COMMENTS

LOOKING BEYOND EFFICIENCY: APPLYING THE CONSUMER-CHOICE STANDARD TO AGRICULTURE[*]

> *Somewhere in Iowa, a pig is being raised in a confined pen, packed in so tightly with other swine that their curly tails have been chopped off so they won't bite one another. To prevent him from getting sick in such close quarters, he is dosed with antibiotics. The waste produced by the pig and his thousands of pen mates on the factory farm where they live goes into manure lagoons that blanket neighboring communities with air pollution and a stomach-churning stench. He's fed on American corn that was grown with the help of government subsidies and millions of tons of chemical fertilizer. . . . That's the state of your bacon—circa 2009.*[1]

I. INTRODUCTION

American farming has transformed over the years from millions of small farms spread across the United States to a highly concentrated industry dominated by only a few large companies. While this shift has made the industry efficient at producing large quantities of food,[2] there are growing concerns regarding the costs of these efficiency-enhancing changes.[3] Antitrust laws, which were enacted to prevent the degree of concentration now found in the agricultural sector, have failed the industry and its consumers.[4] A new way of analyzing antitrust harm, particularly in agriculture, where consumers are particularly aware of nonprice aspects of competition, is necessary to prevent additional, and likely irreversible, damage to the market.

Strong monopsony[5] forces in the marketplace have eliminated any choice that conventional farmers[6] once had as to how to raise their animals,[7] and have made it

* Julie C. Berson, J.D., Temple University Beasley School of Law, 2011. I'd like to thank my friends and family for their support during law school and their attempts to care about the contents of this Comment as much as I do. Specifically, I'd also like to thank my grandfather, Joseph Bakewell, for explaining the two most important economic principles every five-year-old should know: (1) supply and demand and (2) there's no such thing as a free lunch.

1. Bryan Walsh, *America's Food Crisis and How to Fix It*, TIME, Aug. 21, 2009, at 31.

2. *See id.* at 32 ("The U.S. agricultural industry can now produce unlimited quantities of meat and grains at remarkably cheap prices.").

3. *See, e.g.*, *id.* at 35 (noting that California voters recently approved ballot measure that "guarantees farm animals enough space to lie down, stand up and turn around").

4. See *infra* notes 195–97 and accompanying text for a discussion of increasing concentration in the beef, pork, and poultry markets.

5. "Monopsony power is market power on the buy side of the market. As such, a monopsony is to the buy side of the market what a monopoly is to the sell side . . . ." Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007) (citation omitted).

difficult for farmers to make a profit.[8] Moreover, even as monopsonists squeeze profits from their growers, they have also succeeded in transferring many of their costs of production directly to the American taxpayer. Before even entering a supermarket, every taxpayer has subsidized costs of conventional farming, including costs related to feed-grain subsidies, pollution clean-up projects, less effective antibiotics, decreased property values, and tainted food.[9] As a result, not only are consumers presented with fewer options, but to purchase a sustainably produced good, they must pay both additional taxes and the higher prices that result from incorporating the full cost of production.[10]

While many argue that consumers benefit from lower food prices under the current system, the actual cost of production is still the same despite a lower level of quality or selection of goods than would otherwise be available in a free and open market.[11] To stall the decline of American farming, and protect competition, courts and enforcers should look to the consumer-choice approach because it provides the benefits of competition—lower prices, better products, and more choice—directly to consumers, instead of focusing on the total efficiency of the economy. This is particularly important for agriculture, where there are more nonprice considerations and monopsony power is particularly prevalent.

Part II.A of this Comment examines the confusion regarding the proper definition of "harm to competition" under U.S. antitrust law. While the Supreme Court has clearly stated that the purpose of antitrust law is to protect competition, vague statutory language has failed to provide helpful guidance regarding how to implement that policy.[12] In the 1980s, the Chicago School of antitrust theorists claimed that the only harm to be prevented by antitrust law is economic inefficiency.[13] The last twenty years, however, have seen a shift away from the Chicago School towards a more comprehensive analysis that incorporates the nonprice aspects of competition valued by

6. In this Comment, the phrase "conventional farming" will generally refer to situations where (1) production terms are dictated by several small processors and (2) many of the production costs are externalized to be paid for by taxpayers. In contrast, "sustainable farming" will refer to farming techniques, including organic farming, which focus more on incorporating the production costs into the cost of the good while limiting harm to the environment, communities, and farmers themselves. The Comment focuses on farms that raise livestock and poultry, although clearly many of the same issues impact crop and dairy farmers.

7. See *infra* Part III.B.2 for a description of terms dictated to conventional farmers by monopsonists.

8. See *infra* notes 255–71 and accompanying text for a discussion of the economic challenges farmers face.

9. See *infra* Part II.C.3 for a discussion of government subsidies to the conventional farming industry.

10. *See* Walsh, *supra* note 1, at 37 (explaining that once externalities of conventional farming are incorporated into cost, organically and conventionally produced products have similar price tag).

11. *See id.* ("Once you factor in crop subsidies, ecological damage and what we pay in health-care bills . . . , conventionally produced food looks a lot pricier.").

12. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) ("[L]egislative history illuminates congressional concern with the protection of *competition*" but "Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets.").

13. Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959, 959–60 (1999).

consumers.[14] Support for this change is found in the intersection of consumer protection law, antitrust statutes, and recent antitrust case law.

Part II.B reviews the issue of monopsony power. After presenting the predatory-pricing test developed by the Supreme Court in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[15] the Comment examines its application in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[16] In *Weyerhaeuser*, the Supreme Court effectively decided that the same analysis should be used for both monopoly and monopsony conduct.[17] Part II.B examines the potential consequences of this decision.

Part II.C reviews the Obama Administration's vow to review competition issues that specifically affect agriculture in the wake of increasing concentration[18]—particularly in the meat industries[19]—as well as the increasing pressure on the federal government to deal with the externalities caused by conventional farming techniques.[20] The federal government has long been concerned with the relationship between antitrust law and American farmers,[21] and yet the current problems have arisen due to lax enforcement and ineffective administration of various programs intended to protect various market participants from unlawful restraints of trade.[22]

In Part III, the Comment turns to an examination of the impact that an enhanced focus on consumer choice could have on the agriculture industry. Part III.A makes the case that the consumer-choice model of review is particularly well suited for the agricultural industry because of (1) consumer interest in the nonprice aspects of competition, (2) extensive government intervention in the market, and the (3) magnification of monopsony issues in the industry. Moreover, agriculture is shown to be similar to industries that theorists have identified as likely to benefit from the consumer-choice paradigm.[23]

Part III.B discusses the political feasibility of switching to the consumer-choice standard in light of (1) President Obama's interest in reviewing antitrust issues in agriculture and (2) the trend away from the strict per se rule for anticompetitive conduct.

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14. See *infra* notes 65–66 and accompanying text for a discussion of consumer values other than price.

15. 509 U.S. 209 (1993).

16. 549 U.S. 312 (2007).

17. *Weyerhaeuser*, 549 U.S. at 315.

18. *See* Walsh, *supra* note 1, at 36 ("[C]onsolidation and industrialization have seen the number of U.S. farms decline from 6.8 million to fewer than 2 million . . . .").

19. RENÉE JOHNSON, CONG. RESEARCH SERV., RECENT ACQUISITIONS OF U.S. MEAT COMPANIES 1 (2009), http://www.nationalaglawcenter.org/assets/crs/RS22980.pdf. See *infra* notes 186–92 and accompanying text for a discussion of JBS's recent attempt to acquire the fourth- and fifth-largest meat packing industries.

20. See *infra* Part II.C.3 for a discussion of public discontent with federal subsidies to agribusiness.

21. *See* Capper-Volstead Act, Pub. L. 67-146, 42 Stat 388 (1922) (codified at 7 U.S.C. §§ 291–92 (2006)) (exempting certain agricultural associations from antitrust laws); Packers and Stockyards Act, Pub. L. 67-51, 42 Stat 159 (1921) (codified as amended at 7 U.S.C. §§ 181–231) (prohibiting price manipulation and monopoly creation).

22. See *infra* notes 227–28 and accompanying text for a discussion of problems with the Grain Inspection, Packers and Stockyards Administration ("GIPSA").

23. Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 199–216 (2007).

Part III.C shows why the Supreme Court was wrong in deciding that the standard used for monopolistic conduct (the *Brooke Group* test) should also be applied to monopsonistic conduct. Finally, to the extent that *Brooke Group* remains the test for both monopolistic and monopsonistic conduct, Part III.D argues that it should (1) incorporate externalities as part of the measurement of a defendant's costs and (2) remove the safe haven for above-cost predatory pricing and bidding.

II. OVERVIEW

A. *Against What Type of "Harm" Does Antitrust Law Protect?*

Under the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[24] Additionally, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[25] While the Supreme Court has instructed us that the purpose of the statute is to protect competition, not competitors,[26] the vague language of the statute fails to provide any guidance as to how to implement that policy. In order to protect competition, the courts would seemingly need to have a clear standard of what qualifies as harm to competition. No such standard exists.

The policy goals that antitrust law should protect have been a subject of debate for many years.[27] It might seem that because antitrust law is supposed to protect competition, and because competition should provide consumers with the best price under market conditions, an analysis of the effect on price is all that is required to determine whether conduct violated antitrust law. However, theorists have conjured up more complex analyses of "harm," in part due to the belief that price alone is an insufficient metric.[28]

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24. Sherman Act, 15 U.S.C. § 1 (2006).

25. *Id.* § 2.

26. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

27. *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) ("[F]ederal courts . . . have [not] arrived at a definitive statement of the values or policies which control the law's application and evolution."); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 67 (1982) ("Considerable dispute over the goals of the antitrust laws has surfaced in scholarly commentary on the subject.").

28. *See, e.g.*, James May, *Historical Analysis in Antitrust Law*, 35 N.Y.L. SCH. L. REV. 857, 863 (1990) (noting one scholar's conclusion that "Sherman Act reflected a general philosophy of 'economic egalitarianism'" where "Congress hoped to protect not only competition and efficiency, but also economic opportunity, wealth distribution, and political liberty").

1. Per Se Versus the Rule-of-Reason Approach

Despite the seemingly tough language of the Sherman Act,[29] the Supreme Court adopted a "rule-of-reason" approach for interpreting the statute in *Standard Oil Co. of New Jersey v. United States*.[30] Under the rule-of-reason approach, only those combinations that *unreasonably* restrain trade are unlawful.[31] The possession of monopoly power is not prohibited outright.[32] To determine whether a restraint is reasonable, courts engage in a fact-intensive inquiry aimed at deciding if the anticompetitive harm outweighs the pro-competitive benefits.[33] Again, however, a clear definition of "harm" does not exist.

Recently, courts have subjected an increasing number of traditionally per se unlawful restraints to the rule-of-reason analysis.[34] In the 1970s, the Supreme Court indicated that only cases that are "so 'plainly anticompetitive'"[35] such that they "'lack . . . any redeeming virtue'"[36] may be "presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases."[37] In determining whether to review under a per se or rule-of-reason approach, the characterization of conduct is the primary concern,[38] but the Court has also said that the per se rule is only applicable if the court has "considerable experience with certain business relationships."[39] The Court advised against "extend[ing] per se analysis to restraints imposed in the context of business relationships where the economic impact . . . is not

29. See *supra* notes 24–25 and accompanying text for direct language from the Sherman Act.

30. 221 U.S. 1 (1911).

31. *Standard Oil*, 221 U.S. at 69.

32. *Id.* at 63–67. Without the rule-of-reason approach, the Court asserted, "every contract, act or combination of any kind or nature" would be within the statute and thus prohibited. *Id.* at 63.

33. The *Standard Oil* Court relied on market concentration and a review of business practices to conclude that the trade restraints were unreasonably anticompetitive. *Id.* at 70–77. As the Court described:

> [T]he acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

Id. at 76–77.

34. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881–82 (2007) (reversing precedent by holding that rule-of-reason approach should be used to review minimum resale price maintenance agreements); Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 759 (1999) (holding that "quick-look" analysis is not sufficient and full rule-of-reason analysis is required where likelihood of competitive injury is not obvious); State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (holding that vertical maximum price-fixing should be evaluated under rule-of-reason approach); Cont'l TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977) (instructing courts to analyze nonprice vertical restraints under rule-of-reason approach).

35. Broad. Music, Inc. v. Colum. Broad. Sys., Inc., 441 U.S. 1, 8 (1979) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

36. *Id.* (omission in original) (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

37. *Id.*

38. *Id.* at 19–20 (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 436 n.13 (1978)).

