WHY CALLS FOR SHIFTING TO BRANDEISIAN ECONOMIC THEORY ARE FLAWED: AN EVALUATION OF THE UNITED STATES' AND EUROPEAN UNION'S APPROACH TO VERTICAL MERGERS

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INTRODUCTION

The tech industry has exploded over the last few decades and progressives are advocating for a shift in antitrust review in the United States (US).[1] Seeking a modified economic theory based on the writings of the late Justice Louis Brandeis (Brandeisian economic theory), these advocates seek to control the vertical expansion of dominant tech firms such as Amazon.[2] On a broad level, this position argues for a shift of US antitrust regulatory review towards the European Union's (EU) application of antitrust regulation. This paper provides a review of both US and EU antitrust review, provides a primer on vertical merger theory and Chicago-school economic theory, and compares and contrasts US and EU

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1. *See* Astead W. Herndon, *Elizabeth Warren Proposes Breaking up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html [https://perma.cc/FMJ6-CFZZ]; Makena Kelly, *Pete Buttigieg Wants the FTC to Fight Big Tech Monopolies*, THEVERGE (Apr. 23, 2019), https://www.theverge.com/2019/4/23/18512428/pete-buttigieg-facebook-google-amazon-apple-antitrust-ftc-break-up [https://perma.cc/M882-58UU]; *Joe Biden Says He's Open to Breaking Up Facebook*, CNBC (May 13, 2019), https://www.cnbc.com/2019/05/14/2020-hopeful-joe-biden-says-hes-open-to-breaking-up-facebook.html [https://perma.cc/GZ2G-EW8N].

2. *See* Jake Walter-Warner & Jonathan H. Hatch, *A Brief Overview of the "New Brandeis" School of Antitrust Law*, PATTERSON BELKNAP: ANTITRUST (Nov. 8, 2018), https://www.pbwt.com/antitrust-update-blog/a-brief-overview-of-the-new-brandeis-school-of-antitrust-law [https://perma.cc/BF3B-VGK5]; Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 716, 742 (2017).

review of certain business practices to conclude Brandeisian economics will not achieve its advocates' goals and will have a negative impact on consumers. Finally, this paper supports a proposal to modify and strengthen consent decrees following merger review in order to use a scalpel—rather than a sledgehammer—to adapt to the changes in the technological environment. Most importantly, this proposal would actually protect consumers, not competitors in the marketplace.

I. ANTITRUST REGULATORY REGIMES

This section lays out the parties who enforce the antitrust laws in both the US and EU. It further analyzes the pre-notification merger review process. Then it analyzes the theories of harm required to levy an antitrust injury against a vertically integrated firm.

A. *The United States' Regulatory System*

1. The Enforcers

The US employs a multi-faceted antitrust enforcement mechanism that is shared between federal agencies, the States, and private third parties.[3] The parties involved in a merger, along with third parties, have fewer rights, such as the "right to be heard, [and] right of access to the file," than in the EU.[4] Specifically, there are two main national competition authorities—the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—that share the authority to enforce section 7 of the Clayton Act.[5] Additionally, the Federal Communications Commission (FCC) "has authority under the Communications Act of 1934 to review mergers under a 'public interest' test that encompasses, but is not limited to, consideration of a transaction's likely

3. William E. Kovacic, Petros C. Mavroidis & Damien J. Neven, *Merger Control Procedures and Institutions: A Comparison of the EU and US Practice* 1 (Eur. Univ. Inst., Robert Schuman Ctr. for Advanced Stud., Working Paper No. 476, 2014).

4. *Id.*

5. *See* 15 U.S.C. § 18a(b); J. Robert Robertson & Corey W. Roush, *Procedural and Substantive Differences in Merger Challenges by Different Authorities in the United States*, 58 ANTITRUST BULL. 201, 202 (2013). State Attorneys General also have authority to enforce § 7 and a review by the federal government does not preclude state involvement. Kovacic et al., *supra* note 3, at 9. Even if the federal government clears a merger, State AGs may use § 7 to block or seek additional relief. *Id.* at 9–10 (citing California v. American Stores Co., 495 U.S. 271 (1990)).

competition effects."[6] To block a proposed merger, the agency handling the case must obtain an injunction in federal court.[7] The courts do not have a role in the agency process to clear mergers.[8] The courts simply "accept settlements that require divestitures or conduct remedies" determined by the DOJ or FTC.[9] When the FTC has come to a proposed settlement with the merging firms, it must be published for notice and comment, "but its final decision about the remedies to be adopted is not subject to judicial review."[10] When the DOJ challenges a merger, "it must obtain judicial approval through . . . a Tunney Act Proceeding . . . [which] requires the court to assess whether the proposed consent decree is in the public interest."[11]

2. Pre-Merger Review

Since the New Deal and its construction of the administrative state, disclosure has been the preferred commercial process.[12] For mergers and acquisitions, it took a few more decades to mirror securities laws, but Congress eventually required a disclosure process requiring entities to disclose certain information.[13] The Hart-

6. Kovacic et al., *supra* note 3, at 10. Other regulatory agencies may review mergers but typically they are reviewed concurrently with DOJ and the FTC. ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 673 (2017) 3d ed. (providing examples such as "railroads (Surface Transportation Board), . . . energy producers (Federal Energy Regulatory Commission), and banking (Federal Reserve Board)"). Furthermore, "[m]ergers involving national security interests are subject to antitrust review and to an additional regulatory regime under the Exon-Florio Amendment to the Defense Production Act of 1950 ("Exon-Florio"), 50 U.S.C. App. § 2170." *Id*. Additionally, "state public utility commissions enjoy substantive authority similar to the FCC's competence for deals that affect commerce within their state borders. Many state public utility laws establish public interest mandates that enable the public utility commission (PUC) to review and oppose mergers on competition grounds." Kovacic et al., *supra* note 3, at 10. For the purposes of this paper, my analysis will only focus on the DOJ and FTC's role in merger and vertical restraint review.

