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The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other

ABSTRACT. The potential complementarities between antitrust and consumer protection law—collectively, "consumer law"—are well known. The rise of the newly established Consumer Financial Protection Bureau (CFPB) portends a deep rift in the intellectual infrastructure of consumer law that threatens the consumer-welfare oriented development of both bodies of law. This Feature describes the emerging paradox that rift has created: a body of consumer law at war with itself. The CFPB's behavioral approach to consumer protection rejects revealed preference—the core economic link between consumer choice and economic welfare and the fundamental building block of the rational choice approach underlying antitrust law. This Feature analyzes the economic, legal, and political institutions underlying the potential rise of an incoherent consumer law and concludes that, unfortunately, there are several reasons to believe the intellectual rift shaping the development of antitrust and consumer protection will continue for some time.

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ESSAY CONTENTS

INTRODUCTION

The intellectual soul of American consumer law is up for grabs as a battle emerges between its two pillars—conventional consumer protection law and antitrust law. The former focuses on ameliorating the deleterious effects of market failures associated with consumers' imperfect or incomplete information; the latter provides the institutional framework for protecting consumers from losses associated with the creation and acquisition of monopoly power. As both share the common goal of protecting consumer welfare, it is unsurprising that legal scholars, economists, and regulators envision a fully integrated "consumer law"—a term I use hereafter to refer jointly to antitrust and consumer protection.

The potential complementarities between antitrust and consumer protection are well known.[1] Both consumer law institutions seek to maximize consumer welfare, with antitrust policy focusing on market failures associated with the creation of market power and consumer protection emphasizing instances in which, despite ample competition, consumer welfare is threatened by information asymmetries and deception.[2] A simple price-theoretic, rational choice model of complementary operation of antitrust and consumer protection institutions might therefore envision consumer protection institutions allocating resources aimed toward improving disclosures, filling information gaps, and protecting against fraud and deception, with antitrust limited to preventing the unlawful creation or acquisition of market power and failures of the competitive process. While the consumer welfare paradigm would discipline both consumer law institutions under this complementary view, lines would clearly be drawn between them so as to minimize conflict.[3] Indeed, the global trend is toward integration of consumer law institutions.[4] Despite these substantial economic and legal complementarities, the Dodd-Frank Wall Street Reform and Consumer Protection Act portends a deep rift in

1. *See* WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 35-38 (2009), *available at* http://www.ftc.gov/os/2009/01/ftc100rpt.pdf; Mark Armstrong, *Interactions Between Competition and Consumer Policy*, COMPETITION POL'Y INT'L, Spring 2008, at 97, 100-12; Paul A. Pautler, *Consumer Protection Policies, Economics, and Interactions with Competition Policy*, COMPETITION POL'Y INT'L, Spring 2008, at 83, 83-84.
2. Armstrong, *supra* note 1, at 112-25.
3. WILLIAM MACLEOD, ORG. FOR ECON. CO-OPERATION AND DEV., DAF/COMP/GF/WD (2008)37, THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES 3 (2008), *available at* http://www.oecd.org/dataoecd/31/56/40080545.pdf.
4. At least thirty agencies worldwide integrate competition and consumer protection functions. *See* KOVACIC, *supra* note 1, at 37.

the intellectual infrastructure of consumer law that threatens the development of both bodies of law, as well as consumer welfare and economic growth. This Feature identifies the intellectual and institutional origins of that rift and describes the emerging paradox it has created: a body of consumer law at war with itself.

Dodd-Frank heralded a revolution in consumer protection law and enforcement. It created the Consumer Financial Protection Bureau (CFPB) and granted it unprecedented regulatory powers in the consumer law context, including the exclusive rulemaking and primary enforcement authority over consumer financial protection,[5] while divesting consumer financial protection functions from the Federal Trade Commission (FTC) and other federal regulators.[6] In addition to the authority to prohibit unfair or deceptive practices in consumer financial product markets,[7] a statutory grant of power otherwise identical to that granted to the FTC,[8] the CFPB is charged with

5. 12 U.S.C.A. § 5512(b)(4) (West 2010).

6. *Id.* § 5581.

7. *Id.* § 5531(a).

8. *Compare id.* ("The Bureau may take any action . . . to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."), *with* 15 U.S.C. § 45(a)(2) (2006) ("The Commission is hereby empowered and directed to prevent persons . . . from using . . . unfair or deceptive acts or practices in or affecting commerce."). The CFPB's enforcement authority is not limited by prior FTC interpretations and guidance. *See* Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43,569, 43,570 (July 21, 2011) (to be codified at 12 C.F.R. ch. X) (construing enforceable "rules and orders" to exclude guidance issued by the agencies that transferred rules to the CFPB). Some have expressed concerns that the lack of coordination between the FTC and the CFPB will weaken consumer protection. *See* William E. Kovacic, Comm'r, Fed. Trade Comm'n, *The Consumer Financial Protection Agency and the Hazards of Regulatory Restructuring*, LOMBARD STREET, Sept, 14, 2009, at 19, 24-27, *available at* http://www.ftc.gov/speeches/kovacic/090914hazzrdsrestructuring.pdf ("[I]t makes no sense to exclude the FTC. . . . In light of the strong similarities between the FTC's unfair or deceptive authority and the CFPA's authority with respect to unfair, deceptive, or abusive practices, it would be wise to authorize the FTC to enforce CFPA rules. . . . [T]here is no assurance—beyond aspirational mandates for interagency coordination—that the CFPA will account properly for the FTC's views about the appropriate content of unfairness and deception jurisprudence. Conflicts in interpretation and in litigation strategies will adversely affect every core area of consumer protection for which the FTC will continue to exercise primary responsibility."). Kovacic refers to the "CFPA," or Consumer Financial Protection *Agency*, rather than the CFPB because at the time, it was thought that the regulator would be an independent agency rather than a bureau of the Federal Reserve. *Compare* Kenneth R. Harney, *Consumer Financial Protection Agency: An Overview*, L.A. TIMES, Aug. 2, 2009, http://www.latimes.com/classified/realestate/news/la-fi-harney2-2009aug02,0,7083818.story (describing early

eliminating "abusive" practices[9] in the consumer financial services business and ensuring that consumer disclosures are "fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service."[10] Dodd-Frank also attempts to insulate the CFPB from interference by the political branches by lodging the new Bureau in the Federal Reserve,[11] giving it a budget that lies outside the appropriations process,[12] and providing the Director of the CFPB with a term appointment of five years subject to removal only for cause.[13]

What is most important about Dodd-Frank and consumer protection, however, is that it represents the arrival of behavioral law and economics as the intellectual centerpiece of the current administration's approach. Behavioral law and economics, as advocated by Professors Bar-Gill and Warren in an article laying out the blueprint for a new agency,[14] played a significant role in the creation of the CFPB. Behavioral law and economics is built upon the foundational assumption that consumers make predictable and systematically

proposals for a stand-alone Consumer Financial Protection Agency), *with* Jim Puzzanghera, *Consumer Financial Protection Bureau Closer to Reality*, L.A. TIMES, June 23, 2010, http://articles.latimes.com/2010/jun/23/business/la-fi-financial-reform-20100623 (reporting that House and Senate negotiators had agreed to locate the consumer regulator within the Federal Reserve).

9. 12 U.S.C.A. § 5531(a) (conferring authority to prevent abusive acts or practices in addition to those that are unfair or deceptive).

10. *Id.* § 5532(a).

11. *Id.* § 5491(a).

12. *Id.* § 5497(a) (providing that funding is to be determined by the Director, subject to a cap, and transferred from the Federal Reserve System's earnings).

13. *Id.* § 5491(c)(1), (3).

14. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 6-7 (2008) (identifying a "need for systemic regulation" in the financial services market and advocating for creation of a new federal agency to regulate consumer credit products). Numerous academics credit Bar-Gill and Warren's work for influencing the creation of the CFPB. *See, e.g.*, Edward J. Janger, *Locating the Regulation of Data Privacy and Data Security*, 5 BROOK. J. CORP. FIN. & COM. L. 97, 97 (2010) ("The proposal for [an agency like the CFPB was] made initially by Elizabeth Warren and Oren Bar-Gill."); Jared Elosta, Recent Development, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1273 (2011) ("Adopting the idea of Bar-Gill and Warren, Dodd-Frank created the . . . CFPB . . . ."); Richard Epstein, *Richard Epstein on the Dangerous Allure of Behavioral Economics: The Relationship Between Physical and Financial Products*, TRUTH ON THE MARKET (Dec. 6, 2010, 1:20 PM), http://truthonthemarket.com/2010/12/06/richard-epstein-on-the-dangerous-allure-of-behavioral-economics-the-relationship-between-physical-and-financial-products (discussing financial regulation and finding that "[f]ew academic publications have had as much direct public influence on the law as the 2008 article by . . . Oren Bar-Gill . . . and Elizabeth Warren").

irrational decisions, and, indeed, that individual choice is not a reliable predictor of individual economic welfare;[15] this observation in turn has inspired both commentators and legislatures to propose various restrictions on consumer choice.[16] Behaviorists broadly contend that consumers systematically make choices that are both to their detriment and unrepresentative of their true preferences, and much of the behaviorist literature dedicates itself to establishing one or more of these biases in a specific context.

A critical component of the CFPB's mission, representative of this new vision of consumer protection, is to improve consumer decisionmaking by altering the basic design of consumer credit products, adding disclosure requirements, reducing consumers' choices, and instituting default rules favoring products approved by the given legislative agency. Notably, if this component of the CFPB's mission merely involved improving disclosures to ensure consumers are able to appropriately assess the risks of consumer financial products, its impact would be relatively modest. However, the behavioral approach to consumer law rejects revealed preference and with it the core economic link between consumer choice and individual welfare. Revealed preference in economics is the principle that allows economists to recover information about consumer preferences, and hence utility, from actual choice behavior.[17] Application of revealed preference requires an assumption that the consumer's preferences are stable over the relevant time period, but when that assumption is satisfied, it provides a powerful tool for extracting policy-relevant information about consumer preferences. Revealed preference does not imply that individual choices will lead to the socially optimal outcome or guarantee the absence of market failure; it simply states that among the choices available to the individual, the selected bundle best satisfies consumer preferences.

15. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 7, 9 (2008) (explaining that "[h]undreds of studies confirm that human forecasts are flawed and biased," and that "[h]uman decision making is not so great either," and claiming that the assumption that "almost all people, almost all of the time, make choices that are in their best interest" is "obviously false"); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 175 (2003) ("The false assumption is that people always (usually?) make choices that are in their best interest. . . . We claim that [such an assumption] is testable and false—indeed, obviously false.").

16. *See* Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. (forthcoming Apr. 2012) (manuscript at 30-35) (cataloging these various proposals).

17. *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 121 (9th ed. 2009) (describing revealed preference as the statement that "[i]f a bundle *X* is chosen over a bundle *Y*, then *X* must be preferred to *Y*").

While I describe the CFPB's behaviorist intellectual foundation as rejecting the notion of revealed preference, it is important to understand that this does not merely mean that the CFPB rejects consumer sovereignty. Nor does price theory merely embrace consumer sovereignty. A brief background in the intellectual underpinnings of modern market regulation highlights the distinction between the behavioral approach to regulation and the standard microeconomic approach.

The standard economic theory of regulation predicates governmental intervention upon a demonstrable and correctable market failure.[18] A market failure occurs when functioning markets fail to realize full gains from trade through efficient production.[19] A broad swath of regulations, many of which outright prohibit certain products or reduce consumer sovereignty drastically, embraces this standard economic model. For example, consider the cases of exploding toasters and toys tainted with dangerous levels of lead. In either case, standard economic models of market failure associated with informational asymmetries may justify regulation to correct market failure.[20] Current regulations to combat monopolies, information asymmetries, and externalities draw upon this standard economic model. Environmental restrictions seek to force firms that are inefficiently overproducing to instead internalize pollution costs imposed upon third parties.[21] Industry-wide disclosure mandates on products ranging from medicine to finance prevent firms from inefficiently overproducing in reliance on the reasonable but unjustified expectations of lesser-informed consumers.

Whether or not these regulations achieve their stated goals remains beyond the scope of this piece, but it suffices to say that each of these regulations—and

18. *See, e.g.*, W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST, at xviii (4th ed. 2005) (describing the foundational question in the economics of regulation as, "[W]hat particular market failures provide a rationale for government intervention?"). However, market failure is a necessary but not sufficient condition for regulation. *See, e.g.*, Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (criticizing and comparing the "nirvana approach" with the comparative institutions approach, which presents the relevant policy choice as between "alternative real institutional arrangements").

19. N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 11 (5th ed. 2009). For a more technical definition of market failure, see DANIEL F. SPULBER, REGULATION AND MARKETS 3 (1989), which defines market failure as "a departure of the market equilibrium allocation from the set of Pareto optimal allocations of goods and services."

20. *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 443-52 (4th ed. 2005); George A. Akerlof, *The Market for "Lemons": Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491 (1981).

21. MANKIW, *supra* note 19, at 209-10.

the standard economic regulatory framework associated with them—*assumes* standard, stable, *rational* consumer preferences. In other words, the standard framework maintains (even when restricting consumer choice) that the consumer's choice behavior reflects sincerely held preferences. Notwithstanding the revealed-preference principle, because of the market failures described above, *social* welfare may not be maximized. Whereas the standard economic model attacks some market failure preventing private exchanges from maximizing rationally held consumer preferences, behaviorists advance a combination of theories that may be summarized as "imperfect optimization"[22]: consumers *do not* maximize their own welfare, even absent traditional market failures.[23]

Both economic approaches contemplate situations in which restricting individual choice improves both private and social welfare. The key distinction between behavioral and rational choice approaches to consumer protection is therefore not differences in respect afforded to consumer sovereignty per se, but rather the conceptual link between individual choice and inferences of economic welfare. Whereas price theory embraces the conventional economic understanding of revealed preference—an economic agent choosing apples over oranges is made better off by his decision—the behaviorist approach requires a comparison of the agent's choice with the selection that the agent would have made according to his "true" preferences, which would only be revealed if he were free from cognitive biases.

The behaviorists' rejection of revealed preference highlights the uniqueness of the CFPB's approach to consumer protection. Many regulatory agencies, including the Food and Drug Administration and the Consumer Product Safety Commission, often exercise their consumer protection enforcement

22. In the case of the exploding toaster (an example that Bar-Gill and Warren invoke, *see* Bar-Gill & Warren, *supra* note 14, at 103, 106-09), rational choice economics might justify a product ban on the assumption that all or nearly all fully informed consumers would not buy the product and that the costs of disclosing the risks to consumers would be greater than a product ban achieving the same end. This assumption is falsifiable (i.e., if well-informed consumers consistently express pro-exploding-toaster preferences). By contrast, behavioral economics relies on the unfalsifiable hypothesis that even fully informed consumers make choices that diverge from their "true" preferences. Under this assumption, greater disclosure can even widen the divergence between "true" preferences and actual choice behavior. (If well-informed consumers consistently express preferences for adjustable-rate mortgages, behavioral economists can simply write those consumers off as victims of cognitive biases who are unable to reveal their true preferences.)