39. United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972).

immediately obvious."[40] Effectively, because the circumstances where the application of per se rules are justified have narrowed, courts may now consider more types of harm and numerous price and nonprice considerations during their fact-intensive review of the reasonableness of alleged restraints on trade.[41] However, certain anticompetitive restraints, including price-fixing agreements, joint refusals to deal (e.g., boycotts), and geographical market divisions, are still found unlawful per se.[42]

2. Robert Bork and the Rise of the Chicago School of Antitrust Policy

In 1966, Robert Bork wrote that in their attempts to interpret the Sherman Act, federal courts had failed to definitively establish the "values or policies which control the law's application and evolution."[43] Finding support in the Congressional Record, Bork arrived at the narrow conclusion that "the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction."[44] In other words, antitrust law should *only* prohibit harm to economic efficiency.[45] Highlighting references by courts to "values other than consumer welfare,"[46] Bork complained that the judicial "free verse" was completely without support in the legislative history.[47] Yet, in coming to the conclusion that Congress had no intention for courts to consider values other than total efficiency under the statute,[48] Bork acknowledged that the legislators who originally passed the Sherman Act may have prioritized values not strictly categorized as "consumer welfare."[49] The legislative history reflects that the Sherman Act may also have been intended to protect small businesses, where that goal does not conflict with efficiency.[50] "Bork reasoned that since we now know that the 'only' harm to 'consumer welfare' from higher prices is economic inefficiency, congressional displeasure with market power can fairly be equated with a concern

40. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458–59 (1986).

41. *See, e.g.*, *Broad. Music*, 441 U.S. at 23–25 (refusing to apply per se rule to horizontal conduct where trade restraint creates a new product).

42. *See, e.g.*, Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 355–57 (1982) (holding as per se illegal agreement between doctors and insurers to set maximum price for services); *Topco Assocs.*, 405 U.S. at 607–08 (holding as per se illegal any practice that restricts or eliminates potential rivals by assigning exclusive territory); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659–60 (1961) (holding as per se illegal refusal to deal with competitors); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (holding *any* combination between competitors formed for purpose and with effect on prices is per se illegal); Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 590, 595 (7th Cir. 1984) (holding as per se illegal industry agreements forbidding members from engaging in business outside designated geographic area).

43. Bork, *supra* note 27, at 7.

44. *Id.*

45. *See id.* at 7–10 (discussing various cases and legislative history supporting view that economic efficiency is only harm to be prevented).

46. *Id.* at 8.

47. *Id.* at 10.

48. *Id.*

49. *Id.*

50. *See id.* (noting there was repeated expression of concern among legislators "over the injury trusts and railroad cartels inflicted upon farmers and small businessmen").

about economic efficiency."[51] Bork added that the economic efficiency theory is the only definition of harm that could be administered by the courts.[52]

By the 1980s, the majority of the antitrust community, dominated by the Chicago School,[53] had adopted Bork's thesis.[54] The Chicago School advocated that there was only one permissible goal of antitrust policy—to protect market efficiency.[55] As such, the only harm intended to be prevented by antitrust law was harm related to economic efficiency.[56] The Chicago School was also marked by the belief that lower prices for the consumer are *always* good.[57]

3. The Post-Chicago Switch: Building Toward the Consumer-Choice Model

In the 1970s, some theorists began to argue that antitrust enforcement should not rely solely on economic efficiency because social goals outweigh efficiency in some cases.[58] Despite differing opinions, most in this camp agreed that the characterization of antitrust law's purpose has far-reaching intentional and unconscious effects on the outcome of cases.[59]

For the most part, these criticisms of the Chicago School—and alternative models proposed during the 1980s—did not gain momentum until many years later.[60] In

51. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 199 (2008).

52. Lande*, supra* note 13, at 960 (citing Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985) (asserting "courts are not . . . entitled to balance such things as consumer welfare against small business welfare without engaging in a task that is so unconfinedly legislative as to be unconstitutional")).

53. *Id.* at 959 (stating Robert Bork was "a leading Chicago School theorist" and "[t]he heads of both federal enforcement agencies were proud disciples, as were an increasing number of federal judges").

54. *See* Kirkwood & Lande, *supra* note 51, at 193–94 (noting Bork's followers in the Chicago School gained significant control over antitrust world during Reagan Administration in 1980s).

55. Lande*, supra* note 13, at 959–60.

56. *Id*

57. United States v. AMR Corp., 335 F.3d 1109, 1114 (10th Cir. 2003) (noting that "Chicago scholars argued that lowering prices could only be pro-competitive and any prohibition on such conduct could ultimately deter firms from engaging in conduct that is socially beneficial").

58. *See* John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182, 1186–89 (1977) (summarizing various arguments including: (1) that the laissez faire model's incomplete understanding of human psychology, as reflected by its singular focus on selfish and rational behavior, ignores "equally significant factors of human motivation that may stem from irrational behavior, a lust for power, or a praiseworthy sense of fraternity or altruism"; and (2) that while efficiency suggests the desire to maximize value, U.S. law is actually intended to achieve a balance between fulfilling wants and restricting overindulgence).

59. *See id.* at 1187–89 (discussing various ways that assumptions made by decision-makers in antitrust issues about purpose of antitrust law influence adjudicative outcomes).

60. The waning influence of the Chicago School was evident in a 2003 opinion by the Tenth Circuit. In *United States v. AMR Corp*., the Tenth Circuit moved away from the Chicago School's belief that below-cost pricing is irrational and implausible; a belief which, when coupled with concerns about holding companies liable for pro-competitive behavior, had previously led to the adoption of a very high standard for predatory pricing. *AMR Corp*., 335 F.3d at 1114–15. In *AMR Corp*., the court reviewed American Airlines' alleged predatory-pricing scheme "with caution," but not "with the incredulity that once prevailed." *Id.* at 1115. The case thus indicated a shift towards more active enforcement of the prohibition on predatory pricing than would otherwise be the case under a pure Chicago School approach.

particular, Robert Lande's "wealth transfer thesis,"[61] originally published in 1982, was republished in 1999.[62] Lande acknowledged that there is frequently a lag time between the promulgation of new theories and their implementation by the courts.[63] Working in conjunction with expert economists, Lande concluded that the Sherman Act was intended to protect competition by "preventing 'unfair' transfers of wealth from consumers to firms with market power,"[64] even where such a transfer might be considered the most efficient result for the market as a whole. Lande considered ways that antitrust analysis might be expanded to consider a broader understanding of consumer welfare other than prices[65] because he had found that in addition to competitively priced goods, consumers want "optimal levels of quality, variety, and safety."[66]

In his criticisms of Robert Bork's analysis, Lande asserted that Bork was actually referring to "total welfare" when he improperly equated consumer welfare with economic efficiency.[67] Total welfare refers to the sum of consumer surplus (i.e., consumer welfare) *and* the producers' surplus.[68] By failing to distinguish the final consumers from firms with market power,[69] Bork's theory actually suggests that higher consumer prices are acceptable as long as the market as a whole is operating efficiently.[70] Lande pointed out that Bork's theory contradicts his acknowledgement that the Sherman Act debates reflect the belief that "'[t]he touchstone of illegality is raising prices to consumers. There [are] no exceptions.'"[71] Lande further rejected Bork's understanding of consumer welfare because it was unable to capture "the transfer of [the] consumers' surplus from purchasers to firms with market power, and the overall distribution of wealth in society."[72] Bork had unequivocally concluded that Congress was not concerned with any possible "distributive issues."[73]

Lande continued to build on his critique of other theories and his understanding that protection of the consumer would require the flexibility to consider factors that could not easily be analyzed by the models that shared Bork's focus on market-efficiency or price. He published several articles[74] advocating that the *real* purpose of

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61. The "wealth transfer thesis" posits that antitrust laws were not solely intended to protect market efficiency, but also to protect consumers from unfair transfers of wealth from consumers to firms with market power. Lande, *supra* note 27, at 68.

62. *See* Lande, *supra* note 13.

63. *Id.* at 966.

64. Lande, *supra* note 27, at 68.

65. Lande, *supra* note 13, at 962.

66. *Id.* at 962–63.

67. Kirkwood & Lande, *supra* note 51, at 199–200.

68. *Id.* at 200 n.30.

69. Unlike final consumers, firms with market power have the power "to raise prices and thereby extract wealth from purchasers." *Id*. at 199.

70. *Id*.

71. *Id.* at 201 (quoting Bork, *supra* note 27, at 16).

72. *Id.* at 200.

73. *Id.* at 198.

74. *See generally* Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44, 44 (1998) [hereinafter *Consumer Choice*]; Averitt & Lande, *supra* note 23, at 175; Kirkwood & Lande, *supra* note 51, at 192; Robert H. Lande,

antitrust law is "to provide the benefits of competition to consumers—lower prices, better products, and more choice—not to improve the efficiency of the economy."[75] In other words, Lande argued that competition is adversely affected when consumers have fewer options than would otherwise be available in a competitive marketplace. As such, while antitrust enforcement cannot ensure the maximum number of options in the marketplace, it should "prevent[] business conduct that artificially limits the natural range of choices in the marketplace."[76] Dubbed the "choice-centered approach" or consumer-choice paradigm, Lande predicted that its application would lead to "a more efficient market, the lowest prices, the best product quality and variety, the highest level of consumer surplus, and all the other benefits of a competitive economy."[77]

4. Other Support for the Consumer-Choice Paradigm

Robert Lande found support for the consumer-choice model during his work with Neil Averitt reviewing the intersection of antitrust and consumer protection law.[78] Lande and Averitt found that these two bodies of law work together: antitrust ensures that consumers will have a number of options[79] and consumer protection enables consumers to make informed decisions among those options.[80] The result is that both are needed "to facilitate the exercise of consumer sovereignty or effective consumer choice."[81]

The consumer-choice approach is well grounded in antitrust statutes and case law.[82] Simply put, the statutes prohibit the types of conduct that manipulate the number of options available to the consumer.[83] Lande cited explicit and implicit references by courts to the importance of consumer choice "in monopolization cases, attempted monopolization cases, as well as cases involving agreements among competitors, vertical mergers, boycotts and joint ventures, tying, refusals to deal, and vertical restraints."[84]

Specifically, Lande reviewed the 2001 decision in *United States v. Microsoft Corp*.[85] He presented the case as an example of a judge reviewing alleged anticompetitive conduct without focusing solely on the price or cost of the product.[86] The judge showed a high level of concern for potential harm to nonprice or intellectual competition that could suppress new ideas and products.[87] Lande stated that *Microsoft*

Consumer Choice as the Ultimate Goal of Antitrust, 62 U. PITT. L. REV. 503, 504 (2001) [hereinafter *Ultimate Goal of Antitrust*]; Lande, *supra* note 13, at 961; Lande, *supra* note 27, at 68.

75. Kirkwood & Lande, *supra* note 51, at 192.

76. *Ultimate Goal of Antitrust*, *supra* note 74, at 503–04.

77. *Id.* at 504 (footnote omitted).

78. *Consumer Choice*, *supra* note 74, at 44.

79. *Id.*

80. *Id.* at 44–45.

81. *Id.* at 44.

82. *Ultimate Goal of Antitrust*, *supra* note 74, at 504–05.

83. *Id.* at 505.

84. *Id.* at 509–10 (citations omitted).

85. 253 F.3d 34 (D.C. Cir. 2001).

86. *Ultimate Goal of Antitrust*, *supra* note 74, at 514.

87. *Id.* at 511–12.

was a prime example of an antitrust case that was "argued in terms of consumer choice, and not in terms of price," and that this "illustrate[d] how consumer choice is emerging as an explicit paradigm for antitrust."[88] He also suggested that the result of the shift would be enhanced consumer protection,[89] because, in some cases, competition in nonprice dimensions "such as innovation, product variety, safety, and product quality"[90] is "affected at concentration levels different from those most relevant for pure price considerations."[91] Thus, mergers that might otherwise be permitted, may be challenged under the consumer-choice model.[92]

Later, in conjunction with John Kirkwood, Lande again articulated that antitrust law is supposed "to protect consumers from behavior that deprives them of the benefits of competition."[93] Their review of recent court decisions suggests that courts have not prioritized efficiency over consumer protection, except where necessary to protect small businesses from buyer-side anticompetitive behavior.[94] The authors also found that use of the term "consumer welfare" is not intended by judges to mean "economic efficiency."[95] Furthermore, their study indicated that judges do not accept the argument that anticompetitive conduct that harms consumers is justified if it is more efficient for the market as a whole.[96] As they note, "whenever the courts have addressed an actual or potential conflict between consumer well-being and economic efficiency, consumer interests have always prevailed."[97] In sum, their review indicates that judges "believe that the aim of antitrust is to prevent behavior that deprives consumers of the benefits of competition and transfers their wealth to firms with market power," even where that is not the most efficient result for the market as a whole.[98]

5. Comparing the Choice Framework with the Price and Efficiency Model

In 2007, Robert Lande and Neil Averitt wrote that not only does the choice framework more accurately assess nonprice competition considerations, but it is also more transparent and reaches better outcomes in real-world situations.[99] Although the

88. *Id.* at 514.

