

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2019

Platforms and the Rule of Reason: The *American Express* Case

Herbert J. Hovenkamp

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Antitrust and Trade Regulation Commons](#), [Commercial Law Commons](#), [Economic Policy Commons](#), [Law and Economics Commons](#), [Policy Design, Analysis, and Evaluation Commons](#), and the [Supreme Court of the United States Commons](#)

Repository Citation

Hovenkamp, Herbert J., "Platforms and the Rule of Reason: The *American Express* Case" (2019). *Faculty Scholarship at Penn Law*. 2058.

https://scholarship.law.upenn.edu/faculty_scholarship/2058

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

PLATFORMS AND THE RULE OF REASON:
THE *AMERICAN EXPRESS* CASE

Herbert Hovenkamp*

I.	Introduction: Antitrust on Two-Sided Platforms.....	35
II.	The <i>Amex</i> Case in the Supreme Court.....	46
III.	Observations: Applying the Rule of Reason to Platform Exclusion	56
	A. The Significance of Burden Shifting	56
	B. Platform Market Delineation.....	57
	C. Complements in Use or Production.....	64
	D. Free Rider Concerns	65
	E. Use of the Record	68
	F. Inattentiveness to Economic Analysis	71
	G. Marginal Harms and Benefits.....	75
	H. Implications for Market Definition	81
IV.	Conclusion.....	88

I. INTRODUCTION: ANTITRUST ON TWO-SIDED
PLATFORMS

In *Ohio v. American Express Co.* (“*Amex*”),¹ the Supreme Court had its first explicit opportunity to apply antitrust’s rule of reason to an allegedly anticompetitive practice on a two-sided platform. The writ of certiorari petition asked the Court to consider “how Section 1 of the Sherman Act, which bans unreasonable restraints of trade, applies to ‘two-sided’

* James B. Dinan University Professor, Penn Law and the Wharton School, University of Pennsylvania. Thank you to Dennis Carlton, Harry First, Irving Scher, and Erik Hovenkamp for comments. A version of this paper was delivered at the William Howard Taft Lecture, September 14, 2018, to the New York State Bar Association, Antitrust Law Section.

© 2018. Herbert Hovenkamp. All rights reserved.

¹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

platforms that unite distinct customer groups.”² The challenge was to a vertical interbrand restraint,³ intended to prevent merchants from steering customers away from American Express (“Amex”) and toward lower cost credit cards.⁴ The suit was originally brought during the Obama administration by the Antitrust Division and seventeen states.⁵ The government won in the district court,⁶ but the decision was reversed by the United States Court of Appeals for the Second Circuit.⁷ The 2016 presidential election intervened, and the United States, under the new administration did not seek certiorari, but eleven states who had been co-plaintiffs did.⁸ After certiorari was granted, though, the United States filed a brief on behalf of the plaintiffs.⁹

Careful fact-finding is essential to the rational administration of antitrust under the rule of reason. Under antitrust’s per se rule, once a practice is shown to fall within a certain classification, such as naked price fixing, little additional evidence of anticompetitive effects is relevant and defenses are limited.¹⁰ By contrast, proper application of the

² Petition for Writ of Certiorari at i, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16-1454).

³ A vertical interbrand restraint, such as exclusive dealing, tying, or most favored nation requirements, consists of limitations on the way that a dealer can promote or sell a brand other than the one owned by the firm imposing the restraint. By contrast, an intrabrand restraint, such as resale price maintenance or a territorial limitation, is a restraint on the disposition of the imposing firm’s own brand.

⁴ See *Am. Express Co.*, 138 S. Ct. at 2280.

⁵ See *United States v. Am. Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015), *rev’d*, 838 F.3d 179 (2d Cir. 2016), *aff’d sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

⁶ *Id.* at 238–39.

⁷ *United States v. Am. Express Co.*, 838 F.3d 179, 207 (2d Cir. 2016), *aff’d sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

⁸ See Petition for Writ of Certiorari, *supra* note 2.

⁹ Brief for the United States as Respondent Supporting Petitioners, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16-1454).

¹⁰ See 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1509 (4th ed. 2017).

rule of reason requires a searching and detailed factual examination and careful development of a record, enabling the court to understand the structure and economic effects of the defendant's activities.¹¹ This in turn obliges appellate courts to review the record developed in the district court. The Supreme Court's *Amex* opinion should be tested against this requirement.

A significant portion of the debate among the various courts and the Supreme Court majority and dissenters concerned the way market power and anticompetitive effects should be measured. Therefore, it is essential to consider what it means that this dispute took place on a "two-sided" platform. Although some people speak of two-side markets, that term creates some confusion when used in juxtaposition with the term "relevant market" in antitrust. As both the majority and the dissent made clear, the fact that a platform is two-sided does not entail that it should be treated as a single relevant market for antitrust purposes.¹² Indeed, because they lack market power, many platforms are not relevant markets even if both sides are considered.

Many firms sell complementary products, and often to different groups of buyers, but that fact alone does not make them two-sided platforms. Rather, a two-sided platform is a business that depends on relationships between two different, noncompeting groups of transaction partners.¹³ A traditional example is the printed periodical, such as a newspaper, which earns revenue by selling both advertising and subscriptions to the paper itself. Depending on the chosen business model,

¹¹ *See id.* ¶ 1507 (tracking factual allegations and proof burdens in rule of reason cases).

¹² *Am. Express Co.*, 138 S. Ct at 2285–86; *id.* at 2300–01 (Breyer, J., dissenting).

¹³ The classic treatment of two-sided markets can be found in Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003). On definitional problems, see generally Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018). Many of the issues were initially raised in William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & ECON. 541 (1983).

such a periodical might obtain very different mixtures of advertising and subscriber revenue. At one extreme, *Consumer Reports* does not sell advertising but derives its revenue entirely from subscriptions and donations.¹⁴ At the other extreme, the local neighborhood shopping flier might be distributed free to customers, with its production and distribution supported entirely by advertising revenues. The manager of a two-sided platform maximizes profits by coming up with the optimal mixture of participation and revenue on the two sides.

Two-sided platform sellers can be harmed by feedback effects if they make the wrong choice on one side of their platform. For example, a magazine might keep its user subscription price low by relying on relatively more advertising, but this may cause subscribers to cancel their subscriptions due to excessive advertising. As this happens, the magazine will become less attractive to advertisers, leading to a vicious cycle of revenue loss on both sides. The trick for the magazine is to find the “sweet spot” that optimizes revenue between paid subscribers and paid advertisers. Such an optimized allocation is a consequence not merely of the price level on the two sides of the platform, but also of the amount of participation on each – that is, of appropriate “participation balanc[ing].”¹⁵ This spot, once achieved, is also an equilibrium for that firm.¹⁶ That is, it has

¹⁴ See *About Us*, CONSUMER REP., <https://www.consumerreports.org/cro/about-us/support-our-work/index.htm> [<https://perma.cc/L75W-HQ9R>].

¹⁵ See Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. (forthcoming 2019) (manuscript at 11–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219396 [<https://perma.cc/5UFG-92XT>]; see also Dennis W. Carlton, *The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error of Amex*, 2019 COLUM. BUS. L. REV. 93, 101 (2019) (“The insight of Rochet and Tirole is that a two-sided market has the property that the price to each side of the market matters separately. That is, it is not only the sum of the prices that matters but also the relative prices on each side of the market.”) (citing Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006)). Identifying and reaching this sweet spot is sometimes called “participation balancing.” See Hovenkamp, *supra* at 12–14.

¹⁶ See Hovenkamp, *supra* note 15, at 13.

no reason to change the balance as long as circumstances remain the same. Of course, if something changes that balance—such as a large postage rate increase for magazine subscribers—then the firm may have to seek out a new equilibrium. Significantly, not only the aggregate level of fees, but also their distribution determines the point that maximizes the platform operator’s profits.¹⁷ The Second Circuit seemed to ignore this attribute of platforms in *Amex*, when it spoke of the network’s profitability as determined by the “net price” of using the Amex card but said nothing about participation balancing.¹⁸ The same net price might yield very different levels of output and profits depending on how the price is distributed between the two sides.

In the platform literature, the term “indirect” network effects describes situations in which the value of the platform to one side depends on either the revenue generated or the number of users on the other side.¹⁹ For example, ride-hailing platforms such as Uber can succeed only if they have a critical volume of drivers on one side and a critical number of passengers on the other side.²⁰ If fares are set too high, the number of passengers will fall off. If they are set too low, the number of drivers will fall off. Ongoing antitrust litigation alleges that Uber is facilitating price fixing among drivers because its platform computes fares that are the same for similar rides.²¹ But platform economics suggests otherwise. The situation is more similar to the one in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (“*BMI*”), a 1979

¹⁷ See generally Rochet & Tirole, *supra* notes 13, 15. See also Dennis W. Carlton & Ralph A. Winter, *Vertical Most-Favored-Nation Restraints and Credit Card No-Surcharge Rules*, 61 J.L. & ECON. 215, 236 (2018); Hovenkamp, *supra* note 15, at 11–12.

¹⁸ See *United States v. Am. Express Co.*, 838 F.3d 179, 203 (2d Cir. 2016), *aff’d sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹⁹ See generally Rochet & Tirole, *supra* note 15 ; see also DAVID S. EVANS & RICHARD SCHMALENSEE, *MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS* 25 (2016).

²⁰ See Hovenkamp, *supra* note 15, at 4, 9.

²¹ See *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 820–21 (S.D.N.Y. 2016); see also *infra* notes 173–76 and accompanying text.

Supreme Court decision that also involved a two-sided platform, although the Court did not identify it as such.²² In *BMI*, the Court considered whether nonexclusive licenses, granted by owners of recorded music and assembled by the defendant into a “blanket license” granting nonexclusively to broadcasters, amounted to unlawful price fixing by the copyright owners.²³ The Court held that this practice was not unlawful, because petitioners’ blanket licenses were a highly valuable product that could be assembled only by the cooperation of the participating artists.²⁴ The parallels to the Uber case are quite strong.

The fact that a platform has two sides does not necessarily mean that both sides are positive contributors of revenue. It is important to distinguish between the revenue *level*, which is the aggregate price, and the revenue *distribution*, which is how the price is divided up among participants on the two sides.²⁵ Sometimes the price to users on one side of the platform is zero. For example, traditional “free” over-the-air television is supported entirely by paid advertising. Viewers pay nothing for program access. This is also the case for most consumer web search engines, such as Google Search, Bing, and Yahoo, and social networking sites such as Facebook. These services are generally free to users, but are supported by advertising revenue.²⁶ Nevertheless, those advertising revenues still depend on the number of users or the number of page views.

In some cases, as in *Amex* itself, the revenue from one side can be negative.²⁷ Credit card companies routinely charge

²² *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).

²³ *Id.* at 8–9 (assuming that the artists were “literally” fixing prices).

²⁴ *Id.* at 20–21, 24.

²⁵ *See* Hovenkamp, *supra* note 15, at 11–12.

²⁶ Some social networking sites, such as LinkedIn, also have a “premium” version for which users pay a monthly fee. *See LinkedIn Premium*, LINKEDIN, <https://premium.linkedin.com/> [<https://perma.cc/LD7E-VWSJ>].

²⁷ *Ohio v. Am. Express Co.*, 138 S. Ct. at 2274, 2281 (2018); *see also* *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 203 n.36 (E.D.N.Y.

merchants acceptance fees for the use of the cards, while the cost to customers can be zero or even negative depending on the terms of customer card ownership.²⁸ A typical card might charge no annual fee to customers, and no usage fees other than interest on unpaid balances or penalties for late payments. In addition, the card may award “perks” or other inducements that make the cost of the credit card negative to the consumer. These can include favorable treatment such as airline travel miles, extended warranties on products purchased with the card, or increased insurance protection for vehicles rented on the card.²⁹ That was largely the case with Amex’s card offerings: many of the company’s cardholders paid nothing for ownership of the card but received perks for each purchase made with it.³⁰ As a result, it was actually cheaper to use the card than to pay cash. Significantly, as the district court noted but the Supreme Court majority overlooked, these perks are granted for card *use*, not simply for card ownership.³¹ For example, consumers do not receive product purchase protection simply because they happen to carry an Amex card in their wallet; they must actually use the card to make the qualifying purchase.³²

Some so-called “transactional” platforms, including credit card networks and ride-hailing apps, exhibit a very direct

2015) *rev’d*, 838 F.3d 179 (2d Cir. 2016), *aff’d sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

²⁸ *The process is described in* Steven Semeraro, *Settlement Without Consent: Assessing the Credit Card Merchant Fee Class Action*, 2015 COLUM. BUS. L. REV. 186, 196 (2015). *See generally* Dany H. Assaf & Rebecca Moskowitz, *Global Credit Card Wars: Litigation, Legislation, or Innovation as a Path to Peace*, 29 ANTITRUST 42 (2015).

