INFRAMARGINAL CONSUMERS AND THE PER SE LEGALITY OF VERTICAL RESTRAINTS

Don Boudreaux and Robert B. Ekelund, Jr.***

I. INTRODUCTION

Although antitrust law has never strictly followed the latest fashions in economic theory, the theory of industrial organization has had an important, if sometimes ambiguous, impact on the law. This has been the case with regard to the impact of price and non-price vertical restraints agreed upon by upstream suppliers and downstream distributors.[1] Over the past twenty-five years, the courts have vacillated in their treatment of price and non-price forms of contractual vertical integration.[2] Recently, the Supreme Court declared that non-contractual, non-specific price restraints do not constitute a *per se* violation of the antitrust laws.[3] However, the Court presently maintains that restraints imposed to fix resale prices (resale price maintenance or r.p.m.) are *per se* illegal,[4] while geographic and other non-price arrangements between upstream manufacturers and their downstream retailers are subject to a rule-of-

* Assistant Professor of Economics, George Mason University; B.A. Nicholls State University, 1980; M.A. New York University, 1982; Ph.D. Auburn University, 1986.

** Lowder Eminent Scholar in Economics, Auburn University; B.B.A. St. Mary's University, 1962; Ph.D. Louisiana State University, 1967.

The authors would like to thank Richard Ault, David Kaserman, Bill Shughart, Bob Tollison, and Mark Thornton for helpful comments on early drafts of this Article.

1. A vertical price restraint is an attempt by a manufacturer to control the price at which independent wholesalers and retailers may sell its products. *See* T. VAKERICS, ANTITRUST BASICS § 7.01, at 7-1 to -2 (1987). A vertical non-price restraint generally involves efforts by manufacturers to restrict the marketing of its products, for example, by imposing geographical or customer restrictions upon the distribution of its products, or by exclusive or reciprocal dealing. *See id.*

2. "Vertical integration" is defined as the "situation where a company moves into more than one stage of production or distribution." *Id.* § 5.06[6], at 5-67 to -69.

3. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 108 S. Ct. 1515, 1525 (1988).

4. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (retaining the *per se* rule prohibiting vertical price restraints despite an *amicus* brief filed by the Department of Justice urging a relaxation of price-constraint prohibitions).

reason analysis.[5]

Economic theory relating to price and non-price vertical restraints has similarly been at loose ends. Following Lester Telser[6] and Robert Bork,[7] a number of theorists have argued that many forms of non-price intrabrand restraints[8] are actually pro-competitive because they strengthen and maintain interbrand competition.[9] Several influential opposing viewpoints have surfaced in the recent literature on the topic, however, including that of Professor William Comanor.[10] Comanor argues that a theoretically untoward restraint on inframarginal consumers[11] supports a more vigilant stance by the courts against non-price restraints.[12] Comanor supports his argument

---

5. *See* Continental Television, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (acknowledging the possible pro-competitive effects of non-price restrictions).

6. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

7. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 375 (1966).

8. "Intrabrand competition" is the competition that exists between companies selling the same brand of products, for example, two wholesalers selling Pepsi-Cola. T. VAKERICS, *supra* note 1, § 7.01, at 7-1 to -3.

9. *See, e.g.*, Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1, 5-6 (1982) (arguing that exclusive dealing arrangements, to the extent they "increase the per-unit cost of dealer promotional services when compared with multiline dealers," may foster competition from secondary suppliers who can "obtain a competitive advantage over the industry leader by failing to require exclusive dealing."); Marvel & McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 347 (1984) (arguing that resale price maintenance is not anti-competitive as evidenced by its use by "new entrants to apparently competitive industries."); *cf.* Mathewson & Winter, *An Economic Theory of Vertical Restraints*, 15 RAND J. ECON. 27, 28 (1984) (identifying vertical restraints which merely neutralize externalities and that may be obstructing efficient markets); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 23 (1981) (stating that "economic theory teaches that a manufacturer will [unilaterally] restrict distribution only in order to be more competitiveness.").

"Interbrand competition" refers to the competition that exists between two or more companies that sell different brands of the same generic product. T. VAKERICS, *supra* note 1, § 7.01, at 7-1 to -3.

10. *See* Comanor, *Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985); *see also* Gould & Yamey, *Professor Bork on Vertical Price Fixing*, 76 YALE L.J. 722, 723 (1967) (demonstrating that "r.p.m. can be practised so as to restrict output and raise prices, thereby refuting Bork's major contention.").

11. "Inframarginal consumers" are those consumers who "place a value on the original product substantially higher than the original price." Comanor, *supra* note 10, at 991. Therefore, these consumers are "relatively insensitive to any price increase needed to fund a change in product quality. Even if, according to their valuations, the improvement does not warrant the additional cost, they will not buy less of the product as a result." *Id.*

12. *See id.* at 991-92. For a general discussion of the issues in the debate, see *Resale Price Maintenance: Theory and Policy in Turmoil*, 3 CONTEMP. POL'Y ISSUES 1 (1985). Comanor reiterates his position in an article which he co-authored contained in the same symposium. Comanor & Kirkwood, *Resale Price Maintenance and Antitrust Policy*, 3 CONTEMP. POL'Y ISSUES 9 (1985). None of the other authors challenged Comanor's analysis of the in-

by postulating that the economic welfare of inframarginal consumers may be damaged by the introduction of new product qualities resulting from vertical restrictions.[13] He proposes that courts undertake as part of their rule-of-reason analysis a determination of the effects of non-price vertical restraints on consumer welfare.[14]

This Article examines the economic argument and the legal remedies proposed by Comanor and others, concluding that an attempt to inject consumer welfare valuations into the quality changes that ensue from the imposition of vertical restraints is entirely misappropriate. More significantly, it is maintained that the judicial implications which are drawn from economic theory of this sort are a perversion of the traditional rule of reason known to antitrust case law. The first section evaluates the economic case proffered by Comanor;[15] the second considers traditional and contemporary antitrust precepts;[16] and the concluding section evaluates the status of non-price vertical restraints within economic theory and antitrust law.[17]

II. Vertical Restraints and the Inframarginal Consumer

Analyses of the causes and effects of vertical integration have a long history in economic theory. Early work typically questioned the impact of monopoly at one (or more) stage(s) of manufacturing or distribution. In 1950, for example, Joseph Spengler argued that even without vertical integration, a firm with a monopoly of one stage of a product's production could fully capture monopoly profits with respect to that product, assuming production at fixed proportions characterizes the rest of the industry.[18] Spengler's conclusions were later

---

framarginal consumer. *But see* White, *Resale Price Maintenance and the Problem of Marginal and Inframarginal Customers*, 3 Contemp. Pol'y Issues 17, 18 (1985) (generally accepting Comanor's analysis relating to inframarginal consumers but stating that he is not convinced by the argument that inframarginal consumers are more knowledgeable than marginal consumers, thereby benefitting less from the promotional efforts that r.p.m. encourages).