7. 15 U.S.C. § 53(b) (permitting the FTC to seek injunctions in federal court to block mergers or address other forms of anticompetitive conduct); FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (interpreting § 53(b) to require issuing injunctions when the FTC has raised important issues worthy of fuller examination in the FTC's process). "[C]ourt[s] would issue a preliminary injunction to enjoin the merger pending resolution of the issues in question in an FTC administrative trial. By contrast, DOJ has no administrative mechanism." Kovacic et al., *supra* note 3, at 10.

8. Kovacic et al., *supra* note 3, at 11.

9. *Id*.

10. *Id*.

11. *Id*. (citing 15 U.S.C. § 16).

12. *See* Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified at 15 U.S.C. § 77a et seq.).

13. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90

Scott-Rodino Antitrust Improvements Act (HSR) was enacted in 1976 and has "set the modern foundation for the US merger review process."[14] HSR erected a notification procedure for parties participating in mergers at certain size thresholds with waiting periods to allow the DOJ and FTC time to either seek injunctive relief or engage in settlement discussions to avoid litigation.[15] The US system requires only one institution—the DOJ or FTC—to conduct a review but there are certain business sectors where one agency has "an overwhelming advantage" and will most certainly be the reviewer.[16] "[T]he FTC has reviewed all mergers involving pharmaceutical companies . . . [and the] DOJ has reviewed all mergers involving mining, such as coal production."[17] Analysis of the proposed merger necessarily occurs prior to consummation and analyzes structural presumptions of the relevant market.[18] The "'structural presumption' predicts anticompetitive effects based on significant increases in market concentration . . . [and] can be understood as a legal device for making predictions about the competitive effects" of the merger.[19] The specific threshold triggers the notification periods and can lead to an intricate waiting period for the parties depending on the merger and the concerns of the government.[20] As will be discussed below, the problems of false positives and false negatives are a real concern under the HSR if the changes proposed by Brandeisian economists are enacted.

3. Post-Merger Antitrust Theories of Harm for Vertically Integrated Firms

In the event that post-merger plaintiffs find anticompetitive conduct in the marketplace, they may litigate. Under either section 1 or section 2 of the Sherman Antitrust Act, plaintiffs may challenge vertical restraints.[21] As the Supreme Court has stressed, the thrust

Stat. 1383.

14. Kovacic et al., *supra* note 3, at 24. As Kovacic notes, "[t]he HSR premerger notification provisions appear in Section 7A of the Clayton Act, which is codified in 15 U.S.C. § 18a." *Id*. at 24, n.78; *see also Symposium: Twenty Years of Hart-Scott-Rodino Merger Enforcement*, 65 ANTITRUST L.J., 813 (1997) (detailing the origins and consequences of the act).

15. Kovacic et al., *supra* note 3, at 24–27.

16. *Id*. at 24.

17. *Id*.

18. GAVIL ET AL., *supra* note 6, at 673.

19. *Id*.

20. For a detailed description of the pre-notification process see Kovacic et al., *supra* note 3, at 25–28 (detailing the HSR notification and waiting period, the second phase inquiry, agency decision to intervene, and the decisions on liability).

21. *See* 15 U.S.C. § 1 (permitting challenges for unreasonable restraints of trade); *id*. §

of the American antitrust system was "congressional concern with *the protection of competition, not competitors*."[22] Non-price vertical restrictions are evaluated under the rule of reason.[23] The Supreme Court noted that exclusive territories had potential to "induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer."[24] Furthermore, the Court agreed with manufacturers' desire to prevent free-riding and concluded anti-free-riding efforts are not anticompetitive.[25] Accordingly the Court stated "independent action is not proscribed. A manufacturer . . . has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."[26]

As is the case throughout Sherman Act litigation and enforcement, when challenging distribution channel restrictions, plaintiffs must be able to show that restraints will harm competition—particularly interbrand competition—and that the harm outweighs any benefits.[27] The evaluation by courts requires a plaintiff to show an exclusive deal "forecloses competition in a substantial share of the line of commerce involved," in order for "the opportunities for other traders to enter into, or remain in the market, must be significantly limited."[28] Plaintiffs will need to show these deals "foreclose[] rivals from . . . at least 40–50 percent of the relevant

2 (permitting challenges for exclusionary conduct in furtherance of monopoly power).

22. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis added); *see also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26–27 (1984) (evaluating a thirty percent market share and concluding it was an insufficient market share for an antitrust injury in a tying case); K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995) (holding that "[t]here must be "other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherent anticompetitive nature of defendant's behavior or the structure of the interbrand market").

23. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania, Inc. 433 U.S. 36, 38 (1977); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459–60 (1986) (detailing the rule of reason as a plaintiff showing anticompetitive effects such as increased price coupled with decrease supply, which may be rebutted by the defendant with plausible procompetitive justifications such as reduction in cost, efficiencies, and innovations that led to those problems, which can then be rebutted by the plaintiff by showing that the anticompetitive harm outweighs the benefits).

24. *Sylvania*, 433 U.S. at 55.

25. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762–63 (1984).

26. *Id*.

