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Ohio v. American Express: A Year Later…

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

On June 25, 2018, the Supreme Court sided in a 5-4 decision with American Express in a lawsuit over rules it imposes on merchants who accept its cards. The Supreme Court's decision in *Ohio v. American Express* addressed a number of important issues concerning multisided platforms: for instance, whether each side of a platform is a separate relevant product market and whether a *prima facie* assessment of competitive harm must incorporate the impact to consumers on all sides of a platform.

The articles in this month's edition of the CPI Antitrust Chronicle look back at the Supreme Court's decision in the *Amex* case. We are pleased to kick off this edition with a CPI Talks… interview with the FTC's Alden Abbott and Bruce Hoffman. In addition, we have articles from David S. Evans & Richard Schmalensee, Michael L. Katz, Joshua Wright & John Yun, Benjamin Klein, Keith Hylton and other notable scholars. Where do things stand a year after the Supreme Court's decision?

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

As always, thank you to our great panel of authors (one who suffered a monkey bite and still got his paper in on time!).

Sincerely,

CPI Team

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CPI TALKS…

…with Alden Abbott & Bruce Hoffman

In this month's edition of CPI Talks we have the pleasure of speaking with Alden Abbott & Bruce Hoffman of the Federal Trade Commission ("FTC"). Alden Abbott is the General Counsel of the FTC. As the Commission's chief legal officer and adviser, the General Counsel represents the agency in court and provides legal counsel to the Commission and its bureaus and offices. Bruce Hoffman is Director of the Bureau of Competition at the FTC. Mr. Hoffman came to the FTC from Shearman & Sterling, where he was global co-head of the firm's antitrust practice. Previously, Mr. Hoffman served as chair of Hunton & Williams' antitrust practice, and prior to that, as Deputy Director and Associate Director of the FTC's Bureau of Competition.

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Ohio v. American Express: Assessing the Threat to Antitrust Enforcement

By Michael L. Katz

One year later, the U.S. Supreme Court's opinion in *Ohio v. American Express* remains a glaring example of the misapplication of economic theory coupled with disregard for the factual record. If applied to other cases, the approach to antitrust analysis stated in that opinion would threaten sound enforcement. In this note, I assess the breadth and likelihood of that threat. I observe that a wide variety of firms could fall under the Court's definition of a transaction platform and, thus, be candidates for application of the American Express approach. However, in recently decided *Apple v. Pepper*, neither the majority opinion nor the dissent applied the *American Express* approach despite the fact that Apple App Store clearly is a transaction platform.

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The Role Of Market Definition in Assessing Anticompetitive Harm in *Ohio v. American Express*

By David S. Evans & Richard Schmalensee

This article shows that the Supreme Court reached the right outcome in *Ohio et al. v. American Express*. The District Court had found that American Express was a two-sided transaction platform that provided joint services simultaneously to cardholders and merchants. But it then chose, by adopting a single-sided merchant services market, to analyze the effect of the anti-steering provisions at issue solely on one side of these simultaneous transactions. That decision appears to have prevented the lower court from seeing that the plaintiffs' evidence of anticompetitive harm to merchants was weak. The District Court also decided that case law prevented it from considering the effect of the conduct on the other half of the transactions even at the second-stage of the rule-of-reason. The Supreme Court did not discuss the limitations of the plaintiffs' theory and evidence at length but simply and properly found that the plaintiffs had failed to prove antitrust injury to platform competition for transactions. This article also shows that criticisms of the Supreme Court decision seem to be based on the rejection or misunderstanding of the economics literature on multi-sided platforms on which the District Court, the Appeals Court, and the Supreme Court all relied.

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Ohio v. American Express: Implications for Non-Transaction Multisided Platforms

By Joshua D. Wright & John M. Yun

The Supreme Court's decision in *Ohio v. American Express* settled a number of critical issues concerning multisided platforms — including whether each side of a platform constitutes a separate relevant product market. The ruling also addressed whether a *prima facie* assessment of competitive harm must incorporate the impact to consumers on all sides of a platform. The Court, however, potentially narrowed the scope of its ruling by making an explicit distinction between "transaction" and "non-transaction" platforms. We examine whether this is a meaningful distinction and explain how the Court's logic applies to non-transaction platforms.

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Antitrust Analysis of Vertical Contracts in Two-Sided Platforms: The *Amex* Decision

By Benjamin Klein

The recent *Amex* decision emphasizes that antitrust analysis of vertical restraints used in two-sided platforms must consider both sides of the platform. This does not mean that the anticompetitive effects of restraints should be measured by aggregating the net price over the two sides. Instead, consistent with the established U.S. antitrust law of vertical restraints, a determination must first be made that the platform possesses market power. Once the overall platform exceeds a minimum market share screen, the potential anticompetitive effects of the vertical restraints should then be evaluated on the side of the platform where the restraints operate. However, contrary to the *Amex* dissent, this does not involve a determination of whether the price on that side of the platform is higher than it otherwise would be. Instead, one must determine if the vertical restraints distort the competitive process to maintain or enhance platform market power.

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Ohio v. American Express: The Supreme Court Still Passes the Test

By Abbott B. Lipsky, Jr.

In the early 1970's antitrust was dominated by *per se* rules; in *United States v. Topco Associates* (1972) the Supreme Court ridiculed the use of economics. Shortly thereafter, however, the Court shifted ground, making economics the touchstone of antitrust analysis outside the cartel context. *Ohio v. American Express* carries two reassuring messages for antitrust: first, sound economic analysis remains central to the Court's antitrust approach. Second, the decision shows seasoned judgment in assessing conflicting economic arguments involving new and complex industries. Specifically, the decision is the first that shows the Court's understanding of deep economic insights traceable to earlier path breaking work of William F. Baxter. While studying multi-party payment systems (electronic funds transfer and general-purpose credit cards) Baxter became the first to recognize the distinct character of "two-sided" markets and to explain why sound economic analysis requires holistic consideration of all aspects of industries that involve such markets.

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Much Ado About *Amex*

By Keith N. Hylton

Ohio v. Amex has gained a great deal of attention because of its implications for digital platforms. The decision, though harshly criticized by many commentators, does not presage major changes in antitrust enforcement. *Amex* is likely to have a limited impact on antitrust law and enforcement. The reason *Amex* has a limited reach is that it is mostly a response to the plaintiffs' proof of market power using direct (pricing) evidence. *Amex* should be understood as a statement about the direct evidence approach to proving or inferring market power. Under *Amex*, in cases involving two-sided markets where plaintiffs present such direct evidence, courts must conduct market power analyses with a view toward both sides of the market.

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Not So Fast, You Still Have to Define the Relevant Market: The Less Debated Yet Vital Teaching of *Ohio v. American Express*

By Elai Katz

Most discussions of *Ohio v. America Express* focus on two-sided markets. This article will not. Instead, the article analyzes the Court's ruling that plaintiffs cannot evade defining the relevant market when challenging vertical restraints (and arguably other practices subject to the rule-of-reason). In holding that courts must first define the relevant market before assessing evidence of anticompetitive effects in rule-of-reason cases, the majority resisted efforts to relax the market definition requirement, which has been advocated by scholars and litigants in recent years. Instead, the Court reaffirmed the centrality of relevant market definition, which has been a fundamental feature of antitrust jurisprudence for nearly a century.

WHAT'S NEXT?

For July 2019, we will feature Chronicles focused on issues related to (1) **Arbitration & Antitrust**; and (2) ***AT&T/Time Warner* & Vertical Mergers**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES AUGUST 2019

For August 2019, we will feature Chronicles focused on issues related to (1) **Editorial Board Antipasto**; and (2) **State AGs**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…WITH ALDEN ABBOTT & BRUCE HOFFMAN

In this month's edition of CPI Talks we have the pleasure of speaking with Alden Abbott & Bruce Hoffman of the Federal Trade Commission ("FTC"). Alden Abbott is the General Counsel of the FTC. Bruce Hoffman is Director of the Bureau of Competition at the FTC.

Thank you, Mr. Abbott & Mr. Hoffman, for sharing your time for this interview with CPI.

1. **In light of the Supreme Court's *Ohio v. American Express* case (*Amex*), what are some of the biggest implications for non-transaction multisided platforms? Please discuss the distinction the Court made between "transaction" and "non-transaction" platforms.**

2. **Do the Court's distinctions between transaction and non-transaction platforms prohibit the application of the economic logic to the ruling on non-transaction platforms?**

Questions 1 and 2 raise a set of related issues. As those questions implicitly recognize, the Supreme Court's opinion dealt with a rather special set of circumstances, and should be read in that light. Three points merit highlighting.

First, in *Amex* the Court by its own terms limited its precedential analysis to cases involving a multisided transaction platform, where the output is a transaction itself, and parties on both sides of the market are engaging in a simultaneous transaction. Although multi-sidedness characterizes many different sorts of platforms, only in the narrow set of circumstances of a transaction platform is a two-sided market definition specifically called for, under the terms of the Court's decision. This counsels against reading the case too broadly.

Second, *Amex* was a vertical restraints case, involving a platform that holds only roughly one-fourth to one-third of the relevant market. As such, it should not be read to say anything about appropriate tests for monopolization, nor about the treatment of horizontal restraints. (Indeed, an agreement among competing digital transaction platforms to impose similar anti-steering arrangements would raise major competitive problems, but such a situation was not presented in the *Amex* case.)

Third, the Court in *Amex* did not specifically address the application of economic logic derived from multi-sided markets analysis to cases involving non-transaction platforms. The Court merely stated, "it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. . . [For example,] b]ecause of. . . weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such." *Amex*, slip op. at 12-13. The Court's language left it to the lower federal courts to determine factually, case-by-case, what (if any) non-transaction platforms have sufficiently robust indirect network effects to merit application of two-sided market analysis. It is too early to determine how that analysis will play out.

3. **Please give us your thoughts on the Supreme Court's approach as to whether each side of a platform constitutes a separate relevant product market for the purposes of antitrust analysis.**

As we discussed above, the Court's analysis suggests that whether each side of a platform constitutes a separate relevant product market will turn on the specific facts and economics presented in a particular case. In the case before it—involving a Sherman Act Section 1 challenge to vertical restraints in a two-sided transactional platform market where the firm whose conduct was challenged did not have market power—the Court determined that both sides of the platform were part of a single relevant product market. The Court did not hold that both sides of a platform would always be considered part of a single relevant product market; to the contrary, it pointed out situations in which the different sides of the platform would appropriately be treated as different markets. Under the Court's analysis, we believe that market definition in cases involving two-sided platforms will involve considering the facts and economics of the particular platform at issue, as well as the type of allegedly anticompetitive conduct at issue and the legal theory under which that conduct is challenged.

4. **What are your reactions to Justice Breyer's dissent overall, and in particular with regard to the distinction between products sold by two-sided platforms and complementary products?**

Justice Breyer's dissent focused on factual and economic analysis of the credit card market and the anti-steering restraints, and as such represents a further positive contribution to the Court's analytical approach to antitrust cases. That said, we find the description of products sold by two-sided transactional platforms (such as the transaction completion services at issue in the case) as complements to be somewhat debatable. It is likely correct that demand for transaction completion services on each side of the platform is increasing in demand for the other side; this is a standard feature of complementarity. However, there is no separate merchant and consumer demand for completion of a credit card transaction; if the merchant does not accept a credit card, or a consumer does not carry it, no transaction exists to be completed. This is unlike most complementary products, such as hot dogs and ketchup; while demand for the one is increasing in demand for the other, the products face independent demand and can be (and are) sold separately. Credit card transactions—the specific product at issue in the case, as distinct from some of the other card services and features offered to merchants and consumers—are not independent products facing independent demand from merchants and consumers. While this could be viewed as strict complementarity, in some ways, such transactions may be better viewed as a single product with two simultaneous consumers and a single price that needs to be apportioned between those consumers.

5. **What is the role of *Ohio v. American Express* in the "continued evolution of economic reasoning in Supreme Court jurisprudence"?**

This decision demonstrates that the Court continues to be willing to recognize and apply well-attested and accepted new methodologies in economic science to enrich antitrust analysis. Of immediate interest to the antitrust community is how the particular innovations set forth in *Amex* will be applied by the lower federal courts. We have a limited amount of data on that topic, which will expand over time, as new cases are litigated and "two-sidedness" arguments are briefed to the courts. Let us briefly examine relevant case law as of mid-April 2019.

As of April 16, 2019, twenty federal court decisions have cited to the Court's *Amex* decision.

A. NCAA Decision

On market definition, the only in-depth discussion is the decision in *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation* (N.D. Cal.),[1] which distinguishes the student athletic market from a two-sided transaction platform in that there is no "simultaneous" sale. On summary judgment, the court held that the relevant markets are athletic services in men's and women's Division I basketball and FBS football, where each class member participates in his or her sport-specific market. The court had excluded Defendants' expert's opinion regarding a multi-sided market definition. After the Supreme Court's *Amex* decision, defendants argued that the district court erred in excluding the opinion. The court invited both sides to argue the issue. In reaffirming the decision to exclude the expert testimony, the court noted key differences between this case and *Amex*, particularly the "simultaneity" aspect and the distinction between vertical and horizontal restraints:

> In this litigation, the market participants and their interactions are nothing like what the Supreme Court observed in the context of credit-card transactions in American Express. There is no simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes "only one product." Additionally, the restraints at issue in this litigation are horizontal agreements among competitors to limit student-athlete compensation, which is alleged to constrain competition among the universities; by contrast, the

1 *In re National Collegiate Athletic Assoc. Athletic Grant-in-aid Cap Antitrust Litigation*, 2018 WL 4241981, No. 14-md-02541 CW (N.D. Cal. Sept. 3, 2018) (Wilken, J.).

restraint analyzed in *American Express* was a vertical agreement between a single credit card company, American Express, and the merchants who participate in that credit card company's network, which American Express claimed allowed it to better compete with other credit card companies.[2]

The court also found that the expert did not perform an economic analysis to support a multi-sided market definition, and suggested that was required by *Amex*:

Nothing in *American Express* supports the notion that a relevant market can be defined to include more than one side without performing any economic analysis. To the contrary, the law review articles cited in *American Express* indicate that the presence and degree of the economic relationships discussed in that case present "an empirical issue." See, e.g. David S. Evans & Michael Noel, Defining Antitrust Markets When Firms Operate Two-Sided Platforms, 2005 Colum. Bus. L. Rev. 667, 671 (2005) (Evans & Noel).[3]

B. Two Monopolization Cases

Two monopolization cases cite the "effects" portion of *Amex*, i.e. that a plaintiff must show increased prices or reduced output. *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*[4] cited *Amex* in passing for the proposition that a showing of a restricted market output effect supported a jury finding of competitive harm in a private antitrust action.

Viamedia v. Comcast[5] rejected an exclusive dealing claim in part because the plaintiff (a competitor) only showed harm to itself rather than price or output effects. Viamedia brought its claims under Section 2 of the Sherman Act. The crux of the complaint was that monopolist Comcast refused to deal with its competitor, Viamedia. Comcast prevailed on a motion to dismiss because court found that Comcast had no duty to deal with Viamedia. On summary judgement, Viamedia restructured its claims as tying and exclusive contracting. The court rejected the exclusive dealing claim in part by citing *Amex* for the proposition that the plaintiff did not show evidence of a price higher than one would expect to find in a competitive market.

C. Passing References in Other Cases

The other citing references to *Amex* include decisions related to credit card cases[6] and cases citing *Amex* only for general propositions.[7]

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2 *Id.* at 4.

3 *Id.* at 6.

4 *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, No. 16-56823, 2019 WL 495139 (9th Cir. Feb. 8, 2019) (unpublished) (Fletcher, Paez, Gleason, Circuit Judges) (merely citing).

5 *Viamedia, Inc. v. Comcast Corp.*, 335 F. Supp. 3d 1036, 1066–67 (N.D. Ill. 2018) (St. Eve, J.).

6 *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 361 F. Supp. 3d 324 (E.D.N.Y. 2019) (merchant plaintiff private action); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05MD1720MKBJO, 2019 WL 359981, at *2 (E.D.N.Y. Jan. 28, 2019) (merchant class action); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (MKB), 2018 WL 4158290, at *3 (E.D.N.Y. Aug. 30, 2018); *B&R Supermarket v. Visa, Inc.*, No. 17CV2738MKBJO, 2018 WL 4921661, at *4 (E.D.N.Y. July 20, 2018) ("In short, Discover seizes on the AmEx court's findings that 'Discover has 'only a 5.3% share of the network services market" (which allows the inference that 'merchants can profitably drop Discover if the network overplays its hand'") and that American Express's anti-steering rules harmed Discover."); *B & R Supermarket, Inc. v. MasterCard Int'l Inc.*, No. 17CV02738MKBJO, 2018 WL 4445150, at *6 (E.D.N.Y. Sept. 18, 2018) ("Discover contends that the reversal of the district court's decision in Amex and the Supreme Court's ruling that American Express' anti-steering rules are lawful, contrary to Judge Orenstein's findings in the R&R, further strengthen Discover's argument that it could not have been motivated by the "impending" fall of the anti-steering rules.").

7 *Lifewatch Servs. Inc. v. Highmark Inc.*, 902 F.3d 323, 336 (3d Cir. 2018) (citing for proposition that "[s]ome horizontal restraints may warrant only a "quick look," rather than a complete rule-of-reason analysis"); *Cinetopia, LLC v. AMC Entm't Holdings, Inc.*, No. 18-2222-CM-KGG, 2018 WL 6804776, at *3 (D. Kan. Dec. 27, 2018) (citing for proposition that vertical restraints of trade are analyzed under the "rule-of-reason" instead of the *per se* rule.); *Wholesale All., LLC v. Express Scripts, Inc.*, No. 4:18CV01015 AGF, 2019 WL 423378, at *4 (E.D. Mo. Feb. 4, 2019) (citing for proposition that Section 1 restraints can be analyzed under the *per se* rule or the rule-of-reason); *United States v. Sanchez*, No. 17-10519, 2019 WL 325151, at *1 (9th Cir. Jan. 25, 2019) (cited for proposition that Supreme Court continues to recognize categories of *per se* violations); *CollegeNet, Inc. v. Common Application, Inc.*, 355 F. Supp. 3d 926, 948–49 (D. Or. 2018) (citing for proposition that for unlawful restraints, plaintiff can show anticompetitive effects either directly or indirectly); *Cedra Pharmacy Houston, LLC v. UnitedHealth Grp., Inc.*, No. CV H-17-3800, 2019 WL 1433600, at *5 (S.D. Tex. Mar. 7, 2019) (citing for proposition that "[t]he Supreme Court has construed section 1 to outlaw unreasonable restraints of trade."); *Panhandle Cleaning & Restoration, Inc. v. Nationwide Mut. Ins. Co.*, No. 3:17-CV-117, 2018 WL 3717108, at *3 (N.D.W. Va. Aug. 3, 2018) (citing for proposition that restraints can be unreasonable either as *per se* or under the rule-of-reason).

6. What are some of the ways the Supreme Court's opinion underscores (or doesn't) the Court's weighing of efficiency justifications in a rule-of-reason analysis and in the assessment of vertical restraints?

The Court's holding did not directly address efficiencies. It did not need to because it held that plaintiffs had not carried their burden of proving, under step one of the rule of reason, that Amex's antisteering provisions had anticompetitive effects. Thus, although the Court described "Amex's business model [as one that] has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions[,]" *Amex*, slip op. at 20, it did not evaluate the potential efficiency arguments for the company's antisteering provisions. Although some commentators have referred to those provisions as designed to prevent merchant "free riding" on American Express's investments in goodwill, we believe it may be more accurate to characterize the possible efficiency at issue as preventing opportunism. Opportunism problems are well-known in settings involving sequential performance, because the party who performs second may have the incentive and ability to fail to perform. Here, for example, it is possible that merchants, having received the benefit of American Express's performance (attracting AmEx cardholders to patronize the merchant) might then fail to perform (by paying AmEx the agreed price), and instead persuade customers to use other cards. Opportunism often creates market inefficiencies, both in its direct effects and in costly attempts to guard against it. Avoiding opportunism may have been an efficiency benefit to be weighed had the Court proceeded past the first step of the rule-of-reason.

OHIO v. AMERICAN EXPRESS: ASSESSING THE THREAT TO ANTITRUST ENFORCEMENT

BY MICHAEL L. KATZ[1]

1 Sarin Chair Emeritus in Strategy and Leadership at the Haas School of Business and Professor Emeritus in the Department of Economics at the University of California, Berkeley. I testified as the government's economic expert in *United States v. American Express*. This note does not draw on any confidential materials from that matter.

I. INTRODUCTION

One year later, the U.S. Supreme Court's opinion in *Ohio v. American Express* remains a glaring example of both misapplication of economic theory and disregard for the factual record.[2] The decision also remains a threat to the use of antitrust enforcement to promote competition and consumer welfare in the modern economy. But how great is that threat?

In Section II, I discuss several significant effects that application of the approach enunciated by the majority in *American Express* could have on antitrust enforcement. Some of these effects are presumably intended by the majority (e.g. plaintiffs would bear a high initial burden of proof) but I strongly suspect some are not (e.g. the use of efficiencies defenses in merger cases could be undermined).

In the remaining sections of this note, I address how broadly and likely it is for this approach to be applied. The majority emphasized that many of its findings applied specifically to "transaction platforms." Consequently, the impact of *American Express* will depend, in part, on where the courts draw the boundaries between transaction and non-transaction platforms. In Section III, I discuss the lack of clarity regarding the majority's definition of a transaction platform and the fact that many firms would appear to satisfy even a narrow interpretation of the majority's definition.

In Section IV, I demonstrate that, although much of the reasoning applied by the majority to transaction platforms is fundamentally unsound, some of that faulty reasoning applies equally to certain types of firms that the majority very likely did not have in mind when defining transaction platforms. This fact indicates that the threat to sound antitrust enforcement posed by *American Express* may extend beyond the treatment of transaction platforms.

However, the extent of the threat that *American Express* poses to antitrust enforcement also depends on whether the Supreme Court will choose to apply the approach of *American Express* to future cases that fall within the boundaries of the majority's reasoning. As I explain in Section V, both the majority and dissenting opinions in the recently decided *Apple Inc. v. Pepper et al.* appear to have ignored *American Express*.[3] Given the infirmities of that opinion, this may well be a good thing.

II. CONSEQUENCES INTENDED AND UNINTENDED

Before discussing how broadly *American Express* will be felt, it is useful to describe some of the reasons why it matters. Because they lie closest to economics (as opposed to legal process), I will focus on the effects of the majority's assertions regarding two-sided market definition and the use of the two-sided price as a measure of harm to competition and consumer welfare.