89. *Id.* at 514–15.

90. *Id.* at 515.

91. *Id.* at 516.

92. *Id.* See *infra* note 114 for an explanation of how mergers may be handled differently under the consumer-choice model.

93. Kirkwood & Lande, *supra* note 51, at 191 (emphasis omitted).

94. *Id.*

95. *Id.* at 212.

96. *Id.*

97. *Id.* at 216.

98. *Id.* at 212. Lande explains that "the Court equated 'consumer welfare' with the welfare of consumers, not with total welfare." *Id.* at 214 (citing Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (applying rule-of-reason approach to vertical restraints upon trade, thereby overruling earlier precedent that would treat vertical minimum resale prices as per se unlawful, and noting that price minimums enhance interbrand competition by allowing consumers to choose between brand levels). Alternatively, few decisions explicitly state that the goal of antitrust laws is to promote efficiency. Kirkwood & Lande, *supra* note 51, at 212.

99. Averitt & Lande, *supra* note 23, at 175.

authors acknowledged that the price and efficiency models "brought some much-needed discipline and rigor into antitrust analysis,"[100] they argued that these analyses ultimately fail because they cannot adequately assess nonprice competition.[101] This is because in applying the price model there is usually an attempt to translate nonprice attributes into price equivalents. The result is that these "unquantifiable nonprice issues" often get lost in translation.[102] Instead of attempting this translation, or reducing the nonprice considerations to mere afterthoughts, the choice model addresses these concerns directly as part of the main analysis.[103]

Moreover, as previously mentioned, the choice model only considers those savings or improvements that create new options for the consumer or are actually, or likely, to flow to the consumer in the form of decreased prices, while the efficiency model recognizes a cost saving as contributing to consumer welfare even if it is retained by a firm.[104] The efficiency model does not consider supracompetitive prices for consumers as a negative factor in these cases.[105] As such, the choice model best addresses these distributive concerns and "recognizes that consumers do not just want competitive prices—they want options."[106]

Recognizing that the price and efficiency models are still important to antitrust practice, Lande and Averitt showed that their choice model is rooted in current antitrust practice.[107] They argued that (1) in ninety-five percent of cases, the decision will still be based on price or on price competition ensuring nonprice competition (the choice model merely gives *more* consideration to nonprice factors than is possible using the other methods); (2) application of the choice-oriented approach would not attack conduct that only slightly reduces the number of options available to the consumer or that merely "limit[s] options through ordinary market competition"; and (3) the choice model does not revert to the "standardless and unduly hostile to business" vague values approach of the 1960s and 1970s.[108] Building on Lande's earlier analysis that consumer-choice is well grounded in recent precedent, Lande and Averitt concluded that courts frequently refer to choice, and, even where they are not explicit, "their outcomes are still best explained in terms of choice."[109]

Also, in contrast to Bork's argument that only the efficiency model is administrable,[110] Lande and Averitt found that the choice model, "can build the same kind of empirical foundation for itself" such that it can be used in administrable and

100. *Id.* at 176–77.

101. *Id.* at 176.

102. *Id.* at 186.

103. *Id.* The failure to properly assess nonprice characteristics is particularly relevant where there is little price competition in a market, conduct that impairs consumers' decision-making ability, and/or the market requires more firms to foster innovation than to ensure price competition. *Id.* at 176.

104. *Id.* at 188–89.

105. *Id.* at 188.

106. *Id.* at 178.

107. *Id.* at 177.

108. *Id.*

109. *Id.* at 190; *see also* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 348 (1982) (finding agreement to limit maximum prices illegal since high prices may provide variety to consumers).

110. Lande*, supra* note 13, at 960–61.

predictable ways.[111] Furthermore, in response to warnings that "[s]o long as courts countenance such non-economic goals, prediction of results in the world of antitrust will be an art rather than a science,"[112] Lande and Averitt proposed five ways to address these concerns. To increase predictability of decisions, they recommended, (1) amending the *Horizontal Merger Guidelines*[113] to indicate which choice issues would be analyzed;[114] (2) identifying specific sources to rely on to decide new issues; (3)

111. Averitt & Lande, *supra* note 23, at 177.

112. Flynn, *supra* note 58, at 1188.

113. The *Horizontal Merger Guidelines*, published by the Department of Justice and the Federal Trade Commission, "articulate the [current] analytical framework the Agenc[ies] appl[y] in determining whether a merger is likely substantially to lessen competition." DOJ & FTC, HORIZONTAL MERGER GUIDELINES 1–2 (1997) [hereinafter HORIZONTAL MERGER GUIDELINES], *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf. This five-part analysis includes "(1) market definition and concentration; (2) potential adverse competitive effects; (3) entry analysis; (4) efficiencies; and (5) failing and exiting assets." FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 2 (2006) [hereinafter COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES], *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf. The market is defined, in part, by "consumers' willingness to switch from one product to another in reaction to price changes." *Id*. at 5. Market concentration reflects the number of firms in the market and their market shares. This is measured by the Herfindahl-Hirschman Index ("HHI"), which is calculated by summing the squares of the individual market shares of all participants. *Id.* at 15. The Department of Justice and the Federal Trade Commission currently rely on the effect a merger will have on the HHI when determining whether to proceed with additional analysis of the possible anticompetitive effect. *Id.*

114. In advance of the 2010 Revised Guidelines, Lande and Averitt posited that adopting the consumer-choice model would require amending the *Horizontal Merger Guidelines* and related Commentary. Averitt & Lande, *supra* note 23, at 237. This was because the then-current Guidelines and Commentary did not provide for consideration of nonprice aspects of competition. The Guidelines stated that mergers should be prevented where they would "create or enhance market power or to facilitate its exercise," but market power only reflects a seller's ability to profitably maintain supracompetitive prices. HORIZONTAL MERGER GUIDELINES, *supra* note 113, at 2. Although the 2006 *Commentary on the Horizontal Merger Guidelines* (the "Commentary") purported only to provide guidance on how the Guidelines are employed by the Agencies, it expanded upon the definition of "market power." The Commentary explained that in addition to using market power to raise prices, such power may also be utilized in an anticompetitive fashion to reduce quality and/or curtail innovation. COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, *supra* note 113, at 1. However, this broader definition is still not sufficient to incorporate the consumer-choice model.

Lande and Averitt argued that the result of incorporating their proposed changes to the Guidelines and Commentary would be that some mergers that would otherwise be approved under the price or total efficiency models would be challenged. Averitt & Lande, *supra* note 23, at 223. They provided examples of matters that might be handled differently under the consumer-choice model. *Id.* For example, a merger of hospitals in Santa Cruz, California "resulted in church-affiliated organizations controlling approximately three-quarters of local hospital capacity." *Id.* at 227. As a result, consumers in the relevant market were unable to obtain a tubal ligation (a sterilization procedure for women). "The range of consumer choice was, therefore, significantly threatened in an important nonprice dimension, which should have been considered in the consent decree as carefully as the price considerations." *Id.* While the merged hospital removed the restriction, the provision of the service was not guaranteed. *Id.* at 228. The authors argued that "[i]t would have been better, however, to recognize that the nonprice option of tubal ligations would not necessarily be preserved by measures aimed at protecting marketwide price competition and to have instead included an order provision [in the Federal Trade Commission's consent decree] specifically designed to protect it." *Id.* at 229. The taxicab market in Montgomery County, Maryland was provided as another example. *Id.* at 233–35. Although prices were regulated, consumers were not protected from nonprice effects of one company's dominance. Specifically,"[i]n the absence of competition, service appears to have deteriorated." *Id.* at 234. "A choice model of competition would have anticipated these kinds of problems and would not have allowed this level of concentration to

revising the Herfindahl-Hirschman Index ("HHI")[115] thresholds; (4) reviewing choice considerations under the rule-of-reason analysis[116] of mergers; and (5) safeguarding against prosecutorial discretion.[117] In response to complaints that the choice model is not administrable because it "is somewhat more complex than the alternatives, and it is less tied to objective metrics, such as prices and elasticities,"[118] Lande and Averitt posited that the choice model is easier to explain to nonspecialists[119] and, consequently, may increase enforcement by focusing on issues that are imperative in the context of the specific merger.[120]

Furthermore, Lande and Averitt did not contemplate that the consumer-choice paradigm would be used in place of the efficiency model in every industry.[121] Generally, the consumer-choice approach would be reserved for three types of markets: (1) markets where there is little to no price competition, possibly due to regulations, joint ventures, or third-party payors;[122] (2) markets where consumers have been persuaded to purchase an unbefitting product due to advertising restrictions or other conduct that impeded consumer decision making;[123] and (3) markets where consumers are less concerned with the price of a good and more focused on other qualities of the product.[124] Examples of industries that would be analyzed under the consumer-choice model include media, hospitals, and high-technology markets where innovation is essential to maintain competition.[125]

To determine the *optimal* level of consumer choice, an industry-by-industry analysis is necessary.[126] A balance is required between the benefit consumers perceive from variety and diminishing returns resulting from reduced economies of scale, consumer overload, or product differentiation (which results in producers gaining market power and the ability to raise prices).[127] It is also important to analyze the effects of both short-term variety in immediate consumption and long-term variety in innovation to identify industries where consumers are particularly interested in more variety and lower market concentration.[128] "Antitrust practitioners will seek to understand in which industries variety is particularly important to consumers; in which

arise, even in a regulated industry." *Id.* at 234–35.

115. See *supra* note 113 for an explanation of the HHI.

116. See *supra* Part II.A.1 for an explanation of the rule-of-reason approach.

117. Averitt & Lande, *supra* note 23, at 237.

118. *Id.* at 237.

119. *Id.* at 248.

120. *Id.* at 248–49.

121. *See id.* at 195 ("Given the[] difficulties in formulating a single general antitrust rule, it makes sense to proceed instead on an industry-by-industry basis.").

122. *Id.* at 196–99.

123. *Id.* at 199–201.

124. *Id.* at 201–23. The third category would have a cut-off point somewhere "along a continuum, with one end being products that are sold primarily on the basis of price and the other end being products that are sold primarily on their nonprice attributes." *Id*. at 202.

125. *Id.* at 206.

126. *See id.* at 195 (suggesting a "single antitrust rule for all circumstances" is inappropriate to achieve "optimal overall consumer choice").

127. *Id*. at 192.

128. *Id.* at 191.

ones the necessary variety must be created by independent competitors; and what particular number of competitors are required."[129]

B. Monopsonies Are Bad Too—Another Trend in Antitrust Law

While the review to this point has focused primarily on seller conduct, anticompetitive conduct by buyers, or monopsonies, is an area of increasing concern in the field of antitrust.[130] "Monopsony power is market power on the buy side of the market."[131] A monopsonist may use its market power in the buyers market to force sellers to accept supracompetitive input prices,[132] or "to exact some other form of advantage for the monopsonist."[133] These abuses may also occur in an oligopsony, where there are a few large buyers in the market.[134] In 1991, Roger Blair and Jeffrey Harrison concluded that when courts analyze possible anticompetitive effects from a monopsony, they cannot rely solely on price analysis.[135] This is because although generally monopsony power leads to lower prices, lower prices may not always be a positive development if sellers are forced to sell their goods at a lower price that is not passed on to the final consumers.[136]

1. How Should We Assess Monopsony Harm?

For many years, antitrust experts have debated whether monopoly and monopsony conduct should be assessed the same way.[137] The *Horizontal Merger Guidelines* ("Guidelines") and the recent revision of these Guidelines ("Revised Guidelines"),[138] state that because monopsony power has similar negative effects as monopoly power,[139] "an analytical framework analogous to the framework of the[] Guidelines"

129. *Id.* at 195.

130. Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402, 402 (2008).

131. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007) (citing Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991)). As noted by Blair and Harrison, "monopsony envisions a market with only one buyer that uses its power to reduce the quantity purchased, thereby reducing the price that the monopsonist has to pay." Blair & Harrison, *supra*, at 297–98.

132. Blair & Harrison, *supra* note 131, at 306.

133. *Id.* at 320.