27. *See* Generac Corp. v. Caterpillar, Inc., 172 F.3d 971, 977 (7th Cir. 1999) (detailing that plaintiffs "must demonstrate, at a minimum, that its agreement with Caterpillar has an anticompetitive, welfare-reducing effect that is not overcome by any pro-competitive, welfare-enhancing consequences of the agreement"). In exclusive dealing context, vertical restraints "do not raise competitive concerns [without] a plaintiff's ability to show that they are likely to have" a completely negative impact on competition. James C. Cooper, Luke M. Froeb, Daniel P. O'Brien & Michael G. Vita, *A Comparative Study of United States and European Union Approaches to Vertical Policy*, 13 GEO. MASON L. REV. 289, 295 (2005).

28. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328–29 (1961).

market" to properly assert anticompetitive effects.[29] As has been true since then-Judge Taft's decision in *United States v. Addyston Pipe & Steel Co.*, ancillary restraints require evaluation of time and ability to exit the deal, as these are important analytical points to evaluate anti-competitiveness.[30] Once this initial harm has been shown, the analysis continues and plaintiffs must show the agreements are likely to result in higher prices and inversely lead to lower output that harms competition.[31] Courts analyze "such factors as the defendant's market share and entry barriers, and the likelihood that rivals can find alternative means to reach the downstream market."[32] The Supreme Court has also permitted maximum and minimum resale price maintenance deals and judges them under the rule of reason.[33] While per se illegality has been lowered for minimum resale price maintenance some states have shifted to per se illegality due to the Supreme Court's movement.[34] Overall, this is a very high burden for plaintiffs to successfully prevail—as it should be—because of the increase to consumer welfare and the efficiencies that result from vertically integrated firms.

29. Cooper et al., *supra* note 27, at 296 n.27 (citing United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001); United States v. Microsoft Corp., 87 F. Supp. 2d 30, 52 (D.D.C. 2000)).

30. *See* 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *see also* Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1063 (8th Cir. 2000) (analyzing ancillary restraints and concluding they were not anticompetitive because the builders were free to exit the deal at any time).

31. Cooper et al., *supra* note 27, at 296.

32. *Id*.

33. State Oil Co. v. Kahn, 522 U.S. 3, 22 (1997) (relieving review from per se to rule of reason for maximum resale price maintenance deals); *see* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407–08 (1911) (foreclosing minimum resale price maintenance as per se illegal), *overruled by* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007); *cf.* OECD Competition Committee, Policy Roundtable; Resale Price Maintenance 2008, DAF/COMP (2008) 37, 50 (2009), https://www.oecd.org/daf/competition/43835526.pdf [https://perma.cc/9CUY-SWJA]. As Professor Joshua Wright details, "[a] recommendation of a resale price generally is permitted in the United Kingdom, but if the resale price recommendation is tied to any financial inducement or penalty, the arrangement becomes a mandatory resale price and is considered a hard-core infringement of the competition laws." Joshua D. Wright, *The Economics of Resale Price Maintenance & Implications for Competition Law and Policy*, Remarks of Joshua D. Wright, Commissioner, Federal Trade Commission before the British Institute of International and Comparative Law n.8 (Apr. 9, 2014).

34. *See, e.g.*, Michael Lindsey, *Overview of State RPM*, ANTITRUST SOURCE (Apr. 2017), https://www.dorsey.com/-/media/files/newsresources/publications/2017/apr17_lindsay_chart.pdf?la=en [https://perma.cc/N7XA-HWHB]; Michael Lindsey, *State Resale Price Maintenance Laws after* Leegin, ANTITRUST SOURCE (Oct. 2009), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_Lindsay10_23f.authcheckdam.pdf [https://perma.cc/4LB8-CY45].

For section 2 challenges, plaintiffs must show the monopolist's conduct "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power."[35] But monopolistic behavior is not, standing alone, an antitrust injury to the plaintiff. Whether a defendant's "conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [the plaintiff]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way."[36] Thus, the conduct "must harm the competitive *process* and thereby harm consumers."[37] The Supreme Court has stated that "[u]nder the best of circumstances, applying the requirements of § 2 [when analyzing vertical restraints between suppliers and retailers] 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.'"[38] Accordingly, the US antitrust review sets a high bar for plaintiffs to challenge a vertically integrated firm.

B. *The European Union Regulatory System*

1. The Enforcer

The European Union (EU) requires a lower burden of proof to enjoin mergers or engage in litigation than the United States through its enforcement arm, the European Commission (EC).[39] In 2004, the EU expanded enforcement to include national competition authorities and courts of EU members, permitting evaluation of mergers under Article 81 and 82.[40] But in contrast to the US, the Commission "is the sole enforcer of the EU merger provisions and the influence other regulatory agencies on EU merger reviews is limited."[41] As Kovacic details, "since member states have no role in enforcing the merging regulation, merger control is actually more

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35. United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (quoting PHILIP E. AREEDA & HERBET HOVENKAMP, 3 ANTITRUST LAW ¶ 651c at 69 (1996)).

36. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).

37. *Microsoft*, 253 F.3d at 58.

38. Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (quoting United States v. Microsoft, 253 F.3d 34, 58 (D. Cir. 2001)).

39. *See* Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 208–09.

40. Commission Regulation 773/2004, 2004 O.J. (L 1) 18; *see also* Kovacic et al., *supra* note 3, at 2–9 (detailing the intricate procedural process and the constituencies involved with the Commission for pre-merger reviews).