23. Jolls, Sunstein, and Thaler describe these departures from perfect optimization as "*bounded rationality*, *bounded willpower*, and *bounded self-interest*." Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998).

powers in a manner that reduces consumer sovereignty.[24] However, as explained above, it is not necessary to abandon revealed preference, or conventional price theory, to justify choice-reducing (but consumer-welfare- or efficiency-maximizing) regulatory interventions designed to solve conventional market failures. What distinguishes the behavioral approach to consumer protection is the rejection of revealed preference—that is, abandoning the notion that consumer choices reveal something useful about the consumer's welfare. The behavioral approach must substitute the information provided by operation of the revealed preference principle. The most unique (and challenging) feature of the behavioral approach generally, and certainly in the consumer protection context specifically, is that it requires identification of "true" preferences, which commonly must be identified by the regulator, in order to generate the information needed to understand how policies impacting consumer choices relate to consumer welfare.[25]

The new consumer protection policy contemplated by Dodd-Frank combines the insights of behavioral economics and its fundamental assumptions about individually irrational behavior and welfare with the centralization—and incentives—of a powerful administrative agency. While some have recognized the monumental changes that Dodd-Frank portends for consumer protection law, its significant implications for antitrust law have not been fully appreciated.[26] By way of contrast with the near-sudden legislative creation of the new behavioral consumer protection law, the evolution of the Sherman Antitrust Act has been a tale of measured integration of neoclassical microeconomic analysis into the vague contours of the Sherman Act. Antitrust law has gradually incorporated both theoretical and empirical insights from antitrust economics under the Supreme Court's auspices and through the

24. The Food and Drug Administration and the FTC have long had an agreement to coordinate efforts to protect consumer welfare in food and drug markets. *See* Working Agreement Between Federal Trade Commission and Food and Drug Administration, 4 Trade Reg. Rep. (CCH) ¶ 9850.01 (June 9, 1954), *available at* http://www.fda.gov/ohrms/dockets/DOCKETS/06p0394/06p-0394-cp00001-10-Tab-08-Trade-Reg-Rpts-vol1.pdf.

25. Jolls et al., *supra* note 23, at 1474-75 ("In conventional economic analysis, normative analysis is no different from prescriptive analysis, since the goal of the legal system is to maximize 'social welfare,' usually measured by people's revealed preferences, and prescriptive (in our sense of the term) analysis also focuses, for the conventional economist, on how to maximize social welfare. But from the perspective of behavioral economics, the ends of the legal system are more complex. This is so because people's revealed preferences are a less certain ground on which to build; obviously issues of paternalism become central here.").

26. *But cf.* Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368 (2011) (arguing that an antitrust approach bolstered by new statutory authority would achieve Dodd-Frank's objective of reducing systemic risk).

case-by-case development of a common law of antitrust. There is no serious debate that the institutional integration of economics into antitrust law through the courts has been a boon for consumers.

Robert Bork's *The Antitrust Paradox* famously exposed the then-incoherent, unstable, and unpredictable body of antitrust law pursuing multiple (sometimes conflicting) goals, none with any success.[27] The integration of economics shifted antitrust law from an intellectually embarrassing and socially costly body of law to a broad "consumer welfare prescription."[28] Indeed, antitrust law has traveled an institutional journey that has resulted in its deep commitment not merely to economic analysis generally but specifically to *rational choice* microeconomics.

The antitrust/consumer protection paradox represents a critical crossroads for consumer law. While the intellectual and philosophical underpinnings of rational choice and behavioral economics are important components of the rift in consumer law, they do not explain its emergence. Rather, the key to understanding the emerging chasm between antitrust and consumer protection lies in comparative institutional analysis. The primacy of judicial decisionmaking and private litigation in the development of antitrust is conducive to a set of economic tools that narrows the possible set of outcomes, reduces uncertainty, and improves the quality of decisions.[29] An important feature of behavioral economics is that it broadens rather than reduces uncertainty about possible equilibrium outcomes from a given transaction, rule, or business practice. Thus, it is unsurprising that behavioral economics has not gained traction in the courts, especially with respect to antitrust.[30] On the other hand, behavioral economics' lack of predictability makes it malleable and easier to manipulate than its neoclassical relative, which are attractive features for achieving the political ends sought by an administrative agency.

The emerging policy equilibrium is both unstable and untenable in the long run. It is not only wildly inefficient but also causes firms attempting to avoid liability from one pillar of consumer law to increase their exposure under another. There can be no peaceful equilibrium coexistence of the "new"

27. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

28. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 27, at 66).

29. *See generally* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011) (discussing the increasing complexity of economic analysis in judicial decisionmaking in antitrust and demonstrating judges with economic training exhibit improved performance).

30. Douglas H. Ginsburg & Derek W. Moore, *The Future of Behavioral Economics in Antitrust Jurisprudence*, COMPETITION POL'Y INT'L, Spring 2010, at 89, 97.

consumer protection and the "old" antitrust. There are only two general possibilities for the ultimate resolution of this paradox: (1) the successful hostile takeover of "old" antitrust by a "new" behavioral version consistent with the "new" consumer protection or (2) the failure of behavioral consumer protection institutions and reversion to neoclassical consumer law. Over the short and perhaps even medium term, the divergence is likely to persist. Indeed, resolution of the internal intellectual conflict within antitrust evolved over decades, not years. The outcome, in terms of both the nature and timing of such a resolution, depends most critically upon a comparative analysis of antitrust and consumer protection institutions.

In Part I of this Feature, I describe the birth of behavioral consumer protection, beginning with its intellectual origins and leading to the passage of Dodd-Frank. I explain how this novel approach to consumer protection assumes a weak conception of consumer choice and rejects the link between revealed preference and economic welfare. I also describe existing antitrust law and institutions, which are built upon a foundation of rational choice economics and a strong conception of consumer choice and revealed preference.

In Part II, I identify the emerging antitrust/consumer protection paradox. The trajectory of the new consumer protection places consumer law at war with itself in a very practical sense. Antitrust law encourages behavior that consumer protection condemns, and vice versa. This intellectual rift poses serious consequences for how the law conceives of both consumer protection as well as consumers themselves.

In Part III, I explain the emergence of the paradox as a function of the legal, economic, and political institutions shaping both branches of consumer law. More specifically, I describe the differing assumptions animating neoclassical economics and behavioral economics and how these assumptions shape antitrust and the new consumer protection law, respectively. These differences set the stage for a comparative institutional analysis of the courts and agencies that play the central roles in determining how and to what extent economic assumptions are built into consumer law and policy.

I. CONSUMER LAW AND ITS INSTITUTIONS

A. Consumer Protection Law

Two bodies of law comprise the modern law of consumer welfare: consumer protection and antitrust. Modern consumer protection law originates in the common law and its perceived failings. Redress for common consumer grievances—such as the inaccurate description of a product or the dishonoring of a warranty—lay in suits for breach of contract, fraud, or fraudulent misrepresentation.[31] Both tort and contract remedies presented problems, however. Tort theories of recovery imposed "intent to deceive" and causation requirements, while contract theories required privity between buyer and seller,[32] which became more uncommon in the increasingly mobile 1960s American economy. Judicial remedies often could prove economically futile as the cost of a suit typically could overwhelm whatever damages the consumer could demonstrate.[33]

The Federal Trade Commission Act (FTCA) created the Federal Trade Commission in 1914.[34] The FTCA established the Federal Trade Commission and empowered it to regulate "[u]nfair methods of competition."[35] The Commission initially focused on antitrust and other trade regulation violations, hinting at the two complementary purposes that the modern FTC has come to embody.[36] After an early U.S. Supreme Court case ruling that the FTC lacked the power to prosecute consumer harms absent competitive injury,[37] Congress amended the FTCA to prohibit "unfair or deceptive acts or practices in . . . commerce,"[38] statutory language that remains the foundation of modern federal consumer protection law.[39] Congress consciously left this proscription open-ended, delegating both definition and enforcement of these prohibitions to the FTC in the pursuit of maximizing consumer welfare.[40]

31. Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 168-69 (2011).

32. *Id.* at 169.

33. *Id.*

34. William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 592 (1982).

35. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

36. *See* Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921-1925*, 77 ANTITRUST L.J 145, 193 (2010).

37. FTC v. Raladam Co., 283 U.S. 643, 654 (1931).

38. 15 U.S.C. § 45(a)(1).

39. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 8 (2005).

40. *Id.* at 8, 11-12. The FTC set forth its policy statements on its interpretation of "deception" and "unfairness" in letters to Congress. *See, e.g.*, Letter from James C. Miller III, Chairman, FTC, to Representative John D. Dingell (Oct. 14, 1983), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm; Letter from Michael Pertschuk, Chairman, FTC, to Senators Wendell H. Ford and John C. Danforth (Dec. 17, 1980) [hereinafter Unfairness Policy Statement], *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm.

Yet, dogged failures in both federal consumer protection law as well as ineffective FTC enforcement provoked state-driven consumer protection law.[41] The FTCA lacked a private right of action enabling individuals to recover losses sustained as a result of harmful practices.[42] While the FTC enjoyed the power to enforce the FTCA by pursuing injunctions against unfair practices, by the 1960s, the FTC was widely viewed as a paradigm of regulatory capture and was characterized as ineffectual and beholden to flights of fancy.[43] States responded by passing a variety of state consumer protection acts.[44] The earliest acts prohibited a specific list of actions deemed or expected to be harmful to consumer welfare, focusing on "consumer fraud."[45] Subsequent acts tended to track the FTCA's language, leading to the moniker "little FTC Act" for these state laws,[46] many of which expressly deferred to federal interpretations of analogous provisions in consumer protection law.[47] Some of these "little FTC Acts" failed to require deference to the FTC's interpretation of the FTCA, and many enabled private rights of action, thereby vastly broadening the reach of state consumer protection law.[48] They further provided that state attorneys general could seek injunctions against acts in violation of the consumer protection laws while "private attorneys general" prosecuted private complaints.[49] State laws removed many of the tort barriers and provided for attorneys' fees to a prevailing plaintiff so as to make vindicating meritorious consumer protection claims an economically viable enterprise.[50] In short, these laws gave consumers broad redress for welfare-harming practices.

41. Butler & Wright, *supra* note 31, at 167-68.
42. *Id.* at 165.
43. *Id.* at 167-68.
44. *Id.* at 165.
45. *Id.* at 169.
46. 1 DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 2:10 (2010).
47. *See, e.g.*, CONN. GEN. STAT. § 42-110b (2011); HAW. REV. STAT. ANN. § 480-2 (LexisNexis 2011); MONT. CODE ANN. § 30-14-103 to -104 (2011); OHIO REV. CODE ANN. § 1345.02 (LexisNexis 2011); S.C. CODE ANN. § 39-5-20 (2010).
48. Butler & Wright, *supra* note 31, at 165, 170-72. Today, at least twenty-eight states defer to the FTC interpretation of the FTCA, and every state authorizes private rights of action under its consumer protection laws. JOSHUA D. WRIGHT ET AL., SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION 9, 10 (2009), *available at* http://ssrn.com/abstract=1708175.
49. Butler & Wright, *supra* note 31, at 165, 172.
50. *Id.* at 165.

A review of both these federal and state consumer protection laws reveals a focus on "consumer welfare"—even as the definition of that term evolved. At the federal level, following a Supreme Court case limiting the FTC's authority to directly regulate consumer harms, Congress passed the Wheeler-Lea Act to allow the FTC to address "unfair or deceptive acts or practices in commerce."[51] The courts have interpreted "deceptive" as something less stringent than the requirements of common law fraud, in keeping with the FTC's consumer-centered mission: a practice that merely had the tendency or capacity to deceive has sufficed to implicate the FTC's authority under deceptive practices.[52] Similarly, a 1964 FTC statement describing "unfairness" emphasized whether a practice proved "immoral, unethical, oppressive, or unscrupulous" as well as if it "cause[d] substantial injury to consumers."[53] A 1980 federal reformulation of the FTC's unfairness analysis took consumer welfare concerns yet further, determining unfairness based upon whether a practice inflicted a substantial injury, taking into consideration whether the practice offered countervailing benefits and whether consumers themselves could have most easily avoided the complained-of injury.[54] Congress codified this definition of unfairness into the FTCA in 1994.[55]

The evolution of state consumer protection law also reflects this consumer-welfare driven focus. The Revised Uniform Deceptive Trade Practices Act, one of the first model state consumer protection acts, focused on preventing consumer harm arising from the "misleading trade identification or false or deceptive advertising."[56] The Unfair Trade Practices and Consumer Protection Law similarly focused on acts that created a "likelihood of confusion or misunderstanding."[57] Straightforward economic logic underlies both rationales: in dynamic markets, consumers' revealed preferences best demonstrate consumer desires, and consumer welfare is increased when consumers are better able to satisfy their desires through transparent and accurate transactions. The traditional thrust of consumer protection, therefore, was in

51. Schwartz & Silverman, *supra* note 39, at 8.

52. *Id.* at 54.

53. Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964) (codified at 16 C.F.R. § 408).

54. Unfairness Policy Statement, *supra* note 40.

55. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified as amended at 15 U.S.C. § 45(n) (2006)).

56. NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS, REVISED UNIFORM TRADE DECEPTIVE TRADE PRACTICES ACT WITH PREFATORY NOTES AND COMMENTS 4 (1966).

57. 1 PRIDGEN & ALDERMAN, *supra* note 46, § 3.

preserving consumers' reasonable expectations in transacting while reducing both economic and legal barriers to suit imposed by the common law regime.

One branch of economics increasingly questions this link, however, leading some legal academics to question the policy implications of modern consumer protection law's reliance upon revealed preferences. The 1990s and 2000s heralded a dramatic rise in the behavioral law and economics literature, largely centered on cataloguing, describing, and explaining various "biases" in individual decisionmaking, such as optimism bias, hyperbolic discounting, and framing effects.[58] Whereas only 14 legal articles in the early 1990s referenced "behavioral economics," 103 articles did so in the late 1990s, and 993 articles did so from 2005 through 2009.[59]

Behavioral legal economists share a presumption: the link between consumers' revealed preferences and actual consumer welfare is far weaker, and holds in far fewer situations, than rational choice economic presumptions—and traditional consumer protection law—presume. A change to this fundamental presumption carries drastic policy implications; with the narrowing or abolition of the presumption of consumer welfare, as expressed through consumer sovereignty and revealed preferences, behaviorally informed legal scholarship and policies necessitate some external, third-party validation of welfare-maximizing choices.[60] Where additional consumer choice is not necessarily welfare enhancing, a regulatory body must impose itself to discern welfare-maximizing choices from "biased," or welfare-reducing, ones.