²⁹ *See, e.g., infra* note 30.

³⁰ Current perks for various classes of American Express credit cards are summarized at *Retail and Travel Benefits*, AM. EXPRESS, <https://www.americanexpress.com/us/credit-cards/features-benefits/policies/index.html> [<https://perma.cc/P7SJ-P59T>].

³¹ *See Am. Express Co.*, 88 F. Supp. 3d at 191.

³² *See, e.g., Purchase Protection*, AM. EXPRESS, <https://www.americanexpress.com/us/credit-cards/features-benefits/policies/purchase-protection/faq.html#5> [<https://perma.cc/P3TZ-9PMW>] (limiting purchase protection to goods purchased with Amex card).

relationship between transactions on one side and those on the other.³³ The Supreme Court emphasized this in its peculiar approach to market definition.³⁴ For example, each time a customer uses an Amex card to make a purchase, the platform simultaneously logs one transaction on the customer side and an equal and offsetting transaction on the merchant side, less Amex's merchant acceptance fee.³⁵ The same thing is true of Uber.³⁶ Each time a passenger hails a ride, the passenger pays the fare through the Uber application and the driver is compensated accordingly, after Uber subtracts its fee. This one-to-one transactional correspondence does not apply to all two-sided platforms. Health insurance networks, newspapers, search engines, and streaming sites, for example, exhibit a less direct relationship between transactions on the two sides of the market. In a market such as free television, advertising volume and rates might be based on Nielsen or other surveys that assess the size and composition of the audience.³⁷ Advertising rates on a search engine such as Google are often based on clicks, which means that more heavily used search engines generate more advertising

³³ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018) (citing Benjamin Klein, Andres V. Lerner, Kevin M. Murphy & Lacey L. Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 580, 583 (2006)).

³⁴ See *infra* notes 82–86 and accompanying text.

³⁵ See *id.*

³⁶ See Brief of the International Air Transport Association and Airlines for America as Amici Curiae in Support of Petitioners at 5–6, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16–1454).

³⁷ See *Advertising Effectiveness*, NIELSEN, <https://www.nielsen.com/us/en/solutions/advertising-effectiveness.html> [<https://perma.cc/TLL5-63FX>]; see also *United States v. Gray Television, Inc.*, No. 1:15-CV-02232, 2016 WL 1064377, at *10–11 (D.D.C. Mar. 3, 2016) (noting how television advertising rates are computed from Nielsen ratings based on audience size and demographic characteristics). Some pay television contains advertising as well, and Nielsen data may also be used to compute ad rates for such products. See, e.g., *Dish Enlists Nielsen Digital Measurement to Power Advanced Advertising Across Slings TV*, NIELSEN (Sept. 20, 2018), <https://www.nielsen.com/us/en/press-room/2018/dish-enlists-nielsen-digital-measurement-to-power-advanced-ads-across-sling.html> [<https://perma.cc/CM2W-CL93>].

revenue.³⁸ The volume and price of advertising is certainly affected by these measures of traffic, but it is hardly true that a one-to-one correspondence exists between a viewer's activity and the purchase of advertising.

The antitrust challenge in *Amex* was to an “antisteering” rule that Amex imposed upon merchants accepting its credit cards.³⁹ Amex charges merchants an acceptance fee, typically a percentage of the transaction price, that can run much higher than the fee charged by competing credit card issuers such as Visa, Mastercard, and Discover.⁴⁰ Many customers who carry the Amex card likely also carry one or more other cards.⁴¹ This incentivizes the merchant to induce the customer to use a less costly card, which it might do by offering the customer a product price discount or other compensation if she agrees to switch. For example, if the merchant acceptance fee on a large purchase is thirty dollars with an Amex card, but only twenty dollars with a Visa card, the merchant might wish to offer the customer a price discount of six dollars for using the Visa card rather than Amex. Alternatively, it might offer free delivery or some other valuable good or service. The antisteering rule prevents the merchant from making this offer, or even from informing the customer that the Amex card was more costly to use.⁴² The rule does not apply to transactions that do not use a card at all, such as payment by cash or checks, and it does not apply

³⁸ For a summary of how these alternatives compute advertising rates, see generally *Web Tracking Solutions, L.L.C. v. Google, Inc.*, No. 08-CV-03139, 2011 WL 3418323 (E.D.N.Y. July 27, 2011) (providing the magistrate judge's report and recommendation); see also Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401, 413–14 (2014).

³⁹ See *Am. Express Co.*, 138 S. Ct at 2280.

⁴⁰ The district court found that Amex maintained higher merchant acceptance fees than rival cards, although the difference had been declining. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 200 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). The differences tended to be higher in purchases involving airlines, rental cars, and lodging. *Id.*

⁴¹ See *id.* at 178.

⁴² *Id.* at 165.

to debit cards.⁴³ The government alleged that the antisteering rule effectively forced customers to stay with the higher priced card, thus increasing not only merchant fees, but also product prices indirectly.⁴⁴ Visa and Mastercard also used their own versions of such provisions, but signed consent judgments agreeing to abandon the practice.⁴⁵

“Steering” is fundamental to competition of any kind, including competition among platforms. It offers market participants an incentive to seek out lower cost alternatives. Some platforms are “single-homing,” which means that users typically engage with only one platform.⁴⁶ For example, smartphones are costly, and managing two different phones would be inconvenient. For that reason, most smartphone users have only a single phone at a time. iPhone users purchase their apps on the App Store, and Android users purchase them on Google Play. Competition for a particular user exists *for* the platform—the smartphone itself—rather than among platform incumbents. Credit cards are different, however. They readily accommodate “multi-homing.”⁴⁷ Cardholders often own two or more general purpose credit cards and use whichever satisfies them most for a particular transaction. The same is true of ride hailing services, web browsers, and computer search engines. Competition among

⁴³ *Id.*

⁴⁴ *See Am. Express Co.*, 138 S. Ct at 2288–89. As the Supreme Court described the antisteering rule, it prohibits:

... merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on Amex cards; or promoting other cards more than Amex. The antisteering provisions do not, however, prevent merchants from steering customers toward debit cards, checks, or cash.

Id. at 2283.

⁴⁵ *See id.* at 2293 (Breyer, J., dissenting); *see also* *United States v. Am. Express Co.*, No. 10–CV–4496, 2011 WL 2974094, at *2 (E.D.N.Y. July 20, 2011) (approving proposed consent judgment, 75 Fed. Reg. 62858–02 (Oct. 13, 2010)).

⁴⁶ *See* Hovenkamp, *supra* note 15, at 18–19.

⁴⁷ *See* Hovenkamp, *supra* note 15, at 17.

platforms can help ensure competitive prices and high-quality service, but an antisteering rule, such as Amex's, eliminates a consumer's incentive to use the least costly alternative.

The credit card steering problem presents some analogies to the existing economic literature on cartels. Limitations on price competition encourage firms to compete in ways other than price. For example, although cartel members may be forbidden from cutting the nominal price, they may compete with one another on nonprice terms, such as by offering perks that may be equivalent to those offered for credit card use.⁴⁸ At the margin, the cartel members may throw in nonprice perks right up to the point that their costs equal the price level. For example, if the competitive price is ten dollars but the cartel price is fourteen dollars, the cartel members may end up competing against one another by including nonprice perks costing them up to four dollars. Even apart from cartels, however, mixtures of price and nonprice competition are ubiquitous.

Steering facilitates both price and nonprice competition by permitting merchants to reward cardholders for using less costly forms of payment. Card issuers can compete either by cutting their merchant acceptance fee or by increasing their perks. With steering, merchants can permit customers to choose between a lower product price obtained by using a card with a lower acceptance fee, or a higher-price product purchased with a card that rewards the customer with higher perks. An antisteering rule deprives customers of the opportunity to make this choice, at least among alternative credit cards. In the process, it serves to blunt both price and nonprice competition.

Some Amex cardholders place greater value on the perks than others—a point that the *Amex* majority overlooked. It assumed that the higher transaction fees are justified by increased perks, as if they conferred the same value to

⁴⁸ See generally George J. Stigler, *Price and Non-Price Competition*, 76 J. POL. ECON. 149 (1968). On application to transactions and merchant credit card fees, see Carlton & Winter, *supra* note 17, at 218, 230. See also *In re Text Messaging Antitrust Litig.*, 782 F.3d 867 (7th Cir. 2015) (treating a rise in non-price competition as evidence of collusion).

everyone. The very fact that steering worked, however, indicates that at least some Amex customers preferred the lower product price rather than the perks. Were that not true, a steering rule would not have been necessary.

This Article considers how antitrust's rule of reason should be applied to an exclusionary practice on a platform market. It considers the rule of reason's basic burden-shifting framework, unique elements of market delineation on platform markets and the relevance of placing production complements into the same "market." It also considers the Court's regressive, antieconomic conclusion on a proposition that was never briefed—whether a market definition is necessary in an antitrust challenge to a vertical practice. Then it considers the Court's odd treatment of free rider problems. It also faults the Court for paying so little attention to the record, its lack of economic analysis, and in particular its confusion of total with marginal harms and benefits. Finally, it looks at the implications of the Court's decision for market delineation in cases involving platforms.

II. THE *AMEX* CASE IN THE SUPREME COURT

In *Amex*, the Supreme Court dismissed the government's challenge to the Amex antisteering rule,⁴⁹ affirming the Second Circuit's decision reversing the district court. The Supreme Court acknowledged that antitrust's rule of reason involves a "three-step, burden-shifting framework[.]"⁵⁰ First, the plaintiff must show "that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."⁵¹ If the plaintiff carries this burden, "then the burden shifts to the defendant to show a procompetitive rationale[.]"⁵² If this showing is successful, "then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably

⁴⁹ *Am. Express Co.*, 138 S. Ct. at 2290.

⁵⁰ *Id.* at 2284.

⁵¹ *Id.* (citations omitted).

⁵² *Id.* (citations omitted).

achieved through less anticompetitive means.”⁵³ Because the dissenters agreed with this verbal formulation of the rule of reason, it appears to have the unanimous support of the Court.⁵⁴ The differences lay mainly in how the *prima facie* case must be made out and how market power is to be established.

The Court concluded that the government did not carry its burden at the first stage. It observed that anticompetitive effects could be shown in two ways—either “directly,” by “proof of actual detrimental effects on competition,”⁵⁵ which could include “reduced output, increased prices, or decreased quality in the relevant market[.]”⁵⁶ It could also be shown “indirectly,” by “proof of market power plus some evidence that the challenged restraint harms competition.”⁵⁷ As the dissent observed, both of these descriptions were inconsistent with traditionally accepted requirements under the rule of reason. First, “direct” proof of actual detrimental effects does not require a market definition;⁵⁸ however, the majority spoke of direct evidence of “reduced output, increased prices, or decreased quality in the relevant market” as if it did.⁵⁹ As Justice Stephen Breyer noted in his dissent, “[o]ne critical point that the majority’s argument ignores is that proof of

⁵³ *Id.*

⁵⁴ *See id.* at 2290 (Breyer, J., dissenting) (“I agree with the majority and the parties that this case is properly evaluated under the three-step ‘rule of reason’[.]”).

⁵⁵ *Id.* at 2284 (quoting *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460 (1986)).

⁵⁶ *Id.* (internal citations omitted).

⁵⁷ *Id.* (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998); *Spanish Broad. Sys. of Fla. v. Clear Channel Commc’ns, Inc.*, 376 F.3d 1065, 1073 (11th Cir. 2004)).

⁵⁸ *E.g.*, 2B PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, *ANTITRUST LAW* ¶521 (4th ed. 2014); Louis Kaplow, *Why (Ever) Define Markets*, 124 HARV. L. REV. 437 (2010).

⁵⁹ *Am. Express Co.*, 138 S. Ct. at 2284. The Court cited *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986), but that decision never spoke of relevant market.

actual adverse effects on competition *is, a fortiori*, proof of market power.”⁶⁰ The dissent continued:

The District Court’s findings of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances. And so the majority’s extensive discussion of market definition is legally unnecessary.⁶¹

Second, the Court’s formulation of “indirect” proof as requiring “proof of market power plus some evidence that the challenged restraint harms competition”⁶² resembles the general case for competitive harm under the rule of reason, but misses the point of “indirect” proof, which is that it draws inferences of market power from a market share and other features of a properly defined relevant market.