41. Kovacic et al., *supra* note 3, at 1.

centralised in the EU than the US, despite the fact that the EU institutional construction falls short of a full federal structure."[42]

2. Pre-Merger Notification

Since the adoption of its merger regulation in 1989, the Commission has had the singular power of reviewing mergers and implementing the regulation.[43] While not legally binding,[44] "the rationale for pre-notification is to make optimal use of the short statutory limits that the Commission must observe when notified of a proposed merger."[45] This pre-notification period is where "the Commission expects to complete a significant part of its investigation and during which the parties can make substantive submission on the theories of harm, its validation, and on potential efficiencies."[46] This period could last "several months and involve a number of meetings with the parties as well as several substantive submissions."[47]

The EU's notification procedure is far more intricate—mainly due to the constituencies involved—than the United States' system. For example, when a merger falls within the scope of the regulation, the commission must decide within twenty-five working days which process it will take.[48] While the process involves significant threshold questions, broadly speaking the Commission follows a two-stage process. During phase one, it "undertake[s] a preliminary investigation . . . to filter out the merger that are clearly not problematic" for the Commission must follow "Art. 6.1(b), which might involve commitments."[49] During phase two, the Commission "investigate[s] further those mergers that may be problematic," for which the Commission must follow Article 6.1(c).[50]

42. *Id*.

43. Commission Regulation 139/2004 of Jan. 20, 2004, On the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1, 3 (Amending Commission Regulation 4064/89, 1989 O.J. (L 395)).

44. *See* Kovacic et al., *supra* note 3, at 20.

45. *Id*.

46. *Id*. at 20–21.

47. *Id*. at 21.

48. Commission Regulation 139/2004, *supra* note 43, art. 7, art. 10(1) (detailing that no merger can be consummated unless the Commission has decided to permit it).

49. Kovacic et al., *supra* note 3, at 19.

50. *Id*.; *see also id*. n.65 (stating "[t]he original merger regulation did not explicitly allow for remedies in Phase 1 . . . . This possibility has been introduced in 1997 (Regulation 1310/1997)" (internal citations omitted)).

Unlike the FTC, the "Commission is under the obligation to publish detailed final decisions . . . . [T]he Commission has to spell out its objections in detail and may decide to provide a non-confidential version of its objections to third parties."[51] But during pre-merger notification, the Commission has "no statutory basis to request information . . . . [T]he Commission is not bound by the procedural requirements and best practices of the formal investigation process . . . [and] evidence submitted by the parties cannot be held against them,"[52] thus this process is less cumbersome for firms than in the US.

3. Post-Merger Antitrust Theories of Harm for Vertically Integrated Firms

The Commission "can challenge vertical arrangements entered into by both dominant *and non-dominant* firms under Art. 81, and can challenge those entered into by dominant firms under Art. 82."[53] Article 81(1) puts the burden on the EC to prove the agreements "object or effect, the prevention, restriction or distortion of competition within the common market."[54] Similar to the US, once a plaintiff meets its burden, the defendant is then afforded the opportunity to rebut the anticompetitive argument by showing efficiencies borne out by the agreement that outweigh the negative effects.[55] But where it appears similar to the rule of reason employed by the US, the practical reality is different in the EU.[56] The

51. *Id.* at 19. For a detailed overview of the process see Kovacic et al., *supra* notes 14–17; *see also* Fresenius Medical Care AG, FTC No. 171-0227 (Feb. 19, 2019) (Dissenting Statement of Comm'r Chopra) (arguing that the FTC should release more detailed analysis of mergers for the benefit of future firm behavior).

52. Kovacic et al., *supra* note 3, at 21.

53. Cooper et al., *supra* note 27, at 297–98 (emphasis added); *see also* Lauren Hirsch, *Elizabeth Warren's Antitrust Bill Would Dramatically Enhance Government Control Over the Biggest US Companies*, CNBC (Dec. 7, 2019, 11:32 AM), https://www.cnbc.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggest-companies.html [https://perma.cc/6NN6-7JKG] (detailing Elizabeth Warren's antitrust bill that will go beyond regulating current and past deals between companies but will cover everything from the way these firms treat their competitors to how they set the prices of their products).

54. Treaty Establishing the European Community, *supra* note 39, art. 81(1).

55. Cooper et al., *supra* note 27, at 298; *see also* Vincent Verouden, *Vertical Agreements and Article 81(1) EC: The Evolving Role of Economic Analysis*, 71 ANTITRUST L.J. 525, 573 (2003) (describing in more detail the burden shifting arrangement required in the EU).

56. "EU caselaw suggests that it is enough for the Commission to show that the agreement in question restricted the 'economic freedom' of either a party to the agreement or a third party, without regard to a likely effect on prices, output, or consumer welfare generally." Cooper et al., *supra* note 27, at 298. Furthermore, certain decisions "appear[] to have returned the European 'rule of reason' to its original role, focusing on the impact of the restrictions on the producer's distribution system, rather than on the wider market context."

Court of First Instance (the Commission's appellate court) has been explicit: Article 81 requires review "of the actual conditions in which" the vertical arrangement operates, but this review "does not mean that it is necessary to weigh the pro and anticompetitive effects" in the same way the US analyzes under rule of reason.[57] Additionally, the Court noted that "in various judgments [we] have been at pains to indicate that the existence of a rule of reason" is "doubtful" under EU law.[58] The Court outlined the "economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned" as the "actual conditions."[59]

The EU has promulgated a Block Exemption Regulation (BER) that exempts non-dominant firms from Article 81(3) review and applies "economic rather than formalistic analysis" for antitrust regulatory review and "recognizes many of the efficiency-enhancing reasons for vertical restraints."[60] The BER recommends that a firm with forty percent market share, which forecloses thirty-six percent of the downstream market with exclusive dealing requirements, would not qualify for an exemption under the BER.[61] The BER also forecloses specific categories of distribution restrictions that are equivalent to the United States' per se illegality.[62]

Verouden, *supra* note 55, at 562.