First, the majority concluded that, at least with regard to challenges to vertical restraints, a transaction platform must be assessed within the context of a single, two-sided antitrust market — as opposed to forgoing market definition entirely or defining two closely interrelated, but distinct, markets with one on each side.[4] Reliance on a single, two-sided market has several potential consequences.

One is that, by defining the users on different sides of a platform to be in the same antitrust market, the court can balance the welfare effects of a platform's conduct across users on different sides of the platform without running afoul of *Philadelphia National Bank*.[5]

A second consequence is that a plaintiff's initial burden of proof will be greater. In comparison with demonstrating single-sided harm to user welfare, the requirement that a plaintiff account for user welfare effects on both sides of a platform can increase the complexity and difficulty of meeting the initial burden of establishing that the challenged conduct is harmful.

2 *Ohio v. American Express Co.,* 138 S. Ct. 2274 (2018). As Justice Breyer observes in this dissent, there is a remarkable lack of reference to the factual record. See also, Wu, Tim, "The Supreme Court Devastates Antitrust Law," *The New York Times,* June 26, 2018 ("The court used academic citations in the worst way possible — to take a pass on reality.").

3 *Apple Inc. v. Pepper et al.*, 587 U.S. ___ (2019).

4 138 S. Ct. 2274 at 2287.

5 *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963). See, also, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma,* 468 U.S. 85 (1984) (a non-merger case in which the competitive harms in one market could not be offset by competitive benefits in another).

Although the first two consequences might very well have been intended by the majority, it is likely that the third one was not. The majority asserts that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions."[6] This would appear to imply that the relevant market — to which the majority attaches great importance — can include only parallel two-sided platforms. But a transaction platform may, in fact, face competition from firms that operate on only one of its sides. As Wright & Yun (2019) observe, "[f]or instance, Uber is a transaction platform that competes with non-platforms, to one degree or another, including taxis, subways, and buses — as well as with other platforms such as Lyft. The same holds for Airbnb, which compete with non-platforms such as hotels and owner rentals."[7] The majority mistakenly excludes such competitors from consideration and thus risks defining markets that are inappropriately narrow.

The majority is also deeply confused about the relationship between prices, consumer welfare, and competition. Specifically, the majority apparently believes that a transaction platform's two-sided price (i.e. the sum of the prices it charges to the two sides for a transaction) is sufficient for assessing harm to competition and user welfare.[8] By focusing on the two-sided price, the majority risks having courts count harms as efficiencies and efficiencies as harms. In *American Express*, the plaintiff alleged that American Express's conduct weakened competition among credit card networks and allowed American Express to charge higher fees to merchants. Some percentage of these higher fees was passed on to American Express cardholders in the form of increased rewards. The majority concluded that any increase in rewards should be counted as a consumer benefit of the conduct, to be weighed against the harm to merchants. In doing so, the majority took no account of the nature of the conduct that led to the increased rewards.

Consider the application of this approach in other cases. Suppose, for example, that a merger between two ride-sharing apps would allow them to suppress the payments made to drivers, which would then result in the merged company's charging lower prices to riders. By the majority's logic, the lower prices charged to riders would be counted as merger benefits that would at least partially offset the lower payments to drivers (which correspond to a higher price charged by the platform for matching them with riders). Alternatively, suppose the two ride-sharing apps did not merge but instead colluded with respect to payments to drivers. The majority's logic would say that showing that the ride-sharing platforms had successfully suppressed payments to drivers would be insufficient to meet even the plaintiff's initial burden of showing harm to competition — it would also be necessary to account for any resulting reduction in the price of rides. This view is manifestly at odds with the *per se* treatment of price fixing.

Now suppose, instead, that merging the two ride-sharing apps allows them to allocate drivers more efficiently, which in turn reduces the demand for drivers and reduces their per-ride payments. By the logic of the majority's decision, the price effects on both sides of the platform should be taken into account, and the reduction in payments to drivers should be weighed against any reduction in the prices charged to riders. In other words, holding the price charged to riders constant, merger efficiencies with respect to drivers would count as merger *harms*. Although such an outcome would surely appeal to some advocates of progressive antitrust, one does not usually count the majority as members of that group. This problem — like that of counting competitive harms as efficiencies — arises because the majority in *American Express* insists on balancing price changes on the two sides of a transaction platform without regard for the source of those price changes.

6 138 S. Ct. 2274 at 2287 citing Filistrucchi, Lapo, Damien Geradin, Eric van Damme & Pauline Affeldt (2014), "Market Definition in Two-Sided Markets: Theory and Practice," *Journal of Competition Law & Economics,* 10(2): 293-339, at 301. By contrast, the majority recognizes that a non-transaction platform may face competition from firms that operate on only one of its sides. (*Id.,* note 9.)

7 Wright, Joshua D. & John M. Yun (2019), "*Ohio v. American Express:* Implications for Non-Transaction Multisided Platforms," forthcoming in *Media Markets and Competition Law,* Antonio Bavasso, David S. Evans, and Douglas H. Ginsburg, (eds.), Competition Policy International, at 12 (typescript).

8 138 S. Ct. 2274 at 2287-2288. This confusion may be a fourth consequence of the majority's insistence that a transaction platform offers only a single product. If the majority had recognized two closely interrelated, but distinct markets, it would have been forced to consider the prices to the two sides and, thus, take a more complete view of competition.

III. WHAT MAKES A FIRM A TRANSACTION PLATFORM?

The majority in *American Express* has created a situation in which antitrust enforcement may differ dramatically based on whether a firm is considered to be a transaction platform. For this approach to be sound, it is critical that the notion of transaction platform be well defined — if not, there is the risk of costly and time-consuming arguments as each side tries to pigeonhole the firm at issue in a favorable way. It is also important that the definition be tied to characteristics of the firm that merit the differential treatment triggered by identification as a transaction platform. Unfortunately, the majority's definition fails on both counts.

It is necessary to define both what constitutes a multisided platform, in general, and a transaction platform, in particular. Loosely speaking, a multisided platform facilitates the interactions between users on different sides of the platform. However, as has been widely noted, there is a lack of consensus regarding the precise definition of a multisided platform generally.[9] Let us ignore that problem and focus on the distinction between transaction platforms and non-transaction platforms. According to the majority, the defining feature of a transaction platform is that it facilitates direct transactions between users on its different sides and "cannot make a sale to one side of the platform without simultaneously making a sale to the other."[10]

Many firms are transaction platforms by the majority's definition. Manifestly, the majority believes payment-card networks are transaction platforms, although whether they are is less clear than it might first appear, as will be discussed below. Online marketplaces — such as Amazon Marketplace, Apple's iOS App Store, and eBay — and matching platforms — such as Airbnb, Grab, Lyft, and Uber — also appear to fit the definition. Transaction platforms do not have to rely on electronic networks: Both online and bricks-and-mortar mortgage brokers, insurance brokers, and realtors also clearly facilitate direct transactions between platform users. Perhaps less obviously, bricks-and-mortar retailers that have the right to return unsold inventory to the manufacturer (as is the case with many bookstores and apparel stores) also constitute transaction platforms under the majority's definition. Similarly, a firm that licenses intellectual property (e.g. video content or the patents necessary to manufacturer a smart phone) on a per-unit or per-buyer basis and then distributes that intellectual property to its customers can be viewed as a platform facilitating transactions between the intellectual property owner and the platform's customers.

In the majority's view, newspapers are not transaction platforms.[11] Indeed, newspapers are perhaps the leading examples of non-transaction platforms in the academic literature on which the majority purportedly relies.[12] More generally, "media platforms" — which sell advertising to users on one side of the platform and sell or give away content to users on the other — are often contrasted with transaction platforms on the grounds that there is no direct transaction between someone, say, who uses Google to search the web and a retailer that has paid Google to place ads on its search-results page.[13] But why shouldn't Google Search or Facebook be considered transaction platforms selling "direct transactions" in the form of "advertising exposures"?

Indeed, why shouldn't the same be said of a free newspaper that is supported solely by advertising? According to Klein *et al*. (2006):[14]

> while a newspaper publisher supplies two distinct but interrelated products, newspapers for readers and a medium for advertisers, a payment card system supplies only one product, payment card transactions that are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment. Accordingly, the two sides of a payment card system are not only interdependent, as are the two sides of the newspaper market, but their consumption of payment card transactions must be directly proportional. The two sides of the market can be thought of as providing inputs into the supply by the payment system of this single product.

9 At various points, the majority defines a multisided platform as being an intermediary (138 S. Ct. 2274 at 2280), as "often" exhibiting cross-platform network effects (*id.*), and as having a price structure that affects output (*id.* at 2281). The majority also considers a market to be one-sided if network effects and the effects of price structure are "minor" (*id.* at 2286). For discussions of alternative definitions that have been offered in the academic literature, see Auer, Dirk & Nicolas Petit (2015), "Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy," *The Antitrust Bulletin,* 60(4): 426-461, and Hermalin, Benjamin E. & Michael L. Katz (2018), "What's So Special about Two-Sided Markets?" in *Towards a Just Society: Joseph Stiglitz and Twenty-First Century Economics,* Martin Guzman (ed.), New York: Columbia University Press.

10 138 S. Ct. 2274 at 2280 citing Klein, Benjamin, Andres V. Lerner, Kevin M. Murphy & Lacey L. Plache (2006), "Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees," *Antitrust Law Journal,* 73(3): 571-626, at 580 and 583.

11 138 S. Ct. 2274 at 2287, note 9.

12 See, e.g. Klein *et al.* (2006), *supra* note 10, at 580; Filistrucchi *et al.* (2014), *supra* note 6, at 298.

13 For a discussion of differences between media platforms and transaction platforms, see generally, Filistrucchi, Lapo, *et al.* (2010), *Mergers in Two-Sided Markets – A Report to the NMa,* available at http://www.acm.nl/sites/default/files/old_download/documenten/nma/NMa_Two-Sided_Markets_-_Report_-_16_July_2010.pdf.

14 Klein *et al.* (2006), *supra* note 10, at 580.

But the distinction is far from being as clear as those authors claim. One can easily use their argument that a payment-card network is a transaction platform to argue that a free newspaper offers only one product: "advertising transactions," which are incidents in which a reader is exposed to an advertisement. Consider the following paraphrase of key sections of the quotation above:

> a [free newspaper] supplies only one product, [advertising transactions] that are jointly consumed by a [reader], who uses the [newspaper and is thus exposed to advertisements], and a merchant, who [uses the newspaper as means of exposing potential customers to its advertisements]. Accordingly, the two sides of a free newspaper] are not only interdependent… but their consumption of [advertising] transactions must be directly proportional. The two sides of the market can be thought of as providing inputs into the supply by the [newspaper] of this single product.

Some proponents of the distinction between transaction and non-transaction platforms would add a condition to the majority's definition in an attempt to narrow it: namely, these proponents define a transaction platform as one that facilitates direct transactions between users on its different sides *and* can observe those transactions so that it can levy per-transaction fees if it chooses to do so.[15] But online advertising platforms (e.g. Google Search) often are paid on a per-click basis. And even newspaper and broadcast television advertising approximates per-exposure pricing when payment is based on audience size, which is directly proportional to the number of exposures.[16]

There is also something inherently problematic about having the fundamental antitrust treatment of a firm hinge on the particular revenue model that it has chosen from among several different options available to it. Consider health insurance. In the United States, many large employers self-insure with respect to their employees' healthcare but enter into Administrative Services Only ("ASO") contracts under which an insurance company acts as an administrator and also often negotiates lower rates with health care providers, which are then paid by the employer. In some cases, the ASO platform keeps a percentage of the savings, which is equivalent to charging a percentage fee on the value of the transactions. Such fees have exactly the structure of those charged by American Express — the care provider (respectively, merchant) receives the amount paid the employer (respectively, consumer) minus the amount kept by the insurer (respectively, American Express). In other instances, the insurance company collects a per-member fee. Is an ASO a transaction platform if it relies on the shared-savings model but not if it relies solely on fixed fees? And what if it has a hybrid revenue model, involving both subscription and transaction fees? Would that disqualify it as a transaction platform? If so, was it a mistake to label American Express, which earns substantial revenues (e.g. credit-card interest and annual card membership fees) that are not directly tied to the number of card transactions, as a transaction platform?

Indeed, there is another reason to question whether American Express is a transaction platform as the majority defined it. Arguably, American Express does not sell "transactions" to merchants. Instead, it sells "acceptance services." The key distinction is this: a merchant does not purchase individual card transactions from American Express. Instead, the merchant agrees to accept any valid American Express card presented to it for payment — that is, the merchant purchases the right (and the obligation) to hold itself out to the public as accepting American Express cards.[17] Moreover, the majority's theory that the no-steering provisions served to prevent merchant free riding[18] makes absolutely no sense in the context of a pure transaction platform — as Justice Breyer observes in his dissent, it is impossible to free ride on benefits that are tied to the transactions themselves.[19] If there were to be a colorable theory of free riding, it would have to be that merchants benefited from the acceptance of American Express cards even when transactions were completed on other credit-card networks. In other words, merchants would have to be buying more than American Express card transactions from American Express.

15 See, e.g. Filistrucchi *et al.* (2014), *supra* note 6, at 298.

16 Indeed, broadcast television advertising agreements often have *ex post* adjustments that are made if the audience size of a program is less than was projected at the time the advertising agreement was entered into.

17 Merchants' inability to choose — or to attempt to influence consumers' choices — at the transaction level was the central focus of the plaintiff's case against American Express.

18 138 S. Ct. 2274 at 2289-2290.

19 138 S. Ct. 2274 at 2304 (Breyer, J. dissenting).

IV. HOW BROADLY DOES THE MAJORITY'S REASONING APPLY (AND IS IT CORRECT TO BEGIN WITH)?

The breadth of the threat posed by *American Express* will depend, in part, on whether the majority's approach is extended beyond transaction platforms.

First, consider the majority's approach to market definition. The majority asserts that: (a) market definition is essential in cases involving vertical conduct, even when plaintiffs offer direct evidence of anticompetitive effects, and (b) transaction platforms must be analyzed using a single, two-sided market.

According to the majority, "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market."[20] There appears to have been nothing in the majority's reasoning that limits this conclusion to transaction platforms, or even to platforms. This is unfortunate, as there also is nothing in the majority's reasoning that has the support of sound economics. There are many modes of economic analysis for assessing the effects of vertical conduct that do not require the formal delineation of bright-line market boundaries. In fact, it is well known that strict adherence to bright-line boundaries can be an obstacle to good analysis.

The majority reaches its conclusion that a single, two-sided market must be used to analyze transaction platforms based on several factors that they believe follow from the fact that a transaction platform can make sales only to both sides at once. First, "[b]ecause they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand."[21] Second, transaction platforms are "better understood as 'suppl[ying] only one product'—transactions."[22] The majority further asserts that "[e]valuating both sides of a two-sided transaction platform is also necessary to accurately assess competition," both because "[o]nly other two-sided platforms can compete with a two-sided platform for transactions"[23] and because a platform can facilitate a transaction between users on two different sides of the marketplace only if they both participate on that platform.[24] The majority ultimately concludes that "For all these reasons, '[i]n two-sided transaction markets, only one market should be defined.'"[25]

To the extent that the majority's conclusion is based on the perceived need to have a single market in order to account for bi-directional, cross-platform feedback effects, one would expect the majority to believe its conclusion should apply to any platform subject to network effects in both directions across the platform.[26] For example, multichannel video programming providers (MVPDs) can be viewed as platforms that facilitate the interaction of programmers and viewers. Viewers can clearly place value on a platform's having a broader array of programming available, and programmers typically will place greater value being carried by an MVPD with more potential viewers. It is not clear whether the majority would consider an MVPD that sells subscriptions to broad packages of programming to viewers and pays various forms of license fees to network owners to be a transaction platform.[27]

20 138 S. Ct. 2274 at 2285, note 7.

21 As a matter of logic, this relationship need not always hold. Consider an industry in which multiple transaction platforms connect buyers with sellers of a homogeneous commodity that has a price set on a market-wide basis. Buyers may have little interest in the number of sellers on a given platform as long as that number is greater than or equal to one.

22 138 S. Ct. 2274 at 2286 quoting Klein *et al.* (2006), *supra* note 10, at 580. Oddly, while it asserts that a transaction platform offers only a single product, the majority also states that a transaction platform is "a special type of two-sided platform" (138 S. Ct. 2274 at 2280) and that, "[a]s the name implies, a two-sided platform offers *different products or services* to two different groups who both depend on the platform to intermediate between them" (*id.* at 2280, emphasis added).

23 138 S. Ct. 2274 at 2287 citing Filistrucchi *et al.* (2014), *supra* note 6, at 301.

24 138 S. Ct. 2274 at 2287.

25 138 S. Ct. 2274 at 2287 quoting Filistrucchi *et al.* (2014), *supra* note 6, at 302.

26 Wright & Yun (2019), *supra* note 7, at 11 (typescript) make a similar point.

27 Wright and Yun identify yellow pages as an example of a platform with two-sided network effects that is not a transaction platform. (*Id.*) Along the lines discussed in Section III above, one might argue that yellow pages constitute a transaction platform, although the majority in *American Express* might well reject that characterization. The fact that such a debate is possible is itself evidence of a problem with the majority's definition.

Requiring that a broader set of firms be evaluated using a single, two-sided market would be unfortunate. It is not, in fact, necessary to define a single, two-sided market in order to properly account for feedback effects between the two sides of a platform, transaction or otherwise. In fact, one may be better able to account for feedback effects with an approach that defines a multisided platform as operating in two, closely interrelated but distinct markets.[28]

Next, consider the majority's narrow focus on the two-sided price. The majority opined that "[p]rice increases on one side of the platform … do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services" (i.e. the two-sided price).[29] The majority implicitly asserts that the effects of challenged conduct on the welfare of the users on the two sides of a transaction platform should be balanced against one another, and that users cannot collectively be harmed by conduct that fails to raise the two-sided price.

To the extent the majority's focus on the two-sided price is based on its determination that a transaction platform offers only a single product, the primacy of the two-sided price will be limited to enforcement against transaction platforms. However, extending the focus on the two-sided price even to other transaction platforms can raise issues. Consider a transaction platform that charges fees to users on one side and neither levies fees nor offers financial rewards to users on the other side. Would a plaintiff have to show that a price increase to the first side was not offset by a quality increase to the second one? Doing so might prove to be extremely difficult in practice. Moreover, one could imagine the court's making a broader argument that the conduct of any two-sided platform can be assessed only by simultaneously considering the effects on users' welfare on both sides of the platform and balancing those effects against one another if they go in opposite directions.

It is important to recognize that, even for transaction markets, the majority's sole focus on the two-sided price is fundamentally at odds with the economic literature on which the majority claims to have based its decision. The central point of the literature on two-sided transaction platforms is that looking solely at the two-sided price is insufficient for understanding how the market is performing. Indeed, in a seminal article, Rochet & Tirole (2006) take the fact that output depends on more than the two-sided price to be the defining characteristic of a transaction platform.[30] Moreover, as I have discussed in Katz (2019), the change in the two-sided price is not a sufficient statistic for the changes in either consumer or total surplus — one can construct examples in which conduct reduces consumer welfare even as that conduct reduces the two-sided price.[31]

28 See Katz, Michael L. & Jonathan Sallet (2018), "Multisided Platforms and Antitrust Enforcement, *Yale Law Journal*, 127(7): 2142-2175.

29 138 S. Ct. 2274 at 2286.

30 Specifically, Rochet & Tirole (2006) consider a firm charging per-transaction prices p_1 and p_2 to users on sides 1 and 2, respectively, and define the firm as a two-sided transaction platform if and only if its transaction volume varies as p1 changes even when $p_1 + p_2$, remains constant. In other words, the defining feature is that the *structure* of prices (i.e. the individual values of p_1 and p_2) matters, not just the *level* (i.e. the two-sided price, $p_1 + p_2$). (Rochet, Jean-Charles & Jean Tirole (2006), "Two-sided markets: a progress report," *RAND Journal of Economics,* 37(3): 645-667.) The error in the majority's opinion is particularly glaring given that the opinion references Rochet & Tirole (2006) and discusses the fact that the price structure can affect sales volume. (138 S. Ct. 2274 at 2281.)

31 Katz, Michael L. (2019), "Platform economics and antitrust enforcement: A little knowledge is a dangerous thing," *Journal of Economics & Management Strategy,* 28(1): 138-152. In practice, the majority did not adhere to its statement that showing an increase in the two-sided price was sufficient to establish harm. The majority conceded — and then ignored — the fact that American Express's challenged conduct had raised the two-sided price. As Justice Breyer stated in his dissent, "the majority retreats to saying that even [two-sided] price increases do not matter, after all, absent a showing of lower output." (138 S. Ct. 2274 at 2302 (Breyer, J. dissenting).) The majority's reliance on an output test would make sense only if a higher quantity necessarily corresponded to a higher level of user welfare. In a one-sided market, this relationship typically holds as long as product quality is unchanged and the supplier does not engage in price discrimination. But this is not the case for transaction platforms. The interests of users on opposites sides of a transaction platform often are not aligned, and a platform may be able to exploit this fact. For example, under some business models, a platform can lower the price to users on one side of the platform and increase transaction volume while harming users on the other side and lowering overall user welfare. (See Katz (2019), § 6, and references cited therein.)

V. WILL THE COURT IGNORE *AMERICAN EXPRESS*?

The extent to which *American Express* distorts antitrust enforcement will also depend on whether the Supreme Court applies the principles of *American Express* to future cases. Both the majority and dissenting opinions in a recently decided case suggest that the justices may simply ignore *American Express* when it suits them.

Apple Inc. v. Pepper et al. concerns a class action brought against Apple's iOS App Store.[32] It is impossible to imagine how the App Store could fail to be a transaction platform if American Express's credit and charge card network is one: each facilitates transactions between buyers (app purchasers and card-carrying consumers, respectively) and sellers (app developers and merchants, respectively) and charges the latter a percentage of the dollar value of the transactions completed over the platform. Yet neither the majority nor dissenting opinion in *Apple* identified the App Store as a transaction platform.

According to the majority in *Apple*, "[t]he plaintiffs purchased apps directly from Apple and therefore are direct purchasers under Illinois Brick."[33] This view is consistent with the view of the majority in *American Express* that a transaction platform offers a single product to users on both sides simultaneously. However, the majority in *Apple* also asserts that:[34]

> Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*.

This assertion directly contradicts the view espoused by the majority in *American Express* that a transaction platform offers a single product and that the price charged to users on one side of the platform cannot be understood in the absence of the price charged to users on the other side. Not only is it a common fund; it is a common (two-sided) price. Stated another way, if one ascribes to the framework of the *American Express* opinion, then it makes no sense to speak to two different theories — instead, Apple would be viewed as allegedly engaging in exclusionary conduct that gives it monopoly power in the sale of a single product: app transaction services.[35]

The dissent in *Apple* also contradicts the majority in *American Express*. Specifically, according to the dissent:[36]

> The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it. Plaintiffs can be injured *only* if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. [Emphasis in original.]

