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## ARTICLES

### The Commensurability Myth in Antitrust

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*Modern antitrust law pursues a seemingly unitary goal: competition. In fact, competition—whether defined as a process or as a set of outcomes associated with competitive markets—is multifaceted. What are offered in antitrust cases as procompetitive and anticompetitive effects are typically qualitatively different, and trading them off is as much an exercise in judgment as mathematics. But despite the inevitability of value judgments in antitrust cases, courts have perpetuated a commensurability myth, claiming to evaluate “net” competitive effect as if the pros and cons of a restraint of trade are in the same unit of measure. The myth is attractive to courts because it appears to allow the law to avoid the murky, value-laden compromises struck by other areas of regulation. But courts have suppressed important debates about what matters most about competition by glossing over the fact that even given a narrow mandate—to protect competition—antitrust law must make contested value judgments. Debunking the commensurability myth is the first step in stimulating scholarly and judicial debates about how to balance antitrust’s inherent tradeoffs, such as price effects with qualitative consumer welfare,*

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*present with future benefits from competition, and consumer welfare among different classes of purchasers.*

*This Article explores the commensurability myth, using Sherman Act § 1 cases to illustrate the incommensurability of most pro- and anticompetitive effects claimed in an antitrust suit. It then argues that the myth distorts antitrust litigation as courts find ways—such as insurmountable burdens of proof—to avoid the appearance of incommensurate balancing. Finally, it identifies the doctrinal and institutional debates—largely missing from antitrust discourse today—raised by confronting the commensurability problem in antitrust.*

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## INTRODUCTION

At its heart, antitrust law believes it is exceptional. Unlike most areas of regulation where rules must trade off costs and benefits different in kind, antitrust claims to pursue one single goal: competition.<sup>1</sup> Courts often endorse the idea that the values traded off in competition regulation—the procompetitive effects and the anticompetitive effects—are commensurate. For example, courts frequently characterize Sherman Act § 1 as condemning restraints on

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1. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”); Gregory J. Werden, *Antitrust’s Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 714 (2014) (“[T]he impact of a challenged restraint on the competitive process is the only issue the Court considers under the rule of reason.”).

trade having a “net” anticompetitive effect, and condoning those whose effects sum to a neutral or procompetitive effect. This supposedly unitary goal of antitrust—to facilitate competition—allows the law to appear to avoid the murky, value-laden compromises struck by other areas of regulation.

But antitrust law is not exceptional. Even within the now-dominant paradigm that antitrust pursues only economic goals,<sup>2</sup> value judgments are unavoidable. What are typically offered in antitrust cases as procompetitive and anticompetitive effects are rarely two sides of the same coin, and there is no such monolithic thing as “competition” that is furthered or impeded by competitor conduct. In fact, competition—whether defined as a process or as a set of outcomes associated with competitive markets—is multifaceted. Antitrust law often must trade off one kind of competition for another, or one salutary effect of competition (such as price, quality or innovation) for another. And in so doing, antitrust courts must make judgments between different and incommensurate values.

The incommensurability problem is not entirely unrecognized in antitrust discourse, but it is downplayed in a manner harmful to policy and doctrine.<sup>3</sup> Antitrust scholars acknowledge—and sometimes even highlight—the incomparability of the effects they measure.<sup>4</sup> Judicial opinions occasionally, although less often, contain explicit discussions of the disparate competitive values at stake.<sup>5</sup> But more often, these judgments are implicit.

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2. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978). Phrases of this ilk are ubiquitous; see, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 n.27 (1984) (“[T]he policy unequivocally laid down by the [Sherman] Act is competition.” (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958))).

3. Professor Maurice E. Stucke, for example, has a nice, but very brief, discussion of the problem in his article *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1441–46 (2009) (“Economists, much less judicial fact-finders, are ill-equipped to quantify the value of different forms of competition, such as inter- and intrabrand competition, static versus dynamic efficiency, and a restraint’s impact on that competition.”).

4. See, e.g., Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 36 (2015) (observing that antitrust must sometimes trade off incommensurable values associated with free speech and innovation); Philip C. Kissam, *Antitrust Boycott Doctrine*, 69 IOWA L. REV. 1165, 1171–72 (1984) (briefly observing that the Rule of Reason “typically will involve [balancing] incommensurable factors”); Werden, *supra* note 1, at 755 (recognizing the problem of incommensurability but declining to explore its significance for his defense of “competition” as the unitary goal of antitrust). Cf. Alan Devlin & Michael Jacobs, *Antitrust Divergence and the Limits of Economics*, 104 NW. U. L. REV. 253, 282 (2010) (noting that the costs and benefits of the US’s and EU’s different approaches to antitrust are incommensurable).

5. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007) (debating the merits of intrabrand versus interbrand competition).

The absence of attention to the fact that procompetitive and anticompetitive effects, as they are presented in an antitrust suit, are usually incommensurate, and the absence of debate about how to trade them off means that antitrust law is under-theorized. Rhetoric of commensurability in antitrust has made it unpopular for judges to acknowledge the use of value judgments in deciding antitrust cases.<sup>6</sup> This has pushed important debates about those values into the subtext of antitrust opinions rather than allowing for the full and open discussion that they merit. It has also led to a set of doctrines that courts use to avoid the appearance of judgment, which distort antitrust litigation usually in favor of defendants. These evasive maneuvers have made a mess out of questions such as when the burden of production shifts from plaintiff to defendant, which arguments require empirical proof or a rigorously defined market, and what kinds of procompetitive justifications are categorically illegitimate.

This Article uses Sherman Act § 1 liability to illustrate the incommensurability of most pro- and anticompetitive effects in antitrust litigation. Although the problem pervades antitrust law and policy, § 1 doctrine nicely illustrates the (false) exceptionalism of antitrust. The rhetoric of the Rule of Reason<sup>7</sup> (the dominant mode of §1 analysis) exemplifies the problem: it claims to protect agreements that enhance competition and condemn those that destroy it,<sup>8</sup> as if “competition” referred to one single value that antitrust must promote. But below the surface, the cases and rules actually do struggle with how to trade off very different benefits and costs of agreements among

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6. See *infra* Section I.B (discussing the origins and modern manifestations of the use of value judgments in deciding antitrust cases).

7. The Rule of Reason under § 1 of the Sherman Act—a standard that balances pro- with anticompetitive effects—is the standard used for all restraints on trade not subject to *per se* condemnation. Only hard-core price fixing and other cartel-like activities are condemned *per se*—that is, without hearing defenses of their efficiency. All other agreements among competitors are evaluated under the Rule of Reason, which condemns restraints whose negative competitive effects (“anticompetitive effects”) outweigh their benefits to competition (“procompetitive effects”). Those that are more “pro” than “anti” pass muster under the Rule of Reason. See, e.g., *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508 (4th Cir. 2002) (“[A] plaintiff must show that the net effect of a challenged restraint is harmful to competition.”); Werden, *supra* note 1, at 744, 748–49.

8. See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458 (1986) (“[Under the Rule of Reason,] the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition.” (quoting *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918))); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 691 (1978) (“[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.”); *Wilk v. Am. Med. Ass’n*, 719 F.2d 207, 227 (7th Cir. 1983) (holding that under the Rule of Reason, the plaintiff should show an agreement “has been to restrict competition, rather than promote it”).

competitors. Examples include trading off quantitative for qualitative measures of consumer welfare, balancing present and future competitive effects, and trading off competitive effects on different classes of consumers. These latent debates play out in cases considering restraints that suppress intrabrand competition while stimulating interbrand competition,<sup>9</sup> that trade a free market with failures for a self-regulated market with suppressed rivalry,<sup>10</sup> and that create a “new product” by otherwise restricting competition.

I do not intend to argue that antitrust should take into account a broader set of social goals such as wealth redistribution, protection of small businesses, or mitigating the evils of bigness.<sup>11</sup> These common criticisms of modern antitrust run contrary to over three decades of consensus among courts—and most scholars—that antitrust ought to pursue only economic goals in the form of competition.<sup>12</sup> What this account intends to do is to point out that this consensus, as it is often presented by courts and commentators, contains an important and problematic hypocrisy. A focus on purely economic effects is sometimes touted as avoiding difficult value judgments,<sup>13</sup> but it does no such thing.

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9. *Compare Leegin*, 551 U.S. at 878 (implying that it was appropriate to trade off reduced intrabrand competition for greater interbrand competition because “the primary purpose of [antitrust law] is to protect [interbrand] competition”), *with* *United States v. Topco Assocs.*, 405 U.S. 596, 609–10 (1972) (generally accepting a reduction in intrabrand competition in support of interbrand competition, but noting a general “inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector”).

10. *Cf.* *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 760–62 (1999); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 819–22 (6th Cir. 2011).

11. For scholars discussing and rejecting non-economic justifications for antitrust intervention, see Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 475–76 (2012); Robert Pitofsky, *Antitrust Modified: Education, Defense, and Other Worthy Enterprises*, 9 ANTITRUST, Spring 1995, at 23, 25; and Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer*, 22 LOY. CONSUMER L. REV. 336, 350 (2010).

12. *See Leegin*, 551 U.S. at 909 (stating that the goal of the Sherman Act is to “bring about the lower prices . . . and more efficient production processes that consumers typically desire” through competitive market forces); *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 695 (explaining that the Sherman Act is intended to promote competition); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1176 (7th Cir. 1983) (same); RICHARD A. POSNER, ANTITRUST LAW ix (2d ed. 2001) (same); Adam J. Di Vincenzo, *Editor’s Note: Robert Bork, Originalism, And Bounded Antitrust*, 79 ANTITRUST L.J. 821, 833 (2014) (discussing the “enduring consensus” that antitrust serves only economic goals); Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense To Horizontal Price-Fixing*, 81 CAL. L. REV. 243, 254 (1993) (noting that “the courts, commentators, and even critics have more or less reached consensus that efficiency is the appropriate objective when analyzing antitrust issues”); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 135–36 (2010) (observing that most antitrust scholars “now agree that the protection of consumer welfare should be the only goal of antitrust laws”).

13. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 114–15 (2d ed. 1993).

Nor does this Article argue that antitrust law must be completely reformed. I mean to observe that antitrust courts *do* trade off incommensurate values in Rule of Reason cases, and that is as it must be. Given that this is the inevitable project of antitrust law, I argue that a more honest account of what kind of balancing is involved will improve the rationality, transparency, and legitimacy of the law. This Article suggests a significant change in the way we talk about antitrust law, but I do not argue that the incommensurability of competitive effects makes antitrust judging impossible or illegitimate. Rather I argue that recognizing the incommensurate nature of the values in tension in the typical antitrust case can light a clearer path forward.

Part I defines commensurability and identifies the commensurability myth in antitrust law, revealing its origins and illustrating its continued prominence in antitrust discourse. It then contrasts antitrust with two other areas of law—constitutional law and administrative law—where commensurability problems are confronted head-on. Part II then illustrates the incommensurability problem that pervades § 1 analysis, using cases to illustrate the myth and its consequences. Part III identifies the distorting doctrines courts have developed in response to the commensurability problem, doctrines that have made antitrust less predictable and less fair. Finally, Part IV outlines the doctrinal and institutional debates currently missing from antitrust discourse that are inevitably raised by the commensurability problem. A short conclusion follows.

## I. INCOMMENSURABILITY IN ANTITRUST AND ELSEWHERE

Rhetoric of commensurability is common in antitrust case law generally and § 1 standards specifically. It is implicit in frequently-invoked images of “net” effect on competition, and in the idea that a restriction’s ultimate effect is either to promote or to suppress competition. This Part identifies these themes, traces their origins, and illustrates their continued dominance.

In Section A, I define what I mean by commensurate and incommensurate, because these terms are often used—in philosophy and law—to describe subtly different phenomena. Armed with a workable definition of commensurability, Section B then sketches the history of the commensurability myth and its current status in antitrust jurisprudence. Section C further highlights the commensurability myth by presenting contrasting areas of law where the commensurability problem is addressed more openly than in antitrust.



*A. What is Commensurability?*

In this Article I do not use “incommensurable” in its strongest philosophical sense, which would apply only to values or objects that cannot ever be compared or traded off in a rational manner.<sup>14</sup> Rather, I call “incommensurate” those values that cannot be traded off without appeal to another external set of values, some of which may be controversial.<sup>15</sup> For example, under my definition of “commensurability,” apples and oranges are incommensurate because choosing between them requires developing a set of criteria—which may be contested—for how to compare the fruits. But this does not imply that apples and oranges can never be rationally compared. If, for example, we could agree that sugar content was the most important factor for comparison, with fiber to serve as a tie-breaker, a decision maker could quite rationally compare apples and oranges. In contrast, euros and dollars are, for my purposes, commensurable; there is a standard rate, at any given time, by which one can be converted to the other that leaves very little room for debate or judgment in the calculation.<sup>16</sup> The apples-and-oranges example requires judgment about comparative criteria, and the euros-and-dollars does not.

I do not dispute that markets are capable of making otherwise incommensurate values—such as product quality, nutritional value, personal pleasure, or self-esteem—commensurate with money.<sup>17</sup> Nor do I argue that such conversions are illegitimate and undesirable; indeed, antitrust is premised on the traditional free market principle that consumers, by purchasing according to their own idiosyncratic preferences, should set the price for goods under competitive conditions. Thus when I argue that quality and price are incommensurate, I do not mean that they cannot be made commensurate by market forces.

I mean that in the typical antitrust case, consumer preferences about intangibles such as quality and variety are unobservable, either because the defendant is making a counterfactual claim (“without this

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14. See Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1172 (1998) (defining incommensurability as incomparability, which precludes justified choice).

15. Cf. Richard Craswell, *Incommensurability, Welfare, Economics, and the Law*, 146 U. PA. L. REV. 1419, 1421 (1998) (“[T]wo goods can always be ranked on *some* scale.” (emphasis added)).

16. Note that my definition of commensurability is a question of degree, since it is possible that some people may dispute which conversion rate to use—that posted by the U.S. Federal Reserve, the European Central Bank, or some third source. My point is that some conversions between values require relatively little judgment. When the freedom embodied in that judgment is sufficiently small (and where that threshold lies is undoubtedly context-dependent), one may call the values “commensurate.”

17. See generally Craswell, *supra* note 15 (arguing against the notion that idiosyncratic utility and risks resulting from consumer choices are incommensurable with money).

restriction, quality would suffer”) or because data on consumer behavior is unavailable, too costly to collect, or unreliable. In other words, the values *as they are presented to a court* are incommensurate. In the typical antitrust case, the judge, not the consumer, is in the position of trading off values for which there is no uncontroversial conversion rate. Judges, just like consumers, can and do make judgments between these incommensurate values and so, in the philosophical sense, make them commensurate again. The commensurability myth is that those choices, because they aim to maximize a seemingly unitary goal, such as consumer welfare or competition, can be made without reliance on contested (at best) or idiosyncratic (at worst) value judgments.

*B. The Commensurability Myth in Antitrust:  
Origins and Modern Manifestations*

The roots of the commensurability myth can be found in early Sherman Act cases, but it is the rhetoric of the Chicago School revolution that firmly entrenched the myth in modern antitrust law and policy. Thanks to a reordering of antitrust priorities in the 1970s and 1980s, heavily influenced by Professor Robert Bork, the modern consensus among courts is that antitrust vindicates economic goals alone, not social or welfare goals unrelated to competition or efficiency.<sup>18</sup> This realignment led to what many applaud as the rationalization of antitrust law, with economic analysis playing a starring role.<sup>19</sup> But a common error among those embracing the economic paradigm is to assume that when economics won out as the dominant mode of antitrust analysis, we solved the commensurability problem once and for all.

In an article that would become a lodestar of the economic revolution of antitrust, Professor Bork identified a virtue of the wealth maximization paradigm of antitrust: avoiding value judgments. His

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18. See Di Vincenzo, *supra* note 12, at 833 (discussing the “enduring consensus” that antitrust serves only economic goals). Some critics have argued that antitrust should be, and perhaps once was, designed to trade off disparate values such as fairness and welfare or concentrations of political power and production efficiency, Louis Brandeis being perhaps the most prominent figure holding this view. See Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 66 (2013) (observing that Brandeis espoused “a view of antitrust that looks beyond the efficiency effects of a particular combination or restraint to the broader social effects of domination of the market by a few, large entities”). These arguments, although sometimes still made from a position critical of the modern-day antitrust paradigm, have not had much traction in courts since the 1970s. See *supra* note 12 and sources cited therein.

19. See, e.g., David L. Meyer, *We Should Not Let the Ongoing Rationalization of Antitrust Lead to the Marginalization of Antitrust*, 15 GEO. MASON L. REV. 1175, 1175 (2008) (characterizing the realignment of antitrust around economic principles as “highly beneficial”).

language was emphatic, and is now archetypal of the many judicial opinions endorsing the commensurability myth:

Because [antitrust] serves the single, unchanging value of wealth maximization it does not require the courts to choose or weigh ultimate values in the decision of individual cases or in the continuing evolution of doctrine. Neither are the courts involved in making comparisons of and choices between persons and groups of persons.<sup>20</sup>

His principle of wealth maximization, which he equated with consumer welfare,<sup>21</sup> promised to save antitrust from value judgments altogether.<sup>22</sup>

Professor Bork's singular focus on consumer welfare as the guiding goal of antitrust thus offered to transcend ideology at a time when antitrust was seen as an excessively political game that "the government always wins."<sup>23</sup> The concern for small competitors and fairness in competition that had dominated antitrust litigation, at least according to Professor Bork, made for unstructured choices for which there was "no social science, no set of criteria, which could guide the choice in the particular case."<sup>24</sup> His was a message of judicial minimalism that was particularly attractive to judges and enforcers because it allowed them the legitimacy of using science instead of judgment.<sup>25</sup> In Professor Bork's words, the adoption of the economic standard in the 1970s transformed antitrust from "social policy" to "merely law."<sup>26</sup>

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20. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 1), 74 YALE L.J. 775, 838 (1965).

21. See Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 991 (2002) ("[Bork] championed total wealth maximization . . . as the goal of antitrust, although he confusingly labeled this goal 'consumer welfare.'").

22. See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10 (1966) (criticizing Learned Hand as assuming a "value-choosing role" in *Alcoa* and *Associated Press*).

23. *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting); see also Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217–18 (2010) ("The Court had read into the Sherman Act an assortment of vague and, ironically, anti-competitive social and political goals, such as protecting small traders from their larger, impersonal (and more efficient) rivals.").

24. Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 246 (1967).

25. See Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 835 (2014) (noting that Professor Bork's emphasis on consumer welfare "reduced antitrust law to an elegant and precise formula that ostensibly could be applied with consistency, accountability, and scientific rigor"); Di Vincenzo, *supra* note 12, at 829; George L. Priest, *The Abiding Influence of The Antitrust Paradox: An Essay in Honor of Robert H. Bork*, 31 HARV. J.L. & PUB. POL'Y 455, 458, 461 (2008) (noting that Bork's *Antitrust Paradox* "explains why the consumer welfare standard for antitrust law provides a consistent, normatively defensible, and politically removed standard for decision by courts").