57. Case T-112/99, Metropole Television (M6) & Co. v. Comm'n, 2001 E.C.R. II-2459, ¶¶ 76–77.

58. *Id*. ¶ 72.

59. *Id*. ¶ 76. "[T]he CFI held that pro-competitive aspects of an agreement are weighed only in the Art. 81(3) inquiry. If the Commission's burden to show a restriction on competition under Art. 81(1) does not require proof of a likely anticompetitive effect, then the burden in an Art. 81 case effectively rests on the defendant to show an agreement deserves exemption under Art. 81(3)." Cooper et al., *supra* note 27, at 299 n.44 (internal citations and quotation marks omitted).

60. Cooper et al., *supra* note 27, at 299; Commission Notice Guidelines on Vertical Restraints, 2000 O.J. (C 291) 01, ¶ 115.

61. Commission Notice Guidelines on Vertical Restraints, 2000 O.J. (C 291) 01, ¶ 159. These same factors likely would not be sufficient to find a section 1 violation in the U.S. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 321 (1962); *see also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26–27 (1984) (evaluating a thirty percent market share and concluding it was an insufficient market share as judged against competitors in a tying case); K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995) (holding there must be "other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherent anticompetitive nature of defendant's behavior or the structure of the interbrand market").

62. Commission Regulation 2790/1999, art 4 (a)–(e), 1999 O.J. (L 336) 21; *see also* Cooper et al., *supra* note 27, at 299 (listing off "indirect minimum resale price maintenance, some territorial and customer restrictions, restrictions to sell only to end-users imposed on retailers in a selective distribution system, restrictions on cross supplies within a selective distribution system, and restrictions on component suppliers to sell the components they

Dominant firms—firms possessing a market share of fifty percent or greater—face an even harsher review in the EU.[63] "Dominant companies may not impose non-compete obligations or otherwise tie their buyers unless they can objectively justify such commercial practice within the context of Article 82."[64] Further, Article 82 "prohibits rebate programs that induce customers to increase the proportion of their purchases made from a dominant firm."[65] The Coca-Cola settlement exemplifies the harshness of the EU's review of dominant firm behavior.[66] Coca-Cola agreed to refrain from "enter[ing] into vertical relationships that would limit the ability of its downstream customers . . . to carry competing brands."[67] As Cooper opines, while "it is impossible to know what evidence the Commission had regarding the effects of Coca-Cola's agreements on consumer welfare, the Commission's press release strongly suggested that the competition issue involved was consumer ability to choose from competing brands rather than supracompetitive pricing of Coca-Cola's offerings."[68] Thus, Brandeisian economics proposals would have American antitrust enforcement similarly mirror the EU.

II. VERTICAL MERGER ECONOMIC THEORY

To recap, vertical merger economic theory has transformed over the decades because of its complexity and the lack of a "one-size

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produce to independent repairers or service providers").

63. *See* Case C-62/86, AKZO Chemie BV v. Comm'n, 1991 E.C.R. I-3359, ¶ 60 (July 3, 1991); Cooper et al., *supra* note 27, at 300.

64. EUROPEAN COMMISSION, COMPETITION POLICY IN EUROPE: THE COMPETITION RULES FOR SUPPLY AND DISTRIBUTION AGREEMENTS 20 (2002).

65. Cooper et al., *supra* note 27, at 300 (citing Case T-219/99, British Airways PLC v. Comm'n, 2003 E.C.J. CELEX LEXIS 659 (Dec. 17, 2003); Case T-203/01, Manufacture française des pneumatiques Michelin v. Comm'n, 2003 E.C.R. II-4071).

66. European Commission Press Release IP/04/1247, Commission Close to Settle Antitrust Probe into Coca-Cola Practices in Europe (Oct. 19, 2004), https://ec.europa.eu/commission/presscorner/detail/en/IP_04_1247 [https://perma.cc/4KHV-BURJ].

67. Cooper et al., *supra* note 27, at 301. The agreement went on to specify that Coca-Cola would "no longer (1) require its customers to sell exclusively Coca-Cola products; (2) provide rebates 'that reward its customers purely for purchasing the same amount or more of Coca-Cola's products than in the past'; and (3) tie the purchase of 'less popular products' to purchasing Coca-Cola's 'best-selling brands.'" *Id.* (citing European Commission Press Release IP/04/1247, *supra* note 66).

68. Cooper et al., *supra* note 27, at 301; *cf.* Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300 (5th Cir. 1984) (finding no anticompetitive problems with a tying arrangement similar to the one in the EU's Coca-Cola case).

fits all" analysis common in horizontal merger theory.[69] Accordingly, "vertical merger analysis arises from the general tendency [to assume that] . . . vertical integration . . . enhance[s] output and reduces prices."[70] This economic outlook was not always the case and economists theorized, pre-Chicago School, that vertical mergers were anticompetitive because the merged firms would "reduce