But how is this consistent with the view of the majority in *American Express*, which would imply that the App Store's only product is the facilitation of app sales transactions and that single product is jointly sold to — and paid for by — app buyers and app developers? The dissent rejects the view that users on both sides of a transaction platform jointly pay the two-sided price and excludes the possibility that the exercise of market power by Apple prevented consumers from receiving rewards from Apple for making purchases. The *Apple* dissenters' contradiction of *American Express* is particularly striking given that all of the dissenters in *Apple* were members of the majority in *American Express*. Perhaps even they now want to disavow the *American Express* opinion.

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32 My discussion of *Apple* is intended only to identify tensions with *American Express.* I am offering no views of the merits of either the majority or dissenting opinion in *Apple.*

33 587 U.S. ___ (2019) (slip op at 2).

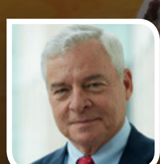
34 587 U.S. ___ (2019) (slip op at 13). According the majority, "[t]he plaintiffs' allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps." (*Id.* at 4.)

35 Justice Kavanaugh authored the majority opinion, and this is not the first time that his approach to platforms does not accord with *American Express.* The U.S. Department of Justice, eleven States, and the District of Columbia challenged Anthem, Inc.'s proposed acquisition of Cigna Corporation in part on the grounds that it would harm competition in the sale of ASO plans to large employers. (*United States v. Anthem, Inc.,* 236 F.Supp.3d 171 (D.D.C. 2017).) The parties defended the proposed merger by arguing that it would allow them to induce healthcare providers to accept lower rates, which would be passed on to the merged company's employer-customers. In his dissent, then-Circuit Judge Kavanaugh stated that there were two distinct markets: one for the sale of services to large employers and a distinct upstream market in which an insurance company negotiates rates with care providers. (*United States v. Anthem, Inc.,* 855 F.3d 345 (D.C. Circuit 2017) at 372 (Kavanaugh dissenting).) Moreover, he stated that, if the reduction in the prices paid by employer-customers to pay care providers were due to increased insurer bargaining power (rather than the exercise of monopsony power), then the merger would be procompetitive because the resulting savings to employer-customers would outweigh any increase in administrative fees charged to those customers by the merged firm. (*Id.* at 381.) Notably, he made no attempt to look at a two-sided price, which would count the reduction in fees paid to care providers as a loss to those users to be weighed against the gains to employer-customers.

36 587 U.S. ___ (2019) (Gorsuch, J. dissenting slip op at 5).

THE ROLE OF MARKET DEFINITION IN ASSESSING ANTICOMPETITIVE HARM IN *OHIO v. AMERICAN EXPRESS*

BY DAVID S. EVANS & RICHARD SCHMALENSEE[1]



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I. INTRODUCTION

In this essay, we argue that the Supreme Court reached the right outcome in *Ohio et al. v. American Express*.[2] We explain that the single-sided market definition adopted by the District Court, despite its finding that American Express ("Amex") was a two-sided transaction platform as described in the economics literature, effectively prevented it from seeing how weak the plaintiffs' case was.[3] The Supreme Court did not discuss the limitations of the plaintiffs' theory and evidence at length but simply and, we believe, properly found that the plaintiffs had failed to prove antitrust injury. Many criticisms of the Supreme Court decision seem to be based on the rejection or misunderstanding of the economics literature on multi-sided platforms on which the District Court, the Appeals Court, and the Supreme Court all relied.

II. THE DISTRICT COURT'S BACKGROUND FINDINGS ON THE CASE

The U.S. Department of Justice, together with the State of Ohio and other states, brought the case against American Express in 2010. Before addressing the merits of the plaintiffs' lawsuit, the District Court provided some background on the payment card business and the use of anti-steering provisions as well as other issues.

When a purchase is made with a general-purpose credit or charge ("GPCC") card, the merchant pays, to a third party, a fraction of what it charges the buyer. Most of that payment, the merchant fee, goes to the firm that issued the card: American Express in the case of American Express cards, and a bank in the case of Visa or Mastercard cards. Historically, Amex has had a "spend-centric" business model: it has focused on attracting consumers who are likely to spend heavily, in part by offering more generous rewards for using its cards than Visa or Mastercard issuers had typically done. It has financed its reward programs by charging higher merchant fees than Visa or MasterCard. Visa and Mastercard issuers, in contrast, had "lend-centric" business models: they did not focus on attracting heavy spenders and made much of their money by lending to cardholders.

Despite the higher Amex merchant fees, and even though most Amex cardholders also carried one or more Mastercards and Visa cards, the Amex card was accepted at around 6.4 million U.S. merchant locations. But it was *not* accepted at around 3 million U.S. merchant locations that had chosen to accept Visa and MasterCard.[4]

Since the 1950s, Amex's contracts with merchants that had chosen to accept its card generally prohibited merchants from using both price and non-price forms of what has come to be called "steering."[5] Steering via price would involve the merchant imposing special surcharges on purchases made with Amex cards rather than other GPCC cards.[6] Non-price steering would involve the merchant trying in other ways — by pleading hardship, disparaging Amex, or posting "We Prefer Visa" signs — to persuade customers who carried and perhaps had presented their Amex cards instead to use a means of payment that was less expensive for the merchant. If they did so, customers would generally give up some standing in the Amex rewards program and possibly use a less preferred card from their standpoint. There were similar anti-steering provisions in Visa and MasterCard merchant contracts.

Beginning in the late 1980s, MasterCard and Visa mounted campaigns aimed at persuading consumers that their cards were more useful than Amex cards and persuading merchants to steer consumers toward their cards using non-price methods. These two campaigns together were effective: between 1990 and 1995, Amex's share of GPCC volume declined from 25 percent to 20 percent. Amex responded by strengthening and enforcing the anti-steering provisions in its merchant contracts.

2 *Ohio v. American Express Co.* 138 S.Ct. 2274 (2018). The U.S. Department of Justice was the lead plaintiff in the cases below. It decided not to join to the States in seeking certiorari, so the States are the plaintiffs in the Supreme Court case. After cert was granted, the Justice Department ended up filing a brief for plaintiffs and participating in oral arguments.

3 The argument that the plaintiffs' case was fatally flawed is consistent with the discussion provided by Huang, Thu & Joshua H. Soven (2018) "More Old News than New News in American Express" *Antitrust Magazine* (Fall 2018).

4 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 204 (2015).

5 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 161 (2015). American Express was launched in 1958. At the time Diners Club was the dominant GPCC system in the US. See Evans, David & Richard Schmalensee (2005) *Paying With Plastic*, 2nd Edition, The MIT Press, at pp. 57-59.

6 There have never been restrictions on giving discounts from list price for the use of cash or other means of payment. The Amex contracts' restrictions on steering via price did not bar surcharging relative to cash, checks, or debit cards, only relative to other GPCC cards.

In 2010, the U.S. Department of Justice ("DOJ") and several states charged that the restrictions on *non-price* steering in the merchant contracts of Amex, Visa, and MasterCard were unreasonable restraints of trade and thus violations of Section 1 of the Sherman Act. Independent class-action cases brought by groups of merchants challenged the restrictions on surcharging.[7] The plaintiffs' case thus had nothing to do with direct restrictions on price competition at the merchant level, and certainly nothing to do with discounts for cash or debit cards, despite some commentators' claims to the contrary.[8]

An important theory of harm, in the case that was brought initially, was that the restrictions on non-price steering by the three leading systems unreasonably limited the ability of smaller GPCC systems, like Discover, to compete by charging low merchant fees. Visa and Mastercard, which accounted for 68.3 percent of GPCC volume in 2013,[9] agreed to drop their restrictions on non-price steering, thus greatly weakening the plausibility of that theory as applied to Amex alone.[10] The plaintiffs nonetheless persisted, as did Amex, and a seven-week trial ensued during the summer of 2014.

III. THE DISTRICT COURT'S RULE-OF-REASON ANALYSIS

The District Court issued a 97-page decision in February 2015.

A. District Court Findings on Amex as a Platform

At trial, experts for both sides described Amex as a two-sided platform. The court agreed, citing a number of works from the relevant economics literature. The judge noted the existence of indirect network effects between merchants and consumers on the two sides of that platform. This ready acceptance of the economic literature on multi-sided platforms is in marked contrast to the strenuous attacks on that literature that has appeared in later commentary on this case,[11] some of which we discuss below.

The judge went on to describe Amex as a two-sided *transactions* platform:[12]

> …the two sides of the platform are brought together to consummate a single, simultaneous transaction, and the products provided by the platform are consumed in fixed proportions by the consumer and the merchant.

That finding became a key predicate of the Supreme Court's decision.

Having found that Amex was a two-sided platform, the judge faced a critical choice that has been discussed at some length in the academic literature: whether to define a single market linking both sides of the platform, or to carry out the analysis working with two closely coupled

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7 The merchants' suit against MasterCard and Visa was brought in 2005 and was finally settled in January 2019. Both networks now permit surcharging with disclosure requirements and limits on the charges: see Visa, "Visa Core Rules and Visa Product and Service Rules" at pp. 338-368, available at https://usa.visa.com/dam/VCOM/download/about-visa/visa-rules-public.pdf; MasterCard, "MasterCard Rules" at pp. 262-269, available at https://www.mastercard.us/content/dam/mccom/global/documents/mastercard-rules.pdf. In 2008, another group of merchants challenged all of Amex's anti-steering provisions. Individual merchant cases and a putative merchant class action challenging Amex's provisions were consolidated in 2011. In January 2019, the trial court ordered both parties to proceed to trial using the two-sided market definition in the Supreme Court *Amex* decision: Memorandum and Order, *In Re: American Express Anti-Steering Rules Antitrust Litigation*, 11-MD-2221 (NGG) (RER) January 14, 2019. On April 12, 2019, the individual merchant cases were dismissed with prejudice pursuant to a joint stipulation between the parties that settled the litigation on undisclosed terms. There is a pending motion to dismiss and compel arbitration of the class action. It seems that all of Amex's anti-steering restrictions are still in force: American Express, "American Express US Merchant Reference Guide" at Section 3.2, available at https://icm.aexp-static.com/Internet/NGMS/US_en/Images/merchantpolicypdfs/US_RefGuide_NS.pdf. Complicating this picture, ten states and Puerto Rico had anti-surcharge laws in effect in 2016. Several of these have been voided as impermissible restrictions on commercial speech, and the validity of others is being litigated. See National Conference of State Legislatures, "Credit and Debit Card Surcharge Statutes" October 13, 2016, available at http://www.ncsl.org/research/financial-services-and-commerce/credit-or-debit-card-surcharges-statutes.aspx.

8 See, for instance, Hovenkamp, Herbert (2019) "Platforms and the Rule of Reason: The American Express Case," *Columbia Business Law Review* (forthcoming) at pp. 1, 35, 43, 45, 77-78.

9 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 188 (2015).

10 Nevertheless, the District Court found that Amex's restrictions on non-price steering, the only restrictions at issue in the case, by themselves "…render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks." The testimony from Discover on which this finding apparently rested, however, referred to a period in which MasterCard and Visa also had restrictions barring both price and non-price steering. *Id.* at 213-214.

11 See Evans, David S. & Richard Schmalensee, "Two-Sided Red Herrings," *CPI Antitrust Chronicle*, October 2018.

12 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 155 (2015).

markets.[13] He chose to describe the GPCC business as consisting of two markets, one involving Amex and merchants and the other involving Amex and consumers. He then decided to limit consideration to the merchant side of the business in the first step of the rule-of-reason analysis and thus to consider initially whether Amex's policies in that market had unreasonably restrained competition.[14] As we will discuss below, he also decided that he could not consider any pro-competitive benefits from the consumer market in the second step of the rule-of-reason analysis.

This single-sided market approach basically precluded the court from considering the implications of its own finding that Amex was a two-sided transaction platform. It had to view the facts of the case through a lens that distorted the business reality the court itself had emphasized.

B. The Choice of Market Definition and the Rule-of-Reason to Two-Sided Platforms.

In principle, the conclusions of an *economic* analysis of the effects of a challenged practice by a two-sided transactions platform should be the same whether based on consideration of a single platform market or two closely coupled markets corresponding to each side. Unfortunately, the conclusions of a *legal* analysis under the three-step structure of rule-of-reason analysis in U.S. courts can depend critically on this choice of market definition. In particular, the single platform market definition allows consideration of all the relevant evidence and accounts for the business realities surrounding platform competition, while the side-specific platform market definitions suppress this evidence and distort business reality.

Under the rule-of-reason, plaintiffs have the initial burden of showing that challenged conduct harmed competition. If they do so, the defense has an opportunity to demonstrate pro-competitive benefits. In principle, if both sides meet their burdens, the finder of fact must balance pro- and anti-competitive effects. As a practical matter, however, if plaintiffs succeed at the first step, defendants have a very difficult task.

The *American Express* case illustrates why. First, it isn't clear that the court could consider the other side-specific market in the second-stage of the rule-of-reason inquiry. The trial court judged noted that pro-competitive benefits on the consumer side, in "a separate, though intertwined antitrust market," could not be used to offset anti-competitive effects on the merchant side.[15] Second, after finding that a practice is anti-competitive in the first stage, courts seldom give much weight to pro-competitive benefits in the second stage. In this case, the judge essentially ignored the tight linkage between the two markets he had defined: Amex's pro-competitive justifications for its conduct are not discussed until the last 14 pages of the 97-page District Court opinion.[16]

When a challenged practice clearly has effects on both sides of a two-sided transactions platform, as in this case, to exclude either side of the platform in the first step of the analysis is to bias the result.[17] After all, the output (transactions consummated by both sides), the price of that output (paid by both sides), and the profits earned (contributed by both sides) necessarily depends on both sides. Once a court has found that a business is a two-sided transaction platform, it makes no economic sense to ignore the consequences of the challenged conduct for half of the parties to the joint transaction. And in the case of transactions platforms, the most natural way to take into account the impact of the challenged

13 A useful overview of that discussion is provided by Wright, Joshua D. & John M. Yun (2019) "Burdens and Balancing in Multisided Markets: The First Principles Approach of Ohio v. American Express," *Review of Industrial Organization* 54(4), pp. 717-740. See also Affeldt, Pauline, Lapo Filistrucchi, Damien Geradin & Eric Van Damme (2014) "Market Definition in Two-Sided Markets: Theory and Practice," *Journal of Competition Law and Economics* 10(2) pp. 293-339 and, for a different view, Katz, Michael & Jonathan Sallet (2018) "Multisided Platforms and Antitrust Enforcement," *Yale Law Review* 127(7), pp. 2142-2175.

14 After excluding debit cards and other forms of payment from the relevant market, the trial judge found Amex had a 26.4 percent share of GPCC transactions volume. Despite this relatively small share he found that Amex had sufficient market power to affect competition and proceeded to analyze the effects of the challenged conduct. *U.S. v. American Exp. Co.* 88 F.Supp. 143, 207 (2015). We take market power as given for the analysis below even though one could quarrel with the court's finding. For example, the court found that Amex's cardholders' loyalty was "…critical to the court's finding of market power…" even though that loyalty was, at least in large part, purchased by Amex through its generous rewards program. The Court of Appeals disagreed, holding that there is no reason to intervene because of market power that depends on rewards and prestige: *U.S. v. American Exp. Co.* 838 F.3d. 179, 204 (2016).

15 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 229 (2015). It seems unsettled whether under U.S. case law it is possible to consider the benefits from a related market. Several eminent law professors who filed an amicus brief in support of the plaintiffs before the Supreme Court said it was not appropriate to do so. The U.S. Department of Justice seemed sufficiently uncertain about this that they advocated that the Court find that those benefits could be considered. See "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); "Brief for the United States in Opposition" *State of Ohio, et. al., v. American Express Company, et. al*, (2017) No. 16-1454 (SCOTUS).

16 Justice Breyer, in dissent, would have allowed the benefits from the interlinked market to be considered in the second step of the rule-of-reason. He then noted the likely futility of that defense: "A Sherman Act §1 defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another."*Ohio v. American Express Co.* 138 S.Ct. 2274, 2302 (2018) (Breyer, J., dissenting).

17 We have argued elsewhere that there is no reason to presume that this bias always works against the defendant since the anti-competitive harm could be felt on the side that is ignored. See Evans, David & Richard Schmalensee (2018) "Applying the Rule of Reason to Two-Sided Platform Businesses," *University of Miami Business Law Review* 26(2) pp. 1-15.

conduct on both sides of the same transaction is to define a single market for the service of connecting the two sides.[18] Doing otherwise means, as a practical matter, the court ignoring pro-competitive benefits for the other interlinked side or putting little weight on this evidence.

C. What the District Court Missed from Relying on a Single-Sided Platform Market

In this case, it is instructive to suppose that the trial court had decided to take a serious look at the consumer side of the platform in the first step of the analysis and that Amex had fully availed itself of this opportunity. Amex could have made a good argument for the facial reasonability of its anti-steering provisions in light of general business practice. As one commentator asked, rhetorically, when the DOJ complaint was initially filed,[19]

> [T]he larger question is whether … American Express, or any firm, could possibly violate the Sherman Act by telling agents that are distributing its services as well as the services of its competitors that once the customer has expressed a clear preference to use its service rather than a competing offering, the agent must accept the consumer's preference.

In addition, if the District Court had been able to look at the platform as whole, Amex might have been able to make its free-riding argument more persuasive. After all, why would a merchant decide to accept the Amex card and then to try to persuade customers not to use it rather than simply not accepting the card unless accepting the Amex card generated incremental business? That incremental business must have resulted from investments by Amex, on which some merchants who wanted to engage in non-price steering wished to ride free.[20]

Amex could have gone on to note that it is common for two-sided platforms to restrict the behavior of participants on one side in order to benefit those on the other side. For instance, OpenTable terminates the accounts of diners who are no-shows four times in a 12-month period.[21] This rule is an inconvenience to diners but clearly benefits restaurants. Similarly, Amex's restrictions on non-price steering by merchants clearly benefitted its cardholders: it freed them from being hassled to give up rewards in order to lower merchants' costs. Or from just being hassled when they'd like to pay and get out of the store. These restrictions enabled Amex to offer a more attractive product by ensuring what it called "welcome acceptance."[22]

Experience abroad provides additional support for the direct consumer benefit from rules that restrict merchant steering. Australia and the United Kingdom both prohibited card networks, including American Express, from forbidding merchants from imposing surcharges which is the leading price-based steering method.[23] Both found that, of the merchants who surcharged, some did so opportunistically.[24] The surcharges sometimes greatly exceeded the fees merchants paid. Most troubling, some online merchants imposed these fees at the end of the check-out process as an extra fee—a practice known as "drip pricing." Having persuaded the consumer to go through the purchase process and enter their payment details, the merchant anticipates that the surcharge at the end won't dissuade them for completing the purchase.[25]

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18 For a more detailed discussion of this point, see *Id.*

19 Brown, Thomas P. (2010) "U.S. v. American Express, et al.—Failing To Make Something Out Of Nothing" *Lydian Journal*, available at https://www.pymnts.com/assets/Lydian_Journal/LydianJournalNovemberTomBrown.pdf.

20 On this point, see the discussion by the Court of Appeals, *U.S. v. American Exp. Co.* 838 F.3d. 179, 204 (2016).

21 OpenTable, "what is your no-show policy?" available at https://help.opentable.com/s/article/What-is-your-no-show-policy-1505261059461?language=en_US.

22 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 156 (2015). This point was accepted by the Supreme Court: *Ohio v. American Express Co.* 138 S.Ct. 2274, 2289-90 (2018).

23 Reserve Bank of Australia, "A Guide to the Card Payments System Reforms" September 2010, available at https://www.rba.gov.au/publications/bulletin/2010/sep/7.html.

24 Reserve Bank of Australia, "Review of Card Payments Regulation" May 2016, available at https://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/conclusions-paper-may2016/; Office of Fair Trading, "Payment surcharges: Response to the Which? Super-complaint" July 2012, available at https://webarchive.nationalarchives.gov.uk/20140402220446/http://www.oft.gov.uk/shared_oft/super-complaints/OFT1349resp.pdf.

25 See Amelia Fletcher, "Drip pricing: UK experience" Presentation to the FTC, May 21, 2012, available at https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/afletcher.pdf.

Australia revised its regulations to limit the surcharges so they could not exceed merchant fees.[26] The United Kingdom has prohibited merchant surcharging altogether.[27] Puerto Rico and ten U.S. states have passed legislation that prohibit merchants from imposing surcharges.[28] Under the single-sided market approach, a court could not consider the possibility that American Express was prohibiting surcharges to protect its cardholders from opportunistic behavior, nor could it consider any consumer benefits that this protection provides.

To address the charge that its restrictions on non-price steering nonetheless constituted an unreasonable restraint of trade that reduced consumer welfare, Amex would stress that payment systems compete for *transactions*, which requires them to cater to both merchants and consumers. It would point to the many merchants that had elected not to accept the Amex card because of its high merchant fees as evidence that price competition is alive and well in the GPCC card business. It would remind the court that it did not restrict merchants' ability to offer discounts for cash, checks, or debit cards and that their ability to charge more when more expensive payment systems were used — to surcharge — was not an issue in this case. The only competition that was suppressed by the Amex restrictions at issue was merchant jawboning aimed at the customers of a firm with a 26.4 percent share of GPCC transactions' volume.

All of these arguments go to the heart of the question that should have been before the court at the first stage of the rule-of-reason — did the practice restrict competition among two-sided transaction platforms? — but couldn't be considered under the single-sided definition adopted by the District Court in this or similar cases.

D. The District Court's Evidence on Antitrust Injury in the Single-Sided Merchant Market

Plaintiffs stressed evidence that Amex had market power and that the anti-steering provisions restricted one form of non-price competition which some merchants testified that they would have employed but for those restrictions. And, as noted above, the District Court was somehow persuaded that the Amex restrictions on non-price steering had, by themselves, made it "nearly impossible" for Discover or other systems to compete on the basis of low merchant discounts.[29]

The rest of plaintiffs' evidence relied on by the District Court seems to add little economic substance to this.[30] Plaintiffs stressed that Amex had increased its merchant discounts substantially over the 2005-2010 period with only a slight decline in merchant acceptance, though these increases were in response to earlier increases by MasterCard and Visa. Amex was selling a differentiated product in a concentrated market, and generally offering higher consumer rewards, so price differences and price changes are hardly symptoms of competitive breakdown. Plaintiffs were unable to persuade the trial judge that Amex charged supra-competitive prices, or that it earned supra-competitive profits, or that its merchant fees were above those of Visa and MasterCard. So, in the end, plaintiffs did not provide any quantitative evidence showing a *causal* link between Amex's more stringent enforcement of its ban on non-price steering and any change in market competition.