13. *See* Comanor, *supra* note 10, at 999 (stating that the effect on consumers of the imposition of vertical restraints is dependent upon "whether gains to marginal consumers outweigh losses to their inframarginal counterparts.").

14. *Id.* at 1001-02.

15. *See infra* notes 18-69 and accompanying text.

16. *See infra* notes 70-103 and accompanying text.

17. *See infra* notes 104-13 and accompanying text.

18. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. Pol. Econ. 347 (1950). The existence of a monopoly at one stage of production has the potential to either produce higher prices, due to the exclusive command over supply, or lower prices, due to the minimization of costs gleaned from the transfers within an organization (at marginal costs) as opposed to between organizations (at marginal costs plus profits). *See* Westfield, *Vertical Integration:*

modified to accommodate specialized inputs, variable proportions, and incentives to partially or contractually integrate.[19]

A parallel strand of development relates to the economic efficiency and welfare effects of both price and non-price contractual restraints. Almost three decades ago, Lester Telser argued that manufacturers will press minimum resale prices on retailers to induce retailers to provide product services.[20] Telser maintained that minimum resale price maintenance would eliminate a "free rider" effect[21] by forcing retailers to compete for customers through product service provisions.[22]

A. *Vertical Restraints and Consumer Welfare*

Former Judge Robert Bork, in his well-known analysis of verti-

---

Does Product Price Rise or Fall?, 71 AM. ECON. REV. 333, 334 (1981) (stating that "[t]here is a general agreement that the opposing effects exactly offset each other where inputs are utilized in fixed proportions by the downstream industry.").

19. *See* Vernon & Graham, *Profitability of Monopolization by Vertical Integration*, 79 J. POL. ECON. 924, 924-25 (1971) (stating that imperfect capitalization of monopoly position will occur when input proportions are variable). In a series of articles, Roger D. Blair and David L. Kaserman have shown that devices such as franchising, input tying, lump-sum payments, or royalties can substitute for full integration even when downstream firms can vary input proportions. *See* Blair & Kaserman, *Optimal Franchising*, 48 S. ECON. J. 494, 504 (1982) (discussing the use of a lump-sum franchise fee in conjunction with the royalty on sales revenues or output as a means of extracting rent by the franchisor, as an alternative to or substitute for full integration); Blair & Kaserman, *Vertical Control with Variable Proportions: Ownership Integration and Contractual Equivalents*, 46 S. ECON. J. 1118, 1119-27 (1980) (examining two contractual alternatives that may be used in an attempt to obtain the benefits of ownership integration or input tying—a franchising-type arrangement in which the intermediate product monopolist obtains by contract the right to impose a per unit tax or royalty on the output of downstream producers and a requirement by the upstream firm of a lump-sum payment or entry fee in exchange for the opportunity to buy the monopolized input); Blair & Kaserman, *Vertical Integration, Tying and Antitrust Policy*, 68 AM. ECON. REV. 397, 397-401 (1978) (proving how the upstream monopolist can obtain results identical to those gained by full integration by tying the purchase of non-monopolized substitutable inputs to the purchase of the intermediate product over which the monopolist exercises control); *cf.* Warren & Boulton, *Vertical Control by Labor Unions*, 67 AM. ECON. REV. 309 (1977) (discussing union actions such as restrictive workrules or output taxes which are analytically similar to vertical integration controls employed by certain manufacturers). *See generally* R. BLAIR & D. KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL (1983) (providing a useful survey of the economics of vertical restraints).

20. *See* Telser, *supra* note 6, at 87, 89.

21. Telser described the free rider problem in the following terms:

> A customer, because of the special services provided by one retailer, is persuaded to buy the product. But he purchases the product from another paying the latter a lower price. In this way the retailers who do not provide the special services get a free ride at the expense of those who have convinced consumers to buy the product.

Id. at 91.

22. *Id.* at 91-92.

cal restraints, maintains that economic efficiency and consumer welfare benefits are produced by both price and non-price devices, including geographic and territorial restraints on retailers.[23] Bork argues that a manufacturer will impose restraints only when profits are thereby increased by higher sales, and consumers will augment their demand for products only when the value of product services (or product qualities) exceeds the higher retail price the seller must charge to cover the higher costs of selling the product.[24] According to Bork:

> consumer choice will dictate the use or non-use of r.p.m. When r.p.m. is the more profitable course for the manufacturer of product x, we know that consumers as a whole prefer product x with the reseller-provided information and service that is purchased by r.p.m. . . . . The consideration of consumer choice supports the proposal to legalize manufacturer-desired r.p.m.[25]

Comanor challenges this view by identifying "circumstances in

---

23. *See* Bork, *supra* note 7, at 474-75. Bork stated that economic efficiency supports the legality of "horizontal market-division or price-fixing agreements" if four conditions are present:

> (1) the agreement accompanies a contract integration (the coordination of other productive or distributive efforts of the parties); (2) the agreement is ancillary to the contract integration (capable of increasing the integration's efficiency and no broader than required for that purpose); (3) the aggregate market share of the parties does not make restriction of output a realistic threat; and (4) the parties have not demonstrated that their primary purpose was the restriction of output.

Id.

Professors Gould and Yamey were the first to discuss the issue of inframarginal consumers, arguing that resale price maintenance restricts the range of consumer choices. *See* Gould & Yamey, *supra* note 10, at 723. They refute Judge Bork's major premise and argue in favor of judicial supervision of r.p.m. by offering four arguments as to how r.p.m. can both raise prices and restrict output:

> (1) that output can be reduced even where r.p.m. raises the efficiency of distribution; (2) that r.p.m. may have the effect of reducing output even where the intention is to increase it; (3) that a monopolist manufacturer can use r.p.m. to preserve or strengthen his monopoly position and so restrict output; and (4) that each of a non-colluding group of manufacturers can use r.p.m. to reduce competition *inter se* and so restrict output.

Id.

