these two functions to work together in the FTC; (2) there are practical benefits in having the two functions within one organization; and (3) the association with the consumer protection function may help to show when certain competition issues should be handled by the FTC rather than the Department of Justice.

The unified theory of consumer sovereignty propounded in this article was implicit in Congress's original design for the FTC's mission. Section 5 of the FTC Act initially prohibited both competitive and consumer unfairness in a single phrase—"unfair methods of competition"[122]—which encompassed everything from predation to fraud.[123] Traditional consumer protection violations, such as deception, were reached by this concept on the theory that they diverted trade from honest firms and ultimately harmed competition.[124] Congress's language thus did not appear to state two separate and independent goals for the FTC,[125] but rather to visualize areas of activity that the legislature considered to be closely related.[126]

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[122] Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 719 (1914). The statute was subsequently amended to explicitly spell out the prohibition against "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1) (Supp. 1996).

[123] There is no doubt that Congress considered the original prohibition against "unfair methods of competition" to encompass both types of concerns. *See* Averitt, *supra* note 2, at 225.

[124] *See, e.g.*, FTC v. Winsted Hosiery Co., 258 U.S. 483, 493–94 (1922); *see also* FTC v. R.F. Keppel & Bro., 291 U.S. 304, 313 (1934) (consumer unfairness theory); FTC v. Algoma Lumber Co., 291 U.S. 67, 69–72 (1934) (deception theory).

[125] Several members of Congress considered the competition and consumer protection missions of the agency to be intertwined and very closely related. *See* 51 CONG. REC. 14,936–37 (1914) (remarks of Reps. Cooper and Stevens).

[126] In recent years the FTC has interpreted its statute as if Congress had intended it that way. The agency has described the two halves of the statute as working together in ways similar to the two halves of our model of consumer sovereignty:

> 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.

Federal Trade Commission, Companion Statement to Policy Statement on the Commission's Consumer Unfairness Jurisdiction, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,203 at p. 20,909-3 (Dec. 17, 1980); *see also* Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8357 (1964) (FTC consumer protection authority involves "a broad mandate to proscribe acts or practices which exploit the consumer and impair his freedom to choose among available products").

In this respect the congressional plan seems well designed. There are benefits to having the FTC as a single agency that can consider both competition and consumer protection issues. Some types of conduct will inevitably be difficult to classify in terms of our dichotomy. Some of these cases will have characteristics of both competition and consumer protection violations.[127] In other cases, the enforcers' theory of why a practice is anticompetitive could change after a complaint is brought.[128] Cases having the potential to develop in these ways are best brought by an agency that has the authority to pursue whichever type of violation appears most relevant once all the evidence has been gathered.

A consideration of these factors may be particularly useful in deciding whether the FTC or the Department of Justice should be the agency to handle a particular class of cases. The best disposition of a case often depends on the collateral authority of the agency involved. For example, the Department of Justice has an advantage in handling hard-core horizontal restraint cases that may turn out to involve criminal conduct of the sort that only it can pursue. Conversely, however, there seem to be clear advantages in using the FTC to review matters where the legal theory may change between competition and consumer protection law during the course of an investigation.[129] There may also be an advantage to using the FTC to review matters that are clearly antitrust issues, but where the firms involved may be simultaneously engaging in related conduct that raises consumer protection issues.[130]

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[127] *See* discussion *supra* part III.A. A similar mix of competition and consumer protection issues is addressed by the Commission's Standards and Certification program. *See infra* note 137. Both types of issues were also present in the administrative proceedings involving online computer reservation systems. *See* Civil Aeronautics Bd., Dkt. No. 41686, Comments of the FTC Staff (Nov. 17, 1983). If these systems were biased to favor the particular airlines operating them, it might raise consumer protection concerns about possible deception in the information on the most desirable flights, and also competition concerns about the effects of these practices on other airlines. Other competition issues may spring from the system operator's access to sensitive information about its competitors' sales.

[128] For example, suppose a case like *Sandoz Pharmaceutical*, FTC File No. C-3385, July 30, 1992 (consent order), was brought originally because the enforcers believed that it was a traditional attempt to extract consumer surplus via a tie-in, but subseqently discovered that the tie-in's real purpose was to create consumer confusion.