Perhaps a trial court that considered both sides of the platform in this fashion in the first step of the rule-of-reason analysis would nevertheless have found that Amex's restrictions on non-price steering constituted an unreasonable restraint of trade and that consumer welfare was on balance reduced by it. But we think that looking at the interlinked consumers and merchants together, in a single platform market, would more likely have revealed just how weak the DOJ's case was and would have led to a decision for Amex by the District Court. In the actual world, the District Court found that Amex had violated Section 1.[31]

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26 Reserve Bank of Australia, "Review of Card Payments Regulation" May 2016, available at https://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/conclusions-paper-may2016/.

27 GOV.UK, "Card surcharge ban means no more nasty surprises for shoppers" January 13, 2018, available at https://www.gov.uk/government/news/card-surcharge-ban-means-no-more-nasty-surprises-for-shoppers.

28 See *supra* note 7.

29 See *supra* note 10.

30 On what follows in this paragraph, see *Ohio v. American Express Co.* 138 S.Ct. 2274, 2288 (2018). The District Court also noted that in the absence of surcharging or discounting, the cost of Amex's merchant fees is paid by all consumers at merchants that accept Amex cards, even those consumers that don't use Amex cards. It argued that this could result in a regressive subsidy from poor consumers who use cash to rich consumers who use Amex cards: *U.S. v. American Exp. Co.* 88 F.Supp. 143, 216-7 (2015). The claim that GPCC cards result in cash users subsidizing card users (and poor people subsidizing rich people) is often made by commentators on *American Express* as well as by the plaintiffs. The point isn't as obvious as it may seem at first blush. Merchants incur significant costs from handling cash, after all, and cash-intensive and card-intensive users seem likely to tend to patronize different merchants. The unpublished paper by Schuh, Stavins & Oz, which is often cited in support of the cash/poor subsidy point demonstrates the fragility of the evidence on this point. See, Schuh, Scott, Oz Shy & Joanna Stavins "Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations" *Presentation at the Joint ECB/OeNB conference on The Future of Retail Payments: Opportunities and Challenges, May 12-13, 2011* at Slide 18, available at https://www.ecb.europa.eu/events/pdf/conferences/ecb_oenb/Presentation_Schuh.pdf?42499b9ccf32f21fae815637eea2caf1. They find no cross-subsidy if the merchant pass-through rate is 50 percent or less, which is within the range of pass-through rates found in the literature, and report results based on 100 percent pass-through. For an overview of evidence on pass-through rates see Chang, Howard, David Evans & Steven Joyce (2015) "The Impact of the U.S. Debit-Card Interchange Fee Regulation on Consumer Welfare" *Journal of Competition Law and Economics* 11(1), pp. 23-67.

31 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 238-9 (2015).

IV. MARKET DEFINITION FOR TWO-SIDED TRANSACTION PLATFORMS AND ANTITRUST INJURY ON APPEAL

In 2016 a three-judge panel of the Court of Appeals for the Second Circuit unanimously reversed the District Court, largely on the grounds that the correct product market definition was GPCC transactions:

> The District Court's definition of the relevant market in this case is fatal to its conclusion that Amex violated §1.[32]

It held that by looking only at services to merchants, plaintiffs had not established antitrust injury in the relevant antitrust market, the market for transactions. The Second Circuit then declined to have the full court reconsider the panel's decision.

The State plaintiffs appealed, and the Supreme Court granted certiorari in 2017. It issued its decision in June 2018.[33] In that decision, the majority began, almost exactly as the District Court and the Court of Appeals had done, by defining two-sided platforms and indirect network effects, citing much of the relevant economic literature, and concluding that Amex is a two-sided platform:

> As the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them.[34]

This description of two-sided platforms has been criticized as being over-inclusive, notably by Justice Breyer in dissent,[35] and some have argued that it would enable almost any business to claim special treatment because it is two-sided.[36] Like the District Court and the Court of Appeals, however, the Supreme Court majority cited relevant studies in the economics literature with more systematic, and less-inclusive, definitions. The literature cited by the Supreme Court includes a 2008 paper of ours, for instance, that offers a less-inclusive definition that is widely accepted in the economics literature:[37]

> Two-sided platforms serve two distinct groups of customers who need each other in some way, and … provide a common (real or virtual) meeting place … *to facilitate interactions between members of the two distinct customer groups*."

This context and the lower court decisions demonstrate that the majority was not departing from the now-voluminous economics literature on this point. That literature is entirely consistent with the proposition that, even though multi-sided platforms are increasingly important, many businesses, large and small, are not multi-sided.

Like the District Court and the Court of Appeals below, the majority went on to find that Amex operates a transaction platform, with indirect network effects running in both directions, providing a joint product simultaneously to two parties engaged in a transaction.[38] And like the Court of Appeals, it found that given this finding it was appropriate to define a single relevant market for GPCC transactions, rather than two different markets for merchant services and consumer services.[39] As with the Court of Appeals, it also found that the plaintiffs' evidence on antitrust injury was completely wanting.

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32 *U.S. v. American Exp. Co.* 838 F.3d. 179, 196 (2016).

33 *Ohio v. American Express Co.* 138 S.Ct. 2274 (2018).

34 *Id.* at 2280.

35 *Id.* at 2298-2300 (Breyer, J., dissenting).

36 See, e.g. Sagers, Chris (2018) "Ohio v. American Express: Clarence Thomas Sets Sail on a Sea of Doubt, and, Mirabile Dictu, It's Still a Bad Idea," *Pro Market,* June 27, 2018, available at https://promarket.org/ohio-v-american-express-clarence-thomas-sets-sail-sea-doubt-mirabile-dictu-still-bad-idea/.

37 Evans, David & Richard Schmalensee (2008) "Markets With Two-Sided Platforms," 1 *Issues in Competition Law and Policy* 667, emphasis added. See also Evans & Schmalensee, *supra* note 11, and the studies cited in note 13, *supra*.

38 *Ohio v. American Express Co.* 138 S.Ct. 2274, 2280 (2018).

39 *Id.* at 2287.

Given that market definition, the Supreme Court found that evidence on merchant fees, on which "plaintiffs stake their entire case," was "unpersuasive" absent more.[40] The majority noted the lack of evidence of supra-competitive pricing of transactions and cited the District Court's finding that there was no reliable evidence on Amex's transactions' prices or profit margins, nor conclusive evidence about whether Amex charged more than its competitors.[41] The Court also took note of evidence that Amex's price had increased from 2005 to 2010, but it found, properly, that an increase in price by a single firm, not found to have engaged in supra-competitive pricing, during a period of output growth did not establish an anti-competitive effect. It went on to point to evidence of vigorous competition among networks. It affirmed the judgement of the Court of Appeals.

It is worth repeating that this outcome was largely dictated by the findings of the District Court. There wasn't any dispute among the parties that Amex was a two-sided platform, the District Court found that it was a transaction platform, and the District Court didn't cite credible evidence that would establish that the anti-steering provisions had caused antitrust injury. The Supreme Court decision was not like Athena, full born from the head of Zeus. It was the logical outcome of the District Court's findings but for the trial judge's decision to ignore the consumer side of the two-sided transaction platform.

V. CRITICISMS OF THE SUPREME COURT'S *AMERICAN EXPRESS* DECISION

The Supreme Court's conclusion that the facts in *American Express* should be viewed through the lens of a single market for transactions, which we have endorsed above, seems to have attracted the most hostile commentary. In dissent, Justice Breyer argued at length that it is simply wrong because it aggregates complements — services to merchants and services to consumers — rather than substitutes.[42] The majority's market definition has been described by prominent commentators as "incoherent" and "economic nonsense."[43] In contrast, the economics literature generally indicates that a single-market lens may be more appropriate for use in some cases involving two-sided platforms, depending on fact patterns and analytical convenience.[44]

The *American Express* majority has *not* erred in treating complements as if they were substitutes for purposes of market definition. Rather, it has defined a market for the product, GPCC transactions, that is produced by the card systems by combining merchant-side and consumer-side complements in *production*. Antitrust markets of this sort are hardly novel. Left shoes and right shoes are plainly not substitutes in consumption. Rather, they are complements in *production*. They are combined to produce the product of interest to both suppliers and demanders: pairs of shoes. Similarly, engines and brakes are complements in production that are combined, along with other complementary inputs, to produce automobiles, potentially a relevant antitrust product market.

Justice Breyer said in the oral argument that the two sides were just like "nuts and bolts" and in his dissent like "tires and gasoline."[45] Professor Carlton, who has made the same point in earlier writing, has another analogy:[46]

> Steel and rubber are used to make a golf club, but it would make no sense to claim that steel and rubber are in one market.

But there is nothing obviously wrong with defining a market for golf clubs, which, as Professor Carlton notes, are produced by combining the two complementary inputs he mentions along with other inputs. These comparisons, and the complement point, seem to willfully ignore a voluminous literature on two-sided platforms that, since the early 2000s, has recognized that the two-sides aren't just ordinary complements.

40 *Id.* at 2287.

41 *Id.* at 2288.

42 *Id.* at 2297-2301 (Breyer, J., dissenting).

43 These descriptions are from Tim Wu (2019) "The American Express Opinion, Tech Platforms & The Rule of Reason" *The Journal of Antitrust Enforcement* (forthcoming) and Hovenkamp, *supra* note 8, respectively.

44 See the articles cited in note 13, *supra*. Justice Breyer cites us (Evans & Schmalensee, *supra* note 37) for the proposition that in some cases it is appropriate to ignore linkages between the two sides of a platform (*Ohio v. American Express Co.* 138 S.Ct. 2274, 2300 (2018) (Breyer, J., dissenting)). We still agree with that proposition, but *American Express* is not one of those cases.

45 Transcript of Oral Arguments at 22, *Ohio v. American Express Co.*, 138 S.Ct. 2274 (No. 16- 1454); *Ohio v. American Express Co.* 138 S.Ct. 2274, 2298 (2018) (Breyer, J., dissenting).

46 Carlton, Dennis (2019) "The Anticompetitive Effects of Vertical Most-Favored-Nations Restraints and the Error of *Amex*" *Columbia Business Law Review* 2019(1) pp. 93-106 at pp. 93, 105.

The definition of "transaction market" adopted by the District Court and quoted above emphasizes fixity of proportions as well as simultaneity.[47] Fixity of proportions is central to the examples in the preceding paragraph and other similar examples, as well as to the production of GPCC transactions. It is hardly irrelevant, as the Supreme Court majority said, that "…credit cards determine their market share by measuring the volume of transactions they have sold."[48] The plaintiffs used those same shares which of course are exactly the same from both sides of the two-sided transaction platform.

The Supreme Court found that the plaintiffs "have not carried their burden to prove anticompetitive effects in the relevant market."[49] Justice Breyer in dissent argued that as a legal matter, market definition was unnecessary if "proof of actual detrimental effects" on competition were at hand.[50] We have argued above that the evidence for "actual detrimental effects" presented to the District Court was weak when considered on one-side of the platform and incomplete by refusing to consider the other side of the platform.

Apart from the facts in this case, we believe that as an economic matter, it is essential to consider market definition and, more fundamentally, market power in Sherman Act rule-of-reason cases, even if market boundaries are often blurry and market power often eludes quantification. The use of "direct evidence" to prove anti-competitive effects in *American Express* illustrates why.

In discussing proof of actual detrimental effects, for instance, Justice Breyer noted that American Express raised its merchant fees 20 times in five years without losing appreciable market share.[51] Since Visa and MasterCard were also raising their merchant fees over the same period, it seems at least plausible that the JCB card, which issued cards in several U.S. states until 2018 but had a trivial share of GPCC card volume,[52] also raised its merchant fees. Is that fact, taken alone, *à la* Justice Breyer without the market context, proof that the JCB card's conduct had actual detrimental effects on competition?

Justice Breyer also pointed to testimony from numerous merchants that they would have engaged in steering but for Amex's anti-steering restrictions.[53] Suppose the JCB card's merchant agreements also had anti-steering provisions to which some merchants objected. Would that constitute evidence that those agreements had had anti-competitive effects sufficient for a Sherman Act Section 1 violation? If the JCB card had market power, perhaps. But without more than the quantum of market power that comes from selling a differentiated product, a firm's unilateral conduct simply cannot have any appreciable impact on competition in a relevant antitrust market. JCB's hypothetical anti-steering provisions may be a restraint of trade in the literal sense, but without market power they simply could not be an unreasonable restraint of trade, the requirement for an antitrust offense. Thus, if *Ohio v. American Express* imposes a new requirement to consider market-level effects when attempting to prove anti-competitive effects from direct evidence, as some commentators have argued,[54] we do not think this is a bad development.

If nothing else, *Ohio v. American Express* stands for the proposition that the now well-established economics of multi-sided platforms cannot be ignored in antitrust litigation. The Supreme Court and the Court of Appeals followed the District Court and found that Amex was a two-sided transactions platform, and all three decisions cited some of the voluminous relevant economics literature in support of those findings. Aside from how to treat market definition it doesn't appear that the basic economics was controversial at all.

Nonetheless, Justice Breyer complains that "The phrase 'two-sided transactions market' is not one of antitrust art …"[55] This seems to be correct but, in light of the history of antitrust law and policy, irrelevant. At the time the Sherman Act was enacted, and for quite some time after, modern microeconomics and industrial organization theory, including game theory, hadn't even been developed. "Barriers to entry" was not a term of antitrust art from 1890 until sometime after the concept emerged in the economics literature in the 1950s, and the hypothetical monopolist (or SSNIP) approach to market definition was unheard of in antitrust litigation from 1890 until the publication of the 1982 merger

47 Note 12, *supra.*

48 *Ohio v. American Express Co.* 138 S.Ct. 2274, 2286 (2018). The District Court found that transactions' volume was the best indicator of market share: *U.S. v. American Exp. Co.* 88 F.Supp. 143, 189 (2015).

49 *Ohio v. American Express Co.* 138 S.Ct. 2274, 2287 (2018).

50 *Id.* at 2296 (Breyer, J., dissenting), citing *Indiana Federation of Dentists*, 476 U.S., at 460-61, 106 S.Ct. 2009.

51 *Id.* at 2293 (Breyer, J., dissenting).

52 See Wikipedia, "JCB Co., Ltd." available at https://en.wikipedia.org/wiki/JCB_Co.,_Ltd..

53 *Ohio v. American Express Co.* 138 S.Ct. 2274, 2296 (2018) (Breyer, j., dissenting).

54 See, e.g. Kully, David & Joseph Vardner (2018) "Vertical Restraints after Amex: Quietly Imposing New Burdens on Section 1 Plaintiffs" *Antitrust* 33(1), pp. 31-36.

55 *Id.* at 2298 (Breyer, J., dissenting).

guidelines. Over the decades, antitrust lawyers and courts have proven able to incorporate new developments in economics in pursuit of more economically rational antitrust outcomes.

Despite the volume of economics literature on multi-sided platforms that has been produced over nearly two decades, Professor Hovenkamp argues that multi-sided platform theory may be something of a fad, the implication being that courts should curb their enthusiasm for it.[56] The analytical value of multi-sided platform theory is not seriously disputed among economists, however, and economic research on multi-sided platforms shows no sign of slowing after nearly two decades.

Finally, some have argued that taking the multi-sided platform literature seriously will dramatically weaken antitrust enforcement.[57] Taking the correct economics into account may complicate at least some cases. But the argument for weakened, rather than more accurate enforcement is an argument that courts will be persistently confused by defendants, despite plaintiffs' best efforts at adducing relevant economic evidence of harm to competition. In the end the case against American Express failed because the plaintiffs didn't have any credible evidence of harm to competition. Vertical restraints can harm platform competition, and when they do, plaintiffs should be able to demonstrate that with quantitative and qualitative evidence.

In light of the substantial and growing economic importance of multi-sided platforms, it is hard to see a responsible alternative to taking seriously the economic literature that helps understand their unique characteristics. Professor Jean Tirole, Nobel Prize-winning economist and co-author of pioneering work on two-sided platforms (which he calls two-sided markets) has described essential elements of the necessary, if difficult, path forward:[58]

> Regulators, then, will need to refrain from mechanically applying traditional principles of competition policy. When it comes to multi-sided platforms, these principles simply are not applicable in many cases. New guidelines for adapting competition policy to two-sided markets would require that both sides of the market be considered together, rather than analyzed independently, as competition authorities still sometimes do. This will require care and a new analytical approach. But this is better than misapplying traditional principles or simply treating these sectors as legal no-go zones for competition authorities.

Sound antitrust policy has always focused on market-specific competitive realities rather than just applying abstract theory. In markets with multi-sided platforms, new learning has made it clear that competitive realities often differ fundamentally from those in ordinary single-sided markets. New tools may well be necessary to apply traditional principles appropriately in markets with multi-sided platforms, but there is no reason to abandon those principles.

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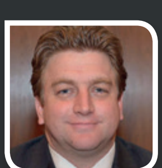
56 Professor Hovenkamp, *supra* note 8, argues that the economic theory of multi-sided platforms may follow the trajectory of contestability theory and recede into relative obscurity. We think this very unlikely: contestability theory rested on very strong assumptions and was controversial from its inception, while the economic theory of multi-sided markets is much more robust and has been almost universally accepted among economists.

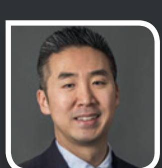
57 Compare, Wu, *supra* note 43, and Evans, David & Richard Schmalensee (2018) "Ignoring Two-Sided Business Reality can also Hurt Plaintiffs" *CPI Antitrust Chronicle* (April 2018). Professor Wu's argument is distinct from that advanced by Kully & Vardner, *supra* note 54, which has nothing to do with two-sidedness.

58 Jean Tirole "Regulating the Disruptors" *LiveMint,* January 1, 2019, available at https://www.livemint.com/Technology/XsgWUgy9tR4uaoME7xtlTI/Regulating-the-disrupters-Jean-Tirole.html. Professor Tirole's pioneering work on multi-sided platforms was cited in all three *American Express* decisions.

OHIO v. AMERICAN EXPRESS: IMPLICATIONS FOR NON-TRANSACTION MULTISIDED PLATFORMS

BY JOSHUA D. WRIGHT & JOHN M. YUN[1]





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I. INTRODUCTION

The Supreme Court's recent decision in *Ohio v. American Express* has important implications for the antitrust analysis of multisided platforms.[2] The Court expressly addressed two fundamental issues: (1) defining the relevant product market(s) when there are two or more "sides" to a platform; and (2) specifying the "three-step" burden shifting paradigm under a rule-of-reason analysis.[3] The Court filled an immense void as practitioners had sought antitrust guidance on these central issues involving platforms.[4] The Court also left open a number of important issues. Perhaps most critically, *American Express* limits the scope of its decision by introducing a distinction between "transaction" and "non-transaction" platforms.

The Court observes that transaction platforms, such as credit-cards, are different than non-transaction platforms, such as newspapers, since transaction platforms — as the name implies — "facilitate a single, simultaneous transaction between participants."[5] The Court further differentiates transactional and non-transactional platforms by explaining that, "[n]on-transaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers."[6] Referencing newspapers, the Court further explains that "indirect network effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains."[7]

A critical question for antitrust practitioners, courts, and agencies is whether the underlying economic logic of the Court's analysis in *American Express* applies to non-transaction platforms as well. In Section 2, we detail the impact of the *American Express* decision on the antitrust analysis of multisided platforms. Section 3 details the similarities and differences between transaction and non-transaction platforms and argues why the economic principles detailed in *American Express* also apply to non-transaction platforms. Section 4 concludes.

II. *OHIO v. AMERICAN EXPRESS*

In *American Express* the Court was asked to address the proper methodology to address antitrust issues involving multisided platform. Evans & Schmalensee (2013) state that a multisided platform "has (a) two or more groups of customers; (b) who need each other in some way; (c) but who cannot capture the value from their mutual attraction on their own; and (d) rely on the catalyst to facilitate value creating interactions between them."[8] The appeal of this definition is that it can describe both transaction and non-transaction platforms — although there are important differences between the two types.[9] Examples of transactional platforms include payment card systems, ride sharing apps, and eBay. The common thread is that there is a direct, commercial transaction between the two sides, such as cardholders and merchants, that a platform, such as American Express, facilitates. In contrast, non-transaction platforms such as newspapers and search engines, which bring together consumers and advertisers, facilitate an engagement, at some level, between the two groups that lacks a direct, commercial exchange. Importantly, as Schmalensee & Evans' definition highlights, a non-transaction platform is still a catalyst that brings together two groups and unlocks value for both.

The specific issue before the Court in *American Express* was whether the antisteering provisions in agreements between American Express and merchants violate Section 1 of the Sherman Act. When cardholders and merchants transact, there is a "swipe fee" that merchants must pay to the credit card company. American Express has a relatively high swipe fee compared to rivals such as Visa, MasterCard, and Discover; thus, merchants have an incentive to "steer" cardholders at the point-of-sale to use a rival credit card with a lower swipe fee. In order to

2 See *Ohio v. Am. Express Co., 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018)*, hereafter "*Am. Express Co.*"

3 Broadly, the court determines in Step One whether there is harm to competition; this is the *prima facie* burden. If harm to competition is established, the burden is shifted to the defendant in Step Two to produce evidence of procompetitive efficiencies that offset the competitive harm. If such efficiencies are identified, in Step Three, the decisionmaker weighs these two countervailing effects with the ultimate burden of persuasion remaining with the plaintiff.

4 For instance, see the dueling amicus briefs from attorneys and economists on each side of *American Express* representing vastly different positions on these questions (available at http://www.scotusblog.com/case-files/cases/ohio-v-american-express-co/).

5 *Am. Express Co.* at 13.

6 *Am. Express Co.* at footnote 9.

7 *Am. Express Co.* at 12.

8 Evans & Schmalensee (2013), "The Antitrust Analysis of Multi-Sided Platform Businesses," NBER Working Paper No. 18783, pp. 1-72 at 7.

9 See Filistrucchi, Geradin, van Damme & Affeldt (2014), "Market Definition in Two-Sided Markets: Theory and Practice," *Journal of Competition Law & Economics* 10, pp. 293-339.

protect against this, American Express — and others — included an antisteering provision in its contracts with merchants. The district court agreed with the U.S. Department of Justice ("DOJ") that the effect of the antisteering provision was to "restrain competition between networks."[10] The Second Circuit reversed, finding that petitioners failed to demonstrate market-wide anticompetitive harm — particularly given that there was no evidence of diminished output or quality.[11]

Importantly, a fundamental fact that the courts had to deal with is that American Express is a two-sided platform that must balance the interests of both groups due, in large part, to the presence of indirect network effects. Indirect network effects, also known as cross-group effects, occur when the size of one group, e.g. cardholders, increases the value of participating on the platform for the other group, e.g. merchants. The cross-group effect also goes from merchants to cardholders.