Judge Bork responded that requiring retailers to sell a product at higher prices, either directly or indirectly, creates incentives for the retailer to provide more customer service; otherwise, there would be no justification for the higher prices. Bork, *A Reply to Professors Gould and Yamey*, 76 YALE L.J. 731, 731 (1967).

24. *See* Bork, *supra* note 23, at 731 (asserting primarily that "vertical price fixing or r.p.m., when it is not used as the tool of a cartel among resellers or among manufacturers, can only result from the manufacturer's desire to increase efficiency, and, further, that courts should accept that motivation as conclusive of the effect of such r.p.m.").

25. *Id.* at 742-43.

which manufacturers' interests conflict with those of consumers."[26] These circumstances, he argues, are seated in the potential conflict between the incentives of manufacturers in instituting quality changes *qua* changes in distribution services and the overall consumer welfare derived from those services.[27] As Comanor puts it, arguments espousing vertical restrictions based upon their supposed benefit to consumers ignore "the importance of differences among consumers regarding their preferences for dealer-provided services. Where such differences exist, manufacturers' and consumers' interest [in imposing vertical restrictions] do not necessarily coincide."[28] Dealer-provided services made possible by vertical restrictions may provide benefits to some consumers, i.e. "marginal" consumers, but not to inframarginal consumers of the product.[29]

Building on a model suggested by Michael Spence relating to product quality and consumer preferences,[30] Comanor argues that it is only the *marginal* consumer that affects seller policy.[31] He contends that where marginal consumers derive sufficient positive utility from the dealer-provided services which stem from vertical restrictions, such restrictions will be implemented.[32] He notes, however, that welfare gains or losses from product changes are measured by the preferences of *all* consumers—marginal *and* inframarginal.[33] Since inframarginal consumers place a substantially higher value on the original product than its original price, the welfare of inframarginal consumers may be diminished "[t]o the extent that [the changes in the product] fail to reflect [their] preferences."[34] Consequently, if there are a significant number of inframarginal consumers attaching little or no value to the additional dealer services, the

---

26. *See* Comanor, *supra* note 10, at 983.

27. *Id.* at 990-92.

28. *Id.* at 990.

29. *Id.* at 991.

30. *See* Spence, *Monopoly, Quality, and Regulation*, 6 BELL J. ECON. 417, 417-19 (1975).

31. *See* Comanor, *supra* note 10, at 991. Spence's analysis emphasizes that since the marginal consumer's personal valuation of the product approximates its current price, he is the most sensitive to factors affecting this equilibrium. *Id.* In contrast, inframarginal consumers, who place a substantially greater value on the product than the current price, are relatively insensitive to any price increase which the producer may deem to be necessary to finance a change in quality or service. *Id.* It should be noted that Spence formulated his model for application to conditions of government-supported monopoly and not for the broader application utilized by Comanor.

32. *Id.*

33. *Id.*

34. *Id.*

welfare gains to marginal consumers and to sellers who earn higher profits from the imposition of vertical restrictions may not offset the overall welfare losses to inframarginal consumers.[35] Comanor therefore concludes that vertical restrictions are not necessarily welfare-enhancing.[36]

Moreover, Comanor argues that price or non-price vertical restraints affecting *established* products should either be deemed *per se* illegal or subject to a modified rule of reason analysis under which the defendant would have to show that the restraints have generally enhanced overall consumer welfare.[37] On the other hand, Comanor believes that vertical restrictions imposed on "new products or products of new entrants into the market" should be treated to a more lenient type of rule-of-reason analysis because they are not likely to adversely affect consumer welfare.[38]

B. *Inframarginal Consumer Demand*

The critical part of Comanor's argument relates to the situation and consumption patterns of the inframarginal purchaser.[39] Comanor argues that *marginal* consumers, when deciding whether to pay a higher nominal price for higher quality, *will consume marginally*:

---

35. *Id.* at 992, 999-1000.

36. *Id.* at 991-92, 999-1002.

37. *Id.* at 1001-02.

38. *Id.* at 1002.

39. The only commentator to raise *any* questions regarding Comanor's analysis of the inframarginal consumer has been Lawrence White. *See* White, *supra* note 12, at 17-18. While generally accepting Comanor and Kirkwood's analysis relating to inframarginal consumers, *see* Comanor & Kirkwood, *supra* note 12, White states that he is "not convinced by their argument that inframarginal customers are likely to be knowledgeable (and therefore not benefit greatly from the promotional efforts that RPM would encourage), while customers at the margin are likely to be less knowledgeable. Arguments that run in the opposite direction can be constructed." White, *supra* note 12, at 18. The arguments White refers to are those of Steven Salop and Joseph Stiglitz. *See* Salop & Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUD. 493 (1977). In an argument explaining possible price dispersion under monopolistically competitive conditions, Salop and Stiglitz develop a model of heterogeneous consumers in a world of costly information. *Id.* at 493. They categorize consumers as "efficient" or "inefficient" information gatherers, rather than as marginal or inframarginal, and conclude that a kind of informational externality exists between the two types of information seekers. *Id.* at 493-94. Agents who become informed provide an external benefit to the uninformed; by searching for better prices, they keep all prices lower. *Id.* at 494. Conversely, the uninformed inflict an external diseconomy on the informed by shopping at higher priced stores and thus necessitating that the informed search for lower prices. *Id.* The point to be made is that Salop and Stiglitz's informed and uninformed consumers need not correspond to Comanor's marginal and inframarginal consumer classifications since Comanor's consumers do not share any informational externality between them.

