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 &*

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).

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 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

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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).

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).

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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 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]

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18 15 U.S.C. §15.

19 415 U.S. 486 (1974).

20 433 U.S. 36 (1977).

21 *Id.* at 59.

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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 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.

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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).

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).

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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 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

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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).

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.*

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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 implications 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]

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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.

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).

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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.

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