26. See BORK, *supra* note 13, at ix–x.

When courts adopted Professor Bork's singular focus on economic effects, they also accepted his rhetoric of commensurability, and the myth was born. Antitrust legal opinions since then are rife with characterizations of § 1 liability that imply symmetry between pro- and anticompetitive effects. Courts will often discuss the "net" competitive effect of a restriction,<sup>27</sup> a concept that is encouraged by the oft-quoted language from *Chicago Board of Trade* that "the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."<sup>28</sup> Interpreting the Rule of Reason to be an inquiry into net effects is a reasonable understanding of this language, since if a restriction can suppress or promote "competition," it would seem that "competition" has a single meaning or value that can be increased or destroyed. The Court's language in its 1999 opinion in *California Dental Association v. FTC*<sup>29</sup> is typical, and has been quoted repeatedly since then: "the [challenged] restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."<sup>30</sup>

In addition to ubiquitous judicial references to "net" competitive effects, cases often identify antitrust as serving a single goal—always a variation of economic efficiency, competition, or wealth maximization. It has become so mainstream to simplify antitrust policy in this manner as to be taken for granted. Thus, the references to the single-mindedness of antitrust policy are usually off-hand: "the sole aim of antitrust legislation is to protect competition"<sup>31</sup> is typical. And it is unexceptional to begin a sentence in an antitrust case with something like the following clause: "Assuming as I must that the sole goal of antitrust is efficiency or, put another way, the maximization of total societal wealth . . . ."<sup>32</sup>

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27. See, e.g., *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1138 (9th Cir. 2011) (suggesting analysis of an agreement should look to whether it "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition" (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999))); *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508 (4th Cir. 2002) ("[A] plaintiff must show that the net effect of a challenged restraint is harmful to competition.").

28. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). This language is quoted in hundreds of federal antitrust cases. See, e.g., *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203 n.10 (2010); *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963); *United States v. Brown Univ.*, 5 F.3d 658, 668 n.8 (3d Cir. 1993); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 853 F. Supp. 837, 840 (E.D. Pa. 1994).

29. 526 U.S. 756 (1999).

30. *Id.* at 771.

31. *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689 (1975).

32. *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 602 (7th Cir. 1996).

Courts so enthusiastically embraced Professor Bork's invitation to rationalize antitrust law that they overlooked a key exaggeration in his claim. Adopting economic efficiency as the single goal of antitrust law and policy may have settled much of the ideological dispute in antitrust, but it did not eliminate all important value judgments in its application. And some modern scholars have also encouraged the myth. For example, in a 2013 article, Professor Thomas B. Nachbar invokes commensurability:

Another major benefit of a singular focus on efficiency is its compatibility with the kind of balancing called for by the rule of reason. Any restraint can be broken down into a number of effects, and economics renders those effects perfectly commensurable, and hence balanceable. Effects on efficiency can be re-stated as scalars, which vastly simplifies rule-of-reason balancing.<sup>33</sup>

These proclamations have led courts to (at least claim to) avoid value judgments in antitrust cases. For example, in the much-maligned *Topco*<sup>34</sup> case that held a horizontal geographic restriction on competition to be illegal, the Supreme Court emphasized its "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector."<sup>35</sup> Likewise, the Court has declared that "it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry . . . . [T]hat policy decision has been made by the Congress."<sup>36</sup> These statements of judicial incompetence and congressional intent emphasize not only that courts need not—but that they should not—weigh incommensurate competitive values.

### *C. Incommensurability in Other Areas of Law*

Two other areas of law, constitutional law and administrative law, face significant commensurability problems and, for the most part, address these problems more explicitly than antitrust. In these areas of law, anxiety about incommensurate balancing leads to thoughtful debates about the appropriate weight given each side of the scale. To be sure, the values traded off in these kinds of cases are more disparate—and incomparable—than those in the antitrust context. But as the next Part illustrates, value judgments are unavoidable in antitrust, albeit among a narrower set of interests. Thus, the maturity of debates about

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33. Nachbar, *supra* note 18, at 64.

34. *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

35. *Id.* at 609–10.

36. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

disparate values in administrative and constitutional law can illuminate the near total absence of similar debates about competitive values in antitrust jurisprudence.

### 1. Incommensurability in Constitutional Law

In constitutional law, balancing is a commonly used metaphor for what courts do in protecting individual rights against legitimate governmental interests in welfare, safety, and social order. Thus, judicial opinions deciding the constitutionality of a state statute potentially limiting privacy address the state's interest and the individual privacy interests in turn, rather than casting the inquiry into a "net" effects analysis on a unitary goal such as happiness or welfare.<sup>37</sup> There is no pretense that "net" is a term that makes sense in the context of balancing a private right against a public good, even though judges must and do trade off one for the other.<sup>38</sup>

The nakedness of the commensurability problem means that constitutional scholars and courts debate the incommensurate values at stake. For example, there is a particularly robust debate in the First Amendment context about when an individual's speech interest may be outweighed by an unrelated state interest.<sup>39</sup> Likewise, scholars and judges frequently theorize about how safety and privacy should be balanced in Fourth Amendment cases.<sup>40</sup> These debates help expose disagreement about the right way to trade off effects, and also help to get the balance "right" by approximating a political or academic consensus about incommensurate values where it exists.

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37. Scholars have noted that incommensurability results when you trade off a right against a state interest. *E.g.*, Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 794 (1994).

38. First Amendment cases often ask courts to trade off an individual's interest in free speech against the government's interest in social order and safety. *See, e.g.*, Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1270 n.132 (2004) (discussing the legitimacy of weighing the government's interest in safety and social order against First Amendment concerns (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60–64 (1973))). Similarly, Fourth Amendment cases trade off interests in privacy for police interests in solving crimes and keeping the peace.

39. *See* Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1045–46 (1978) (discussing the potential conflicts between the constitutional right to free press and the right to a fair trial, and suggesting that the weight attributed to each value by the Court during the balancing process is "subject to differences of view").

40. *See, e.g.*, Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 39–46 (2013) (discussing how balancing may be better calibrated in the Fourth Amendment context); Laura A. Lundquist, *Weighing the Factors of Drug Testing for Fourth Amendment Balancing*, 60 GEO. WASH. L. REV. 1151, 1152–54 (1992) (suggesting a framework for balancing Fourth Amendment concerns in drug testing cases).

In some cases, the difficulty or impropriety of balancing incommensurate values leads scholars and judges to conclude that balancing is not appropriate.<sup>41</sup> In these cases, a critic may advocate for doctrinal solutions that avoid balancing or that give the task to a more fitting decisionmaker. For example, dissenting in a dormant Commerce Clause case challenging a state's law tolling the statute of limitations for out-of-state businesses, Justice Scalia criticized as incoherent the majority's "balancing" of the in-state and out-of-state interests at stake:

Having evaluated the interests on both sides . . . roughly . . . , the court then proceeds to judge which is more important. This process is ordinarily called "balancing," but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.<sup>42</sup>

To Justice Scalia, such a task is unbecoming to a federal judge and more appropriately addressed by Congress.<sup>43</sup> Such criticisms of incommensurate balancing expose its difficulties and risks, and underline the need for comparative institutional analysis.

## 2. Incommensurability in Administrative Law

In regulation through the administrative state, incommensurate balancing often takes the form of cost-benefit analysis. Cost-benefit analysis is different from constitutional balancing—which never really claims to solve the incommensurability problem—because the aim of cost-benefit analysis is to reduce apples and oranges to a commensurate unit (dollars) and so to approximate an apples-to-apples comparison. Thus, cost-benefit analysis is an acknowledgement both that the values traded off in administrative regulation are more commensurate than in

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41. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 944–45 (1987). Justice Hugo Black was famous for rejecting the notion of balancing in First Amendment cases. See, e.g., *El Paso v. Simmons*, 379 U.S. 497, 533 (1965) (Black, J., dissenting) (“[C]onstitutional adjudication under the balancing method becomes simply a matter of this Court’s deciding for itself which result in a particular case seems . . . the more acceptable governmental policy and then stating the facts in such a way that the considerations in the balance lead to the result.”); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 164 (1961) (Black, J., dissenting) (urging the Court to “abandon what [he] consider[ed] to be the dangerous constitutional doctrine of ‘balancing’”); *Konigsberg v. State Bar*, 366 U.S. 36, 68 (1961) (Black & Brennan, JJ., dissenting) (accusing the majority of pushing balancing “to the limit of its logic”); *Barenblatt v. United States*, 360 U.S. 109, 141 (1959) (Black, J., dissenting) (“I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process.”); *Rochin v. California*, 342 U.S. 165, 175–77 (1952) (Black, J., concurring) (arguing that balancing imperils individual liberty); see also Henkin, *supra* note 39, at 1023 (“The most eminent critic of balancing, all know, was Justice Hugo Black . . .”).

42. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (citation omitted).

43. *Id.*

the constitutional context (because they can be approximated in the same unit of measure) and that they are not entirely commensurate (otherwise agencies would not bother with the complicated and contested task of reducing costs and benefits to monetary terms).

This explicit process of conversion from incommensurate to commensurate is a source of lively controversy, as it should be. There are vigorous debates about the dollar value of social or moral values, such as human life or environmental health, to which scholars bring many tools from empirical economic modeling to moral theory.<sup>44</sup> There is likewise debate in many areas of regulation about whether converting some values to a dollar scale (and therefore cost-benefit analysis in the first place) is ever an appropriate exercise.<sup>45</sup>

The sophistication of academic debates about cost-benefit analysis reveals the benefits of explicit engagement with incommensurability problems. For example, in monetizing the value of life and health, some scholars hold that discounting future benefits is inappropriate and leads to anti-regulation cost-benefit analyses.<sup>46</sup> Others hold that discounting is an appropriate measure.<sup>47</sup> An agency's choice to discount, and by how much, must confront this debate and its moral and political implications, leading to better, or at least more legitimate, decisionmaking. Similarly, some scholars argue that cost-benefit analysis in its most common form does not account for adaptation—by individuals and firms—to regulation, but it can and should be calibrated to measure regulatory costs and benefits that reflect these adjustments.<sup>48</sup> Other scholars more critical of cost-benefit analysis argue that it is categorically inappropriate in a particular circumstance, or argue that it has systematically favored politically conservative perspectives.<sup>49</sup> All of these debates reveal the value

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44. See, e.g., Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REG., Jan.–Feb. 1981, at 33; James V. DeLong et al., *Defending Cost-Benefit Analysis: Replies to Steven Kelman*, REG., Mar.–Apr. 1981, at 39.

45. Kelman, *supra* note 44, at 33; see Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388–89 (1981) (arguing against the use of cost-benefit analysis in justifying private law rules).

46. RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 107–17 (2008).

47. See, e.g., W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITY FOR RISK 55 (1992) (“[T]here is no evidence to indicate that we should use a different rate of discount when weighting the long-term health benefits of policies that affect life extension as compared with other benefit and cost components that these policies may have.”). Likewise, the OMB guidelines approve of future discounting. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-431–36 (Sep. 9, 2003) (discussing the use of discount rates).

48. See REVESZ & LIVERMORE, *supra* note 46, at 85–93, 131–43.

49. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 7–12 (2004).



judgments inherent in cost-benefit analysis, value judgments made inevitable by the incommensurability problem cost-benefit analysis is designed to address. This transparency allows for better engagement with, and attention to, the motivations and biases that agencies bring to regulation.

## II. THE INCOMMENSURATE VALUES OF COMPETITION

In this Part, I argue that whether the Rule of Reason is seen as vindicating consumer welfare or competition as a process, most § 1 cases must tackle incommensurability between pro- and anticompetitive effects. There is almost unanimous consensus among modern interpreters of the Sherman Act that its purpose is to further economic welfare by protecting competition.<sup>50</sup> There is, however, some debate about whether the correct welfare standard under the Sherman Act is total welfare, which would include producer and consumer surplus, or consumer welfare alone, which is typically equated with consumer surplus.<sup>51</sup> Under a total welfare standard, antitrust laws would allow restrictions on trade that harm consumers, as long as they benefit producers by a greater amount.<sup>52</sup> Under a consumer welfare standard, any restriction that harms consumers, whatever its effect on producers, would be condemned under the antitrust laws.<sup>53</sup>

This article assumes that the appropriate standard is consumer welfare, for two reasons. First, consumer welfare is the more dominant paradigm, especially in the courts, but even among scholars. Second, it is the easier case for the commensurability myth and so gives my critics the benefit of the doubt. In other words, if there is significant

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50. See *supra* note 12.

51. See Orbach, *supra* note 12, at 137 (“Rather, today, there are two major groups of thought: one argues that the term should mean ‘consumer surplus,’ and the other asserts that the appropriate meaning is ‘total surplus’ or ‘aggregate welfare.’”); Salop, *supra* note 11, at 336 (“Some commentators favor the aggregate economic welfare standard . . . . [O]ther commentators favor what I will refer to as the true consumer welfare standard.”). Consumer surplus is typically defined as the aggregate difference between consumers’ willingness to pay and the prevailing price. In a simple market where one price prevails, consumer surplus is the area under the demand curve above price. Similarly, producer welfare is defined as the aggregate difference between price and marginal cost. Again, in a simple market where one price prevails, producer welfare can be defined as the area above the supply curve (marginal cost curve) and below price. See Orbach, *supra* note 12, at 140, for a simple graphical illustration of these concepts.

52. See Blair & Sokol, *supra* note 11, at 483 (advocating for a total welfare standard that would deem legal a restraint that benefits the winners more than it harms the losers); Salop, *supra* note 11, at 336 (“[T]he aggregate economic welfare standard would condemn conduct only if it decreases the sum of the welfare of consumers (i.e., buyers) plus producers (i.e., sellers plus competitors); and without regard to any wealth transfers.”).

53. Salop, *supra* note 11, at 336 (“[T]he true consumer welfare standard would condemn conduct if it reduces the welfare of buyers, irrespective of its impact on sellers.”).

incommensurability among pro- and anticompetitive *consumer* welfare effects (as I intend to show), then the problem must be even worse among producer *and* consumer welfare effects.

Section A provides a typology of the incommensurate tradeoffs courts are typically asked to make in Rule of Reason cases. The incommensurate comparisons are loosely grouped into three categories: tradeoffs between quantitative and qualitative measures of welfare, tradeoffs between welfare now and welfare in the future, and welfare tradeoffs between different groups of consumers. Section B then explores three categories of restraints often challenged under the Rule of Reason, illustrating that in the typical case, the pro- and anticompetitive effects offered by the litigants trade in different units of measure.

### A. Types of Incommensurate Tradeoffs

A consumer welfare standard, as it is now understood,<sup>54</sup> would assess a restriction's effect on consumer surplus, or the aggregate difference between price and each consumers' willingness to pay.<sup>55</sup> This can be simplified graphically by using a two-dimensional supply and demand curve: consumer welfare is the area below the demand curve and above price. If a restriction enlarges this area, then it has the effect of improving consumer welfare.<sup>56</sup> But the mathematical and graphical simplicity of using two-dimensional supply-and-demand curves to illustrate consumer surplus<sup>57</sup> oversimplifies the concept. There are many different factors that influence a consumer's willingness to pay, meaning that a single restriction can simultaneously offer benefits and

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54. There is significant controversy over what Robert Bork meant by using this term in THE ANTITRUST PARADOX. See, e.g., Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032 (1987) (noting that Bork's usage of the term "as a synonym for economic efficiency [was] an unnecessary and confusing redundancy" and contending that the "term consumer welfare is the most abused term in modern antitrust analysis"); Di Vincenzo, *supra* note 12, at 828 (noting the substantial uncertainty as to what Bork meant by "consumer welfare"); Orbach, *supra* note 12, at 136 ("The Antitrust Paradox ended the debate over the stated goals of antitrust law and opened a new debate over the meaning of the term 'consumer welfare.' Antitrust scholars have known for many years that Bork was 'confused' when he used the term 'consumer welfare.'"). Without taking a stand on that debate, I adopt the now-dominant use of that term—the aggregate consumer surplus in a market for a particular product.

55. See Orbach, *supra* note 12, at 134 n.1 (noting that while the term remains largely ambiguous in antitrust, it has a defined meaning in economics as "the benefits a buyer derives from the consumption of goods and services.").

56. See *id.* at 140 (demonstrating this point with a simple graph).

57. This method of illustrating consumer surplus is ubiquitously used in antitrust casebooks, treatises, and even opinions. See, e.g., *NaBanco v. VISA U.S.A., Inc.*, 596 F. Supp. 1231, 1266–67 (S.D. Fla. 1984) (illustrating merchant willingness to pay based on a series of demand curves).

costs to a single consumer, or benefit some consumers while harming others. To make matters even more complicated, a restriction may inflict harm on a consumer today but promise him benefits in the future. The result is that in most Rule of Reason cases, the “net” effect on consumer welfare cannot be ascertained because what consumers gain and what they lose by a restriction are not presented to the court in commensurate units of measure.

### 1. Quantitative Versus Qualitative Aspects of Consumer Welfare

The two-dimensional supply-and-demand curves that dominate antitrust textbooks depict only two axes of product attributes: quantity and price. This abstraction makes clean and obvious the nature of consumer surplus: it is the excess in consumers’ aggregate willingness to pay above the price offered by the market. But the supply-and-demand graph is a simplification—albeit a very useful one—of a more holistic concept. Price and quantity are not the only relevant dimensions of a market, nor is antitrust so limited in the aspects of consumer welfare that it can consider. There are two major ways in which antitrust doctrine accounts for consumer welfare beyond these x-and-y axes of price and output. First, and most importantly, the law recognizes that consumer surplus is a function not only of price and output but also of product quality and the buying experience, broadly defined.<sup>58</sup> Second, courts recognize that consumers intrinsically value choice and variety in markets.<sup>59</sup> All of these values—price, output, quality, choice, and variety—are appropriate measures of consumer welfare, and all potentially play a role in any § 1 case.

#### *a. Quantitative Measures of Welfare: Price and Output*

Although the two-dimensional supply-and-demand curves typically used to illustrate the economics of antitrust are oversimplified, there is a good reason why those are the two dimensions chosen for the simplification. Price is an essential element of consumer welfare; all things being equal, consumers want to pay less for the same products.<sup>60</sup> Output is likewise an essential element of consumer welfare because it

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58. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882–83 (2007) (describing how Leegin’s business model focused on a high-quality and personalized shopping experience).

59. See *id.* at 927 (Breyer, J., dissenting) (stating that providing consumers with choices is a basic objective of antitrust law).

60. See Craswell, *supra* note 15, at 1426 (noting that it is safe to assume that individuals “prefer to pay a lower price” and “prefer more of a good rather than less”).

is the flip side of price; holding all else constant, a price increase will reduce output, and a reduction in output will increase price.<sup>61</sup> Additionally, price and output are relatively easily quantified, and so present fewer measurement problems than other dimensions of consumer welfare. Thus, price and quantity form the bread and butter of consumer welfare analysis.

*b. Qualitative Measures of Welfare: Quality and Variety*

All things being equal, consumers want to pay less for more. But the modifying phrase, “all things being equal,” is important in recognizing the sacrifices made for the simplicity of the price-quantity paradigm. The price-quantity model holds constant product quality, which has obvious implications for consumer welfare. If quality changes too, then the welfare effect of a price or output shift can no longer be taken for granted. And outside of hard-core cartel activity, price changes are usually accompanied by changes in product quality or the addition or subtraction of product features.

