



# The Times - Picayune

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## I. INTRODUCTION

New Orleans is famous for Mardi Gras, Creole cuisine, Dixieland Jazz, and, of course, *Times-Picayune*.<sup>2</sup> That is a 1953 Supreme Court decision involving the only morning newspaper in the city at the time. It has gained recent fame in the debate over the proper antitrust analysis of two-sided platforms leading up to the *American Express* decision. *Times-Picayune* was featured in the dissent and the majority opinion distinguished it briefly.<sup>3</sup>

The dissent said the Court had already decided the central market definition issue before it — the other way. *Times-Picayune* concluded, it argued, that antitrust analysis of two-sided platforms, like newspapers, should focus narrowly on the service provided by the side of the platform subject to the challenged conduct.<sup>4</sup> The relevant antitrust market pertained to that side, and not the platform overall. There was no need to consider the other side. The majority decision distinguished *Times-Picayune* on the grounds that it was appropriate to analyze newspaper advertising as single-sided because the indirect network effects that connect the groups served by platforms were minor, given that readers did not care about advertising.

This article takes a closer look at the journey of *Times-Picayune* from a complaint filed by the U.S. Department of Justice, to the District Court, and then to the Supreme Court. The majority decision in *Times-Picayune*, and the lower court decision the Court relied on in part, don't provide much support for the notion that an antitrust analysis under the rule-of-reason should consider just one side of a two-sided platform. Even in the case of newspapers.

*Times-Picayune* is a useful case study of platform competition. The Government's complaint described a plausible strategy for destroying a platform competitor which could be relevant to other cases involving ad-supported platforms. The case provides insights for determining conditions when that strategy could work, and when it is implausible. This old newspaper case remains relevant for the antitrust analysis of other ad-supported media including digital platforms.

<sup>2</sup> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

<sup>3</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286, 2295 (2018).

<sup>4</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2295 (2018) (Breyer dissenting opinion). The Justice Department and various *amici* in support upholding the District Court decision, based on a merchant-specific market, also cited *Times-Picayune* prominently as having already decided the issue. See "Brief for the United States in Opposition" *State of Ohio, et. al., v. American Express Company, et. al.* (2017) No. 16-1454 (SCOTUS) at pp. 11, 13; "Brief of 28 Professors of Antitrust Law as Amici Curiae Supporting Petitioners" *State of Ohio, et. al., v. American Express Company, et. al.* (2017) No. 16-1454 (SCOTUS) at p. 22; "Brief for Amici Curiae John M. Connor, Martin Gaynor, Daniel McFadden, Roger Noll, Jeffrey M. Perloff, Joseph A. Stiglitz, Lawrence J. White, and Ralph A. Winter in Support of Petitioners" *State of Ohio, et. al., v. American Express Company, et. al.* (2017) No. 16-1454 (SCOTUS) at p. 3.

## II. THE GOVERNMENT’S CASE AGAINST THE PUBLISHER OF THE TIMES-PICAYUNE

The U.S. Department of Justice filed a complaint against the Times-Picayune Publishing Company (“Company”) on June 14, 1950.<sup>5</sup> At that time, the Company published the Times-Picayune, the only morning newspaper in New Orleans, the New Orleans States (“States”), an evening newspaper which the Company had purchased in 1933, and a Sunday newspaper (“Times-Picayune & States”). The other significant newspaper in New Orleans, the Item, had evening and Sunday editions. These newspapers earned money from paid circulation and advertising. There were three categories of advertising: local display, general national, and classified.

The Government claimed that the Company engaged in an unlawful tie by offering advertising only as a unit at combined rates in both morning and evening newspapers. The “unit rule,” as it was called, applied to classified and general advertising but not to local display advertising.