In *Amex*, the plaintiff had relied on direct proof, which would not ordinarily require a market definition. As discussed below, however, the Court held that for vertical cases such as this one, even direct proof required a market definition.⁶³ The Court then concluded that the relevant market consists of both sides of the platform as “the area of effective competition.”⁶⁴ For example, firms such as the defendant earn a profit by maximizing revenue across both sides of the platform and can do so even if one side operates at a loss.⁶⁵ Further, “[p]rice increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform’s services.”⁶⁶

⁶⁰ *Id.* at 2297 (Breyer, J., dissenting).

⁶¹ *Id.* (Breyer, J., dissenting).

⁶² *Id.* at 2284.

⁶³ *See infra* text accompanying notes 76–77.

⁶⁴ *Id.* at 2285–86.

⁶⁵ *See id.*

⁶⁶ *Id.* at 2286.

The Court cited a great deal of literature on distinctive features of two-sided platforms. It concluded that “in two-sided transaction markets, only one market should be defined.”⁶⁷ Why these observations entailed that noncompeting goods should be grouped into the same relevant market is not clear. The price and output of complements certainly affect a firm’s profit-maximizing output and price,⁶⁸ but that hardly requires redefinition of its market.⁶⁹ Further, the Court’s discussion about the “transactional”⁷⁰ nature of Amex’s platform applies to conventional markets where sellers and buyers meet face to face. It is hardly unique to platforms. For example, if a gardener pays three dollars for a packet of spinach seeds in a hardware store there is a single simultaneous transaction, but we would never define a single market for gardeners and spinach seeds.

Without relying on an economically incoherent conception of a relevant market, the Court could simply have said that when power is sought to be proven by direct effects all relevant effects should be considered. It does not matter whether these effects occur in the same relevant market, because no relevant market need be defined in the first place. This is more consistent with Justice Breyer’s dissenting approach which (1)

⁶⁷ *Id.* at 2287 (internal quotations omitted) (quoting Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 302 (2014); see also David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 671 (2005)).

⁶⁸ In general, the presence of a substitute serves to increase a firm’s own price elasticity of demand, thus reducing its power; the presence of a complement serves to reduce a firm’s own price elasticity of demand, thus increasing its power. Both are considered in ordinary methodologies for computing residual demand. See generally Aviv Nevo, *Mergers with Differentiated Products: The Case of the Ready-to-Eat Cereal Industry*, 31 RAND J. ECON. 395 (2000); Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363 (1998). On application to two-sided platforms, see generally Andre Boik & Kenneth S. Cortis, *The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry*, 59 J. L. & ECON. 105 (2016).

⁶⁹ See *infra* notes 110–11 and accompanying text.

⁷⁰ See *Am. Express Co.*, 138 S. Ct. at 2286–87.

eschewed reliance on market definition;⁷¹ but (2) would consider all effects rather than just benefits on one side of the platform.⁷² The district court was also clear on that point, although the majority opinion ignored it. Indeed, one of the district court's fact findings was that the antisteering rule resulted in higher product prices across the board for merchants who accepted the Amex card, whether or not the customer used that card.⁷³ That finding alone was sufficient to establish the defendant's power, as well as anticompetitive effects.

In a footnote, the Court concluded that while direct proof of market power does not require proof of a relevant market in a horizontal case, it did in a vertical case such as this. The Court stated:

The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. . . . Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. . . . But vertical restraints are different. Vertical 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.⁷⁴

This confusing statement appears to do no more than assume the conclusion. The Court did not clarify why

⁷¹ See *id.* at 2294–96.

⁷² See *id.* at 2296–97.

⁷³ See *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 208 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018); see also *infra* notes 146–53 and accompanying text.

⁷⁴ *Am. Express Co.*, 138 S. Ct. at 2285 n.7 (internal citations omitted).

horizontal and vertical restraints should be treated differently in situations where both require proof of market power. One possibility, which Justice Breyer mentioned in his dissent, is that the majority believed that there was some category of anticompetitive effects that could be established without market power.⁷⁵ The final sentence of the statement appears to conclude as a statement of law something that in reality presents a question of fact, and that in any event is incorrect. There is no obvious reason why power cannot be inferred from effects in both horizontal and vertical cases. For example, in exclusive dealing cases, which are vertical, evidence that a defendant was able to exclude a rival or suppress its sales even while keeping its own price high is certainly probative, as the Eleventh Circuit found in *McWane, Inc. v. FTC*.⁷⁶ Direct proof has its own limitations, of course. The facts must indicate that exclusion is a consequence of anticompetitive behavior rather than efficiency, but there is no obvious reason for thinking these things are fundamentally different in a vertical case.

Further, the Court's analysis is regressive, given the significant work in economics that both weakens the case for traditional market definition and improves upon econometric methodologies for measuring market power more directly.⁷⁷ This is particularly true when the immediate concern is the ability of a firm or group of firms to increase price above the competitive level through means other than collusion.⁷⁸ When the issue is likelihood of collusion, on the other hand, then market definition may be an aid in identifying those in the

⁷⁵ See *id.* at 2297 (Breyer, J., dissenting) (“One critical point that the majority’s argument ignores is that proof of actual adverse effects on competition is, *a fortiori*, proof of market power.”).

⁷⁶ See *McWane, Inc. v. FTC*, 783 F.3d 814, 829–32 (11th Cir. 2015).

⁷⁷ See, e.g., Kaplow, *supra* note 58.

⁷⁸ See, e.g., Herbert Hovenkamp, *Markets in Merger Analysis*, 57 ANTITRUST BULL. 887 (2012); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 68 (2010) (noting the move away from traditional market definition in merger analysis); Gregory J. Werden, *Market Delineation and the Justice Department’s Merger Guidelines*, 1983 DUKE L.J. 514, 572–74 (1983).

collusive group, and also their relative strengths as cartel contributors or enforcers.⁷⁹ The alarming thing about the Court's footnote is that it does not engage or even cite any of the extensive literature on the measurement of market power, providing not one single empirical rationale for the conclusion it draws. Indeed, the proposition that the Court asserted—namely, that a plaintiff in any vertical restraints case must define a relevant market no matter how power is sought to be established—was never briefed. Further, the Court stated this conclusion as a rule of law. Clearly, the permissible methodologies for proving power—a question of expert testimony—should be a question of fact.

Market definition is even less reliable as an indicator of power in markets of significantly differentiated products.⁸⁰ Market definition is necessarily binary, putting products either inside or outside of the market. Placing differentiated products in the same market serves to exaggerate the degree of competition. Placing a differentiated product outside serves to understate the degree of competition. *Amex* concerned differentiated payment systems, as well as differentiation in costs and perks within the group of general purpose credit cards. Further, the fundamental concern was with high prices but not with collusion among issuers. In that case, measuring market power by reference to share of a defined market seems distinctly inferior.

In any event, the Court then held that the proper relevant market for considering the restraint at issue was both sides of the platform.⁸¹ It also referred to “credit-card transactions as

⁷⁹ These are principal attributes of the Herfindahl-Hirschman Index, which is often used in merger enforcement and requires a market definition. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 12.4 (5th ed. 2016); John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice* 7–8 (Oct. 9, 2018) (unpublished manuscript), <https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf> [<https://perma.cc/HX3Z-CKE2>].

⁸⁰ See 2B AREEDA ET AL., *supra* note 58, at ¶ 563; Herbert Hovenkamp, *Response: Markets in IP and Antitrust*, 100 GEO. L.J. 2133, 2146 (2012).

⁸¹ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286 (2018).

a whole” as the relevant market.⁸² That odd usage, of grouping both the buyer and seller into the same relevant market, would make any coherent economic analysis of the relevant market impossible, which is apparently why the opinion limited this definition to credit card transactions rather than transactions generally. Since every sale in a market involves a transaction, a broader conclusion would require holding that the spinach seeds and the gardener who purchases them are in the same market simply because they are simultaneously on the buy- and sell-side of the same transaction.

Concluding that credit card transactions make up the relevant market should also have given the decision to the plaintiff. The record established unambiguously that the antisteering rule forced a specific buyer and seller to replace a lower price transaction that *both* preferred in favor of a higher cost transaction that injured both of them, as well as rival card issuers.⁸³ In other words, it established exclusion, harm to the affected parties, and higher prices across the board.

Importantly, the Court cabined this noneconomic market definition conclusion in other ways, adding this critical limitation:

To be sure, 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. Newspapers that sell advertisements, for example, arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. But in the newspaper-advertisement market, the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. Because of these weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such.

⁸² *Id.* at 2287.

⁸³ *See infra* notes 180–91 and accompanying text.

But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually. To optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants.⁸⁴

Platforms that “facilitate a single, simultaneous transaction between participants”⁸⁵ would include the credit card networks and very likely also ride-sharing platforms, such as Uber or Lyft, and perhaps eBay or Airbnb, which function mainly as brokers between buyers and sellers. The Court itself acknowledged that it would not include platforms such as newspapers, where there is no transaction-specific relationship between the two sides. A fortiori, it does not include television or radio stations that accept advertising revenue from one side. Nor would it include advertising-supported computer search engines, music streaming, or other advertiser-supported computer applications in which advertising satisfies the company's general revenue requirements, but there is no one-to-one transaction between the user and the advertiser. And it would exclude networks that sell things such as health insurance, where the buyer and seller do not engage in simultaneous transactions on a per-service basis.⁸⁶

The Court concluded that assessing competitive effects of a two-sided transaction platform required the fact finder to

⁸⁴ *Am. Express Co.*, 138 S. Ct. at 2286 (citations omitted).

⁸⁵ *Id.*

⁸⁶ *See infra* note 215 and accompanying text.

evaluate both sides.⁸⁷ Here, the Court held, the plaintiffs had not carried their burden:

Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.⁸⁸

Further, the majority concluded, "[t]he plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market."⁸⁹ Rather, "Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price."⁹⁰

What the Court said could not possibly have been true of potential customers who would have agreed to a steering offer. Clearly, they did not value the perks by more than the merchant's offered inducement, or else they would not have preferred to switch. That is, the relevant question concerned the *marginal* effect on consumers and merchants that resulted from the no steering rule.⁹¹ It is also worth noting that proof of any of these things does not rest on the premise that the merchant and customer sides of the platform were in the same relevant market. Further, the majority opinion

⁸⁷ *Am. Express Co.*, 138 S. Ct. at 2287.

⁸⁸ *Id.* (citations omitted).

⁸⁹ *Id.* at 2288.

⁹⁰ *Id.*

⁹¹ *See infra* notes 183–88 and accompanying text.

ignored numerous explicit fact findings in the district court, all of which took effects on both sides into account but were based on an economically coherent market definition.⁹²

The Court also concluded that a dealer offering a discount to customers for purchasing with an alternative card was a form of free riding that “undermines the cardholder’s expectation of ‘welcome acceptance’—the promise of a frictionless transaction.”⁹³ “A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants.”⁹⁴ The Court described this “lack of welcome acceptance” as an “externality” that “endangers the viability of the entire Amex network,”⁹⁵ and likened the situation to the use of resale price maintenance to prevent one seller from free riding on the efforts of a competing seller.⁹⁶

III. OBSERVATIONS: APPLYING THE RULE OF REASON TO PLATFORM EXCLUSION

A. The Significance of Burden Shifting

While all members of the Court nominally agreed with the rule of reason’s three-part burden-shifting analysis, the majority appeared to believe that the entire antitrust challenge depended on the plaintiff’s *prima facie* case. Some writers on two-sided platforms make the same mistake,

⁹² See *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 174 (E.D.N.Y. 2015), *rev’d*, 838 F.3d 179 (2d Cir. 2016), *aff’d sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (“American Express is correct that the court must account for the two-sided features of the credit card industry[.]”). The Second Circuit acknowledged this as well, but apparently concluded that benefits could be assessed only with a market definition that included both sides. *United States v. Am. Express Co.*, 838 F.3d 179, 199–200 (2d Cir. 2016), *aff’d sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018); see also *infra* notes 149–51 and accompanying text.

⁹³ *Am. Express Co.*, 138 S. Ct. at 2289 (citing *Am. Express Co.*, 88 F. Supp. 3d at 156).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 2289–90 (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890–91. (2007)); see also *infra* notes 134–38 and accompanying text.

faulting analyses such as the district court's for looking only at one side of the market.⁹⁷ But that clearly is not what the district court did in this case, and it is not the proper way to think of the burden shifting rule-of-reason framework. The prima facie case considers whether the plaintiff has presented enough evidence of competitive harm to require the defendant to offer an explanation.⁹⁸ Because the defendant is the creator of its restraint and presumably knows what its motives were, it is in a far better position to provide proof of its rationale and effects. If it had a procompetitive justification, such as cost reduction or product improvement, that must have been a motivating factor in its creation of the restraint.⁹⁹ In any event, the district court made clear that its analysis considered both sides of the market even under the burden shifting approach.¹⁰⁰

B. Platform Market Delineation

The majority never explained why assessing effects on both sides of a platform required jettisoning economically coherent conceptions of the relevant market as a group of substitute goods or services. That is, a relevant market is a “collusive group.”¹⁰¹ Putting production complements into the same market simply because making a deal requires both introduces economic nonsense into the law and economics of market power. Superior techniques exist for evaluating the pricing relationship among substitutes and complements, and

⁹⁷ See, e.g., Filistrucchi et al., *supra* note 67, at 301.