Within this context, the Supreme Court was asked to decide on the appropriate antitrust framework to apply to markets involving platforms including (1) whether each side of a platform constitutes a separate relevant product market for the purposes of antitrust analysis and (2) what evidence is required to satisfy a plaintiff's *prima facie* burden under the rule-of-reason in the context of platforms. Two primary schools of thought have developed around these questions. While each school appears to agree in principle upon the relevant economic considerations in evaluating the competitive effects of conduct in multisided platforms, there are critical differences between the two schools when it comes to how courts and agencies should structure and sequence their analysis.

The first school argues that platforms should be assessed in a manner similar to single-sided markets in that each side should, ultimately, be considered separately — which we can label as the "separate markets" approach.[12] Further, harm to a group of consumers on one side of a platform should be sufficient to dispel the plaintiff's *prima facie* burden and, without more, establish an antitrust violation regardless of the effects on other consumer groups. We can label this as the "separate effects" approach, as it finds that any effect that makes a group worse off somewhere on a platform — for example, a price increase to merchants — is generally sufficient to show antitrust harm.[13] Thus, countervailing welfare gains for consumers on the other side of a platform would only be considered a "defense," and defendants would bear the burden of proof to establish that resulting efficiencies outweigh harm to the first group.

In contrast, the second school of thought argues that platforms are inherently defined by the interrelationships between their various sides and thus, product market definitions should generally include all sides of a platform. Thus, courts and agencies must explicitly consider cross-group effects when defining markets.[14] We can label this as the "integrated market" approach. For instance, American Express would be considered a platform that operates in a single product market.[15] Given this integrated market definition, it follows that finding harm to one side of a platform is insufficient to meet the *prima facie* burden and a proper competitive effects analysis must jointly consider all sides of a platform — which we can label as the "integrated effects" approach. This approach does not simply treat the other side of a platform as a potential consideration for an "efficiencies defense," capable of rebutting a showing of harm, but rather as a fundamental part of determining whether there is competitive harm of the type proscribed by the antitrust laws — that is, the acquisition or exercise of monopoly power — in the first place.

The stakes between the two schools of thought, as it relates to competitive effects and the *prima facie* burden, cannot be understated. Central to the issue of liability in rule-of-reason cases is the idea of "harm to competition." It is well understood that harm to a specific group of consumers does not necessarily establish cognizable antitrust harm. For instance, price discrimination harms some groups of consumers but

10 U.S Department of Justice, Complaint for Equitable Relief in United States v. American Express, ¶23. See also *United States v. Am. Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015).

11 See *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).

12 See, e.g. Katz & Sallet (2018), "Multisided Platforms and Antitrust Enforcement," *Yale Law Journal* 127, pp. 2142-2175; Conner, Gaynor, McFadden, Noll, Perloff, Stiglitz, White & Winter (2017), "Brief for Amici Curiae un Support of Petitioners in *Ohio et al. v. American Express Company*;" and Brief of 28 Professors (2017), "Brief of 28 Professors of Antitrust Law as Amici Curiae Supporting Petitioners in *Ohio et al. v. American Express Company.*" There is a general recognition, however, that cross-group effects must still be considered, to some degree, even if separate markets are defined. See, e.g. Katz & Sallet (2018). For a detailed overview of the two schools of thought, see Wright & Yun (2018), "Burdens and Balancing in Multisided Markets: The First Principles Approach of *Ohio et al. v. American Express*," *Review of Industrial Organization*, forthcoming.

13 See Brief of 28 Law Professors (2018) at 14.

14 See, e.g. Ratliff & Rubinfeld (2014), "Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?," *Journal of Competition Law & Economics* 10, pp. 517-541.; Ward (2017) "Testing for Multisided Platform Effects in Antitrust Market Definition" *The University of Chicago Law Review* 84, pp. 2059-2012; Evans & Schmalensee (2018), "Brief for Amici Curiae Prof. David S. Evans and Prof. Richard Schmalensee in Support of Respondents in *Ohio et al. v. American Express Company*;" and Sidak & Willig (2018), "Brief for Amici Curiae J. Gregory Sidak and Robert D. Willig in Support of Respondents in *Ohio et al. v. American Express Company*."

15 See Sidak & Willig (2018).

benefits others — yet, it is generally not the type of conduct that results in a restriction of market output and increase in market price.[16] Another example would be an efficient merger that drives out a less-efficient rival. In this case, consumers who preferred the differentiated product of the rival would be worse-off — although consumers, as a whole, are better off.[17] Thus, it is not extraordinary that decisions in competitive markets harm some group of consumers but benefit others. Indeed, it is a fundamental feature of competition when products are differentiated. Consequently, the focus of antitrust laws is to condemn conduct that improperly creates or maintains monopoly power. It is, thus, critical to make a distinction between harm to a group of consumers and "competitive harm" or "anticompetitive effects" cognizable by the antitrust laws. This is particularly relevant for multisided markets where there are two or more distinct group of consumers.

Within this setting, the Supreme Court fully affirmed the Second Circuit and endorsed the integrated market and integrated effects approach — as it applies to transaction platforms such as American Express. Justice Clarence Thomas, writing for the majority, observes, "[C]redit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole."[18] Thus, "[i]n two-sided transaction markets, only one market should be defined."[19] Moreover, "[e]vidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."[20]

American Express filled a large void in the understanding how courts will analyze analytical claims of potential anticompetitive conduct involving platforms. One area, however, that the Court did not fully address is whether the principles underlying its analysis apply, and if so, to what extent, to what it describes as "non-transaction platforms." This gap in the Court's decision has not gone unnoticed — with commentators offering speculations and conjectures as to the impact of the case on non-transaction platforms, such as Google and Facebook, in the future.[21] In the following section, we explain why there are sound economic reasons the Court's decision should apply to non-transaction platforms as well.

III. THE COMMON ECONOMIC LOGIC OF TRANSACTION & NON-TRANSACTION PLATFORMS

Early in the development of the economic literature on platforms, researchers recognized that not all platforms share the same features — particularly as it relates to the size, strength, and direction of cross-group effects and the presence of direct network effects.[22] Evans (2003) makes a distinction between three types of multisided platforms: (1) "market-makers," (e.g. eBay, shopping malls) (2) "audience-makers," (e.g. online search engines, newspapers) and (3) "demand-coordinators" (e.g. video game consoles, payment cards).[23] For market-makers, a platform such as eBay is the mediator in the direct transaction between buyers and sellers. Similarly, demand-coordinators such as video game consoles are enabling various groups, e.g. gamers, game developers, and manufacturers of peripheral devices, to interact. Evans places payment card platforms in the demand-coordinators category; although, there does not appear to be a great deal of substantive difference between market-makers and demand-coordinators other than perhaps where the direct transaction occurs. For market-makers, the transaction occurs "on" the platform itself, e.g. buyers and sellers on eBay's webpage, while for demand-coordinators the transaction does not necessarily have to physically occur "on" the platform, e.g. video game sales can occur at a third-party retailer. Finally, for audience-makers, platforms match advertisers with users, who are attracted to the platform primarily through the provision of compelling content. Examples are advertising-supported media such as online search engines, newspapers, yellow pages, and some social media.

16 See Klein (1996), "Market Power in Aftermarkets," *Managerial and Decision Economics* 17, pp. 143-164 ("[M]arket power is not necessary for a firm to successfully engage in discriminatory pricing. All that is necessary is that the firm face a negatively sloped demand for its products, as all firms selling unique products do. Although such a negatively sloped demand and ability to price discriminate would not exist under the assumptions of perfect competition, it must be distinguished from the negatively sloped demand and ability to price discriminate that is present because a firm possesses a large share of the market, p. 155").

17 See Heyer (2012), "Welfare Standards and Merger Analysis: Why Not the Best?," *Competition Policy International* 8, pp. 146-172 at 155.

18 *Am. Express Co.* at 2 (Syllabus).

19 *Am. Express Co.* at 14 (citing to Filistrucchi *et al.* (2014), p. 302).

20 *Am. Express Co.* at 15.

21 See, e.g. Forbes.com, "Will the Supreme Court's Amex Decision Shield Dominant Tech Platforms from Antitrust Scrutiny," July 18, 2018 (available at https://www.forbes.com/sites/washingtonbytes/2018/07/18/antitrust-enforcement-of-dominant-tech-platforms-in-the-post-american-express-world).

22 Unlike cross-group effects, direct network effects stay *within* a group and either increase or decrease the value to existing members of the group as more members join.

23 See Evans (2003), "The Antitrust Economics of Multi-Sided Platform Markets," *Yale Journal on Regulation* 20, pp. 325-381 at 334-336.

Likely recognizing the closeness in concept between Evan's market-makers and demand-coordinators, Filistrucchi et al. (2014) use a simpler classification system: (1) transaction and (2) non-transaction platforms.[24] As the name implies, transaction platforms enable a direct transaction between two or more groups — which encompasses both Evans' "market-makers" and "demand-coordinators." Whereas, non-transaction platforms map with Evans' "audience-makers." This simpler classification is what the majority decision in *American Express* relied upon when it stated: "The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other."[25]

The question then becomes: what are the meaningful economic differences between transaction and non-transaction platforms? And from this, does the logic that the Court used in defining an integrated market for transaction platforms extend to non-transaction platforms? More importantly, even if the Court suggests that non-transaction markets should be assessed as separate, non-integrated, markets, did the Court's reasoning suggest that the competitive effects should be materially different between the two types of platforms? We address these questions below.

First, the Court identifies the following distinction, relying upon Klein et al. (2006): "'Because cardholders and merchants jointly consume a single product, payment card transactions, their consumption of payment card transactions must be directly proportional.'"[26] In other words, for a transaction platform such as credit cards, merchants and cardholders share the same "quantity" since both sides are necessary to execute a transaction. In contrast, a non-transaction platform involves advertisers engaging with some users but not others — or during certain times but not at all times. For instance, the number of newspapers sold does not match one-for-one with the number of advertising "engagements" with readers, i.e. the number of ads read by a reader. While this is an important distinction, it can be overstated. For a non-transaction platform, the level of user consumption will be highly correlated with the level of advertising engagement. For example, the number of advertising clicks on a search engine will be highly correlated with the number of search users/queries. Similarly, the number of ads viewed on a television station will be highly correlated with the number of viewers. Consequently, the larger point still holds — that in order to understand the participation level for one side of a platform, it is still necessary to understand the participation level for the other side. Profit maximization still depends on a joint assessment of the pricing and volume on both sides.[27] Whether the volume on each side is a precise one-to-one matching or something highly correlated does not change this fundamental fact.

The second critical distinction the Court highlights, using the example of a newspaper, is that "indirect network effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains."[28] In other words, for a non-transaction platform, the cross-group effects are strong from the perspective of advertisers, in that their participation depends heavily on the size of the user group, whereas the cross-group effects from the perspective of users are generally weaker, zero — or even negative, depending on user preference for ads. While this is generally true for newspapers, it does not necessarily hold for other non-transaction platforms such as yellow pages, where readers explicitly use yellow pages to find advertisers.[29] Thus, importantly, non-transaction platforms are not uniform in the strength and direction of the cross-group effects. While the Court certainly did not imply that all non-transaction platforms are the same, the sole use of newspapers to illustrate the point could create some confusion. Thus, the important economic take-away is to focus on the strength and direction of the cross-group effects rather than determining whether there is a direct transaction or not.

A third distinction that the Court identified is that "only other two-sided platforms can compete with a two-sided platform for transactions."[30] As a corollary, the Court states, "Non-transaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform."[31] As an example, the Court stated that "[a] newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers."[32] Is it correct that transaction platforms only compete with other transaction platforms? The Court appears to make an error in this distinction. For instance, Uber is a transaction platform that competes

24 Klein *et al.* (2006) also made this distinction; although, they did not use the explicit nomenclature suggested by Filistrucchi *et al.*

25 *Am. Express Co.* at 1.

26 *Am. Express Co.* at 13.

27 See Rochet & Tirole (2003), "Platform Competition in Two-Sided Markets," *Journal of European Economic Association* 1, pp. 990-1029.

28 *Am. Express Co.* at 12.

29 Although, some readers can be interested in advertisements in certain sections of a newspaper, e.g. classifieds, or during certain times of the year, e.g. Memorial Day sales.

30 *Am. Express Co.* at 14.

31 *Am. Express Co.* at footnote 9.

32 *Am. Express Co.* at footnote 9.

with non-platforms, to one degree or another, including taxis, subways, and buses — as well as with other platforms such as Lyft. The same holds for Airbnb, which competes with non-platforms such as hotels and owner-rentals. Even for American Express, alternative payment methods that arguably compete with payment cards include debit cards, checks, and cash, which are not multisided platforms. The Court's point regarding non-transaction platforms, however, is correct. Non-transaction platforms can involve advertisers who are relatively indifferent to the actual content of a platform — be it search results, news stories, social media feeds — as long as it has the intended effect of informing the consumer about their products. Consequently, from an advertiser's perspective, at some level search engines compete with social networks, other online sites, and even, potentially, offline advertising including newspapers, radio, and television. If this is the primary point that the Court was making, the implications could be profound for future antitrust cases involving non-transaction platforms and allegations of competitive harm to advertisers. Specifically, given this precedent, the relevant product market is credibly broader than just the specific type of media platform, e.g. a search engine-only market would be rejected as too narrow.

Given these distinctions, particularly as it relates to cross-group effects, the Court finds that "[a] market should be treated as one [or single] sided when the impacts of indirect network effects and relative pricing in that market are minor."[33] Thus, again using newspapers as an example, "the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such."[34] While the Court used newspapers to illustrate this point, again, it is not a point that solely applies to non-transaction platforms.[35] Transaction platforms could also have weak cross-group effects. A potential example is Amazon Marketplace, which brings together third-party sellers with potential buyers. It is conceivable that the cross-group effect from third-party sellers to buyers, on Amazon, is relatively unimportant — rather what is more important to buyers is the fact that Amazon itself sells many of the items that they are looking for.[36] Again, it is the strength and direction of the cross-group effects that distinguish platforms from single-sided markets; consequently, that should be the primary focus in determining whether to define separate or integrated markets — given that both transaction and non-transaction platforms can have strong or weak cross-group effects. Wright & Yun (2018) discuss the strengths and weaknesses of the integrated or separate approach to market definition as it relates to non-transaction platforms. However, the critical implication of this distinction is not a matter of market definition, but competitive effects analysis.

Regardless of whether one or two relevant product markets are defined, an integrated approach to competitive effects analysis is the only approach that satisfies the requirements for a finding of anticompetitive harm as understood by the antitrust laws. The economic logic of the majority in *American Express* applies with as much force to non-transaction platforms, whether or not separate relevant markets are defined: "Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."[37] The economic literature has clearly established the interrelationship between the two-sides of a platform in profit maximization.[38] Consequently, we cannot seek to assess market power when only half of the profit maximization equation is considered as relevant evidence to establish anticompetitive harm. The reason is that the very definition of the exercise of monopoly power — the reduction of market-wide output and increase in the market price — cannot be satisfied by evidence of a price effect on only one side of a given platform. Thus, the *prima facie* burden must necessarily involve an assessment of both sides of a platform. A price change on one-side of a platform can imply an increase, decrease, or neutral change in market-wide welfare. What matters is the structure of the interrelated relative prices — not the price levels themselves.[39] This interrelationship between the prices on both sides of a platform is one of the most fundamental findings in the now well-established economic literature on platforms.

Proponents of a separate market and separate effects approach suggest that potential, procompetitive effects on a specific group can be assessed in a burden shifting step two of the rule-of-reason framework. We find that severing the two halves of a platform and then, subsequently, trying to piece them back to together in terms of an efficiencies defense is inadequate and likely to generate significant error. As discussed, competitive effects analysis under the antitrust laws requires the plaintiff to show that harm to a group of consumers is caused by conduct that creates or maintains monopoly power. An approach that artificially bifurcates sides of the market for the purpose of answering that fundamental antitrust question is incapable of fulfilling this objective.

33 *Am. Express Co.* at 12.

34 *Am. Express Co.* at 12-13.

35 *Am. Express Co.* at 12.

36 Of course, it is an empirical matter to determine this with certainty. The point is that there is nothing that *conceptually* prevents the possibility that a transaction platform has weak cross-group effects going in one direction.

37 *Am. Express Co.* at 15.

38 See, e.g. Rochet & Tirole (2003) and Klein, Lerner, Murphy & Plache (2006), "Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees," *Antitrust Law Journal* 73, pp. 571-626.

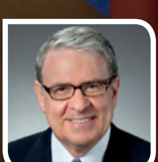
39 See Rochet & Tirole (2006), "Two-Sided Markets: A Progress Report," *RAND Journal of Economics* 37, pp. 645-667 at 646.

IV. CONCLUSION

The Court's guidance on multisided platforms settled a number of issues in regard to defining relevant product markets and assessing competitive effects. The Court, however, left open the potential that the ruling is narrowly aimed at specific types of platforms — namely, transaction platforms. We argue that the Court's distinctions between transaction and non-transaction platforms do not, nor should they, prohibit the application of the economic logic to the ruling on non-transaction platforms. Moreover, even if separate relevant product markets are defined for non-transaction platforms, an integrated effects analysis is the only proper approach in all platform settings, including the non-transactional platform analysis seemingly left unresolved by the Court.

ANTITRUST ANALYSIS OF VERTICAL CONTRACTS IN TWO-SIDED PLATFORMS: THE *AMEX* DECISION

BY BENJAMIN KLEIN[1]



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I. INTRODUCTION

The debate that surrounds the recent Supreme Court *Amex*[2] decision has concentrated on the narrow question of what relevant market definition should be used to determine if vertical restraints employed by a two-sided platforms meet the first anticompetitive effects test of rule-of-reason analysis. The Court concluded that the plaintiffs' evaluation of the anti-steering rules American Express included in its contracts with merchants failed to correctly consider the anticompetitive effects of the rules in a relevant market consisting of both the cardholder and merchant sides of the Amex transaction platform. The dissent, on the other hand, emphasized that to meet the first anticompetitive burden of rule-of-reason analysis one may look at direct evidence of anticompetitive effects of the Amex rules solely on the merchant side of the platform where the restraints operate, specifically the fact that the anti-steering rules resulted in higher Amex merchant fees. Unfortunately, this debate has led to questions, such as whether the two sides of the platform should be considered substitutes or complements or whether harm and benefits to buyers on both sides of the platform should be offset at the initial anticompetitive stage of the analysis, that have little relevance or insight into how antitrust analysis of vertical contracts used in two-sided platforms should be conducted.

This paper argues that antitrust analysis of vertical contract restraints used in two sided platforms should be conducted in the same way that vertical restraints are now analyzed under established U.S. antitrust law. If the vertical contracts are interbrand, as are the Amex restraints, the platform's overall market share should be used as a minimum screen for the existence of platform market power. If this screen is passed, economic analysis of the vertical restraints should then be undertaken on the side of the platform where the contract restraints operate to determine if they provide the platform with the ability to anticompetitively maintain or enhance its market power. This framework is different from both the decision and the dissent.

II. ANTITRUST FRAMEWORK OF ANALYSIS

The *Amex* decision and dissent both recognize that Amex supplies a credit card transaction platform that, as with all platforms, operates in two markets. Amex must make its credit cards desirable in both a consumer cardholder market and a merchant acceptance market. Moreover, the fact that the platform is a transaction platform means that the two markets are necessarily connected – the supply on one side of the market cannot be changed without a change on the other side. Amex then takes account of the presence of positive indirect network effects between the two sides of the platform in setting profit-maximizing relative prices in the two markets.[3]

Justice Thomas, writing for majority, observes that credit-card transaction platforms are "better understood as 'supplying only one product' – transactions … that 'are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment.'"[4] Consequently, "competition cannot be accurately assessed by looking at only one side of the platform in isolation."[5] Accordingly, it is necessary to analyze "the two-sided market for credit card transactions as a whole to determine whether the plaintiffs have shown that Amex's anti-steering provisions have anticompetitive effects."[6] However, other than the Court's conclusion that the plaintiff did not meet the first rule-of-reason anticompetitive burden because it incorrectly focused solely on the effects of the Amex restraints on merchant fees on the merchant side of the market, it remains unclear from the decision exactly how this fundamental insight that platform competition involves both sides of the platform should influence antitrust analysis of a platform's vertical restraints.

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2 *Ohio v. American Express Co.*, 505 U.S.___ (2018), slip opinion cited throughout.

3 Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, J. European Economic Assoc. 990 (2003), Jean-Charles Rochet & Jean Tirole, *Two Sided Markets*: *A Progress Report*, 37 Rand J. Econ. 645 (2006) and Benjamin Klein, Andres V. Lerner, Kevin M. Murphy & Lacey L. Plache, *Competition in Two-Sided Market: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L. J. 571 (2006).

4 *Amex* at 13, citing Klein et al, *id*. at 580.

5 *Amex* at 14.

6 *Amex* at 15.

A. Minimum Platform Market Share Screen

One way to interpret the *Amex* decision's view that the first anticompetitive step of rule-of-reason analysis of vertical contract restraints should involve the platform "as a whole" is to require an initial platform market power screen. This is a key element of the Court's analysis, incredibly presented in a single footnote.[7] Consistent with established U.S. antitrust law of vertical contractual restraints, the firm instituting a vertical restraint must possess a sufficient market share for the restraint to have an anticompetitive effect.