The Government also alleged that the Company “[u]sed the dominant advantage . . . of the Times-Picayune to injure and destroy competition” for its evening and Sunday newspapers by (a) engaging in the tie; (b) using profits from the morning paper to subsidize arbitrarily low rates for advertising in the evening paper; and (c) “increasing the number of pages in the evening paper without a corresponding increase in revenue for the purpose of inducing and forcing circulation and advertising from the Item to the States.”<sup>6</sup> (There were also a few other claims that are peripheral to the main story and were rejected by the District Court).

These practices, according to the Justice Department, restrained competition in the “dissemination of news and advertising” and were an attempt “[t]o monopolize . . . the dissemination of news and advertising.”<sup>7</sup> Indeed, the Justice Department had described a strategy for ruining competing ad-supported media platforms that could be plausible with the right set of facts.

## III. TWO-SIDED PLATFORMS AND AD-SUPPORTED MEDIA

Two-sided platforms serve two distinct groups of customers who could benefit from interaction. The platform helps them get together through a common meeting place and facilitates interactions between members of the two groups in a way that creates value for the parties to this interaction. Members on one side can typically expect more value when they can interact with more relevant members on the other side; these are what economists call positive indirect network effects.<sup>8</sup>

Platforms set prices recognizing that there is a feedback loop connecting the two sides. That results in their balancing prices between the two sides in a way that ensures that they have enough participants on each side to create value for those on the other side. Commonly, platforms set prices below cost on one side, because they can charge the other side more to get access to those on the subsidized side.

Platforms require a critical mass of customers on both sides to offer a valuable proposition to either side. A ride-sharing platform with few passengers would have trouble attracting drivers, since they would get few pickups, and a platform with few drivers would have trouble attracting passengers, since they would have trouble getting rides. Platforms that can’t reach critical mass therefore fail. There’s a heap of defunct platform startups for that reason. Platforms that lose enough participants to fall below critical mass fail as well. The dead and dying malls across America are visible demonstrations.

Economists have considered ad-supported media businesses two-sided since the start of the economic literature on platform businesses.<sup>9</sup> An ad-supported media business serves both advertisers and readers. There’s a twist compared to other platforms, though. Advertisers appreciate having access to more readers, but readers may not appreciate being exposed to more advertising. In this case, there are posi-

<sup>5</sup> *United States of America v. The Times-Picayune Publishing Company, et al.*, Complaint, No. 2797 (Eastern District of Louisiana, June 14, 1950).

<sup>6</sup> *Id.* at pp. 8-9.

<sup>7</sup> *Id.* at p. 6.

<sup>8</sup> Evans, David S. & Richard Schmalensee (2008), “Markets with Two-Sided Platforms,” *Issues in Competition Law and Policy*, Vol. 1, American Bar Association.

<sup>9</sup> Rochet, Jean-Charles & Jean Tirole (2003), “Platform Competition in Two-Sided Markets,” *Journal of the European Economic Association* 1(4), pp. 990-1029 at p. 990; Anderson, Simon & Jean Gabszewicz (2006), “The Media and Advertising: A Tale of Two-Sided Markets,” in *Handbook of the Economics of Art and Culture*, V. Ginsburgh & D. Throsby, eds., (Elsevier).

tive indirect network effects on one side but not on the other. It turns out, though, that having positive indirect network effects on one side is enough for the economic theories of two-sided platforms to apply, even if the other side has negative indirect network effects.

Indirect network effects aren't the whole story, though.<sup>10</sup> Even if consumers don't like ads, they do like content. And they can't get content, or as much of it, if the media business can't sell advertising, which funds production of that content and is the *raison d'être* for this content. Unfortunately, while they might like to get the content at subsidized prices, without the advertising, they are unlikely to find a willing media business for this proposition. These ad-supported media businesses are also known as attention platforms since they are in the business of trading consumer mindshare.