⁹⁸ See *supra* text accompanying notes 50–51.

⁹⁹ See 7 AREEDA & HOVENKAMP, *supra* note 10, at ¶ 1505a; Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 107 (2018).

¹⁰⁰ See *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 171 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹⁰¹ See, e.g., Kenneth D. Boyer, *Industry Boundaries*, in *ECONOMIC ANALYSIS & ANTITRUST LAW* 70, 73–74 (Terry Calvani & John Siegfried eds., 2d ed. 1988); Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 188–89 (1992).

their effects on market power.¹⁰² These techniques do not require abandonment of sensible economics. In some cases, however, they may serve to strengthen or weaken the inference of power that can be drawn from computation of a market share. Unfortunately, parties will likely waste many hours of litigation resources disputing whether the “relevant market” in their particular case should include complements as well as substitutes.

As Justice Breyer observed in his dissent, “[t]he phrase ‘two-sided transaction platform’ is not one of antitrust art[.]”¹⁰³ The important points, as he observed, are that such platforms “(1) offer different products or services, (2) to different groups of customers, (3) whom the ‘platform’ connects, (4) in simultaneous transactions.”¹⁰⁴ But the majority made no attempt to explain why this set of facts required the Court to develop an economically incoherent conception of the relevant market.

The dissent’s logic here is inescapable. Market definition and market share are only the starting points in the analysis of market power by indirect measures. At that point, a court must consider a number of things that give meaning to market shares.¹⁰⁵ The Second Circuit lost sight of this when it held that the district court could not have accounted for the two-sided features of the credit-card industry without a market definition that included both.¹⁰⁶ When relying on proof from market share, a far better approach is to start out with a

¹⁰² For an introduction, see generally Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, 11 ANTITRUST 21 (1997). See also Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L.J. 3 (1992). For an updated and somewhat more critical overview, see Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31 (2014).

¹⁰³ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2298 (2018) (Breyer, J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ See 2B AREEDA ET AL., *supra* note 58, at ¶¶ 532–33.

¹⁰⁶ See *United States v. Am. Express Co.*, 838 F.3d 179, 196, 200 (2d Cir. 2016), *aff’d sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). The Supreme Court did not discuss the fact finding. See generally *Am. Express Co.*, 138 S. Ct. 2274.

properly defined group of substitutes and then consider other factors that might strengthen or weaken any inference of power drawn from market share. In this case, the alleged relevant market and the one the district court focused on was economically sensible—namely a “network services market” for general purpose charge cards, in which the purchasers were merchants.¹⁰⁷ To this, the Second Circuit required the addition of cardholders.¹⁰⁸ Cardholder transactions were not competitors with network services, but rather were complements in production.¹⁰⁹

It is difficult to see any added value coming from a linguistic requirement that both sides of the platform be placed within the same market.¹¹⁰ It certainly cannot be to assess collusion possibilities because the two sides do not compete with each other. The presence of a second side may affect the ability of the first side to exercise power, but no part of that determination requires a conclusion that the second side is in the same market. The availability or price of complements can certainly limit a firm’s ability to increase its price. For example, the limited supply and high price of gasoline might limit a firm’s ability to charge a higher price for its automobiles. This is another way of saying that substitutes and complements pull in opposite directions when one is estimating a firm’s market power: high prices for substitutes tend to increase it, while high prices for complements tend to decrease it.¹¹¹ Economists have been

¹⁰⁷ See *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 171 (E.D.N.Y. 2015), *rev’d.*, 838 F.3d 179 (2d Cir. 2016), *aff’d sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹⁰⁸ See *Am. Express Co.*, 838 F.3d at 197.

¹⁰⁹ See *infra* at notes 132–133 and accompanying text.

¹¹⁰ See *Carlton*, *supra* note 15.

¹¹¹ See *supra* notes 68–69 and accompanying text; see also Werden, *supra* note 68, at 398. Conceptually, a firm’s market power is determined by its own price elasticity of demand, which is the weighted sum of the cross elasticities of all other products with respect to the first product’s price. See Kaplow, *supra* note 58, at 485–86. In practice, direct measurement of a firm’s own price elasticity is easier than, and preferable to, attempts to measure cross-elasticities with potentially competing products. *Id.* at 490.

making such calculations for decades,¹¹² and without doing anything as irrational as grouping substitutes and complements into a single market.

What the Supreme Court majority was apparently trying to do is force the plaintiff to consider burdens and benefits on both sides of the platform as part of its *prima facie* case. The district court seems to have done that quite adequately,¹¹³ but it did not add the verbal flourish that the two sides were in a single relevant market. How its analysis would have been any different if it had done so is not clear.

The Second Circuit expressed concern that limiting the market to substitutes would ignore “feedback effects”—namely that a “reduction in cardholders’ demand for cards (or card transactions) . . . would accompany any degree of merchant attrition.”¹¹⁴ Of course, that would be true of any firm that sold complementary products. For example, a grocer that sells both milk and Cheerios would have to consider that a price increase in milk might reduce the demand for Cheerios. This would not warrant creating a single market for milk and Cheerios, although it might require the fact finder to consider what impact reduced demand for Cheerios might have on the profitability of the higher-priced milk. That is fundamentally a demand elasticity problem, not a problem in market delineation, and further illustrates why the Court’s insistence on a traditional market definition in a vertical case makes so little sense. In an extreme case, an increase in the price of milk might impact Cheerios so severely as to make it an unsustainable product. In all events, the “feedback” equilibrium depends on all market conditions, including price, that operate on both sides of the platform. A judicial order permitting steering would simply move this equilibrium to a different place. In general, the more competitive the two sides of the market are, the less profitable this equilibrium would

¹¹² See Werden, *supra* note 68, at 398 (citing JOE S. BAIN, PRICE THEORY 25–26, 50–53 (1952); FRITZ MACHLUP, THE ECONOMICS OF SELLERS COMPETITION 213–14 (1952)).

¹¹³ See *supra* notes 99–100 and accompanying text.

¹¹⁴ United States v. Am. Express Co., 838 F.3d 179, 200 (2d Cir. 2016), *aff’d sub nom.* United States v. Am. Express Co., 138 S. Ct. 2274 (2018).

be. In any event, a lost transaction to Amex would be a gained transaction to a lower priced network, affecting the latter's feedback effect as well.

Indeed, the district court also used a version of this feedback argument to make the opposite point, and its analysis was more persuasive. It concluded that the impact of the antisteering rule was to create "derived demand" for the Amex card by deterring customers from switching away, which in turn supported increased merchant fees.¹¹⁵ This was more persuasive because it considered marginal—rather than average—behavior. The reason this rationale is more persuasive is that each and every customer who would have switched away from Amex as a result of steering in fact experienced a loss in value, as did each and every merchant forced to make the transaction using the Amex card.¹¹⁶ There were no gains on either side, but rather losses on both. Profits accrued only to the network operator, not to merchants or card users. The only remaining question was whether the antisteering rule was necessary to provide the minimum volume necessary for the network operator's viability. Assuming that is a viable defense, one does not need a special theory of platforms in order to answer that question.

Similar situations can arise in exclusive dealing cases, where viability of production facilities is sometimes raised as a defense. Suppose, for example, that Uber should impose exclusive dealing¹¹⁷ on its drivers, preventing them from driving for any competing company. To the extent Uber had the power to do so, this would prevent the drivers from selling their services to rivals such as Lyft or traditional taxicabs. One standard defense, as presented in *Amex*, would be that exclusive dealing is necessary to increase volume in order to make the Uber platform viable. That is a testable fact.

¹¹⁵ See *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 188 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹¹⁶ See *infra* notes 180–91 and accompanying text.

¹¹⁷ More specifically, this would be an output contract, in which exclusive dealing is imposed on sellers rather than buyers. See 11 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1803 (4th ed. 2018).

However, it could also be raised as a defense to *any* exclusive dealing claim, whether or not it involved a transactional network or any network at all. For example, in *McWane*, a more conventional exclusive dealing case, the defendant argued that exclusive dealing was necessary for it to maintain minimum viable scale in one of its plants.¹¹⁸ The Eleventh Circuit concluded that *McWane* did not show it needed exclusive dealing in order to get its volume up.¹¹⁹ Given its very high profit margins, it should simply have cut its prices.¹²⁰

By the same token, the evidence in *Amex* pertained to whether the antisteering rule was needed to protect *Amex*'s scale of operations necessary to keep its platform viable. Here, the record was clear. *Amex* offered high-cost cards and continuously raised its merchant prices under the antisteering rule.¹²¹ None of that depended on the fact that *Amex* was operating on a transaction platform. Even assuming that *Amex* had to increase card usage in order to make its platform viable—a fact that was never established—it might have achieved viability by cutting its price. Further, the opinion says nothing about what *Amex*'s viability requirements were. As the district court observed and Justice Breyer noted, at trial *Amex* “presented no expert testimony, financial analysis, or other direct evidence establishing that without its [nondiscrimination provisions] it will, in fact, be unable to adapt its business to a more competitive market.”¹²² Finally, the viability question is not one of networks, but rather of plain, old economies of scale or perhaps of scope.

¹¹⁸ See *McWane, Inc. v. FTC*, 783 F.3d 814, 841 (11th Cir. 2015).

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2293 (2018) (Breyer, J., dissenting) (noting that “American Express raised the prices it charged merchants on 20 separate occasions.”).

¹²² *Am. Express Co.*, 138 S. Ct. at 2304 (Breyer, J., dissenting) (quoting *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 231 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018)).

Properly conducted antitrust law already requires analysis of two sides in cases of vertical interbrand restraints, including the tying of complementary products, although it does not proceed by anything as economically incoherent as putting them into the same relevant market.¹²³ The law of tying and exclusive dealing both assess competitive effects by examining power in a primary market and foreclosure in a secondary market. Typically, as in *Amex*, the two products are complements. The principal exception is tying law's inappropriate but nevertheless tenacious per se rule, which permits an anticompetitive tie to be inferred without reference to foreclosure.¹²⁴

To illustrate, in *Jefferson Parish v. Hyde*, the Supreme Court dismissed a challenge to a hospital-anesthesiology services tie under the rule of reason after finding that the defendant hospital's admission of thirty percent of the surgical patients in the relevant market was inadequate.¹²⁵ Importantly, the Court did not define a single market for anesthesiologists and surgical patients. Hospitals, it should be noted, are two-sided platforms servicing providers on one side and patients on the other.

Anticompetitive harm in vertical interbrand foreclosure cases such as *Jefferson Parish* requires a showing of some degree of presence in the primary market and some minimum amount of foreclosure, exclusion, or perhaps a price increase in the complementary market.¹²⁶ For example, in the well-known *Tampa Electric Co. v. Nashville Coal Co.* exclusive dealing case, the utility controlled a dominant position in the market for electric power in its service area and consumed eighteen percent of the coal consumed in Florida and

¹²³ *Cf. Am. Express Co.*, 88 F. Supp. 3d at 171 (including effects on the other side of the market expressly).

¹²⁴ See 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1720 (4th ed. 2018).

¹²⁵ *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 7, 26–27 (1984) (noting that defendant lacked power because seventy percent of surgical patients in the area went to other hospitals).

¹²⁶ On market definition for purposes of assessing vertical foreclosure, see 2B AREEDA ET AL., *supra* note 58, at ¶ 570.

Georgia.¹²⁷ Under existing exclusive dealing standards, that percentage would have been sufficient for illegality.¹²⁸ The Supreme Court dismissed the complaint, however, because the coal that it purchased represented “less than 1% of the total marketed production” of coal that was available for Tampa Electric to purchase.¹²⁹ The Court did not attempt to define a single market for coal and electric power. Indeed, doing so would have undermined the competitive analysis. Looking at the Tampa utility’s side of the market alone seriously exaggerated the competitive harm. In *Tampa Electric*, the Court got to the correct result by limiting both the upstream and downstream markets to substitutes and then assessing the competitive harm. As Justice Breyer queried in *Amex*, “What is it about the economic relationship between merchant-related and shopper-related services that would justify the majority’s novel approach to market definition?”¹³⁰ Economically speaking, the analysis of market pairs for purposes of evaluating vertical interbrand restraints is no different from the analysis of platforms.¹³¹

C. Complements in Use or Production

On the question of complements, the *Amex* majority concluded that the two sides of the transaction were not complements because they were not purchased by the same buyers.¹³² The dissent countered that they were, and that putting complements and substitutes into the same market

¹²⁷ See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 331 (1961).