In a perfect world, quality effects could be quantified and made commensurate with price. If consumers perceive a quality improvement in a product, then they will be willing to pay more for it. Economists can in theory measure this quality premium and turn the price term in the quantity-price paradigm into “quality-adjusted price.”<sup>62</sup> This could address the commensurability problem; if quality deterioration or improvement could be captured by the “price” variable, then the two-dimensional price-output paradigm would account for consumer welfare impacted by quality issues. But there are two reasons why using quality-adjusted price is unlikely to fully solve the commensurability problem in antitrust litigation.

Data on how consumers react to quality changes is often lacking, either because the defendant is making a hypothetical claim about quality deterioration in a world without the challenged restriction, or because the data is too costly to collect. Further, parsing out the effect of multiple quality changes or the addition or subtraction of features—because rarely are products changed only in one respect at a time—can be an econometric challenge that often results in less-than-reliable

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61. See Orbach, *supra* note 12, at 152 (“In antitrust economics, price and output are variables that tend to have a simple inverse relationship.”).

62. See *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) (discussing “quality-adjusted price” as a variable of consumer welfare); *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 164 (E.D. Pa. 2010) (discussing an expert economist’s report describing the effect of competition on quality-adjusted price); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1306 (W.D. Mich. 1996) (discussing quality-adjusted price).

answers. The result is that rarely are parties to an antitrust suit able to make undisputed claims about changes in quality.<sup>63</sup> More often, claims about product quality are addressed with judges' gut-level instincts about what consumers want from their products. This may be appropriate given the lack of hard data, and is probably preferable to a system that ignores the effects of product quality on consumer welfare. But it does create an apples-to-oranges problem in trading off the welfare effects of restraints of trade aimed at improving product quality.

Another limiting assumption of the quantitative price-quantity model is that the product in question is homogenous and fungible, and therefore the model does not account for the intrinsic value of choice or variety. If a market consists of several products that compete with each other but that are also different in salient ways, then a single two-dimensional supply-and-demand curve will not adequately capture the effect of competition or the welfare implications of the market. Part of this problem could be addressed by summing aggregate consumer welfare by drawing separate curves for each differentiated product and adding up the consumer welfare from each. But even this burdensome exercise would not capture the inherent value in choice and variety on the market. Consumers like product variety not only because it allows them to satisfy their idiosyncratic tastes (which would be captured by summing the curves of individual products), but also because they find utility in having and exercising choice in making purchases (which would not). Indeed, antitrust can and does recognize that consumers benefit from choice,<sup>64</sup> even if it creates a commensurability problem with more easily-quantified values such as price and quantity.

## 2. Consumer Welfare Now or Later: Innovation in Products and Distribution

Consumer welfare also has an intertemporal dimension, creating a commensurability problem: How should courts trade off future consumer welfare gains for present welfare losses? The price-quantity model, even if it is able to capture quality through quality-adjusted price, is limited because it is static in time—it gives only a snapshot of consumer welfare. It cannot capture the competitive and welfare effects of competitor entry, product innovation, or

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63. See Roger D. Blair & D. Daniel Sokol, *Quality Enhancing Merger Efficiencies*, 100 IOWA L. REV. 1969, 1980–81(2015).

64. See *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (discussing the market benefits of patented products where consumers have multiple choices).

improvements to production and distribution over time, yet consumers undoubtedly derive value from these dynamic market effects. A market that maximizes efficiency now but does not incentivize research and development is obviously less beneficial to consumer welfare than one that both promotes efficiency given the present state of technology *and* induces investment in lowering costs and inspiring demand.<sup>65</sup>

If antitrust vindicates consumer welfare, then it should take account of innovation and other intertemporal dimensions of welfare. For the most part, antitrust seeks to maximize short-run welfare because future benefits are thought to be too speculative to justify known and quantifiable harm to consumers.<sup>66</sup> But antitrust's myopia is not absolute. The Supreme Court itself has invoked the possibility of future payoffs to consumers as a justification for antitrust rules.<sup>67</sup> And in the lower courts, defendants can and do raise arguments about future consumer benefit, such as innovation and competitor entry, which can tip the antitrust judgment in their favor.<sup>68</sup>

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65. *Hearing on Antitrust and the New Economy Before the Antitrust Modernization Comm'n*, 109th Cong. 5 (2005) (statement of M. Howard Morse, Partner & Co-Chair, Drinker Biddle & Reath LLP Antitrust Group) [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Statement\\_Morse\\_rev.d.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Morse_rev.d.pdf) [<http://perma.cc/2TKQ-W7GF>] ("Everyone should understand that small increases in productivity from innovation dwarf even significant reductions in static efficiency over time." (citing F.M. SCHERER & D. ROSS, *INDUSTRIAL MARKET STRUCTURE AND PERFORMANCE* 31, 613 (3d ed. 1990)); Orbach, *supra* note 12, at 157 n.136 (citing U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY* § 1 (1995)).

66. *Cf.* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 711 (1975) (suggesting a general concern for short run, rather than long-term, consumer welfare in monopolization cases). The Court's holding in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013)—that some reverse-payment settlements could violate the antitrust laws—could be interpreted as rejecting innovation arguments in the antitrust context.

67. *See* *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

68. *See* *Gen. Motors Corp.* 103 F.T.C. 374 (1984) (consent order) (allowing a joint venture between GM and Toyota in part because it would allow GM to learn Japanese production techniques). For an example of a case identifying innovation as a policy goal of antitrust, see *Atari Games*, 897 F.2d at 1576. For a policy statement identifying innovation as a goal of antitrust, see U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY* § 1 (1995) (describing a goal of antitrust to be "to promote innovation"). For academic discussions of antitrust and innovation, see Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, in 59 PAPERS AND PROCEEDINGS OF THE EIGHTY-FIRST ANNUAL MEETING OF THE AMERICAN ECONOMICS ASSOCIATION 105, 115–16 (1969) (arguing that there is an optimal market size for innovation, and that antitrust can be used to promote it); Brodley, *supra* note 54, at 1025 ("[T]he promotion of production and innovation efficiency should be the first economic goal of antitrust."); Orbach *supra* note 12, at 156–58 (discussing the importance of innovation in antitrust).

If antitrust is interpreted as vindicating consumer welfare over the long (or even medium) run, then courts encounter commensurability problems.<sup>69</sup> They must compare a bird in the hand to two in the bush, as future benefits are necessarily uncertain. As in other areas of welfare analysis, discounting could be used to reduce future benefits to present units, but the nature of innovation and competitor entry is sufficiently mercurial as to make future discounting almost arbitrary.<sup>70</sup>

### 3. Interconsumer Tradeoffs

Despite Professor Bork's statement that an economic welfare standard for antitrust would allow courts to avoid "making comparisons of and choices between persons and groups of persons,"<sup>71</sup> resolving a Rule of Reason case often does involve at least implicitly elevating the interests of one kind of consumer over another. A purely quantitative change to consumer welfare—such as may be effected by a price reduction holding quality and other intangibles constant—is likely to affect all consumers similarly, or at least in the same direction. But other dimensions of consumer welfare are likely to affect different consumers differently.

For example, quality and feature changes are likely to affect different consumers differently.<sup>72</sup> Quality improvements or the addition of product features, unlike price changes, are valued idiosyncratically, meaning that a single quality change may improve consumer welfare for one set of consumers while doing nothing for another set. Even if quality changes were quantifiable, econometric analysis could provide no guidance about how to balance a price increase that affects all consumers against a quality improvement that only some consumers demand.<sup>73</sup> Here the apples-to-oranges problem is larger than merely a

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69. Devlin & Jacobs, *supra* note 4, at 282 (noting that "the short-term benefits of lower prices and greater choice are not readily commensurable with the long-term benefits of higher incentives to invest in invention"); cf. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 238–39 (2008) (there is often a tension between long-run consumer welfare and short-run allocative efficiency).

70. Cf. Brodley, *supra* note 54, at 1029 (discussing the difficulties in measuring future benefits from innovation).

71. Bork, *supra* note 20, at 838.

72. Cf. Don Boudreaux & Robert B. Ekelund, Jr., *Inframarginal Consumers and the Per Se Legality of Vertical Restraints*, 17 HOFSTRA L. REV. 137, 156–57 (1988) (discussing the possibility that marginal and inframarginal consumers are affected differently by product quality).

73. Cf. Craswell, *supra* note 15, at 1448 ("[I]t is probably fair to say that the mainstream of welfare economics . . . has accepted the proposition that there is no meaningful way to make interpersonal comparisons of utility."); Stucke, *supra* note 3, at 1442 ("In balancing pro- and

lack of data; comparison of the competitive costs and benefits would require a theory about how to trade off benefits to one kind of consumer against harm to another.<sup>74</sup> Likewise, consumers are likely to derive idiosyncratic value from having greater variety and choice in a market. And innovation is especially likely to affect different consumers differently, both because consumers are likely to have different preferences for innovative new products, and because the consumers who benefit from innovation in the future may actually be different people from the consumers of today.

Any model of antitrust that promotes economic efficiency—which certainly describes the current antitrust model in the U.S.—encounters interpersonal commensurability problems.<sup>75</sup> But scholars tend to only discuss interpersonal incommensurability when defending<sup>76</sup> or critiquing<sup>77</sup> the status quo as opposed to a standard that would promote wealth redistribution, which would involve even more extreme interpersonal comparison problems. These discussions tend to ignore that even the current economic efficiency paradigm requires a variety of interpersonal tradeoffs, presenting a range of commensurability problems. Some are relatively small, such as the commensurability of a dollar to one consumer and a dollar to another, and some are relatively large, such as the commensurability of an additional product feature to one consumer versus another consumer.

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anticompetitive effects, the fact finder does not consider whether one group bears the brunt of the anticompetitive effects over time.”).

74. Craswell, *supra* note 15, at 1450 (“[W]elfare economics does not pretend to offer any theory of how to justify decisions that affect more than one individual, if some individuals would gain while others would lose.”).

75. Technically speaking, even price changes affect different consumers differently, since welfare models based on individual utility curves are incapable of making interpersonal comparisons—a dollar may have more marginal value to one consumer than another. Welfare economists avoid this problem by assuming that the marginal value of a dollar is the same for every consumer. See, e.g., Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 235 (1985) (discussing the “constant dollar” assumption of the Chicago School model of antitrust policy). The need for this (questionable) assumption suggests that every attempt to measure welfare encounters and assumes away a commensurability problem. For an excellent critique of the assumption of dollar-for-dollar commensurability, see *id.* at 235–37. This article does not address this level of commensurability problems—which are prominent in the debate about whether antitrust can or should serve redistributive goals—but rather accepts *arguendo* the classic assumption that a dollar has equal value to every consumer. To do otherwise would be to reject the economic welfare model of antitrust altogether.

76. See Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703–05 (1986) (arguing that recognizing wealth redistribution as a goal of antitrust would make the interpersonal incommensurability problem even worse).

77. See Hovenkamp, *supra* note 75, at 235–37 (critiquing the notion that efficiency standard for antitrust is apolitical, since accepting its “constant dollar” assumption is itself a policy choice).



The difference in the magnitude of these commensurability problems gets little attention in antitrust cases or scholarship.

Note that economic science offers little guidance when it comes to making the interpersonal tradeoffs required by antitrust law. As discussed above, quality and variety are features that can, at least in theory, be measured econometrically, because markets are theoretically capable of translating them into a measure commensurate with price. Of course, the qualifier “in theory” matters a great deal in the antitrust context, because often there is little data available to quantify a qualitative change. Likewise, the presence of data about how likely innovations are to occur, and how consumers would value such innovations would, in theory—but often only in theory—address the commensurability problem presented by intertemporal tradeoffs. But the problem is even deeper than a lack of data in the case of interpersonal welfare tradeoffs, where economics as a science has little to offer.<sup>78</sup> Such judgments—often required by law—are left to other, non-scientific decisionmaking processes.

### *B. Restraints of Trade Implicating Incommensurate Values*

Courts considering § 1 cases are routinely asked to make tradeoffs between values that are, as presented in litigation, incommensurate. This section explores three categories of cases—which cover the majority of Rule of Reason cases—in which incommensurability is often a problem. For each category I describe the restraint challenged, its typical competitive effects, and the commensurability problem it tends to raise. I then provide examples showing the difficulty courts face when deciding these cases while attempting to adhere to the myth of commensurability.

#### 1. Vertical Restraints on Resale

Today, it is generally accepted that restraints on vertical resale, such as resale price maintenance (RPM), can have consumer welfare-enhancing effects by improving the quality of the buying experience and stimulating the provision of services along with the product.<sup>79</sup> Vertical

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78. See Craswell, *supra* note 15, at 1448 (noting that “economics can supply no single metric by which gains and losses to different individuals can be ranked”).

79. For a full description of how restrictions on intrabrand competition can enhance interbrand competition, see *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007) (discussing the “free-rider” problem that results in the under-provision of ancillary services and promotional efforts at the retail level, and how vertical restrictions such as resale price maintenance can address it).

restraints can solve a market failure associated with free riding, which can lead to less-than-optimal provision of ancillary sales services provided with the product.<sup>80</sup> These restrictions suppress intrabrand competition (competition among dealers for sales of the same brand) to induce robust interbrand competition (competition among different brands) in the form of better customer service, more attractive displays, and other ancillary sales services.

Of course these improvements in the shopping experience can yield consumer welfare benefits, in the form of product quality (if the “product” is defined as including ancillary services), choice, and variety of buying experiences. It can also promote innovation in sales and distribution methods. But there is also significant evidence that practices like RPM raise consumer prices,<sup>81</sup> which by itself would reduce consumer welfare. Often we cannot know the “but for” prices that consumers would pay for the product with and without the restriction (and thus with and without the enhanced purchase experience), so a court cannot assume that the increase in price provides a conversion rate for the enhanced consumer experience. Quality, variety, innovation, and price are all important dimensions of consumer welfare, but they are not directly commensurable.

Competition itself could alleviate the commensurability problem. As Professor Bork pointed out, if RPM is being used in a purely procompetitive manner—that is, if it is being used by manufacturers to induce ancillary services that consumers demand—then courts will not have to trade off price effects for those services.<sup>82</sup> If some consumers do not actually want to pay more for the services, then a competitor brand will emerge that does not use RPM at all, but allows its goods to be sold in “bargain basement” conditions. In this best-case scenario, consumers, not judges, would decide between price and quality. And this best-case scenario also means more choice and variety for the consumer.

But if resale price maintenance is being used in some of the anticompetitive ways identified by the Supreme Court’s jurisprudence

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80. See *Leegin*, 551 U.S. at 890 (noting that resale price maintenance may be justified “because discounting retailers can free ride on retailers who furnish services and then capture some of the demand those services generate” (citing *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977))).

81. See, e.g., THOMAS R. OVERSTREET, JR., FED. TRADE COMM’N, BUREAU OF ECONCS., *RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE* 160 (1983) (“[P]rice surveys indicate that [resale price maintenance] in most cases increased the prices of products sold . . . .”); *Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 94th Cong. 122 (1975) (statement of Keith I. Clearwaters, Deputy Assistant Att’y Gen.) (arguing that minimum resale price maintenance increased prices by 19% to 27%).

82. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 *YALE L.J.* 373, 473 (1966).

on RPM,<sup>83</sup> then courts may be in a position of guessing whether the price increase associated with resale price maintenance actually reflects the value it provides consumers. For example, if a judge suspects that RPM is being used to facilitate a retailer cartel, then lack of competition among retailers would mean that consumers do not have a meaningful choice between retail outlets. The assumption that consumers are paying more because they want the associated services is no longer justified, and courts are stuck balancing price against quality. And certainly there is no reason to believe that *all* consumers want the ancillary services, raising the specter of incommensurate interpersonal welfare tradeoffs.

How these values should be traded off is highly controversial, even among members of the Supreme Court. In *Continental T.V. v. GTE Sylvania*,<sup>84</sup> the first vertical restraint case of the modern era, the Court declared in a footnote that interbrand competition, rather than intrabrand competition, was the primary goal of antitrust.<sup>85</sup> This assertion, often since repeated<sup>86</sup> and rarely defended, provides no normative justification for such a thumb on the scale, nor any guidance for how to judge restrictions that offer minimal benefit to interbrand competition at significant cost to intrabrand competition.<sup>87</sup>

Almost half the Court implicitly disagreed with *Sylvania's ipse dixit* in 2007's *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>88</sup> the case that reversed the century-old ban on resale price maintenance. The *Leegin* majority emphasized resale price maintenance's ability to combat the free-rider problem and to encourage point-of-sale services

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83. See *Leegin*, 551 U.S. at 892–94 (indicating that retail price maintenance can encourage manufacturer and retailer cartels).

84. 433 U.S. 36 (1977).

85. *Id.* at 52 n.19 (“Interbrand competition . . . is the primary concern of antitrust law.”). The case cites no authority for this proposition.

86. The footnote from *Sylvania* has been cited by the Supreme Court three times since, and dozens of times in lower court opinions. See, e.g., *Volvo Trucks N. Am., Inc., v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006); *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 501 (1992); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988); *Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys.*, 723 F.3d 1019, 1025 (9th Cir. 2013); *Toledo Mack Sales & Serv. v. Mack Trucks, Inc.*, 530 F.3d 204, 227 (3d Cir. 2008); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979); *Nw. Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 87 (5th Cir. 1978) (quoting *Sylvania*, 433 U.S. at 52 n.19).

87. See Stucke, *supra* note 3, at 1442–43 (noting that in *Leegin*, “the Court willingly traded off the reduction of intrabrand price competition,” and contrasting that holding with the logic of *Topco* in which the Court refused to trade off intra- for interbrand competition because it found it “beyond its competency and authority . . . ‘to determine the respective values of competition in various sectors of the economy’”) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610–11 (1972)).

88. 551 U.S. 877 (2007).

and promotion—benefits offered by increased interbrand competition.<sup>89</sup> But Justice Breyer, writing in dissent, emphasized the cost of reduced intrabrand competition, citing evidence that resale price maintenance raised prices by 19% to 27%,<sup>90</sup> increasing the average household’s annual retail bills by \$750 to \$1,000.<sup>91</sup> Such a price increase, of course, could be compatible with enhanced overall consumer welfare if that price increase was offset by a larger increase in consumer satisfaction with the sales services and buying experience. The dissent was skeptical that qualitative improvements made the price increase worthwhile, but the majority did not seem to share this view by not discussing the price increases directly. In essence, the majority and the dissent made different judgments about how consumers value service quality, the brand experience, product variety, and price.

## 2. Restraints Creating a “New Product”

Sometimes a market participant will restrain competition as an ancillary effect of creating a “new product.” Defendants can raise “new product” arguments—essentially that absent the competitive restriction, consumers would be offered one less option and existing products would face one less competitor—to save a restriction from *per se* treatment and to defend it under the Rule of Reason. Most new product cases stand or fall on whether the competitive restriction is “reasonably necessary” to create the product,<sup>92</sup> and this question, in turn, often depends on an implicit tradeoff between the price effects of a restriction and the new or unique character of the product. Because parties rarely have data showing either how the restriction affects price or how consumers value the new product, “new product” Rule of Reason cases typically involve incommensurate tradeoffs.