The basic business model for attention platforms has some similarities to the credit card networks considered in *American Express*. Ad-supported media provide readers with content to get them to come to the platform. They generally charge readers prices that don't nearly cover the cost of producing and distributing content. The content is the reward for coming to the platform and being exposed to advertising. The "content reward" plays a much more important role than "reward points" for payment cards, but they both result in a payment to one side to use the platform. Ad-supported media then sell advertisers access to those readers through ads that are interspersed throughout the content. The details of this vary by medium, but the principles are common.

For ad-supported media and for credit-card networks there are separate prices to two distinct groups of customers; those prices are interdependent and effectively negative to one side, and the businesses must compete for both types of customers. Of course, there are differences as well, most notably that readers may not like being connected to advertisers, unlike cardholders who do value being connected to merchants.

So long as there are sufficient entry barriers the Justice Department described a clever and coherent strategy for destroying a competitor and monopolizing a market in its *Times-Picayune* complaint. The morning-evening advertising tie could have deprived the Item from earning enough advertising revenue to fund its content, and with less content it would attract less circulation, which in turn would make it even less attractive to advertisers. Meanwhile, the low advertising prices and an unprofitable expansion of content on the part of the States could have forced the Item to lose advertisers and readers and incur unsustainable losses. The combination of these strategies could have pushed the Item below critical mass and send it into a death spiral.<sup>11</sup>

The Company would have demolished its evening and Sunday competitor. Then it could have exercised anticompetitive market power by raising advertising prices, cutting content, or raising circulation prices. It could also have killed off a potential competitor for its morning newspaper. Since the reader and advertiser sides of the platform are intimately intertwined its strategies would have harmed both customer groups. Of course, the facts would have to support these claims.

## IV. THE DISTRICT COURT DECISION ON PREDATION AND TYING

The U.S. District Court for the Eastern District of Louisiana issued a decision on May 27, 1952.

### ***A. Market Definition, Dominance, and Separate Products***

The District Court concluded that the three newspapers at issue "are the only significant media of news, advertising and other information disseminated regularly for residents of New Orleans through publication and circulation of newspapers." The Company claimed that its morning, evening, and Sunday newspapers were editions of a single newspaper. The judge rejected this on the ground that the papers had different appearances and content. As we will see, that finding was key.

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<sup>10</sup> See Evans, David S. (2019), "Attention Platforms, the Value of Content, and Public Policy," *Review of Industrial Organization* (Feb. 2019).

<sup>11</sup> See Whinston, Michael D. (1990), "Tying, Foreclosure and Exclusion," *The American Economic Review* 80(4), pp. 837-859 for the classic discussion of using tying to foreclose competition by preventing traditional scale economies. The two-sided strategy is similar but exploits demand-side scale economies resulting from indirect network effects. In both cases, since the tie imposes a cost on buyers, the strategy is profitable only if it eliminates the competitor. It is not possible to address that issue for a two-sided platform without considering both sides and the interdependencies.



The trial judge found that the Times-Picayune, the morning paper, was the dominant newspaper. “For at least twenty years,” according to the court, “the Times-Picayune has been the largest newspaper in New Orleans in circulation, advertising lineage, and number of pages published.” The Company’s manager of general advertising had claimed, the judge noted, that the Times-Picayune is “the back-bone of any advertising effort” in New Orleans. “Enjoying as it does a monopoly position in the morning field, and an enormous advantage in circulation, advertising lineage, and number of printed pages,” the judge continued, “newspaper advertisers who desire to cover the New Orleans market must, of necessity, use the Times-Picayune as a medium for the advertising.” In effect, the trial court found that there was a separate market for morning newspapers since neither readers nor advertisers had substitutes.

The District Court’s description of the business is silent on whether readers have any interest in seeing advertising.

