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

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***Ohio v. American Express*: Implications for Non-Transaction Multisided Platforms**
By Joshua D. Wright & John M. Yun

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

***Ohio v. American Express*: The Supreme Court Still Passes the Test**
By Abbott B. Lipsky, Jr.

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By Keith N. Hylton

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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.

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).

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.

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

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).

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.

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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.

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

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.

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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.

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

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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.

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.

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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.

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

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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).

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.

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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]

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]

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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.

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.)

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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).

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