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89. The majority invoked the footnote from *Sylvania*, claiming that “antitrust laws are designed primarily to protect interbrand competition,” and therefore these restraints should be subject to Rule of Reason analysis. *Leegin*, 551 U.S. at 895–96. Note that even the majority’s position—which privileges inter- over intrabrand competition—does not totally avoid the commensurability problem. By applying Rule of Reason analysis to vertical restraints rather than declaring them *per se* legal, the Court implied that some restraints can be so harmful to intrabrand competition as to outweigh any benefits to interbrand competition.

90. *Leegin*, 551 U.S. at 912 (Breyer, J., dissenting).

91. *Id.* at 926.

92. See Thomas L. Greaney, *Chicago’s Procrustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857, 901–02 (2004); see also William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766, 785 (2001) (“Modern decisions have tolerated horizontal restraints when the restrictions are reasonably necessary to facilitate collaboration that improves economic efficiency . . .”).

In *NCAA v. University of Oklahoma Board of Regents*,<sup>93</sup> the Supreme Court confronted a new product argument that required just such a tradeoff between incommensurate values. The defendant, the NCAA, had imposed a set of rules on its university members' college football teams that severely restricted the number of games that each team could televise.<sup>94</sup> Several large schools with popular football teams, including University of Oklahoma, filed suit arguing that the rules imposed an illegal output restriction on television rights for their games in violation of § 1. They claimed that absent the restriction, they could sell many more games to television stations and receive more revenue to benefit their football program.<sup>95</sup>

The NCAA defended the restriction as necessary to sustain robust live attendance at games. The NCAA argued that to create the popular product known as college football, many restrictions were in order—from rules about amateur status to limitations on practice time.<sup>96</sup> The television restriction was of that order; robust attendance at live games was, in the NCAA's view, an essential element of the character of college football.<sup>97</sup> Allowing the few large schools with major

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93. 468 U.S. 85 (1984).

94. *Id.* at 93–94 (describing the NCAA “ground rules” as prohibiting any single team from appearing on national television more than four times per two-year period, while also requiring the television networks to broadcast at least eighty-two different teams during that period).

95. *Id.* at 128 (White, J., dissenting) (noting that without the restrictions, each institution would be allowed to sell its television rights to any entity in a free market transaction, enabling the large schools to capitalize on their additional value).

96. The NCAA Manual explains the role of amateur status as designed to maintain intercollegiate sports as “an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” NAT’L COLLEGIATE ATHLETIC ASS’N, 2014-15 NCAA DIVISION I MANUAL 59 [hereinafter NCAA MANUAL], <http://www.ncaapublications.com/productdownloads/D115JAN.pdf> [<http://perma.cc/X95X-V2QJ>]; see also *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (indicating that the NCAA rules are meant to “prevent commercializing influences from destroying the unique ‘product’ of NCAA college football” and should not be struck down by antitrust laws); Alan J. Meese, *Competition and Market Failure in the Antitrust Jurisprudence of Justice Stevens*, 74 *FORDHAM L. REV.* 1775, 1791 (2006) (noting that “agreements regarding the academic qualifications of players both before and after their admission, as well as agreements on the maximum level of compensation that schools could pay such players for their services” are necessary to ensure the amateur character of college sports). See Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 *HARV. L. REV.* 1299, 1303, 1307 (1992) (finding instances in which courts have upheld precompetitive NCAA rules as promoting the integrity of college football and public interest in the sport). *But see* Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 *MARQ. SPORTS L. REV.* 1, 1 (2000) (observing that the NCAA requires amateur status to promote an image of academically-minded student athletes rather than professionals).

97. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 89 (1984) (“[A] three-person ‘Television Committee’ . . . concluded that ‘television does have an adverse effect on college football

interest from television stations to dominate the airwaves on Saturday afternoons would ruin the sport for everyone, and ultimately erode the very qualities that made the sport so popular (and so in-demand by television stations) in the first place. In welfare terms, this restriction, like other NCAA rules, was necessary to create the “new product”<sup>98</sup> that, depending on the market definition, either created its own market with its own consumer surplus,<sup>99</sup> or competed with professional football and so increased consumer surplus by offering consumers choice and by exerting competitive pressure on pro football.

Thus, the Supreme Court was faced with a tradeoff between incommensurate values: on the one hand, the restriction had obvious negative effects on output if output was to be measured by televised games.<sup>100</sup> That certainly diminished one kind of consumer surplus. But the restriction at least plausibly preserved the character of college football, which is essentially an element of product quality.<sup>101</sup> Thus, the Court was asked to trade off the negative surplus associated with diminished output with the positive surplus associated with augmented quality.

The Court did not frame its decision in this way, rather it attempted to avoid the commensurability problem altogether. The Court dismissed the procompetitive argument as pretextual because even the games that were televised under the plan were shown live, coinciding with other untelevised football games. This suggested to the

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attendance and unless brought under some control threatens to seriously harm the nation’s overall athletic and physical system.”).

98. Of course college football is not “new,” but the “new product” argument applies to actually new products and products that could not exist but for the restriction.

99. Cf. Lee Goldman, *Sports and Antitrust: Should College Students be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 227–28 (1990) (arguing that professional and amateur sports form separate labor markets because professional sports do not offer the same educational opportunities; professional eligibility requirements practically bar college-age players; and college-aged athletes often lack the talent to immediately compete at the professional level); Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 360 n.125 (2007) (suggesting the possibility that “supporters of college teams identify more with players who are also legitimate students,” which would create a line of demarcation between professional and amateur football leagues).

100. See *NCAA*, 468 U.S. at 113 (“[T]he NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the district court establish that it has operated to raise prices and reduce output.”); Meese, *supra* note 96, at 1799.

101. Meese, *supra* note 96, at 1793 (“[R]estrictions on horizontal rivalry could actually improve the quality of the product offered by the league and thereby enhance consumer welfare.”); Lazaroff, *supra* note 99, at 339 (noting that the Court found price restraints, output restrictions, and amateurism rules necessary “in order to preserve the character and quality of the ‘product’” (quoting *NCAA*, 468 U.S. at 102)).

Court that the NCAA did not really care about live attendance.<sup>102</sup> But just because the rule did not go further and control the *timing* of televised games—perhaps by delaying the broadcast of games until after all live games were completed—does not mean that the NCAA’s rule restriction on the *number* of televised games was unrelated to preserving live attendance at games not shown on television.<sup>103</sup> The Court seemed to misunderstand the NCAA’s argument: fans would be less likely to attend a less-popular team’s live game if they could stay home and watch—for free—a more popular team’s game on TV. The more of those games available on TV, the fewer fans attending live games.

This mischaracterization of the NCAA’s argument allowed the Court to express its condemnation in terms of output, and to appear to dodge the quality claims at the heart of NCAA’s procompetitive justification. The Court explained that “[i]f the NCAA’s television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games.”<sup>104</sup> But there was no question that the restriction reduced *televised* output; the question was whether this restriction on output also effected an increase in the *quality* of college football viewed holistically, and whether the output restriction was outweighed by these quality benefits. The Court’s ultimate holding—condemning the restriction as violating § 1—was probably the right answer given the severe output restriction it created and the dubious benefit it offered to the “character” of college football. But by failing to own up to the commensurability problem presented by the case and implicitly resolved by its decision, the Court missed an opportunity to shed light on how such tradeoffs ought to be struck in antitrust.<sup>105</sup>

In *Broadcast Music, Inc., v. Columbia Broadcasting System (BMI)*,<sup>106</sup> another new product case, the Court faced a similar tradeoff but concluded with a much more favorable view of the restriction. BMI,

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102. NCAA, 468 U.S. at 116 (“The plan simply does not protect live attendance by ensuring the games will not be shown on television at the same time as live events.”).

103. *Id.* at 115 (observing that the NCAA was worried “that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television”).

104. *Id.* at 114.

105. For cases challenging the NCAA’s amateurism rules—which present similar commensurability problems—see *Banks v. NCAA*, 977 F.2d 1081, 1083 (7th Cir. 1992) (challenging the NCAA’s “no-draft” eligibility rule); *McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988) (alleging that NCAA rules “are designed to stifle competition”); *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014) (challenging the NCAA’s rules restricting competition for men’s football and basketball players); *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (analyzing a challenge to the NCAA’s eligibility rules).

106. 441 U.S. 1 (1979).

a defendant in the suit, operated a “‘clearing house’ for copyright owners”<sup>107</sup> that offered “blanket licenses” to television and radio programs wishing to use songs composed by its thousands of members. The “blanket license” product was thought to overcome the transaction costs that had plagued the industry. Prior to the availability of the blanket license, television and radio stations would have to contact and negotiate with individual songwriters before playing their compositions on the air; the difficulty of those negotiations and the low probability of artists enforcing their copyrights through individual suits lead to rampant copyright violations.<sup>108</sup> The blanket license gave television stations the right to use any of the songs in the BMI repertoire at any time during a program, in exchange for a percentage of that program’s revenues.<sup>109</sup>

CBS sued BMI, arguing that because BMI was acting as a joint selling agency, the blanket license amounted to price fixing among its thousands of songwriter members.<sup>110</sup> The Court rejected that argument and held that a *per se* rule was inappropriate because of the procompetitive effects of the blanket license. The Court extolled the virtues of the blanket license as providing a popular “new product”<sup>111</sup> that benefited copyright licensees and songwriters alike, and improved upon the atomistic market for song rights that was plagued with market failures.<sup>112</sup>

Again the Court overlooked key features of the parties’ arguments in an effort to avoid the commensurability problem. CBS was not asking for a return to a world without BMI and ASCAP acting as clearinghouses (or joint selling agencies). CBS wanted BMI to offer a different product, a “per use” license that would allow CBS to pay only for those songs it used in the course of a program.<sup>113</sup> In effect, CBS was

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107. *Id.* at 5.

108. *Cf. id.* at 20 (noting that without the “blanket license,” individual transactions are expensive and composers are singularly responsible for monitoring and enforcement of copyright).

109. *Id.* at 31.

110. *Id.* at 6.

111. Again, the product was not “new”; ASCAP and BMI had been selling similar blanket licenses for decades. *Id.* at 5–6. But it is a product that could not exist but for some restriction of head-to-head songwriting competition, and so in that sense it is a “new” product relative to a market where such a restriction is not allowed.

112. *See id.* at 21 (arguing that a bulk license is necessary to capture efficiencies, including reduced costs for transacting and diminished need for extensive monitoring).

113. Brief for Respondent at 3, *BMI*, 441 U.S. 1 (1979) (Nos. 77-1578, 77-1583), 1978 WL 223669, at \*3 (arguing that both BMI and ASCAP “have refused to license on a per-use basis, even though it would be (i) feasible to do so (since they now distribute royalties to their members on a per-use basis), and (ii) less restrictive than the blanket system (since it would permit direct licensing to occur”).



arguing that the restriction—artists agreeing through BMI to offer only the blanket license and not a per use license—was not reasonably necessary to create the product, if the product were understood as the right to indemnified spontaneous use of copyrighted material during a broadcast. CBS’s argument implied that the per use fee would, like the blanket license, solve the market failures of the atomistic market but at less of a cost to CBS’s welfare. If CBS were correct, then the restriction was not “reasonably necessary” (or ancillary) to the creation of the product, and so would be properly subject to *per se* condemnation.

By failing to address this argument head-on, and rather focusing on the market failure and the value of the new product, the Court evaded the incommensurate tradeoff actually required by the case. Direct assessment of CBS’s claim would involve trading off the higher prices CBS was evidently paying for the blanket license than it would for the hypothetical “per use” license, against the degree to which the existence of “per use” licenses would erode (if at all) the value of BMI’s product: spontaneous, indemnified use of an almost unlimited set of songs. The Court’s decision implied that the financial cost to CBS was not worth the threat to the quality of the new product, but in failing to frame the decision this way, the Court avoided all discussion of incommensurate balancing.

### 3. Self-Regulatory Restraints that Mitigate a Market Failure

Rule of reason cases often confront the welfare effects of attempts at industry self-regulation, where balancing competitive effects usually involves comparing incommensurate values. Many common self-regulatory actions—such as limiting advertising, standardizing a product across competitors, or restricting how services can be priced—relax price competition among rivals and thus tend to lead to higher consumer prices.<sup>114</sup> Here, the negative effect on consumers is rather straightforward, as it was in the resale price maintenance example: all things being equal, higher prices reduce consumer surplus. But of course not all things are equal, and firms defend such restraints by claiming that they contribute to consumer surplus by solving one or more market failures.<sup>115</sup> Fixing poorly

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114. See Aaron S. Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1102, 1113 (2014) (demonstrating how licensing boards can raise prices by “making entry [into the profession] difficult”).

115. Here, I use “market failure” in its broadest possible sense, sweeping in all situations in which a free market lacking in any horizontal coordination fails to provide consumers with what they really want at a price that satisfies both consumers and producers. Cf. BLAIR & KASERMAN,

functioning markets, defendants claim, raises product or service quality and better matches consumer with product.<sup>116</sup>

Four categories of market failures cover the majority of arguments raised by defendants in defense of self-regulation. First, information asymmetry, often found in markets for services, can lead to a market failure that results in too-low quality products, leaving consumers who demand—and are willing to pay for—high quality services without any options. Second, a market plagued by externalities—that is, when the true costs or benefits of a transaction are visited on more than the parties to the transaction—can also result in suboptimal quality products. Third, markets with high search and transaction costs result in waste that harms both consumers and producers. Fourth, in markets where product interaction and connectivity is valued, unfettered competition can result in too much product variety. Here standardization among competitors can help increase consumer welfare. For any act of self-regulation aimed at solving one or more of these market failures, a Rule of Reason analysis requires trading off price increases for an incommensurate measure of consumer welfare.

#### *a. Information Asymmetry and Externalities*

Some agreements challenged under § 1 are aimed at addressing information asymmetries between consumers and producers. Information asymmetry can lead to a market failure famously illustrated by George A. Akerlof in his article *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*.<sup>117</sup> If a market contains goods of mixed quality, but consumers are unable to ascertain quality differences before purchase, then they will be unwilling to pay a premium for what producers describe as high-quality goods.<sup>118</sup> If even honest sellers cannot attract a higher price for actually better products

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ANTITRUST ECONOMICS 9 (2d ed. 2009) (“[D]epartures from competitive outcomes are viewed as “market failures” for which remedial actions may be necessary.”).

116. See, e.g., Thomas L. Greaney, *Quality of Care and Market Failure Defenses in Antitrust Health Care Litigation*, 21 CONN. L. REV. 605, 623 (1989) (“Defendants have also attempted to introduce quality/harm evidence to demonstrate that their restrictive practices would promote competition by improving the quality of care provided to consumers.”).

117. George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970).

118. See CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FTC, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 5–6 (1990).

(often referred to as “peaches”),<sup>119</sup> then sellers have no incentive to deal in peaches, and will offer only minimum quality goods (Akerlof’s “lemons”) at the low price that consumers are willing to pay for goods of dubious quality. This means that the market for peaches cannot exist at all, and only lemons will be sold.<sup>120</sup> The unraveling of the peach market is a market failure in the sense that consumers may prefer peaches to lemons, and would be willing to pay a higher price for them, but consumers’ lack of information makes such a transaction—wealth-enhancing for sellers and buyers—impossible.<sup>121</sup> Information asymmetry is especially a problem in markets for professional services, where quality is difficult to ascertain before (and sometimes even after) purchasing a service.

Professional service markets can also exhibit failures associated with externalities. Market externalities occur when the full costs or benefits of a product are not borne by the parties to the transaction.<sup>122</sup> In a market with externalities, rivalrous competition can actually erode the quality of the product rather than enhance it. For example, when the costs of poor medical care are borne not only by the patient but also by his employer, the local ER, an insurance company, or the government, a patient may be willing to purchase too-low quality care.<sup>123</sup> Externalization of costs could lead to more low-price, low-quality transactions than are optimal for society, or than would happen in a market where the parties to the transaction internalized all their costs.<sup>124</sup>

Thus professional restrictions often aim to increase product quality and combat the market failures caused by externalities and information asymmetry. The fact that the consumer then pays more for the service does not indicate that his welfare is reduced because, in theory, he is getting more for the higher price. But whereas the increase in cost of professional service is relatively demonstrable and quantifiable, claims of improved quality from removing market failures are often theoretical or subjective, and of course, different in kind. In these cases, courts must trade off the incommensurate values of quality and price.

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119. See Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1609–10 (2011) (“[I]f buyers do not know whether they are getting a lemon or a peach, they will not pay a peach price.”).

120. Akerlof, *supra* note 117, at 498.

121. See Edlin & Haw, *supra* note 114, at 1115–16, 1147–48.

122. See BLAIR & KASERMAN, *supra* note 115, at 375.

123. See Edlin & Haw, *supra* note 114, at 1115.

124. *Id.* at 1102.

Further, because professional self-regulation can raise price *and* quality, it tends to harm consumers who are less sensitive to quality but prefer a low price and to benefit consumers with large budgets demanding high-quality service. Evaluating professional self-regulation will often require courts to weigh harm to one class of consumer against harm to another class, leading to the apples-to-oranges problem associated with interpersonal comparisons of welfare.

The Supreme Court confronted these tradeoffs between free and (arguably) more functional competition in *National Society of Professional Engineers*.<sup>125</sup> The case challenged a professional rule of ethics created and enforced by the National Society of Professional Engineers, a membership organization that counted the majority of licensed engineers among its members. The rule banned competitive bidding, defined as the submission of “estimates of cost or proposals in terms of dollars . . . or any other measure of compensation whereby the prospective client may compare engineering services on a price basis.”<sup>126</sup>

The restriction had the obvious potential to raise prices of engineering services, but the engineers argued against *per se* condemnation of the practice by claiming it had the procompetitive effect of raising the quality of engineering services. Specifically, the engineers argued:

Experience has . . . demonstrated that competitive bidding . . . results in an award of the work to be performed to the lowest bidder, regardless of other factors such as ability [and] experience . . . and that such awards in the case of professional engineers endanger the public health, welfare and safety.<sup>127</sup>

Although the engineers did not spell out their argument in terms of market failures, it is clear that the harm they associated with price bidding depended on the presence of information asymmetries and externalities in the market. Essentially the engineers argued that price competition incentivized low-price, low-quality bidding, which consumers purchased either because they could not tell that the work offered was low quality (information asymmetry), or because some of the cost of dangerous buildings and bridges would be visited on third parties (externalities).<sup>128</sup> The engineers argued that by disincentivizing low-cost bids, their rule fixed these market failures.

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125. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 679 (1978).

126. *Id.* at 683 n.3.

127. *Id.* at 685 n.7.

128. See Brief for Petitioner at 54–55, *Nat'l Soc. of Prof'l Eng'rs*, 435 U.S. 679 (1978) (No. 76-1767), 1977 WL 189266, at \*54–55 (discussing not only the direct design costs, but also the lifetime costs, maintenance costs, and the potential cost of collapse or other public disaster).

The Court was asked to trade off the incommensurate values of price (which was very likely to be higher under the rule) with improved engineering quality. And because the rule had a blanket application—almost all engineers belonged to the society and were required to adhere to its rules—consumers were not in a position to make the incommensurate tradeoff themselves.