### ***B. The Unit Rule and Tying***

The District Court examined the advertising contracts for classified and national advertising that had the unit rule. Put in terms of the modern language for analyzing tying, the judge found that the tying product was in a dominant position, that the defendant forced customers to take the tied product, and that the unit applied to a substantial portion of the market. He concluded that,

The Times-Picayune, because of its monopoly position, has been able to force buyers of advertising space to purchase what they do not want, space in the States, in order to purchase what they require, space in the Times-Picayune. The very fact that the defendant corporation was able successfully to impose the unit rate on general and classified advertising tends to prove the monopoly position which the Times-Picayune enjoys. . .<sup>12</sup>

In addition to finding an unlawful tie, the trial judge found that the purpose of the unit rule, which was found to violate Section 1 of the Sherman Act, was to harm the Company’s only evening rival.

[I]s apparent from the record that it was also the intention of the [Company] to restrain general and classified advertisers from making untrammelled choice between the afternoon newspapers in purchasing advertising space, and also to substantially diminish the competitive vigor of the Item, the States’ only competitor in the afternoon field.<sup>13</sup>

The same findings showed that the unit rule also violated Section 2 of the Act. The District Court found that the Company used the unit rule to attempt to monopolize “that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space.”

The District Court was silent as to the impact of the unit rule on the dissemination of news and did not conclude that it had prevented the Item from operating a viable newspaper.

### ***C. Tying, Predatory Pricing, and Content Expansion Under Section 2***

As the District Court judge put it, “Considerable evidence was offered by the Government to establish that the defendants maintained a rate structure which, considered as a whole, resulted in the operation of the evening States at a loss.” The Company’s books showed that the States was operating at a profit, but the Government claimed that was the result of questionable allocations.

The judge found, however, “nothing in the evidence which would indicate, much less establish, that the States at any time was operated at a loss.” He was persuaded by testimony from the Company’s auditor that more careful allocations would not reveal that the States was operating at a loss.

The Justice Department and the District Court agreed on one thing though.

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<sup>12</sup> *United States v. the Times-Picayune Pub. Co.*, 105 F. Supp. 670, 678 (E.D. La. 1952).

<sup>13</sup> *United States v. the Times-Picayune Pub. Co.*, 105 F. Supp. 670, 678 (E.D. La. 1952).

The relevant question was whether the States, which derived income from circulation and advertising, was operating at a loss. They both considered the platform as a whole. The Justice Department did not argue that the advertising rates were below cost for serving an advertising market. Rather, it argued that the combination of expenditures on content, which attracts readers, and advertising and circulation prices resulted in the States operating at loss. And the Item couldn't compete with that. Only a platform level analysis, that considered prices and costs overall, could address that monopolization claim.

Thus, the Government ended up victorious only on the claim that the unit rule was an unlawful tie that restricted competition for afternoon advertising. It was defeated on the claim that the States was operated at a loss to destroy competition.

## V. THE SUPREME COURT DECISION ON THE UNIT RULE

The Times-Picayune Publishing Company appealed the decision that the advertising contracts with the unit rule violated Sections 1 and 2 of the Sherman Act. The Court, in a 5-4 decision issued on May 25, 1953, found that they did not.

### A. *The Newspaper Business*

The Court situated the case in the newspaper business in the mid-20<sup>th</sup> century. “The daily newspaper, though essential to the effective functioning of our political system, has in recent years suffered drastic economic decline.” It noted that the number of daily newspapers in 1951 was the lowest it had been since the turn of the 20<sup>th</sup> century. In fact, daily newspaper competition “has grown nearly extinct.”<sup>14</sup>

The Court recognized that “[a]dvertising is the economic mainstay of the newspaper business.” After reporting that “more than two-thirds of a newspaper’s total revenues flow from the sale of advertising space” it noted that, [o]bviously, newspapers must sell advertising to survive.” Competition from other mass media — radio, television, and magazines — had reduced newspapers’ share of total national advertising expenditures from 79 percent in 1929 to 35 percent in 1951.

### B. *The Tying Claim*

Tying is a *per se* violation of Section 1 of the Sherman Act, according to the Court, when the seller has a monopoly position in the market for the tying product and when it forecloses competitors from “any substantial market.”<sup>15</sup> In evaluating the *per se* claim the Court concluded that the key issue was whether the Times-Picayune occupied a dominant market position because it was the sole morning daily in New Orleans.