¹²⁸ See *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 295, 305 (1949) (condemning exclusive dealing contracts covering 6.7% of total retailed gasoline).

¹²⁹ *Tampa Electric*, 365 U.S. at 331.

¹³⁰ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2299 (2018) (Breyer, J., dissenting).

¹³¹ On this point, see generally Carlton & Winter, *supra* note 17.

¹³² *Am. Express Co.*, 138 S. Ct. at 2286 n.8 (asserting that the two were not complements “in which both products are bought by the same buyers” (quoting Filistrucchi et al., *supra* note 67, at 297)).

was “economic nonsense.”¹³³ What neither side stated clearly was that the two sides were clearly complements, but they were complements in production rather than use. The majority was thinking of complements in use, such as toast and jam, or gardeners and spinach seed. Complements in production are goods or services that are produced together, such as beef and cowhide, oil and natural gas, lumber and sawdust, or voice services and messaging services. The majority’s acknowledgement that each cardholder transaction is necessarily offset by an equal merchant transaction acknowledged as much.¹³⁴ Complements in production behave in ways similar to complements in use. For example, strong demand for oil leads to higher oil prices. Necessarily, however, increasing oil production will increase gas production because gas is a natural byproduct. If the demand for gas remains constant, its price will fall just as oil prices rise.

D. Free Rider Concerns

The majority was confused about the existence and nature of free riding. It spoke of the other card companies as free riding on Amex’s “investments in rewards[,]” likening the antisteering provision to the use of resale price maintenance to protect against dealer free riding.¹³⁵ But as the dissent properly noted, the Amex rewards attach to *specific transactions*, not to mere possession of the card.¹³⁶ If a cardholder earned its perks simply by owning an Amex card, then, of course, free riding would be possible. A customer might acquire the card in order to obtain the perks but then make its actual transactions with a lower priced card. The majority paid little attention to the record, but the district

¹³³ *Id.* at 2295–96 (Breyer, J., dissenting) (quoting 2B AREEDA ET AL., *supra* note 58, at ¶ 565a, at 431).

¹³⁴ *See id.* at 2286.

¹³⁵ *See id.* at 2289–90 (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890–91 (2007)).

¹³⁶ *Id.* at 2304 (Breyer, J., dissenting).

court was clear on the point¹³⁷ and it seems incontrovertible. The policy is clear on Amex's own website.¹³⁸

The all-important ingredient in the free-rider explanation of resale price maintenance or other dealer restraints is that the manufacturer is unable to price out services distinctly from the product itself. For example, it cannot charge customers separately for the well-trained sales staff but must include it in the price of the basic product. That makes it possible for the customer to segregate the two—obtaining product education from the full-service dealer, but then purchasing the product from the discounter.¹³⁹ However, if the issuer attaches the perks strictly to payment for the product, then “the ride is not free,” in Judge Frank Easterbrook's words.¹⁴⁰

The majority's free rider argument was attached to a perspective on consumer behavior that can only be described as economically bizarre, and certainly contrary to our usual assumption that consumers are rational maximizers of their own utility. The majority spoke of the antisteering provision as promoting “welcome acceptance” of its card.¹⁴¹ “Welcome acceptance” in this case apparently meant that the buyer

¹³⁷ *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 237 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). (“Plainly . . . investments tied to card use (such as Membership Rewards points, purchase protection, and the like) are not subject to free-riding, since the network does not incur any cost if the cardholder is successfully steered away from using his or her American Express card.”).

¹³⁸ See, e.g., *Extended Warranty Description of Coverage*, AM. EXPRESS https://www.americanexpress.com/content/dam/amex/us/credit-cards/features-benefits/policies/pdf/EW%20Benefit%20Guide_Tier%201%20Rev%2007-18.pdf [<https://perma.cc/8TEZ-HNNL>] (describing extended warranty protection offered with Amex Platinum Card, provided that the product in question was purchased with the card).

¹³⁹ See Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 91–92 (1960); see also 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1613 (4th ed. 2017).

¹⁴⁰ *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 675 (7th Cir. 1992) (“When payment is possible, free-riding is not a problem because the ‘ride’ is not free.”).

¹⁴¹ *Am. Express Co.*, 138 S. Ct. at 2289.

should be prevented from being offered or even told about the availability of a cheaper alternative. Amex made this argument in its brief, offered as a Hail Mary pass, which the majority caught.¹⁴² The Second Circuit had decided that “welcome acceptance” was a viable defense because loss of a sale via steering could have a negative impact on both sides of the market.¹⁴³ Factually, of course, it could be true that loss of “welcome acceptance” on one product could impair a firm’s earnings on a complementary product. For example, condemnation of a cartel’s boycott of a price cutter in its primary market could also have a negative impact on the sales of a complement, or impairing a grocer’s milk sales might also harm that grocer’s sale of Cheerios. By contrast, the district court took a much more economically rational view of the situation, namely that “[a]llowing merchants to actively participate in their customers’ point-of-sale decisions would remove the artificial barrier that now segregates merchant demand from the price of network services[.]”¹⁴⁴

Putting the most sensible gloss on the argument, Amex had invested in a business model that depended on high merchant acceptance fees. When a merchant offered a customer a lower price to use a different card, that offer undermined Amex’s model. Factually, of course, that is true. Anytime a merchant tells a buyer that a better deal is available than the buyer’s initially chosen one it serves to diminish “welcome acceptance” of that initial offer. Indeed, competition of any sort does that. One wonders if that argument, which now has the majority’s imprimatur, will also

¹⁴² See Brief for Respondents Am. Express Co. & Am. Express Travel Related Servs. Co., Inc. at 9, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16-1454).

¹⁴³ See *United States v. Am. Express Co.*, 838 F.3d 179, 191 (2d Cir. 2016), *aff’d sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (“Although merchants across various industries regularly try to ‘steer’ their customers toward certain purchasing decisions via strategic product placement, discounts, and other deals, steering within the credit-card industry can be harmful insofar as it interferes with a network’s ability to balance its two-sided net price.”).

¹⁴⁴ *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 220–21 (E.D.N.Y. 2015), *rev’d*, 838 F.3d 179 (2d Cir. 2016), *aff’d sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

appear as a defense to price fixing. After all, permitting rivals to offer a lower price than the cartel's offer will undermine "welcome acceptance" of the cartel's product.¹⁴⁵

Further, the majority failed to observe the one instance of free riding that the facts indicated. The antisteering rule made the Amex cardholder indifferent as to which card he or she used, because the increased cost was borne entirely by the merchant. The merchant for its part had to absorb these higher costs, which it did via higher product prices, as the district court also found.¹⁴⁶ Effectively, all purchasers, whether they used an Amex card or any card at all, were forced to subsidize Amex's higher merchant acceptance fees. That was a true case of free riding.

The Second Circuit did not disagree with this fact finding, but it held that higher product prices could be justified by the greater value of Amex's perks to its own cardholders, particularly for merchants where Amex cardholders insisted on paying with the Amex card and nothing else.¹⁴⁷ What the Second Circuit apparently did not see is that this finding conceded Amex's market power: that is, it had the power to compel higher merchant product prices across the board in order to subsidize Amex's perks to its own cardholders. A firm that lacked power would not be able to compel higher prices market wide, harming everyone else for the benefit of its own customers. The Supreme Court did not discuss the Second Circuit's treatment of the issue.

E. Use of the Record

One of the rule of reason's most essential features is development and analysis of a record. The rule of reason requires detailed factual analysis because the restraint is not of a type that can be disposed of categorically, as under per se rules of illegality or legality.¹⁴⁸ The *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.* predatory pricing case

¹⁴⁵ See Hovenkamp, *supra* note 15, at 31.

¹⁴⁶ See *infra* note 154 and accompanying text.

¹⁴⁷ See *Am. Express Co.*, 838 F.3d at 202.

¹⁴⁸ See 7 AREEDA & HOVENKAMP, *supra* note 10, at ¶¶ 1507–08.

provides an instructive example, where the Supreme Court carefully reviewed the record, citing it nearly twenty times and ultimately agreeing with the district court that the plaintiff's legal case had failed.¹⁴⁹

By contrast, the Supreme Court's *Amex* opinion contains only a single mention of the record, for a proposition unrelated to the challenged restraint, and virtually no analysis.¹⁵⁰ The Second Circuit had discussed the record multiple times, mainly concerning the district court's conclusion that the relevant market must be limited to reasonably interchangeable goods. The Second Circuit also concluded that harms to merchants needed to be offset by benefits to cardholders, and that only a market definition that grouped the two together could do that.¹⁵¹ It did not acknowledge that for cardholders affected by the antisteering rule, the benefits were necessarily less than the higher fees.¹⁵² The Supreme Court did not discuss these findings either. On the district court's finding of higher retail prices, the Second Circuit held that this conclusion was error because it "fail[ed] to take into account offsetting benefits to cardholders in the form of rewards and other services."¹⁵³ That was tantamount to a conclusion that *Amex* was entitled to raise merchant prices across the board for the benefit of its own cardholders.¹⁵⁴

While the majority did not disagree with or repudiate the district court's detailed fact findings, it made almost no use of them—a point that the dissenters noted.¹⁵⁵ Indeed, the only way that the Court could reach its conclusions was by ignoring the record. While the majority opinion did cite significant

¹⁴⁹ See generally *Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

¹⁵⁰ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2282 (2018) (citing record for proposition that *Amex* made some banking and payment services available to low-income individuals).

¹⁵¹ See *Am. Express Co.*, 838 F.3d at 205.

¹⁵² See *infra* notes 188–92 and accompanying text.

¹⁵³ See *Am. Express Co.*, 838 F.3d at 204 n.52.

¹⁵⁴ On the free rider issue, see *supra* notes 94–96, 134–45 and accompanying text.

¹⁵⁵ See *Am. Express Co.*, 138 S. Ct. at 2293 (Breyer, J., dissenting).

academic economics literature on the issue of platforms, the Court made very little use of it other than setting up some basic definitions. In, fact, the Court never bothered to analyze the particular transactions at issue and how the antisteering rule affected consumer behavior and welfare.

By contrast, the dissent summarized the district court's conclusions: Under the antisteering rule, Amex was able to increase merchant acceptance fees approximately twenty times during a five-year period, specifically because it did not have to worry about merchants shifting their customers to a less costly card.¹⁵⁶ It found that in the absence of the no-steering rule, merchant acceptance fees "would likely have been lower."¹⁵⁷ It also found that the antisteering rule had successfully deterred an attempt by Discover, a competitor, to switch merchants by offering them lower acceptance fees.¹⁵⁸

The district court also found that for many merchants the costs of credit card acceptance were "among many merchants' highest," giving them "a strong economic incentive to take steps to reduce" them.¹⁵⁹ The court concluded that the "Plaintiffs additionally are able to show harm to those same merchants' customers on the other side of the GPCC platform, as inflated merchant discount rates are passed on to all customers—AmEx cardholders and non-cardholders alike—in the form of higher retail prices."¹⁶⁰

The key target of the Sherman Act's restraint of trade standard is reduced output and, consequently, higher prices.¹⁶¹ The particular fact finding by the district court hit

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 2293–94. On the use of vertical most-favored-nation clauses or similar practices to deter entry, see Carlton, *supra* note 15.

¹⁵⁹ *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 221 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹⁶⁰ *Id.* at 208.

¹⁶¹ See Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 44 J. CORP. L. (forthcoming 2019) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3197329 [<https://perma.cc/EG3A-6N3C>].

that target's bullseye. On the question of output, the record showed everything that the Court needed to know. The antisteering rule shifted deals to a higher cost transaction that resulted in lost value to both the affected cardholder and merchant. Further, it resulted in higher product prices across the board, even to those who purchased without the use of the Amex card.

The district court had also concluded that “the customer neither sees nor pays the additional cost when networks increase the price of network services to merchants (other than in the form of higher retail prices, which are paid by all consumers); thus, the customer cannot be expected to initiate substitution in the first instance.”¹⁶² As Justice Breyer described this evidence, it showed that “[c]onsumers throughout the economy paid higher retail prices as a result[.]”¹⁶³ The district court also observed that Amex “sharply dispute[d]” these fact findings but resolved them in favor of the government.¹⁶⁴ The Supreme Court did not upset that conclusion.

F. Inattentiveness to Economic Analysis

Another point missing from the majority opinion was analysis of how the antisteering rule affected market participants. The Court apparently reasoned that because transactions on the two sides of the platform balanced out, this meant that “costs” on one side of a platform are offset by “benefits” on the other side.¹⁶⁵ This assumption, which is

¹⁶² *Am. Express Co.*, 88 F. Supp. 3d at 177. The district court concluded that “[i]n the longer term, the court expects that merchants will pass along some amount of the savings associated with declining swipe fees to their customers in the form of lower retail prices.” *Id.* at 221.