One such body is the CFPB, a key component of Dodd-Frank. If the burgeoning behaviorally inclined legal scholarship indicates the arrival of

58. *See, e.g.*, Mark Armstrong & Steffen Huck, *Behavioral Economics as Applied to Firms: A Primer*, COMPETITION POL'Y INT'L, Spring 2010, at 3; Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004); Jolls et al., *supra* note 23, at 1523-24; Christine Jolls, *Behavioral Law and Economics*, *in* BEHAVIORAL ECONOMICS AND ITS APPLICATIONS 115 (Peter Diamond & Hannu Vartiainen eds., 2007); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 212 (2006); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990). Optimism bias refers to the tendency of individuals to underestimate the likelihood they will experience loss, inducing them to undertake risks they otherwise would avoid. Wright & Ginsburg, *supra* note 16 (manuscript at 14). Hyperbolic discounting involves decisionmaking based upon time-inconsistent preferences—that is, time preferences that lead individuals to heavily discount the future when making decisions only to regret those decisions in the future. *Id.* (manuscript at 13). Framing effects describe individual choices that systematically differ when the choice set is held constant but the choices are presented to the decisionmaker in different contexts. *Id.* (manuscript at 11-12).

59. Wright & Ginsburg, *supra* note 16 (manuscript at 29).

60. *See* THALER & SUNSTEIN, *supra* note 15, at 18.

behaviorism in the academy, the CFPB, replete with an impressive behaviorist intellectual pedigree, shows its meteoric emergence in the legislative and regulatory spheres. The CFPB broadly originates from several behaviorist papers,[61] including a seminal work by Professors Oren Bar-Gill and Elizabeth Warren, which largely denounced perceived exploitative practices by credit card companies and other lenders.[62] Bar-Gill, Warren, and other behaviorists maintain that they can improve consumer decisionmaking by altering or standardizing the design of consumer products, especially financial products, to reduce behavioral biases.[63] Conventional, price-theoretic approaches to consumer protection defer to revealed preferences and focus upon improving disclosures, correcting information asymmetries, and preventing deception; by contrast, the new CFPB appears to take a more interventionist approach aimed at correcting well-known consumer-welfare-reducing market failures as well as "debiasing" consumers in order to identify their true preferences.

These behaviorist suppositions have already found their way into law. Dodd-Frank originally contained a variety of hallmark behaviorist suggestions, including a "plain vanilla" provision requiring lenders to offer a preapproved standardized product (and consumers to opt out of a standard product before purchasing other products),[64] extensive disclosure requirements,[65] and the

61. MICHAEL S. BARR, SENDHIL MULLAINATHAN & ELDAR SHAFIR, NEW AM. FOUND., BEHAVIORALLY INFORMED FINANCIAL SERVICES REGULATION: PREPARING FOR THE ASSET BUILDING PROGRAM 2 (2008); Bar-Gill & Warren, *supra* note 14, at 41-42; Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 8.

62. *See* Bar-Gill & Warren, *supra* note 14.

63. *See id.* at 99; *see also* BARR ET AL., *supra* note 61, at 8-11 (suggesting that consumers should be required to explicitly reject default options before lenders are allowed to offer more complicated products or services).

64. *See* BARR ET AL., *supra* note 61, at 9-10 (describing a plain vanilla mortgage option).

65. Disclosure requirements, of course, need not be behaviorist. As discussed above, *see supra* text accompanying note 25, the behaviorist approach rejects the link between individual choice and true preferences. Thus, the traditional economic approach to disclosure to ameliorate market failures associated with imperfect or asymmetric information is unlikely to resolve behaviorist concerns with market failure attributable to imperfect optimization and unstable preferences. This approach is focused upon providing consumers with full information concerning a set of products and allowing consumers to choose among them. The behaviorist approach to disclosure is, instead, aimed at "nudging" consumers toward the product the regulator has determined maximizes welfare according to "true," and not revealed, preferences. The plain vanilla rule is an example of such a behavioral disclosure requirement. For discussion of the plain vanilla rule, see *infra* notes 68, 118-120.

power to ban financial products deemed "abusive" by the CFPB.[66] Several of these behaviorist elements became law under Dodd-Frank,[67] and the others may yet be implemented under the CFPB's broad rulemaking authority.[68] This adoption of behaviorist theories merely tracks a larger advancement of behavioral economics within governments. The elevation of Cass Sunstein and Richard Thaler, patriarchs of behaviorism and authors of perhaps the best-known behaviorist work, *Nudge*,[69] to prominent regulatory roles—the former as the head of the Office of Information and Regulatory Affairs (OIRA), the latter as a regulatory advisor to the present U.K. government—indicates that Dodd-Frank is a lagging, not a leading, indicator of the influence of the behaviorist regulatory movement. Still other legislators at both state and local levels advocate a variety of similar "nudges," such as reversed default rules, opt-outs, and sin taxes, to encourage consumer compliance with regulators'

66. Consumer Financial Protection Agency Act, H.R. 3126, 111th Cong. §§ 131, 136 (2009) (proposing 2009 Consumer Financial Protection Agency legislation for passage by Congress).

67. *See, e.g.*, 12 U.S.C.A. §§ 5532, 5536(a)(1)(B) (West 2010).

68. The CFPB's disclosure authority requires disclosures that "are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service." *Id.* § 5532(a). If the CFPB interprets the vague language in the statute to mean that all or nearly all consumers—rather than most consumers or even the reasonable consumer—understand disclosures before a product is authorized, then this authority is the functional equivalent of the plain vanilla requirement. Professor Warren has claimed that 95% of consumers would be likely to understand plain vanilla contracts, a target that would require significantly increased disclosures if deemed necessary for "full, accurate, and effective" disclosure by the CFPB. Elizabeth Warren, *Three Myths About the Consumer Financial Product Agency*, BASELINE SCENARIO (July 21, 2009, 6:00 AM), http://baselinescenario.com/2009/07/21/three-myths-about-the-consumer-financial-product-agency. Others have recognized that the CFPB's broad disclosure authority is sufficient to replicate the plain vanilla provision through rulemaking. *See Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau: Hearing on H.R. 4173 Before the H. Comm. on Fin. Servs.*, 112th Cong. 11 (2011) [hereinafter *Who's Watching the Watchmen?*] (statement of David S. Evans, Chairman, Global Economic Group) (explaining that, even without explicit authority to do so, "the CFPB has the ability through its rule making procedures [to] steer financial services companies towards offering 'plain vanilla products' by either banning products that do not conform to the CFPB's view or by making it legally risky and expensive for lenders to deviate too far from the products that the CFPB approves. In addition, it is possible for the CFPB to use disclosure requirements to force companies to standardize products around certain criteria that are the focus of those requirements"); Brian C. McCormally et al., *The Dodd-Frank Act Establishes the Consumer Financial Protection Bureau as the Primary Regulator of Consumer Financial Products and Services*, ARNOLD & PORTER LLP 7 (July 2010), http://www.aporter.net/resources/documents/Advisory—The_Dodd-Frank_Act_Establishes_the_Consumer_Financial_Protection_Bureau_071510.pdf.

69. THALER & SUNSTEIN, *supra* note 15.

preferred behaviors.[70] If these recent developments portend anything for American consumer law, it is that rational choice's presumptions within consumer protection law have given way to behaviorist suspicions of revealed preference and consumer sovereignty. The modern consumer protection regulator views additional consumer choice—and choices themselves—with suspicion.

B. Antitrust Law

American consumer protection law was born and developed in response to the failures of the common law. However, antitrust law owes many of its most prominent features to common law methods of development. Congress passed the first of the antitrust laws, the Sherman Antitrust Act, in 1890. With brevity uncharacteristic of modern statutes, Congress gave the courts substantial latitude for shaping antitrust doctrine.[71] Further statutes, such as the FTCA, followed, but this scarcity in direction remained common: the federal courts had to establish what ambiguous terms such as "restraint of trade" and "monopolization" meant.[72]

The first half-century of decisions interpreting the antitrust laws suffered from what might be charitably called internal inconsistencies, which were eventually tamed through antitrust law's subsequent evolution through economic discipline. Dissenting in *United States v. Von's Grocery Co.*,[73] Justice Stewart pithily observed that the sole consistency he noted in section 7 of the

70. *See, e.g.*, *id.* at 176; Ted O'Donoghue & Matthew Rabin, *Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes*, 93 AM. ECON. REV. 186 (2003).

71. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute."); *see also* RICHARD A. POSNER, ANTITRUST LAW 1 (2d ed. 2001) ("The courts have spent many years interpreting, or perhaps more accurately supplying, th[e] meaning [of the antitrust laws]. . . . The result of the 'common-law' (that is, judge-made) character of antitrust law . . . is a considerable fluidity in the meaning and application of the law . . . ."); RICHARD A. POSNER, HOW JUDGES THINK 5 (2008) ("American antitrust law is far more the creation of judicial decisions than of antitrust legislation: the most important antitrust laws are as skimpy and vague as most provisions of the Bill of Rights.").

72. *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) (construing the term "restraint" under the Sherman Act as prohibiting only unreasonable restraints of trade); Schwartz & Silverman, *supra* note 39, at 8.

73. 384 U.S. 270 (1966).

Clayton Act was that the Government always won.[74] Early merging parties would go so far as to disclaim any potential efficiencies from their proposed merger so as to discourage government attention.[75] The 1950s-1970s' structure-conduct-performance paradigm that dominated mid-century industrial organization literature postulated that market structure influenced firm conduct, which in turn influenced market performance, or market power, within a given industry.[76] This theory led the U.S. government to apply inflexible criteria in challenging mergers that nearly all modern economists would recognize as procompetitive.[77]

74. *Id.* at 301 (Stewart, J., dissenting). Unlike sections 1 and 2 of the Sherman Act, which generally apply to collusive agreements between rival firms and monopolization by single entities, respectively, section 7 of the Clayton Act applies exclusively to mergers, "the effect [of which] may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (2006).

75. *See* Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. 105, 113 (1969) (observing "the regrettable condition in which a company proposing a merger, an apparent effect of which is to realize economies, consciously suppresses the economies aspect lest it be used affirmatively by the government to attack the merger"); Herbert Hovenkamp, Book Review, 33 HASTINGS L.J. 755, 761 n.44 (1982) (reviewing THEODORE P. KOVALEFF, BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION: A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT (1980)) (noting that the defendants in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), "were forced to argue that in fact the merger did *not* create any efficiency and that the post-merger company would not be any better able to undersell competitors").

76. *See* ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN R. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 65 (2d ed. 2008). *See generally* JOE S. BAIN, INDUSTRIAL ORGANIZATION (2d ed. 1968) (discussing the structure-conduct-performance paradigm); Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104, 1105 (1979) (same).

77. Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008, at 29, 29; *see, e.g.*, *Brown Shoe*, 370 U.S. at 345-46 (condemning a merger that would have given Brown Shoe control over only 2.3% of all national retail shoe outlets); BORK, *supra* note 27, at 210 (calling *Brown Shoe* potentially "the worst antitrust essay ever written"); Christina Bohannan & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 908-09 (2010) (discussing prior antitrust policies that condemned procompetitive conduct); Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 874 (2010) ("[I]n the *Brown Shoe* decision, the Supreme Court upheld an FTC order condemning exclusive dealing by a shoe manufacturer where there was no realistic expectation of harm to competition."). *But see* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 556-57 (2006) ("Despite the shortcomings of *Brown Shoe*, it is by no means clear that a merger with the characteristics of the Brown-Kinney consolidation would wholly escape antitrust merger enforcement under modern standards.").

This paradigm—and its economic incoherence—came to an end with the rise of the "Chicago School" in antitrust economics. While the term "Chicago School" is often overused—or even cavalierly used—it may be fairly attributed to two separate major influences in antitrust. The first is the school's impact upon industrial organization literature: this group of scholars successfully debunked the structure-conduct-performance paradigm in the 1970s, leading to a renaissance of economic research and legal scholarship now commonly referred to as the New Learning.[78] The second begins with Aaron Director in the 1950s and extends through Robert Bork, Frank Easterbrook, and Richard Posner across the following several decades. Through incremental but powerful observations, these scholars demonstrated that most marketplace conduct was procompetitive and, indeed, pro-consumer; that error costs should inspire caution in antitrust intervention; and that antitrust observers should not, in the words of Ronald Coase, presume an anticompetitive explanation for market phenomena that they simply fail to understand.[79]

The common law development of antitrust permitted the federal courts, especially the Supreme Court, to revisit early established precedents. Beginning in 1977 with *Continental T.V., Inc. v. GTE Sylvania Inc.*,[80] the Supreme Court began integrating the economic discipline fostered by Chicago School literature into judicial decisionmaking directly; the Court also began revisiting earlier precedents imposing broad, per se prohibitions against large classes of conduct.[81] The Court incorporated Chicago School observations grounded in

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78. Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 8-9 (2003). *See generally* INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston eds., 1974) (memorializing the conference at which scholars from the Chicago School debunked the structure-conduct-performance paradigm); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-33 (1979) (discussing the Chicago School's development).

79. R.H. Coase, *Industrial Organization: A Proposal for Research*, *in* 3 ECONOMIC RESEARCH: RETROSPECT AND PROSPECT: POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59, 67 (Victor R. Fuchs ed., 1972), *available at* http://www.nber.org/chapters/c7618.pdf ("[I]f an economist finds something—a business practice of one sort or other—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on a monopoly explanation frequent.").

80. 433 U.S. 36 (1977).

81. *Id.* at 55-59; *see also* GAVIL ET AL., *supra* note 76, at 365-66 ("*Sylvania* initiated a major change of course for the law of vertical restraints. . . . [Its rationale] represented a remarkable turn about from the position taken by the Court just five years earlier . . . , where the majority refused . . . to 'ramble through the wilds of economic theory' by entertaining the assertion that reductions in intrabrand competition might be reasonable if they benefitted interbrand competition."); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of* rational choice economics and a strong commitment to empirics in relaxing prohibitions in vertical relationships,[82] requiring proof of consumer harm in claims arising under section 2 of the Sherman Act,[83] and adopting economically driven iterations of the Department of Justice and the FTC's Horizontal Merger Guidelines.[84] The Supreme Court went so far as to describe the Sherman Antitrust Act as a general "consumer welfare prescription," embracing consumer welfare as expressed through rational choice economics as the sole and complete goal of the antitrust laws.[85]

The Roberts Court continues to demonstrate modern antitrust law's commitment to the Chicago School and its further adoption of economic analysis into antitrust doctrine. Perhaps most notably, the Roberts Court overturned *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[86] and the per se prohibition against vertical resale price maintenance (RPM) in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[87] relying heavily upon economic literature indicating that vertical RPM arrangements tend to be procompetitive.[88] The Roberts Court similarly relied upon Chicago School rational choice economic concerns in imposing a "plausibility" requirement in antitrust cases, reflecting serious and thoughtful concerns over administrative costs and potential competitive rationales for the defendant companies' actions.[89] The Roberts Court directly applied Chicago School understandings of predatory pricing and

Consistency and Coherence in Supreme Court Decision Making, 33 HARV. J.L. & PUB. POL'Y 217, 218 (2010) ("Starting in the 1970s, the Supreme Court began systematically reworking antitrust doctrine in order to bring it into alignment with the modern economic understanding of competition.").