"If the amount that a marginal consumer is willing to pay for higher quality even slightly exceeds the accompanying increase in price, he will generally buy more of the product. Similarly, if he does not find the improvements worth the increased price, he will generally purchase less."[40] But the story is different for inframarginal consumers. According to Comanor, these consumers are "relatively insensitive to any price increase needed to fund a change in product quality. Even if, according to their valuations, the improvement does not warrant the additional cost, they will not buy less of the product as a result."[41] Therefore, the profitability of vertical restraints depends upon marginal consumers, whereas the welfare change is ambiguous when inframarginal consumers, *who are not allowed, ex hypothosi, to consume marginally*, are considered.[42]

1. Quality Changes and Demand Shifts.— Comanor's argument, in effect, sets up an externality to vertical restraints—the profitability of restraints is divorced from possible untoward welfare effects stemming from the introduction of quality changes.[43]

A full assessment of vertical restraints first requires an understanding of the nature of product quality changes. What forms do quality changes resulting from price and non-price restraints assume? Such changes might include virtually all possible forms of product and service differentiation, including increased information from retailer advertising, storage efficiencies, physical product quality improvements such as increased freshness or safety, on-site product demonstrations, or any of a number of other forms of service provisions. Virtually all of these possibilities are conceded by Comanor, although he focuses on the provision of product information supplied by retailers.[44] Howard Marvel includes quality certification as another important informational effect of vertical restrictions.[45]

40. Comanor, *supra* note 10, at 991.

41. *Id.* These *a priori* expectations concerning the *form* of the market demand curve for commodities are not shared by a number of eminent demand theoreticians. *See, e.g.*, Hotelling, *Edgeworth's Taxation Paradox and the Nature of Demand and Supply Functions*, 40 J. POL. ECON. 571, 587 (1932) (delineating a hypothesis respecting general market demand convexity which demonstrated that the "compounding" of features contributing to market demand led to a normal distribution and to an *expected* convex demand function for all consumers).

42. *See* Comanor, *supra* note 10, at 991.

43. *See id.* at 991-92.

44. *See id.* at 992, 999; Comanor & Kirkwood, *supra* note 12, at 14.

45. *See* Marvel, *How Fair is Fair Trade?*, 3 CONTEMP. POL'Y ISSUES 23, 28 (1985) (stating that "[c]onsumers require[] continued reassurance—not as to the product's quality, but rather as to its stylishness."); Marvel & McCafferty, *supra* note 9, at 355-59 (1984). Marvel and McCafferty argue that price and non-price restrictions on dealers may, in many

All or any of these product quality changes will affect the demands of both marginal and inframarginal consumers. From the nineteenth century writings of the engineer Dupuit to the writings of Professor Stigler, quality improvements have been recognized as ordinarily having the effect of shifting individual demand curves rightward, as in Figure 1(a).[46]

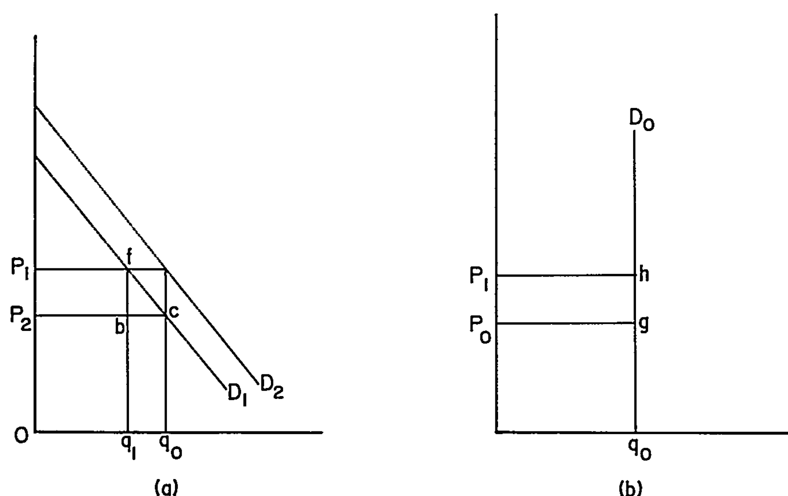

FIGURE 1

That is, product quality is held constant along any particular individual demand curve so that a new product dimension (product plus information, product plus service, etc.) would ordinarily increase the

---

cases, flow from manufacturers' desires to achieve quality or style certification from reputable dealers. *Id.* at 355-57. Non-tangible quality certification is created when, for example, upscale dealers of Lennox fine china are created in outlets that sell a number of other quality brands of china, such as Wedgewood and Fitz & Floyd. *Id.* at 357-58. The purchase of quality certification by manufacturers explains the apparant contradictions when reputable dealers not only sell, but are expected to offer, a number of quality brands. *Id.* at 355-56.

46. *See* J. DUPUIT, DE LA MESURE DE L'UTILITE DES TRAVAUX PUBLICS (1844), *reprinted in* DE L'UTILITE ET DE SA MESURE 63-64 (M. deBernardi ed. 1933); Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 60 (1964).

marginal evaluations of consumers.[47] The negative slope of both demand curves in Figure 1(a) simply indicates the expected demand relation for any *given* product.[48]

The Comanor-Spence view of inframarginal consumers, as revealed in Figure 1(b), is considerably different. Under their assumptions, introductions of new products or new product qualities have no effect on the position or slope of the demand curve.[49] The demand curve, at least over the range of discussion, is completely inelastic.[50] Inframarginal consumers are assumed to maintain prior purchase levels after the new product is introduced, *as well* as to be totally unresponsive to price changes.[51] This extreme form of individual demand not only implies that consumers place no value on the new product characteristics, but also that such individuals will not substitute among competing products in the face of price increases or price declines. In the scenario of Figure 1(b), consumers do not make marginal adjustments.

2. Price Changes and Welfare Effects.— When the introduction of vertical restraints reduces prices or leaves prices the same (Marvel considers the latter effect plausible), *consumer* welfare (consumer surplus) is unambiguously enhanced.[52] Price increases may, however, reduce consumer surplus if quality changes do not produce higher marginal valuations in excess of the price rise.

A price increase under the consumer behavior suggested in Figure 1(b) would reduce consumer surplus by an amount P_0P_1hg. When consumers are assumed to exhibit marginal behavior, however, the result is clearly different. When inframarginal consumers purchase the product marginally in a competitive environment, valuations of the gain from the new product will be compared with additional consumer costs. In Figure 1(a), for example, a rise in price could be accompanied by a rise in valuation (represented by the shift in demand from D_1 to D_2). With a price increase from P_0 to P_1 accompanying the rightward shift in demand, the buyer may purchase more, less, or the same amount of the product depending upon his valuation of the additional gain and the additional cost of the quality change. That evaluation will depend upon the form and elasticity of

47. *See* Stigler, *supra* note 46, at 60.
48. *See id.*
49. *See* Comanor, *supra* note 10, at 991-93; Spence, *supra* note 30, at 425.
50. *See* Comanor, *supra* note 10, at 991-93.
51. *See id.*
52. *See* Marvel, *supra* note 45, at 31-32.

the valuation to the individual consumer.