134. *Id.* at 308.

135. *Id.* at 298–99.

136. *Id.* at 299–300.

137. *See e.g.*, John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 625 (2005); Peter C. Carstensen, Young-Bascom Professor of Law, Univ. of Wis. Law Sch., Statement Prepared for the Workshop on Merger Enforcement held by the Antitrust Division of the Department of Justice and the Federal Trade Commission: Buyer Power and Merger Analysis—The Need for Different Metrics 3 (Feb. 17, 2004), *available at* http://www.ftc.gov/bc/mergerenforce/presentations/040217carstensen.pdf; Marius Schwartz, Professor of Econ., Georgetown Univ., Comments Presented at the Workshop on Merger Enforcement held by the Antitrust Division of the Department of Justice and the Federal Trade Commission: Should Antitrust Assess Buyer Market Power Differently than Seller Market Power? 1 (Feb. 17, 2004), *available at* http://www.justice.gov/atr/public/workshops/docs/202607.pdf.

138. See *infra* Part III.B.1 for a discussion of the recent revisions to the Horizontal Merger Guidelines.

139. HORIZONTAL MERGER GUIDELINES*, supra* note 113, at 3.

will be used to analyze mergers of monopsonies.[140] Opposing views were presented during the 2004 joint Department of Justice and Federal Trade Commission Workshops on Merger Enforcement. On one hand, experts including Marius Schwartz, argued that there is no economic reason to treat seller-side market power differently from buyer-side market power.[141] On the other hand, experts such as Peter Carstensen, argued that "the metrics by which [a monopsony's] likely effects should be measured . . . necessarily must reflect the difference between the economic context of buying and selling."[142]

The Supreme Court has also weighed in on the issue, concluding that there is no economic reason to treat seller market power differently from buyer-side market power. Specifically, in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[143] the Court held that the test for predatory pricing (monopoly, or seller-side conduct) also applies to predatory-bidding claims (monopsony, or buyer-side conduct).[144] Under the test, established by the Court in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[145] it is not sufficient to show that the alleged predatory pricing is harming a competitor, as it is competition that matters. To establish liability, the plaintiff must prove that the defendant (1) priced goods below cost and (2) had either a "reasonable prospect" or "dangerous probability, of recouping its investment in below-cost prices."[146] The rationale for the second prong of the *Brooke Group* test is that if the defendant sells a good below cost and is not able to recoup that investment in below-cost pricing, consumer welfare is actually enhanced by lower aggregate prices in the market even if one of the defendant's competitors is harmed.[147] Both prongs are thus necessary to avoid imposing liability where no actual harm to the consumer has occurred.[148] The Court refused, however, to define or explain how to calculate "below-cost" pricing.[149]

In *Weyerhauser*, Ross-Simmons alleged that Weyerhaeuser used its dominant position in the timber market to drive up the cost of logs, which represented seventy-five percent of production costs, to eliminate Ross-Simmons as a competitor.[150] After acquiring an existing sawmill, Weyerhaeuser made substantial investments that enhanced efficiency and increased production.[151] As of 2001, Weyerhaeuser was

140. *Id.* Similarly, the Revised Guidelines state, "[t]he Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers." DOJ & FTC, HORIZONTAL MERGER GUIDELINES FOR PUBLIC COMMENT 2 (Apr. 20, 2010), [hereinafter HORIZONTAL MERGER GUIDELINES FOR PUBLIC COMMENT], *available at* http://www.ftc.gov/os/2010/04/100420hmg.pdf.

141. Schwartz, *supra* note 137, at 1.

142. Carstensen, *supra* note 137, at 3.

143. 549 U.S. 312 (2007).

144. *Weyerhaeuser*, 549 U.S. at 315.

145. 509 U.S. 209 (1993).

146. *Brook Group*, 509 U.S. at 222–24 (commonly referred to as "*Brooke Group* test").

147. *Id*. at 224.

148. *Id.* at 225–26.

149. *Id.* at 222 n.1.

150. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 316 (2007).

151. *Id.* at 315.

purchasing sixty-five percent of the available logs in the region.[152] Meanwhile, Ross-Simmons did not make comparable efficiency-enhancing investments.[153] The jury was instructed that Ross-Simmons could be successful in proving predatory bidding "if the jury concluded that Weyerhaeuser 'purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price.'"[154] The verdict for Ross-Simmons, once trebled, amounted to nearly $79 million.[155]

On appeal, the Ninth Circuit affirmed the verdict against Weyerhaeuser, rejecting Weyerhaeuser's argument that the *Brooke Group* test for predatory pricing should also apply to claims of predatory bidding.[156] The court's rationale was that "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing."[157] Thus, the justification for the *Brooke Group* test's high burden for proving liability—the fear of imposing liability for pricing that does not harm the consumer—is not similarly indicated for predatory bidding.[158]

In reversing the Ninth Circuit, the Supreme Court accepted Weyerhaeuser's argument that *Brooke Group* should apply to both predatory pricing and predatory bidding.[159] The Court instructed that because monopsony mirrors monopoly,[160] the same test, with slight adaptations, should be used to determine whether a purchaser

152. *Id.*

153. *Id.* at 316.

154. *Id.* at 317 (alteration in original).

155. *Id.*

156. Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co., 411 F.3d 1030, 1035–36 (9th Cir. 2005), *vacated*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S 312 (2007).

157. *Id.* at 1037. As the Ninth Circuit noted:

> In a predatory bidding scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases. No consumer benefit results during this predation period if the firm raises or maintains the same price level for its finished products. Although consumers might temporarily benefit if a firm lowered prices during the predation period, a reduction in prices would place even greater pressure on competitors, thereby increasing the threat to competition arising from the predatory bidding. Thus, even though a short-term benefit to consumers might occur in some predatory bidding situations, serious concerns about the threat to competition would concurrently arise in those situations. Moreover, predatory bidding claims do not directly challenge a firm's decision to cut prices; instead, they focus on a firm's decision to raise the cost of inputs.

Id. at 1037–38 (citations omitted). Moreover, the court stated that:

> In the long run, to carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials. If it succeeded in driving out competition, during this recoupment period the firm would likely pay less for its materials while charging consumers a higher price. The firm would have little incentive to pass on the benefit of lower input prices to consumers when it possessed greater market power and needed to recoup the higher costs it had paid for its materials. Thus, the overall effect of a predatory bidding scheme would result in harm to consumers.

Id. at 1038 (citation omitted).

158. *Id.*

159. *Weyerhaeuser*, 549 U.S. at 325.

160. *Id.* at 321–22. (citing John B. Kirkwood, *supra* note 137, at 653).

engaged in predatory bidding.[161] The Court reasoned that the high standard of liability was justified by the high cost of erroneous findings and the likelihood that "mistaken findings of liability would 'chill the very conduct the antitrust laws are designed to protect.'"[162] Moreover, the Court felt that predatory bidding (monopsony conduct) "presents less of a direct threat of consumer harm than predatory pricing" because it can be successful without raising prices for the final consumers.[163]

In response to the Supreme Court's decision in *Weyerhaeuser*, Natalie Rosenfelt, an attorney at the Department of Justice, suggested that the Court's decision to treat buyer- and seller-side conduct the same is not a new development and is reflected in prior enforcement actions and court decisions.[164] According to Rosenfelt, "[b]ecause courts and enforcers generally agree that protecting consumers is a major purpose of the antitrust laws, one might expect buyer conduct to be treated less strictly than seller conduct by the courts and agencies."[165] However, after reviewing a sample of decisions, Rosenfelt concluded that buy-side conduct is not treated more leniently.[166] Based on this finding, Rosenfelt states that the choice by courts and enforcers to condemn a significant number of instances of anticompetitive buyer-side conduct, which might not seem to directly threaten consumer welfare in the short run, may signify that they are considering "the interests of all market participants";[167] and/or recognizing that "in the long run, monopsony can ultimately be just as harmful to consumers as anticompetitive conduct occurring in the output market."[168] The decision to treat monopoly and monopsony the same way, therefore, "has implications on the debate about whether the antitrust laws should be applied using a 'consumer welfare' or 'total welfare' standard."[169]

161. "The first prong of *Brooke Group*'s test requires little adaptation for the predatory-bidding context. A plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs." *Weyerhaeuser*, 549 U.S. at 325.

162. *Id.* at 320 (quoting *Brooke Group*, 509 U.S. at 226) (internal quotation marks omitted).

163. *Id.* at 324.

164. Rosenfelt, *supra* note 130, at 403. Rosenfelt reached these conclusions by reviewing various antitrust decisions, particularly regarding buyer-side cartels, nonprice concessions, and mergers. *See id.* at 405–09 (reviewing decisions including FTC v. Consol. Foods Corp., 380 U.S. 592 (1965); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392 (1953); United States v. Griffith, 334 U.S. 100 (1948), *abrogated by* Copperweld Corp. v. Independence Tube Corp. 467 U.S. 472 (1984); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948); Am. Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000); Balmoral Cinema Inc. v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. 1989); Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir. 1983); Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); United States v. Syufy Enters., 712 F.Supp. 1386 (N.D. Cal. 1989)).

165. Rosenfelt, *supra* note, at 402.

166. *Id.* at 403.

167. *Id.* at 412.

168. *Id.*

169. *Id.* at 411–12.

2. Extending the Consumer-Choice Model to Monopsony

In addition to finding that the consumer-choice model should be used because antitrust law is supposed to protect final consumers from conduct that divests them of competition's benefits,[170] Robert Lande and John Kirkwood pointed out that antitrust law is intended to protect suppliers from abuse by buyers with market power.[171] This is because "the courts' focus on supplier interests in buy-side cases is simply the mirror image of their focus on consumer interests in sell-side cases."[172] Suppliers would similarly benefit from the consideration of nonprice aspects of competition that is encouraged by the consumer-choice approach. Relying on congressional intent, Lande and Kirkwood found that just as Congress sought to preclude sellers from acquiring monopoly power through unfair means (because they would then be able to raise prices and "transfer wealth from consumers to themselves"[173]), Congress also "wanted to prevent buyers from using unfair means to acquire monopsony power (because they could then lower input prices and transfer wealth from suppliers to themselves)."[174] Thus, concern for supplier welfare is supported by "the same legislative and normative roots as the concern with consumer welfare in sell-side cases."[175]

However, courts are wary of deterring conduct that lowers prices for consumers.[176] While some courts will find anticompetitive activity where there is harm to a supplier, but no harm to consumers,[177] others refuse to conclude that an agreement that extorted concessions from suppliers and passed them to buyers was illegal because, while it harmed the supplier, it benefited the consumer.[178] Recently, courts have begun to conclude that "anticompetitive practices by buyers cannot be justified by showing that the buyers passed on some of their gains to consumers."[179] Lande and Kirkwood suggest that if this trend continues, the welfare of consumers may be trumped in a limited number of cases by the welfare of suppliers, despite concerns about deterring conduct that lowers prices for consumers.[180]

C. Antitrust Issues in the Agricultural Market

Coinciding with the Chicago School's waning influence and the courts' increasing interest in monopsony conduct, consumers, growers, and antitrust enforcers are becoming increasingly aware of complex nonprice considerations in the agricultural industry. The Obama Administration has been very clear that it will aggressively

170. Kirkwood & Lande, *supra* note 51, at 191.

171. *Id.* at 233.

172. *Id.* at 234.

173. *Id.*

174. *Id.*

175. *Id.* at 235.

176. *Id.* (citing Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 930–31 (1st Cir. 1984)).

177. *Id.* at 234 (citing Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124 (10th Cir. 2002)).

178. *Id.* at 234 (citing Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 324–25 (2007)).

179. *Id.* at 235 (citing Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988–89 (9th Cir. 2000)).