82. *Sylvania*, 433 U.S. at 54-55.

83. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-16 (2004); *see also* United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam) ("[T]o be condemned as exclusionary, a monopolist's act must . . . harm the competitive *process* and thereby harm consumers.").

84. FTC v. Staples, Inc., 970 F. Supp. 1066, 1081-82 (D.D.C. 1997) (citing 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992), in the analysis of a proposed merger).

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

86. 220 U.S. 373 (1911).

87. 551 U.S. 877 (2007). In resale price maintenance, a manufacturer and its distributors agree that the latter will sell the former's products at certain prices or within specifies ranges of prices. If the distributors refuse to adhere to this agreement, either openly or covertly, the manufacturer may refuse to continue doing business with them. *See The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 425-26 (2007).

88. *Leegin*, 551 U.S. at 889-92.

89. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

the need for some proof of "recoupment" in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[90] reversing a Ninth Circuit decision omitting the need for recoupment, a sine qua non in the Chicago School's treatment of predatory pricing claims.[91]

Modern antitrust law's commitment to the Chicago School through the Roberts Court may be fairly summarized, albeit in no way fully captured, in a few foundational observations, all of which flow from rational choice economic analysis. Perhaps foremost is the Court's affinity for empirical evidence and predictive power in selecting antitrust models: indeed, rejecting the model selection problem sometimes cited in the antitrust literature, the Court has taken up the Chicago School credo of adopting the rules best supported by economic theory and available economic evidence.[92] In turn, the Court has largely opted not to employ more modern—but less empirically supported—post-Chicago School game-theoretic models that predict multiple anticompetitive equilibria, but whose predictions are rarely supported by empirical evidence.[93] The Court thereby demonstrates a preference for the Chicago School's use of price theory and rational choice economics over game-theoretic and other contributions in more recent literature.[94] Moreover, the Court has paid careful attention to potential error costs and the institutional limits of antitrust, carving out a modest niche for the overarching purpose of the body of law and rejecting attempts to apply antitrust as a catch-all business regulatory statute.[95] The Court has consequently paid close heed to Professor Coase's warning in requiring proof of competitive harm before condemning behavior that may otherwise serve procompetitive purposes.[96] These observations necessitate a

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90. 549 U.S. 312 (2007).

91. *Id.* at 325-26.

92. *See, e.g.*, *Leegin*, 551 U.S. at 889-98 (holding that vertical price restraints are not per se illegal because "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance" and "recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule").

93. *See, e.g.*, *id.* (citing the Court's economic discussion).

94. *See id.*

95. *See, e.g.*, Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 282 (2007) (focusing upon the possibility of error costs and noting that "antitrust courts are likely to make unusually serious mistakes" in determining whether conduct is pro- or anticompetitive).

96. Coase, *supra* note 79, at 69 ("What people do not normally do is inquire whether it may not be the case that the practice in question is a necessary element in bringing about a competitive situation. If this were done, I suspect that a good deal of supposed monopoly would disappear, and competitive conditions would be seen to be more common than is now generally believed.").

strong—even elemental—commitment to the presumptions that consumer sovereignty through revealed preferences reflects consumer welfare, and that consumer exercise of that sovereignty necessarily increases consumer welfare. One need look no further than recent Court decisions mentioned above to illustrate this commitment. In overturning *Dr. Miles*, for example, the Court recognized that even minimum RPM, a practice long condemned as per se illegal, "has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between."[97]

Unlike consumer protection, antitrust law has hewed closely to the rational choice presumption that consumer choice best expresses consumers' true preferences. While behaviorists have called attention to several common business situations that they feel warrant more frequent, greater antitrust intervention, these theoretical applications of behavioral economics suffer from serious present infirmities for failure to generate any consistent, predictable, testable implications at the firm or market levels.[98] In contrast, as the Court has shown, the rational choice presumption generates specific, predictable consequences for both consumer and firm behavior for antitrust purposes: greater consumer choice is presumed procompetitive, greater quantities supplied and lower prices for consumers are presumed to provide greater consumer utility, and single-firm conduct must demonstrate clear and unambiguous consumer harm to offset presumed consumer gains generated through free consumer decisionmaking. This approach necessarily contrasts with the growing behaviorist suspicion of the proliferation of product choices with complicated and often subtle distinctions between them—especially by large firms. As I explore next, these two approaches to consumer welfare—the presumption that consumers' revealed preferences accurately reflect consumers' true desires and a growing body of scholarship that doubts that very link—must manifest themselves along a number of predictable lines. These conflicts will present the first signs of deleterious movements in the corpus of American consumer law. I discuss the vanguard of this movement next.

97. *Leegin*, 551 U.S. at 878.

98. *See, e.g.*, Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517 (2012).

II. THE ANTITRUST/CONSUMER PROTECTION PARADOX

A necessary condition of coherent consumer law is a common view of the relationship between consumer preferences and welfare.[99] Both competition and consumer protection law have aimed to protect consumer welfare, and, in turn, consumer choices, from business practices that would diminish it. That common premise has resulted in the design of complementary competition and consumer protection institutions and in a unified approach to consumer law designed to improve satisfaction of consumer preferences.

While the sovereignty of consumer choice in antitrust law is deeply entrenched and embedded in antitrust institutions,[100] as discussed above, the primacy of consumer decisionmaking in consumer protection law has a decidedly longer history. The Supreme Court has long described this commitment to the link between consumer preference and consumer welfare in the context of consumer protection law in near absolute terms: "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."[101]

As discussed, behavioral economics provides the intellectual foundation for a revolutionary departure from the assumption of consumer protection and antitrust law that actual choice behaviors reveal evidence of welfare. Individual decisions may reveal an individual's preferences over the choice set he faces, but behavioral economics rejects the standard economic understanding that his choosing *X* over *Y* necessarily implies that the agent expects to be better off with *X*. Instead, behavioral economics involves the comparison of the actual

99. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a consumer welfare prescription. A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law." (citation and internal quotation marks omitted)).

100. *See id.*; Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (describing the Sherman Act as a "consumer welfare prescription" (citing BORK, *supra* note 27, at 66)); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 22 (1979); *supra* Part I.

101. FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934) (citations omitted). The notion that existing consumer protection law shares antitrust law's approach to consumer welfare is taken for granted in modern consumer protection. A leading modern consumer protection law treatise begins with the assertion that "[i]t is widely understood that competition and consumer protection law are mutually reinforcing" and have "shared objectives: fair competition and consumer welfare." AM. BAR ASS'N SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS, at iii (2009).

choice with a hypothetical choice that the economic agent would have made if he were able to act upon his true preferences—that is, those preferences that would be revealed if the decision were made unfettered from various cognitive biases. The search for true preferences has been contentious both within and outside behavioral economics.[102] These debates turn upon whether the behaviorist's search for true preferences commits the "nirvana fallacy"[103] by constructing a counterfactual for the individual's preferences that is too malleable and too manipulable to support reliable public policy. This is because the fallacy allows regulators and judges to fill the "true preference" void with their preferred outcome, even—and perhaps especially—when individuals do not share their preference.

However, while there are vigorous debates internal to economic theory over this approach to identifying true preferences as opposed to revealed preferences,[104] and with respect to the quality and generalizability of empirical support for behavioral theories,[105] these debates are only tangential to our present focus: the emerging conflict within consumer law between rational

102. *See, e.g.*, O'Donoghue & Rabin, *supra* note 70, at 186; Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 701 (2009) ("[T]he normative standard inherent in any attempt to 'help' agents with hyperbolic preferences is *inherently vague*. We do not know where 'reasonable' impatience ends and 'excessive' patience begins."); Wright & Ginsburg, *supra* note 16 (manuscript at 37-40).

103. *See* Demsetz, *supra* note 18, at 1 ("The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing 'imperfect' institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is between alternative real institutional arrangements."); *see also* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1272 (1982) ("Those who purport to discover discrepancies between an ideal norm and existing imperfect institutional arrangements and then conclude that existing arrangements should be displaced . . . commit the nirvana fallacy well known in economic literature.").

104. *Compare* Faruk Gul & Wolfgang Pesendorfer, The Case for Mindless Economics (Nov. 2005) (unpublished manuscript), http://www.hss.caltech.edu/~camerer/NYU/mindless2.pdf (endorsing the approach), *and* David K. Levine, Is Behavioral Economics Doomed?: The Ordinary Versus the Extraordinary (June 8, 2009) (unpublished manuscript), http://levine.sscnet.ucla.edu/papers/behavioral-doomed.pdf (same), *with* Rizzo & Whitman, *supra* note 102 (opposing the approach), *and* Wright & Ginsburg, *supra* note 16 (same).

105. *See generally* Steven D. Levitt & John A. List, *Viewpoint: On the Generalizability of Lab Behaviour to the Field*, 40 CAN. J. ECON. 347, 351 (2007) (finding that "it is likely that the qualitative findings of the lab are generalizable, even when the quantitative magnitudes are not"); Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 N.Y.U. J.L. & LIBERTY 470 (2007) (concluding that conventional price-theoretic approaches have greater explanatory power than behavioral approaches for explaining firm behavior and consumer contracts).

choice antitrust and behavioral consumer protection, the economic damage this conflict will cause, and possible resolutions. Put simply, it is evident that the new behavioral approach to consumer protection seeks affirmative evidence that individual choices maximize welfare according to a somewhat loosely defined set of true preferences, while antitrust law continues to follow its traditional conception of revealed preference and deference to consumer choice. This Part more concretely demonstrates this divergence between the two formerly complementary strands of consumer law.

In *The Antitrust Paradox*, Robert Bork described antitrust policy as being "at war with itself" because some of the law's basic principles conflicted with each other, causing anomalous legal outcomes.[106] Bork showed that antitrust law's development had been schizophrenic, noting the emergence of institutions that both promoted and destroyed competition.[107] The effects of the latter competition-destroying elements of antitrust—whether legal, economic, or political—had far dominated any positive effects. Antitrust tolerated some competitive business practices that improved efficiency and consumer welfare while punishing others. As is clear from the title of this Feature, Bork's work has provided the intellectual stimulus for this project. Bork's primary goals were to identify and highlight the conflicts within antitrust, to explain why they were antithetical to the purpose of maximizing consumer welfare, and to suggest reforms. My thesis is that consumer law stands now where antitrust law did twenty-five years ago, and that the conflict between fundamental consumer law institutions, as with antitrust, will result in confused and counterproductive policy.[108]

Before turning to the causes and consequences of this divergence—and possible solutions—I begin with a series of examples to make it clear that the

106. BORK, *supra* note 27, at 7.

107. *Id.* ("Current law lacks [the virtue of maximizing consumer welfare] precisely because the Supreme Court has introduced conflicting goals, the primary one being the survival or comfort of small business.").

108. There are, of course, some important and meaningful differences between consumer law as it stands now and the incoherent status of antitrust when Bork wrote. For example, when Bork wrote, the conflicts within antitrust had already done serious consumer harm. By way of contrast, my analysis is largely—but not entirely—predictive as "behavioral" consumer protection institutions are just beginning to emerge and generate the conflicts discussed herein. Moreover, Bork wrote as the Chicago School revolution of microeconomic analysis was on the verge of making its way through antitrust, whereas both behavioral economics and behavioral law and economics have a relatively longer history. These differences do not undermine the similar analytical framework or substantial policy need in comprehending the divergent and sometimes antithetical legal institutions oriented toward consumer wellbeing.

emerging conflict between consumer protection and antitrust will be no mere intellectual skirmish, but a war with serious consumer welfare casualties. In each case, the fundamental disagreement with respect to the relationship between revealed preference and welfare leads to a significant policy conflict concerning business practices common in the modern economy.

A. Example 1: Entry and the Introduction of New Products

A clear tension emerges in comparing the approach to new product entry in antitrust to that of the new behaviorally informed CFPB. From an antitrust economics perspective, perhaps the single most protected class of behavior involves entry, the introduction of new products or services to satisfy consumer preferences and, more generally, conduct that increases consumer choice. The rational choice consumer welfare economics of introducing new products or product variants are simple: if consumers are assumed to make rational choices among feasible alternatives in order to maximize their own welfare, expanding consumers' choice set can be expected to improve consumer outcomes.[109] Thus, antitrust law grants considerable deference to the introduction of new products, rarely, if ever, imposing liability. When new product entry is challenged, it is often under the guise of alleging that the product design creates interoperability or harms rival firms. Consider, for example, *Berkey Photo, Inc. v. Eastman Kodak Co.*,[110] in which the plaintiff alleged that the introduction of the product without advance notice *to competitors* was an anticompetitive act.[111] Successful antitrust claims based upon the impact on competition created by the entry of a new product, whether couched in terms of product design or interoperability, are the exception to the rule. A corollary of this deference to the consumer-welfare-increasing tendencies of new product introduction is antitrust analysis of market entry. The 2010 Horizontal Merger

109. The rational choice economic tradition, of course, anticipates that increasing the choice set can be costly. Indeed, Chicago School economists were among the first to highlight information and search costs and their implications for efficiency. *See* Demsetz, *supra* note 18, at 9-11; George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 216 (1961).

110. 603 F.2d 263 (2d Cir. 1979).

111. *See id.* (reversing district court finding of liability). So-called product hopping cases object to the simultaneous introduction of the new product and removal of a prior product. *See, e.g.*, Abbott Labs. v. Teva Pharm. USA, Inc., 432 F. Supp. 2d 408 (D. Del. 2006) (denying motion to dismiss); HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 12.5 (2007) (discussing product hopping).