What if, however, the consumer purchases any given product marginally, but places little or no additional value on the product after the restriction-induced quality change? If we assume, to take an extreme case, that the demand (or marginal valuation) curve remains invariant at D_1 in Figure 1(a), the buyer reduces consumption of the product from q_0 to q_1 after the price increase. In an industry offering alternative service-quality combinations the consumer would shift expenditures to substitute purchases. In a general equilibrium competitive system, the consumer's behavior would ensure little or no loss because he would receive approximately P_2P_1fcb in welfare from new units of consumption.

In plainer language, the existence of a significant number of inframarginal consumers suggests that a good deal of consumer surplus is being experienced. In a healthy competitive industry, however, it is implausible to assume that the actions of any one producer can cause substantial diminution in consumer welfare. Other producers are available to pick up the slack. A marginal consumer might offer the manufacturer of Zenith televisions a higher price to provide on-site product demonstrations at its retail outlets. Inframarginal consumers, in contrast, may care nothing for this service. If the retail price of Zenith televisions increases as a result of its decision to offer these on-site demonstrations, and if inframarginal consumers place no additional value on those televisions, other television manufacturers will find it in their best interests to offer televisions which are comparable in quality to Zenith's, but without on-site demonstrations. Welfare loss to consumers is minimal or non-existent under such circumstances.[53]

3. Welfare Loss: General Equilibrium Considerations.— The supposed welfare loss described in the Comanor-Spence inframarginal consumer case contains several additional peculiarities. The economic system is constantly generating new products and product qualities, some of them through the various forms of vertical integration. It is unclear whether new product qualities are in fact new "products." In either case, standard neoclassical welfare consid-

---

53. Indeed, Zenith itself might offer a generic model. Even under monopoly conditions, it should often be profitable to cater to the different demands of inframarginal consumers. "[D]isregard of differences among buyers," as Stigler has noted, "proves to be equivalent to imposing an excise tax upon them, but one which is not collected by the monopolist. A price structure of some complexity will usually be the goal of collusive oligopolists." Stigler, *supra* note 46, at 45.

erations lose meaning because the bases upon which consumers make valuations are altered whenever there are any changes in the assortment of goods and services made available to them. The Comanor-Spence case is also troublesome because of its erroneous assumption that economists are somehow specially equipped to make interpersonal judgments concerning utility transfers or to make welfare comparisons between gainers and losers from price fluctuations. Comanor argues that if vertical restraints are profitable to manufacturers but deleterious to consumer welfare, the welfare loss to inframarginal consumers dominates the gains to marginal consumers.[54] Statements to this effect in any actual market would require interpersonal judgments concerning the distribution and direction of welfare change.

Even if these problems could be overcome, doubt may still be cast upon Comanor's proposition when the interests of producers are included with those of consumers. Consider an inframarginal consumer as depicted by Comanor in Figure 1(b) above. The fact that the consumer is willing to pay more for the product than he is currently paying implies that a surplus is being earned on consumption of the product. If the price of the product rises and the quantity demanded is not reduced, the individual consumer is in fact made worse off. But for social welfare (the sum of consumer and producer surplus) to be reduced, at least some of what the individual inframarginal consumer loses must not be gained by anyone else.[55] The higher price, however, is a gain to producers. Comanor maintains that the producer undertakes a product-improving change (which requires a higher price) only in response to the demands of marginal consumers.[56] No inframarginal consumers are driven from the market, and the marginal consumers are made better off.[57] There is no social welfare loss in this case because the additional product costs borne by the inframarginal consumers profit the producers who in turn may increase research, production, or marketing efforts to improve their products for marginal consumers.[58] If Comanor's quest to make welfare comparisons between marginal and inframarginal

54. Comanor, *supra* note 10, at 999.

55. *See generally* Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 3 ECONOMETRICA 242 (1938) (discussing the classic statement of this well-settled principle of welfare economics).

56. Comanor, *supra* note 10, at 991-92.

57. *Id.*

58. *Id.*

consumers is extended to welfare distributions between consumers and producers, the economic case for abandoning the movement for modified *per se* legality of vertical restrictions is a weak one indeed.

4. Inframarginal Consumers and Monopoly.— Admittedly, the above analysis may be somewhat misdirected. The model of inframarginal consumption invented by Spence pertains explicitly to restraints imposed by monopolists on downstream competitive sellers.[59] While Comanor makes no such assumption (at least not explicitly), his analysis of the inframarginal consumer would take on different meaning in the case of monopoly. In an industry without freedom of entry there is less of a check on the ability of manufacturers to alter the terms of trade to consumers. Suppose, for example, that Zenith is the only manufacturer of televisions. If Zenith is protected from competition by some natural or artificial device (such as a patent), then nonmarginal consumers cannot go elsewhere to bargain for a more satisfactory deal when Zenith imposes price-raising vertical restrictions designed to improve the product for marginal consumers. Given the validity of certain interpersonal comparisons between marginal and inframarginal consumers, on the one hand, and producers, on the other, it might indeed be the case that social welfare is reduced. The problem here, however, is monopoly subject to prosecution under the Sherman Act,[60] not vertical restrictions *per se*.

5. Product Differentiation and Welfare.— As Lawrence White has observed, Comanor's objections to the *per se* legality of manufacturer-imposed vertical restraints may be reduced to the ancient debate concerning the welfare effects of product differentiation.[61]

---

59. *See* Spence, *supra* note 30, at 417-19.

60. 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986).

61. *See* White, *supra* note 12, at 17-18. One of the most important analyses is the Schumpeterian perspective, which concludes that:

> dynamic, endogenous, competitive (but not *perfectly* competitive) practices to avert costly technological change are part of the essence of progress under capitalism. . . .
>
> . . .
>
> Schumpeter maintained that many endogenous restrictions on the competitive system, observed only in a *static* framework, are dynamically optimal in that they regulate the introduction of new and (ultimately) cost-reducing technology.

Boudreaux & Ekelund, *Regulation as an Exogenous Response to Market Failure: A Neo-Schumpeterian Response*, 143 J. INST. & THEORETICAL ECON. 537, 545-46 (1987) (emphasis in original). In contrast, the new-institutionalists hold that regulation may be an efficient and welfare-enhancing response which results in optimal contracts. *Id.* at 546. We attempted to disprove the new-institutionalist viewpoint using Schumpeterian analysis by applying [w]arranty length [as] a proxy for the more general category 'contract terms.'" *Id.* at 547.