69. *Compare* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/MPH4-XPRN], *with* U.S. DEP'T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES (1997), https://www.justice.gov/atr/page/file/1175141/download [https://perma.cc/24LW-RM43]. *See generally* Steven C. Salop, Revising the Vertical Merger Guidelines: Presentation at the Fed. Trade Comm'n Hearings on Competition & Consumer Protection in the 21st Century (Nov. 1, 2018), https://scholarship.law.georgetown.edu/facpub/2108/ [https://perma.cc/S3YU-DE6T]; Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018); Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENF'T 1 (2015); FED. TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES: THE SECOND FTC SURVEY (2007), https://www.ftc.gov/sites/ default/files/documents/reports/consumer-fraud-united-states-second-federal-trade-commission-survey-staff-report-federal-trade/fraud.pdf [https://perma.cc/ZL9H-EHE3]. The DOJ and FTC recently released proposed Vertical Merger Guidelines for notice and comment rulemaking procedures. *See* Press Release, Dep't of Justice & Fed. Trade Comm'n, FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment (Jan. 10, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment [https://perma.cc/TTL9-65CQ]. I do not comment on these new guidelines here but there has already been thoughtful commentary and review of the proposed guidelines by several leading antitrust academics. *See generally* Tad Lipsky, Joshua D. Wright, Douglas H. Ginsburg & John M. Yun, *DOJ/FTC Draft 2020 Vertical Merger Guidelines Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University* (Geo. Mason L. & Econ. Research Paper No. 20-03, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534352 [https://perma.cc/TR7Y-PN3U]; Joshua Wright, Doug Ginsburg, Tad Lipsky & John Yun, *Connecting Vertical Merger Guidelines to Sound Economics*, TRUTH ON THE MARKET (Feb. 6, 2020), https://truthonthemarket.com/2020/02/06/wright-vmg-symposium/ [https://perma.cc/DU3V-6MQ4]; Jan Rybnicek, *The Draft Vertical Merger Guidelines Do More Harm Than Good*, TRUTH ON THE MARKET (Feb. 7, 2020), https://truthonthemarket.com/2020/02/07/rybnicek-vmg-symposium/ [https://perma.cc/DJF4-92NH]; Wright et al., *Connecting Vertical Merger Guidelines to Sound Economics*, TRUTH ON THE MARKET (Feb. 6, 2020), https://truthonthemarket.com/2020/02/06/wright-vmg-symposium/ [https://perma.cc/DU3V-6M Q4].

70. Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, 22 ANTITRUST 74, 75 (2007); *see also id.* (citing Michael A. Salinger, Fed. Trade Comm'n, Is It Live or Is It Memorex? Models of Vertical Mergers and Antitrust Enforcement, Speech at Ass'n of Competition Economics Seminar on Non-Horizontal Mergers (Sept. 7–8, 2005), https://www.ftc.gov/sites/default/files/documents/public_statements/it-live-or-it-memorex-models-vertical-mergers-and-antitrust-enforcement/050927isitlive.pdf [https://perma.cc/4UZR-ZAZP]) (detailing that the "fundamental difference between horizontal and vertical relationships [are] two horizontal competitors have a mutual incentive to restrict their joint output, while two vertically related companies generally have a mutual incentive to expand their joint output."); MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE 107 (1991) ("[R]ational economic actors working within the confines of the market seek to maximize profits by combining inputs in the most efficient manner. A failure to act in this fashion will be punished by the competitive forces of the market."); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7–8 (1978) (enunciating this theory most clearly for the first time).

sales of the input to non-integrated downstream firms, effectively increasing concentration in the 'open market' for the input and increasing prices for the input"—essentially anticompetitive conduct.[71] Further, this theory believed the vertical merger would harm "non-integrated suppliers of the input [and they] would lose access to a downstream customer, placing such suppliers at a competitive disadvantage that [would] ultimately lead[ ] to their exit [from the marketplace], further increasing input prices."[72] Chicago-school economists demonstrated these two hypotheses were incorrect because a merged firm will not discontinue selling to, or buying from, non-integrated firms unless there was a more beneficial and efficient reason to do so.[73] The practical reality is exhibited when,

> assuming that the markets are competitive, any attempts to increase prices would be offset by output expansions: if the integrated firm sought unilaterally to restrict output, then the non-integrated firms would profit by expanding output; if non-integrated firms sought to restrict output, then the vertically integrated firm would profit by expanding output.[74]

Advocates of Brandeisian economic theory point to two flaws in the Chicago theory: a narrowing of barriers to entry, and the shift from structuralism to consumer prices.[75]

71. Yde, *supra* note 70, at 75; *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 328–34 (1962) (enjoining a vertical merger between a supplier and retailer that would "foreclose competition"). *See generally* JOE S. BAIN, INDUSTRIAL ORGANIZATION (2d ed. 1968); CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959).

72. Yde, *supra* note 70, at 75; *see also* Khan, *supra* note 2, at 718 ("(1) [M]onopolistic and oligopolistic market structures enable dominant actors to coordinate with greater ease and subtlety, facilitating conduct like price-fixing, market division, and tacit collusion; (2) monopolistic and oligopolistic firms can use their existing dominance to block new entrants; and (3) monopolistic and oligopolistic firms have greater bargaining power against consumers, suppliers, and workers, which enables them to hike prices and degrade service and quality while maintaining profits.").

73. ROGER D. BLAIR & DAVID L. KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 147–51 (1983).

74. Yde, *supra* note 70, at 75 (citing David Reiffen & Michael Vita, *Comment: Is There New Thinking on Vertical Mergers?*, 63 ANTITRUST L.J. 917, 918 (1995)).

75. Khan, *supra* note 2, at 717–31; *cf.* BORK, *supra* note 70, at 7 ("[T]he only legitimate goal of antitrust is the maximation of consumer welfare."); *id.* at 110 (explaining that "[t]hose who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers as a collectivity, does not take this income effect into account").