¹⁶³ *See Am. Express Co.*, 138 S. Ct. at 2294 (Breyer, J., dissenting).

¹⁶⁴ *See Am. Express Co.*, 88 F. Supp. 3d at 222.

¹⁶⁵ *See Am. Express Co.*, 138 S. Ct. at 2288. The Second Circuit made the same assumption. *See United States v. Am. Express Co.*, 838 F.3d 179, 203 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). Like the Supreme Court, it did not look at individual transactions but rather made general observations about increased aggregate value to one or the other side of the platform.

frequently made in bird's-eye views of networks, drove much of the Court's analysis. Thus in the Court's mind it became essential to compare burdens and benefits on the two sides in making out a prima facie case.¹⁶⁶

Some cases involving two-sided platforms do involve offsetting costs and benefits on the two sides. This is particularly likely to be true when the only issue is source and amount of revenue. A good example is *Wallace v. IBM*.¹⁶⁷ IBM used an open source program as the operating system for one of its computer lines.¹⁶⁸ As part of the open source licensing obligations, the program had to be given away for free.¹⁶⁹ This is a common practice. For example, a large variety of smart phones are sold with the Google Android operating system included at a price of zero. IBM, of course, is not in the business of giving away software, but of selling computers, to which the software was distributed as a complement. Daniel Wallace had developed a competing, proprietary operating system that he wanted to sell to users of these computers,¹⁷⁰ but competing with a price of zero is difficult. Wallace accused IBM of predatory pricing.¹⁷¹ Judge Easterbrook dismissed the complaint, holding mainly that the facts did not fall within predatory pricing rules requiring a likelihood of recoupment.¹⁷² In any event, one cannot evaluate a claim such as predatory pricing without looking at all sources of revenue. The price of the computer-plus-operating system was never

¹⁶⁶ See, e.g., *Am. Express Co.*, 138 S. Ct. at 2288 (“Amex’s higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants. On the other side of the market, Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants. That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends.”) (citations omitted).

¹⁶⁷ *Wallace v. IBM Corp.*, 467 F.3d 1104 (7th Cir. 2006).

¹⁶⁸ *Id.* at 1107.

¹⁶⁹ *Id.* at 1105.

¹⁷⁰ *Id.* at 1106.

¹⁷¹ See *id.*

¹⁷² See *id.* at 1106, 1108.

alleged to be below cost, so the court rejected the predatory pricing claim.

Another good example arose in *Meyer v. Kalanick*, which alleged that Uber was engaged in price fixing by setting a common price among its drivers.¹⁷³ Price fixing is anticompetitive because it is an output reducing practice that results in higher consumer prices. But in order to determine output effects on a two-sided platform, one must see how the effects on one side play out on the other side, just as in *Wallace*. For that purpose, it is not necessary to do anything as irrational as define a single market for riders and drivers. Nevertheless, one must examine the economic rationales for Uber's price in order to determine its effects on market output. As the operator of a platform, Uber needs to seek out the equilibrium spot that will bring in the optimal number of drivers and riders. Setting fares too high discourages riders, while setting them too low discourages drivers.¹⁷⁴

This process does not necessarily mean that Uber's conduct is lawful, although it does indicate that it should not be addressed under the per se rule for ordinary price fixing. Indeed, the very fact that this price fixing occurs in the context of an elaborate joint venture should be a sufficient trigger for the rule of reason.¹⁷⁵ Under this analysis, Uber's conduct may still be unlawful. For example, perhaps Uber is controlled by a local cartel of drivers that has market power in some area. They set prices that are too high to maximize overall profits, but instead try to maximize the profits of the colluding drivers.¹⁷⁶ The complaint challenges Uber's "peak load"

¹⁷³ See *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 819–20 (S.D.N.Y. 2016) (discussing antitrust issues in the context of a class action).

¹⁷⁴ See *supra* notes 20–21 and accompanying text.

¹⁷⁵ Cf. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–03 (1984) (stating that the rule of reason must be applied if a restraint is essential to making the product available at all); *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 22–25 (1979) (rejecting claim of per se unlawful price fixing and applying the rule of reason to conduct on a two-sided platform that the Supreme Court described as price fixing).

¹⁷⁶ See First Amended Complaint at ¶ 4, *Meyer*, 174 F. Supp. 3d 817 (No. 1:15-CV-9796), 2016 WL 950376 (alleging that Uber's CEO conspired with drivers to increase prices at expense of riders); *but see id.* ¶ 47 (noting

pricing model that increases prices during busy periods, when demand is large in relation to driver supply.¹⁷⁷ But that is precisely how one would expect an efficient two-sided platform to work in order to maintain an equilibrium between the two sides of the market. When rider side demand increases, a fare increase is necessary to balance that demand with the supply of drivers. Proof of antitrust harm would require additional evidence, such as proof of driver control and of an entry restriction that prevents additional drivers in such an area. In sum, anticompetitive harm is an unlikely scenario, but one that cannot be dismissed out of hand.

Whether or not a firm operates a platform, evaluating its revenue requires examination of all relevant sources. For a non-platform illustration, Coca-Cola provides free coke machines to employers who agree to stock the machines exclusively with Coca-Cola products.¹⁷⁸ But that does not necessarily mean that Coca-Cola is engaging in predatory pricing of dispensing machines. In order to determine the profitability of this enterprise one must look at the revenues obtained from both the dispensing machine and the products. Notably, one does *not* need to define a single relevant market for Coca-Cola and dispensing machines in order to answer that question.

In *Amex*, however, the charge was not predatory pricing or price fixing, but rather an exclusionary practice more akin to exclusive dealing or a most-favored-nation (MFN) clause.¹⁷⁹

that “[f]ares are calculated based on an Uber-generated algorithm” which increases fares as demand increases in relation to supply (surge pricing)). Similar peak load pricing is common in intermediate sales of electric power, which also occurs on a two-sided platform between generators and users. See, e.g., RAFAL WERON, MODELING AND FORECASTING ELECTRICITY LOADS AND PRICES: A STATISTICAL APPROACH 4–5 (2006).

¹⁷⁷ See First Amended Complaint, *supra* note 176, at ¶¶ 2, 4, 47.

¹⁷⁸ *Coke Vending Machine*, VENDINGSOLUTIONS, <http://www.vendingsolutions.com/coke-vending-machines> [<https://perma.cc/MVR6-4EJP>]; see also Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 ARIZ. L. REV. 925, 942, 943 n.78 (2010).

¹⁷⁹ On antisteering rules as most-favored-nation clauses, see Carlton, *supra* note 15; see also Carlton & Winter, *supra* note 17, at 215–16.

Not only did the Court pay scant attention to the record, but it also never analyzed the transaction to determine how the harms and benefits balance out on the two sides. As Ronald Coase taught, when one wants to understand a practice, there is no good substitute for examining the incentives to make each individual transaction, small as they might be, and considering how they affect the whole.¹⁸⁰ However, neither the Second Circuit nor the Supreme Court did this.

G. Marginal Harms and Benefits

Competition always exists at the margin. It requires firms to make incremental changes to their business methods, continuously tracking and adjusting to reflect their successes or failures. These changes may or may not be anticompetitive, quite apart from the overall structure of the firm or organization that implements them. To the extent that a chosen rule or decision might harm competition, the rule of reason is designed to manage this process. For example, in *Amex* the government was not trying to tear down Amex's entire business model, but only to enjoin its antisteering rule. Such a case requires an assessment of the *marginal* costs and benefits of the antisteering rule itself. One pervasive error in the Supreme Court majority's analysis was that it failed to distinguish the challenged rule's marginal effects from the overall impact of the defendant's business model. It simply assumed that harms on one side were offset by benefits on the other, or else it spoke of evidence about the defendant's overall business model. The record was clear, however, that *at the margin* each merchant affected by the steering rule was worse off, and each cardholder was worse off as well. Competitive harm was clear.

One cannot evaluate the competitive effects of a particular restraint by considering whether the overall costs of a defendant's business practices exceed the benefits. For example, in *NCAA v. Board of Regents of University of Oklahoma*, the challenge was not to the existence or

¹⁸⁰ See R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 397–98 (1937).

legitimacy of the NCAA as an association; rather it was to the effect of a limitation on the televising of games.¹⁸¹ The issue was whether the incremental harm to competition caused by the challenged restriction on the number of televised games was justified by offsetting incremental benefits.¹⁸² By the same token, the question in *Amex* was not whether Amex's general business model of charging higher merchant fees for large perks produced overall benefits. Rather it was whether the incremental harm caused by the antisteering rule produced incremental competitive harms greater than incremental benefits. That would require an assessment of the competitive effects of that particular rule.

The Second Circuit also confused total and marginal effects by stating that “because the NDPs¹⁸³ affect competition for cardholders as well as merchants, the Plaintiffs initial burden was to show that the NDPs made *all* Amex consumers on both sides of the platform—i.e., both merchants and cardholders—worse off overall.”¹⁸⁴

But that was not the question. As with any restraint, many customers were not affected at all. For example, the restraint on game televising in *NCAA* did not affect those who did not watch televised games at all.¹⁸⁵ Similarly, rules imposing resale price maintenance affect only discounters who would otherwise charge a lower price.¹⁸⁶ Standard setting and other boycott rules affect only producers at risk of violating a

¹⁸¹ *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984); see also 7 AREEDA & HOVENKAMP, *supra* note 10, at ¶¶ 1502–03, 1511.

¹⁸² See *id.* at 94.

¹⁸³ The Second Circuit used the term “nondiscrimination provisions,” or NDPs to describe Amex’s policies “barring merchants from (1) offering customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) expressing preferences for any card, or (3) disclosing information about the costs of different cards to merchants who accept them. *United States v. Am. Express Co.*, 838 F.3d 179, 184 (2d Cir. 2016), *aff’d sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹⁸⁴ *Id.* at 205.

¹⁸⁵ See *NCAA*, 468 U.S. 85.

¹⁸⁶ See 8 AREEDA & HOVENKAMP, *supra* note 139, at ¶¶ 1624d, 1625, 1627.

standard.¹⁸⁷ One might continue with such illustrations. But it should be clear that when the government was seeking only an injunction against the rule rather than complete destruction of the defendant's business method, then it is the effect of that particular rule that must be examined. Here, those customers affected by the antisteering rule were those that *would have switched* to a less costly card but for the rule. By implication, the value they placed on the defendant's perks was less than the incremental price to merchants of using the Amex card.

Consider the following example, which can readily be generalized.¹⁸⁸ On a typical transaction, the Amex merchant acceptance fee may be fifty percent greater than the fee charged by competing cards. Suppose that on a particular purchase Amex's merchant fee was \$30, but \$20 for Visa. This \$10 difference creates bargaining room—a "surplus," in Coasean terms¹⁸⁹—for the merchant and the cardholder to strike a mutually beneficial deal. Suppose that the merchant offers the customer a \$6 discount for using a Visa card instead, which would make the customer \$6 better off for that particular transaction and the merchant \$4 better off. The customer would agree if the value it placed on Amex's perks was less than the \$6 price discount.

The antisteering provision prevents this transaction from occurring, however. As a result, the customer stays with the Amex card and experiences a \$6 loss. The merchant loses \$4 as well. So, far from being a situation where value goes up on one side and down on the other, it actually goes down on both sides. At the margin, both the cardholder side and the merchant side of the platform are losers. In addition, the competing platform, Visa, is also worse off because it was denied the opportunity to offer a lower cost substitute transaction. The only entity that is better off is Amex—the owner of the platform itself, but *not* the dealing parties on one

¹⁸⁷ See 13 HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 2231 (3d ed. 2012).

¹⁸⁸ The analysis here relies on Hovenkamp, *supra* note 15, at 27.

¹⁸⁹ See, e.g., Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 4 (1982) (discussing R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

or the other side of the platform. It is better off because the Amex cardholder who would have switched did not place much value on the Amex perks, suggesting that margins on those sales would have been particularly high. The Amex cardholders most likely to switch are those that would benefit most from using a different card.

As the district court observed, other Amex cardholders would decline the merchant's offer to switch, because for them the value of the perks might be as high as the merchant's acceptance fee, or at least as high as that portion of the fee that the merchant offered them for switching.¹⁹⁰ Cardholders whose behavior was actually changed by the antisteering rule were worse off as a result of the rule, thus creating lost value on both sides of the platform.¹⁹¹ That is why, even if the market were irrationally defined as including both sides, the way the majority defined it,¹⁹² competitive harm was apparent: at the margin, cardholders, merchants, and rival platforms were all injured by an output-reducing restraint.