Comanor's economic argument against vertical restraints applies equally to *all* production and marketing decisions.[62] Suppose, for example, that a street corner lemonade vendor decides to add more sugar to his lemonade; sugar increases the vendor's cost, so a higher price must be charged. Following Comanor's argument, it could be said that those consumers who are indifferent to the sweetness of lemonade are nonetheless forced to pay the higher price because the vendor was responding to the tastes of the marginal consumer.[63] If Comanor truly believes his argument, he would have to concede that the decision to make the lemonade sweeter presents the real possibility of decreasing social welfare. While Comanor probably does not wish to subject lemonade vendors' decisions regarding sugar content to administrative or judicial review, how would he distinguish between the lemonade case and the case in which an electronics manufacturer alters the characteristics of its products in response to the marginal consumer? Vertical restraints are only a *means* enabling manufacturers under certain conditions to alter their product mix. Comanor's argument is, fundamentally, not an argument against vertical restraints as such, but rather an argument against changes in product characteristics.[64]

Comanor falsely assumes that only the preferences of marginal consumers matter.[65] One of the great benefits of a decentralized market economy is that it provides a variety of different products and product types so that each particular product appeals to a certain relatively narrow class of consumers.[66] With free entry there is an array of different products and marketing arrangements for each particular class of product. If the number of consumer types is greater than the number of available product types, it can only be because the cost of separating consumers into even finer "types" (by offering outputs that more precisely meet individual consumer tastes) is too high relative to the benefits of a more precise matching of products to individual tastes. As with all costs, this particular cost implies that the reigning situation will be less than optimal when

62. *See* Comanor, *supra* note 10, at 991.

63. *See id.* at 999-1000.

64. *See id.* at 991 (stating that "[t]o the extent that [product] alterations fail to reflect the preferences of inframarginal consumers, the interests of consumers in general may not be served." (emphasis in original)).

65. *See id.* (stating that "only the preferences of marginal consumers determine whether the product improvements will increase sales and manufacturers' profits.").

66. Query, for example, how many different types and qualities of stereo systems or breakfast cereals are on the market.

compared with a hypothetical world in which all consumers are able to buy products that precisely match their tastes. But in the real world the cost of tailoring product characteristics to perfectly match consumer tastes, that is, the cost of producing a sufficiently wide variety of products so that each consumer is a marginal consumer, implies that optimality is *not* characterized by the precise matching of products to individual tastes. It follows, therefore, that in the real world, changes in product characteristics may redound to the detriment of some consumers independent of whether vertical restrictions are the means through which such changes are made. Comanor's complaint relating to the dichotomous valuations of marginal and inframarginal consumers[67] could only be solved in a world in which it is possible to expand product varieties without increased costs.

Moreover, Comanor's proposed solution only contributes to the problem. Comanor's argument leads to the proposition that any institution that reduces the costs of refining the types of goods and services offered to consumers should be encouraged.[68] But one of the virtues of vertical restraints is that they allow such diversification of product types. In other words, vertical restraints allow manufacturers to change the types and varieties of products they offer. Comanor's proposal to give government agencies and the courts the power to determine which particular vertical restraints are welfare-enhancing and which are not[69] undermines the ability of market forces to assure the optimal degree of diversification for products and qualities. Comanor's proposal would effectively lock consumers into fewer product types and varieties, thus reducing consumer options. Reduced options, however, make it *more* likely that some consumers will involuntarily have to suffer price increases whenever there is a change in product quality.

III. Vertical Restraints and the Rule of Reason in Antitrust Law

In addition to the flaws in the economic arguments used by Comanor to support possible social welfare diminution under vertical restraints, his leap from welfare theory to the policy conclusion that such restraints should be governed under the rule of reason is heroic.[70] There is solid evidence to support a claim that the rule-of-

67. *See* Comanor, *supra* note 10, at 991-92.
68. *See id.* at 995.
69. *See id.* at 1001-02.
70. Comanor bases a "more hostile treatment of vertical restraints" on his analysis of

reason approach endorsed by Comanor for vertical price and non-price restraints[71] is unrelated to the rule of reason that is particularized in United States antitrust law.[72]

Comanor does not dispute the claim that, in general, vertical restraints create competitive elements in markets.[73] He readily concedes that Telser and others have correctly assessed vertical restraints as causing retailers and distributors to compete on non-price margins rather than price margins.[74] It is the efficacy of competition in expanding consumer welfare that Comanor questions.[75] While the theoretical possibilities of negative welfare effects stemming from competitively driven quality changes are questionable, Comanor believes that these possibilities demand the attention of the courts.[76] While eschewing a mandatory rule of *per se* illegality for vertical restraints, Comanor, in contrast to Bork and Posner, calls for a rule-of-reason adjudication based upon consumer welfare as well as upon monopoly considerations.[77] Analysis of the rule of reason as articu-

---

potential damage to inframarginal consumers. *Id.* In spite of his recognition of the difficult informational costs which would have to be borne by the judiciary, Comanor espouses "general policy standards," even though they will sometimes lead to "improper" results. *Id.* at 1001.

71. *See id.* at 1001-02 (advocating a modified rule-of-reason analysis to be applied on a case-by-case basis).

72. *See infra* notes 78-103 and accompanying text. Comanor suggests a "*modified* rule of reason analysis under which the defendants would be required to demonstrate that the restraints have benefitted consumers generally." *See* Comanor, *supra* note 10, at 1001-02 (emphasis added).

73. *See* Comanor, *supra* note 10, at 986-88 (noting that vertical restraints augment competition between distributors who must compete through the provision of various consumer services).

74. *See id.* Telser noted that retailers who do not provide the additional services, and charge less for the product, gain a benefit from the retailers who provide the extra services and charge more. Telser, *supra* note 6, at 91.

75. *See* Comanor, *supra* note 10, at 989 (arguing that "[i]n evaluating the overall societal gain or loss from the vertical restraint, one must determine whether the increase in services is worth the increase in the price of the product.").

76. *See id.* at 1001-02 (contending that since vertical restraints may have either a positive or negative effect on consumer welfare, the courts should not *per se* permit such practices).

77. *Compare id. with* Bork, *supra* note 7, at 397 (suggesting that "every vertical restraint should be lawful," or *per se* legal, except where market divisions or price maintenance have been devised by "resellers acting in concert") *and* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 6-26 (1981) (arguing that the time has come to adopt a new standard for evaluating the legality of "restricted distribution," namely, *per se* legality). Unlike Bork, Posner believes that collusion exceptions are inapposite. *See id.* at 22. Posner argues that "cases in which dealers or distributors collude to eliminate competition among themselves and bring in the manufacturer to enforce their cartel . . . can be dealt with under the conventional rules applicable to horizontal price fixing conspiracies." *Id.* He suggests that these are not pure vertical restraint cases, and

lated in United States antitrust law, however, does not support such an application.