Faced with the prospect of choosing between quality and price, or between rivalry or self-regulation, the Court dodged. It ostensibly rejected the proffered procompetitive justification altogether as “nothing less than a frontal assault on the basic policy of the Sherman Act,”<sup>129</sup> seeming to obviate any incommensurate balancing. But at the same time, it is clear from the opinion that the Court at least entertained the potential gains to quality that consumers may have enjoyed from the restriction, because the opinion did not condemn the restriction as *per se* illegal.<sup>130</sup> The Court’s declaration that the Sherman Act’s “policy precludes inquiry into the question of whether competition is good or bad”<sup>131</sup> is at odds not only with its refusal to apply the *per se* rule in that case, but with many Rule of Reason cases that accept procompetitive justifications that cure market failures associated with unfettered rivalry among competitors.

*California Dental v. FTC*,<sup>132</sup> in which the Court seemed comfortable sacrificing rivalry for a better functioning market, is just such a case. The dental association, counting the majority of California dentists among its members,<sup>133</sup> prohibited false or misleading advertising, which the Federal Trade Commission (FTC) found involved a *de facto* ban on advertising price or service quality. The FTC presented evidence that in other industries, similar advertising bans were associated with higher consumer prices. The dentists invoked Akerloff’s “lemons problem” to justify the restriction, arguing that unfettered competition in dental advertising would worsen the information asymmetry problem in the market for dental services. Unlike in *Engineers*, where the Court seemed to categorically reject any

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129. *Nat’l Soc. of Prof’l Eng’rs*, 435 U.S. at 695.

130. Within the same paragraph, the Court explained its intention to “adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly . . . [e]thical norms may serve to regulate and promote . . . competition, and thus fall within the Rule of Reason.” *Id.* at 696.

131. *Id.* at 690 n.14; see also *id.* at 692 (“[T]he purpose of the [rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.”).

132. 526 U.S. 756 (1999).

133. *Id.* at 759.

argument that competition is bad for consumers, the Court in *Cal Dental* found the quality arguments advanced by the dentists to be plausible enough to save the restriction from summary condemnation.<sup>134</sup>

The dentists' argument about advertising and the lemons problem is somewhat counter-intuitive, and so requires some explanation. Truthful advertising can help solve the information asymmetry problem, since it can provide a vehicle for communicating product quality to the consumer. If the consumers can sort the lemons from the peaches, perhaps because they have been well-described in advertisements, then the market will function properly, allowing the high-quality sellers to charge a premium for their products and the low-quality producers to sell to the buyers with low ability or willingness to pay. Restricting truthful advertising can exacerbate the information asymmetry between consumers and producers, and can contribute to the lemons problem.<sup>135</sup>

But not all advertising is truthful, and especially in the market for professional services, claims about quality are difficult to verify. In a world where producers can be expected to over-claim without serious consequences, advertising can make the information asymmetry problem worse. For example, when a patient willing to pay for "painless" dental services finds those services to be very painful indeed, he feels he actually knows less about the service than he did before seeing the advertisement, and he is less willing to pay for dental services in the future. High-quality, high-cost dentists cannot attract customers in such an atmosphere of distrust, and so all dentists find themselves in Akerlof's market for lemons.<sup>136</sup> Thus, restrictions on false advertising can combat information asymmetry and mitigate market failure. But in practice, advertising restrictions can never perfectly sort the truthful from the false advertising; rules will inevitably chill some truthful advertising while also reducing puffery and fraud.

By remanding the case for more thorough consideration, the Court essentially asked the lower court to trade off quality and price,<sup>137</sup>

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134. *Id.* at 778 (arguing the restrictions may simply be a procompetitive ban on false or misleading statements).

135. See Edlin & Haw, *supra* note 114, at 1115 n.101 (discussing a similar line of reasoning with respect to occupational licensing requirements).

136. See *Cal. Dental*, 526 U.S. at 774–75 (“[T]he recurrence of some measure of intentional or accidental misstatement due to the breadth of their claims might leak out over time to make potential patients skeptical of any such across-the-board advertising, so undercutting the method’s effectiveness.” (citing Akerlof, *supra* note 117, at 495)).

137. *Id.* (explaining that the lower court should weigh the procompetitive benefits of quality advertising against the potential for anticompetitive price increases).

implying that, contrary to its proclamations in *Engineers*, § 1 liability sometimes requires courts to trade off free, but failing markets for fettered, yet functional ones. In the end, the different outcomes in *Engineers* and *Cal Dental* are easily justified; the price increase likely to flow from a ban on competitive price bidding is probably larger than the higher prices associated with advertising restrictions. And the presence of governmental regulation in the *Engineers* case (state licensing for engineers and state and local building codes) meant that problems associated with information asymmetry and externalities may have already been addressed by a less self-interested actor.

But the Court's pronouncement in *Engineers* that the association's defense—that unfettered rivalry was bad for the market—was a “frontal assault on the policy of the Sherman Act”<sup>138</sup> makes no sense,<sup>139</sup> except as an effort to appear to avoid the inevitable incommensurate balancing that cases like *Engineers* and *Cal Dental* demand. In fact, incommensurate balancing occurred in both cases: in *Engineers* when the Court decided a ban on price bidding was just too anticompetitive to outweigh the possible quality benefits, and in *Cal Dental* when the lower court on remand conducted a more thorough inquiry into the restriction's effect on price and quality.<sup>140</sup>

### *b. Search and Transaction Costs*

Firms frequently restrict competition among themselves with an eye toward making the market more accessible to consumers. These restrictions are aimed at preventing or mitigating market failures associated with high search and transaction costs. Evaluating the competitive effects of efforts to solve these problems requires balancing incommensurate values.

If the costs of seeking out a product, comparing it with the others on the market, and completing a transaction are borne by the consumer, then his willingness to pay for the product will be diminished by the costs he must incur in purchasing it. When those costs are high, it can discourage a significant number of mutually wealth-enhancing

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138. *Nat'l Soc. of Prof'l Eng'rs*, 435 U.S. 679, 695 (1978).

139. Scholars have noted that *Engineers* should not be taken seriously in its language that seems to prohibit such considerations under the Rule of Reason. See, e.g., Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859, 862 (1989) (suggesting that *Engineers* should not be taken “too literally in rejecting the safety justification offered”). Similarly, Phillip Areeda admonished: “I doubt that the Court meant to go so far as to condemn a restraint that actually saves lives.” PHILLIP E. AREEDA, ANTITRUST ANALYSIS 381 (1987).

140. See *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 950–57 (9th Cir. 2000) (ultimately holding that the procompetitive effects outweighed the anticompetitive effects).

transactions that would be consummated if search and transaction costs were low or non-existent. These deterred exchanges represent a deadweight loss to society—the consumer and the producer fail to realize their joint surplus because it was overwhelmed by the costs of finding and entering into the transaction. This kind of market failure will not typically unravel the market, as in the case of information asymmetry, but it is an example of the market failing to match buyer and seller at an otherwise mutually acceptable price.

Producers have an incentive to address market failures caused by search and transaction costs because those costs reduce consumer demand for their products. By reducing the consumers' costs in finding and engaging in the transactions, producers can increase demand, allowing for higher profits on each transaction and allowing transactions that would not otherwise have occurred. And often the producers are in a good position to reduce search and transaction costs, for example by creating a single marketplace for the product or a central repository for information that facilitates comparison shopping. Of course organizing a marketplace or standardizing a product listing service requires collective action and often involves creating rules for inclusion and exclusion of competitors. When competitors use these opportunities to self-deal, their restrictions can raise price or restrict output.

For example, realtors often combine their efforts to create a multiple listing service (MLS) that provides up-to-date, centralized, and uniform information about houses for sale.<sup>141</sup> Allowing such one-stop shopping benefits consumers by allowing them to quickly comparison shop and saves them time and effort in finding the right house.<sup>142</sup> For at least one class of consumers—those who highly value convenience, lack the means to research homes for sale, or place a premium on their

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141. Christopher R. Leslie, *Tying Conspiracies*, 48 WM. & MARY L. REV. 2247, 2293 (2007) (“Real estate agents often combine through realtor associations to create a multiple listing service (MLS), in which all of the available properties in a particular geographic area are listed in a centralized registry.”); see, e.g., *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

142. Robert W. Hahn, Robert E. Litan & Jesse Gurman, *Bringing More Competition To Real Estate Brokerage*, 35 REAL EST. L.J. 86, 95–96 (2006) (“Collecting all of the listings for a given region in one place significantly reduces the amount of time buyers and sellers—and their brokers—have to spend gathering information that is crucial to potential transactions.”); Mark S. Nadel, *The Consumer Product Selection Process in an Internet Age: Obstacles to Maximum Effectiveness and Policy Options*, 14 HARV. J.L. & TECH. 183, 186 (2000) (“Databases, like the real estate industry’s multiple-listing services (“MLSs”), offer consumers access to a dramatically broader set of options than any traditional store or salesperson’s memory could hold. They also permit shoppers to sort these options according to dozens, if not hundreds, of attributes.”).



leisure time—the MLS can significantly improve their purchasing experience.

But the standardization required to create an MLS means competitor realtors must agree on how much and what kind of information will be offered to consumers, which can restrict the terms of competition in the housing market. Further, competitors must control access to the list to incentivize realtor participation. Unfettered access to the list may permit free riding by realtors who wish to use the valuable resource without contributing their own information to it. Thus, many multiple listing services require realtors to share their own information as an “ante” to using the list at all.<sup>143</sup> Finally, realtors may want to preserve the value of their list as accurate and honest by restricting membership only to those realtors in good standing. Each of these acts of restriction and exclusion has the potential to decrease price competition.<sup>144</sup> Evaluating MLS services under the Rule of Reason thus requires balancing consumer values that trade in different units of measure.

In *Realcomp II, LTD. v. FTC*,<sup>145</sup> the Sixth Circuit affirmed the FTC’s decision condemning a multiple listing service’s exclusion of homes listed by low-cost agents offering less than the full package of traditional broker services. The defendants claimed that the low-cost providers were free riders, and that exclusion of free riders was necessary to the very existence of the list.<sup>146</sup> The opinion weighed the harm to the competitive process—excluding low-cost competitors—against the arguments offered that the restriction promoted the competitive process by excluding free riders.<sup>147</sup> The court had an easy time of it, since, as it turns out, this particular free-rider argument made no sense; the low-cost providers contributed (albeit indirectly) to the listing service in the same way all members did.<sup>148</sup> But a legitimate free-rider argument would have put the court in the position of having to trade off apples and oranges.

Another category of horizontal restraints on trade aimed at combatting transaction and search costs are rules establishing

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143. *Cf. Leslie, supra* note 141, at 2293 (presenting the analogy between MLS and traditional tying services, suggesting that undesired but required membership is tied to desired access).

144. *See, e.g., Hahn, Litan & Gurman, supra* note 142, at 96 (discussing the potential for anticompetitive practices through MLS, including controlling access to the services in an effort to discourage brokers from charging lower fees).

145. 635 F.3d 815 (2011).

146. *See id.* at 835.

147. *Id.* at 829–36.

148. *Id.* at 834 (rejecting the procompetitive justification of excluding free-riders as “not legitimate, plausible, substantial, and reasonable”).

marketplaces and exchanges. Marketplaces and exchanges create centralized locations and standardized systems for consummating transactions and can thereby reduce costs on both sides of the market, much like multiple listing services. They also afford competitors an opportunity to relax price competition by setting the who, what, where, and when of exchange. Assessing the competitive effect of competitor-created marketplaces requires trading off incommensurate notions of consumer welfare: price and convenience.

A good illustration of the commensurability problem raised by competitor-controlled marketplaces is the case that established the most famous formulation of the Rule of Reason, 1918's *Board of Trade of Chicago v. United States*.<sup>149</sup> The Board of Trade, run by competitor purchasers of grain, was the largest grain market in the world. Trade occurred both during the open hours of the market—from 9:30 to 1:15—and after the market closed. But whereas the official market hours were open to both members and to the public, only members could trade after hours.<sup>150</sup> The market was bifurcated into a thicker market during the day, and a thin market after the exchange closed, where presumably the few member purchasers were able to exert market power to artificially bid down the price of grain.<sup>151</sup> The restriction challenged in the case was designed to combat the problem of monopsony in this after-hours market by fixing the after-hours price at the last price traded at in the regular hours market.<sup>152</sup> The restriction was challenged under § 1 as illegal price fixing.<sup>153</sup>

Did the restriction in *Board of Trade of Chicago* promote or hinder competition? It did both, but in different ways. It increased competition in the daytime market by promoting two conditions associated with competitive markets: numerous buyers and sellers. Prior to the rule, member purchasers had an incentive not to bid during the day, when they had to compete with the general public, and instead wait until the market closed, when they could exert their monopsony power to their advantage.<sup>154</sup> And since members could purchase on

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149. 246 U.S. 231 (1918).

150. *Id.* at 236 (describing the public, “regular session” compared to the private, “special sessions”).

151. *Cf.* Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WM. & MARY BUS. L. REV. 1, 27 n.111 (2010).

152. *Bd. of Trade of Chi.* at 237 (explaining the “call rule”—the restriction challenged in the case—which fixed the price of transactions between the close of the session and the opening the next day at the last trading price at the close of the public market).

153. *Id.* at 238.

154. *Cf.* Peter C. Carstensen, *Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. PA. J. BUS. L. 775, 797 (2012).

behalf of others after the market closed, even the general public would prefer not to participate in the daytime market if it could get a member to bid on its behalf in the evenings. By hobbling this purchaser cartel, the restriction made the daytime market more attractive to all market participants and so increased the volume of trading,<sup>155</sup> likely driving price down.

But the restriction also suppressed all price competition in the after-hours market. And, together with all the rules that created the grain market in Chicago—from opening hours to membership policy—it tinkered with the free-market process by allowing competitors to set potentially self-dealing limits on who could make deals and when. Ultimately, the Supreme Court decided that the rule's benefits to competition in the official grain market justified restricting competition in the after-hours market, and approved the restriction under what would become known as the Rule of Reason. That decision was perfectly sensible, but it implied a value judgment about which market, and which kind of competition—free but failing competition or fettered but functional competition—was more valuable under the circumstances.

### *c. Product Standardization*

A final category of restraints vulnerable under § 1 are those aimed at reducing product differentiation. Where product interconnectivity is valued, or where simultaneous use of products is desirable, atomistic competition can lead to more product variety than consumers demand. In these markets it is common for competitors to combine their efforts to develop a standard with which all producers will comply.<sup>156</sup>

Standardization offers obvious benefits to consumer welfare by increasing the usefulness of products (an element of product quality). And it can stimulate product innovation by making interface and interaction possible, leading to more complex and sophisticated technology that consumers want. But the ways in which standards threaten consumer welfare are significant and typically incommensurate with the benefits. First, standardization can reduce consumer welfare by eliminating incompatible features that some consumers want. Second, and relatedly, standardization harms consumers by reducing variety and choice. And third, because the

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155. *Bd. of Trade of Chi.*, 246 U.S. at 240 (observing that the rule “brought into the regular market hours of the Board sessions, more of the trading in grain ‘to arrive’”).

156. Standard-setting is facilitated by the Standard Setting Organization Advancement Act. See 14 U.S.C. § 4301 (2012).

standard setting process gives competitors an opportunity to exclude firms that are poorly positioned to comply with the standard, standardization can reduce the number of competitors and lead to higher prices and restricted output. Courts considering a § 1 challenge to an agreement on a standard must trade off these incommensurate values in measuring competitive effect.

Such tradeoffs are ubiquitous in high-tech industries,<sup>157</sup> but the phenomenon of standardization stimulating demand is also observable in other kinds of markets. In *Continental Airlines, Inc., v. United Airlines, Inc.*,<sup>158</sup> competing airlines at Dulles airport coordinated around a single overhead luggage size limit so that the security stations at the airport, which serviced all airlines, could use a single template to measure luggage as it passed through x-ray machines. Absent coordination, security officers would have to ask individual passengers which airline they were flying and switch templates, leading to delays and frustration.<sup>159</sup> The preferred experience for consumers was a streamlined, quick trip through security, which required coordination among competing airlines as to the size and shape of the baggage template.

The size agreed on by the majority of the airlines operating at Dulles was smaller, however, than that preferred by Continental Airlines. Continental had invested in planes with large overhead capacity and was marketing to its customers the convenience of traveling without having to check baggage.<sup>160</sup> Continental sued, arguing that the standard unfairly restricted its ability to compete on overhead space.<sup>161</sup> Although the district court summarily condemned the restraint after a “quick look” (an abbreviated form of the Rule of Reason),<sup>162</sup> the Fourth Circuit reversed, essentially arguing that the

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157. For example, standard-setting is ubiquitous in the wireless communication industry. If manufacturers of wireless-enabled devices competed without coordination, then each firm would produce devices compatible with only a particular kind of wireless signal. The demand for wireless products would obviously be less in such a market than in a market where the device manufacturers, and perhaps the developers of wireless signals, had coordinated around one compatible system, allowing all consumers to use their wireless products everywhere. See *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 911–12 (N.D. Ill. 2012).

158. 277 F.3d 499 (4th Cir. 2002).

159. *Id.* at 512 (noting that this was particularly troublesome at Dulles Airport, which had only two security checkpoints and therefore caused several “bottlenecks”).

160. *Id.* at 505.

161. *Id.* at 507.

162. The “quick look,” first established by the court in the 1970s, is a truncated version of the Rule of Reason that is something less than a full market analysis. Some have likened the §1 liability to a spectrum, with *per se* on one end, full-blown Rule of Reason on the other, and quick look in the middle.

district court had failed to consider the market failure that would occur without standardization of baggage size.<sup>163</sup>

Like so many opinions that confront commensurability problems, the Fourth Circuit's decision did not detail the different and incommensurate competitive effects of the restriction. But it is clear from the facts of the case that any Rule of Reason analysis (including a "quick look") would have to balance the convenience offered by the standard template against the additional benefit Continental passengers would receive from having more overhead luggage space. This comparison would involve not only trading off two incommensurate aspects of the quality of the flying experience (speed of security versus luggage convenience), but it would also involve trading off the harm to one class of consumers (Continental passengers) against benefits to another (passengers of other airlines). And the Rule of Reason would also have to account for the ways in which such standard setting would suppress innovation in airline travel, such as Continental's development of more overhead luggage space for its passengers. The court rightly remanded for a more detailed analysis of these tradeoffs,<sup>164</sup> but it did not note, as courts seldom do, that the tradeoff would involve incommensurate comparisons.

### III. THE DANGER OF THE COMMENSURABILITY MYTH: DOCTRINES OF AVOIDANCE

Since the commensurability myth has made overt value judgments—for example between quality and price, between consumer value now and later, and between different classes of consumers—appear illegitimate, it should not be surprising that courts have embraced doctrinal elements of the law that help them avoid, or at least appear to avoid, incommensurate balancing. Some avoidance moves could, at least in theory, truly obviate the incommensurability problem, and these should be used when appropriate. But too often these doctrines of avoidance do not really avoid the commensurability problem at all, but merely relegate it to the subtext of a decision, leaving the value judgments untheorized and undefended.