180. Kirkwood & Lande, *supra* note 51, at 235–36.

enforce antitrust law.[181] In September 2009, the Assistant Attorney General of the DOJ's Antitrust Division, Christine Varney, testified before the Committee on the Judiciary in the U.S. Senate that "[c]ompetition issues affecting agriculture [are] a priority."[182] Three days later, Varney announced joint DOJ-FTC workshops to review the Horizontal Merger Guidelines, which are used by both agencies to determine whether a proposed merger will harm competition.[183] In so doing, Varney stated that there are many types of harmful effects that may result from a merger, "including higher prices, slower innovation, lower quality, and reduced product variety."[184] Subsequently, the DOJ and U.S. Department of Agriculture (USDA) announced a series of workshops "to explore competition issues affecting the agriculture industry in the 21st century and the appropriate role for antitrust and regulatory enforcement in that industry."[185] The DOJ-USDA workshops were announced less than a year after the DOJ, joined by thirteen states, filed a complaint seeking to block JBS S.A.'s ("JBS") acquisition of National Beef Packing Co. ("National").[186]

JBS, the world's largest meat packer and processor, purchased the third-largest U.S. beef processor, Swift & Co., in July 2007.[187] In early 2008, JBS made plans "to acquire the fourth- and fifth-largest U.S. beef packing companies, National and the Smithfield Beef Group, respectively."[188] The DOJ chose to challenge the acquisition of National (but not Smithfield[189]) on the grounds that the transaction would reduce competition in the production and sale of USDA-graded boxed beef.[190] The merger review focused on price and market concentration. The acquisition would have given JBS a total of thirty percent of the commercial cattle-slaughter market in the United

181. Stephen Labaton, *Administration Plans to Strengthen Antitrust Rules*, N.Y. TIMES, May 11, 2009, at A1.

182. *Crisis on the Farm: The State of Competition and Prospects for Sustainability in the Northeast Dairy Industry: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Hon. Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4055&wit_id=8200.

183. Press Release, DOJ, Dep't of Justice and Fed. Trade Comm'n to Hold Workshops Concerning Horizontal Merger Guidelines 1 (Sept. 22, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/250236.pdf.

184. Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the Georgetown Law Global Antitrust Enforcement Symposium 2 (Sept. 22, 2009), *available at* http://www.justice.gov/atr/public/speeches/250238.pdf.

185. Press Release, DOJ, Justice Dep't and USDA to Hold Pub. Workshops to Explore Competition Issues in the Agric. Indus. 1 (Aug. 5, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/248797.pdf.

186. JOHNSON, *supra* note 19, at 2.

187. *Id.* at 1.

188. *Id.*

189. The DOJ decided not to challenge the acquisition of Smithfield Beef Group ("Smithfield"), even though this gave JBS another six percent of the cattle slaughter market (up to nineteen percent) and made JBS the largest cattle feeder in the United States. *Id.* at 2.

190. Amended Complaint at 12–14, United States v. JBS S.A., No. 08-CV-5992 (N.D. Ill. Nov. 7, 2008) (alleging anticompetitive effect was unlikely to be eliminated or mitigated).

States.[191] Soon after the complaint was filed and after negotiations with the DOJ broke down, JBS walked away from the deal with National.[192]

Even without JBS acquiring National, however, the concentration in the beef industry has increased considerably. As a basis for comparison, the top 4 beef packers as of April 2007 had attained over 83 percent of the market (up from 72 percent in 1990), the top 4 pork packers had 66 percent of the market (up from 40 percent in 1990), the top 4 firms for broiler chickens controlled at least 58 percent of the market (up from 44 percent in 1990), and the top 4 firms in the turkey market controlled 55 percent of the market (up from 31 percent in 1988).[193] In addition to fewer packers, there are also fewer farmers. Hog farms decreased from 666,000 in 1980 to 71,000 in 2010; cattle farms decreased from 1.6 million farms in 1980 to 950,000 in 2010.[194] These changes have not gone unnoticed. A recent review notes that "[s]ince 1935, consolidation and industrialization have seen the number of U.S. farms decline from 6.8 million to fewer than 2 million."[195]

1. Monopsony and Agriculture

In October 2003, the Senate Judiciary Committee held a hearing on monopsony issues in agriculture.[196] Witnesses raised both general antitrust issues[197] and antitrust issues that pertain only to agriculture. Concerns specific to the agriculture industry included (1) the increasing concentration of firms;[198] (2) regional concentration;[199] (3)

191. JOHNSON, *supra* note 19, at 3.

192. *Id.* at 3.

193. MARY HENDRICKSON & WILLIAM HEFFERNAN, UNIV. OF MO., CONCENTRATION OF AGRICULTURAL MARKETS (2007), *available at* http://www.foodcircles.missouri.edu/07contable.pdf.

194. Press Release, USDA, USDA Announces Proposed Rule to Increase Fairness in the Marketing of Livestock and Poultry, at ¶ 4 (June 18, 2010).

195. Walsh, *supra* note 1, at 36.

196. *Monopsony Issues in Agriculture: Buying Power of Processors in Our Nation's Agricultural Markets: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 1 (2003).

197. First, some note that the increasing concentration in the agricultural industry raises concerns about the potential for firms to exercise market power. *Id.* at 6–7 (statement of Hon. Herb Kohl, Sen. from Wis.) ("Increased concentration on the buyer side has dramatically shrunk the market for farmers and driven many out of business."); *id.* at 59 (statement of Professor Peter C. Carstensen, Univ. of Wis. Law Sch.) ("The existence of concentrated markets creates the incentive and the capacity for such firms to engage in conduct aimed at exploiting those participants with limited options and to entrench existing market power against the threat of deconcentrating and effective competition."); *id.* at 156 (statement of R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., Dep't of Justice) ("High concentration in a market is not in and of itself a violation of the antitrust laws. On the other hand, a high level of concentration increases the need for antitrust scrutiny."). Second, others cautioned that monopsonistic exploitation of markets may arise where firms have a lower market share than previously deemed troublesome on the selling side of the market. *Id.* at 22–24 (statement of Dr. Ronald W. Cotterill, Univ. of Conn.) (describing lack of leverage milk farmers hold in Northeast region dominated by concentrated supermarket retailers). Third, some testified that exploitation of market power by a monopsonist creates an inefficient allocation of resources resulting in diminished economic welfare. *Id.* at 138–39 (statement of the Hon. Orrin Hatch, Sen. from Utah). Finally, it was observed that monopsonists may use their market power to force a seller to accept less favorable nonprice terms than would otherwise result in a competitive market. *Id.*

198. *Id.* at 45–46 (statement of Dr. DeeVon Bailey, Utah State Univ.); *id.* at 11–12 (statement of R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., Dep't of Justice).

evidence of possible antitrust violations, including manipulation of public and producer prices;[200] (4) issues arising from excessive buyer power;[201] and (5) structural mechanisms enabling some firms to have both buyer and seller power.[202]

Later, during the 2004 joint DOJ and FTC Workshops on Merger Enforcement, C. Robert Taylor argued that not only are strong monopoly and monopsony forces operating in the food system, but the associated market power may be used in many ways that are not yet understood.[203] The global food system is already very efficient, so the issues arising in the food industry relate primarily to "fairness and economic freedom for farmers and ranchers.[204] As Taylor noted, "farmers and ranchers world-wide are increasingly squeezed by monopoly, monopsony and economic power."[205] Power in the food system is the consequence of

> dominance in a market resulting in a non-competitive price or non-competitive contract terms, asymmetric information, price discrimination, barriers to entry and control of entry/exit, control of innovation, use of threats, agency capture, association capture, economic power to control or influence legislation aimed at restoring competition, and firms simultaneously being buyers and sellers in a market.[206]

This power is clear in the hog industry, where "producers received 50 [percent] of the retail value of a hog in 1980, but only 24.5 percent in 2009," and in the cattle industry, where "producers received 62 percent of the retail value of a steer in 1980, but only 42.5 percent in 2009."[207]

Taylor continued by reviewing the issues that are characteristic of the beef and poultry industries. Of particular note in the beef industry is the increasing vertical integration coupled with the reduced bargaining power of growers.[208] Packers use discriminatory pricing to control the entry and exit of producers into and out of the market. Packers are also able to manipulate the cash prices for cattle, resulting in sub-competitive prices.[209] In the poultry industry,[210] which quickly vertically integrated in

199. *Id.* at 22–24 (statement of Dr. Ronald W. Cotterill, Univ. of Conn.) (highlighting concentration of supermarket retailers in Northeast and its effect on dairy farmers).

200. *Id*. (finding retailer concentration in Northeast led to unfair milk pricing resulting in higher bottom-line net profits for retailer than farmer and lower wholesale prices in Northeast than in Midwest, the supply hub for milk).

201. *Id*. (stating antitrust enforcement was active, but failed to prevent the concentration of processors and retailers in the Northeast's milk industry).

202. *Id.* at 45–46 (statement of Dr. DeeVon Bailey, Utah State Univ.) (suggesting large concentrated packers, the processers of the meat packing industry, exercise buying power with feedlots and selling power with retailers).

203. C. Robert Taylor, Alfa Eminent Scholar of Agric., Auburn Univ., Statement at the DOJ/FTC Workshop on Merger Enforcement: The Many Faces of Power in the Food System (Feb. 17, 2004), *available at* http://www.justice.gov/atr/public/workshops/docs/202608.pdf.

204. *Id*.

205. *Id*.

206. *Id*.

207. Press Release, USDA, *supra* note 194.

208. Taylor, *supra* note 201.

209. *Id.*

210. In the poultry industry, processors (i.e., broiler divisions, integrators) contract with growers (i.e.,

the 1950s, "[i]ntegrators contract with growers to provide production facilities (houses) and labor for the day-to-day management and care of the birds."[211] Although the integrators own the birds and feed, and can therefore control the quality of chicks,[212] it is the chicken growers who take on the risk of purchasing chicken houses. These chicken houses, which have no alternative use absent expensive modifications, cost between $230,000 and $260,000.[213] Moreover, growers have little opportunity to sell their services to different integrators because of the regional structure of the market and the different specifications required by each integrator.[214]

2. Capper-Volstead Exemption and the Packers Stockyards Act

The expansive language of the Sherman Act put agricultural cooperatives in jeopardy.[215] Because many believed that agricultural cooperatives were necessary to ensure competitive returns for small farms, which might otherwise fall prey to local monopsonists, these cooperatives were given immunity by section 6 of the Clayton Act in 1914.[216] In 1922, the Capper-Volstead Act extended the exemption to capital stock agricultural cooperatives comprised of "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, [or] nut or fruit growers."[217] The exemption is strictly construed.[218]

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farmers). The processors own the birds and feed, and thus control the quality of chicks, quality of feed, and timing of deliveries of these crucial inputs. Growers must maintain chicken houses according to the processor's strict specifications (each processor has different requirements). Once the chicks have reached maturity, they are returned to the processor. Growers are paid for performance, but due to the processor's overwhelming control over the inputs of product (chicks and feed), the processor can actually determine how each grower will perform. *Id.* Consequently, "[g]rowers can be instantly bankrupt if the grower delivers a few batches of bad chicks, or chooses to not deliver any chicks. Thus, the [processor] largely controls production as well as pay for growers." This aspect of the market enhances the processor's bargaining power. *Id.*

211. *Id.*

212. *Id.*

213. Tomislav Vukina & Porametr Leegomonchai, *Oligopsony Power, Asset Specificity, and Hold-Up: Evidence from the Broiler Industry*, 88 AM. J. AGRIC. ECON. 589, 592 (2006).

214. *Id.*

215. Edward V. Jesse et al., *Interpreting and Enforcing Section 2 of the Capper-Volstead Act* 2 (Food Sys. Research Grp., Working Paper No. 51, 1981), *available at* http://www.aae.wisc.edu/fsrg/publications/Archived/wp-51.pdf.

216. *Id.* at 2, 5. Senator Capper believed farmers, acting together in cooperatives, would have access to a much broader market, and thus not be forced to sell to local monopsonists. *Id.* at 5. Section 6 of the Clayton Act in 1914 states

> [n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Clayton Antitrust Act of 1914, Pub. L. 63-212, § 6, 38 Stat. 730, 781 (codified at 15 U.S.C. § 17 (2006)).

217. Capper-Volstead Act, Pub. L. 67-146, § 1, 42 Stat 388 (1922) (codified at 7 U.S.C. § 291).

218. USDA, OFFICE OF THE CHIEF ECONOMIST, COMMENT TO THE ANTITRUST MODERNIZATION COMM'N'S REQUEST FOR PUB. COMMENT 5 (2005).

In *Maryland & Virginia Milk Producers Ass'n v. United States*,[219] the Supreme Court summarized the legislative intent of the Capper-Volstead Act:

> We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said: "Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it." This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws.[220]

While this is not generally thought to convey all the rights of a corporation to agricultural cooperatives,[221] it does, in addition to granting an exemption, provide evidence of Congress's intent to protect farmers from monopsonistic power of large purchasers.[222]

The Packers and Stockyards Act (PSA),[223] passed in 1921, was another attempt by Congress to address issues in livestock that are not otherwise properly addressed under antitrust law.[224] The PSA bans packers from using unfair practices, including conduct aimed at manipulating prices or otherwise restraining trade.[225] Claims under PSA are brought before a USDA administrative law judge by the Grain Inspection, Packers and Stockyards Administration (GIPSA).[226] Recent reviews have concluded, however, that GIPSA's program is not very effective and is unable to address the more complicated anticompetitive conduct alleged in recent years.[227] GIPSA has neglected its significant role in informing Congress about the activities in the livestock markets,[228] leaving Congress and others with little information on what is happening.