[129] One easily could imagine the theory switching from antitrust to consumer protection, or vice-versa, in the tying examples discussed *supra* text accompanying notes 97–105, or in the RPM example discussed *supra* text accompanying notes 91–92.

[130] *See, e.g.*, Marvel, *supra* note 104 (discussing cases involving vertical restraints in the hearing aids industry). Review by a single agency could be useful, for example, if Congress were to deregulate local electric service. Depending on the terms of any new legislation, the processes of bringing new competition to consumers in this industry, and informing them of the terms on which it is brought, could raise a mix of competition and consumer protection questions that might be most efficiently considered together.

B. THE JURISDICTIONAL COVERAGE OF THE ANTITRUST AND CONSUMER PROTECTION LAWS CAN BE CLARIFIED

A second practical consequence of our dichotomy is that, by adding rigor to the definitions, it will assist government officials in determining whether a particular problem should be pursued as an antitrust or a consumer protection case. This is important for three reasons.

First, Sherman Act antitrust violations can lead to criminal penalties,[131] and virtually every antitrust violation can lead to automatic treble damages.[132] In light of these relatively heavy penalties, it only seems fair to articulate more clearly which type of actions are antitrust actions.

Second, the decision on which statute to apply has many practical consequences for the development and conduct of a case. It will affect the procedures to be followed, the remedies that are available, and the enforcement staff that will have jurisdiction over it. For example, the FTC has been given special procedures for use in rulemaking[133] and in consumer redress[134] in consumer protection cases, but not for use in antitrust matters. The Commission is similarly required to use civil investigative demands (CIDs) in most consumer protection cases, but not

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[131] *See* 15 U.S.C. §§ 1-3 (Supp. 1996).

[132] *See id.* § 15(a). Some exceptions exist for those relatively rare events that violate the FTC Act but not the Sherman or Clayton Acts. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980).

[133] The FTC Act was amended to provide special, specific rulemaking procedures for use "with respect to unfair or deceptive acts or practices." 15 U.S.C. § 57a(a)(1) (1994). The amendment spells out procedures affecting Federal Register notice, notice to Congress, the rights that the parties have to present evidence, specific points to be addressed by the Statement of Basis and Purpose, and similar matters. *Id.* § 57a. The section goes on to specify that "[t]he Commission shall have no authority . . . other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices . . . ." *Id.* § 57a(a)(2). Competition rules, in contrast, may be promulgated through the general procedures of the Administration Procedures Act. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 696–97 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[134] Courts are specifically authorized to grant redress in certain consumer protection matters. An amendment to the FTC Act states that, where there has been a violation of a rule involving unfair or deceptive acts or practices, or certain types of particularly clear violations of the general consumer protection statutes, courts "shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers . . . . Such relief may include . . . rescission or reformation of contracts, the refund of money or return of property, [or] the payment of damages. . . ." 15 U.S.C. § 57b(b) (1994). Somewhat similar remedial authority, usable in both competition and consumer protection contexts, has also been judicially implied as inherent in the courts' equitable powers to grant injunctions under § 13(b). *See, e.g.*, FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).

in antitrust matters.[135] Properly assessing the type of case involved will determine which of these procedures should be used.

Third, our dichotomy can help to determine whether the main substantive charge in a particular matter has been framed under the proper provision of the law.[136] This will help prosecutors ensure that a matter has been brought using the proper terms and by the right enforcer, and thus may protect against motions to dismiss. Conversely, familiarity with these issues may help members of the defense bar secure the dismissal of actions that have been brought under an improper legal heading.[137]

C. CLOSE LEGAL QUESTIONS CAN BE JUDGED MORE CORRECTLY ONCE THE POLICIES OF THE STATUTES ARE BETTER DEFINED

A third benefit of the consumer sovereignty model is that it can help to determine when questionable business practices significantly violate