The full list of avoidance moves is long. It includes procedural decisions such as lower courts punting Rule of Reason decisions to a

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163. *Cont'l Airlines*, 277 F.3d at 513 (suggesting that the standard templates would promote a service not otherwise available at this particular airport). The court even seemed to say that it believed consumers preferred streamlined security procedures to larger overhead luggage capacity, and for that reason the restriction was procompetitive. *See id.* at 514.

164. *Id.* at 516–17.

jury, appellate courts remanding for further consideration, and the Supreme Court denying certiorari. It also includes *Daubert* decisions to exclude expert testimony essential to a pro- or anticompetitive argument. It also includes the aggressive use of increasingly stringent requirements on pleading. And it also includes the use of a “least restrictive alternative” analysis, which courts use to condemn restrictions whose effect could be achieved through a less anticompetitive means.<sup>165</sup>

Here I focus on three categories of avoidance techniques that are somewhat specific to antitrust, and that have at least some doctrinal pedigree. First, courts often use “burden shifting” in § 1 cases to avoid side-by-side comparison of pro- and anticompetitive arguments, rather than as a tool to weed out unmeritorious cases. Second, and somewhat relatedly, courts often find the presence of any plausible procompetitive argument to allow a restriction to pass muster under the Rule of Reason, thus creating a kind of *per se* legality that avoids overt balancing. Third, courts often place unreasonable demands on plaintiffs—in the form of empirical evidence and unassailable market definitions—in order to avoid considering the defendant’s procompetitive (and usually incommensurate) argument at all.

#### *A. The Burden-Shifting Paradigm and Avoiding the Appearance of Judgment*

Although early formulations of the Rule of Reason seemed to call for a direct balancing of pro- and anticompetitive effects, unstructured balancing quickly came under heavy attack as an unworkable and unwieldy standard.<sup>166</sup> Most criticisms of unstructured balancing focus on difficulties in measuring effects,<sup>167</sup> but the incommensurability of pro- and anticompetitive effects are likewise a reason to disfavor open-ended balancing. In the 1980s, coinciding with the reorientation of antitrust around an economic standard, courts (with the help of scholars) developed a solution: impose a series of burden-shifts on

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165. See generally C. Scott Hemphill, *The Less Restrictive Alternatives Shortcut* (Nov. 2015) (unpublished manuscript), <http://ssrn.com/abstract=2668269> [<http://perma.cc/WPR8-VAXC>] (describing variations on the Least Restrictive Alternatives test and noting their effects on litigation).

166. See 7 PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 389 (3d ed., 2006).

167. See, e.g., *id.* at 397 (observing that there is almost never enough information about a competitive restraint to “quantify the magnitude” of its effect); COMPETITION COMM., ORG. FOR ECON. COOPERATION & DEV., *POLICY ROUNDTABLES: COMPETITION ON THE MERITS 11* (2005), <http://www.oecd.org/dataoecd/7/13/35911017.pdf> [<https://perma.cc/7RFH-TUA7?type=source>] (discussing challenges of evaluating the magnitude of changes in net consumer welfare, even assuming it were possible to determine whether they were net pro- or anti-competitive).

parties to a § 1 suit, reserving balancing for worst-case scenarios where both sides carry their burdens.

In theory, burden-shifting could help judges with the commensurability problem presented by the Rule of Reason. It could be used to force parties and judges to identify the precise harms and benefits on either side, and if neither side had a logical argument about helping or harming competition, it could speed resolution of the case. But instead, empirical research has shown that the burden almost never shifts *even in the first instance*, suggesting something is amiss with the “burden-shifting” framework itself. The commensurability myth at the heart of § 1 is at least partly to blame.

### 1. The Rise of the Burden-Shifting Paradigm

The Supreme Court’s opinion in *Chicago Board of Trade* is often cited for its formulation of the Rule of Reason. The Court explained that for those restraints not subject to the *per se* rule, courts should engage in an all-things-considered inquiry into the reasonableness of the restraint. The opinion suggested courts should consider:

the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.<sup>168</sup>

Although *Chicago Board of Trade* seemed to make relevant *all* facts particular to the business and *all* kinds of evil that the restraint is designed to address, today only arguments about economic or competitive effect are accepted on both sides of the scale.<sup>169</sup>

Even this modification left the rule without enough structure for fair and predictable application because the economics of a restraint could be complex and were almost always contested. In response to this problem, courts and academics began to spell out a “structured Rule of Reason” that offered to avoid the “wilds of economic theory.”<sup>170</sup> Today, numerous versions of this structured Rule of Reason abound,<sup>171</sup> but they all share a similar structure: they impose a series of burden shifts on

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168. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

169. See 7 AREEDA & HOVENKAMP, *supra* note 166, at 389; *cf. supra* note 12 and sources cited therein.

170. *United States v. Topco Assocs.*, 405 U.S. 596, 622 (1972).

171. Formulations of the burden-shifting paradigm include “quick look” review, see *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 763 (1999); “inherently suspect” analysis, see *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32–33 (D.C. Cir. 2005); and the “truncated Rule of Reason” (*California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137 (9th Cir. 2011)). Each differs slightly, but their basic structure—shifting burdens between plaintiff and defendant to show anti- and procompetitive effects—is the same.

the litigating parties in an effort to avoid head-to-head comparison of pro- and anticompetitive effects in all but the closest cases. Although originally associated with “quick look” review, most courts and critics agree that all levels of Rule of Reason scrutiny, from “quick look” to “full-blown” market analysis, call for structured burden-shifting.<sup>172</sup>

Essentially, to carry its initial burden, the plaintiff must first show a plausible anticompetitive effect of the restraint.<sup>173</sup> Then the burden shifts to the defendant to show a legitimate procompetitive argument in favor of the restraint.<sup>174</sup> The plaintiff then has an opportunity either to rebut the defendant’s justification or to argue that the restraint is not reasonably necessary to achieve the claimed procompetitive effect—sometimes this is called the “least restrictive alternative” test.<sup>175</sup> Only when the plaintiff and defendant have both met their burdens must the court “balance” the pro- and anticompetitive effects.<sup>176</sup> That burden-shifting could reduce reliance—or at least the appearance of reliance—on balancing incommensurate values made the framework especially appealing to those judges who saw their role in antitrust litigation as staying out of value-laden judgments.

## 2. Burden-Shifting Comes Up Short

Although it is popular to write opinions according to the burden-shifting paradigm—so much so that one scholar has commented that “rule of reason balancing is perhaps the greatest myth in all of U.S. antitrust law”<sup>177</sup>—closer observation reveals that burden-shifting is doing less work than its proponents claim. In his impressively comprehensive empirical study of all 495 rule of reason cases decided between 1977 and 1999, Professor Michael Carrier set out to prove that “balancing,” although nominally the primary mode of rule of reason analysis, almost never happened.<sup>178</sup> And so he did: in only 4% of cases

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172. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 760 (2012) (describing burden-shifting); Muris, *supra* note 139.

173. Gavil, *supra* note 172, at 760.

174. *Id.*

175. See Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 583 (2009).

176. See 7 AREEDA & HOVENKAMP, *supra* note 166, at 390.

177. ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES CONCEPTS AND PROBLEMS IN COMPETITION POLICY 207* (2d ed. 2008).

178. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 16 BYU L. REV. 1265, 1267 (1999).



did the court ever actually reach the balancing phase.<sup>179</sup> The rest were disposed of at an earlier inflection point. But in the process he found something else: that burden-shifting itself was extremely rare. His study found that in 84% of cases the plaintiff did not carry its initial burden and thus the burden never shifted to the defendant.<sup>180</sup> When he updated the study a decade later, his results were even starker. Ninety-seven percent of rule of reason cases decided between 1999 and 2009 never progressed beyond the plaintiff's prima facie case.<sup>181</sup> Of the 3% that did survive the initial shift, two-thirds ended in head-to-head balancing.<sup>182</sup>

This paucity of actual burden shifts could mean that the burden-shifting paradigm has lent much-needed structure to § 1 analysis, and revealed that the overwhelming majority of antitrust plaintiffs have no plausible anticompetitive argument when they walk through the courthouse door.<sup>183</sup> This may be part of the explanation, but there is also reason to believe that the commensurability myth has put pressure on judges to dismiss cases quickly, before fully considering the competitive arguments on both sides. Writing opinions in a manner that suggests the burden never shifted at all has advantages in an environment where incommensurate balancing is seen as illegitimate.

We may therefore expect judges to seek out rules and doctrines that make it especially difficult for the plaintiff to carry its initial burden. A close reading of the cases bears out this prediction. Early formulations of the structured rule of reason suggested that the plaintiff's prima facie burden was light: a plaintiff must show only that there is a significant anticompetitive effect, theoretical or empirical, associated with the defendant's restriction.<sup>184</sup> But when courts began to consider the details of what was required to make this showing, the rule became progressively less liberal. The requirement of "actual effects"

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179. *Id.* at 1269.

180. *Id.* at 1268.

181. Michael A. Carrier, *The Rule Of Reason: An Empirical Update For The 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009).

182. *Id.* at 827. This research bears out Professor Gavil's observation about the "myth" of balancing, but it also bears out the observation that the Rule of Reason is merely a euphemism for "defendant wins": between 1977 and 2009, defendants won in 98% of the cases.

183. This is certainly a popular view of the burden-shifting paradigm. See Feldman, *supra* note 175, at 576 (interpreting Professor Carrier's results as showing that courts rarely perform balancing because one side has failed to show competitive effect and citing sources coming to similar conclusions).

184. Philip Areeda, *The Rule Of Reason—A Catechism On Competition*, 55 ANTITRUST L.J. 571, 582 (1986) (suggesting that a plaintiff need only show that the defendant engaged in activity that *can* restrain trade significantly, or which *can* result in impairment of consumer welfare which is *likely* to be significant).

evidence, discussed below, is an example.<sup>185</sup> Another technique to make the burden shift harder is to perform unacknowledged balancing at the initial stage, effectively asking the plaintiff to put on more than a prima facie case. Opinions accepting or rejecting a plaintiff's initial case are frequently infused with analysis of the defendant's justification, and so implicitly perform the very balancing burden-shifting is meant to avoid.

For example, when a plaintiff challenges a restriction that arguably solves a market failure, courts will analyze the market failure when considering whether the plaintiff has made an initial showing of competitive harm.<sup>186</sup> *California Dental* is an obvious example: there the Court explained that because the market for dental services could suffer from market failures caused by information asymmetries, and because the dental association claimed that the restrictions were tailored to prevent misinformation, the FTC had failed to raise a sufficient anticompetitive effect in the first place.<sup>187</sup> But because an argument about solving a market failure goes to the procompetitive potential of the restraint, it should have been dealt with at the second shift when the defendant must show procompetitive effects.<sup>188</sup>

Lower court case law provides several additional illustrations of implicit balancing at the initial burden stage. In *Barry v. Blue Cross of California*,<sup>189</sup> the Ninth Circuit considered a challenge to vertical arrangements between Blue Cross and participating physicians, including an agreement not to refer Blue Cross patients to non-Blue Cross physicians without patient consent. After extensively analyzing and crediting Blue Cross's procompetitive arguments, the Court

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185. See *infra* Section III.C.

186. See *e.g.*, *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 872 (9th Cir. 1986); *Nat'l Cable Television Ass'n, Inc. v. Broad. Music, Inc.*, 772 F. Supp. 614, 625–26 (D.D.C. 1991); *cf.* *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 580–81 (N.D. Miss. 2004) *aff'd and remanded*, 459 F.3d 1328 (Fed. Cir. 2006) (though Monsanto was nominally the plaintiff in this suit, the defendant farmers raised Monsanto's alleged antitrust law violation as a defense and thus had the burden of initially showing competitive harm).

187. The Court held that the Rule of Reason requires courts to “identify[ ] the theoretical basis for the anticompetitive effects *and* consider[ ] whether the effects *actually are* anticompetitive” before the burden shifts to the defendant. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 775 n.12 (1999) (emphasis added).

188. This defect may be inherent in burden-shifting in the first place. Even courts intending to follow the burden-shifting paradigm closely may find themselves discussing market failure in considering the plaintiff's initial burden because the question cannot be parsed so cleanly. After all, a strict burden-shifting regime would have courts asking a rather pointless question: whether in a market without any market failures (which is not, according to the defendants at least, this market) the restriction would be anticompetitive. Of course a restriction that successfully confronts a market failure at minimal cost to competition serves antitrust's goals, and so it is awkward for courts to claim, even as a prima facie matter, that there is an anticompetitive potential to the restraint.

189. 805 F.2d at 867–68.

concluded that “[t]herefore, the agreements do not have any prohibited anticompetitive effects,”<sup>190</sup> and so did not shift the burden. The Northern District of Mississippi was even more brief in its treatment of anticompetitive arguments in *Monsanto Co. v. Scruggs*,<sup>191</sup> in which it held the Scruggses<sup>192</sup> to an initial burden of proving “an unreasonable restraint of trade,”<sup>193</sup> conflating the ultimate balancing standard with the initial burden. It found, in one sentence, that the burden had not been met.<sup>194</sup>

Similarly, in a case challenging the same blanket license agreement at issue in *BMI*, the District Court for the District of Columbia implicitly considered procompetitive effects when evaluating the plaintiff’s claim of anticompetitive effects.<sup>195</sup> The court found that the plaintiff had not alleged that a restraint existed at all, because licensees were still free to individually negotiate with artists.<sup>196</sup> To claim that the blanket license involves no restraint at all is to ignore that the license is a product of a horizontal agreement among thousands of songwriters to offer a specific product under specific terms. The fact that parties were still free to individually negotiate mitigated the anticompetitive effects of the restraint, and so should have been considered only after the initial burden shift.

The conflation of pro- and anticompetitive effects at the initial stage undermines the “structure” claimed for burden-shifting and requires the balancing of incommensurate values in an implicit—and thus opaque—manner. It is too facile, therefore, to read Professor Carrier’s research as proof that “balancing” very rarely happens in § 1 cases or that burden-shifting has obviated the need for value judgments in all but 2% of Rule of Reason cases. That judgment is often happening without the court acknowledging the need for any balancing at all.

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190. *Id.* at 872.

191. 342 F. Supp. 2d 568.

192. Typically the plaintiff bears the initial burden to show anticompetitive effects, but in *Scruggs* the roles were reversed because it was the defendant that raised the Sherman Act §1 claim as a counterclaim in a patent infringement suit.

193. *Id.* at 580.

194. *Id.*

195. *Nat’l Cable Television Ass’n, Inc. v. Broad. Music, Inc.*, 772 F. Supp. 614, 625–26 (D.D.C. 1991).

196. *Id.*

*B. Ancillarity and Per Se Legality*

Relatedly, judges sometimes use the very presence of procompetitive justifications as a complete defense in Rule of Reason cases. While this move ostensibly avoids head-to-head balancing, it does not avoid the commensurability problem; any judgment that a procompetitive effect legitimates an anticompetitive practice *per se* implies that the procompetitive value—which likely is different in kind from the anticompetitive effect alleged—is always more important. That judgment implies a choice between competing incommensurate competitive values, but is almost never accompanied by a discussion or defense of that choice.

The idea that procompetitive potential always trumps anticompetitive effect has old roots that can be traced to a decision that predates the Rule of Reason itself. That case, *United States v. Addyston Pipe & Steel Co.*,<sup>197</sup> is often credited with ancillarity analysis,<sup>198</sup> which in modern doctrine can save a restriction from *per se* illegality in favor of Rule of Reason analysis. But often a finding of ancillarity is tantamount to *per se* legality, and Professor Bork has argued that this is rightly so,<sup>199</sup> perhaps because it avoids incommensurate balancing. This move, however, implies a value judgment between incommensurate measures of competition and welfare, albeit in a tacit, unexamined way.

Judge Taft, writing for the Sixth Circuit in *Addyston Pipe*, explained that the test of legality under the Sherman Act for agreements restraining trade was whether they were “merely ancillary to the main purpose of a lawful contract.”<sup>200</sup> He justified this rule as avoiding the indeterminacies of estimating “how much restraint of competition is in the public interest, and how much is not.”<sup>201</sup> Essentially, Judge Taft argued that ancillarity analysis avoided direct balancing of often incommensurate measures of pro- and anticompetitive effects, an exercise he characterized as “set[ting] sail on a sea of doubt.”<sup>202</sup> Although the ancillarity defense endorsed by Judge Taft in *Addyston Pipe* did not prevail as the dominant mode of §

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197. 85 F. 271, 271 (6th Cir. 1898).

198. See Werden, *supra* note 1, at 753 (“[Taft’s] nascent ancillary restraints doctrine divided all trade restraint into just two categories—ancillary and prohibited.”).

199. Professor Bork advocated *per se* legality for horizontal restraints and boycotts ancillary to an otherwise procompetitive venture. See BORK, *supra* note 13 at 263–79 (horizontal restraints); *id.* at 330–44 (boycotts).

200. 85 F. at 282.

201. *Id.* at 284.

202. *Id.*

1 analysis, it was resurrected by courts during the economic reorientation of antitrust in the 1970s and 80s as a way to avoid *per se* condemnation and to earn the more lenient Rule of Reason analysis.

But at least in the case of vertical restraints, a finding of ancillarity—that the restraint on intrabrand competition is ancillary to a purpose to promote interbrand competition—is often enough to declare the restraint lawful *per se*. Judge Douglas H. Ginsburg, writing fourteen years after non-price vertical restraints as a class were spared *per se* condemnation and made subject to the Rule of Reason, studied the analysis of the forty-one vertical cases decided in that interval.<sup>203</sup> He found that almost half were resolved in favor of the defendant without any consideration of intrabrand competitive effects, and thus without any balancing. In these nineteen cases, the courts decided the issue based entirely on the possibility of benefit—or at least lack of harm—to interbrand competition.<sup>204</sup> Similar observations have been made about the treatment of vertical price agreements since 2007, when *Leegin* spared them from *per se* condemnation.<sup>205</sup>

These cases imply that benefits to interbrand competition, no matter how small, always trump costs to intrabrand competition, no matter how large. That itself is a judgment between incommensurate measures of consumer welfare. Rather than discuss the virtues and vices of such a presumption, courts use Taft's ancillarity framework to appear to avoid choosing at all. This avoidance move allows important and contested value judgments to fly under the radar, and allows courts to appear to avoid the commensurability problem while actually resolving it with a thumb on the scale in favor of legality.

### C. Inconsistent Demands of “Actual” Evidence

Another popular technique used by courts to avoid appearing to balance incommensurate values is to demand empirical evidence of anticompetitive harm. In fact, it is far from clear that § 1 liability actually requires empirical proof of competitive harm through higher prices, decreased output, or even empirically-supported market power. But several Supreme Court cases have left sufficient doubt on the question that many lower courts feel free to demand what the Court has

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203. Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 73–75 (1991).

204. *Id.*

205. These cases have essentially adopted Professor Bork's prescription, relying on Taft's ancillarity framework, that vertical restraints be subject to near *per se* legality. See D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1003–04 (2014).

confusingly called “actual evidence” from plaintiffs and dismiss their § 1 claims when they do not have it. Summary dismissal is attractive because courts can then avoid balancing and thus the appearance of judgment between incommensurate values.