Guidelines, for example, describe entry as the antidote to a potential loss of competition arising from a merger.[112]

Special antitrust deference for new product introductions was not always the case. Nobel laureate Ronald Coase famously lamented economists' longstanding attraction to ascribing anticompetitive explanations to new forms of conduct that are not yet well understood.[113] He was concerned about economists' eagerness to rely upon monopoly explanations when confronted with new business practices and economic phenomena despite the fact that "in this field we are very ignorant, [and] the number of ununderstandable practices tends to be rather large."[114] Courts initially followed economists' example in condemning new products and business models.[115] However, the evolution toward the current approach to product design and innovation illustrates an important feature of antitrust law's institutional design—namely, how economic insights are adopted into the law over time. In particular, economic knowledge has come to recognize the critical relationship between innovation and economic growth and the enormous consumer welfare gains it generates. As this knowledge has expanded, antitrust has continued to embrace new product innovation and business models. There is now a robust literature establishing that even apparently small innovations, such as the introduction of a new brand variant (e.g., Apple Cinnamon Cheerios) can generate large

112. U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 9 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf ("The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers."). The antitrust laws also give some deference to new products in the form of immunizing them from per se treatment. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979) ("[I]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations.") (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972)); White Motor Co. v. United States, 372 U.S. 253, 261 (1963) ("This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us.").

113. Coase, *supra* note 79, at 67. For an explanation of how economists' professional incentives biased antitrust law against innovative business practices, see Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 164-68 (2010).

114. Coase, *supra* note 79, at 67.

115. *See* Harold Demsetz, *How Many Cheers for Antitrust's 100 Years?*, 30 ECON. INQUIRY 207, 209 (1992); Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMPETITION L. & ECON. 21, 26-27 (2005).

consumer benefits.[116] It is broadly recognized by industrial organization economists that innovation and entry of new products are important components of economic growth.

Competitive entry of new products is not merely tolerated in modern antitrust analysis but celebrated as the antidote to potential competitive problems.[117] Like much microeconomic analysis of the law, this deferential treatment of new product entry derives from the link between revealed preference and consumer welfare. Consumer preferences for new products are assumed to maximize stable consumer utility functions. Thus, when consumers express those preferences by purchasing new products, they exhibit increased welfare.

The behavioral consumer protection approach to new product innovation strikes at the heart of this relationship between revealed preference and welfare. Even new entry of products and services is suspect under this approach. One tenet of the new behavioral approach to regulating consumer credit, which underlies the intellectual foundation of the CFPB, is that rules and regulations can be designed to improve consumers' decisionmaking abilities by altering the *design* of some consumer credit products, by restricting consumers' access to others, and by instituting default rules in favor of standardized products

116. Jerry A. Hausman, *Valuation of New Goods Under Perfect and Imperfect Competition*, *in* THE ECONOMICS OF NEW GOODS 209, 213-16 (Timothy F. Bresnahan & Robert J. Gordon eds., 1997) (discussing the consumer welfare gains from new product introductions and product line extensions). The same lesson can be applied to new business models. *See* Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart*, 22 J. APPLIED ECONOMETRICS 1157 (2007); Amil Petrin, *Quantifying the Benefits of New Products: The Case of the Minivan*, 110 J. POL. ECON. 705 (2002).

117. *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993) (describing ease of entry as justifying summary disposition of predatory pricing claims on the grounds that monopolists could not recoup losses sustained during the predation period); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[I]t is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits."); *see also* U.S. DEP'T OF JUSTICE & FTC, *supra* note 112, § 9, at 28 ("The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers."); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984) ("Monopoly prices eventually attract entry," thus allowing the market to self-correct in the face of a false negative).

approved by the Bureau. This approach goes beyond mere disclosure and affirmatively introduces a barrier to entry for new products in the name of advancing consumer welfare.

Consider the so-called plain vanilla requirement associated with the originally proposed Dodd-Frank legislation. Michael Barr, a law professor and former Assistant Treasury Secretary for Financial Institutions—along with Sendhil Mullainathan, who was recently appointed as the Assistant Director for Research at the CFPB—first proposed the requirement that a lender offer a standardized product in addition to any of its new or unique products.[118] Moreover, if the consumer wishes to opt out of this plain vanilla product, the lender would have to provide "meaningful disclosures" to inform the borrower's decision. Only then could the borrower select another lending product. In sum, the essence of the plain vanilla requirement is to increase the cost of entry for non-vanilla products in two ways. First, the rule would require would-be entrants to develop and market a plain vanilla product as well. Second, the original requirement would have imposed upon entrants the additional cost of complying with the necessary disclosures to consumers. The increased cost of entry for new products would reduce the incentive for entry, resulting in less entry, reduced competition, and lower consumer welfare. Although the intended effect of the plain vanilla requirement may well be to increase consumer choice with lenders offering both vanilla and non-vanilla variants (after appropriate disclosures), this optimistic prediction ignores the standard and unavoidable prediction that increased costs of entry result in less protection on the margin. Thus, the conflict between antitrust and the new behavioral consumer protection clearly emerges in the case of evaluating competitive entry and its impact upon consumers. Although the plain vanilla requirement did not ultimately make it into the final legislation,[119] this sort of

118. BARR ET AL., *supra* note 61, at 9. The authors envision the plain vanilla mortgage to be, for example, "a fixed rate, self-amortizing 30 year mortgage loan, [offered] according to reasonable underwriting standards. The precise contours of the standard set of mortgages would be set by regulation." *Id.* Additionally, the authors perceive a pure opt-out regime to be inadequate to overcome cognitive biases influencing consumers toward nonstandard products, and thus proposed "sticky" opt-outs, including "heightened disclosures and additional legal exposure for lenders" offering nonstandard products. *Id.* Elizabeth Warren offered a similar proposal for credit cards. *See* Warren, *supra* note 61, at 18.

119. *See* Letter from Barney Frank, Chairman, House Comm. on Fin. Servs., to Democratic Members, House Comm. on Fin. Servs. (Sept. 22, 2009), *available at* http://garrett.house.gov/UploadedFiles/FSCMemberMemoreCFPA092209.pdf (explaining that the plain vanilla requirement would be removed in the final version of the bill). However, the structure and broad authority of the CFPB indicate that, even absent an express provision, the Bureau can still implement a plain vanilla requirement. *See Who's Watching the Watchmen?*, *supra* note

regulatory barrier to entry is well within the intellectual framework of the new behavioral approach to consumer protection. Further, the standard behavioral toolkit regularly contains more severe restrictions on product development, including outright prohibitions.[120]

Once again, the nature of the conflict between antitrust and consumer protection is characterized by divergent assumptions concerning consumer preferences and leads to an internally incoherent consumer law. Innovation, experimentation with new product variants, de novo entry, and product repositioning are encouraged in the modern antitrust economic framework while regulatory barriers to entry are discouraged as likely causes of consumer harm. On the other hand, new product entry and innovation are not only viewed skeptically by the CFPB and by behavioral consumer protection principles, but affirmative barriers to entry are also erected in the name of the shared goal of consumer-welfare maximization.[121] While both strands of analysis claim to serve the same master, this conflict results in inconsistent and contradictory consumer law policies, which inevitably entail significant efficiency losses.

B. Example 2: Above-Cost Price Discounting

While our first example dealt with divergent regulation of business conduct that increased consumer choice holding all else—including the terms of trade, such as price—constant, the second example considers the case of holding the choice set constant while improving the terms of trade with lower prices. The consumer welfare economics of lower prices, and in particular above-cost discounting, are simple: the neoclassical model leads to the simple intuitive

68, at 11 (statement of David S. Evans, Chairman, Global Economics Group); *see also* text accompanying notes 66-68.

120. *See, e.g.*, BARR ET AL., *supra* note 61, at 15 (discussing restricting consumer access to credit cards on terms the government deems unsafe); Bar-Gill, *supra* note 58, at 1422-23 (proposing credit card usury caps); *see also* David S. Evans & Joshua D. Wright, *The Effect of the Consumer Financial Protections Agency Act of 2009 on Consumer Credit*, 22 LOY. CONSUMER L. REV. 277, 319-20 (2010) (discussing the CFPA's authority to ban consumer lending products); Jonathan Gruber & Botond Koszegi, *Tax Incidence When Individuals Are Time-Inconsistent: The Case of Cigarette Excise Taxes*, 88 J. PUB. ECON. 1959 (2004) (discussing excise taxes on cigarettes); O'Donoghue & Rabin, *supra* note 70 (describing sin taxes).

121. There is another possible conflict. Regulatory barriers to entry erected for new consumer financial products could favor incumbent firms over new entrants, increasing market concentration and rendering acquisition of monopoly power and antitrust scrutiny more likely.

prediction that price reductions improve welfare.[122] In the modern economy with competitive firms facing downward-sloping demand curves selling differentiated products, equilibrium prices are generally above marginal cost. Thus, a significant fraction of discounting activity will involve above-cost discounts. There is a clear tension between the regulatory approach to such discounting behavior under the antitrust laws and the new consumer protection. Whereas antitrust offers nearly complete immunity to unilateral decisions to reduce prices so long as they remain above cost, behavioral consumer protection views such discounts more suspiciously.

Antitrust law's approach to lower prices complements its approach to increased output in the form of new entry described in the first example. Price competition has been described as the "central nervous system of the economy."[123] The Department of Justice Antitrust Division's primer on the antitrust laws and their role observes that "[i]n a freely competitive market, each competing business generally will try to attract consumers by cutting its prices and increasing the quality of its products or services. Competition and the profit opportunities it brings also stimulate businesses to find new, innovative and more efficient methods of production."[124]

The antitrust preference for lower prices has its limits, even when restricting our attention to above-cost pricing. For example, the antitrust laws prohibit conspiracies among buyers depressing prices on the same grounds as those among sellers.[125] Further, as noted, predatory pricing can result in trading today's lower prices for tomorrow's monopoly prices. Unsurprisingly, the consumer-welfare antitrust approach to pricing behavior is focused upon

122. Although the possibility of predatory pricing resulting in long-run increased prices can complicate the simple neoclassical model, it is important to recognize that antitrust law's real objection to lower prices is not that they are too low, but that consumer welfare will ultimately be taxed by higher prices when the monopolist has driven its rivals to exit the market and is finally free from competition.

123. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); *see* Edward D. Cavanagh, *Vertical Price Restraints After* Leegin, 21 LOY. CONSUMER L. REV. 1, 19 (2008); Richard Dagen, Rambus*, Innovation Efficiency, and Section 5 of the FTC Act*, 90 B.U. L. REV. 1479, 1493 (2010).

124. *Antitrust Enforcement and the Consumer*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/public/div_stats/276198.pdf (last visited Mar. 19, 2012).

125. *See, e.g.*, Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948) (involving a purchasers' agreement to depress prices of sugar beets); *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896 (6th Cir. 2009) (involving an allegation of agreement to cut commission rates for travel agents); *see also* Roger D. Blair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 NW. U. L. REV. 331, 335 (1992) ("Monopsony's social welfare effects are analogous to those of monopoly in that too few resources will be employed.").

identifying below-cost pricing that has the potential to drive equally efficient rivals out of business, while remaining sensitive to the concern of chilling the price competition at the core of the antitrust enterprise.[126] Thus, even in the case of below-cost discounting, modern antitrust rarely imposes constraints on pricing because plaintiffs face the difficult burden of demonstrating both that the price is below the relevant measure of cost and also the likelihood of future recoupment.[127] The Supreme Court gives wide latitude to discounting decisions because "unsuccessful predation is in general a boon to consumers,"[128] because "predatory pricing schemes are rarely tried, and even more rarely successful,"[129] and because "cutting prices in order to increase business often is the very essence of competition."[130]

Several state consumer protection statutes break with this federal definition of predatory pricing. The state rules, unlike the federal antitrust statute, generally do not require a demonstration of recoupment or likely consumer harm.[131] Those statutes, however, predate the behavioral consumer protection movement. While other state consumer protection enforcement efforts against low prices, such as Wal-Mart's generic prescription program, clearly run counter to the consumer welfare approach laid out in federal antitrust law, there is no sign that those efforts are motivated by behavioral concerns.[132]

There are, however, uniquely behaviorally motivated approaches to consumer protection regulation of low prices, including above-cost price discounts, which are left outside the scope of conventional antitrust analysis. For example, several behavioral consumer protection advocates have taken the economic logic that short-term price reductions (such as teaser rates on credit cards) increase consumer welfare and turned it on its head, arguing that these

126. Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, *in* ANTITRUST LAW AND ECONOMICS 116, 116-17 (Keith N. Hylton ed., 2010).

127. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993).

128. *Id.* at 224.

129. *Id.* at 226 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 590-91 (1986)).

130. *Id.* (quoting Cargill, Inc. v. Montfort of Colo., Inc., 479 U.S. 104, 122 n.17 (1986)).

131. *See, e.g.*, Wal-Mart Stores, Inc. v. Am. Drugs, Inc., 891 S.W.2d 30, 34 (Ark. 1995) (requiring specific intent to harm competition rather than probability of recoupment); Bay Guardian Co. v. New Times Media LLC, 114 Cal. Rptr. 3d 392, 404-06 (Ct. App. 2010) (finding that California's predatory pricing law does not require a showing of probability of recoupment or anticompetitive impact).

132. *See Generic Retail Drug Pricing and States: $4 and Free Drug Promotions by Large Chains Affected by State Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Mar. 2011), http://www.ncsl.org/default.aspx?tabid=14440.

short-term discounts exploit irrational consumers' biases and, despite consumers' revealed preferences for the discounted products and services, make them worse off.

Professor Bar-Gill's scholarship on "teaser rates" usefully demonstrates this logic and the tension between this approach and antitrust law's immunity for above-cost discounts. Bar-Gill argues that to the extent that consumers fail to transfer their balance once the promotion ends, they may be seduced into irresponsible borrowing.[133] He observes that consumers would benefit from transferring their balance; however, they often fail to do so, resulting in a considerable amount of borrowing at high post-promotion rates.[134] Finding that "[t]he teaser strategy works," he notes that "more than a third of all consumers consider an attractive introductory interest rate to be the prime selection criterion in credit card choice."[135]

A similar observation has been made in the context of rebate redemption. Under logic similar to that of teaser rates, consumers considering rebate redemption face the incentive to make a purchase at full cost up front with the expectation of redeeming a discount at a later date. However, many consumers irrationally fail to redeem their rebates due to procrastination, forgetfulness, or the endowment effect,[136] which arises when individuals place greater value on goods when they own them than when they do not.[137] Behaviorists then interpret this failure as evidence that low prices induced consumers to engage in harmful long-term decisionmaking strategies.

Accordingly, advocates of behavioral consumer protection policies have condemned the same short-term price reductions that the Supreme Court has praised in the antitrust context. The conflict is strongest in the case of above-cost discounting. However, even in the case of below-cost pricing, as a practical matter antitrust offers very little constraint upon firm pricing decisions. Thus, the actual conflict between antitrust law's preference for discounting and the behavioral suspicion of discounting, especially with regard to complex products or pricing models, is not limited to above-cost pricing. Moreover, from the rational choice consumer-welfare perspective, extreme sensitivity to teaser rates and discounts implies a revealed preference; however, once the

133. Bar-Gill, *supra* note 58, at 1392.

134. *Id.*

135. *Id.* (citing DAVID S. EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 225 (1999)).