The Court described the two-sided features of the newspaper business. It noted that “every newspaper is a dual trader in separate though interdependent markets; it sells the paper’s news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space.”<sup>16</sup> It said that the case only concerned the advertising market which was the subject of the tie and that “dominance in the advertising market” was decisive in determining the legality of the unit rule.<sup>17</sup>

The Court stated it didn’t think that the Times-Picayune was dominant in the advertising market. It noted that the morning paper’s share of “both general and classified linage over the years hovered around 40%”.<sup>18</sup> That conclusion assumed, however, that the relevant market consisted of general and classified advertising in all three papers.

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14 *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 602-603 (1953).

15 *International Salt Co., Inc. v. United States*, 332 U.S. 392, 396 (1947). Of course, the antitrust law on tying has evolved considerably since then including the seminal decision in another case situated in New Orleans. See *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984).

16 *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610 (1953).

17 *Id.*

18 *Id.* at 612.

Critical for that assumption, the Court rejected the trial judge's finding that these newspapers were separate products from the standpoint of the advertiser.<sup>19</sup> According to the Court, just because readers may distinguish between the papers, doesn't necessarily mean that advertisers do.<sup>20</sup>

But that readers consciously distinguished between two publications does not necessarily imply that advertisers bought separate and distinct products when insertions were placed in the Times-Picayune and States. So to conclude here would involve speculation that advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning and evening readers in New Orleans.

That finding didn't just support the finding of lack of dominance. It defeated the tying claim since, from the standpoint of the advertiser, there was a single product and not two.

Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the markets the same. . . . In short, neither the rationale nor the doctrines evolved by the 'tying' cases can dispose of the Publishing Company's arrangements challenged here.<sup>21</sup>

There was no *per se* violation of Section 1, based on unlawful tying, because there was no separate tied product and there was no dominance once the two alleged tying and tied products were considered together.

### ***C. The Unreasonable Restraint of Trade Claim***

The Court then turned to whether the unit rule was an unreasonable restraint of trade under Section 1. It articulated the rule-of-reason analysis as requiring it to determine the amount of business controlled, the strength of the remaining competition, and "whether the action springs from business requirements or purpose to monopolize". It then eviscerated the District Court's finding that the unit rules were unreasonable restraints of trade.

Earlier the majority decision had reported that local display advertising accounted for 44 percent of total revenue (including circulation), classified 13 percent, and general display 14 percent. The District Court had rejected bundling claims related to local display, leaving only 27 percent for the Court to deal with.

The Court noted that the unit rule for classified ads was adopted in 1935 to compete with the Item. At that time the Item operated a morning and evening newspaper which together carried more classified ads than the Company's. The Item suspended its morning newspaper in 1940. It was also common practice among newspapers with morning and evening editions.

Over the next decade, the Item's share of classified advertising lineage declined by three percentage points overall (from 23 percent to 20 percent) and by five percentage points considering only the evening papers (from 37 percent to 32 percent). The unit rule was instituted for general advertising in 1950, by which time it was common in the industry. The Court found that there was no material change in 1951, the only later year for which there was data. It concluded that, taking the effects of classified and general together, the Item's revenue had declined by less than one percent.

Had this effect been larger, the unit rule could have harmed newspaper competition and, with it, the dissemination of news and advertising. However, as an exclamation mark on this analysis, the Court noted that, "The Item, the alleged victim of the Times-Picayune Company's

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<sup>19</sup> The Court noted that newspaper advertising might compete with other forms of advertising but lacked evidence on this. *Id.* at 611-612.