However, these two arguments are misplaced and there are simple economic reasons why these arguments do not counter the consumer welfare standard advanced by Chicago-school economists. When analyzing an upstream firm (a manufacturer) and a downstream firm (a retailer) when these firms are not integrated, "each will add a mark-up that does not account for the impact on the profits of the other firm."[76] Simply put, by integrating these firms vertically, this markup is eliminated and therefore the consumer realizes the benefits—thus consumer welfare is enhanced downstream because markups at each stage of production are eliminated.[77] As Yde notes, "economists generally agree that, where the upstream and downstream markets are either both competitive or both monopolized prior to the merger, vertical merger will benefit consumers."[78] However, despite this rather simple explanation as to why vertical integration does not pose a problem to consumers, "'Post-Chicago' literature on vertical integration has sought to identify conditions under which a vertical merger might be anticompetitive."[79] What is important to the analysis here is that Brandeisian economics maps on to EU antitrust regulatory review of vertical merger theory, and, thus a comparative analysis of both jurisdictions analyzing the same behavior exposes the problems inherent in Brandeisian economics.

Before I compare and contrast the US and EU's review of the same activity, there are several other economic reasons why Brandeisian economics is not a solution mainly because there "is [an] absence of a coherent and robust theory of harm to competition (as the law requires) as distinguished from harm to competitors."[80] Additionally, "'customer complaints' must be assessed far differently in vertical transactions from how they are evaluated in horizontal transactions. In the former, customers are also competitors

76. Yde, *supra* note 70, at 75.

77. *Id*.

78. *Id*. (citing BLAIR & KASERMAN, *supra* note 73; James C. Cooper, Luke M. Froeb, Daniel O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005)).

79. *Id.* (citing Salinger, *supra* note 70; Michael W. Klass & Michael A. Salinger, *Do New Theories of Vertical Foreclosure Provide Sound Guidance for Consent Agreements in Vertical Merger Cases*, 40 ANTITRUST BULL. 667 (1995); *see also* John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 CORNELL L. REV. 1140 (1981); Herbert Hovenkamp, *Antitrust's Protected Class*, 88 MICH. L. REV. 1 (1989); Robert H. Lande, *A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORD. L. REV. 2349 (2013).

80. Yde, *supra* note 70, at 75.

of the integrated entity. Efficient vertical mergers that benefit consumers also 'harm' rivals."[81] There are three main reasons why this is the case. "First, these [economic] models lack generality—they do not predict *likely effects*; at most they describe *possible effects*, even under the most strictly devised theoretical conditions."[82] "Second these economic models typically ignore procompetitive rationales for vertical mergers—rationales that have much greater empirical support than the alleged anticompetitive rationales."[83] "Third, even assuming that these models describe an empirically relevant class of vertical mergers, their practical utility remains severely limited."[84] What is most problematic with the Brandeisian antitrust reforms is the potential for an over-prosecution of false positives and an under-prosecution of false negatives that leaves consumers worse off and will chill innovation in the marketplace.[85]

III. COMPARING US AND EU ANTITRUST REVIEW AND A PROPOSAL TO STRENGTHEN OVERSIGHT THROUGH STRONGER VERTICAL MERGER CONSENT DECREES

As Cooper observes, "[l]egal action brought by Virgin against British Airways . . . on both sides of the Atlantic for its use of promotional incentives to travel agents . . . highlights the different approaches to vertical restraints found in US and EU competition law."[86] British Airways provided an incentive program where it offered travel agents higher commissions on all sales if they beat last year's sales.[87] The European Union found this to be an abuse of dominance in violation of Article 82 even without any "evidence of harm to market-wide competition as defined by US courts."[88] The Court of First Instance found "the incentives 'restricted the freedom' of travel agents from 'supplying their services to the airline

81. *Id*. at 75 & 82 n.14.

82. *Id*. at 75.

83. *Id*. at 76.

84. *Id*.

85. *See* Cooper et al., *supra* note 27, at 303–07 (detailing the economic problems associated with false positives and false negatives when comparing the US and EU enforcement regimes); *see also* Steven C. Salop, *Analyzing Vertical Mergers to Avoid False Negatives: Three Recent Case Studies*, 33 ANTITRUST 27 (2019).

86. Cooper et al., *supra* note 27, at 302.

87. *Id*.

88. *Id*.

of their choice,' and restricted 'the access of those airlines to the United Kingdom market for air travel agency services.'"[89]

By contrast, the Second Circuit Court of Appeals affirmed the Southern District of New York's finding that neither section 1 or 2 of the Sherman Act were violated.[90] The district court, granting summary judgment, found the incentive agreements were not shown to "have had an actual adverse effect on competition as a whole in the relevant market."[91] The Second Circuit furthered this point when it noted "even with monopoly power, a business entity is not guilty of predatory conduct through excluding its competitors from the market when it is simply exploiting competitive advantages legitimately available to it."[92] A further comparison is the Court of Justice of the European Union (CJEU) judgment against Intel, as compared to the FTC settlement, which suggests the EU may be softening its stance on per se illegality to a more nuanced rule of reason approach.[93] In Intel, the CJEU took a "nuanced approach to the allocation of the legal and evidential burdens . . . [and] when considering whether exclusivity arrangements are capable of restricting competition under Article 102, the Commission 'is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.'"[94]

However, unlike those advocating for Brandeisian economic theory, the Chicago School followers have presented a solution that is more practical and reasonable than upending decades of prece-

89. *Id.* (quoting Case T-219/99, British Airways PLC v. Comm'n, 2003 E.C.R. 0000, ¶ 292).

90. Virgin Atl. Airways Ltd. v. British Airways PLC, 69 F. Supp. 2d 571, 573 (S.D.N.Y. 1999), *aff'd*, Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256 (2d Cir. 2001).