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[135] CIDs may be used in antitrust matters, although the antitrust staff generally prefers to rely on conventional subpoenas. *See* 15 U.S.C. § 57b-1(a)(7) (1994) ("violation" includes "any antitrust violation"). For most forms of administrative litigation in consumer protection matters, however, CIDs *must* be used as the vehicle for discovery. "For the purpose of investigations performed pursuant to this section with respect to unfair or deceptive acts or practices ... all actions of the Commission [under certain sections] shall be conducted pursuant to subsection (c). . . ." *Id.* § 57b-1(b). That section then spells out special procedures covering such matters as oaths, where and how the CIDs are served, in what way the subjects of the inquiry may be represented by counsel, and the like. *Id.* § 57b-1(c).

[136] This article is only concerned with the selection of the proper provision of federal law under which to investigate or prosecute practices that potentially threaten consumer interests. The state trade regulation statutes are beyond the scope of this article. Specific state antitrust, consumer protection, or other statutes might have different goals, either in terms of process or results, or different underlying purposes. Each must be analyzed in terms of its own legislative history.

[137] One area of consumer protection authority might have been called into some question by such an examination, at least with respect to the manner in which it was originally pursued by the agency. The Commission maintains a program called Standards and Certification. This addresses, among other things, situations in which certifying organizations made up of industry participants may have set inappropriate and exclusionary product standards. Such standards may, for example, impede the introduction of high-technology new materials into the construction industry. Cases addressing this situation clearly protect the range of options in the marketplace and clearly are antitrust matters. (The cases may also have a consumer protection component insofar as restrictive standards may falsely imply that nonconforming materials are inadequate.) For reasons having to do primarily with historical circumstance, however, those matters were handled for many years in the FTC's Bureau of Consumer Protection, in part because some of the first important cases to be litigated involved certifying organizations whose standards were deceptive as well as exclusionary. *See* Society of the Plastics Indus., Inc., 84 F.T.C. 1253 (1974). Perhaps in consequence, some early initiatives under the program were based simultaneously on competition and consumer protection authority, without always being explicit as to which provision would control. *See, e.g.*, Notice of Proposed Rulemaking, Standards and Certification, 43 Fed. Reg. 57,269 (1978). Standards and certification cases continue to be located

the underlying purposes of the consumer protection or antitrust statutes and, thus, when they should be considered law violations.

One example will illustrate how the process could work. The improved conceptual structure of the consumer sovereignty model will help to distinguish between two different kinds of emotionally conditioning advertising—subliminal advertising and associational advertising. Subliminal ads (assuming that they work as intended) bypass the viewer's conscious mind entirely and lodge in the subconscious as fully formed and conclusory thoughts. They are, therefore, inconsistent with the goal of rational consumer choice and should be condemned as an unfair consumer practice.[138] An apparently quite similar technique is associational or image advertising.[139] This type of advertising typically depicts the product as being linked with the attainment of vitality, good looks, and the admiration of the opposite sex. Associational advertising may fuel consumer desires that are every bit as irrational as those induced by subliminal messages. Nonetheless, those ads do not inevitably prevent the operation of the consumers' critical facilities. If the consumers choose to set those facilities aside—or, perhaps more accurately, if they choose to value psychological attributes of the product as well as, and perhaps more highly than, its physical characteristics—this is a decision that market advocates must respect. Associational advertising, therefore, should not be condemned.[140]

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organizationally in the Bureau of Consumer Protection, but are now pursued explicitly on a theory of unfair methods of competition when they involve antitrust issues.

[138] Although it is not clear that such ads are actually effective, as long as there is a significant risk that they will be, they would seem properly subject to FTC regulation. Such ads are already banned from television commercials by the Federal Communications Commission. *See* Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016, 1016–17 (1974).

[139] The associational effects of advertisements were a basis for Commission prohibition in at least one matter. The Cigarette Rule required affirmative disclosure of the health hazards of smoking in part to offset the effect of advertisements that portrayed smoking as "'pleasurable or desirable, compatible with physical health, fitness or well-being, or indispensable to full personal development and social success . . . .'" Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8326 (1964). *See also id.* at 8342, 8346, 8357. This particular rationale for the rule does not appear to be followed today, however, and probably does not represent current thinking at the Commission. The Cigarette Rule was subsequently superseded by legislation. *See* Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–341 (Supp. 1996); 30 Fed. Reg. 9484–85 (1965) (withdrawing rule).