GIPSA recently announced, however, that it would consider comments on a proposed rule that would (1) limit the ability of processors to require expensive capital upgrades, (2) establish a base pay amount for growers, (3) require the same pay for growers raising the same type and kind of poultry, and (4) require that processors give

219. 362 U.S. 458 (1960).

220. *Md. & Va. Milk Producers*, 362 U.S. at 466 (footnote omitted).

221. Jesse et al., *supra* note 215, at 3.

222. *See id.* at 4 (summarizing the legislative discussion regarding enactment of Capper-Volstead and the sentiments expressed regarding "depressed state of farmers, the 'unconscionable profits' of 'unnecessary middlemen', [sic] and the resulting unnecessarily high prices to consumers").

223. Packers and Stockyards Act, Pub. L. 67-51, 42 Stat 159 (1921) (codified as amended at 7 U.S.C. §§ 181–231 (2006)).

224. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-532T, PACKERS AND STOCKYARDS PROGRAMS: CONTINUING PROBLEMS WITH GIPSA INVESTIGATIONS OF COMPETITIVE PRACTICES 3–4 (2006).

225. *Id.* at 3.

226. *Id.* at 3–4.

227. *Id.* at 4.

228. *Id.* at 1–2.

growers at least ninety days' notice prior to suspending delivery of birds.[229] Intended to protect growers by defining unfair practices and unreasonable preferences, GIPSA proposed the rule in response to the "increasing consolidation and vertical integration in the livestock and poultry marketplace, and shrinking farm numbers."[230]

3. Eroding Consumer Choice Through Subsidies

Consumers are becoming increasingly critical of federal subsidies to agribusiness, which force consumers to pay certain costs regardless of whether they purchase the subsidized goods. A prime example that costs taxpayers billions of dollars every year are subsidies to privately owned "confined animal feeding operations" (CAFOs).[231] CAFOs benefit from subsidized grain,[232] pollution prevention subsidies,[233] and projects to clean up production-related pollution.[234] "[C]onservative estimates of grain subsidies and manure distribution alone suggest that CAFOs would have incurred at least $5 billion in extra production costs per year if these expenses were not shifted onto the public."[235] Taxpayers are paying more to cover the externalities caused by CAFOs, costs related to decreased effectiveness of antibiotics due to overuse in livestock production,[236] and increased healthcare costs both because thousands of people are infected with diseases carried by livestock each year[237] and even more get sick from eating tainted food.[238] Moreover, rural communities suffer as a result of decreased property values.[239]

Other externalities of the current agricultural-subsidy system include the health effects produced by the subsidized food products. As noted by one observer, the food system's ability to "generate[] cheap, filling food [comes] at the literal expense of healthier produce" and is a contributing factor to America's obesity epidemic, which costs over $147 billion in medical expenses per year.[240]

Although the current system does not give consumers a practical choice as to whether to subsidize these practices, voters are beginning to take a stand by purchasing organically and sustainably produced food. Despite the global recession, the organic

229. *Id.*

230. Press Release, USDA, *supra* note 194.

231. DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOS UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS 1–3 (2008), *available at* http://www.ucsusa.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf.

232. *Id.* (noting that CAFOs receive four billion dollars per year in grain subsidies).

233. *Id.*

234. *Id.* at 4 (costing, for example, $4.1 billion nation-wide to clean up contaminated soil caused by dairy and hog CAFOs).

235. *Id.* at 5.

236. *Id.* at 5, 6 tbl.ES-1 (estimating public health costs of $1.5–3.0 billion per year from overuse of antibiotics).

237. *Id.* at 5.

238. Walsh, *supra* note 1, at 32. In 2009 alone, peanuts tainted with salmonella "killed at least eight people and sickened 600." *Id.*

239. GURIAN-SHERMAN, *supra* note 231, at 5.

240. Walsh, *supra* note 1, at 32.

food industry is worth more than $46 billion and growing quickly.[241] "While the conventional food industry still dwarfs the organic sector with $550 billion in yearly sales, it is producing an unappetizing 2 to 3 percent annual growth rate, while the organic industry has savored several years of 17 to 20 percent growth."[242]

III. DISCUSSION

Antitrust law is better equipped to protect competition when the consumer-choice approach is used because doing so provides the benefits of competition to consumers. This goal is not met when courts treat monopoly and monopsony power the same. The consumer-choice approach is particularly important for agriculture, where there are more nonprice considerations and monopsony power is particularly prevalent. Recent developments in the law and increased efforts by the Obama Administration support the change from the efficiency model of review to consumer-choice.

A. *Why Is the Consumer-Choice Model More Important for Agriculture?*

1. Nonprice Competition, Government Intervention, and Consumer Interest

Agriculture is an industry that should be analyzed under the consumer-choice model because Americans select food products based on nonprice considerations. According to polling data, Americans rank taste and quality, in addition to price, as "the top considerations when choosing food products."[243] Other nonprice factors that influence consumer choice include varieties of available foods, demographics, lifestyle, federal agricultural policies, food palatability, education,[244] and concerns regarding food safety.[245] However, as more of the costs of production are treated as externalities and subsidized by the government,[246] consumers lose choices that they may not even know they had. Consumers must pay these costs regardless of whether they purchase these subsidized goods and, consequently, may be unable to purchase the goods they would otherwise have chosen.

Surveys conducted by the Hartman Group in 2000 indicated that consumers purchase organic food because of "health and nutrition . . . , taste . . . , environment . . . , and availability."[247] Another survey, by Fresh Trends in 2001, "revealed that 12 percent of the shoppers surveyed reported that whether a product is organic is a primary

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241. *Id.* at 35–36.

242. Nanette Hansen, *Organic Food Sales See Healthy Growth*, MSNBC.COM (Dec. 3, 2004, 10:46 AM), http://www.msnbc.msn.com/id/6638417/.

243. JEFF SIMMONS, ELANCO, FOOD ECONOMICS AND CONSUMER CHOICE 5, *http://www.elanco.com/images/Food-Economics-and-Consumer-Choice-White-Paper.pdf* (last visited Sep. 23, 2010).

244. NAT'L ACAD. OF SCIS., EXPLORING A VISION: INTEGRATING KNOWLEDGE FOR FOOD AND HEALTH 15 (2004), *available at* http://www.nap.edu/catalog.php?record_id=10936.

245. SIMMONS, *supra* note 243, at 4–5.

246. See *supra* Part II.C.3.

247. CAROLYN DIMITRI & CATHERINE GREENE, USDA, RECENT GROWTH PATTERNS IN THE U.S. ORGANIC FOODS MARKET 6 (2002), *available at* http://www.ers.usda.gov/publications/aib777/aib777.pdf.

factor in their purchasing decision."[248] Employing the consumer-choice model for review of anticompetitive conduct in agriculture would be a step in the right direction by preventing harm to competition in the form of reduced options that consumers clearly want.

2. Monopsony Power Issues Are Magnified in the Agricultural Industry

The passage of the Packers and Stockyards Act[249] and Capper-Volstead Act[250] demonstrated heightened concern for antitrust issues in agriculture. The Capper-Volstead Act is especially important because it provides an antitrust exemption for farmers acting as a cooperative to receive a higher price for their goods and a clear signal that Congress is interested in the distributive effects of monopsony power in agriculture.

There are several general reasons that agriculture is particularly susceptible to monopsony power. First, because agricultural commodities are perishable, growers have a stronger incentive to sell quickly, which improves the buyer's bargaining power.[251] Perishability has also fostered regional concentration because goods cannot be transported long distances.[252] Second, agricultural production is capital intensive. This creates a barrier to entry by new firms and puts some parties in a weaker bargaining position due to their high level of indebtedness.[253] Third, production is already highly concentrated.[254]

The problem of monopsonistic power in agriculture is evident in the poultry industry. In the poultry industry, processors (i.e., broiler divisions and integrators) contract with growers (i.e., farmers) to provide live birds. While poultry-processing companies make an average of $3.24 per bird, a grower makes only 34 cents.[255] Because the contracts cover only one flock at a time, they are up for renewal several times per year.[256] The growers are responsible for raising the chicks in facilities that meet the processor's strict specifications, and each processor has different requirements.[257] An average grower has three to four chicken houses,[258] which cost $230,000 to $260,000 to build[259] and hold 23,000 to 27,000 birds.[260] As a result of the mortgages used to purchase these facilities, over seventy percent of growers report

248. *Id.*

249. See *supra* notes 223–26 and accompanying text for an overview of the Packers and Stockyards Act.

250. See *supra* notes 217–22 and accompanying text for an overview of the Capper-Volstead Act.

251. Blair & Harrison, *supra* note 131, at 313–14.

252. Where a good cannot be easily transported without losing significant value, farmers must be located within a certain radius of the buyer to be profitable. Consequently, farmers are also less likely to look outside their geographic location for an alternative buyer.

253. GURIAN-SHERMAN, *supra* note 231, at 2.

254. See *supra* notes 193–95 and accompanying text for data on the increasing concentration in the beef, pork, and poultry industries.

255. Press Release, USDA, *supra* note 194.

256. Vukina & Leegomonchai, *supra* note 213, at 589, 596.

257. *Id.* at 589, 593 n.6.

258. *Id.* at 595.

259. *Id.* at 592.

260. *Id.*

having more than $50,000 in debt, while fifteen percent of growers report having over $500,000 in debt.[261] This situation persists despite the fact that three out of four farmers hold a job off their farm.[262] Making the situation more desperate, off-farm job options are typically limited because the average grower is fifty-one years old with only a high school education.[263]

Moreover, chicken houses have no other use without extensive retrofitting.[264] The houses may not even satisfy other chicken processors' requirements.[265] Because live birds cannot be transported long distances, growers must be within miles of the processor. Thus, "processors may have monopsony-oligopsony power in a given geographical area," since "growers may have limited opportunity to contract with other processors."[266] Further, because there are fewer and fewer processors to contract with, the problem is getting worse.[267]

These characteristics of the poultry market—including perishable goods, short-term contracts, large capital expenditures, function-specific assets, high levels of indebtedness, and the concentration of processors—have given processors bargaining power that they exploit by contracting on "a take-it-or-leave-it basis."[268] For example, processors are able to demand that growers accept inadequate pay or upgrade their facilities without just compensation.[269] Forty percent of growers report that they did not see their contracted pay increase between 2000 and 2003[270] and that they make less than the processor advertised before they entered the market. The reasons given for lower-than-expected profits were "operating costs that had risen faster than expected, followed by the poor quality of chicks received from the integrator, the company's frequent requests for expensive improvements and upgrades, and higher than expected chick mortality."[271] The majority of these problems are completely within the control of the processors.

While federal programs, such as the Grain Inspection, Packers and Stockyards Administration (GIPSA) program, were specifically established to prevent anticompetitive conduct in the agricultural industry, they have thus far proved ineffective at doing so.[272] Although GIPSA recently proposed a new rule that is intended to protect growers from powerful processors, it is unclear what the impact of that change will be or when it will take effect.[273] While the rule seems to provide

261. *Id.* at 595. "For nearly 47% of growers, more than three quarters of the total farm debt is tied to broiler operations." *Id*.

262. *Id.*

263. *Id.*

264. *Id*. at 592.

265. *Id.* at 589, 593 n.6.

266. *Id.* at 589.

267. *Id.* at 596.

268. *Id.* at 592.

269. *Id.* at 593.

270. *Id.* at 596.

271. *Id.*

272. See *supra* note 227–28 and accompanying text for discussion on the limited effectiveness of GIPSA.

273. Press Release, USDA *supra* note 194, at ¶ 4.

important protections going forward, it cannot compensate for the damage already inflicted on the industry by unfair practices.

3. Agriculture Is Similar to Industries Previously Identified as Likely to Benefit from the Consumer-Choice Model

Agriculture fits into at least one category of industry that Lande and Averitt have identified as likely to benefit from the consumer-choice paradigm.[274] In their second category (where consumers choose products that are not best suited for their needs), the choice model would be beneficial because it is able to account for increased search costs and unquantifiable harm to consumer decision-making abilities.[275] Lande and Averitt explained that "[i]n many of these cases the firms inhibited comparison shopping by making it harder for customers to obtain competing bids."[276] As such, "[a] complete rule-of-reason analysis in such cases needs to take account of all the harms that flow from this conduct, including the adverse effects on choice and suitability."[277] In the case of agriculture, consumers routinely purchase products that are arguably not in their best interest because they are unaware of the consequences of conventional farming and the hidden costs covered by taxpayers. Even those customers who are aware, may not be able to afford competing products because they have already been forced to subsidize the conventionally produced goods. Employing the rule-of-reason and choice approaches in combination would allow judicial consideration of these issues.