A. *The Rule of Reason*

The long history of antitrust law in the United States demonstrates an explicit desire to refrain from using the law as a device to police the reasonableness, fairness, equity, and efficiency of competitive markets. Judges and administrators, if not all academics, have supported the notion that the law should assure that all markets are competitive.[78] The "trust" in "antitrust" is the belief that competition functions better than any other alternative system of resource allocation that could be devised and implemented.[79]

The hostility toward using the antitrust law to assess particular *outcomes*, rather than market structures and processes, is most clearly seen in the courts' long-standing opposition to judging the reasonableness of prices. Consider Justice Peckham's majority opinion in *United States v. Trans-Missouri Freight Association*,[80] in which a price fixing cartel of railroads defended themselves on the grounds that their rates were reasonable.[81] The Court stated:

> If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the

---

"would be decided the same way even if pure vertical restrictions were legal *per se*." *Id.*

78. *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979) (stating that antitrust laws are violated where the purpose of the practice is to threaten the proper operation of our predominantly free market economy); Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975) (stating that a major purpose of the Sherman Act is to foster competition and to protect the ability of competitors to enter markets), *cert. denied*, 423 U.S. 1053 (1976); A. NEALE & D. GOYDER, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 19-21 (3d ed. 1980). *See generally* 58 C.J.S. *Monopolies* § 18 (1948 & Supp. 1988) (noting that the purpose of antitrust laws was Congress' desire to terminate great aggregations of capital in order to preserve, for its own sake, despite the cost, an organization of industry composed of economic units capable of free competition).

79. *See* Demsetz, *The Trust Behind Antitrust*, in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, 1979 A.B.A. SEC. ANTITRUST L. 45, 47. Demsetz states that:

> [t]hese two premises—that competition is desirable and that it is naturally robust and pervasive—are so important to our antitrust policy that they must be taken as facts, or on faith, by those who seek to preserve and improve that policy. *They are the trust behind antitrust.* Together they rationalize a policy whose goal, at most, can be to deal only with uncommon problems.

Id. (emphasis in original).

80. 166 U.S. 290 (1897).

81. *Id.* at 331.

> rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? . . . Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? . . . It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation.[82]

The Supreme Court's ruling two years later in *Addyston Pipe & Steel Co. v. United States*[83] further strengthened the *per se* rule against price fixing. The Court reaffirmed its commitment to refuse to pass judgment on the reasonableness of "naked restraints" of trade—restraints that had no purpose other than to raise prices.[84] The Court dismissed discussion of whether to allow for a reasonableness defense where the restraints were in furtherance of a legitimate business practice because the Court believed that such a defense would be inapplicable to the case in any event.[85] The *per se* judgment against price fixing was supported by the decisions in *United States v. American Tobacco Co.*[86] and *Standard Oil of New Jersey*

---

82. *Id.* at 331-32.

83. 175 U.S. 211 (1899). In *Addyston*, the government sought an injunction against six corporations, engaged in the manufacture, sale, and transportation of iron pipe, from acting in combination and conspiracy to restrain competition. *Id.* at 212-13. The Court observed that in cases of combinations that limit or restrict the right of each member to transact business in the ordinary way, the overall effect is to destroy competition and thus raise prices; consequentially, the combination is a restraint of trade. *Id.* at 244-45. The Court determined the portion of the combination which was interstate in its character was a violation; however, the Commerce Clause could not be used to reach those defendants that combined in regard to contracts to sell pipe within their own state. *Id.* at 247-48.

84. *Id.* at 244. The Court in *Addyston* stated:

> We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them . . . so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity.

Id.

85. *Id.* at 235-38. *But see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984) (noting that a plaintiff in an antitrust suit should present evidence that "reasonably tends to prove" that the defendant(s) " 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " (quoting Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981))).

86. 221 U.S. 106, 181 (1911) (finding that the United States established violations of the Sherman Act by showing the existence of contracts and other combinations that resulted in destruction of competition at all phases of tobacco trade).

v. United States,[87] in which the rule-of-reason analysis was endorsed.

In *United States v. Socony-Vacuum Oil Co.*,[88] twelve midwestern oil refiners were charged with conspiring to fix prices.[89] The oil refiners claimed that the purpose for their actions was to avoid ruinous competition and "competitive abuses" and that the prices they set were reasonable.[90] According to Justice Douglas:

> If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition . . . .[91]

Douglas thus opined that the antitrust laws were designed to protect competition, not to give the courts the power to assess the outcomes of either competitive or monopolistic markets.[92] Contemporary observers of antitrust law are substantially in accord with this view. For example, Neale and Goyder argue that "[c]ontrary to its name, the rule [of reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead it focuses directly on the challenged restraint's impact on competitive conditions."[93] Therefore, if the restraint does not substantially reduce competition for the consumer's

---

87. 221 U.S. 1, 74-76 (1911) (finding that the United States proved a violation of the Sherman Act by showing that Standard Oil had such vast control over the entire industry that it restrained free trade).

88. 310 U.S. 150 (1940).

89. *Id.* at 165-66.

90. *Id.* at 163-64.

91. *Id.* at 221.

92. *Id.* at 212-14. More recently, the Eleventh Circuit in Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553 (11th Cir. 1983), convincingly made this point. According to the court, a determination of benefit "would be beyond the intellectual power of this or any other court. Ultimately it is the market which will be the final arbiter of the efficiency, or lack thereof, of this [arrangement] . . . . What we are dealing with are contracts made between and among consenting adults and corporations." *Id.* at 1560; *see also* Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 23 (1984) (asserting that "[a] fundamental difficulty facing the court is the incommensurability of the stakes . . . . In most cases even a perfectly informed court will have trouble deciding what the optimal long-run structure of the industry is, because there is no 'right' balance between cooperation and competition.").

93. A NEALE & D GOYDER, *supra* note 78, at 30. The authors argue that the rule of reason and the *per se* rule are not in conflict: "Conflict would arise only if the rule of reason involved a distinction between good and bad, justifiable and unjustifiable, restraints of trade. But in modern antitrust . . . the rule of reason invokes the exercise of discretion only on what are ultimately questions of fact." *Id.* at 32-33. Comanor's proposed use of welfare analytics to determine when the competition inspired by vertical restraints is or is not good or justifiable is exactly the inquiry that Neale and Goyder point out the courts refuse to make.

dollar, but merely channels it into alternative avenues, then the restraint should be presumptively legal.