[140] Associational advertising can actually be permitted under either of two different applications of the consumer sovereignty theory. On the one hand, we may conclude that associational advertising influences but does not prevent the exercise of consumer judgment, and so is permissible for the reasons set out above. Or, on the other hand, we may conclude that it does at least sometimes prevent the exercise of consumer judgment, at least in the limited sense that it can instill product preferences that are every bit as fixed and "irrational" as those achievable through subliminal advertising. Even in the latter

D. NONPRICE COMPETITION SHOULD BECOME A HIGHER PRIORITY FOR BOTH ANTITRUST AND CONSUMER PROTECTION ENFORCEMENT

A fourth implication of this article's analysis is that the protection of consumer choices generally, not just low-price choices in particular, should be the focus of both antitrust and consumer protection law.[141]

The enforcement agencies have already recognized the importance of preserving nonprice options in sufficiently clear circumstances. They have recognized that firms can compete on dimensions other than price—such as innovation, product variety, and product quality.[142] Indeed, in some products quality competition may be the most important kind. In the market for bulletproof vests, for example, buyers certainly care much more about product reliability than about product price. For this reason, the FTC was concerned when an association of bulletproof vest manufacturers adopted a rule restricting comparative advertising. The association's rule had declared that it was unethical for any member to represent that another member's vests had failed certification testing, even if the advertising claim were true. The FTC had no difficulty accepting a consent agreement against this practice because elimination of the advertising ban would tend to foster useful quality competition.[143]

In more ordinary antitrust cases, however, where the elimination of nonprice competition is not so obviously central to the violation, the enforcement agencies have sometimes tended to deemphasize this fac-

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case, however, we should find the advertising acceptable. This is so because a consumer sovereignty theory is not intended to reach relatively minor influences that just may happen to be controlling in individual cases. The goal of clarity and predictability requires that we normally condemn only those influences that are consistently substantial. Associational advertising probably does not ordinarily produce this kind of consistently substantial effect. If the ads are targeted to members of a particularly vulnerable group, however, then the "substantiality" of their effect might best be judged by the effects on members of that limited group.

[141] This implication should have a greater effect on antitrust doctrine than on consumer protection law because the essence of consumer protection analysis, "enhancing choice among existing options," already implicitly includes choices made for nonprice reasons.

[142] Nonprice competition is often extremely important to both businesses and consumers. Such competition can take place in terms of innovation, scheduling, service, convenience, or product variety. Such factors can be especially important in particular industries. At certain times in the past, for example, the airlines appeared to compete in large part in terms of scheduling and convenience, and members of the motion picture industry still compete in terms of product innovation. These qualities may or may not be readily expressed in terms of price, but they definitely affect the range of choice in the marketplace and, thus, are easily comprehended under a formula that focuses on the factor of choice.

[143] Personal Protective Armor Ass'n, 59 Fed. Reg. 19,019 (1994).

tor.[144] For example, the conventional antitrust analysis under Section 7 of the Clayton Act concentrates almost exclusively on the price effects of a merger: the merger is to be condemned if it is likely to lead to higher prices. Even if it has no significant effect on price, however, an anticompetitive merger might adversely affect consumers with respect to other forms of competition. A focus on consumer choice as a goal will make it easier for enforcement agencies to consider the merger's effects in these areas. Moreover, given that competition in these dimensions might be affected at concentration levels different from those most relevant for pure price considerations, attention to consumer choice may sometimes suggest challenges to mergers that would not otherwise be illegal.