It is relatively uncontroversial that a full-blown Rule of Reason analysis requires some form of empirical evidence of competitive harm.<sup>206</sup> Such evidence can come in two forms. A plaintiff can show harm indirectly by proving (empirically) market power and allowing the court to infer competitive harm from the restriction.<sup>207</sup> Alternatively, the plaintiff can show empirical evidence of competitive harm—typically through higher prices—and skip the market definition and market power analysis.<sup>208</sup> But many (perhaps most) Rule of Reason analyses fall short of “full-blown” status; they are some form of “quick look” located on the spectrum of analytic intensity between the Rule’s extreme poles. Here, the requisite empirical showing from a plaintiff is uncertain and inconsistent.

On the one hand, there is ample support in Supreme Court jurisprudence that the plaintiff need not show empirical evidence of harm at all; theoretical harm can suffice. The leading case here is *Engineers*, which held that the price-bidding ban was sufficiently obvious in its anticompetitive effect to make further empirical proof of harm unnecessary.<sup>209</sup> Likewise, the competitive harm condemned in *NCAA* was not exactly empirical in nature; the Court did not define a market, nor did it require rigorous econometric evidence of the restriction’s effect.<sup>210</sup> Taken together, these cases could be understood to mean that empirical proof—through market power or actual effects—is (at least sometimes) unnecessary in many Rule of Reason cases. Some lower courts have applied this logic and condemned restraints under

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206. See, e.g., Marina Lao, Comment, *The Rule of Reason and Horizontal Restraints Involving Professionals*, 68 ANTITRUST L.J. 499, 526 (2000) (describing full-blown rule of reason analysis as “requiring empirical proof of anticompetitive effect or economic proof of market power”).

207. Gavil, *supra* note 172, at 755 (“[T]he market power of a combination may be so obvious that no elaborate evaluation is needed and rule of reason analysis may therefore be ‘truncated.’” (quoting Brief for the United States as Amicus Curiae in Support of Affirmance at 16–17, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (No. 83-271))).

208. Actual higher prices or restricted output is seen as evidence, *a fortiori*, of market power, which is defined as the ability to raise price or reduce output anticompetitively, thus a separate showing of market power is unnecessary. See, e.g., *NCAA*, 468 U.S. at 109 n.38 (1984) (citing *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969)).

209. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (“[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”).

210. *NCAA*, 468 U.S. at 100.

the Rule of Reason without rigorous market definitions or econometric analyses of effects on price or output.<sup>211</sup>

On the other hand, the Court's opinions in *California Dental* and *FTC v. Indiana Federation of Dentists (IFD)*<sup>212</sup> cast significant doubt on that conclusion. In *IFD*, the Court condemned a rule, passed and enforced by a federation of dentists that made up about 85% of the state's practicing dentists,<sup>213</sup> that prohibited dentists from sharing x-rays with insurance companies.<sup>214</sup> The Court emphasized the fact that the plaintiffs were able to show that the insurers were "actually unable to obtain compliance with their requests for submission of x rays," which the court characterized as "actual detrimental effects" evidence.<sup>215</sup> This case standing alone does not mean that a plaintiff *must* show "actual effects" evidence to succeed under the Rule of Reason; rather, the opinion could mean that such evidence is sufficient—but not always necessary—to carry a plaintiff's burden.

But the Court's subsequent holding in *California Dental* placed that interpretation on shaky ground. There, although the Court acknowledged that a "theoretical basis for anticompetitive effects" can suffice, its holding—that the theoretical anticompetitive effects of an advertising ban were insufficient to shift the burden to the defendant—seemed to say the opposite.<sup>216</sup> Indeed, some lower courts have interpreted *California Dental* and *IFD* as requiring "actual evidence" to shift the plaintiff's burden.<sup>217</sup> The Ninth Circuit's opinion in the *California Dental* case on remand is an extreme example: there the

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211. See, e.g., *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 362–68 (5th Cir. 2008) (finding that the "net anticompetitive effects of [defendants'] practices were obvious" without empirical proof); *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) (condemning the NCAA's restrictions on assistant basketball coaches' salaries without defining a market or determining through empirical means that salaries would be higher absent the restrictions).

212. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465–66 (1986).

213. *Id.* at 449.

214. The insurance companies had demanded the x-rays as a way to contain costs. *Id.* at 449–50.

215. *Id.* at 460 (quoting 7 AREEDA & HOVENKAMP, *supra* note 166, at 429).

216. See Gavil, *supra* note 172, at 757–59 ("[S]ome of the language used by the Supreme Court in *California Dental* appeared to limit [quick look Rule of Reason] to cases involving evidence of actual anticompetitive effects.").

217. See, e.g., *California ex rel. Harris v. Safeway, Inc.* 651 F.3d 1118, 1139 (9th Cir. 2011) (noting that although "it is true that the arrangement provides a cushion that may arguably affect incentives to compete, that alone, absent evidence of actual anticompetitive impact on pricing, is not sufficient" to resolve the issue on a "quick look" basis); *Deutscher Tennis Bund v. ATP Tour Inc.*, 610 F.3d 820, 832 (3d Cir. 2010) (holding that "[b]ecause 'the contours of the market' here are not 'sufficiently well-known,' " quick look was an inappropriately mode of analysis) (quoting *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004)).

court rejected even *empirical* evidence from the FTC about the effect of advertising bans because the studies examined a different industry.<sup>218</sup>

The ambiguity in the case law about how much “actual evidence” (of competitive effects or of market power) is required to qualify for quick look review or satisfy the quick look standard allows lower courts significant leeway in dismissing plaintiffs’ claims. High burdens on the plaintiff to show market power<sup>219</sup> and other demands of empirical evidence are useful if courts wish to avoid the appearance of incommensurate balancing, but they distort § 1 litigation by holding plaintiffs to a burden of “actual evidence” while allowing defendants to prevail with only theoretical benefits to competition or welfare.<sup>220</sup>

#### IV. TOWARDS A COMMENSURABILITY DEBATE: WHAT’S MISSING FROM ANTITRUST THEORY AND INSTITUTIONAL DESIGN

The commensurability myth means that judges do not engage explicitly with the value judgments inherent in most Rule of Reason cases. But what are those value judgments, and what would exposing the incommensurability of competitive values mean for antitrust theory and institutional design?

Section A of this part identifies two debates that are largely missing from substantive antitrust law and argues that confronting them would improve antitrust decisionmaking. First, the commensurability myth has allowed courts and scholars to avoid decisions about when qualitative aspects of consumer welfare—such as product quality, innovation, and variety—should outweigh more quantifiable effects like price and quantity. Second, the myth has allowed courts to avoid developing a framework for when competitors may suppress rivalry for the sake of a more functional market. A more robust theory of industry self-regulation will add much-needed rationality and transparency to antitrust law.

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218. *Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 951–52 (9th Cir. 2000) (requiring “some . . . relevant data from the precise market at issue in the litigation”). For a critique of this holding, see Thomas L. Greaney, *A Perfect Storm On the Sea of Doubt: Physicians, Professionalism and Antitrust*, 14 LOY. CONSUMER L. REV. 481, 494 (2002) (describing the Ninth Circuit as “unjustifiably wary of drawing inferences from those studies as to the likely effects of advertising restraints by dentists”).

219. See *Bhan v. NME Hosps. Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991) (finding plaintiff failed to make required showing); see also *Mary Kay, Inc. v. Dunlap*, No. 3:12–CV–0029–D, 2012 WL 2358082 at \*6–7 (N.D. Tex. June 21, 2012) (dismissing a § 1 claim for failure to empirically define a market).

220. See, e.g., *Cal. Dental*, 224 F.3d at 949, 956.



Section B discusses the institutional design implications of confronting the commensurability myth. I first explore the possibility that commensurability problems point towards more administrative and less judicial decisionmaking in antitrust, observing that expert agencies may have an advantage in tackling the quantification problems that give rise to incommensurability. I then address the possibility that because antitrust often involves choosing between competing values, the legislature should take on a larger role in regulating competition. Finally, I explore the arguments for leaving at least some antitrust decisionmaking to the courts. I conclude by suggesting that commensurability problems point towards a blend of decisionmaking across the branches, but that the current balance is too focused on courts.

### *A. Incommensurability in Antitrust: Hidden Debates*

In §1 law and policy, debates about how to address the incommensurability problem are mostly hidden and implicit, resulting in unsatisfactory judicial decisionmaking about what competitive values should be prioritized. Two specific examples are discussed here. Without providing answers to these debates, this subsection frames these essential questions and illustrates the need for their further development.

#### 1. When and How to Trade Off Qualitative Effects for Quantitative?

Although consumers benefit both from quantitative measures of welfare—such as quantity and price—and from qualitative measures—such as product quality, innovation, and variety—antitrust often emphasizes the quantitative over the qualitative. For example, the Antitrust Guidelines for Collaborations Among Competitors, issued jointly by the FTC and the DOJ, put price effects first and allow efficiency arguments (that might go to such qualitative benefits as “improved quality, enhanced service, or new products”) only after they pass a very high bar of proof.<sup>221</sup> A comprehensive study of health

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221. FED. TRADE COMM’N & THE DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 24 (April 2000), [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf) [<https://perma.cc/2ADP-J33L>] [hereinafter “COLLABORATIONS GUIDELINES”] (noting that because “[e]fficiencies are difficult to verify and quantify,” they must be verified and may not be “vague or speculative”).

industry antitrust cases revealed “a lack of attention to quality data,”<sup>222</sup> and found that when courts did engage with quality arguments, they did so “at an abstract rather than a specific level.”<sup>223</sup> Arguments about innovation often seem similarly disfavored, perhaps because courts perceive patent and copyright law as better suited to balancing innovation concerns. This antitrust-IP dichotomy has led many courts to avoid crediting arguments about innovation as procompetitive.<sup>224</sup>

But antitrust’s disfavor of qualitative welfare arguments is far from complete. The Supreme Court’s opinion in *California Dental* may be the most prominent example of a successful qualitative welfare argument.<sup>225</sup> By accepting the dentists’ claim that advertising restrictions would improve the quality of dental care, the Court essentially elevated quality over price concerns.<sup>226</sup> The Ninth Circuit’s opinion on remand made this judgment even starker when it held that empirical evidence about price effects (by analogy to a similar industry) offered by the FTC was trumped by theoretical quality arguments made by the dentists.<sup>227</sup> Variety and choice, as qualitative benefits to consumers, are likewise persuasive to antitrust courts,<sup>228</sup> and occasionally even arguments about innovation carry the day in §1 cases.<sup>229</sup>

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222. Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545, 615–16 (2002).

223. *Id.* at 621.

224. *Id.* at 628 (observing that the tradeoffs between “competition” and “innovation” appear to be resolved by defining the domain of antitrust law to exclude disputes classified as patent or regulatory); Mark A. Lemley, *Industry-Specific Antitrust Policy For Innovation*, 2011 COLUM. BUS. L. REV. 637, 651 (2011) (noting that “[a]ntitrust courts defer to patent law within the scope of the patent right, largely contenting themselves with policing the edges to make sure that parties do not expand the right beyond its scope” and concluding that “patent law, not antitrust law, determines how innovation will be protected”). Similarly, the Court’s recent holding in *Actavis* could be read as a rejection of the idea that antitrust can vindicate consumer welfare in the form of possible future innovation. See Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating Actavis*, ANTITRUST, Fall 2013, at 16, 19–20 (“[T]his sort of argument was part of the fundamental approach of the dissent, which favored an exception to antitrust law premised on the presence of a patent to encourage innovation.”).

225. See *infra* Section II.B.3.a.

226. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 778 (1999).

227. *Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000) (rejecting the FTC’s empirical evidence suggesting that comparable restrictions on legal advertising contributed to increased price of legal services in favor of the dentists’ argument that the advertising restrictions are theoretically procompetitive).

228. Hammer and Sage attribute this to the fact that “[c]hoice is a consideration that is easy for economists and antitrust lawyers to understand.” Hammer & Sage, *supra* note 222, at 623.

229. See *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (suggesting that when patented innovation arises in a market with a variety of competing products, it may encourage “innovation, industry and competition” as opposed to giving rise to any antitrust concerns).

Scholars and courts should be more explicit about when and how to trade off these different dimensions of consumer welfare. One salient difference between these sources of consumer welfare is their relative measurability: the welfare effects of price and quantity, although not easily ascertained in every case, are more quantifiable than those associated with innovation, variety, and product quality. But according empirical quantitative arguments and theoretical qualitative arguments equal weight may make it too easy for the side raising qualitative arguments to make its case. This asymmetry may justify a heavier burden of proof on qualitative arguments; this is arguably the approach of agencies, as epitomized by the Collaborations Guidelines.<sup>230</sup> But where that threshold of proof should lie is not at all obvious, and deserves more scholarly and judicial attention. Too heavy of a burden would make qualitative arguments too often unsuccessful precisely because parties will usually lack hard empirical proof of quality improvements or increased innovation.

Another consideration in trading off dimensions of consumer welfare is the problem of subjectivity. Some sources of consumer welfare, such as low prices and increased innovation, can be reasonably assumed to benefit all consumers; others, such as quality improvements, will benefit only some consumers. For someone who is disinclined to allow restrictions that benefit some consumers at the expense of others,<sup>231</sup> this asymmetry may be another reason for favoring price effects over claimed quality benefits. But others may believe that whatever is better for consumers as a whole should be allowed by the antitrust laws, having no quarrel with an asymmetry of benefits as long as some consumers receive an aggregate benefit greater than the aggregate cost to the rest.<sup>232</sup>

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230. See COLLABORATIONS GUIDELINES, *supra* note 221, at 24 (explaining that efficiencies, which could theoretically take many qualitative forms, must be quantifiable and verifiable to be “cognizable” in defending a restraint).

231. Someone subscribing to this view could describe himself as favoring Pareto optimal antitrust policy. Economist Vilfredo Pareto defined a transaction as efficient if it made at least one actor better off without making any actor worse off. Pareto efficiency is often associated with the consumer welfare standard, since it would bless a restriction benefitting producers only if it did not also harm consumers. See B. Lockwood, *Pareto Efficiency*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008), [http://www.dictionaryofeconomics.com/article?id=pde2008\\_P000024&edition=current&q=pareto%20efficiency&topicid=&result\\_number=1](http://www.dictionaryofeconomics.com/article?id=pde2008_P000024&edition=current&q=pareto%20efficiency&topicid=&result_number=1) (last visited Sept. 11, 2015) [<http://perma.cc/N26H-WN9L>].

232. Someone subscribing to this point of view could describe himself as believing in a Kaldor-Hicks efficient antitrust policy. Economists Nicholas Kaldor and John Hicks defined a transaction as efficient if it increased total welfare. Some transactions, such as a restriction that harms consumers but benefits producers by a greater degree, satisfy Kaldor-Hicks efficiency but not Pareto. See Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV.

Others may want to dodge this question altogether by asking, in the case of quality claims, whether the product faces competition from another set of products technically outside of the market defined in the case. Where that is true, one may be less worried about the subjectivity problem in the first place. An example may be the NCAA cases where, although courts typically define the market as college sports,<sup>233</sup> the fact that consumers may choose professional sports instead makes qualitative arguments about the “character” of intercollegiate sports especially convincing.<sup>234</sup>

Striking the right balance between qualitative and quantitative measures of consumer welfare may depend on the industry. For example, where the costs of inferior quality are especially high, such as in the healthcare industry, some may argue that quality claims should receive an especially warm welcome from antitrust courts. And some may argue for similar deference to qualitative arguments in industries ripe for market failures that lead to less-than-optimal quality, innovation, or choice. Others may take the opposite perspective, and point out that industries where low-quality products are dangerous and that are ripe for market failures—such as professional services like healthcare—tend to be regulated by other sources of law. In industries where occupational licensing and quality oversight have addressed qualitative measures of consumer welfare, some may take a skeptical view of antitrust defenses identifying non-price benefits.

Finally, antitrust should confront the innovation problem head-on, rather than vacillate between deference to intellectual property law and naïve assertion that competition, as vindicated by antitrust law, solves all innovation problems.<sup>235</sup> Here the scholarship has surpassed the doctrine; courts should directly engage with arguments made by scholars like Mark Lemley about the appropriate balance between antitrust law and intellectual property rights.<sup>236</sup> Again, this balance

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1539, 1569 (1989). Kaldor-Hicks efficiency is therefore associated with the “total welfare” antitrust standard. *See also* Craswell, *supra* note 15, at 1450–56 (discussing the Kaldor-Hicks solution to the problem of incommensurability between individuals, and noting its shortcomings).

233. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 112 (1984).

234. Indeed, the NCAA has successfully raised this “character” argument several times. *See id.* at 101–02; *Gaines v. NCAA*, 746 F. Supp. 738, 747 (M.D. Tenn. 1990).

235. *See, e.g., Verizon Commc’ns, Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004) (arguing that competition promotes the “risk taking that produces innovation and economic growth”); *Abbott Labs. v. Teva Pharms., USA, Inc.*, 432 F. Supp. 2d 408, 421 (D. Del. 2006) (noting that innovation, including patented technology, inherently inflicts harm on competitors, but antitrust laws should not intervene so long as it remains “a matter of consumer choice”).

236. Lemley, *supra* note 224, at 648.

may be industry specific, since different industries require different competitive incentives to optimize innovation.<sup>237</sup>

Setting these thresholds and determining the optimal balance between qualitative and quantitative arguments about consumer welfare will require judgment, not science, and will benefit from an open debate. That is not to say that all courts and commentators are ignoring these issues; they underlie many current antitrust disputes, but they do so in a way that is latent and therefore less transparent. The paradigm of “net” competitive effects has made overt discussion of these issues rare.

## 2. When Does a Market Failure Justify Restraints Suppressing Rivalry?

The reorientation of antitrust around an economic standard changed the way courts saw restraints on rivalry, departing from the previous doctrine that was inhospitable to arguments that market failures could make uncoordinated competition inefficient.<sup>238</sup> But current doctrine lacks a coherent theory about when a market failure justifies suppressing rivalry and which restraints pass muster under the Rule of Reason. Development of such a theory has been hindered by commensurability rhetoric that instructs courts to maximize competition, without defining that term. A lively debate about when one kind of competition (coordinated, but functional competition) is better than another kind (atomistic, rivalrous competition) would help carve out a space for industry self-regulation without ceding all control over competition to those who have the most to gain by self-dealing.

A fundamental step in setting the terms of this debate is to define “competition.” At times, courts use it to mean “rivalry,” such as when the Court censured the engineers for their argument that competition (rivalry) was against the public interest.<sup>239</sup> At other times, courts use the term to refer to a well-functioning market, as in *California Dental* when the Court championed the procompetitive potential of the dentists’ restraints on advertising.<sup>240</sup> Yet another possible definition of “competition” would refer to the presence of conditions that economists associate with perfect competition, such as numerous buyers and sellers, good information, and internalized costs

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237. *Id.*

238. See generally Meese, *supra* note 96, 1775–1808.

239. *Nat'l Soc. of Prof'l Engrs v. United States*, 435 U.S. 679, 693–95 (1978).

240. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999).

and benefits.<sup>241</sup> This meaning is perhaps what the Court had in mind in *Chicago Board of Trade* when it applauded the restriction's tendency to thicken the market with more sellers and buyers, and cited that fact as suggesting that the restriction "merely regulates and perhaps thereby promotes competition."<sup>242</sup> Ultimately, the debate about the meaning of "competition" will likely reveal that all three of these definitions are relevant and important, and that the Rule of Reason requires balancing them, but the first step is to be clear that they represent distinct facets of "competition."

Armed with a better sense of the meaning(s) of competition, antitrust courts and commentators should then develop a theory about what circumstances justify private restrictions on rivalry. At least one scholar believes that the Sherman Act forbids private regulation of competition altogether,<sup>243</sup> and although his opinion seems likely to be in the minority,<sup>244</sup> it is striking how little debate there is about this idea. More robust is the debate about whether market failures justify competitive restraints and, if so, which kinds are particularly appropriate for redress through private contracts in restraint of trade. Professor Alan Meese has several interesting pieces on these questions, ultimately suggesting that restraints addressing market failures from "a poor assignment of property rights" resulting in a "misalignment of incentives" should be seen as procompetitive.<sup>245</sup> In contrast, he argues, restrictions designed to address failures caused by "high information costs and consumers' inability to perceive their own interests" should be suspect under § 1.<sup>246</sup> Other scholars have taken up the relationship between market failure and § 1 liability, but their work proposes very controversial changes to existing law<sup>247</sup> or focuses only on market

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241. See Sam D. Johnson & A. Michael Ferrill, *Defining Competition: Economic Analysis and Antitrust Decisionmaking*, 36 BAYLOR L. REV. 583, 587 (1984) (describing the conditions associated with perfectly competitive markets).

242. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

243. See Nachbar, *supra* note 18, at 69 (arguing that antitrust is "[n]ot merely a rule of economic regulation, [but] a rule against private regulation").

244. Daniel A. Crane, "*The Magna Carta of Free Enterprise*" Really?, 99 IOWA L. REV. BULL. 17, 19 (2013) (finding it "difficult to credit the paper's theory that the property/regulatory distinction supplies a general, positive theory of U.S. antitrust doctrine").

245. Meese, *supra* note 96, at 1807; Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 168–70 (2003).

246. Meese, *supra* note 96, at 1807. Yet another approach is suggested by *Engineers*: market failures already addressed by government regulation (such as professional licensing or building codes) should not be used to justify restraints on rivalry.

247. See, e.g., Brodley, *supra* note 54, at 1021 (arguing that antitrust law should "recognize an efficiencies defense that would allow limited-term collaborative action to correct market failure, subject to ex ante scrutiny and ex post audit"); Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH.

failures in a particular industry.<sup>248</sup> In any case, none of this scholarship has induced courts to enter the fray, and the judiciary is an important voice in this debate.

Another important debate missing from the free-or-functional market controversy is the extent to which the process behind the restraint's creation and enforcement should matter for antitrust liability. The process behind a restraint's enforcement proved dispositive in the Supreme Court's 1963 opinion in *Silver v. New York Stock Exchange*,<sup>249</sup> but the Court has not addressed the question since. Perhaps *Silver* is right that the anticompetitive nature of a restraint on rivalry is intimately related to the process of its creation and enforcement, and that the possibility of meaningful dissent from a restraint's victims makes all the difference.<sup>250</sup> But it could also be argued that the process of private restraint creation is too opaque and unaccountable to ever serve as a factor in liability. These questions deserve more scholarly and judicial attention.<sup>251</sup>

Calibrating the tradeoff between rivalry and self-regulation will also require drawing limits on how far self-regulators can go in suppressing rivalry. Section 1 case law illustrates that a relatively minor market failure cannot justify permanent destruction of all rivalry, but the cases are not clear on where the line lies between permissible self-regulation and unreasonable restraint of trade. Some scholars have suggested that courts should emphasize the duration of restrictions, with temporary restrictions receiving more leeway under § 1.<sup>252</sup> Many scholars and judicial opinions hold that restrictions on one dimension of competition that leave free competition along other important dimensions are better than ones that foreclose all forms of

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L. REV. 849, 851 (2000) (“[A]ntitrust law should recognize a defense for private acts that restrain ‘competition’ under the traditional antitrust analysis but advance total welfare.”); Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 CAL. L. REV. 243, 291 (1993) (arguing for a pure “efficiency” standard even for price-fixing).

248. See, e.g., Thomas L. Greaney, *Quality of Care and Market Failure Defenses in Antitrust Healthcare Litigation*, 21 CONN. L. REV. 605, 606–07 (1989) (approaching the topic of market failures with a focus on the health care industry).

249. 373 U.S. 341, 356–67 (1963).

250. Cf. *id.* at 361–67 (holding that a self-regulatory body's failure to hold a hearing before terminating a member's privileges violated the Sherman Act).

251. At least one lower court has arguably addressed this issue; the membership of the alleged cartel in *Moore v. Boating Indus. Ass'ns*, 819 F.2d 693, 699 (7th Cir. 1987), which could be seen as a feature of its decision-making process, proved important to the Seventh Circuit's opinion in that case.

252. Brodley, *supra* note 54, at 1042.

rivalry.<sup>253</sup> But again, there is insufficient debate about how long is too long, or how to trade off different kinds of rivalry.

### *B. Incommensurability and Institutional Design*

Fully recognizing the commensurability problem in antitrust suggests that the current allocation of decisionmaking—which relies heavily on courts—is not optimal. I do not set out in this section to make a precise recommendation of how power would optimally be allocated; rather, I intend to outline the terms of the institutional design debate that—largely because of the commensurability myth—has so far remained underdeveloped, and to suggest ways in which the commensurability problem should influence this debate.

#### 1. The Case for Agency Decisionmaking: Expertise and Cost-Benefit Analysis

As I have argued in previous work, the current dominance of judicial decisionmaking in antitrust law and policy is inefficient,<sup>254</sup> and the commensurability problem may be another reason to be critical of courts as antitrust regulators. In these articles I argue that courts, lacking access to high-level expertise and the power to study economic phenomena in a systematic way, are ill-equipped to serve as the primary rule makers in an area of law now dominated by questions of economic science. Agencies on the other hand, especially the Federal Trade Commission, do have such expertise and ability to generate and analyze econometric data.<sup>255</sup> And because agency regulation often involves making widely applicable rules, rather than individual holdings with potentially narrow application, the FTC could more efficiently and comprehensively provide guidance to firms who wish to avoid antitrust liability.

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253. The Supreme Court's vertical restraint jurisprudence provides some good examples. *See, e.g.,* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) (finding that restrictions which foreclose one dimension of competition, such as intrabrand, yet promote another dimension, like interbrand, should be analyzed under the rule of reason rather than the per se approach); *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (same, as applied to vertical maximum price fixing); *Cont'l TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58–59 (1977) (same, as applied to vertical territorial restraints).

254. Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247 (2011) [hereinafter Haw, *Amicus Briefs*]; Rebecca Haw, *Delay and Its Benefits for Judicial Rulemaking Under Scientific Uncertainty*, 55 B. C. L. REV. 331 (2014) [hereinafter Haw, *Delay*].

255. Haw, *Amicus Briefs*, *supra* note 254, at 1262–63.



For the same reasons, using an agency like the FTC for antitrust law making and adjudication may have significant advantages over courts when it comes to addressing the commensurability problem. To a large extent, the problem is one of quantification; as discussed in Part II.A.1, incommensurability in antitrust cases often arises from lack of data about how consumers behave when offered better quality products or more variety. In contrast to a court, an agency like the FTC has the ability to gather, or even require disclosure of, data from various industries.<sup>256</sup> And when clear data about consumer preferences is unavailable, an agency like the FTC can use its staff of economists to develop ingenious ways—such as by analogy to other industries—of making quantitative estimates of qualitative consumer benefits.

The fact that the incommensurability problem derives in large part from quantification problems, and the fact that some of these problems may be overcome by econometric analysis, suggests yet another reason why increased agency decisionmaking may be optimal for antitrust. Cost-benefit analysis, a frequently-used technique in agency rulemaking, may deliver significant payoffs for antitrust law. Although it is not unusual to casually refer to Rule of Reason analysis as being analogous to cost-benefit analysis,<sup>257</sup> there seems to be little appetite for applying to antitrust the kind of empirically rigorous CBA required for many agency rules and regulations. As a practical matter, this lack of interest in CBA makes sense; the Sherman Act does not call for it, and agencies like the FTC almost never engage in rulemaking that might trigger the need for CBA. But as a matter of theory, it is far from clear that CBA would be an inappropriate method for trading off the otherwise incommensurate values in competition regulation.

I am not prepared to argue here the full-throated case for CBA in antitrust, but I believe the commensurability myth has suppressed important debates about its merits in the antitrust context. CBA is perhaps most appropriate when the costs and benefits of regulation are relatively quantifiable, and when some consensus exists on the social values sought by regulation, as is perhaps true in antitrust.<sup>258</sup> Although, as I explore in Part II, not all costs and benefits of a given

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256. *Id.* at 1259.

257. See, e.g., Mark E. Roszkowski, *The Sad Legacy of GTE Sylvania and its "Rule of Reason": The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129, 157–58 (1989) (“The *GTE Sylvania* approach suffers from the fundamental flaw inherent in all cost-benefit analysis . . .”).

258. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1161 (2008) (arguing that three conditions make antitrust ideal for a technocratic shift: “consensus on ends, resolution of foundational ideological questions, and the absence of explicit distributive considerations in most antitrust adjudication”).

regulation are perfectly quantifiable, they are probably no harder to quantify than in other areas of regulation where CBA is the norm, such as in environmental and workplace law. And although the social values vindicated by antitrust are somewhat varied, giving rise to questions such as whether any weight should be given to future benefits from innovation, or whether it is acceptable to benefit one kind of consumer at the expense of another, those values—economic efficiency, competition, and consumer welfare—occupy a relatively narrow bandwidth when compared to other areas where CBA is used extensively. More needs to be said about whether CBA offers a fruitful way to address the commensurability problem in antitrust, as it has in other areas of law.

## 2. The Case for Legislative Guidance: Balancing Competing Social Values

The tradeoffs required by antitrust regulation may be more circumscribed than in many areas of law, but because the quantification problem is only partly to blame for antitrust's incommensurability, and because the quantitative problem cannot always be satisfactorily solved, antitrust law will likely always require important compromises between competing values. The indeterminacy of economics on questions from how to measure quality to how to trade off interpersonal welfare<sup>259</sup> is perhaps illustrated by the divergence between American antitrust and EU competition law. Both regimes prize economic efficiency and consumer welfare, both use the expertise of economists, and yet they often diverge in rule and rule application.<sup>260</sup> This divergence suggests that value judgments—tasks typically associated with legislative decisionmaking<sup>261</sup>—are required to regulate competition.

When Justice Scalia said that choosing between state and national interests in Dormant Commerce Clause cases was less like balancing and “more like judging whether a particular line is longer than a particular rock is heavy,” his solution was “to leave [the]

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259. See Craswell, *supra* note 15, at 1448–50 (explaining that welfare economics “does not pretend to offer any theory of how to justify decisions that would affect more than one individual, if some individuals would gain while others lose”); Hammer & Sage, *supra* note 222, at 612 (“[E]conomists scrupulously abstain from opining whether higher quality at a higher price is better or worse than lower quality at a lower price.”).

260. Alan Devlin & Michael Jacobs, *Antitrust Divergence and the Limits of Economics*, 104 NW. U. L. REV. 253, 266–67 (2010).

261. See, e.g., Bork, *supra* note 20, at 839 (arguing that “[t]he choice of ultimate values, however, is usually regarded as a function of the legislature”).

essentially legislative judgments to the Congress.”<sup>262</sup> Although he did not explain why he considered the decision “legislative” or why it was best reserved to the Congress, his reasoning is easily supplied. When regulation requires different social values to be traded off, the most appropriate decisionmaker is the one most democratically accountable. In theory, the different social values at stake will be represented in an elected body of government, lending democratic legitimacy to whatever compromise follows.

Because at least some of the commensurability problem is unavoidable—especially the problem of choosing between different consumer groups—legislative decisionmaking may be the most legitimate means of making some antitrust rules. Antitrust does not implicate the same diversity of interests present in other areas of regulation, nor even the diversity of interests that it once vindicated, as when antitrust was seen as a tool to protect small businesses or encourage the decentralization of the economy and political power.<sup>263</sup> But the commensurability problem does present choices among competing interests that would suggest that at least some antitrust decisionmaking qualifies under Justice Scalia’s paradigm as “legislative.”

The trouble with making the argument that more antitrust law should be done legislatively is that the Congress already has broad powers to regulate competition that it has chosen not to use. The Sherman Act was of course an act of legislation, but its text was so broad as to leave wide discretion to courts and agencies in its implementation.<sup>264</sup> And there has been relatively little legislative activity in antitrust since. This inactivity would suggest that there are significant barriers to creating antitrust legislation.

One such barrier could be simple legislative inertia; antitrust has ceased to be the hot button political issue it once was, and so has been placed on the legislative back burner. In a world where passing even highly salient legislation is nearly impossible, back-burner status means almost total paralysis. Another reason why Congress may have preferred to leave antitrust law making to courts is that the world of antitrust is dynamic—both economic science and the structure and

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262. *Bendix Autolight Corp. v. Midwestco Enters., Inc.*, 486 U.S. 888, 897 (1988).

263. *See Crane, supra* note 258, at 1211–12 (2008) (describing the prior views on the goals of the Sherman Act and the modern consensus on economic welfare).

264. In the words of William Howard Taft, the Sherman Act was written “with the intention that they should be interpreted in the light of common law, just as it has been frequently decided that the terms used in our federal Constitution are to be so construed.” WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 3 (1914).

practices of industry change rapidly.<sup>265</sup> In an environment of moving targets, the common law, with its ability to evolve, may be a more efficient way to regulate than by static statutory language.<sup>266</sup> Whatever its cause, the reality of legislative inactivity must be considered before offering Congressional involvement as a cure-all for the commensurability problem in antitrust.

### 3. The Case for Courts: Judgment, Not Calculation

Having made the case for some increased involvement by expert agencies and for more legislative activity, while acknowledging that expecting too much of Congress is unrealistic, I turn to the role of courts in addressing the commensurability problem in antitrust law. Despite the common conception that courts are ill-suited to make law, and the perhaps less common conception that they *do not* make law, courts do have some advantages over legislative branches in regulating activity. Even given the commensurability problems that courts confront, it is worth exploring whether the judiciary's advantages over Congress justify leaving it some norm-creation role. Further, although there are good arguments for an increased role for agencies in antitrust adjudication and rulemaking, the commensurability problem militates against a total technocratic shift for antitrust.

When it comes to creating rules about how to trade off incommensurate competitive values, Congress may have the advantage of democratic legitimacy, but it also has the disadvantage of exercising only discretionary power. This discretion leads to the back-burner and inertia problems discussed above, while courts must, by virtue of deciding individual disputes, create antitrust law at a relatively steady pace.<sup>267</sup> Similarly, because courts are asked to respond to evolving commercial practices and to apply the best economic science available in the moment, they are arguably more able to respond to social and scientific change relevant to regulation. To the extent the commensurability problem changes shape over time—and there is reason to believe that it does—courts may be better positioned to make

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265. William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the 'Common Law' Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982).

266. See Haw, *Delay*, *supra* note 254, at 347 (noting that the Court and proponents of the Sherman Act as a common law statute argue that “only common law rulemaking can respond to the diverse business practices that arise over time in response to changes in the economy and innovation in product development and distribution”).

267. Note that this is not true for the Supreme Court, which, like Congress, has discretion over its exercise of rule-making power. *Id.* at 248–49.

the kinds of rules and compromises called for by incommensurability in antitrust.

Finally, Justice Scalia's claim that all value-laden choices should be made by a legislature and not the judiciary seems exaggerated.<sup>268</sup> Inherent in the very idea of judging is the notion of judgment; courts are frequently delegated regulatory and adjudicative tasks that must choose between valid and important social values. Judges may be more insulated from and unresponsive to public opinion than the legislature,<sup>269</sup> but courts are often asked, especially in the constitutional arena, to make tough calls between competing values. Their insulation from public opinion could actually be a comparative advantage, one that gives the judiciary "the [fundamental] freedom and responsibility to decide [cases] on broad social considerations."<sup>270</sup>

As I have argued elsewhere, more antitrust authority should be delegated to agencies, and the commensurability problem mostly underscores this point. But because some incommensurability is inherent—that is, it is not just a problem of quantification—the technocratic nature of antitrust should not be exaggerated. A total shift of adjudicative and rule-making power to agencies may be a bridge too far when antitrust is an exercise in judgment, not just calculation. The reality of antitrust regulation is that it is—and must be—a collaboration between those trained in the scientific practice of measuring harms and benefits of a competitive practice and those qualified to apply value judgments in the close calls.<sup>271</sup>

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268. Professor Bork made a similar claim, in the antitrust context:

[A]n expansion of output through increased efficiency . . . might impose other welfare losses on society. [This is] a problem whose solution lies with the legislature rather than the judiciary. . . . A trade-off in values is required, and that is properly done by the legislature and reflected in specialized legislation. It cannot properly form the stuff of antitrust litigation.

BORK, *supra* note 13, at 114–15.

269. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 141–42 (1994).

270. *Id.* at 150. In addition, the judicial tradition of writing opinions—especially if the incommensurability problem is recognized and incorporated explicitly into antitrust cases—will help make for better and more transparent antitrust law than could be performed by technocrats alone. *Cf.* Emily Hammond Meazell, *Super Deference, The Science Obsession and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 736 (2011) (describing judicial review as serving the function of demystifying the science on which agencies rely and explaining the scientific bases of agency decisions to the general public).

271. That collaboration could be made more fertile by teaching judges some quantitative skills necessary to understand the tradeoffs they are asked to make. *See* Haw, *Delay*, *supra* note 254, at 349–50.

## CONCLUSION

Antitrust's focus on economic and competitive effects has probably made the law more rational, predictable, and efficient, but it has not made it free from value judgments. Although antitrust courts routinely describe their task in § 1 cases as measuring the "net competitive effect" of a restraint on trade, competitive effects argued on either side are typically different in kind, and so cannot be reduced to a "net" effect. Pro- and anticompetitive effects of agreements among competitors, as they are presented to courts, are usually incommensurate and balancing them under the Rule of Reason requires value judgments that often economic science cannot supply.

The commensurability myth, here illustrated by Rule of Reason cases, pervades all areas of antitrust law where courts must trade off pro- and anticompetitive effects. The myth has led courts to undertake numerous avoidance moves in § 1 litigation that make antitrust less predictable and less fair. It has prevented important academic and judicial debates from reaching maturity: more should be said and written about how to trade off the qualitative dimensions of consumer welfare for quantitative ones, and about when market failures justify a departure from rivalrous competition. And more needs to be said about how the commensurability problem should influence the institutional design of antitrust law and enforcement. This Article, by identifying the myth and some of its consequences, takes the first step in developing a healthy discourse about what kinds of competition are most important. It is time to let go of the view that antitrust is exceptional. Despite our modern economic-driven conception of it, antitrust law is not just a maximization problem, but also an exercise in judgment.