136. Matthew A. Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 STAN. J.L. BUS. & FIN. 362, 384-90 (2007).

137. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003).

behavioral approach substitutes consumers' supposed true preferences—for example, the decisions they would have made with the "correct" estimate of credit card costs—the conclusion becomes one of systematic consumer harm, despite the fact that consumers continue to choose low-price options.

C. Example 3: Product Bundling

Product bundling, defined as the sale of two or more separate products in a package, is ubiquitous in the modern economy.[138] The standard economic definition of "separate products" requires consumer demand for the products when they are sold individually, a restriction that rules out obvious cases for efficient bundling, such as perfect complements (for instance, the sale of left and right shoes). The pervasiveness of bundles in the modern economy is evident from examples such as performance rights sold as a package to a variety of broadcasters; combo meals at fast-food restaurants that include a bundled sandwich, fries, and drink; and round-trip flights or travel tickets bundled with a hotel stay.[139] From brick-and-mortar marketplaces to the modern Internet economy,[140] product bundles are sold to consumers in markets ranging from the highly competitive to the heavily concentrated.[141]

Microeconomic analysis has generated a number of explanations for product bundling. The simplest explanation for bundling is the availability of economies of scope in production. Other explanations include the facilitation of price discrimination and the reduction of transaction costs.[142] Still other

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138. Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide To Regulating Commodity Bundling by Firms? A Survey of the Economic Literature*, 1 J. COMPETITION L. & ECON. 707, 707 (2005); Stefan Stremersch & Gerard J. Tellis, *Strategic Bundling of Products and Prices: A New Synthesis for Marketing*, 66 J. MARKETING 55, 55 (2002).

139. *See* Kobayashi, *supra* note 138, at 708 nn.2-3.

140. *See* U.S. DEP'T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 103 (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf ("Tying and bundling [are] so ubiquitous that we forget they are there . . . . Tying and bundling [are], roughly speaking, what the modern firm does. It's the rationale. It puts things together and offers them in packages to consumers."); David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U. L. REV. 285, 304-05 (2008).

141. For economic analysis of bundling in competitive markets, see David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37 (2005); and Stremersch & Tellis, *supra* note 138.

142. *See, e.g.*, George J. Stigler, United States v. Loew's Inc.*: A Note on Block-Booking*, 1963 SUP. CT. REV. 152, 155. *But see* Roy W. Kenney & Benjamin Klein, *The Economics of Block Booking*, 26 J.L. & ECON. 497, 500, 539 (1983) (explaining that block booking did not facilitate price discrimination, but rather reduced transaction costs by preventing buyers from rejecting parts of the literature focus on strategic bundling as a means of raising rivals' costs and generating anticompetitive harm. While many of these explanations of product bundling rely upon firms' possession of market power, as Professor Bruce Kobayashi notes, economists have disproportionately focused on these cases precisely because many instances of bundling in competitive markets are easily explained by economies of scope or reduction in search costs.[143]

The antitrust approach to bundling is consistent with the standard microeconomic approaches outlined above. The Supreme Court has recognized for over twenty-five years that "there is nothing inherently anticompetitive about packaged sales" and has required plaintiffs alleging unlawfully bundled sales to demonstrate that the bundles constitute an illegal tying arrangement and harm consumers.[144] More recently, the Supreme Court aligned antitrust jurisprudence with mainstream economic theory and evidence when it rejected the presumption that a packaged sale involving a patented product implies the presence of antitrust market power.[145]

It is important to recognize that revealed consumer preferences dominate the antitrust approach to bundling. The sovereignty of the link between revealed preference and consumer welfare is apparent in two ways. First, the efficiency explanations for bundling are analyzed holding consumer preferences constant. If bundling reduces information or transaction costs and results in increased output, all things being equal, it follows from the standard microeconomic approach that consumers are made better off. Second, an illegal tie-in requires "separate products," which, in turn, require separate demand for components of the package as standalone products. Taking this analysis to its logical conclusion, antitrust law recognizes that where consumers uniformly demand the package rather than its component parts, there is a compelling efficiency justification for the bundle and, thus, it is immune from antitrust liability.[146]

As a practical matter, it is difficult to get through lunchtime without observing any number of product bundles. The overwhelming majority of these bundles pose no threat to consumer welfare as traditionally defined. In fact, they likely leave consumers better off. Antitrust, led by conventional

components of a package of products that is average-priced in order to reduce opportunism in the form of investments in informational advantages with little or no social value).

143. Kobayashi, *supra* note 138, at 710.

144. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 25 (1984).

145. *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006); Joshua D. Wright, *Missed Opportunities in* Independent Ink, 2005-06 CATO SUP. CT. REV. 333, 333.

146. *See* United States v. Microsoft Corp., 253 F.3d 34, 88 (D.C. Cir. 2001) (en banc) (per curiam).

microeconomic theory for several decades, leaves broad swaths of ubiquitous product bundling untouched, adopting a rule that encourages the practice in competitive markets. Even in those situations where there is significant market power, the rule requires persuasive evidence that consumer preferences are violated prior to imposing any restriction on packaged sales.

The new, behavioral consumer protection approach to product bundling is in serious conflict with the conventional economic approach adopted in antitrust analysis. Professor Bar-Gill adopts a welfare-based approach to evaluating bundling,[147] and he concedes that there are rational choice explanations for bundling.[148] As we shall see, however, the behavioral approach to bundling requires significant divergence from the neoclassical, rational choice approach. The behavioral consumer protection approach to bundling requires outright rejection of the link between revealed preference and welfare.

Professor Bar-Gill contemplates product bundling as a competitive response by profit-maximizing firms in the presence of consumers with particular behavioral biases. The behavioral bias of interest in this case is consumer misperception of the lifetime value of a product. For example, a consumer might underestimate the number of ink cartridges he will demand over the lifetime of a printer[149] or the amount of consumer credit he will need to borrow.[150] The basic idea is that when consumers systematically misprice one product, it can be bundled with another complementary product. If consumers misprice their total expenditures on ink, a seller can, in theory, profitably reduce the printer price and increase the price of ink cartridges through bundling.[151]

147. Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 36 (2006) ("When bundling reduces welfare, regulation that discourages bundling may provide a valuable tool for policymakers."). The argument that bundling is a competitive response to consumers' cognitive biases has also been discussed in the economics literature. *See* Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. REV. 661, 681-87 (1982); Stefano DellaVigna & Ulrike Malmendier, *Contract Design and Self-Control: Theory and Evidence*, 119 Q.J. ECON. 353, 357 (2004); Richard Thaler, *Mental Accounting and Consumer Choice*, 4 MARKETING SCI. 199, 211 (1985).

148. Bar-Gill, *supra* note 147, at 36-37 ("There are other important explanations for the bundling strategy that have nothing to do with consumer misperception. In particular, as noted above, many bundles can be justified on cost-saving grounds.").

149. *Id.* at 34-35.

150. Bar-Gill, *supra* note 58, at 1395.

151. This analysis is highly related to the inefficiencies in aftermarket tying in the antitrust context. *See* Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak, 63 ANTITRUST L.J. 483, 511 (1995).

In the case of consumer credit, Professor Bar-Gill and others apply this logic to attempt to explain credit card contracts.[152] In the consumer credit market, the behavioral theory of borrowing begins with the premise that consumers misprice debt, systematically underestimating their future borrowing on account of a hodgepodge of behavioral biases such as imperfect self-control and hyperbolic discounting. These behavioral accounts of consumer borrowing claim that consumers are "seduced" by short-term teaser rates and rewards, but because they underestimate their own borrowing behavior, end up paying higher interest rates and total borrowing expenses than they would under an alternative card contract with an annual fee and lower interest rate.[153] As long as consumers myopically price at least one attribute of the product bundle, these models predict seller exploitation and reduced consumer welfare. While the empirical support for behavioral theories of bundling has been questioned,[154] advocates of behavioral consumer protection suggest aggressive policy interventions, including reconsideration of usury,[155] banning subprime mortgages,[156] requiring unbundling of transacting

152. *See* Bar-Gill, *supra* note 58; *see also* Bar-Gill & Warren, *supra* note 14, at 10 ("[C]reditors often design dangerous contracts as a strategic response to consumers' underestimation of the risks that these contracts-products entail."); *cf.* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (discussing inclusion in standard form contracts of inefficient, nonsalient terms that do not affect consumer perception of the contracts' values although they benefit drafters); Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 260 (2006) (discussing companies' incentives to exploit consumers' bounded rationality in order to extract high fees and late charges).

153. Behavioral accounts have also suggested a causal relationship between bankruptcy and the exploitation of behavioral biases through teaser rates and rewards. Bar-Gill, *supra* note 58, at 1399-1400.

154. Empirical evidence is not consistent with the "seduction" hypothesis. *See* Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not So Crazy*, 73 U. CHI. L. REV. 63, 66-67 (2006); Wright, *supra* note 105, at 477-82; Howard Beales & Lacey L. Plache, Rationality, Revolving, and Rewards: An Analysis of Revolving Behavior on New Credit Cards 9 (Apr. 20, 2007) (unpublished manuscript), http://www.ftc.gov/be/consumerbehavior/docs/papers/ Beales _Plache_Paper.pdf. Interestingly, following Brown and Plache, *supra*, Beales and Plache present microlevel data on VISA consumers who choose to switch to new rewards cards. Their behavioral theories predict that these consumers should be more likely to revolve debt and that the probability of their doing so should increase over time. The authors find a significant difference between rewards and non-rewards cards and the likelihood of carrying a balance, but it cuts against the behavioral theories. Notably, the authors find that holders of new rewards cards are significantly *less likely* to revolve debt than holders of non-rewards cards. Beales & Plache, *supra*, at 9.

155. *See* Bar-Gill, *supra* note 58, at 1422-23.

156. *See* Alan M. White, *The Case for Banning Subprime Mortgages*, 77 U. CIN. L. REV. 617 (2008).

and financial services offered by credit card companies,[157] and in the extreme, banning credit cards altogether.[158]

The key point for present purposes is not which of these theories is best supported by economic theory or evidence (although my view on the matter is public record[159]). Rather, the critical point is that while both the rational choice and behavioral approach to bundling posit consumer welfare as the appropriate metric for consumer law and policy, the divergent conceptions of consumer welfare render complementary policies impossible and irreconcilable policy conflicts inevitable. Antitrust analysis interprets evidence of prevalent bundling in competitive markets as prima facie evidence of its efficiency and pro-consumer tendencies; the behavioral approach interprets the same frequency of bundling as prima facie evidence of the prevalence of consumer misperception and of a likelihood that the practice will make consumers worse off. Revealed preferences for bundles shield them from current antitrust scrutiny and liability while exposing them to consumer protection regulation under the new behavioral approach. Bork's lamenting and prescient observation has come full circle: while defending rival models of the consumer—one rational, one irrational—American consumer law shall soon harm both.

III. THE PERSISTENCE OF THE PARADOX: A COMPARATIVE INSTITUTIONAL ANALYSIS

Thus far, I have focused upon the emergence of the antitrust/consumer protection paradox, businesses' uncertainty concerning which of their practices are legal, and the costs that this uncertainty will impose on consumers.[160] The

157. *See* Bar-Gill, *supra* note 58, at 1421-22.

158. *See* George Loewenstein & Ted O'Donoghue, *"We Can Do This the Easy Way or the Hard Way": Negative Emotions, Self-Regulation, and the Law*, 73 U. CHI. L. REV. 183, 198 (2006). *See generally* Evans & Wright, *supra* note 120, at 313 (discussing such "hard paternalism" policies in the context of the Consumer Financial Protection Agency Act of 2009).

159. Evans & Wright, *supra* note 120, at 325-26; Wright, *supra* note 105, at 474-75; Wright & Ginsburg, *supra* note 16 (manuscript at 21); Joshua D. Wright & Todd J. Zywicki, *Three Problematic Truths About the Consumer Financial Protection Agency Act of 2009*, LOMBARD STREET, Sept. 14, 2009, at 29, 29.

160. The costs arising from the uncertainty generated by this conflict are significant in their own right. However, uncertainty attributable to conflicting laws is not the only source of costs consumers will face as a result of the intellectual rift in consumer law. There are also the consumer welfare costs of policy error. Ultimately, the most restrictive consumer policy—whether antitrust- or consumer protection-based—will govern firm behavior. As discussed, many of the behavioral consumer protection policies have included proposals to prohibit

high stakes for efficiency, consumer welfare, and the rule of law motivated Bork's exposure of the paradoxical nature of antitrust as consumer law. Here too, the stakes are high. But where there are significant welfare losses, the dismal science teaches that there are potential gains from trade that can arise from marginal legal improvements and economists' searches for possible equilibrating forces that will bring about convergence. There appear to be three plausible outcomes. Two of these outcomes involve resolving the conflict: (1) antitrust law could abandon its rational choice roots and resolve the conflict by adopting a behavioral approach, or (2) behavioral consumer protection could fizzle out in favor of a rational choice approach. The third outcome, of course, is continued divergence and incoherent consumer law. Unfortunately, the relevant legal, economic, and political institutions shaping the development of antitrust and consumer protection supply no reason for optimism with respect to the first two possibilities and several reasons to believe that the intellectual rift will continue for some time.

There is an important caveat to the institutional analysis to follow. The questions of whether potentially equilibrating forces exist and, if so, whether and which institutions will be successful in unraveling the consumer law paradox necessarily require some degree of speculation.[161] Indeed, the CFPB is a primary player in the creation of the conflicts described above and, as of this writing, has yet to take any concrete enforcement actions. However, as I will demonstrate, the nature of the emerging conflict and many of its likely practical manifestations are sufficiently concrete to allow identification of institutional forces tending to support sustained divergence in consumer law or nudge consumer law toward convergence once again.

A. *The Economic Institutions of Consumer Law: Price Theory and Behavioral Economics*

I begin by returning to the economic underpinnings of antitrust and behavioral consumer protection. While I highlighted the differences between

outright products that economists of all methodological stripes would agree produce value for some consumers.

161. I adopt the New Institutional Economics' broad conception of institutions. *See* Claude Ménard & Mary M. Shirley, *Introduction* to HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 1, 1 (Claude Ménard & Mary M. Shirley eds., 2005) (defining institutions as the "written and unwritten rules, norms and constraints that humans devise to reduce uncertainty and control their environment" which include "(i) written rules and agreements that govern contractual relations and corporate governance, (ii) constitutions, laws and rules that govern politics, government, finance, and society more broadly, and (iii) unwritten codes of conduct, norms of behavior, and beliefs").

these approaches from the perspective of consumer preferences, choice, and welfare in Part I, here I turn, first, to differences in the successful implementation of these economic approaches in their respective bodies of law, and second, to how the differing assumptions animating neoclassical economics and behavioral economics shape antitrust and the new consumer protection law, respectively. These differences in economic methodology are critical to modeling the future path of both bodies of law in light of the conflict.