<sup>20</sup> There doesn't appear to have been any evidence on the extent to which morning and evening readers were substitutes for classified and general advertisers. The morning and evening papers could have tried to differentiate themselves to attract readers with different characteristics that were relevant to advertisers. For example, the morning paper could have skewed towards women and the evening paper towards men

<sup>21</sup> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953).

challenged trade practices appeared, in short to be doing well.”<sup>22</sup> It flourished in the decade before the trial in terms of expanding advertising, reaching record circulation, and in recent years had made a profit. The Court concluded there was no violation of Section 1.

The Court then turned to the Section 2 attempted monopolization claim. It noted that most of the attempted monopolization case had failed in the District Court, including the claim that “the Company deliberately operated the evening States at a financial loss to the detriment of the competing Item.” Only the unit rates remained and, since the Court found that they advanced legitimate business aims, the Court rejected the Section 2 claim as well.

The Court never considered the Government’s original claims that the Company had tried to monopolize dissemination of news, or newspapers overall, since they didn’t survive the District Court decision. Readers didn’t come up except whether they were the source of monopoly power for the morning newspaper over advertisers. And the record is silent on whether readers care about advertising, and therefore whether there’s a feedback from advertisers to readers.<sup>23</sup>

## **VI. *TIMES-PICAYUNE AND AMERICAN EXPRESS***

By the time *Times-Picayune* made it to the Supreme Court it was mainly about whether certain advertising contracts were *per se* violations of Section 1. Consumers of news weren’t the subject of the dispute. Caution signs thus abound for those seeking to place the weight of all subsequent rule-of-reason analysis for two-sided platform cases, or for ad-supported media, on this foundation.

However, upon a close read, there isn’t actually much tension between *American Express* and *Times-Picayune*. To see why, we need to replay the movie, despite having seen its ending.

### **A. *Times-Picayune and the Rule-of-Reason***

Throughout the case, the courts, and the parties themselves, recognized that the newspaper business was about readers and advertisers. One couldn’t be in the newspaper business without providing readers for advertisers, and without securing advertising which was essential for funding the paper. Those business realities, properly, colored everything.

The Government claimed that the Company had engaged in a series of practices, beginning with the purchase of the States in 1933, to establish monopoly control over the daily newspaper business, and the dissemination of news and advertising, in New Orleans. The alleged competitive harm wasn’t limited to an advertising market. It was about destroying a competing two-sided platform and thus necessarily harming competition for both readers and advertisers.

The Government’s predation case was premised on the newspapers providing a joint product for readers and advertisers. It didn’t posit that the Company had lowered advertising prices to monopolize an advertising market. It claimed that the Company was operating the States at a financial loss to drive a competing platform out of business. That harmed newspaper competition and, with it, competition for the dissemination of news and advertising.

The Government, and the trial judge, examined the financials of the newspaper as a whole. That is essentially the two-sided analysis required by *American Express*. It aggregates the revenues received from both sides and costs incurred on both sides to determine whether the challenged conduct restrained competition at the platform level. If the Government could have shown that the States was operating at a financial loss overall, it would have had support for its claim that the Company was monopolizing the dissemination of news and advertising. The trial judge was firm that there no evidence to support these predation claims.

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<sup>22</sup> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 621 (1953).

<sup>23</sup> The Item was sold to the Times-Picayune Publishing Company five years after the Supreme Court’s decision. It lived on another two decades as the Daily States-Item. The afternoon paper was closed in 1980. The Times-Picayune briefly stopped daily publication in October 2012 making New Orleans one of the few major cities without a daily newspaper. It resumed the next year and folded into a regional newspaper group in 2015.



There was another opportunity for the trial judge to consider competitive harm to the dissemination of news. He examined whether the advertising contracts were an unreasonable restraint of trade under Section 1. He found that they were when it came to advertising, but was silent on the impact on the dissemination of news.

Since the Government didn't appeal the District Court's dismissal of their claims, when the case got to the Supreme Court there wasn't much of a rule-of-reason case. Furthermore, harm to newspaper competition overall, or for the dissemination of news, wasn't on the table.