91. *Virgin Atl.*, 69 F. Supp. 2d at 582.

92. *Virgin*, 257 F.3d at 266.

93. *Compare* Case C-413/14 P, Intel Corp. v. European Comm'n, 2017 EUR-Lex CELEX LEXIS 632, *with* Intel Corp., F.T.C No. 9341 (Oct. 29, 2010), https://www.ftc.gov/sites/default/files/documents/cases/101102inteldo.pdf [https://perma.cc/B7T5-AY5Z]. *See also FTC Settles Charges of Anticompetitive Conduct Against Intel*, FED. TRADE COMM'N (Aug. 4, 2010), https://www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel [https://perma.cc/9PLK-LLEZ].

94. Maurits Dolmans, Nicholas Levy, Ricardo Zimbrón, Christopher J. Cook, Francisco Enrique González-Díaz, Thomas Graf, François-Charles Laprévote, Robbert Snelders, Romano Subiotto, & Antoine Winckler, *Modernising Abuse of Dominance—The CJEU's Intel Judgment*, CLEARLY GOTTLIEB (Oct. 16, 2017) https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/2017/publications/alert-memos/modernising-abuse-of-dominance-the-cjeus-intel-judgment-10-17-17.pdf [https://perma.cc/24TM-CZ GE].

dent—strengthening the use of consent decrees as firms seek clearance of pre-merger review.[95] "Currently, DOJ consent decrees contain general language regarding potential modification by the court, and the Commission has the right to reopen and modify FTC orders."[96] As Salop notes, in reality "the court often will treat the provisions of a consent decree as contractual and limiting, and will not permit modification if those provisions fail to achieve some overarching goal of maintaining at least the same level of competition as existed before the merger or would occur absent the merger."[97] By improving merger enforcement policy through stronger consent decrees—especially for vertical mergers—"the merging firms likely would be incentivized to provide more efficient and effective remedies at the HSR stage, rather than bear the risk of less efficient remedies, disgorgement and other relief later."[98]

As Salop details, "[t]here are two general goals served by antitrust sanctions . . . . The ex-ante goal is to deter initial conduct that would lead to the need for ex post relief. If deterrence works perfectly, of course, there will be no need for the ex post remedy."[99] In applying the error-cost approach to strengthening consent decrees, Salop details his proposal takes account of these concerns specifically: "(1) to remedy ineffective consent decrees in order to preserve and restore competition; (2) to facilitate the adoption of more effective remedies during the HSR process; and (3) to deter anticompetitive mergers and the exercise of market power achieved from mergers."[100] Salop provides additional support in his review of three

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95. Steven C. Salop, *Modifying Merger Consent Decrees to Improve Merger Enforcement Policy*, 31 ANTITRUST 15 (2016).

96. *Id*. at 17 (citing United States v. United Shoe Machinery Co., 391 U.S. 244, 252 (1968)).

97. *Id*. at 17.

98. *Id*. at 15.

99. *Id*.; *see also* Wright, *supra* note 33, at 8 ("In order to construct a rule that maximizes consumer welfare it is necessary to employ a framework that considers three key factors. First, the framework must consider the probability that the challenged business arrangement is anticompetitive. Second, the framework must evaluate the magnitude of the social cost created by any errors in assessing antitrust liability because any legal rule inevitably will lead to some errors . . . . Third, the framework must acknowledge the administrative costs of implementing alternative legal rules."); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (detailing the error-cost approach).

100. Salop, *supra* note 95. *Id*. at 16; *see also* JOHN KWOKA, JR., MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015). Kwoka details that "[a]t the product level, the average outcome for all 119 observations on postmerger prices is an increase of 4.3 percent . . . . More than 60 percent of product price changes show increases, and those increases average nearly 9 percent . . . . Of all mergers that resulted in price increases, the agencies acted in only 38 percent of cases, suggesting substantial under-enforcement. Incorrectly cleared mergers on average resulted in price increases in excess of 10 percent." *Id*. at 156.

mergers where stronger ex ante consent decrees may have prevented a decline in consumer welfare post-merger.[101] By providing for stronger consent decree oversight because future litigation "may be more costly [and] could provide a further incentive to solve the problems before the merger. After the merger is consummated, the merged firm also may be deterred from exercising market power gained from the merger" because this exercise of power could lead to further relief through an enforced consent decree.[102]

CONCLUSION

Accordingly, by providing for stronger consent decrees that can be more easily adaptable to the industry and the individual marketplace, protections of consumers and competition can be better regulated. This would be a far more efficient for the marketplace and would lead to more consistent results than an across-the-board introduction of Brandeisian economic theory. The likelihood that Brandeisian economics would lead to significantly deleterious results to consumers and their expectations of the marketplace is extremely high by simply comparing the US and EU's current antitrust review. As we enter the third decade of the Twenty-First Century, antitrust regulation must continue to use the lessons of the past to apply to the future. Despite the populist outcry to break up vertically integrated firms such as Amazon, this action would not lead to the result Brandeisian economists are championing. It would decrease the consumer welfare and chill innovation.

101. Salop, *supra* note 85, at 27 (analyzing the mergers of Staples/Essendent, Fresen ius/NxStage, and Jeld-Wen/Craftmaster Manufacturing); *see also* Salop, *supra* note 95, at 16 ("The goal of preserving competition is often considered to mean that a remedy (say, a divestiture) should be limited to just enough to prevent harms from the merger, not to strictly benefit consumers, relative to the absence of the merger. With this limited goal, consumers would be expected on average to obtain zero net benefits from settled mergers.").

102. Salop, *supra* note 95, at 16.