Neoclassical microeconomics, or price theory, has had a tremendous influence on antitrust analysis. Judge Posner has explained that the distinctive characteristic of the Chicago School—which ultimately proved successful in embedding its insights into mainstream antitrust analysis and Supreme Court jurisprudence—was that it "view[ed] antitrust policy through the lens of price theory."[162] Judge Ginsburg and Derek Moore describe the strength of the modern consensus that price theory is essential to antitrust decisionmaking. They find the consensus reflected in Supreme Court jurisprudence, academia, the bar, and lower court decisions as well as the now-commonplace practice for both sides of a case to rely upon sophisticated economic literature to support their arguments.[163] The success of price theory is attributable to—at least in part—its value as a tool to improve judicial decisionmaking. Jurists tend to be generalists by profession. A fundamental characteristic of neoclassical economic analysis is its emphasis on theory that generates clear, testable implications. Antitrust law demands sophisticated economic analysis from individuals who broadly lack economic training.[164] Ginsburg and Moore observe that price theory delivers to judges a toolkit appropriate for the task at hand, and "[e]ven if economic analysis does not indicate a uniquely correct result in every case, it significantly constrains the decision-making of the courts by narrowing the range of plausible outcomes."[165]

If neoclassical economics inherently narrows the range of plausible outcomes, behavioral economics necessarily broadens it. This is a feature, not a bug, of the behavioral economics mission. Indeed, behaviorists believe

162. Posner, *supra* note 78, at 928; *see also* BORK, *supra* note 27, at 117 ("There is no body of knowledge other than conventional price theory that can serve as a guide to the effects of business behavior upon consumer welfare. To abandon economic theory is to abandon the possibility of a rational antitrust law."); Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, COMPETITION POL'Y INT'L, Autumn 2007, at 24, 33 (quoting Posner, *supra* note 78, at 928).

163. Ginsburg & Moore, *supra* note 30, at 92.

164. Baye & Wright, *supra* note 29, at 2.

165. Ginsburg & Moore, *supra* note 30, at 92.

incorporating a "more realistic" psychological account of economic actors will generate predictive power more accurate than that of existing economic accounts grounded in the assumption of individual rationality.[166] Thus, a substantial component of the behavioral economics research program is the development of what might be described as a "theory of errors."[167] To this point, the research has largely consisted of an effort to document circumstances in which economic decisionmakers deviate from rational choice behavior. In the behavioral context, the combination of possible biases, lack of knowledge about the distribution of those biases and their extent, and rejection of the link between revealed preference and welfare gives rise to an infinite range of potential market outcomes under most behavioral models. Indeterminate predictions, to be sure, are at least one cause of the reluctance to adopt behavioral economics in the law.[168]

This sharp distinction between price theory and behavioral economics provides reason for skepticism that behavioral economics will make significant inroads in antitrust law.[169] It is also a key determinant of whether and how the competing economic theories are incorporated into legal institutions, to which I now turn.

166. Jolls et al., *supra* note 23, at 1487 ("The project of behavioral law and economics, as we see it, is to take the core insights and successes of economics and build upon them by making more realistic assumptions about human behavior. We wish to retain the power of the economist's approach to social science while offering a better description of the behavior of the agents in society and the economy. Behavioral law and economics, in short, offers the potential to be law and economics with a higher 'R^2'—that is, greater power to explain the observed data.").

167. Wright & Ginsburg, *supra* note 16 (manuscript at 9-11).

168. *See* Ginsburg & Moore, *supra* note 30, at 96 ("[Behavioral economics] is almost the opposite of price theory, which narrows significantly the range of outcomes a court may reach in an antitrust case; that price theory ideally generates determinate results is its great virtue as an aspect of jurisprudence.").

169. Wright & Stone, *supra* note 98, at 1550-52. We note that it is also possible that the failure of behavioral economics to significantly affect judicial decisionmaking is attributable to its nascent state. *Id.* at 49-52. Indeed, Professor Hovenkamp documents a historical lag of two or three decades before the courts adopted the new economic learning. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 204 (1991). Even accounting for this lag, however, it is now over fifty years since Herbert Simon's seminal work on bounded rationality and the firm and over thirty years since Daniel Kahneman and Amos Tversky introduced "prospect theory." *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955). The window appears to be closing, if not closed.

B. The Legal Institutions of Consumer Law: Common Law and the CFPB

Rational choice and behavioral economic theories, as well as antitrust and consumer protection law, interact in a way that undermines any potential resolution of the consumer law paradox, whether resolved in favor of either rational choice economics or behavioral economics. Despite some enthusiasm for behavioral economics in antitrust policy circles,[170] I am skeptical that a "behavioral antitrust" will develop, primarily because behavioral economics is less useful to generalist judges deciding complex antitrust cases than price theory.

The "common law" nature of antitrust jurisprudence has ensured deliberate—and at times very slow[171]—incremental evolution toward a more economically coherent antitrust law.[172] Indeed, the common law evolution of antitrust law (and in particular the alignment of its doctrine with price theory) following *The Antitrust Paradox* in the late 1970s was the primary reason that antitrust saved itself from the future Bork had predicted: an intellectual backwater responsible largely for draining economic welfare and taxing consumers.[173]

A historical example of the most recent intellectual challenge to the primacy of price theory bolsters my conclusion that neoclassical antitrust is here to stay. Behavioral economics is not the first challenger to price theory. Consider the challenge of the game-theoretic, post-Chicago challenge to price theory, which reached its zenith of influence in the early 1990s after *Eastman Kodak Co. v. Image Technical Services, Inc.*[174] Judd Stone and I observe that while the highly

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170. *See, e.g.*, Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527 (2011) (describing the potential for incorporating behavioral economics into antitrust agencies' analyses); J. Thomas Rosch, Comm'r, FTC, Remarks at the Conference on the Regulation of Consumer Financial Products: Managing Irrationality: Some Observations on Behavioral Economics and the Creation of the Consumer Financial Protection Agency (Jan. 6, 2010) (endorsing incorporation of insights from behavioral economics into the FTC's approach to antitrust law), *available at* http://ftc.gov/speeches/rosch/100106financial-products.pdf.

171. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881-82, 887-88 (2007); Wright, *supra* note 162, at 26.

172. *See* R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the Thirtieth Annual Conference on International Antitrust Law and Policy: The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct 1 (Oct. 23, 2003), *available at* http://www.justice.gov/atr/public/speeches/202724.pdf.

173. BORK, *supra* note 27.

174. 504 U.S. 451 (1992); *see* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 283-86.

formalized and mathematical post-Chicago School had displaced the traditional Chicago School approach within modern industrial organization circles and economics departments, it enjoyed little success in influencing judicial decisionmaking in lower courts or the Supreme Court.[175] At the time it posed its failed challenge to the price-theoretic foundations of antitrust law, post-Chicago economics was considerably more mature than behavioral economics currently is. Further, the post-Chicago and price-theoretic approaches had much more in common than had the behavioral approach to competition and consumer welfare analysis. Post-Chicago economics also made inroads at antitrust enforcement agencies[176] in a way that behavioral economics has not. To my knowledge, neither the FTC nor the Department of Justice has added behavioral economists to their staff. Still further, it seems highly unlikely that behavioral economics will find success in the courts without significant promotion from the economists of the antitrust enforcement agencies. In light of this history, the nature of behavioral economic theory, and its limited usefulness for judicial decisionmaking, we doubt that behavioral economics will successfully achieve a foothold in *both* the antitrust agencies and in the federal courts, and no doubt both would be required to alter the status quo. Thus, we agree with Ginsburg and Moore's skepticism concerning the prospects of a behavioral antitrust revolution and their conclusion that it remains "highly unlikely, even in the long run, that courts will view any particular area of law—consumer protection and antitrust law included—let alone the law more generally, through the lens of [behavioral economics]."[177]

The alternate possibility for convergence is a consumer protection reversion to its rational choice roots. As the common law of antitrust requires agencies

175. Wright & Stone, *supra* note 98, at 1551; *see also* Bruce H. Kobayashi, *Game Theory and Antitrust: A Post-Mortem*, 5 GEO. MASON L. REV. 411 (1997) (explaining the limited role of the game-theoretical approach in antitrust law). Following the post-Chicago School's Supreme Court debut, lower courts applying *Kodak* have construed it as narrowly as possible in similar aftermarket "lock-in" cases. *See* Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust*, *in* POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 1, 8 (Antonio Cucinotta et al. eds., 2002); *see also* David A.J. Goldfine & Kenneth M. Vorrasi, *The Fall of the* Kodak *Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 ANTITRUST L.J. 209 (2004); Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469, 484-86 (2009) (discussing *Kodak*'s treatment in lower courts).

176. *See, e.g.*, FTC/DOJ/ABA/GULC Conference, Post-Chicago Economics: New Theories—New Cases?, Washington, D.C., May 26-27, 1994; *see also* Wright & Stone, *supra* note 98, at 1550 (noting that although "the Post-Chicagoans and game theory have found only limited success in the federal courts in the United States . . . they have enjoyed much greater success in enforcement agencies in both the United States and abroad").

177. Ginsburg & Moore, *supra* note 30, at 98.

and courts to embrace an economic toolkit for its ultimate incorporation into the law, and thus serves as a barrier to incorporation of behavioral economics into antitrust, similar institutional barriers render unlikely the possibility that consumer protection will shed its newfound appreciation of behavioral economics for a neoclassical approach to revealed preference and consumer welfare analysis. I focus upon several aspects of the organization and structure of the CFPB as the most critical barrier to convergence. Its structure ensures the behavioral consumer protection approach will become deeply entrenched in consumer protection law, which, in turn, will exacerbate the conflict between consumer protection and rational choice antitrust.

That the Bureau will be led by a single director rather than a multimember commission is of major significance.[178] One benefit of the "collegial" multimember structure is the potential for exposure to a variety of views and improved decisionmaking.[179] This single director leadership structure, coupled with the fact that the CFPB has a narrowly focused regulatory mission and is specifically designed to be independent of legislative control,[180] creates a significant likelihood that the Bureau's policy goals will be "subject to the whims and idiosyncratic views of a single individual."[181] This design prohibits the agency from enjoying the benefits of deliberation, which produces more informed judgments about the direction of regulatory policy.[182] The most prominent behavioral economists acknowledge that rational choice economics has much to offer from a policy perspective.[183] Excluding viewpoints built upon

178. *See Who's Watching the Watchmen?*, *supra* note 68, at 3 (statement of Todd Zywicki, Foundation Professor of Law, George Mason University).

179. KOVACIC, *supra* note 1, at 25-26.

180. C. Boyden Gray & John Shu, *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010: Is It Constitutional?*, ENGAGE, Dec. 2010, at 66, 67.

181. *Who's Watching the Watchmen?*, *supra* note 68, at 3 (statement of Todd Zywicki, Foundation Professor of Law, George Mason University).

182. *See* Troy A. Paredes, Comm'r, SEC, Remarks at the 43rd Annual Rocky Mountain Securities Conference (May 26, 2011) (noting that the SEC's structure of five commissioners, of whom no more than three may be from the same political party, allows for "five unique perspectives" and thus a "better regulatory regime"), *available at* http://www.mondovisione.com/media-and-resources/news/speech-by-sec-commissioner-troy-a-paredes-remarks-at-the-43rd-annual-rocky-mou. Elizabeth Warren and proponents of the CFPB appear to have originally agreed with this approach, proposing a commission rather than a single-director-headed bureau. *See* Warren, *supra* note 61, at 16-18; *cf.* David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 CALIF. L. REV. 915, 929 (2007) (discussing deliberation within groups with mixed viewpoints and the benefits gained from increased political tolerance and openness to potential counterarguments).

183. George Loewenstein & Peter Ubel, Op-Ed., *Economics Behaving Badly*, N.Y. TIMES, July 14, 2010, http://www.nytimes.com/2010/07/15/opinion/15loewenstein.html.

rational choice economics, or even failing to fully consider and deliberate upon the merits of these approaches, reduces the opportunities to challenge the assumptions of the behavioral approach and no doubt further cements its primacy in the agency's structure and mission. Further, it remains unclear how economists will be incorporated into the organizational structure of the CFPB. Experience from the FTC teaches that a structure that allows for economic inputs to be delivered at the highest level of agency decisionmaking "fosters high-quality economic analysis and promotes better communication of that analysis to the agency decision makers," and this structure is now increasingly adopted by consumer law agencies around the world.[184] Moreover, while the CFPB is intended to be independent of the executive branch,[185] it was established under an administration that espouses the virtues of the behavioral approach to regulation.[186] CFPB leadership reflects this fact, and it is possible to predict that the CFPB will align itself with the current Administration's policy directives.[187]

Contributing to the likelihood of deprivation from deliberation is the combination of the CFPB's narrow regulatory focus and its hierarchy. Because the CFPB focuses upon consumer protection alone, it will likely fail to account for the implications of its policies on competition.[188] This is in stark contrast to the FTC, whose competition policy mission and expertise have strengthened its consumer protection work.[189] Furthermore, the CFPB's research unit is not mandated to be independent of decisionmaking authority, even though that structural feature has guaranteed proper vetting of policy initiatives in agencies such as the Federal Trade Commission.[190] While it is possible that the CFPB

184. KOVACIC, *supra* note 1, at 39. *See generally* Luke M. Froeb, Paul A. Pautler & Lars-Hendrik Röller, *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569 (2009) (discussing how agencies can organize their economists to maximize the quality of economic analysis within the agency and improve agency performance).

185. *See* Gray & Shu, *supra* note 180, at 67.

186. *See* Wright & Ginsburg, *supra* note 16 (manuscript at 26).

187. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001).

188. *See* Kovacic, *supra* note 8, at 21.

189. *Cf.* KOVACIC, *supra* note 1, at 33-38 (discussing the usefulness of the FTC's independent Bureau of Competition to the FTC's consumer protection mission).

190. Kovacic, *supra* note 8, at 20 ("Unlike the other federal agencies with consumer financial protection responsibilities, the FTC's distinctive institutional design combines a valuable collection of policy perspectives. . . . [T]he agency's Bureau of Economics . . . report[s] directly to the Commission and its Chairman" and "reviews every proposed consumer protection enforcement matter, settlement, rulemaking, and can make its own independent recommendation to the Commission."). Dodd-Frank does not specify the role of the CFPB research unit in its enforcement and regulatory activities. One lesson learned from the FTC will build upon the successful blueprint the FTC has laid out for integrating an independent unit of economists into its consumer protection work, it is unlikely for these two institutional reasons. Instead, the unit will likely pursue a research agenda emphasizing the behavioral economic approach to consumer financial decisionmaking advocated by those responsible for the intellectual foundation of the agency, including its Assistant Director for Research, Sendhil Mullainathan.[191] As discussed above, because the behavioral consumer protection approach has the potential to create great uncertainty, and because policy prescriptions are more susceptible to the approach,[192] it is unlikely that the CFPB's ensuing policy will converge toward antitrust law's rational choice approach.