B. *Recent Decisions*

More recent Supreme Court opinions, particularly *Continental Television, Inc. v. GTE Sylvania Inc.*[94] and *Monsanto Co. v. Spray-Rite Service Corp.*,[95] have reaffirmed the foundation of the Court's traditional position regarding the applicability of the rule of reason analysis in vertical restraint cases. The salient point is that the rule of reason approach to vertical restraints is emphatically not the same application that Comanor endorses.[96] Courts employ the rule of reason to determine whether the vertical restraint is restricting trade for the purpose of creating the ability to charge monopoly prices.[97] The courts concentrate on the question of whether the purpose of the restraint is to raise prices to monopoly levels.[98] If there is only a slight chance that the restraint will lead to both monopoly conditions and prices which are greater than costs, and/or if the restraint is judged to be in furtherance of some legitimate business purpose (for example, improving the quality of product offerings or making available alternative products), the restraint will be found to be legal.[99]

Comanor, in contrast to the courts, seeks to use the rule of reason to assess the *outcomes* of competitive processes.[100] Where the courts now consider the likely effects of a particular practice on the structure and competitiveness of markets, Comanor proposes that they instead consider the likely effects of the practice, competitive though it may be, on consumer welfare.[101] The courts have, with good reason, refused to employ second-guessing in competitive markets.[102] In a world of perfect information, the courts might be able to

---

94. 433 U.S. 36 (1977).

95. 465 U.S. 752 (1984).

96. *See* Comanor, *supra* note 10, at 1000-02 (proposing that the courts review the impact of vertical restraints on social welfare, in contrast to the Supreme Court rule which focuses on achievement of monopoly prices).

97. *Monsanto*, 465 U.S. at 761.

98. *Id.* at 763-65.

99. *Id.* at 763-64.

100. *See* Comanor, *supra* note 10, at 1000-02.

101. *See id.*

102. *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253 (1963). As the Court in *White Motor Co.* stated:

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain . . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and

conduct a cost-benefit analysis measuring the interpersonal welfare effects of a competitively inspired new product or product quality on marginal and inframarginal consumers (assuming the validity of the questionable assumption that inframarginal consumers are in fact damaged). A world of costly and imperfect information means that marginal and inframarginal consumers are practically impossible to identify. For instance, are repeat customers marginal or inframarginal? In *Monsanto*, the Court stated that "[i]n *Sylvania* we emphasized that the legality of arguably anticompetitive conduct should be judged primarily by its 'market impact.' "[103] The Court wisely and appropriately remained reticent about judging the reasonableness of conduct on consumer welfare.

IV. Conclusion

Comanor's argument against vertical restraints is inconsistent with the history and modern development of antitrust law.[104] The courts have never denied the possibility that monopolists may well set reasonable prices on occasion.[105] But the Court refuses to allow a reasonable price defense because it recognizes its own inability to assess such claims.[106] The same inability that prohibits the courts from assessing the *price* outcome of a particular practice also prohibits the courts from assessing the *non-price* outcomes of a particular practice. The courts trust that, if competitive conditions exist, prices are "correct" or acceptable or reasonable.[107] Likewise, the courts should trust that, if competitive conditions exist, non-price elements of goods and services are "correct" or acceptable or reasonable. Assessing the correctness or reasonableness of the non-price aspects of goods and services is just as difficult or impossible for the courts to accomplish as it is for them to assess the correctness or reasonableness of prices.

At the foundation of Comanor's criticism of the welfare effects

---

should therefore be classified as *per se* violations of the Sherman Act.

Id. at 263 (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)).

103. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762 (1984) (quoting Continental Television, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 (1977)). A recent empirical study of resale price maintenance cases finds that dealer or manufacturer collusion is the basis for r.p.m. in less than 15% of 203 antitrust cases between 1976 and 1982. *See* Bureau of Economics, FTC, Resale Price Maintenance: Economic Evidence from Litigation (P. Ippolito 1988).

104. *See supra* notes 70-103 and accompanying text.

105. *See supra* notes 80-92 and accompanying text.

106. *See supra* notes 80-92 and accompanying text.

107. *See supra* note 79 and accompanying text.

of vertical restraints is an argument against the welfare effects of an openly competitive system.[108] Product differentiation and quality variations, as have previously been argued, are part and parcel of that system.[109] In contemporary views of that process, product differentiation (often made possible by advertising) is a *means* (not an end) of competition.[110] Vertical integration, along with less stringent forms of vertical restraints, makes that process economically efficient and, arguably, welfare enhancing under competitive conditions.[111] While antitrust action might flow from contentions that such restraints might create monopoly,[112] an attack on product differentiation under competitive conditions is inappropriate. Such an attack is only viable under outmoded Chamberlinian notions of static "monopolistic competition" where product differentiation is supposed to create "waste."[113] These notions are not only discredited by modern economics, but have been shunned by the courts as the subject of actionable offenses.[114] It is proposed that the courts continue their practice of refusing to second-guess market outcomes.

---

108. *See supra* notes 100-01 and accompanying text.

109. *See supra* notes 66-67 and accompanying text.

110. *See supra* notes 61-67 and accompanying text.

111. *See supra* notes 43-45, 52 and accompanying text.

112. *See supra* notes 59-60 and accompanying text.

113. *See* E.H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION. A REORIENTATION OF THE THEORY OF VALUE 108-09 (8th ed. 1962). The question of efficiency and, indeed, of the existence of monopolistic competition in Chamberlinian terms, is raised in a number of papers by Harold Demsetz. *See, e.g.,* Demsetz, *The Nature of Equilibrium in Monopolistic Competition,* 67 J. POL. ECON. 21, 21 (1959) (arguing "that Chamberlin did not develop the nature of equilibrium in monopolistic competition in a manner that permits judgments about efficiency and . . . that excess capacity is not a necessary implication of the assumptions underlying Chamberlin's model."); *see also* DeVany, *An Analysis of Taxi Markets,* 83 J. POL. ECON. 83, 83 (1975) (arguing that "the Chamberlinian model fail[s] to consider the *value* of excess capacity to consumers." (emphasis added)).

114. *See supra* notes 70-102 and accompanying text.