The Court's rule-of-reason analysis of harm to competition in advertising sales, however, at least touches on the impact of the unit rule on newspapers overall. It noted that the Item was profitable and mentioned its circulation, as well as its advertising. It also gave a nod to the District Court's finding that the States was operating profitably overall as well. Most of its analysis concerns showing that the advertising contracts had a negligible effect on newspaper revenue. Since it recognized that advertising revenue was essential to the operation of newspapers these findings demonstrated, though the Court did not say, that the advertising contracts could not have harmed newspaper competition overall, or the dissemination of news. Since there were no claimed feedbacks between advertising and readers, and no meaningful jeopardy to funding content, that one-sided analysis of the importance of advertising revenue was dispositive.

On a different record the Court could have found that the Company had been running the States at a loss as a result of low advertising rates and that this practice would destroy the Company's only newspaper rival. There is nothing in the majority decision that suggests that the Court would have, if this were the case, limited its analysis to harm in the newspaper advertising market that was the subject of the challenged conduct. It had gone out of its way to emphasize that newspapers couldn't survive, and implicitly provide content to readers, without advertising. Nothing in the decision suggests that, just because the challenged conduct related to advertising, the Court would have rejected the Government's claim that the challenged conduct was harming competition in the dissemination of news. It understood well that, without advertising, there would be no newspaper and no dissemination of news for readers.

## **B. Times-Picayune and the Per Se Tying Analysis**

The Court did say that the case "concerns solely one of the markets" and that "dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan."<sup>24</sup> This language specifically referred to the analysis of whether the unit rule was an unlawful *per se* tie under *International Salt* and the related tying cases. It came between the Court's review of the tying cases and its lengthy analysis of tying in the matter at hand.

The issue was whether the morning newspaper had leverage over advertisers. It may be possible to conduct a sound economic analysis of that particular question without defining a single platform market or considering the interrelated pricing and feedback issues raised by *American Express*.<sup>25</sup> It is not possible, however, to conduct a sound economic analysis without considering how two-sided platform businesses operate.

Here the Court recognized that the analysis had to consider the relationship between the two sides to assess whether there was an unlawful tie. It found that advertisers wanted readers. But it didn't have any basis for finding that advertisers cared whether people saw their classified and general ads in the morning or evening papers. And where they might — as with local displays — there was no tie. That demolished the tying case.

The Court could have reached the same conclusion based upon a substantive examination of newspaper competition. Starting with the challenged conduct a court would have had to decide whether the morning and evening newspapers — the two-sided platforms at issue — were in one relevant antitrust market or two. Evidence that advertisers cared about whether readers were morning or evening would have led to separate newspaper markets while evidence that advertisers found readers fungible would have led to a single newspaper market.

As a general matter there are good economic reasons for considering competition among newspapers overall since advertisers may care about who readers are; readers may care about what the type of content that is attracting them as well as the amount and type of advertising. So long as economic analysis can fully account for inter-relationships, it can get to the right answers on substantive questions regardless of whether newspapers are analyzed in a single newspaper market or interdependent advertiser and reader ones.

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<sup>24</sup> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610 (1953).

<sup>25</sup> Generally, the courts would have to consider whether there were significant feedback effects between advertisers and readers, but none were claimed here.

### C. American Express *Discussion of Times-Picayune*

The *American Express* dissent said that the *Times-Picayune* Court held that “an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service affected by a challenged restraint.”<sup>26</sup> This claim is based on the Court’s statement that “dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company’s unit plan.” The dissent goes on to say that the Government had claimed that the newspaper’s advertising policy was unlawful under the rule-of-reason. But, as noted above, the Court’s statement about focusing on dominance in the advertising market was made in the middle of its *per se* tying analysis.