C. *The Political Institutions of Consumer Law: The Last Hope for Convergence?*

Political institutions can also operate as a force toward convergence to resolve the antitrust/consumer protection paradox and prevent the welfare losses caused by the conflicting threads of law and their enforcement. Agencies that wander too far from the reservation can occasionally be reined in through external accountability to the White House or Congress. As many have noted, the design of the CFPB has many features that avoid such accountability or at least minimize it. For instance, under section 1023(a) of Dodd-Frank, the Financial Stability Oversight Council can only overrule the CFPB if a supermajority (two-thirds) of its members follows several strict procedures and then decides that the regulation endangers the U.S. banking system or the stability of the financial system of the United States.[193] Moreover, Congress cannot exert significant pressure on the CFPB's budget.[194] White House

experience integrating economics into its competition and consumer protection missions is that the optimal regulatory design must consider the role of economists within the agency. Indeed, in the early days of the FTC, agency structure was used to suppress the influence of economists. The CFPB would do well to avoid this error. *See generally* Froeb et al., *supra* note 184 (discussing the organization of economists within competition agencies); Josh Wright, *Organizing Economists at the CFPB*, TRUTH ON THE MARKET (May 13, 2011, 12:16 PM), http://truthonthemarket.com/2011/05/13/organizing-economists-at-the-cfpb (discussing the potential role and influence of economists within the CFPB based upon the Bureau's design).

191. *See* BARR ET AL., *supra* note 61.

192. Ginsburg & Moore, *supra* note 30, at 98.

193. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5513(a)-(c) (West Supp. 2010); *see* Gray & Shu, *supra* note 180, at 71.

194. *See Who's Watching the Watchmen?*, *supra* note 68, at 3 (statement of Todd Zywicki, Foundation Professor of Law, George Mason University); Gray & Shu, *supra* note 180, at 67 control over the CFPB is also reduced relative to similar agencies, such as the FTC. For instance, the Office of Management and Budget has no authority to ensure that the CFPB conducts cost-benefit analyses and regulatory reviews.[195]

The historical example of the FTC's experience with its "unfairness" authority, which the new CFPB also possesses,[196] illustrates the benefits of such accountability and the mechanism through which it can constrain overreaching regulatory bodies. In 1938, the FTCA was amended to prohibit "unfair or deceptive acts or practices" in addition to "unfair methods of competition."[197] Historically, the FTC did not distinguish between practices that were unfair or deceptive, opting instead to challenge business practices on the grounds that they were simultaneously unfair and deceptive. In 1964, the FTC first issued the Cigarette Rule Statement of Basis and Purpose, establishing a three-prong test for determining what constitutes unfair practices: "(1) whether the practice 'offends public policy' as set forth in 'statutes, the common law, or *otherwise*'; (2) 'whether it is moral, unethical,

("[T]he Act dramatically curtails Congress' oversight of the [CFPB] because it provides the [CFPB's] funds out of the Fed's seignorage and prevents both the House and Senate Appropriations Committees from reviewing the [CFPB's] funding."). Based upon the Federal Reserve's 2009 operating expenses and Dodd-Frank's requirement that the Fed give the CFPB 12% of those expenses, the CFPB should receive about $480 million in its first year. Dodd-Frank prohibits Congress from reviewing that grant. *See* 12 U.S.C.A. § 5497(a)(2)(C) (West Supp. 2010).

195. Presidents have traditionally declined to exercise authority, through the OMB, over independent agencies. *See* Exec. Order No. 12,866, § 3(b), 58 Fed. Reg. 51,735, 51,737 (Sept. 30, 1993) (excluding independent agencies from the Order's scope); *see also* Kagan, *supra* note 187, at 2251 ("[A] statutory delegation to an executive agency official—*although not to an independent agency head*—usually should be read as allowing the President to assert directive authority . . . over the exercise of the delegated discretion." (emphasis added)). President Obama has indicated a desire for independent agencies to comply with his orders but has not required them to do so. Exec. Order No. 13,579, § 1(c), 76 Fed. Reg. 41,587, 41,587 (July 11, 2011) (stating only that independent agencies "should" comply with Executive Order Number 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011)); Memorandum from President Barack Obama on Regulation and Independent Regulatory Agencies (July 11, 2011), http://www.whitehouse.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies ("I am asking [independent agencies] today to join in this review and produce your own plans to reassess and streamline regulations.").

196. *See* Kovacic, *supra* note 8, at 23-24. Although the two agencies have similar authority to prohibit unfair or deceptive acts or practices, "there is no assurance—beyond aspirational mandates for interagency coordination—that the CFPA will account properly for the FTC's views about the appropriate content of unfairness and deception jurisprudence." *Id.* at 27.

197. Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a) (2006)).

oppressive, or unscrupulous'; [and] (3) 'whether it causes substantial injury to consumers (or competitors or other businessmen).'"[198]

Despite creating such a test, the FTC rarely used the unfairness authority that was set forth in the Cigarette Rule.[199] However, the Supreme Court's decision in *FTC v. Sperry & Hutchinson Co.*[200] marked a turning point in the FTC's approach to unfair practices.[201] In *Sperry & Hutchinson*, the Supreme Court adopted the Cigarette Rule's definition of what constituted unfair acts and practices, consequently granting the FTC unprecedented power.[202] Because the Supreme Court's decision was devoid of guidance as to how the FTC should weigh each prong of the test, the agency was essentially delegated comprehensive authority to define unfairness, including consideration of public values and immorality, and other realms outside the law, without regard to impact on consumers.[203]

Sperry & Hutchinson coincided with a sudden escalation in consumer protection legislation.[204] Congressional desire to swiftly and aggressively enforce consumer protection laws propelled the FTC to new heights.[205] The FTC proposed over two dozen industry-wide rules under an unfocused and vague unfairness theory.[206] Perhaps the most infamous example of the FTC's consumer protection power-grab was its well-known 1978 children's

198. J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MARKETING 192, 192-93 (2003) (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964) (codified at 16 C.F.R. § 408)).

199. *Id.* at 193.

200. 405 U.S. 233 (1972).

201. William MacLeod, Elizabeth Brunins & Anna Kertesz, *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 947 (2005).

202. *See Sperry & Hutchinson*, 405 U.S. at 241-42.

203. Beales, *supra* note 198, at 193.

204. Barry R. Weingast & Mark J. Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC*, REGULATION, May/June 1982, at 33, 34-35; *see also* Butler & Wright, *supra* note 31, at 169 ("[M]any states adopted consumer protection legislation in the late 1960s and early 1970s. By 1981, every state had adopted some consumer protection legislation."); *supra* text accompanying notes 41-55 (discussing state consumer protection laws in greater detail).

205. Weingast & Moran, *supra* note 204, at 34-35.

206. MacLeod et al., *supra* note 201, at 951-52. FTC Chairman Michael Pertschuk, during the 1971-1980 period, argued that new categories of regulatory proceedings could take place under the unfairness authority based upon general public policy concerns including "prohibit[ing] businesses from hiring illegal aliens" or "prevent[ing] companies from cheating on taxes." *Id.* at 952.

advertising proposal. The "Kid Vid" case, as it came to be known, was the FTC's attempt to halt deceptive advertising to children[207] and contained three parts:

> A complete ban on advertising on programs aimed at children under 8 years of age; a ban on all ads on programs aimed at children under 12 for those sugar-coated products most likely to cause tooth decay; and a requirement that if ads for other heavily sugared products appear on programs aimed at children under 12, such ads be balanced by separate dental and nutritional ads.[208]

The FTC masked the proposal under the legal theory that advertising to children was inherently deceptive because they are unable to "discern the persuasive intent of advertising."[209]

The timing of Kid Vid, however, was not ideal for the FTC. The congressional subcommittee members that had been pushing through consumer protection legislation had left the subcommittee and were replaced by members who had a more restrictive outlook towards the FTC's role in consumer protection.[210] Thus, Kid Vid faced congressional and public hostility as yet another demonstration of how the FTC was becoming a runaway agency.[211] An editorial in the *Washington Post* summed up the sentiment towards Kid Vid, infamously branding the FTC as a "National Nanny" recklessly overreaching by infringing upon the parental duty to monitor children.[212]

With the backlash and political pressure produced by public sentiment and the *Post* editorial, the FTC was forced to reevaluate its unfairness authority. On December 17, 1980, the FTC adopted the Unfairness Policy Statement, placing consumer welfare first by declaring that "[un]justified consumer injury is the primary focus of the FTC Act, and the most important of the three [*Sperry & Hutchinson*] criteria."[213] The Unfairness Policy Statement adopted a cost-

207. Weingast & Moran, *supra* note 204, at 34.

208. Michael Pertschuk, *Stoning the National Nanny: Congress and the FTC in the Late 1970s*, *in* REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 69, 69 (1982) (quoting *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22).

209. MacLeod et al., *supra* note 201, at 955.

210. Weingast & Moran, *supra* note 204, at 36.

211. *Id.* at 34.

212. Pertschuk, *supra* note 208, at 69-70.

213. Beales, *supra* note 198, at 194 (citing Unfairness Policy Statement, *supra* note 40) (alterations in original).

benefit analysis, creating a new three-prong test for unfairness: "The injury (1) 'must be substantial'; (2) 'must not be outweighed by countervailing benefits to consumers or competition that the practice produces'; and (3) 'must be an injury that consumers themselves could not reasonably have avoided.'"[214] James C. Miller III, an economist, would enhance the cost-benefit approach further when appointed as Chairman in 1981.[215] Chairman Miller and then-Director of the Bureau of Consumer Protection (and later Chairman) Timothy Muris issued a Deception Policy Statement to bolster the Unfairness Policy Statement of 1980.[216] The Statement codified the definition of deceptive practices in economic terms, focusing upon whether the practice is "injurious in its net effects."[217] These policy statements resulted from a somewhat unique combination of political change of course in the wake of Miller's appointment and congressional pressure. For more than twenty-five years, they governed the FTC and constrained its regulatory reach by imposing the discipline of consumer-focused economic analysis.[218]

The FTC's unfairness-authority experience certainly suggests that political pressure can be an important equilibrating force. Threats of legislative action impacting the jurisdiction or budget of the agency can effectively nudge it toward different policies. However, the FTC experience also illustrates the rather extreme conditions that were required to set into motion those political forces. Further, the well-timed rise of economic legal analysis (particularly price theory) in the 1970s and the implementation of the analysis at the FTC through the leadership of Chairmen Miller and Muris played key roles in the rationalization of the unfairness doctrine and should not be underestimated.[219] Perhaps most importantly, if the FTC experience is informative, the CFPB's design will not completely immunize it from political constraints but is likely to allow it some freedom with respect to enforcement and rulemaking decisions before political pushback is likely to impose significant constraints. To be sure, there is little doubt that political forces will constrain both the FTC and CFPB upon a number of salient margins. Nonetheless, the FTC experience teaches

214. MacLeod et al., *supra* note 201, at 962 (citing Unfairness Policy Statement, *supra* note 40).

215. *Id.*

216. *Id.* at 964.

217. Beales, *supra* note 198, at 194.

218. MacLeod et al., *supra* note 201, at 963.

219. The intellectual regime change in antitrust economics also played a considerable role at the Antitrust Division. *See* Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 25 (1985) ("[I]t would have been politically impossible for . . . [William] Baxter to have done what he did [as head of the DOJ Antitrust Division], had there not been an intellectual shift in the underpinnings of antitrust . . . .").

that consumers and the economy as a whole may absorb serious welfare losses before political forces are able to provide the sort of equilibrating "course correction" that a serious conflict between antitrust and consumer protection law would require.

CONCLUSION

The antitrust/consumer protection paradox is the result of a unique combination of economic, legal, and political institutions overarching the two key strands of consumer law. The remarkable rise of behavioral economics and, in turn, behavioral law and economics, has spawned a new intellectual foundation for consumer protection law. Behavioral consumer protection law emphasizes, consistent with behavioral economics more generally, that individual decisionmaking systematically deviates from the choices predicted when assuming that economic agents behave rationally. Consumer welfare analysis under behavioral assumptions is complicated by the fact that consumers' revealed preferences may no longer be relied upon to generate inferences of welfare. Once the link between actual choices and welfare is broken, the behavioral regulator must define "true preferences," from which consumer welfare implications may be drawn. This true-preference approach to behavioral consumer welfare analysis is uniquely interesting in the consumer law context because it puts the new consumer protection—embodied by the CFPB—on a collision course with the longstanding and deeply embedded price-theoretic intellectual foundations of antitrust law under which revealed preference dominates.

The intellectual rift between antitrust and consumer protection is not merely academic; entire classes of common business behavior appear likely to be condemned under one branch of consumer law while simultaneously being encouraged by the other. The incoherence of consumer law is likely to lead to significant consumer welfare losses by condemning consumer-welfare-enhancing business practices. The significance and depth of this rift is unique in the realm of consumer protection institutions; as discussed, the rejection of revealed preference as the building block of consumer welfare analysis facilitates these emerging conflicts and distinguishes them from traditional sources of conflict between overlapping activities of competition and consumer protection agencies.

Comparative analysis of the economic, legal, and political institutions of antitrust and consumer protection leaves little hope for a timely resolution of the paradox that would avoid its predictable deleterious effect upon consumers. On the one hand, antitrust agencies and courts—including the Supreme Court—are deeply and irreversibly committed to the price-theoretic foundations of competition policy. The common law nature of antitrust development fends off competing analytical toolkits that do not have the outcome-constraining feature of price theory that has made it attractive to judges to improve decisionmaking in cases involving complex economic issues. For these reasons, among others, the behavioral approach—with its endless, potentially conflicting cognitive biases, infinite equilibria, and subjective search for true preferences—is unlikely to make inroads into antitrust jurisprudence. On the other hand, the commitments to behavioral consumer protection at the CFPB are, while nascent, remarkably firm and deeply integrated into its institutions.

Indeed, as the interaction of price theory and the common law evolution of antitrust fend off challenging economic models, the unique combination of behavioral economics and the organizational structure of the CFPB appear to be built to minimize the legal and political pressures that might otherwise nudge the CFPB towards the rational choice approach: a single-director structure as opposed to a commission, a strong behavioral economics-based foundation, limited external accountability, and limited judicial review all militate in favor of limiting equilibrating pressure towards convergence. While there is some historical precedent suggesting that political pressure can be enough to generate convergence when an administrative agency wanders astray and generates significant welfare losses for society, the CFPB's design gives little reason for optimism that a political solution is forthcoming at all, much less before consumers pay dearly in the form of higher prices, reduced variety, and lower quality products and services.