Whom does the antisteering rule benefit in this case? Not the traders on either side of the platform, but only Amex itself, who is able to retain that transaction at margins in excess of

¹⁹⁰ *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 220 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (“[E]ven if a merchant is inclined to steer away from American Express, the cardholder would still have the freedom to use an Amex card if the cardholder decides the rewards offered by American Express are of greater value than the discount, in-kind perk, or other benefit offered by the merchant.”).

¹⁹¹ The Second Circuit stated the requirement as whether the antisteering rule “made *all* Amex consumers on both sides of the platform—i.e., both merchants and cardholders—worse off over all.” *United States v. Am. Express Co.*, 838 F.3d 179, 205 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). The phrase “over all” is ambiguous, but it may imply the proper question, and the one that the government actually answered, which is that it made every *affected* merchant and cardholder worse off. For example, in an exclusive dealing case courts do not ask if every customer would have switched but for exclusive dealing, thus giving the defendant a market share of zero. Instead, the question is whether enough would have switched to create an inference of competitive harm.

¹⁹² *See supra* notes 64–65 and accompanying text.

the value that these cardholders placed on use of the card. Amex benefits because its volume increases by that one transaction, but Visa loses that same transaction.¹⁹³ One might be tempted to describe that shift as a wash, but in fact it is not. The shift to Visa, the preferred platform for both the cardholder and the merchant, would produce both higher cardholder and merchant value as well as higher output in the product market. To be sure, the loss of these transactions would cost Amex revenue and there would be feedback effects that would generate a new, and likely less profitable equilibrium for Amex, but that is what competition is all about.

This is the point at which a possible defense would come in. One factor worth examining is whether preserving the transaction to Amex was necessary to the viability of its business model. And if so, does that provide a benefit to competition in excess of costs? For example, Amex might argue that it needs a certain minimum transaction volume coupled with higher prices in order to be profitable. First of all, this query does not depend on whether there is one market or two.¹⁹⁴ Indeed, it does not even depend on the existence of a platform, but only on the existence of scale economies or other attributes relating profitability to scale. These are core issues in industrial organization. Second, the need to maintain viability while charging higher prices hardly sounds like a meritorious antitrust defense.

Steering would permit the bargaining parties—i.e., merchants and customers—to negotiate to the joint maximizing position. Consumers who place a small value on Amex’s perks could use a different form of payment and would be better off. For their part, merchants could bargain by discounting the price, or offering collateral services such as free delivery, to reflect the merchant costs of a particular payment form. The important thing is that in the absence of transaction costs and under good information, everything

¹⁹³ See Hovenkamp, *supra* note 15, at 30–31.

¹⁹⁴ See *id.* at 25–27.

would get discounted into the purchase price.¹⁹⁵ This becomes an important efficiency principle: payment systems should be “neutral” and transparent, permitting the parties to negotiate to a mutually beneficial maximum.¹⁹⁶ The Amex antisteering rule was a bargaining impediment that prevented the payment platform’s own participants from reaching a joint-maximizing deal. Moreover, in the process of injuring its own participants, it also excluded rival card platforms who were ready, willing, and able to offer better terms. Consequently, it resulted in higher product prices across the board.

Looking at the situation as a whole, it seems clear that the district court and Justice Breyer got the issue right through a careful examination of the record. Stated in rule of reason terms, the question was whether the plaintiff had presented enough evidence of competitive harm to require the defendant to offer a defense. The harms were clear: cardholders were denied an opportunity to obtain a lower price, the merchants were denied the opportunity for a less costly transaction, and rival cards that were less costly lost sales. From a consumer welfare perspective, the directly affected consumers were worse off, as well as other consumers who were forced to pay higher product prices regardless of the form of payment they

¹⁹⁵ See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–16 (1960).

¹⁹⁶ See Rochet & Tirole, *supra* note 15, at 648 (“*Neutrality in payment systems*. The choice of an interchange fee paid by the merchant’s bank, the acquirer, to the cardholder’s bank, the issuer, is irrelevant if the following conditions are jointly satisfied: First, issuers and acquirers pass through the corresponding charge (or benefit) to the cardholder and the merchant. Second, the merchant can charge two different prices for goods or services depending on whether the consumer pays by cash or by card; in other words, the payment system does not impose a no-surcharge rule as a condition for the merchant to be affiliated with the system. Third, the merchant and the consumer incur no transaction cost associated with a dual-price system.”). As Rochet and Tirole observe, the Coase Theorem indicates that in a well-functioning market, merchants and customers would move to a wealth maximizing equilibrium. *Id.* at 649. But the minimum conditions are that the parties are free to bargain (i.e., no prohibition on steering) and that they have adequate information about the gains that would be available from trading. *See id.*

chose.¹⁹⁷ While Amex itself was benefitted by preserving the transaction to its own system, this was at best a wealth transfer from whatever platform lost the transaction.¹⁹⁸ In fact, the antisteering rule was not a neutral wealth transfer at all, but rather a transfer from a competing platform that generated higher value to one that generated lower value. As Justice Breyer noted in dissent, looking at the *prima facie* case, “there is little more that need be said.”¹⁹⁹

H. Implications for Market Definition

Amex raises important issues concerning market definition in antitrust cases. As discussed above, grouping both sides of a platform into a single relevant market was economic nonsense and, in any event, unnecessary to the analysis that the Court undertook.²⁰⁰ Nevertheless, the law is what it is and, that leaves important questions about the scope of the decision’s holding.

The Court held that not every two-sided platform qualified for its unique approach, but noted that transactional platforms in which there is a simultaneous one-to-one correspondence between the transactions on one side of the platform and those on the other side are “different.”²⁰¹ Even this definition was too broad to be supported by some of the literature the majority cited.²⁰² Further, it was apparently

¹⁹⁷ See *supra* notes 180–92 and accompanying text.

¹⁹⁸ See Hovenkamp, *supra* note 15, at 30.

¹⁹⁹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2294 (2018) (Breyer, J., dissenting).

²⁰⁰ See *supra* notes 101–12 and accompanying text.

²⁰¹ See *Am. Express Co.*, 138 S. Ct. at 2286 (requiring “a single, simultaneous transaction between participants”).

²⁰² As Justice Breyer noted in his dissent, *see id.* at 2300, the Court’s definition was broader than the definition given even in the economic literature that the majority opinion cited. For example, Rochet & Tirole, whom the majority relies on, say this:

“Getting the two sides on board” is a useful characterization, but it is not restrictive enough. Indeed, if the analysis just stopped there, pretty much any market would be two-sided, since buyers and sellers need to be brought together for

driven by the Court's mistaken view that in a transactional platform each gain on one side generates an equal-and-offsetting benefit on the other side.²⁰³

Nevertheless, under the majority's approach the two sides of the Amex platform constitute a single relevant market because a \$50 transaction on the consumer side of the Amex platform is simultaneously offset by a \$50 transaction on the merchant side, less Amex's acceptance fee.

Upon first glance, Uber would appear to be another instance of a pure transaction platform under this approach. Each ride that a passenger purchases generates a corresponding and simultaneous payment to the driver, less the fee. Interbank ATM platforms are very likely in the same category. The same may also be true of airline and hotel reservation websites, such as Orbitz and Expedia, and perhaps of venue websites such as Ticketmaster.²⁰⁴ All of these cases, however, will depend on a careful evaluation of the facts.

The Court also observed that other types of platforms exhibit a looser relationship between transactions on one side and those on the other, and these would not fall within the Court's "single market" rule. It noted sales of newspapers and

markets to exist and gains from trade to be realized. We define a two-sided market as one in which the volume of transactions between end-users depends on the structure and not only on the overall level of the fees charged by the platform. A platform's usage or variable charges impact the two sides' willingness to trade once on the platform and, thereby, their net surpluses from potential interactions; the platforms' membership or fixed charges in turn condition the end-users' presence on the platform. The platforms' fine design of the structure of variable and fixed charges is relevant only if the two sides do not negotiate away the corresponding usage and membership externalities.

Rochet & Tirole, *supra* note 15, at 646.

²⁰³ See *supra* notes 188–93 and accompanying text.

²⁰⁴ See, e.g., Brief of US Airways at 2, *US Airways, Inc. v. Sabre Holdings Corp.*, No. 17-960(L) & 17-983(XAP), 2018 WL 3456163, (2d Cir. July 16, 2018) (considering whether airline Global Distribution System (GDS) for travel agents, which facilitates ticket transactions, is a qualifying single market under *Amex*).

advertising, where the relationship is more attenuated.²⁰⁵ That would also be the case for most magazines. It is also true of computer search engines, advertiser-supported music streaming, and other advertiser-supported services. For these, there is no balanced one-to-one transaction between the two sides. Other pay websites that do not exhibit one-to-one relationships include services such as Netflix, Amazon Prime Video, and Hulu. For these, subscribers typically pay a regular monthly fee after which the incremental cost of content is free. Therefore, there is neither simultaneity nor a very close correspondence between the size of the fee and the volume of content that the viewer can access.²⁰⁶ For example, a Netflix subscriber pays \$8.99 a month for a basic subscription whether she watches one movie during that time period or a dozen.²⁰⁷ Amazon Prime Video is a little more complex because it concurrently offers “Prime” movies at an incremental price of zero and also pay movies, for which Amazon collects an individual fee, say \$3.99, from customers.²⁰⁸

There is an additional problem with movie and music streaming, however, which is that the platform operator itself is often the seller or licensor. Both Netflix and Amazon, as well as the music streamers, typically obtain nonexclusive licenses to the content that they stream, often in fixed-cost license agreements.²⁰⁹ As a result, they are not acting as a

²⁰⁵ See *Am. Express Co.*, 138 S. Ct. at 2286.

²⁰⁶ For example, all Netflix plans offer unlimited viewing of Netflix content for a single monthly fee. See *Choose Your Plan*, NETFLIX, <https://www.netflix.com/signup/planform> (on file with the *Columbia Business Law Review*).

²⁰⁷ See *Choose a Plan That’s Right for You*, NETFLIX, <https://www.netflix.com/signup/planform> (on file with the *Columbia Business Law Review*).

²⁰⁸ See Andy Beatman, *What Is Prime Video? – Amazon Prime Insider*, AMAZON, <https://www.amazon.com/primeinsider/video/prime-video-qa.html> [<https://perma.cc/Y5B9-LYDF>] (describing both “Prime” content and rental content).

²⁰⁹ See Erik Hovenkamp & Neel U. Sukhatme, *Vertical Mergers and the MFN Thicket in Television*, CPI ANTITRUST CHRON., Aug. 2018, at 4, <https://www.competitionpolicyinternational.com/wp-content/uploads>

platform intermediary between the movie's owner and the customer. Having acquired a nonexclusive license at a fixed fee that permits relicensing, Netflix or Amazon are themselves the sellers, so there are not two sides of the market to define but only a seller on one side and a buyer on the other side, as with any market. This is a critical distinction. The premise in a case such as *Amex* is that the merchant is selling its own product and the customer is buying it. *Amex* is only the platform intermediary facilitating the transaction. The merchant does not sell the product to *Amex*, who then in turn sells it to the customer. The same is true of Uber: Drivers do not sell rides to Uber, which in turn sells them to passengers. The *Amex* majority's approach does not apply when the merchandise is actually sold or licensed to the operator of the platform.

By the same token, to the extent that Amazon, Walmart, Target, or numerous other retailers purchase goods from manufacturers and then sell them on their websites, the platform operator is not merely a transaction facilitator. Therefore, the established economics of market definition should apply in those cases. If websites such as Orbitz and Expedia purchase blocks of rooms for resale, or if Ticketmaster purchases a block of tickets for a particular performance, those transactions do not qualify for *Amex*'s market definition approach either. Likewise, in a blanket license case such as *BMI*, the artist provides BMI with a non-exclusive license and subsequently BMI sells a blanket license to a radio station.²¹⁰ There is neither simultaneity nor a one-to-one transactional correspondence.

The status of app stores on smartphones may become relevant in consideration of *Apple, Inc. v. Pepper*, which the

/2018/08/CPI-Hovenkamp-Sukhatme.pdf [https://perma.cc/4SBK-RTH7]. Under fixed-cost license agreements the licensee, such as Netflix, pays a one-time fee for a nonexclusive license to a film for a given time period, but does not pay a per use fee. *See id.*

²¹⁰ *See* *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 4 (1979); *see also supra* notes 22–24 and accompanying text.