This would represent a change of emphasis from traditional merger analysis. Although merger analysis makes pro forma bows toward other dimensions of competition, the analysis promptly returns to price. The federal Merger Guidelines, for example, have a section titled "Purpose and Underlying Policy Assumptions of the Guidelines,"[145] which contains roughly a dozen references in the text to "price," the "transfer of wealth from buyers to sellers," and similar monetary concepts.[146] Only a single footnote suggests that merger policy includes non-monetary concerns.[147] The National Association of Attorneys General (NAAG) Horizontal Merger Guidelines reflect a similar emphasis. They concede in a footnote that consumers can be harmed by oligopoly behavior "on terms of trade other than price,"[148] but also declare, more fundamentally, that the "central purpose" of merger law "is to prevent firms from attaining market or monopoly power, because firms possessing such power can raise prices to consumers above competitive levels. . . ."[149] Both the federal

[144] For a recent instance of this, see International Ass'n of Conference Interpreters, Dkt. No. 9270, slip op. at 35 (Feb. 19, 1997) (finding violations on price fixing and other per se theories, but dismissing for insufficient proof the charges involving nonprice restraints judged under the rule of reason; stating, "With the exception of three findings . . . all of the effects discussed by the ALJ stem from the price-related restraints").

[145] U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992) § 0.1, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569-3.

[146] *Id.* at 20,569-3 to 20,571.

[147] Footnote 6 of the 1992 Merger Guidelines reads, "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation." *Id.* at 20,571.

[148] The footnote actually elaborates this consideration at somewhat more length than the federal guidelines. It reads in full as follows: "Tacit or active collusion on terms of trade other than price also produces wealth transfer effects. This would include, for example, an agreement to eliminate rivalry on service features or to limit the choices otherwise available to consumers." NAAG Horizontal Merger Guidelines (1987) § 2.11, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,405, at 21,186 n.17.

[149] *Id.* at 21,185 (footnotes omitted).

and NAAG Merger Guidelines, therefore, permit consideration of nonprice elements of competition, but both are structured in such a way as not to particularly encourage that exercise.

Some elements of nonprice competition might be captured through use of the concept of "quality-adjusted price." Again, however, the Guidelines are not structured to particularly encourage that approach. Moreover, "quality-adjusted price" may be a difficult concept to apply in those concrete situations where the nonprice components of competition are particularly important or where they take subtle or complex forms.

In looking for possible harms to nonprice competition, antitrust decision makers should be cautious. The consumer sovereignty model will remind the antitrust agencies of the relevance of nonprice factors, but it does not alter or expand the actual reach of Section 7. Harms to nonprice competition are already covered by the Clayton Act and have already informed decisions in merger cases.[150]

Caution here is particularly appropriate because price competition will often serve as a reasonably good proxy for nonprice competition. Once a particular market is price-competitive, in other words, it may often offer self-equilibrating levels of competition in other dimensions as well. Consider, for example, a post-merger market that is price-competitive but that, as the result of a merger, no longer produces the optimum level of product variety. If consumers truly want more variety, and if the firms are truly competitive, then they will soon begin to extend their product lines by introducing a greater number of models and variants to the market.

Sometimes, however, price-proxied competition alone may provide insufficient protection. This is most likely to be a problem with respect to certain kinds of intellectual property, some of which can play a competitive role only in an environment of organizational independence.

The most important option of this sort may be the independent editorial programming of a communications medium. If the owner of one communications medium were to buy another firm of the same kind, the acquisition might not concentrate the market sufficiently to threaten price competition. Being competitive, the market might also soon produce the product menu that consumers desire, in terms of types and formats of shows. But the market would inevitably sustain a loss of editorial diversity, and this cannot be recreated through the normal

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[150] *See, e.g.*, FTC v. PPG Indus., Inc., 798 F.2d 1500, 1505-06 (D.C. Cir. 1986) (preliminarily enjoining merger of manufacturers of "high technology" aircraft transparencies, which competed, among other ways, in new product development).

mechanism of nonprice competition among the surviving firms; the new products would necessarily bear the editorial stamp of their common owner. This suggests that media mergers should be carefully scrutinized for loss of nonprice competition along the dimension of diversity in programming and, where that loss is sufficiently severe,[151] that they be challenged under the Clayton Act, even if there has been no showing of harm to price competition.