Agriculture may also fall within the third category of industry that Lande and Averitt identified as likely to benefit from the consumer-choice model. In the third category, the choice model is preferable because more firms are necessary to "ensure a sufficient range of consumer choice" than might be necessary to ensure price competition, and/or consumers have indicated that their decisions are less focused on price and more on other nonprice attributes of products.[278] While Lande and Averitt focused their analysis on markets where "creativity or innovation"[279] are particularly important, they also explained that even in markets where firms "are motivated to supply a full range of consumer options, and they compete in the most perfect good faith, they may simply be unable to do so."[280] This is because, although "[s]ome failures are due to imperfect information on the part of suppliers," "other market failures are due to imperfect information on the part of *customers*."[281] In other words, customers "may not recognize that their options have been distorted and, therefore, may not demand corrections," or "may not easily recognize situations where

274. See *supra* notes 121–25 and accompanying text for a discussion of the categories to which Lande and Averitt recommend applying the consumer-choice paradigm.

275. Averitt & Lande, *supra* note 23, at 199.

276. *Id.* at 200.

277. *Id.* at 201.

278. *Id.* at 201–02.

279. *Id*. at 201.

280. *Id.* at 203.

281. *Id.* at 204 (emphasis added).

innovations could have been made but were not."[282] Thus, although agriculture is markedly different from the examples provided by the authors,[283] it is similar in that customers may not be aware of the consequences of the lack of competition. Accordingly, more firms are necessary to enable competition in nonprice attributes than in price.

B. *Why Switch to the Consumer-Choice Standard Now?*

At first glance, the idea of switching to the consumer-choice model for antitrust issues in the agricultural industry may appear politically infeasible. Indeed, if the largess of federal subsidies provides any indication,[284] corporate agribusiness has significant political influence in Washington.[285] However, the Obama Administration has demonstrated a clear interest in vigorously enforcing antitrust law, specifically in the agricultural industry.[286] Moreover, as discussed below, the Administration has recently revised the methods for reviewing mergers in a way that enables greater consideration of the nonprice aspects of competition. Thus, while the switch to the consumer-choice standard might seem politically difficult, it may have become more feasible in light of the Obama Administration's efforts. Finally, such a switch arguably gains further support from the current judicial trend towards rule-of-reason review, under which courts can consider the types of harm that the consumer-choice model was designed to prevent.[287]

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282. *Id.*

283. Lande and Averitt specifically addressed communications media, hospitals, and certain types of innovative high-technology businesses. *Id.* at 206. With respect to "high technology" industries, the authors stated that the consumer-choice model should only be applied if the following conditions were met: "(1) the industry must have a history of continuous innovation; (2) the innovation must be cutting-edge; and (3) any successful innovation must have strong positive externalities for the public as a whole, in the sense of providing indirect benefits for those who were neither sellers nor users of the product." *Id. at 216.* The first condition is important because "it provides an empirical basis for believing that innovation will be the main method of competing in the future." *Id.* The second stems from the fact that in cutting-edge innovations, "no one knows even approximately what the successful research avenues will be." *Id.* Thus, "it seems particularly useful to preserve a variety of institutionally independent approaches in that circumstance to ensure that avenues are not prematurely closed off." *Id.* Finally, the third limiting principle is important because, "the general public has a major stake in successful innovation, beyond just the participants' economic stakes, and there is a strong reason to avoid unnecessary delays in achieving it." *Id.*

284. See *supra* Part II.C.3 for a discussion of federal agricultural subsidies. *See also* Brian Riedl, *Still at the Federal Trough: Farm Subsidies for the Rich and Famous Shattered Records in 2001*, HERITAGE FOUND. (April 30, 2002), *available at* http://www.heritage.org/research/reports/2002/04/farm-subsidies-for-the-rich-amp-famous-shattered-records-in-2001 (reporting that agricultural subsidies "tax working Americans to award millions to millionaires and provide profitable corporate farms with money that has been used to buy out family farms").

285. TRAVIS MADSEN ET AL., GROWING INFLUENCE: THE POLITICAL POWER OF AGRICULTURE AND THE FOULING OF AMERICA'S WATERWAYS 4 ENV'T AM. RES. & POL'Y CTR. (2011), *available at* http://www.environmentamerica.org/uploads/d1/18/d1181bda99f350bbc6ed8991ba8ec60c/Growing-Influence---low-res.pdf ("The agribusiness lobby is well known as one of the most powerful in Washington, D.C., and many states.").

286. See *supra* notes 181–85, 229–30, and accompanying text for a discussion of the Obama Administration's interest in reinvigorating antitrust enforcement, including specifically in the agricultural industry.

287. See *infra* Part III.B.2.

1. Effect of the Consumer-Choice Model on Horizontal Merger Review

On September 22, 2009, the DOJ and FTC announced that they were considering updating the Horizontal Merger Guidelines[288] because antitrust enforcement has evolved significantly since the Guidelines were written eighteen years ago.[289] Public workshops were held to determine whether the Guidelines "accurately reflect the current practice of merger review" and whether they "take into account legal and economic developments."[290] Among the topics discussed at the workshops were "the relevance of large buyers" and "the non-price effects of mergers, especially the effects of mergers on innovation."[291]

On August 19, 2010, after soliciting public comment, the FTC and DOJ issued a revision to the Guidelines ("Revised Guidelines") to "better reflect the agencies' actual practices" and to "provide more clarity and transparency."[292] Overall, the changes reflect a trend away from a rigid market-analysis-based approach toward a more fluid approach that should allow for a more robust merger review by enabling the Agencies to engage in "a fact-specific process" instead of being limited to "uniform application of a single methodology."[293]

Although they did not go as far as some recommended, the Revised Guidelines will allow for a more consumer-choice-oriented review.[294] Some of the relevant changes include: (1) expanding the definition of "market power" to include not just the ability to charge high prices, but the ability to "reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives";[295] (2) acknowledging that "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation";[296] (3) relying less heavily on market definition[297] and incorporating additional considerations, such as "the costs and difficulty of transporting the product," into the process of defining the geographic market;[298] (4) stating explicitly that "[t]he

288. Press Release, DOJ, *supra* note 183.

289. *See* Press Release, FTC, Fed. Trade Commission Seeks Views on Proposed Update of the Horizontal Merger Guidelines (Apr. 20, 2010), *available at* http://www.ftc.gov/opa/2010/04/hmg.shtm (noting that since approach to evaluating competitive impact of mergers and their compliance with U.S. antitrust law has "evolved significantly, . . . the Guidelines should reflect that").

290. Press Release, DOJ, *supra* note 183.

291. *Id.* at 2.

292. Press Release, DOJ, Dep't of Justice and Fed. Trade Comm'n Issue Revised Horizontal Merger Guidelines 1 (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/261642.pdf (quoting Christine Varney, Assistant Att'y Gen.).

293. HORIZONTAL MERGER GUIDELINES FOR PUBLIC COMMENT, *supra* note 140, at 23.

294. Averitt & Lande, *supra* note 23, at 237.

295. HORIZONTAL MERGER GUIDELINES FOR PUBLIC COMMENT, *supra* note 140, at 2. Previously, market power was simply defined as from "the ability profitably to maintain prices above competitive levels for a significant period of time." HORIZONTAL MERGER GUIDELINES, *supra* note 113, at 2.

296. HORIZONTAL MERGER GUIDELINES FOR PUBLIC COMMENT, *supra* note 140, at 2

297. *See id.* at 7 (stating market definition is merely "one of the tools the Agencies use to assess whether a merger is likely to lessen competition").

298. *Id.* at 14.

Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger";[299] (5) adding a section on powerful buyers;[300] and (6) adding a section explaining that the Agencies will use an analogous framework to analyze mergers that may result in enhanced monopsony power.[301]

Finally, the Revised Guidelines improve upon the meager reference in the current guidelines to "other dimensions of competition"[302] by stating that the DOJ and FTC will look beyond price effects.[303] Although it may have been more helpful to follow in the path of the 2006 Commentary by providing more concrete examples of the nonprice aspects of competition that may be considered, the change does allow for a more consumer-choice-oriented review.[304]

Unfortunately, the Revised Guidelines continue to use a framework for analyzing mergers that may fail to prevent the enhancement of monopsony power. The Revised Guidelines state:

> Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services. . . . [W]hen that is not the case, the Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.[305]

Others, however, contest this assertion by noting that "buyer-power can arise from a much lower market share than is required in seller-power (monopoly) cases."[306] The Agencies' choice, therefore, to use essentially the same framework to review buyer and seller power may inhibit their ability to detect anticompetitive buyer power in certain industries, such as agriculture, and could result in failures to challenge mergers that may produce significant anticompetitive effects.

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299. *Id*. at 23.

300. *Id.* at 26–27.

301. *Id.* at 32.

302. COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES*, supra* note 113, at 18.

303. *See* HORIZONTAL MERGER GUIDELINES FOR PUBLIC COMMENT, *supra* note 140, at 2 (providing more examples of nonprice effects that Agencies will take into account as compared to current Guidelines, and specifying them in greater detail).

304. Regrettably, the Revised Guidelines move in the opposite direction with regards to the HHI thresholds by raising the numbers that will trigger review or challenge of a merger. *Id*. at 19. The result could be that mergers in a concentrated market may not be properly reviewed or challenged. The Revised Guidelines do indicate, however, that the Agencies will rely less heavily on HHI review, using HHI as only one of the many indicators of the likely competitive effects of a merger, and the thresholds will not serve as cut-offs for review. *Id.* The HHI numbers seem to be only a rebuttable presumption under the more fluid Revised Guidelines. Thus, the new rule is more accurately stated as "[t]he higher the post-merger HHI and the increase in the HHI, the greater is the likelihood that the Agencies will request additional information to conduct their analysis." *Id.* Although it would have better suited many industries, including agriculture, if the final version of the Revised Guidelines did not raise the HHI thresholds, because the Revised Guidelines reflect that the Agencies are relying less on HHI, the change may not have a great impact on merger review.

305. *Id.* at 32.

306. Roger A. McEowen, *The Problem of Buyer-Power (Monopsony) in Agricultural Markets*, AGRIC. LAW UPDATE, Aug. 2004, at 4.

The Guidelines should thus be revised to further facilitate a consumer-choice-oriented review. In so doing, the DOJ and FTC should (1) include additional language about the nonprice aspects of competition that may be considered; (2) lower or maintain the HHI thresholds; and (3) assess buyer and seller power under different analytical frameworks. Such changes would enable challenges to mergers that might not seem dangerous due solely to price effects or the conventional understanding of buyer market power, but which would harm competition by reducing consumer choice or facilitating an increase in buyer market power to a level more harmful to competition than if exerted by a seller. These changes are particularly relevant to the agricultural industry due to the significant number of nonprice considerations that are important to consumers and sellers and the numerous instances of monopsony power. For example, in the JBS case,[307] where the DOJ relied heavily on the HHI analysis in choosing only to block the acquisition of National Beef Packing Company and not Smithfield Beef Group, a better understanding of the resulting increase in buyer market power and nonprice considerations may have led to a different result.

2. Trend Away from Per Se Violations

The strong trend in antitrust law away from per se violations to rule-of-reason review provides further support for switching to a consumer-choice model.[308] When conduct is not per se illegal, but reviewed under the rule-of-reason approach, a court can consider the nature of the alleged conduct[309] and the subsequent harm to competition.[310] In *United States v. Microsoft Corp.*,[311] for example, the court upheld Microsoft's bundling, or tying, of its Windows operating system with its Internet Explorer Web browser under a rule-of-reason analysis because the bundling provided the consumer with *more* choice, greater efficiency, and other benefits that were not otherwise available.[312] Thus, the rule-of-reason approach allows courts to evaluate the effect of the allegedly anticompetitive conduct on consumer choice in a way that would be precluded if such conduct were always per se unlawful.

By fostering additional review where harm is less obvious, the rule-of-reason approach is better suited to consider the types of harm that the consumer-choice model is designed to recognize. Specifically with respect to agriculture, this analysis enables the court to take a deeper look at conduct that may not seem plainly anticompetitive without specialized knowledge of the industry, and to thereby prevent a further reduction in the choices available to consumers, particularly with respect to nonprice aspects of competition.