Justice Breyer in dissent legitimately asks what the legal support consists of for this proposition that the antitrust law of vertical contracts now generally requires a minimum market share for liability and criticizes the Court's sole reference to *Leegin*[8] in this regard. He argues that *Leegin* only moved the analysis of vertical restraints to a rule-of-reason standard, not to *per se* legality in situations where the firm lacks market power as evidenced by an insufficiently large market share.[9] Justice Breyer later further notes that an essential distinction must be made between the antitrust analysis of intrabrand vertical restraints that were at issue in *Leegin* and the Interbrand vertical restraints involved in *Amex*.[10] There has been a *de facto* movement to *per se* legality with regard to intrabrand restraints, culminating in *Leegin*, while interbrand restraints remain subject to a stricter antitrust standard.[11]

B. Intrabrand Platform Vertical Restraints

To illustrate the economic difference between intrabrand and interbrand vertical platform contracts consider first the purely intrabrand vertical price setting contract restraint instituted by the Uber ride-sharing platform. The Uber platform brings together drivers and riders and sets prices on the two sides of the platform. The Uber platform is analogous to the Amex credit card platform in the sense that there are significant indirect network effects in both directions. The value of the Uber platform to drivers, and therefore the demand by drivers to join the platform and supply ride services, is positively related to the number of consumers in the area that have downloaded and use the Uber app. In addition, the value of the Uber platform to consumers, and therefore the demand by consumers to download and use the Uber app to demand rides, is positively related to the number of drivers who supply services on the platform and are available to supply consumers with rides. Uber optimally sets the prices on the two sides of the platform to take account of these network effects. The Uber platform also corresponds to what the Court referred to in *Amex* as a single transaction platform; the prices set on the two sides of the platform are related to a single Uber trip transaction.[12]

The Uber pricing arrangement can be thought of as a form of intrabrand resale price maintenance. Uber sets retail prices and driver compensation share on the two sides of the platform for each trip and prevents drivers from competing with one another for passengers on the platform by offering a lower retail price. This intrabrand price-setting contract arrangement was the basis for the recent consumer class antitrust claim in *Meyer v. Kalanick*,[13] where it was alleged that Uber used its vertical control over pricing to create a price fixing conspiracy among its drivers. Uber, it was argued by the plaintiffs, benefited from this driver conspiracy by obtaining a share of the resulting collusive profits earned by the drivers.[14]

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7 *Amex* at 11, fn. 7.

8 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. 877 (2007).

9 *Amex* dissent at 13-14.

10 *Amex* dissent at 24-25.

11 Three of the four potential anticompetitive motivations for resale price maintenance described in *Leegin* involve the use of resale price maintenance in connection with the enforcement of an interbrand contractual arrangement, such as the use of resale price maintenance to pay merchants to adopt exclusive distribution. The fourth anticompetitive motivation involves an anticompetitive conspiracy among retailers to coerce the manufacturer to adopt intrabrand fixed resale prices against its wishes. Benjamin Klein, *Inferring Agreement in Hub-and-Spoke Conspiracies*, Antitrust L. J., forthcoming (2019).

12 To avoid government regulatory constraints on suppliers of transportation services, Uber initially insisted that it was merely a platform that brought together demanders (passengers) and suppliers (drivers) and was not itself a supplier of transportation services. The fact that Uber actually sets prices and other transaction terms on the two sides of the platform indicates that Uber is more than merely a platform that facilitates transactions between independent buyers and sellers of rides.

13 *Spencer Meyer v. Travis Kalanick*, 174 F. Supp. 3d 817 (2016).

14 The primary motivation for the complaint was Uber's introduction of a "surge" pricing formula, whereby retail prices were increased during high demand periods. However, the retail price fixing structure existed prior to adoption of the "surge" pricing formula. The District Court certified a class of Uber consumers but was reversed by the Appeals Court on the basis that consumers, by downloading the Uber app and registering with Uber, had agreed to Uber's "Terms of Service," including an agreement to arbitrate any claims. *Meyer v. Uber Technologies and Travis Kalanick*, (2nd Cir 2017) U.S. App. Lexis 15497.

In evaluating this antitrust claim, it is essential to recognize that Uber's alleged price fixing is purely intrabrand. Therefore, even though the Uber platform may have a significant market share, Uber does not have an incentive to create an anticompetitive conspiracy among its drivers to fix retail prices with such a vertical pricing restraint and will consequently will not do so unless there are efficiencies associated with the vertical contract. Uber should be thought of as purchasing driver services at a cost equal to the difference between its set retail price and the approximate 25 percent gross margin Uber takes on a trip before payment to the driver of the residual. Uber could continue to collect the same amount per trip based on 25 percent of the list retail price and permit driver retail price competition on transaction prices. This would reduce what the driver receives and therefore for Uber the implicit cost of the driver services it is purchasing. The lower transaction retail prices would then appear to have the advantage of increasing consumer demand for rides and Uber revenues. Uber does not have an anticompetitive motivation to create a conspiracy among its drivers to prevent such retail price competition because there is no additional collusive profit Uber can obtain from such a conspiracy. Uber, if it wished, could always just increase the list retail price and decrease the driver share to keep driver compensation at unchanged, presumably competitive levels. The economics of purely intrabrand vertical restraints, including intrabrand vertical restraints adopted in two-sided platforms, therefore recognizes that such restraints are unlikely to be instituted by a platform for anticompetitive purposes. In spite of the fact that the vertical restraint may increase prices, the platform must be adopting the intrabrand vertical contract for procompetitive efficiency reasons.[15]

C. Interbrand Platform Vertical Restraints Should Be Evaluated on the Side of the Platform Where the Restraint Operates

In contrast to purely intrabrand platform vertical contracts, the economic forces are fundamentally different when the platform's vertical contract specifies how participants on one or both sides of the platform must behave with regard to the platform's rivals. In these types of cases, even when there are no efficiencies associated with the vertical contract, the platform's profits may be increased by an interbrand vertical contract that significantly disadvantages the platform's rivals. This occurs when the platform possesses market power and the interbrand contract anticompetitively preserves or increases the platform's market power. For example, let us hypothetically assume that Uber contractually required its drivers to enter exclusive dealing contracts, so that they could not drive for any other competing ride-providing platform such as Lyft. Antitrust analysis of such an interbrand vertical contract would then require an economic analysis of Uber's market share, the time period over which the restraint is imposed, and the potential resulting effect of the restraint in anticompetitively raising costs and foreclosing rival ride-providing platforms in the driver services supply market.

The *Amex* dissent notes that the Supreme Court clearly recognized more than 60 years ago the necessity to examine the potential anticompetitive effects of a platform interbrand vertical contract restraint in the market on the side of the platform where the restraint operates. *Times Picayune*,[16] involved a dominant newspaper publisher in New Orleans that operated a two-sided platform in the sense that it supplied content to newspaper readers on one side of the platform and advertising space to advertisers on the other side of the platform.[17] In setting relative prices, Times Picayune took account of the largely one-way network effects of increased readers on the increased demand for advertising to underprice subscriptions relative to advertising.

The case involved the introduction by Times Picayune of a vertical contract restraint on advertisers on one side of its newspaper platform. The contract required all advertisers that purchased an ad in its dominant morning paper to also purchase the ad in its evening paper, where it faced an evening newspaper rival. In this way Times Picayune intended to disadvantage its evening newspaper rival.[18] The Court decided that because the restraint did not involve tying of reader demand but only of advertiser demand, the potential anticompetitive effects of the restraint should be determined solely in the advertising market where the contract restraint operated.[19] Examining the effects of the Times Picayune vertical contract restraint in the New Orleans newspaper advertising market, the Court found that the rival newspaper's share of advertising lineage did not decline and therefore concluded that the "factual data, in sum, do not demonstrate that the Publishing Company's advertising contracts unduly handicapped its extant competitor … The record in this case thus does not disclose evidence from which demonstrably dele-

15 There are, in fact, important efficiency reasons for Uber to set retail prices and prevent driver price competition on its platform in terms of preserving optimal relative prices. By preventing drivers from bidding for rides, a minimum driver payment is assured which encourages a greater supply of drivers and shorter waiting time for riders. An individual driver that reduces prices creates a negative platform externality by reducing driver supply and increasing average customer waiting time. Uber's policy of increasing prices to clear the market in high demand periods, in addition to increasing its revenues, efficiently allocates rides across demanders and, by increasing driver compensation, encourages an increased supply of drivers during high demand periods.

16 *Times Picayune Publishing Co. v. U.S.* 345 U.S. 594 (1953).

17 "[E]very 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." *Id.* at 610, cited in *Amex* dissent at 10.

18 *Id.* The vertical contract restraint is less restrictive than a normal tying arrangement where the contract requirement essentially eliminates rival demand for the tied product. In this case advertisers could and often did purchase ads in both the Times Picayune and rival evening papers.

19 *Id.*

terious effects on competition may be inferred."[20] The *Amex* dissent uses this reasoning to conclude that the anticompetitive effects of the Amex anti-steering rules should similarly be examined only on the merchant side of the Amex platform.[21]

III. AMEX

A. Early Use by Amex of Anti-Steering Rules

Applying the above legal framework of analysis of interbrand platform vertical contract restraints to the Amex anti-steering rules it is obvious, first of all, that the vertical restraints would very likely have passed antitrust muster throughout most of the 1990s when Amex had a relatively small market share of around 15 percent. American Express was supplying a somewhat unique product compared to Visa and Mastercard that focused on spending by high-income individuals and the Amex card was accepted by relatively few merchants primarily selling products aimed at these high-income individuals. The merchants who decided to accept the Amex card with its associated higher Amex merchant fee, and as a condition agreed to comply with the Amex anti-steering restraints, considered the incremental advantages of doing so sufficient to offset the higher merchant fee.[22] Although American Express had a group of loyal cardholders that preferred the higher Amex spending limits and the particular rewards offered, no one would claim at this point in time that Amex possessed market power. Competitive firms that supply differentiated products generally face less than perfectly elastic demands by their loyal consumers and also may earn economic rents in competitive equilibrium.[23] While the anti-steering rules may have permitted American Express to maintain its higher merchant fees, pay higher cardholder rewards and possibly earn positive rents, the presumption of antitrust law is that firms without market power should be permitted as part of the normal competitive process to adopt the particular distribution arrangements they desire.

B. Changes in Credit Card Platform Market Conditions

American Express, and more significantly Visa and Mastercard, changed their business strategies in the late 1990s and moved substantially closer to one another in terms of their products offerings. American Express entered issuing contract arrangements with organizations that had established relationships with potential cardholders and also began offering cardholders credit terms for delayed payment. Meanwhile, Visa and Mastercard introduced some types of cards with substantially higher cardholder spending limits and greater rewards along with higher associated merchant fees. Visa and Mastercard were also forced to increase merchant fees as a result of the increased competition they faced to obtain issuance by large financial firms such as Capital One. These card issuing firms developed independent consumer brand names and cardholder loyalty and played off Visa and Mastercard against one another with offers of partial exclusivity in return for increased credit card company compensation. Increased credit card company compensation of issuers funded increased rewards that reinforced issuer cardholder loyalty and resulted in higher Visa and Mastercard fees.[24]

In addition to vividly illustrating that the competitive process in the credit card platform market occurs on both sides of the platform, the growth of high reward Visa/Mastercard credit cards resulted in a substantial narrowing of the average merchant fee gap between American Express and Visa/Mastercard. This, in turn, led to increased merchant acceptance of American Express and the associated growth of Amex as a share of credit card platform market to its now approximately 25 percent level. The somewhat higher Amex market share may suggest that at the time of the litigation American Express perhaps exceeded the proposed initial minimum market share screen required for potential anticompetitive effects. However, other vertical interbrand contract restraints, that are significantly more restrictive in terms of potential anticompetitive effects by foreclosing rivals from particular distribution channels or market segments, generally require a significantly larger minimum market share for antitrust liability.[25]

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20 *Times Picayune at 619.*

21 The *Amex* decision implicitly attempts to distinguish *Times Picayune* by limiting its conclusions to cases where network effects occur in both directions, rather than the largely only one direction network effects in *Times Picayune*, and to cases where the platform is a transactional platform so that, in contrast to *Times Picayune*, quantity cannot be changed on one side of the platform without an identical change on the other side of the platform. However, neither of these factors changes the basic economic and competitive forces present in *Times Picayune* compared to *Amex.*

22 Given the fact that average merchant gross margins are approximately 25 percent, and substantially higher for some products consumed by higher-income individuals such as jewelry or travel-related services, incremental merchant sales need not increase very much to make it worthwhile for some merchants to decide to accept the Amex card. Klein et al, *supra* note 3, at 585-86.

23 Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 Sup. Ct. Econ Rev. 43 (1993).

24 *Id.* at 603-09.

25 For example, vertical interbrand tying contracts as well as exclusive dealing contracts require the firm to possess more than a 30 percent market share. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* 466 U.S. 2 (1984).

C. Claimed Direct Evidence of Anticompetitive Effects

The Amex dissent ignores the question of whether the overall platform market power screen is met and moves directly to an analysis of evidence of anticompetitive effects on the merchant side of the Amex platform. The dissent concludes that, in fact, there is "strong *direct* evidence of anticompetitive effects flowing from the challenged restraint"[26] and hence "proof of actual detrimental effects on competition."[27] The dissent states that this direct evidence of anticompetitive effects implies *a fortiori* the presence of market power.[28] Presumably, this means that the platform market power screen necessary for finding that vertical restraints have been used anticompetitively to increase or maintain monopoly also is met by this evidence.

The dissent's primary claimed direct evidence of anticompetitive effects is asserted to consist, first of all, of the fact that Amex increased merchant fees without a loss of merchant acceptance or market share.[29] This is merely the other side of the Cellophane Fallacy.[30] Does it mean that American Express was not profit-maximizing before it increased merchant fees? What it more likely illustrates is that to measure elasticity of demand one must compare the increase in Amex merchant fees relative to the increase that was simultaneously occurring in Visa and Mastercard merchant fees. As noted above, Visa and Mastercard merchant discounts were generally increasing due to increased competition for issuance, with the difference in merchant discounts between Amex and Visa and Mastercard generally narrowing over time. Moreover, to determine potential anticompetitive effects of a restraint it is necessary to observe market changes in merchant acceptance and market share after the introduction of the vertical restraint at issue, as was done by the Court in *Times Picayune*, not by inferring a much later claimed anticompetitive effect to a long-established restraint.

The *Amex* dissent also uses as direct evidence of anticompetitive effects the fact that the "merchant price increases that resulted from the nondiscrimination provisions 'were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and *resulted in a higher net price*.'"[31] The *Amex* Court does not adopt this standard, stating somewhat less precisely, but legally more accurately, that the law requires the plaintiffs to offer "evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market."[32] As noted above[33], when firms supply differentiated products, market price, neither the price on one side of a two-sided transaction platform nor the total "net" price on the two sides together, fully describes the nature of competition and cannot by itself demonstrate that vertical restraints have been used to anticompetitively exercise monopoly power to disadvantage rivals.

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26 *Amex* dissent at 12, citing 88 F. Supp 3d, at 207-224.

27 *Amex* dissent at 14. The *Amex* decision at 11, n7 notes that the plaintiff's argument that it is not necessary to define a relevant market when there is actual evidence of adverse effects on competition relies on cases that deal with horizontal restraints, for example, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) and *Catalano, Inc. v. Target Sales, Inc.* 446 U.S. 643 (1980). In these cases, agreement among competitors not to compete on certain dimensions may be reasonably considered anticompetitive on their face.

28 *Amex* dissent at 14.

29 *Amex* dissent at 12.

30 *U.S. v. E. I. Dupont DeNemours & Co.*, 331 U.S. 377 (1956).

31 *Amex* dissent at 22 citing District Court factual finding, 88 F. Supp. 3d at 215. (emphasis added)

32 *Amex* decision at 16. The Court goes on to say that the District Court found that "the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins." *Id*. These are irrelevant measures unless perhaps there is a claim of predatory pricing.

33 *Supra* note 23.

IV. CONCLUSION

The *Amex* dissent believes that American Express, through its anti-steering rules, has "disrupt[ed] the normal price-setting mechanism."[34] However, all vertical restraints disrupt the competitive process in the sense that they alter what would otherwise occur in the absence of the restraint. Leegin's intrabrand vertical resale price maintenance contracts change market prices. To meet the first anticompetitive condition of rule-of-reason analysis, one must show that a vertical contract restraint distorts the competitive process so that monopoly power is created or maintained. We do not want to assume that any vertical contract restriction that alters relative prices on the two sides of a platform necessarily involves a distortion of "the competitive process."[35] To meet the first step condition for the demonstration of anticompetitive effects the platform must possess market power and the restraint used to maintain or expand that power.[36]

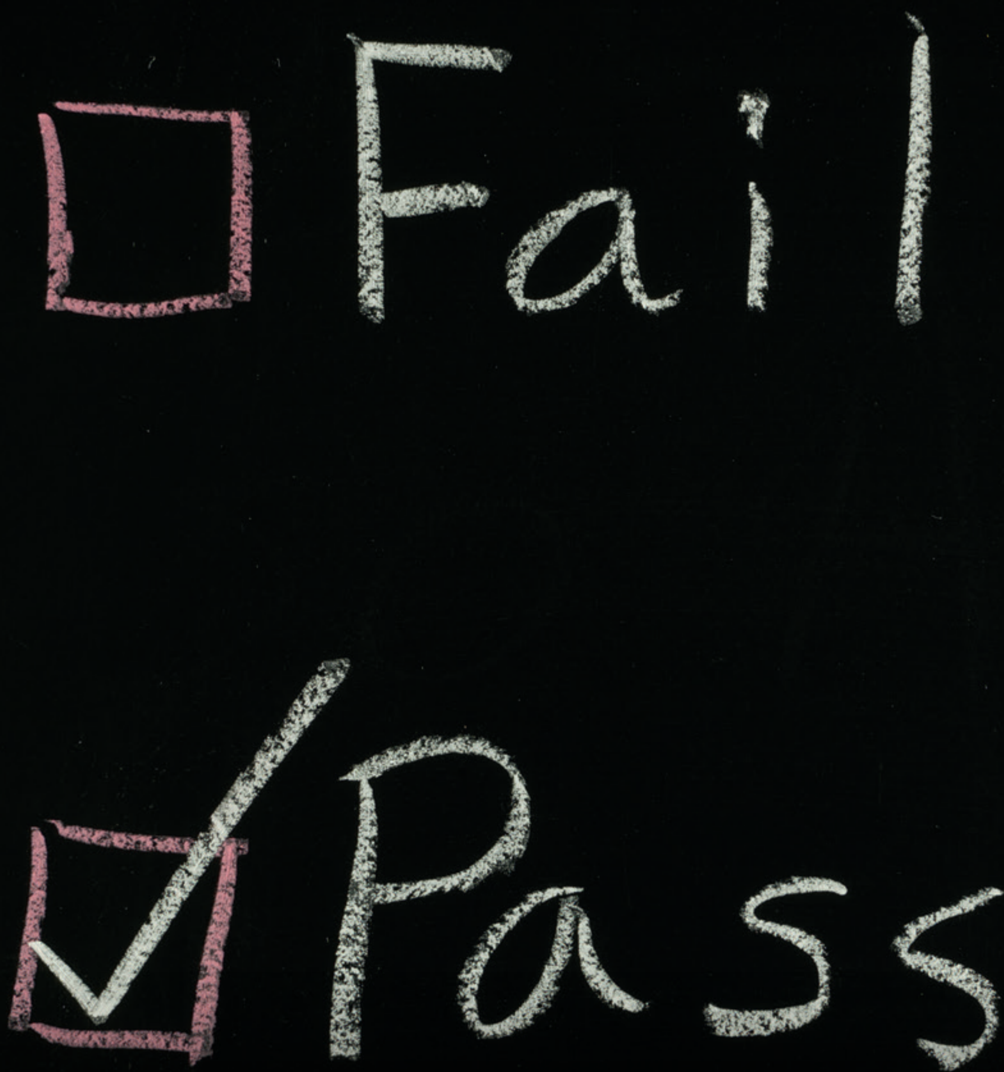
The antitrust law of vertical restraints that has developed in the United States is based on the fundamental proposition that one should let competitive firms that do not possess market power determine how their products are marketed, including the restricted distribution arrangements they choose to adopt, as long as monopoly power is not created or maintained as part of this competitive process. Rather than microregulating the competitive process, a social judgement has been made that the legal framework provided by antitrust law which gives competitive firms discretion to implement the vertical arrangements they desire as part of the normal competitive process optimally leads in the long-run to maximum consumer welfare.

34 *Amex* dissent at 9, quoting District Court at 209.

35 Dennis W. Carlton & Ralph A. Winter, *Vertical MFNs and Credit Card No-Surcharge Restraints*, 61 J. Law & Econ 215, 230 (2018).

36 If a plaintiff is successful in demonstrating anticompetitive effects, the burden shifts to the defendant to demonstrate procompetitive platform efficiencies. While Carlton & Winter, *id.*, claim that the Amex no surcharge rule, which prohibits merchants from imposing a fee on Amex transactions, is equivalent to a merchant being prohibited from setting a higher retail price for Amex's product than the retail price of a rival firm's product even though Amex's product has a higher wholesale price, they ignore that the Amex credit card is not a product but a medium of exchange. Letting merchants add a transaction fee on Amex transactions, in addition to changing relative prices, would significantly decrease the value of the Amex card brand name as a medium of exchange. This may explain why the Visa/Mastercard consent judgement permitted continuation of the no surcharge rule and, in fact, the government did not challenge the no surcharge rule in the Amex litigation.

OHIO v. AMERICAN EXPRESS: THE SUPREME COURT STILL PASSES THE TEST



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129 years after the Sherman Act became law, the fundamental basis for interpretation and application of U.S. antitrust law is sound economic analysis. While naked cartels are condemned *per se*, firms are permitted to defend other conduct using sound economic analysis to show that the challenged conduct is, on balance, procompetitive, even though it may involve limitations on rivalry. Classic examples include vertical restraints, post-transaction restrictions on the seller of a business, and limitations on output-enhancing joint ventures and their members. One can imagine situations in which each type of restriction might be found anticompetitive and therefore illegal, but the point is that the economic approach requires analysis of market facts and circumstances.

This wasn't always the case. In fact, there was a period in the early 1970's when the *opposite* was true. The *per se* rule against cartels emerged in the first decade of Sherman Act enforcement. *Addyston Pipe & Steel Co. v. United States*.[2] In 1911 the Supreme Court first extended the rule outside the cartel context, striking down vertical price agreements as *per se* illegal in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[3] This outcome was based on (1) the ancient common-law rule against post-sale restraints on chattels; and (2) the view that a vertical price restriction imposed by a seller on its distributors or dealers is equivalent in all material respects to a price cartel among the latter. Just one month after *Dr. Miles*, in *Standard Oil Co. v. United States,*[4] the Court held that the "rule-of-reason" – assessing case-specific facts and circumstances to determine the ultimate competitive effect of business conduct – generally governed Sherman Act interpretation. Two weeks after *Standard Oil* was decided the Court affirmed that only unreasonably exclusionary conduct violated Section 2. *United States v. American Tobacco Co*.[5] The Court's broad endorsement of the rule-of-reason provoked a political response, ultimately leading to creation of the Federal Trade Commission and passage of the Clayton Act, intended (broadly speaking) to tighten the legal screws applied to competitive conduct.