Suppose, for example, that the country had only five book publishers and that two of them merged. This might not lead to a loss of price competition or to a narrowing in the range of price options.[152] On the other hand, it might well lead to a quantifiable loss of editorial diversity and, thus, to a narrowing of the competing marketplace options expressed in terms of the types of titles offered. An antitrust suit might properly challenge this result. This would not seek to apply a special standard for the media that is based on First Amendment or diversity considerations.[153] Rather, it would be based on the ordinary, universal standards of Section 7, once that Section has been properly construed to recognize the role of options and of nonprice competition.

E. COUNTRIES ESTABLISHING OR REORGANIZING TRADE REGULATION PROGRAMS CAN DO SO IN A MORE BENEFICIAL MANNER

Many nations are currently deciding whether to establish trade regulation programs and, if so, which legal areas should be the subject of

[151] Antitrust enforcers could not challenge every merger involving intellectual property on the grounds that, by removing the products of the acquired firm as an independent force in the market, the merger would necessarily impair consumer choice. True, in some linguistic sense, every merger of a product involving some element of creativity removes a choice from the market. The incorporation of Oldsmobile into General Motors, for instance, deprived those consumers who preferred the independent Oldsmobile design department of that choice. This alone cannot be the basis for illegality, however, for such an argument would prove too much. It would result in the illegality of every merger involving nonfungible products, regardless of how small the element of independence in the product is or how much or little importance consumers attach to that independence in the context of the particular product involved. Congress cannot have intended this to constitute the "substantial" lessening of competition that is the concern of § 7. Actually figuring out how to express the threshold of substantiality for different types of nonprice competition would be a difficult job, of course, but it is one that needs to be undertaken if antitrust is to come to grips with this set of issues.

[152] An absence of price effects is particularly likely if we assume relatively low entry barriers and a strategy of limit pricing by the firms in the market.

[153] *Cf.* Associated Press v. United States, 326 U.S. 1, 20 (1945) (First Amendment considerations support application of Sherman Act to the media because both of these provisions are intended to encourage diversity, although the media context did not alter ordinary Sherman Act standards); *see also* Turner Broadcasting Sys. v. FCC, 512 U.S. 622 (1994) (Congress can permissably legislate in cable TV area so as to further governmental interest

concern and how the different parts of these programs should relate to one another. The framework suggested here should help with this task, and may also help the governments involved explain the program in a relatively coherent way to their citizens.

Our main substantive suggestion is that a country should frame its laws both in terms of preserving the options that competition would bring and of preserving meaningful consumer choice among these options. A country writing its trade laws on a clean slate might wish to express them specifically in these terms.[154] A statute embodying this option-oriented approach might be worded as follows:

> It is the national policy to foster an economy in which consumers can make free choices among goods and services in a competitive marketplace. Conduct that unreasonably impairs this goal is hereby declared illegal. It is specifically illegal to engage in: (1) A, B, C, and any other conduct that unreasonably limits the range of competitive options that would otherwise have been present in the market; and (2) X, Y, Z, and any other conduct that unreasonably impairs consumers' ability to choose among these options.

A legislature enacting this statute would complete it by filling in the blanks for ABC, and XYZ, with those specific items that the country was confident, in light of its own national experience, that it wished to ban. If the United States were using this approach, for example, it would include specific bans on such things as monopolization, mergers that may substantially lessen competition, and deception.

A statute along these lines would have several attractive features. The specific prohibitions will give the business community as much notice as the nature of the subject matter permits. At the same time, the general residual clauses that are written in terms of options and choice among options will preserve the flexibility necessary to deal with changing conditions.[155] In this respect our model statute is similar to a combination of

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in diverse programming, even if antitrust concerns are not implicated), *after further hearings on remand,* 1997 U.S. LEXIS 2078 (Mar. 31, 1997).

[154] Organizationally, countries adopting new laws might wish to consider the approach that the United States has taken and have both these types of issues handled by one agency, equivalent to our Federal Trade Commission.