307. See *supra* notes 186–92 and accompanying text for a discussion of JBS' attempted acquisition of National and Smithfield.

308. See *supra* Part II.A.1 for an analysis of the per se versus rule-of-reason approaches.

309. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 690 (1977) ("Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance"). The focus of the antitrust inquiry, either under the per se or rule-of-reason approach, is always on the "competitive significance of the restraint." *Id.* at 692.

310. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 104 (1984).

311. 253 F.3d 34 (D.C. Cir. 2001).

312. *Microsoft*, 253 F.3d at 85–95.

C. Brooke Group *Should Not Be Applied to Predatory Bidding*

Even if the consumer-choice paradigm is not adopted in full, it is important that the dangers of monopsony power in the agricultural industry are effectively addressed. Unfortunately, the Supreme Court's recent decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[313] increases the risk that courts, in failing to properly assess the differences between buyer and seller power and the importance of nonprice competition, will exculpate conduct that further damages the market structure in the agricultural industry.

In *Weyerhaeuser*, the Supreme Court erred by applying the *Brooke Group* test for predatory pricing (monopolistic conduct) to predatory bidding (monopsonistic conduct).[314] The Court's holding is based on the premise that the benefits to consumers that may accrue from predatory pricing will similarly accrue from predatory bidding.[315] There are several reasons, however, why this is not so.

First, in the short-run, the predatory bidder will pay more for its materials to squeeze out rivals who are unable to remain profitable with higher input costs.[316] At this stage, consumers will not benefit because the predatory bidder will likely keep prices steady or increase them.[317] Even if the predatory bidder reduces prices during the predation period, this would actually increase the threat to competition because it would make the resulting price squeeze even tighter.[318] "Thus, even though a short-term benefit to consumers *might* occur in some predatory bidding situations, serious concerns about the threat to competition would concurrently arise in those situations."[319] As a result, the Supreme Court's justification for using a high-liability standard for predatory pricing—i.e., that a lower standard will deter low pricing that benefits consumers—is not necessarily indicated for predatory bidding.[320]

Second, in the long-run, the predatory bidder will still have to recoup the increased costs paid for input materials. As the Ninth Circuit explained, if the predatory bidder is successful in driving its rivals from the market, it will "likely pay less for its materials while charging consumers a higher price" during the recoupment period.[321] As a result, the predatory bidder "would have little incentive to pass on the benefit of lower input prices to consumers" when it obtains greater market power and seeks to recoup the elevated costs it paid along the way.[322] In sum, the effect of predatory

313. 549 U.S. 312 (2007).

314. *See Weyerhaeuser*, 549 U.S. at 315, 318–19 (citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993)).

315. *Id*. at 321 (noting that "[p]redatory-pricing and predatory-bidding claims are analytically similar," without addressing difference between the two).

316. Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co., 411 F.3d 1030, 1037 (9th Cir. 2005), *vacated*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

317. *Id.* at 1037–38.

318. *Id*. at 1038.

319. *Id*. (emphasis added).

320. *Id.*

321. *Id.*

322. *Id.*

bidding is harm to consumers.[323] Although the Ninth Circuit recognized that raising input prices *could* incentivize entry into the supply side of the market, which *could* benefit consumers in the long-run, it said this possibility would be case-specific and was not present under the facts of the case before it.[324]

By ignoring the aforementioned differences, and by focusing only on the similarities between predatory-pricing and predatory-bidding claims, the Supreme Court over-emphasized concerns that a lower standard of liability for predatory-bidding schemes will deter beneficial competitive conduct.[325] As noted, the Court failed to consider the likelihood that consumers are less likely to benefit from lower prices in a predatory-bidding than predatory-pricing scheme, and are unlikely to benefit from an increase in short-term choices either. Moreover, when the predation period in a predatory-bidding scheme comes to an end, consumers will almost certainly suffer a reduction in long-term choices. Accordingly, "the metrics by which likely effects should be measured and the more specific typology of likely effects necessarily must reflect the difference between the economic context of buying and selling."[326] This is particularly true in the agricultural industry, where Congress has expressed a clear concern about the dangers of monopsony power[327] and empirical evidence indicates that monopsony power is currently being exerted in a manner likely to increase prices and lead to fewer choices in the future.[328]

D. Brooke Group *Test Should Be Modified*

So long as the *Brooke Group* test continues to be applied to cases of predatory pricing (monopolistic conduct), it should be revised to ensure that consumers are protected from reduced nonprice competition.[329] One way of revising the test would be to define the measurement of a rival's costs—which the Supreme Court has yet to do—to include the costs of externalities that result in reduced consumer choice. An alternative revision would be to apply the test in a manner whereby above-cost pricing could also be found unlawful.

1. Externalities as Part of Measurement of a Rival's Costs

If we focus on the purpose of the *Brooke Group* test—to prevent harm to competition—then, under the consumer-choice approach, the measurement of a seller's costs must actually include all costs that result in a reduction of consumer choice.

323. *Id.*

324. *Id.*

325. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319 (2007).

326. Carstensen, *supra* note 137, at 3.

327. See *supra* Part II.C.2 for a discussion of how the Capper-Volstead Act and the Packers Stockyard Act evince congressional intent to protect sellers from the abuses of excess buyer power in the agricultural industry.

328. See *supra* Part III.A.2 for a discussion of monopsony issues in agriculture.

329. The changes proposed herein to the *Brook Group* test would similarly pertain when the test is applied to predatory-bidding claims.

Phillip Areeda and Donald F. Turner have famously argued that marginal cost[330] is the only cost that matters because this is the cost used by producers to decide whether to produce an additional unit of a good.[331] The production of each additional good at below-cost pricing, therefore, represents an irrational decision by the profit-maximizing producer.[332] Since the Supreme Court has refused to define the measurement that should be used to accurately calculate a rival's costs in predatory-pricing cases,[333] this section will suggest one possible approach.

Where a huge sector of an industry has externalized a significant percentage of its costs, those costs should be incorporated into the measurement of "below-cost" pricing. As one reporter noted, "[o]nce you factor in crop subsidies, ecological damage and what we pay in health-care bills after our fatty, sugary diet makes us sick, conventionally produced food looks a lot pricier."[334] In fact, once the externalities are added to the price charged for conventionally farmed goods, "the two grocery bills don't look so different."[335] Thus, sustainable farmers are at a severe competitive disadvantage when their customers are forced to both subsidize the costs of conventional farming *and* pay the full cost of the production that is typically incorporated into the cost of sustainably produced goods.[336] Considering the externalities as part of the seller's costs is justified on the grounds that the true purpose of the test is to protect competition, and competition is not protected where consumers have fewer choices than would be available in a marketplace where externalities are actually factored into the cost of the final product.

2. Above-Cost Predatory Pricing

Another way to incorporate the emphasis on consumer choice into antitrust analysis is to revise *Brooke Group* so that above-cost pricing would also be found

330. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 700 (1975) (defining marginal cost as "the increment to total cost that results from producing an additional increment of output").

331. *Id.* at 700–03.

332. *Id.* at 702–03.

333. United States v. AMR Corp., 335 F.3d 1109, 1116 (10th Cir. 2003).

334. Walsh, *supra* note 1, at 37. As the article further notes:

> [C]heap food is not free food, and corn comes with hidden costs. The crop is heavily fertilized—both with chemicals like nitrogen and with subsidies from Washington. Over the past decade, the Federal Government has poured more than $50 billion into the corn industry, keeping prices for the crop . . . artificially low.

Id. at 33. Moreover, conventional production is causing other production options to become more expensive:

> When run-off from the fields of the Midwest reaches the Gulf of Mexico, it contributes to what's known as a dead zone, a seasonal, approximately 6,000-sq.-mi. area that has almost no oxygen and therefore almost no sea life. Because of the dead zone, the $2.8 billion Gulf of Mexico fishing industry loses 212,000 metric tons of seafood a year, and around the world, there are nearly 400 similar dead zones. Even as we produce more high-fat, high-calorie foods, we destroy one of our leanest and healthiest sources of protein.

Id. at 34.

335. *Id.* at 33.

336. See *supra* Part II.C.3 for a discussion of the externalities of conventional farming that are paid by taxpayers in the form of subsidies.

unlawful. In determining that one prong of the plaintiff's burden is to prove that the seller's price is below cost, *Brooke Group* "created a safe harbor for above-cost pricing."[337] Again, the justification was that condemning above-cost pricing might chill competitive conduct that lowers prices for consumers.[338] However, some theorists have argued that *Brooke Group* should be revisited because "above-cost pricing can also hurt consumers by limiting competition."[339] For example, "[a]n incumbent monopoly with a significant cost or noncost advantage over entrants . . . can use these advantages to drive entrants from the market by pricing below their cost, but above its own."[340] If new entrants are excluded from the market, then consumers may never enjoy the lower prices, increased innovation, and new choices that might otherwise be made available. While it is necessary to distinguish between pro-competitive and anticompetitive low pricing, the answer is not to rely on the strict *Brooke Group* test. Indeed, economic theory has evolved to the point that it "can reliably be used to identify and efficiently prosecute anticompetitive above-cost pricing."[341]

Conventional farmers fit this paradigm because, as a result of taxpayer subsidies, they have lower costs than any sustainable rival. Conventional farmers are thus able to price out sustainable farmers by pricing above conventional farming costs, but below costs incurred by sustainable farmers. This clear price advantage ensures that subsidized conventional farming is able to limit the options available to consumers by keeping prices low enough to deter entry into the market by nonconventional farmers. Because the consumer-choice model encourages action where the harm to competition results in a reduction of consumer choice, predatory above-cost pricing should also be judicially reviewable.

Finally, another difference that justifies review of predatory above-cost pricing under the consumer-choice model is the purpose behind the pricing conduct in agriculture. Conventional farmers are not just using predatory pricing to keep rivals out of the market so they can raise prices; they also use it to exclude sustainable rivals so that conventional farmers need not engage in nonprice competition (e.g., raising their standards in ways that would decrease their profits). Thus, although the final price to consumers may not be affected, under the consumer-choice approach this conduct would nevertheless be reviewable because of the harm to consumer choice. Consumers have clearly shown that they want the choice to purchase goods produced under higher standards with different methods that are less harmful to the environment, or that simply result in a higher-quality good.[342] The fact, therefore, that so many of the externalities of conventional farming are paid by the taxpayer should not prevent the entry of competitors that will provide these choices or force current oligopolists to respond to consumer demand.

337. DOJ, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 58 (2008).

338. *Id.*

339. Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 942 (2002).

340. *Id.* at 944.

341. DOJ, *supra* note 292, at 58.

342. See *supra* notes 241–42 and accompanying text for statistics indicating that consumers are increasingly choosing to purchase food produced by nonconventional methods.

3. Dangerous Probability of Recoupment

In either case, if externalities are included in the measurement of a seller's costs, or above-cost pricing qualifies as predatory pricing, the second prong of *Brooke Group* is likely to be satisfied because there is a dangerous probability of recouping the investment simply because the conventional farmer is not actually losing anything in the short run. First, conventional farmers are able to keep sustainable farmers out of the market without the short-run losses typically suffered in predatory pricing, and they are not forced to substitute more expensive farming techniques for their conventional methods to provide more choices for consumers. Second, there are significant barriers to entry in sustainable agriculture that enable conventional farmers to recoup their investment even if it is necessary for them to price goods below cost in the short run.[343] Adoption of the consumer-choice approach will, therefore, lead to enforcement of the prohibition on predatory pricing in a way that is consistent with the purpose of the Sherman Act.

IV. CONCLUSION

For antitrust law to have its intended effect of protecting competition, some guidance must be provided as to what constitutes harm to competition. This standard of harm must encapsulate what the consumer actually interprets as harm to competition. With regard to agriculture, adoption of the consumer-choice standard—and vigorous prosecution of monopolistic *and* monopsonistic conduct—will help ensure that antitrust enforcement provides due consideration to the nonprice aspects of competition that consumers clearly value, including lower prices, better products, and more choice.

343. For example, in order to switch from conventional farming to organic methods, "the cows must be fed a diet consisting of at least 80 percent organic feed for 9 months and then 100 percent organic feed for 3 additional months," and "organic dairy products must make use of milk from animals raised organically for at least 1 year prior to producing the milk." DIMITRI & GREENE, *supra* note 247, at 16. The barriers for a completely new entrant to the market would be even higher due to the large capital outlays required to enter the agriculture industry. See *supra* Part III.A.2 and accompanying text for a discussion of intensive capital outlays required for poultry production.