Following the new legislation, enthusiasm for antitrust enforcement waxed and waned over the years. The quarter-century leading up to 1972, however, might be regarded as antitrust law's period of "irrational exuberance." The *per se* approach was extended gradually, but inexorably, to a wide variety of non-cartel practices: Patent licensing restrictions (*International Salt Co. v. United States*[6]), tie-ins (*Northern Pacific R. Co. v. United States*[7]), non-price vertical restraints (*United States v. Arnold, Schwinn & Co.*[8]), mergers and acquisitions (*Brown Shoe Co. v. United States*[9], *United States v. Von's Grocery Co.*[10] – although not *in haec verba* a *per se* rule, it had the same practical impact), and voluntary conduct by firms with monopoly power (*United States v. Aluminum Co. of America*[11]; *United States v. United Shoe Machinery Corp.*[12] – like the rule of *Brown Shoe* and *Von's Grocery*, not identified as a *per se* rule, but with nearly the same practical effect). Moreover, a variety of subsidiary doctrines developed by courts and agencies – e.g. the presumption that an IP right bestows monopoly power,[13] the presumption against summary judgment in antitrust cases,[14] and the rule permitting private treble-damage claimants to estimate damages based on anything short of "mere speculation or guess"[15] – further narrowed the options of antitrust defendants.

The tendency of federal agencies and courts to interpret antitrust strictly and to apply it aggressively brought antitrust to a point where business firms were deprived of most opportunities to defend their conduct – based on lack of market power, intense competition or other supervening market characteristics, procompetitive justifications or any other case-specific exculpatory facts and circumstances. As late as 1977 the Chairman of the Federal Trade Commission was advocating broader definitions of "unfair methods of competition" – the basic standard underlying the Commission's antitrust enforcement authority – to include "social and environmental harms produced as by-products of the

2 175 U.S. 211 (1899).

3 220 U.S. 373 (1911).

4 221 U.S. 1 (1911).

5 221 U.S. 106 (1911).

6 332 U.S. 392 (1947).

7 356 U.S. 1 (1958).

8 388 U.S. 365 (1967).

9 370 U.S. 294 (1962).

10 384 U.S. 270 (1966).

11 148 F.2d 416 (2d Cir. 1945).

12 110 F. Supp. 295 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954).

13 *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962), *overruled*, *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006).

14 *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962).

15 *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of producer-stimulated demand."[16] Had such ideas received any material endorsement by the federal courts, antitrust intervention in business activity might have been substantially broader than it already was, and the performance of the U.S. economy might have been significantly worse.

At the point of "peak *per se*" in 1972, the Supreme Court openly mocked the use of economic analysis. The specific case involved vertical territorial assignments made in support of a legitimate joint venture:

> There has been much recent commentary on the wisdom of *per se* rules.
>
> Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make per se rules inapplicable in some or all cases, and *leave courts free to ramble through the wilds of economic theory* in order to maintain a flexible approach.[17]

So, it came to pass that in 1972, the Court implicitly compared economic analysis of competitive practices to the Lewis & Clark expedition or Henry Morton Stanley's search for Dr. David Livingstone – a "ramble through the wilds." How did antitrust economics evolve from an object of judicial derision to its current position as the centerpiece of construction and interpretation?

To a present-day antitrust "explorer," it seems natural that the Court might wish to be cognizant of the need for U.S. antitrust law to promote economic objectives or at least to avoid inflicting adverse economic consequences. As *Topco* itself confirmed, 405 U.S. at 610, the Sherman Act has been regarded as the "*Magna Carta* of free enterprise" – an economic constitution with admirable parallels to the United States Constitution of 1787. Antitrust has profound economic consequences because it is enforced with the collective savagery of numerous powerful, and in some ways unique, procedural and remedial devices, once referred to as a "cluster bomb" by Judge Richard Posner. The list of munitions is indeed impressive: Antitrust violations are serious felonies punishable by ten years' incarceration for guilty individuals and massive fines for corporations. Criminal prosecution is facilitated by the Antitrust Division's authority to conduct investigations using surreptitious surveillance, to provide complete or partial amnesty/leniency for guilty firms and individuals in return for disclosures of illegal conduct and cooperation with prosecutors, and to use the notorious leverage of grand jury proceedings. These tools (and others) regularly lead to incarceration of guilty individuals and nine-figure criminal fines for corporations. Civil suits by the federal agencies often result in significant injunctive remedies, occasionally including the dissolution of massive enterprises (Standard Oil Co., United Shoe Machinery Corp., and the former Bell System are leading examples). Treble-damages plus payment of winning plaintiffs' attorney's fees create a constant lure to vindicate antitrust rules through private civil litigation. Private antitrust plaintiffs are also aided by opt-out class action procedures, liberal pre-trial discovery, inferential proof of damages, and a variety of other litigation enhancements. Nine- and occasional ten-figure damage awards are a natural result.

Not only are the available procedures and remedies formidable, they are made available to numerous legal agents. There are two separate federal antitrust enforcement agencies, fifty state attorneys general empowered to bring suit both under state antitrust law and as plaintiffs under federal civil-damage provisions, and treble-damage suits are available to *"any person* injured in his business or property" [italics added] by an antitrust violation (the so-called "private attorney general" provision).[18] It is no mystery why antitrust has been among the most prolific sources of private civil litigation in the federal court system for many decades, nor why dozens of individual antitrust violators are incarcerated annually and that total annual criminal antitrust fines in the U.S. have characteristically mounted into the billions – as high as $3.6 billion in fiscal 2015 – in recent years.

In the 1970's two developments helped to create policy debate regarding the wisdom of the then-dominant antitrust zealotry, as reflected in broad expansion of *per se* rules and other subsidiary procedural, evidentiary and remedial doctrines favorable to plaintiffs. First, the U.S. entered a period of discouraging macroeconomic trends (stagflation – remember "WIN" buttons? – increasing deficits in the federal budget and the U.S. balance of payments), with major U.S. industries – automobiles, consumer electronics, machine tools – facing unprecedented competitive challenges from firms in Asia and Europe. The three Nixon "shocks" of 1970-71 – a wage and price freeze, the imposition of a 10% import surcharge, and the termination of dollar-gold convertibility – symbolized the rapid decline of US economic confidence and the onset of a period of

16 Michael Pertschuk, Chairman, Federal Trade Comm'n, Remarks before the Annual Meeting of the Section on Antitrust and Economic Regulation, Association of American Law Schools, Atlanta, Ga. (Dec. 27, 1977)(as quoted in Joshua D. Wright, "Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority," Remarks before the Executive Committee of the Antitrust Section, New York State Bar Association, June 19, 2013, available at https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf).

17 *United States v. Topco Assocs.*, 405 U.S. 596, 609 n.10 (1972)(citations omitted; emphasis supplied).

18 15 U.S.C. §15.

self-protective economic policy. Second, a generation of economic and legal scholars became increasingly vocal about the economic risks of an antitrust system whose dominant enforcement mode prohibited defenses based on market facts and economic analysis. The new generation of scholars – exemplified by Robert Bork and Harold Demsetz, although there were many others – advocated the use of credible tools of economic analysis (both empirical and theoretical) to provide more realistic assessments of the competitive consequences of business conduct. Stiff economic headwinds may have helped to assure that criticisms of the *per se* approach would at least be heard. It seemed that the Court's cavalier dismissal of economics in antitrust, which reached its highest point in *Topco*, was leading predictably to noticeable adverse economic effects.

The economic swoon – culminating in a period of double-digit inflation (13.5 percent in 1980), double-digit interest rates (prime rate 21.5 percent in 1982) and double-digit unemployment (10.9 percent in 1982) at the Carter-Reagan transition – could be traced to a wide range of questionable policies, including misguided fiscal and monetary policy, deteriorating IP protection and restrictive economic regulation of many fundamental economic sectors (transportation, energy, communications) and others, of which antitrust was only a part. Causality or no, the Court responded by recognizing the need for cogent economic analysis in the formulation of substantive antitrust rules. It gradually (but consistently) began to roll back the *per se* designations. In 1974 (*United States v. General Dynamics* Corp.[19]) it rejected a government merger challenge based heavily on concentration effects, recognizing that the government's proposed concentration metric (recent shipments vs. uncommitted reserves of coal) did not reflect the competitive dynamics of the relevant market. Suddenly, the maxim that "the Government always wins" – Justice Stewart's quick and accurate summary (in dissent in *Von's Grocery*) of the prevailing anti-merger presumption – was questionable. Then in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[20] the Court overruled Schwinn's *per se* rule against non-price vertical restraints. In so doing it took a direct shot at *per se* dogma by criticizing the formulation of rules for competitive conduct without reference to economic effects.

> [D]eparture from the rule of reason standard must be based upon demonstrable economic effect, rather than – as in Schwinn – upon formalistic line drawing.[21]

Given that rationale, Justice Byron White warned prophetically (concurring in the result) that an economics-based vertical restraints doctrine could not support a *per se* rule against price restraints:

> The effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established *per se* rule against price restraints.[22]

Justice White's prophecy was ultimately fulfilled, forty years later (*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[23]). In the meantime, economic reasoning became central to Supreme Court antitrust interpretation – a trend that continues in the present day. This became evident not only in vertical restraints cases (pricing, tying), but also in cases analyzing horizontal restraints (other than cartel agreements) as well as predatory pricing and other single-firm conduct. There has not been a plenary Supreme Court decision on the merits in a merger case since *General Dynamics*, so agencies, litigants, and lower courts are left to speculate how the Court might resolve key issues of merger analysis that have not been considered in forty-five years.

As the Court applied sound economics to remove virtually all of the *per se* rules applied outside the cartel area (only a modified *per se* rule for tying remains), it also made a number of mollifying changes to various subsidiary defense-hostile antitrust doctrines. It formulated the threshold requirement of "antitrust injury" to ensure that antitrust claims would not be predicated on *procompetitive* business conduct (*Brunswick v. Pueblo Bowl-O-Mat, Inc.*[24]), developed a common-law test for antitrust standing incorporating proximate-cause considerations as well as the *Brunswick* rule (*Associated General Contractors of California, Inc. v. California State Council of Carpenters, Inc.*[25]), retracted earlier suggestions of

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19 415 U.S. 486 (1974).

20 433 U.S. 36 (1977).

21 *Id.* at 59.

22 *Id.* at 70.

23 551 U.S. 877 (2007). In the interim, *per se* treatment of vertical price agreements was whittled away by *Monsanto Co. v. Spray-Rite Services Corp.*, 465 U.S. 752 (1984) (mere termination of dealer for failure to obey supplier pricing policy not by itself sufficient evidence of vertical price agreement); *Business Electronic Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), (*per se* rule applicable only to vertical agreements on specific price or price levels); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (*per se* rule inapplicable to vertical agreement on maximum prices).

24 429 U.S. 477 (1977).

25 459 U.S. 519 (1983).

a presumption against summary judgment in antitrust cases (*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[26]), refined the standard for proof of concerted action (*Monsanto Co. v. Spray-Rite Service Corp.*[27]; *Matsushita, supra*), required expert testimony to meet minimal standards of rationality (*Matsushita, supra; Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[28]), and abandoned the presumption that ownership of IP confers monopoly power (*Illinois Tool Works, supra* n.13). Finally, and perhaps most consequentially in terms of broad impact on antitrust litigation and enforcement, the Court overruled *Conley v. Gibson*[29], precluding dismissal of federal allegations if conceivably true: *Bell Atlantic Corp. v. Twombly*[30] required antitrust allegations to be plausible, rather than merely conceivable, in order to avoid dismissal.

Although the focus on economic analysis has remained solidly in the mainstream for more than forty years (dating from *General Dynamics*), many cases still challenge the ability of agencies and courts to discern accurately the ultimate competitive effect of business conduct. Important antitrust cases often pose significant challenges as agencies and courts (aided by the advocacy of litigants, *amici curiae*, and the occasional court-appointed expert) strive to provide full, balanced, and accurate consideration to the analysis and understanding of complex competitive circumstances and how they do and will evolve in light of business conduct. Consider, for example, that it took eighty-five years for antitrust scholars to provide a coherent economic understanding of *Standard Oil* – specifically, that Rockefeller agreed to help enforce a cartel formed by dominant railroads in return for efforts by the cartel to protect Rockefeller's oil business from competition.[31] Antitrust cases often reach the Supreme Court because close questions are presented regarding the best economic understanding of the competitive conduct involved.

Since *General Dynamics* the Supreme Court has consistently risen to this challenge. Although the Court (along with the federal agencies) is nowadays accused of complicity in a pattern of alleged "lax" antitrust enforcement, the Court has not hesitated to remind the lower courts to shut down economic defenses where cartel conduct is involved – *Palmer v. BRG of Georgia, Inc.*[32] – nor can it be accused of helping defendants avoid the *per se* rule where it is still applied. Indeed, subject to the maxim that denial of certiorari is not a precedent on any issue presented, the Court may have been insufficiently sensitive to economics when it declined review of *U.S. v. Apple Inc.*[33] The district court had used the *per se* rule to condemn an alleged "hub and spoke" conspiracy, even though it could not be disputed that the "conspiracy" was in aid of one of the most successful and innovative new product introductions in history – the creation of Apple's iBookstore and the introduction of the iPad in competition with Amazon's equally revolutionary "Kindle" e-reader device, which enjoyed a first-mover advantage that arguably had placed it in effective (monopsony) control of ebook prices. The Second Circuit held on appeal that, at most, the impugned agreement was entitled to condemnation under "quick look" analysis, with one judge insisting that the defendant deserved *per se* treatment. Despite the industry-transformative effects of Apple's conduct and exploding production and use of ebooks, the Court offered no help to Apple in presenting a case-specific defense. As a final example, few seemed to notice that when the Court made its most recent controlling decision on predatory pricing – *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[34] – it actually ruled in favor of the plaintiff on the main substantive issue. Specifically, the Court recognized that a claim of "oligopolistic disciplinary pricing" could be stated within the bounds of Section 2(a) of the Robinson-Patman Act. The plaintiff failed despite this victory because the Court was able to determine based on undisputed record facts that the elements of the "oligopolistic disciplinary pricing" theory were not proven.

Ohio v. American Express was a good test of the Court's will and capacity to understand economic analysis of the competitive impact of business practices that occur in a complex setting. The competitive fundamentals of multi-party payment systems were actually well-understood over thirty years ago, when they were correctly recognized by a leading antitrust expert and at least one appellate court. In 1976, the first major general-purpose credit card – Bank of America's "BankAmericard" – had increased in popularity and geographic distribution to the point that it provided the basis for formation of the first general-purpose credit-card payment system (Visa). It was not long before the system came under legal challenge from a variety of sources. In *National Bankcard Corp. (NaBanco) v. Visa U.S.A., Inc.*,[35] a provider of transaction processing services alleged that the fee structure of the Visa system constituted a form of horizontal price-fixing and was therefore subject to the *per se* rule. Both

26 475 U.S. 574 (1986).

27 *Supra* note 23).

28 509 U.S. 209 (1993).

29 355 U.S. 41 (1957).

30 550 U.S. 544 (2007).

31 E. Granitz & B. Klein, "Monopolization by 'Raising Rivals' Costs': The Standard Oil Case," 39 J.L. & Econ. 1 (1996).

32 498 U.S. 46 (1990).

33 791 F.3d 290 (2d Cir. 2015); *cert. denied*, 136 S. Ct. 1376 (2016).

34 509 U.S. 209 (1993).

35 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986).

the district court and the Eleventh Circuit on appeal applied the rule-of-reason and held that the Visa System's price structure did not constitute a form of *per se* illegal price fixing, nor did it constitute an unreasonable restraint of trade.

Underlying these rulings was a path breaking analysis conducted by a consulting antitrust expert, William F. Baxter. His analysis, focused on the competitive character of the credit-card system charge known as the "interchange fee" (the fee charged to the account of a card-accepting merchant for obtaining payment from the card-issuing bank for purchases made by the latter's card-holders) was published as an article, "Bank Exchange of Transactional Paper: Legal and Economic Perspectives," 26 J. Law & Econ. 541 (1983). As economists David Evans & Richard Schmalensee later pointed out:

> The important—and robust—insight from Baxter's analysis . . . is that the interchange fee helps internalize an externality between the two customer groups and, in so doing, *has the potential of making both customer groups better off*.[36]

Aside from supplying a penetrating analysis of the key competitive issues in *NaBanco*, Baxter's analysis is also recognized as that critical point in antitrust history when the unique characteristics and competitive implications of "two-sided markets" were first recognized.[37]

Fate had provided Baxter with unique qualifications to perform this particular type of analysis. First, Baxter was a deeply experienced antitrust expert. His intellectual gifts, his focus on welfare maximization as an antitrust policy objective, and his ability to express key ideas persuasively through brief and memorable phrases are legendary. Baxter was asked to join the Law School faculty at Stanford upon receipt of his degree there. He became, and remained a Professor, teaching and consulting in antitrust matters for his entire career, save for a brief early stint as a law-firm associate in Washington, and then a short but consequential tenure as President Reagan's first Assistant Attorney General for Antitrust. In the latter position he revolutionized merger analysis with the 1982 Merger Guidelines, broke up the former Bell System, and dismissed without prejudice the monopolization case against IBM (the "tech giant" of that era) filed on the last day of the Lyndon Johnson Administration. Baxter also successfully advocated for improved economic rationality in antitrust doctrine through speeches, articles and submissions in Division cases, and by interventions by the Solicitor General as *amicus curiae* in a number of path-breaking Supreme Court antitrust cases including, among others, *Monsanto v. Spray-Rite Service Corp., supra* (precluding application of *per se* rule to dealer termination), *Jefferson Parish Hospital District v. Hyde, supra* (clarifying and limiting the *per se* tying rule), *Copperweld Corp. v. Independence Tube Corp.*,[38] (overruling intra-enterprise conspiracy doctrine) and *NCAA v. Board of Regents of the University of Oklahoma*[39] (requiring rule-of-reason analysis of competitor collaborations with output-enhancing potential).

Second, Baxter was an unusually gifted microeconomist. A. Michael Spence, recipient of the John Bates Clark Medal and the Nobel Memorial Prize in Economics, spent a few years in the 1970s as an Associate Professor in the Economics Department at Stanford, teaching (*inter alia*) Industrial Organization, where he encountered Baxter at Economics Department seminars and similar events. Years later, when Spence was Dean of Stanford's Graduate School of Business, he recalled as follows:

> Bill Baxter used to come to all the Industrial Organization seminars back in the mid-70s at Stanford. But, he didn't just show up; he profoundly influenced the discussions.
>
> As a young, new arrival, it took me a year before I discovered, to my astonishment, that he was a lawyer. Bill is the best economist, who's also a lawyer, in his generation.[40]

Finally, Baxter had substantial prior experience studying the unique institutional, economic, and competitive characteristics of multi-party payment systems. In the 1970's, as improvements in the technology of data storage, communication and processing began to have significant effects on many firms and industries, there emerged the practical possibility of transferring money electronically, dispensing with the costs and risks of physical transmission of checks and other "hard copy" payment documents (or currency). Baxter, together with law professor Kenneth Scott and business professor Paul Cootner, researched the new technology in its industry context and produced a Report exploring the implica-

36 David S. Evans & Richard Schmalensee, "The Economics of Interchange Fees and Their Regulation: An Overview," MIT Sloan Working Paper No. 4548-05 (June 17, 2005; emphasis supplied).

37 *Id.*

38 467 U.S. 752 (1984).

39 468 U.S. 85 (1984).

40 "William F. Baxter: An Evening with Friends and Admirers" at 5 (September 30, 1993). The cited publication is a booklet of anecdotes, quotations from friends and colleagues, and other similar material concerning Baxter, complied for guests at a dinner held in Baxter's honor at Stanford on September 30, 1993. The booklet is on file with the author.

tions of so-called Electronic Funds Transfer ("EFT"). In that Report, "Retail Banking in the Electronic Age: The Law and Economics of Electronic Funds Transfer" (1977), they grappled with some of the unique technical and competitive characteristics of multiparty payment systems (of which transmission of bank checks is one important manifestation). The Report predicted, *inter alia* (and correctly) that EFT would assume its rightful place among the wide variety of payment media in commercial use, but that a total takeover of the payment universe by EFT was unlikely.

Having studied the previous generation of financial innovations in the context of multi-party payment systems, Baxter was perfectly positioned to understand the competitive dynamics of credit-card systems, and his insights into the key implications of the two-sided character of such markets remain valid more than thirty years later. From the perspective of the issue in *Ohio v. American Express*, the key point is the one identified by Evans & Schmalensee: if one looks at the functionality of a credit-card system – including the key transactional and operational features of the interactions among card-holders, merchants, and participating financial institutions – it becomes apparent that *"both customer groups"* – merchants and card-users – can be made better off if the system is free to determine its own transactional terms. Competition with other payment mechanisms is the chief form of interbrand rivalry. Thus, if a single system is disaggregated, and separate analyses are conducted on the distinct but limited components of the system, there is no possibility to recognize how this mutualistic symbiosis between the two groups works. Separate analysis of the various components of the system is an error that assures that the arrangements that govern the system may be found illegal without due consideration of the competitive benefits. Separate analysis is, in effect, truncated analysis rather than an effective implementation of the full rule-of-reason.[41]

From the perspective of the effective enforcement of antitrust law and the evolution of antitrust doctrine, *Ohio v. American Express* had a happy ending. The case reached the right result, and did so on the basis of a full and persuasive economic analysis that can serve as a model for future applications of antitrust law to other complex commercial contexts. The continuing surge in new technologies on which myriad new products and services are based promises to generate more antitrust suits, especially where the competitive structure of new systems and relationships present novel and possibly unprecedented issues. The broad message is that analytical short cuts, however tempting, are potentially destructive of the welfare objectives of antitrust enforcement, as well as the essential antitrust mission of avoiding suppression of innovation. A broad consensus of expert opinion recognizes innovation as the predominant source of long-run economic progress. Thus, by expressing willingness to consider carefully and in depth the innovative competitive characteristics of a complex system involving key interrelationships among different customer groups, *Ohio v. American Express* represents a key positive achievement in antitrust.

41 A full explanation of the Court's analysis of this point is presented in Joshua D. Wright & John M. Yun, "Burdens and Balancing in Multisided Markets: The First Principles Approach of Ohio v. American Express," 54 Rev. Indus. Org. 717 (2019).

MUCH ADO ABOUT *AMEX*

BY KEITH N. HYLTON[1]

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I. INTRODUCTION

Ohio v. Amex[2] has gained a great deal of attention because of its implications for digital platforms,[3] though it is mostly an old economy case, given that credit cards have been in existence since the 1950s. The case involved an antitrust challenge to Amex's anti-steering provisions, which sought contractually to prevent a merchant from persuading a consumer to use some other method of payment than the Amex card. *Amex* treats the credit card network as a two-sided market involving consumers, on one side, and merchants on the other.

Amex holds that both sides of a two-sided market must be taken into account in an assessment of the relevant market and market power. Evidence that merchants are being charged high prices is insufficient to generate an inference of market power without some analysis of the benefits accruing to consumers on the other side of the credit card network.