[155] There is room for disagreement as to whether general provisions of this sort are desirable in the first place. Clearly they have both advantages and disadvantages. As disadvantages, they offer less certainty and leave more room for judicial discretion than would simple prohibitions against things like price fixing. This may be a particular concern in countries that do not yet have a tradition of a nonpartisan judiciary. On the other hand, general provisions allow the law to better adapt to changing business practices and to new forms of organization. A resolution of this dispute is beyond the scope of this article, although we may note in passing that many jurisdictions have found it desirable to adopt some form of general clause, either overtly or through expansive constructions of terms such as "contracts in restraint of trade." In any event, if a decision is made to

the Sherman Act and the FTC Act in American law. The proposed model seems to be an improvement over the present combination in two important respects, however. First, by putting the specific and the general clauses in a single statute it encourages the enforcers and the judiciary to employ general principles to guide the development and application of the specific prohibitions. The statute itself, in other words, will set out internal, general principles of construction that will provide a context within which it is most likely that the specific provisions will be interpreted in the proper manner. Second, even the general clauses are framed in a relatively objective way. Conduct is banned, not on grounds of "unfairness" (the approach used in the FTC Act), which can cause considerable judicial uncertainty,[156] but because of its unreasonable effects on the exercise of consumer choice. The underlying concept of consumer choice will tend to focus the inquiry. Even though the concept of "unreasonable" effects does still leave room for interpretation, this uncertainty will tend to be limited to questions of *degree*—identifying the threshold level of net effect that becomes actionable—rather than leaving the door open to broader uncertainty about what *kinds* of harm are improper.

Perhaps the greatest advantage of an option-oriented statute is that it will help governments explain to their citizens—particularly those businesses and individuals who are relatively inexperienced at dealing with a market economy—why a system of competitive capitalism is in their best interests. Both antitrust and consumer protection laws help to ensure that consumers enjoy the fruits of competition. If protection at both these levels is present, then consumers truly can be sovereign. Our framework might help to explain a market economy in terms that are intuitively understandable and, thus, to facilitate its general acceptance.

VI. CONCLUSION

Trade regulation law is ultimately about choice, and choice is ultimately about options—getting them, keeping them, and selecting among them. The disciplines of antitrust and consumer protection law are best defined in terms of their roles in this process.[157] An antitrust violation may be

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adopt some form of supplemental general clause, then we believe that the form set out here will achieve the benefits of that approach while creating the fewest associated difficulties.

156 This uncertainty can, of course, be diminished over time through clarifying interpretations. The proposed alternative language would seem to require a shorter period of clarification, however.

157 *See* Neil W. Averitt & Robert H. Lande, A New Definition of Antitrust: Option Restriction (working draft, on file with authors) (contrasting an option-oriented definition of antitrust to other possibilities and suggesting that the option-oriented version is superior).

understood as an activity that unreasonably distorts or restricts the options that otherwise would be available to consumers. A consumer protection violation may be understood as activity that unreasonably interferes with consumer choice among the options provided in the marketplace. These two fields of law, acting together, give consumers the tools they need to exercise consumer sovereignty effectively.

A number of benefits should flow from this unified conception of the trade regulation laws. It should make lawyers practicing in these disciplines more alert to the possibility that a case focusing on one element of consumer sovereignty will also raise issues involving the other element. It may also remind practitioners that a violation under one half of the consumer sovereignty model might sometimes best be remedied by a solution that deals with factors normally considered in actions under the other half. It also suggests that economists practicing primarily in one field should gain insights from the other.[158] Both types of market failures seem to be of equal importance, so both would seem equally deserving of professional study.

The final purpose of this article has been to help focus the attention of both fields on options, a shift in focus from the current administrative and judicial emphasis on price. Although price competition often is of utmost importance to consumer welfare, so too is the variety, quality, and innovation of products. These attributes have sometimes been treated as afterthoughts when they actually should be at the forefront of debate and analysis in this important area of the law.

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[158] For example, economists have perhaps tended to be most comfortable as a discipline with the hard, "objective" market imperfections involved in antitrust, and to be less comfortable with the more subjective and sociological kinds of "inside the head" failures that mark the typical consumer protection matter. For exceptions, see the *Kodak* literature, *supra* part III.A.