The Court’s rule-of-reason analysis at least touches on whether the Company had harmed newspaper competition through the unit rule and operating the evening newspaper at loss. The Court didn’t need to go further because if newspaper advertiser competition was not harmed, it follows immediately that competition in the dissemination of news wasn’t harmed. If the unit rule and low advertising rates had diminished the Item, it is hard to see why the Court would have stopped at the boundaries of an advertising market and not crossed over into newspapers and their readers; or why it should have taken such a restrictive view.

Faced with a different record the *Times-Picayune* Court would have had to grapple with similar issues raised in *American Express*. Suppose consumers value classified advertising. That’s likely the case based on common experience and given that people patronize classified ad services such as Craigslist. If this is the case, then the Company could have provided more value to their readers by imposing the unit rule on advertisers. That could have increased the circulation of the Company’s newspapers, which could have benefited its advertisers.

Depending on the facts, it is possible in this hypothetical case that the unit rule could have increased newspaper circulation and advertising in the market overall.<sup>27</sup> It is also possible that benefits to readers outweighed any costs to advertisers. It would therefore not have made economic sense to analyze harm solely in an advertising market for the reasons given in *Amex*.

Of course, we can’t know what the *Times-Picayune* Court would have done with that hypothetical case. But its brief rule-of-reason discussion does not show, at least not clearly, that it would have focused on an advertising market rather than assessing the overall impact of the challenged practices on newspaper competition.

The *American Express* majority opinion gave newspaper advertising as an example of a platform in which indirect network effects were minor because readers do not value advertising. It said, citing *Times-Picayune*, that “the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such.”<sup>28</sup> The economic theory of two-sided platforms, which leads to the pricing and market power issues the *American Express* majority decision was concerned with, does not require positive indirect network effects in both directions. In fact, much of the theoretical and empirical literature concerns two-sided advertising platforms, for which there are possibly negative indirect effects of advertisers on readers. There may well be cases in which the feedback effects between the two-sides are immaterial, or in which they are not relevant to the question at hand. However, there is no economic basis for concluding that is commonly the situation for newspapers or other ad-supported media platforms.

## VII. CONCLUSION

The Court’s decisions in *American Express* and *Times-Picayune* share common ground. Both recognized the two-sided nature of the businesses under consideration and the interdependence of the two groups of customers. Each adhered to the two-sided business realities for the claims and facts before the Court.

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<sup>26</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2295 (2018) (Breyer dissenting opinion).

<sup>27</sup> If the Court was correct that the unit rule didn’t materially reduce classified advertising in the Item, then it is plausible that the unit rule could have resulted in delivering more classified ads that readers valued. Nevertheless, there are certainly other circumstances in which the unit rule could have reduced newspaper competition to the detriment of readers and advertisers.

<sup>28</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286 (2018).

The claimed tension between the two cases is overstated. The lengthy discussion of *per se* tying in *Times-Picayune* was based on the interaction between the two sides of the platform. The Court could then dispense with the *per se* tying claim by showing there was no separate tied product. In analyzing whether the challenged conduct restricted competition, it didn't need to go further than showing the negligible economic effect of the advertising contracts at issue.

The Court did not clearly limit the rule-of-reason analysis of competitive harm to a market restricted to the side of the platform on which the challenged conduct occurred. The very brief discussion in *Times-Picayune* is not inconsistent with looking at harm to platform competition overall.<sup>29</sup> Thus, it is quite a stretch to suggest that *Times-Picayune* established the general rule-of-reason framework for two-sided platforms and concluded that courts should limit their analysis to the side on which the challenged conduct applied.

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<sup>29</sup> Even if it had, the courts have, of course, repeatedly modified their approach to antitrust analysis of conduct under *per se* and rule-of-reason based on economic learning. There has been an explosive growth in the theoretical and empirical learning on two-sided platforms, including credit-card networks and newspapers, in the last 20 years. The Court relied on that learning in developing the fulsome approach towards applying the rule-of-reason to two-sided platforms with significant indirect network effects.

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