The Court's decision has been harshly criticized,[4] and one would think it presages major changes in antitrust enforcement from the tenor of the complaints it has generated. However, *Amex* is likely to have a limited impact on both antitrust law and enforcement.[5]

II. *AMEX*'S LIMITED REACH

The reason *Amex* has a limited reach is that it is mostly a response to the plaintiffs' (the Department of Justice and several state attorneys general) proof of market power. Plaintiffs' expert in *Amex* presented evidence that Amex increased its charges to merchants numerous times without losing a substantial number of them. The immediate inference from this evidence is that Amex was able to impose a "small but significant non-transitory increase in price" ("SSNIP") without losing so many of its customers on the merchant side of the network as to make the price increases unprofitable.

This "pricing evidence" method of inferring market power has been referred to as the "direct evidence" approach.[6] The reasoning behind the direct evidence approach is straightforward. If a firm can increase its price significantly without losing a substantial number of customers, then the firm must be relatively unconstrained by demand-side substitutes or supply-side substitutes. Demand-side substitutes are other firms offering similar products, who would immediately become more attractive to the consumers of the dominant firm after the firm raises its price. Supply-side substitutes are other firms who would shift to produce similar products in competition with the dominant firm after the firm raises its price. For example, a firm making men's shoes might shift to produce children's shoes after a dominant maker of children's shoes increases its price by a substantial amount.

The alternative to the direct evidence approach is the "circumstantial evidence" approach. The circumstantial evidence approach, which is also the traditional method of proving market power, involves the definition of a relevant market and proof of a high market share protected by entry barriers. The circumstantial evidence approach is the traditional method used to infer market power in antitrust cases, most notably *United States v. Microsoft* ("*Microsoft III*").[7]

With these two approaches distinguished, *Amex* should be understood as a statement about the direct evidence approach to proving or inferring market power. Under *Amex*, in cases involving two-sided markets where plaintiffs present such direct evidence, courts must conduct market power analyses with a view toward both sides of the market.

The *Amex* rule therefore targets a subset of antitrust cases having to do with a specific method of proof. It does not require any modifications in the more common and traditional "circumstantial evidence approach" to proving market power. In other words, the market power analysis in *Microsoft III* is unaffected by *Amex*.

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2 585 U.S. ___; 138 S. Ct. 2274 (2018).

3 See, e.g. Mark MacCarthy, *What 'Ohio v. AMEX' really means for tech,* CIO: TECH POLICY PERSPECTIVES (Mar. 26, 2018), https://www.cio.com/article/3265454/what-ohio-v-amex-really-means-for-tech.html; Joyce Jung Min Yeo, *Ohio v. American Express: Should Tech Giants Thank AMEX?, ?,* 2018 Colum. Bus. L. Rev (Oct. 7, 2018), https://cblr.columbia.edu/ohio-v-american-express-should-tech-giants-thank-amex/.

4 See, e.g. Tim Wu, *The Supreme Court Devastates Antitrust Law*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/opinion/supreme-court-american- express.html.

5 In this note I am mostly elaborating on an argument in Hylton, Keith N., Digital Platforms and Antitrust Law (May 2019). Boston Univ. School of Law, Law and Economics Research Paper No. No. 19-8, May 2019. Available at SSRN: https://ssrn.com/abstract=3381803 or http://dx.doi.org/10.2139/ssrn.3381803.

6 *Id.*

7 253 F.3d 34 (D.C. Cir. 2001).

III. MARKET POWER GENERALLY AND *AMEX*

Of course, some of the criticism of *Amex* could stem from the view that the market power requirement is itself an inappropriate burden to put on antitrust plaintiffs. If one is inclined to be skeptical of the market power requirement, then a decision, such as *Amex*, raising the plaintiff's burden of proof on market power will appear to be an unalloyed negative. Even some courts, notably the Ninth Circuit in *Lessig v. Tidewater Oil Co.*,[8] have weakened the market power requirement in the belief that sufficiently bad conduct should be reachable under the antitrust laws even in settings where the traditional market power requirements are not satisfied. This perspective reflects not a critique of *Amex* but of the market power test generally.

Market power determinations by courts – including both the definition of the market and the assessment of power – are often difficult to predict in advance and tend to provide attractive openings to criticize a court judgment in retrospect. The likely reason for this appearance of precariousness is that market power determinations often serve as a preliminary checkpoint or weigh station where courts balance several considerations often having more to do with the social costs of antitrust intervention than with the technical search for market boundaries.[9] The technical search for market boundaries is an entirely appropriate method of analysis within enforcement agencies, and provides the additional benefit of constraining discretion within the agencies, but courts oversee the application of antitrust law from a broader perspective. Theories of specific legal rules that are appropriate for constraining agency discretion are not necessarily desirable as constraints on the courts.[10]

Market power determinations by courts are similar to duty determinations in tort law. They enable a court to screen out cases when the court fears that the standard legal test governing the determination of reasonableness, sometimes applied by a jury, might generate a result that is inconsistent with the aims of the law. If the anti-steering contractual provisions of *Amex* are efficient,[11] which seems plausible in light of their functional similarity to the resale price maintenance agreements examined in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[12] then rules that tend to raise the burden of proof on market power will have the desirable effect of shielding such provisions from repeated attacks under the antitrust laws.

Of course, the Court's aim in *Amex* was not to raise the burden of proof on market power, but to correct a potentially erroneous application of the direct evidence method of proving market power. Still, the impact of that correction is the same as a decision to raise the burden of proof for a particular set of cases. In a decision theoretic approach to antitrust law, legal standards and burdens of proof should respond to perceptions of the social cost of erroneous applications of the law.[13]

IV. IMPACT OF *AMEX*

Will the *Amex* rule severely constrain antitrust litigation or enforcement? The answer depends on how many cases involve two-sided markets, and whether the benefits to one side appear to be substantial relative to the charges to the other side. My suspicion is that *Amex* may turn out to be an unusual case on this score.

One set of examples of two-sided markets in the tech sector consists of search platforms, such as Google and Bing. Both Google and Bing have search consumers on one side of the platform and advertisers on the other. Each search is a transaction where the advertiser pays a positive price (bidding to reach the consumer) and the consumer pays either zero (in the case of Google) or a negative price (in the case of Bing rewards customers). While not every Bing search consumer is a member of its rewards program, the fact that some Bing search consumers are members implies that the average price charged to Bing search consumers is negative.

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8 327 F.2d 459 (9th Cir. 1964). The Ninth Circuit's *Lessig* doctrine, which permitted plaintiffs to prove attempted monopolization using only evidence of anticompetitive intent, has been superseded by Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

9 Keith N. Hylton, *Brown Shoe Versus the Horizontal Merger Guidelines*, 39 Review of Industrial Organization 95 (2011).

10 *Id.*

11 See Hylton, *supra* note 5.

12 551 U.S. 877 (2007).

13 See, e.g. C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 Antitrust L.J. 41 (1999); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469 (2001)

Suppose Bing were to become sufficiently attractive in the future to some segment of search consumers that it could charge exorbitant prices to advertisers and at the same time offer substantial rewards to search consumers.[14] For example, since Bing tends to attract older search consumers than Google, it might develop a special attraction to advertisers who wish to reach an older population of consumers.[15] A plaintiff might attempt to prove market power by showing that Bing had imposed a SSNIP (small but significant non-transitory increase in price) on advertisers without losing so many of them as to make the strategy unprofitable. *Amex* would require the plaintiff to also examine the rewards Bing provides to its search consumers, to show that the net price charged by the search platform had increased substantially.

The foregoing hypothetical – of Bing and its rewards program – suggests a reason the *Amex* holding on the assessment of market power may be defensible.[16] In the hypothetical, Bing charges advertisers exorbitant prices and uses the revenue from advertisers to fund substantial rewards to search consumers on its platform. This would be an example of differentiated product competition where Bing targets a specific subset of search consumers and Google continues to serve the vast majority of consumers. If an antitrust plaintiff were to point to the high charges to advertisers as evidence demonstrating Bing's market power – on the theory that the charges show that Bing could impose a SSNIP without losing advertisers – then it would seem questionable, to say the least, for a court to embrace the plaintiff's argument. If a court were to do so, then it might be confusing evidence of a particular competitive strategy with evidence of market power.[17]

Although *Amex* may seem to impose a serious burden on plaintiffs in proving market power through the direct evidence approach, the seriousness of the burden will depend on how often cases of two-sided markets arise, and how substantial the benefits (or negative prices) are on the subsidized side of the market. In many cases involving two-sided markets, the benefits on the subsidized side will not be substantial enough to move the net price far from the price charged to the unsubsidized side of the market. Bing, as it is currently constituted (unlike the hypothetical above), is an example. The rewards available to Bing search consumers appear to be small in comparison to the rewards available to Amex customers. It is unlikely that the net price charged to Bing advertisers, at present, would be much different from the price charged to advertisers on the platform. In light of this feature, *Amex* would not impose a substantial burden on a plaintiff who attempted now to use evidence of its charges to advertisers in an effort, most likely quixotic, to prove that Bing possesses market power in the online search market.

For antitrust plaintiffs, *Amex* does not mean that the sky is falling. As Steve Calkins once put it, antitrust law has "equilibrating tendencies."[18] Decisions that seem to tilt the playing field in favor of one party are often counterbalanced by decisions that tilt the field in favor of that party's opponents. *Amex* is likely to reveal this tendency in antitrust doctrine as time passes. Courts are likely to read it as the somewhat narrow decision that it is.

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14 Hylton, *supra* note 5.

15 *Id.* at 6 (discussing age demographics of search consumers).

16 *Id.*

17 *Id.*

18 Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of. Equilibrating Tendencies in the Antitrust System, 74 Geo. L.J. 1065 (1986).

NOT SO FAST, YOU STILL HAVE TO DEFINE THE RELEVANT MARKET: THE LESS DEBATED YET VITAL TEACHING OF *OHIO v. AMERICAN EXPRESS*

90%

60-64%

33%

BY ELAI KATZ[1]

1 Partner, Cahill Gordon & Reindel LLP. This article was prepared with the assistance of Neal Mehrotra, summer associate at the firm. The article does not necessarily reflect the views of the firm or any of its clients. In the interest of full disclosure, the firm represented David S. Evans and Richard L. Schmalensee in their influential friend-of-the-court brief in *Ohio v. American Express*.

I. INTRODUCTION

Most discussions of *Ohio v. America Express*[2] revolve around multi-sided platforms or two-sided markets. This article will not. Here, we will focus on the Court's ruling that plaintiffs cannot avoid defining the relevant market in challenging vertical restraints under Section 1 of the Sherman Act. In this part of the decision — holding that courts must first define the relevant market before assessing evidence of anticompetitive effects in rule-of-reason cases — the majority resisted efforts to relax the market definition requirement, which has been suggested in various contexts in recent years.[3] Instead, the majority reaffirmed the preeminence of defining the relevant market, which has been a fundamental feature of antitrust jurisprudence for nearly a century.[4]

In *American Express*, the U.S. Supreme Court ruled that courts must, from the outset, consider customers on both sides of credit card transactions — merchants and cardholders — when evaluating antitrust claims, from. In so doing, the Court affirmed the U.S. Court of Appeals for the Second Circuit's rejection of claims that anti-steering provisions in American Express's merchant agreements violated Section 1 of the Sherman Act.[5] The court stated the product market at issue was transaction services for merchants and cardholders, not merchant services, and that assessing whether the anti-steering rules are anticompetitive required appraising their effects on both sides of the platform.[6]

In many antitrust cases, there is not much debate about whether one is required to define the relevant product and geographic market before turning to analyze effects on competition. Litigated merger and monopolization cases almost always involve ample exploration of the relevant market. However, some advocates, scholars, and decisions have suggested that one can dispense with defining the relevant market whenever the plaintiff can demonstrate actual anticompetitive effects, such as higher prices. The dissent and the plaintiffs argued that this was just such a case and that it was not necessary to define the market or debate whether it is one-sided or two-sided. The majority in *American Express* rejected the assertion that, as a general matter, defining the relevant market is required only when there is a lack of evidence of actual competitive harm (often in the form of higher prices or reduced output), ruling that "we must first define the relevant market."[7]

II. JUSTICE BREYER'S VIEW THAT MARKET DEFINITION WAS UNNECESSARY

The position rejected by the majority is best articulated by the dissent. Justice Breyer argued in his dissent that there was no need to define the relevant market and debate two-sided markets in this case because the plaintiffs showed actual anticompetitive effects in the form of price hikes by American Express and Discover's inability to grow its business with lower prices. Breyer explained that defining a relevant market and estimating market shares is a proxy for evidence of market power, which can be demonstrated directly with proof of anticompetitive effects. He was persuaded that American Express's price increases constituted "proof of actual adverse effects on competition" that would have been sufficient for the district court to find that American Express's nondiscrimination provisions preventing merchants from steering customers to other cards violated the Sherman Act.[8]

Justice Breyer relied principally on the Supreme Court's 1986 opinion in *FTC v. Indiana Federation of Dentists*[9] for the proposition that the ultimate question for courts to address in a rule-of-reason case is whether the challenged restraint "had, or is likely to have, anticompetitive effects"[10] and that issues surrounding relevant market definition, market shares and market power, are merely means to approximate an answer to that ultimate question – whether there are actual or likely anticompetitive effects:

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2 *Ohio v. American Express Co.*, 585 U.S. __, 138 S. Ct. 2274 (2018).

3 See, e.g. Louis Kaplow, Why (Ever) Define Markets?, 124 Harv. L. Rev. 437 (2010).

4 See, e.g. Gregory J. Werden, The History of Antitrust Market Delineation, 76 Marquette L. Rev. 123 (1992). See also Jonathan B. Baker, Market Definition: An Analytical Overview, 74 Antitrust L.J. 129, 129 (2007) ("Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue.").

5 138 S. Ct. 2274 (2018).

6 *Id.* at __.

7 138 S. Ct. at 2285.

8 138 S. Ct. at 2297.

9 476 U.S. 447, 459-61 (1986).

10 138 S. Ct. at 2291.

> Since the purpose [in a Sherman Act § 1 case] of the inquiries into ... market power is [simply] to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'[11]

Accordingly, the dissent concluded, "a discussion of market definition was legally unnecessary,"[12] and, as a result, there was no need to decide whether the nondiscrimination provisions should be evaluated in a one-sided market (merchants only) or a two-sided market (including merchants and cardholders).

As the leading precedent for Breyer's argument, *Indiana Federation of Dentists* warrants a short detour: In 1976, a group of dentists in Indiana formed the Indiana Federation of Dentists and collectively refused to comply with requests from dental insurance companies for patient X-rays. Dental insurers said they used X-rays to determine the cheapest adequate treatment for patients. But the federation viewed this practice as a nascent threat to the financial success of dentists and was concerned that providing X-rays might lead the insurers to make inaccurate determinations of the proper level of care.[13] In 1978, the FTC brought a complaint against the federation, alleging that the collective practice of withholding X-rays eliminated competition among dentists. The federation argued that the FTC erred as a matter of law because the it did not make specific findings concerning the definition of the market.[14]

Although it characterized the restraint as lacking in competitive virtue and nearly "naked" – "a refusal to compete with respect to the package of services offered to customers"[15] – the Court in *Indiana Federation* did not condemn the restraint as per se unlawful because, among other things, it was a professional association rule and the economic impact was not immediately obvious.[16] As such, the case falls within the narrow set of restraints that qualify for a "quick look," somewhere between *per se* and the rule-of-reason. The Court ruled the FTC did not need to define a relevant market and prove market power because there was direct evidence of actual anticompetitive effects — dental insurers were unable to obtain X-rays in areas with a large percentage of federation dentists.[17]

III. THE MAJORITY DECLINES TO JETTISON RELEVANT MARKET REQUIREMENT

In *American Express*, the majority distinguished *Indiana Federation of Dentists* and other cases cited by plaintiffs in support of the argument that courts need not define the relevant market because plaintiffs offered evidence of actual adverse effects in the form of increased merchant fees. The Court stated that plaintiffs' cases evaluated horizontal agreements among competitors not to compete in some way, whereas the restraint challenged in *American Express* was a vertical restraint, "which cannot be evaluated unless the Court first defines the relevant market."[18] A superficial reading may suggest that horizontal restraints can be condemned without defining a relevant market while vertical restraints cannot. But the precedents supporting such condemnation dealt with nearly "naked" restraints, potentially subject to a quick look, rather than more complex horizontal restraints that should be evaluated with a full-blown rule-of-reason review, which would be unwise to conduct without a proper definition of the relevant market.

The majority was careful in the language it used to characterize the absence of a market definition element in the horizontal restraint claims in prior cases, stating, "this Court concluded that it did not need to *precisely* define the relevant market to conclude that these agreements were anticompetitive."[19] The U.S. Court of Appeals for the Seventh Circuit made a similar point in a less subtle manner, observing that *Indiana Federation of Dentists* does not allow

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11 *Id*. (quoting *Indiana Federation of Dentists, supra*, at 460–461, (quoting 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (3d ed. 1986)).

12 138 S. Ct. at 2297.

13 476 U.S. 447, 451-52 (1986).

14 *Id*. at 460.

15 *Id*. at 459.

16 *Id*. at 458-59.

17 *Id*. at 460-62. Significantly, the Court rejected the federation's argument that the FTC failed to prove that the dentists' collective refusal to provide X-rays to dental insurers resulted in consumers selecting more costly services. This argument was rejected because the practice of preventing customers from obtaining information to determine whether a service's cost is justified is so likely to affect price setting that actual proof of increased pricing is not required. *Id*.

18 138 S. Ct. at 2285 n.7.

19 *Id*. (emphasis added).

> an antitrust plaintiff to dispense entirely with market definition. Rather these cases stand for the proposition that if a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power – in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.[20]

The majority and other courts' resistance to jettisoning the relevant market requirement (or at least the "rough contours" of a relevant market) may be attributed to several grounds. First, defining a relevant market serves an important narrative purpose, contextualizing the defendant's conduct and any relief that the courts may impose.[21] Second, the economic principle that underlies the no-market-definition position applies best to classic hypothetical markets for the sale of fungible commodities. In such markets, it is true that, generally speaking, a firm facing competition should not be able to raise prices without losing sales. But that general economic principle finds so many exceptions outside of fungible commodities. Differences in branding, quality, services, and other terms may enable one firm to raise prices without losing a significant number of sales to its competitors. Third, when courts assess evidence of anticompetitive harm, they must have some sense of competition in the relevant context. But how can courts or enforcers know that competition has been harmed – especially where the challenged conduct is not within a presumptively unlawful category – if they do not know the relevant economic market within which to evaluate the alleged harm?[22] The phrase used by Breyer and others is proof of actual or likely *anticompetitive* effects. Not all effects or harms count as competitive effects. When courts turn to deciding whether the effects in the pleadings or presented at trial are anticompetitive as opposed to merely incidental individual injuries, having at least the contours of a relevant market, if not a precise definition, is crucial. The following example may be instructive.

A well-known bakery with a loyal following insists that its landlord agree not to lease space to any other bakery anywhere in the sprawling shopping center. The bakery invests in new recipes using organic ingredients and emphasizes freshness. At the same time, it raises its prices by 10-20 percent but does not lose many customers. Might a plaintiff assert an unlawful exclusive dealing arrangement with actual anticompetitive effects, eschewing the need to define a relevant market? Wouldn't the court need to know if there are other shopping centers nearby? Might an enforcer want to learn if adjacent supermarkets sell baked goods? In the abstract, a price hike coupled with a vertical restraint does not tell us enough about the effect on competition.

IV. HISTORY OF RELEVANT MARKET DELINEATION

Finally, courts resist abjuring the relevant market inquiry because of the long and deeply ingrained tradition of market delineation in antitrust jurisprudence. Economists and courts first began using relevant market analysis and market power tests at least as early as the 1940s.[23] Since Judge Learned Hand's famous dictum about the market shares of the defendants in alternative markets — while ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough: and certainly thirty-three percent is not" — relying on market shares has become crucial to the structural analysis of antitrust to assess actual or potential market power and harm to competition.[24] Although no Sherman Act violation was found, the earliest usage of the term "relevant market" in a federal antitrust case traces to the Supreme Court's 1948 decision *United States v. Columbia Steel Company*.[25] Legal scholarship was not far behind judicial opinions, and the first two law review articles on antitrust market definition arrived six years later.[26] In the mergers and acquisitions context, judicial decisions interpreting Section 7 of the Clayton Act, which bars mergers and acquisitions the effect of which "may be substantially to lessen competition… in any line of

20 *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004).

21 See, e.g. Keith N. Hylton, *Brown Shoe* Versus the Horizontal Merger Guidelines, Review of Industrial Organization (2011).

22 Similarly, judicial determination of whether a private plaintiff suffered antitrust injury to support recovery under the Clayton Act requires at least some understanding of the relevant market, even in *per se* cases, which generally do not require relevant market definitions. See, e.g. *Atlantic Richfield v. USA Petroleum*, 495 U.S. 328, 346 (1990) ("The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity.").

23 Gregory J. Werden, The History of Antitrust Market Delineation, 76 Marquette L. Rev. 123 (1992).

24 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (certified to the Second Circuit due to absence of a quorum of Supreme Court Justices).

25 334 U.S. 495, 508 (1948); see also *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953) (tying cases analyze market power in the "whole and not part of a relevant market").

26 Note, *The Market: A Concept in Anti-Trust,* 54 Colum. L. Rev. 580 (1954); David Macdonald, Comment, *Product Competition in the Relevant Market Under the Sherman Act,* 53 Mich. L. Rev. 69 (1954).

commerce ... in any section of the country," have long relied on market definition.[27]

By the 1960s, relevant market analysis had become so well established that the Court declared: "Without a definition of [the] market there is no way to measure ability to lessen or destroy competition."[28] The *American Express* Court did not accept the invitation to question these longstanding precedents in 2018, proclaiming that "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market."[29]

V. CONCLUSION

The *American Express* decision will undoubtedly lead to close examination of two-sided markets and debates about which markets require a multi-sided look in antitrust cases, but the opinion may have wider impact in tempering efforts to limit the enduring requirement that plaintiffs define a relevant market at the start of most antitrust cases. Even where that requirement is relaxed (as in horizontal, quick look cases), it isn't completely dispensed with. The Court was careful to say that, in those cases, the precedents indicated that the relevant market need not be defined *precisely*, not that it need not be delineated at all.

27 See, e.g. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974) (quoting *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) ("[P]roper definition of the market is a 'necessary predicate' to an examination of competition that may be affected by the horizontal aspects of merger[s]."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.28 (1962) ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger, are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.").

28 *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

29 138 S. Ct. at 2285.

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