Supreme Court will soon address.²¹¹ The issue is whether customers who purchase apps for their iPhones or other Apple devices through Apple's App Store, are direct purchasers from Apple. Assuming that the app producers are the violators, the underlying legal question is whether the app platform is a mere broker between the app producer and the consumer, or a purchaser-reseller. If the latter, the indirect purchaser rule barring damages actions to indirect purchasers applies.²¹² A question pertinent to *Amex* that is not necessarily governed by *Illinois Brick* is whether the transactions were "simultaneous," as *Amex* requires. For instance, the app producer may have licensed and delivered its app to Apple in advance, which held them in its own cloud or storage devices, delivering them to a customer upon order. Under that scenario, the developer sold (licensed) the app to Apple, which held it until a later time when a customer bought (licensed) a copy.²¹³ One important principle is that *Amex* does not provide a basis for turning ordinary vertical distribution into a single market at both the upstream and downstream levels. Many of the economic effects commonly attributed to platforms are similar to those that result from ordinary vertical distribution.²¹⁴

There are also intermediate platforms where the relation between transactions on one side of the platform and those on the other side is not one-to-one and, in most cases, not simultaneous either. A prominent example is health

²¹¹ See *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017), cert. granted sub. nom. *Apple, Inc. v. Pepper*, 138 S. Ct. 2647 (2018); see also *Salveson v. JP Morgan Chase & Co.*, 663 F. App'x 71 (2d Cir. 2016); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 05-MD-1720, 2018 WL 4158290, at *3 (E.D.N.Y. Aug. 30, 2018) (noting possible relevance of *Amex* to decision considering whether credit cardholders were indirect purchasers from issuing banks).

²¹² See *Ill. Brick v. Illinois*, 431 U.S. 720, 730–31 (1977); see also 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP, ROGER D. BLAIR & CHRISTINE PIETTE DURRANCE, *ANTITRUST LAW* ¶ 346 (4th ed. 2014).

²¹³ Apple's position on the issue is articulated in a brief to the Supreme Court. See Brief of Petitioner at 2–3, *In re Apple iPhone Antitrust Litig.*, 138 S. Ct. 2647 (No. 17-204).

²¹⁴ On this point, see Carlton & Winter, *supra* note 17, at 215.

insurance networks. On one side is the insured patient, who receives a covered medical procedure. On the other side is a health care provider. In the middle is the platform, which is an insurer who collects premiums from the insured or her employer and pays the provider's claim.²¹⁵ Here, however, the sales to insured are neither simultaneous nor are they made on a matching fee-for-service basis.

Actually, the arrangement that the Supreme Court condemned under the per se rule in its *Arizona v. Maricopa County Medical Society*²¹⁶ decision looks a little more like a two-sided platform as the *Amex* opinion defined it. In that case, physician participants agreed to be compensated at stipulated fees per service, which were paid by the insured or, more likely, an employer.²¹⁷ Even this arrangement would not meet the *Amex* definition unless payment and receipt were simultaneous. In any event, since *Maricopa* condemned such arrangements, insurers have taken a more actuarial approach that requires providers to share a certain amount of risk.²¹⁸ The *Maricopa* decision itself contemplated that result, suggesting that firms that “pool their capital and share the risks of loss as well as the opportunities for profit” be treated more like an integrated single entity.²¹⁹

In the modern health insurance network, characterized by risk sharing and actuarial pricing, it clearly is not the case that the platform “facilitate[s] a single, simultaneous

²¹⁵ One decision that discussed the then-pending *Amex* decision involved a horizontal territorial division and price-fixing agreement among Blue Cross affiliates is *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1276 n.20 (N.D. Ala. 2018); see also *Lifewatch Servs. Inc. v. Highmark Inc.*, 902 F.3d 323, 337 (3d Cir. 2018), which mentioned the possible relevance of *Amex* to a market definition question in a health insurance market, but did not decide the case on that basis.

²¹⁶ See *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332 (1982).

²¹⁷ *Id.* at 339–40.

²¹⁸ See Scott D. Danzis, *Revising the Revised Guidelines: Incentives, Clinically Integrated Physician Networks, and the Antitrust Laws*, 87 VA. L. REV. 531, 531–44 (2001); Thomas L. Greaney, *Managed Competition, Integrated Delivery Systems and Antitrust*, 79 CORNELL L. REV. 1507, 1530 (1994).

²¹⁹ *Maricopa*, 457 U.S. at 356.

transaction between participants[.]” as the Supreme Court required.²²⁰ The insurer might receive a premium of, say, \$500 per month from the insured and pay the insured’s medical expenses for that month, less any deductibles, copays, and the like. The insurer’s payment could be greater or smaller than \$500 depending on the insured’s needs. To be sure, there is often a co-payment, such as a flat fee per office visit. However, this co-payment is often not made to the insurer at all, but rather directly to the health care provider. In that case the network is not acting as an intermediary. Once again, there is no substitute for careful examination of a record.

Suppose that an insurer network enters an exclusive agreement with a provider, effectively denying that provider the ability to service other networks or health payment systems. Ordinary exclusive dealing principles might require foreclosure on the order of, say, thirty percent for a prima facie case.²²¹ This might require that both a provider market and a consumer market be defined, but it would not require anything as economically incoherent as putting them into the same market.²²² In response, the defense might be raised that the network provider needs exclusive dealing with, say, anesthesiologists in order to make its network economically viable, but that is a question that can largely be answered independently of network considerations.

Other platforms not included in Amex’s “single market” definition include intermediaries that bring buyers and sellers together but have little to do with the resulting transaction. For example, real estate websites such as realtor.com and Zillow.com identify real properties that are for sale or rent. Having settled on a property, a prospective purchaser then contacts the broker by email or telephone and, after subsequent negotiations, there may be a sale. But none of this comes close to the kind of simultaneous one-to-one

²²⁰ Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018).

²²¹ See 11 HOVENKAMP, *supra* note 117 ¶ 1821c (discussing foreclosure percentages and suggesting a minimum in the range of thirty percent).

²²² See *supra* notes 122–26 and accompanying text.

transaction that was present in *Amex*. The same thing is largely true of dating websites such as Match.com or OkCupid.com. Typically, members on both sides pay a monthly or annual fee, although some sites also offer free versions. As in the case of real estate sites, however, the website does little more than introduce two people to each other. What, if anything, happens later occurs largely off the site. At first glance, Craigslist appears to resemble these sites more than, say, eBay, which actually completes transactions on the site. On Craigslist, offerors of merchandise or services essentially post an advertisement with contact information, but prospective purchasers typically make their contact and any subsequent transaction off the site.

The same thing appears to be true of the NCAA, which may be a multi-sided platform that, according to one expert, brings together students, student athletes, alumni, coaches and athletic staff.²²³ Factually, this may be true, but that will not satisfy the definition of a single two-sided relevant market for antitrust purposes unless someone can show the requisite simultaneous one-to-one transaction between both sides.

There are certainly other examples, but the important point is that only a relatively small subset of two-sided platforms fall within the Court's requirements for treating the two sides as a single market. On this question, maintaining a coherent economic approach to antitrust policy requires that *Amex* be limited to its facts. In any event, the Supreme Court was clear that the two sides should not be treated as a single market unless they were characterized by "transactions" that were both "simultaneous" and one-to-one.²²⁴

IV. CONCLUSION

One danger of the *Amex* decision is its signal that neither close economic analysis nor careful examination of the record is necessary to apply antitrust law under the rule of reason. That, of course, flies in the face of a century-long history of

²²³ See *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 CW, 2018 WL 4241981, at *4 n.3 (N.D. Cal. Sep. 3, 2018).

²²⁴ *Am. Express Co.*, 138 S. Ct. at 2286.

rule of reason analysis in the federal courts, which has always emphasized careful examination of a well-developed record on issues pertaining to both power and conduct.²²⁵ Judge William Howard Taft himself distinguished ancillary from naked restraints only by careful examination of the facts.²²⁶

The *Amex* majority never concluded that the district court's fact findings were an abuse of discretion or otherwise improper. Rather, it simply ignored them. Nor did it declare as a matter of law that close examination of a factual record is unimportant in antitrust cases under the rule of reason. As a result, the lower federal courts should not feel precluded from engaging in the kind of close transactional analysis that the rule of reason traditionally requires if decisions are to be economically coherent.

The economic literature on two-sided platforms has made major contributions to price and industrial organization theory in a wide variety of markets. It deserves an important position in both industrial economics and competition policy. At the same time, however, its influence should not be exaggerated. It is, essentially, a tool of neoclassical economics, not a discovery that realistically threatens to alter the foundations of economics.

The two-sided-platform literature is strongly reminiscent of another development in the theory of industrial organization thirty years ago. That theory, termed "contestable markets," grew out of the imminently reasonable observation that where a market contains only one seller, competition "for the market" can yield competitive outcomes just as much as competition by multiple incumbents "in the market."²²⁷ The theory of contestable markets was introduced

²²⁵ See Hovenkamp, *supra* note 99, at 101–02.

²²⁶ See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280–83 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

²²⁷ On the initial debate, see generally Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968) and Oliver E. Williamson, *Franchise Bidding for Natural Monopolies—In General and With Respect to CATV*, 7 BELL J. ECON. 73 (1976). For a reprise, see Herbert Hovenkamp, *Regulation and the Marginalist Revolution*, FLA. L. REV. (forthcoming 2019),

by prominent economists with great fanfare, producing a spate of articles and at least one important book.²²⁸ The late William J. Baumol, a past president of the American Economic Association, proclaimed it to be an “uprising” in the theory of industry structure.²²⁹ It promised to eliminate the need for such things as public utility or airline regulation because even a natural monopolist incumbent knew that the instant it attempted to charge too high a price a potential rival would swoop in and steal the business.

But the theory never lived up to anything remotely resembling its expectations, although it did provide some valuable lessons. Even in the airline industry, thought to be a prime target for contestability, competition among incumbent carriers remains an important determinant of price and output. The theory of platform markets will pursue much the same course. After a brief period of exaggeration, industrial organization theory will be enriched, but will remain fundamentally the same. The *Amex* majority opinion serves to highlight what happens when a Court abandons fundamental economics in its haste to encounter something new.

The decision that seems to come closest to *Amex* as an economic “misfire” is the Supreme Court’s 1992 ruling in *Eastman Kodak Co. v. Image Technical Services*, in which the Court held that sufficient power to condemn a tie of parts and service by a nondominant firm could be inferred from consumer “lock in.”²³⁰ *Kodak* was a six to three decision, but the reaction to *Kodak* was so strongly critical that subsequent lower court decisions went to great lengths to limit it.²³¹ It has

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3181852
[<https://perma.cc/6ZWD-MAKB>].

²²⁸ See WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* (1988).

²²⁹ William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 *AM. ECON. REV.* 1, 1 (1982).

²³⁰ See *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 496 (1992).

²³¹ On the case law limiting *Kodak*, see 10 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1740 (4th ed. 2018) (discussing tying arrangements and the *Kodak* decision).

had little impact on antitrust outcomes even though lock-in is more prevalent today in our modern networked world than it was in 1992.

Other consequences could be on the horizon. This decision will encourage more legislation and regulation as more decision makers lose confidence in judge-made antitrust rules to promote competition. As Justice Breyer noted in his dissent, several jurisdictions around the world have acted against high interchange fees and antisteering rules, mostly by statute or agency rule.²³² The United States legal system has historically relied less on regulation and more on antitrust law, which can be much less intrusive. But what this decision describes as “steering” is actually among the most ordinary and essential of competitive functions: encouraging people to acquire information and giving them the option to choose. This process protects the competitive process, both improving product quality and driving prices to the competitive level. For example, a common concern about healthcare costs is that they are so high because patients are indifferent to prices. First, medical bills are paid indirectly by insurers. Second, most patients do not even pay the insurance premium; rather, it is paid by either an employer or a government agency. As a result, the patient bears only a small portion of the cost and is inclined to spend too much. The antisteering rule operates in much the same way: it makes the cardholder indifferent to merchant costs and thus diminishes the consumer incentive to reduce them.

Today, the consumer welfare principle in antitrust is under attack from people who argue for abandonment of economic approaches to antitrust in favor of populism, political theory, or some other source.²³³ Decisions like *Amex* add fuel to their

²³² See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018) (Breyer, J., dissenting) (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-558, CREDIT AND DEBIT CARDS: FEDERAL ENTITIES ARE TAKING ACTIONS TO LIMIT THEIR INTERCHANGE FEES, BUT ADDITIONAL REVENUE COLLECTION COST SAVINGS MAY EXIST 31–35 (2008)).

²³³ See generally Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & BUS. 1 (2017); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018); see also Hovenkamp, *supra* note 161, at 1–4.

cause. The success of antitrust as an enterprise driven by economic policy depends on the ability and willingness of judges to use economics effectively, bringing monopoly prices and output restrictions under control while protecting provable efficiencies. The rule of reason cannot be simply an excuse for judges to ignore well developed records and sound economic theory in order to reach a conclusion that they find pleasing on noneconomic grounds.