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What's in Your Wallet (and What Should the Law Do About it?)

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In traditional markets, firms can charge prices that are significantly elevated relative to their costs only if there is a market failure. However, this is not true in a two-sided market (like Amazon, Uber, and Mastercard), in which firms often subsidize one side of the market and generate revenue from the other. This means consideration of one side of the market in isolation is problematic. The Court embraced this view in Ohio v American Express*, requiring that anticompetitive harm on one side of a two-sided market be weighed against benefits on the other side.*

Legal scholars denounce this decision, which, practically, will make it much more difficult to wield antitrust as a tool to rein in two-sided markets. This inability is concerning as two-sided markets are growing in importance. Furthermore, the pricing structures used by platforms can be regressive, with those least well-off subsidizing their affluent and financially sophisticated counterparts.

In this Essay, I argue that consumer protection, rather than antitrust, is best suited to tame two-sided markets. Consumer protection authority allows for intervention on the grounds that platform users create unavoidable externalities for all consumers. The Consumer Financial Protection Bureau (CFPB) has broad power to curtail "unfair, abusive, and deceptive practices." This authority can be used to restrict practices that decrease consumer welfare, like the antisteering rules at issue in Ohio v American Express.

INTRODUCTION

> "It's a two-sided market. I mean, I—I—I've never seen such jargon." Justice Stephen Breyer, Oral Argument in *Ohio v American Express*.[1]

Ohio v American Express[2] is regarded as one of the most significant antitrust decisions in recent history. American Express's (AmEx's) business model is based on charging merchants higher fees for transaction processing than its competitors.[3] It generates

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1 Transcript of Oral Argument, *Ohio v American Express Co*, No 16-1454, *22 (US filed Feb 26, 2018) (*AmEx* Transcript).

2 138 S Ct 2274 (2018) (*AmEx*).

3 Id at 2282.

significant revenue from these high fees by incentivizing card usage through attractive rewards programs.[4] Merchants argue that they lack the power to bargain with AmEx for lower fees, instead receiving only a "take-it-or-leave it" offer—and "leave it" is not an option because failure to accept AmEx cards can mean significant customer attrition.[5] AmEx, understanding this dynamic, raised merchant interchange fees significantly in recent years.[6]

AmEx contractually prohibits merchants from passing along high processing costs to AmEx cardholders, or even mentioning the high processing costs associated with their cards.[7] In *Ohio v American Express*, acting on the complaints of merchants, several states and the federal government challenged this "anti-steering" ban as an illegal restraint on competition,[8] with the lower court finding in their favor because the practice impeded competitor networks like Discover from gaining market share by offering merchants better deals.[9]

AmEx successfully appealed to the Supreme Court, which found that, although this restraint may harm merchants, consumers benefited by receiving high rewards for transacting with AmEx cards.[10] These rewards had to be weighed against the merchant harm and since this balancing had not occurred, the lower court erred.[11]

The balancing the Court mandates is complex. Card networks are two-sided markets: they intermediate between merchants, whom they must convince to accept their cards, and consumers, whom they must convince to use them.[12] This means card networks must choose not only prices, but also price structures.[13] When a consumer swipes her card, a card network can generate revenue in myriad ways. On the consumer side, card networks can charge transaction fees. On the merchant side, they can generate revenue from processing, or "interchange," fees.[14]

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4 Id.

5 Id at 2281, 2281 n 2.

6 *AmEx*, 138 S Ct at 2288.

7 Id at 2292–93 (Breyer dissenting).

8 Id at 2283.

9 *United States v American Express Co*, 88 F Supp 3d 143, 220–21, 224 (EDNY 2015).

10 *AmEx*, 138 S Ct at 2287–88.

11 See *United States v American Express Co*, 838 F3d 179, 206 (2d Cir 2016); *AmEx*, 138 S Ct at 2290.

12 *AmEx*, 138 S Ct at 2280.

13 Id at 2281.

14 *American Express Co*, 838 F3d at 188.

Two-sidedness makes antitrust analysis complex (see Justice Breyer's consternation above). Traditionally, when a price can be sustained above the cost of offering a good or service, this is indicative of a market failure. However, in a two-sided market, high prices on one side of the market alone are not proof of anticompetitive harm. The relevant economic question is whether card networks' total revenue—on both sides of the market—is elevated relative to the total cost of intermediating this transaction. The economics of two-sided markets push for consideration of the market as a whole, rather than each side in isolation.

The *AmEx* decision makes a version of this argument, stating that "[e]vidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power."[15] Many antitrust experts believe this is flawed reasoning that represents a stark departure from precedent,[16] which historically defines markets for antitrust analysis narrowly by focusing on the service "directly affected by a challenged restraint."[17] These critiques have merit. But unless reversed, the *AmEx* decision will make it difficult to challenge the pricing practices of many two-sided platforms on antitrust grounds. This is also true for two-sided markets beyond payment networks: just as a card network's restraint on merchants can be offset by benefits to consumers on the other side of the market, so too can restraints on Uber drivers be offset by low-cost rides.

This Essay proposes a way forward for reining in two-sided markets. Specifically, I advocate that consumer protection authority can play the role historically performed by antitrust, at least with respect to the payment industry. The Dodd-Frank Act[18] provides the Consumer Financial Protection Bureau (CFPB) with the authority to prohibit unfair, deceptive, or abusive acts or practices (UDAAP) that cause injury that cannot be "reasonably avoid[ed]."[19] The anti-steering clauses at the heart of the *AmEx* decision are unfair to consumers and thus can be restricted using the CFPB's UDAAP authority. This is true generally for prohibitions on merchants' ability to surcharge retail customers who

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15 *AmEx*, 138 S Ct at 2287.

16 See, for example, Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 Colum Bus L Rev 35, 80–81; Erik Hovenkamp, *Platform Antitrust* *8–9 (forthcoming manuscript), archived at https://perma.cc/JQ2H-A7T7.

17 *AmEx*, 138 S Ct at 2295 (Breyer dissenting).

18 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203, 124 Stat 1376 (2010).

19 Dodd-Frank Act § 1031, 124 Stat at 2006, codified at 12 USC § 5531.

use rewards cards to transact that are expensive for merchants to process.

Antitrust critics of the *AmEx* decision focus on the harm suffered by *consumers* in credit card markets. As Professor Erik Hovenkamp explains:

> The Supreme Court overlooked the parties' capacity to balance fees against rewards through bilateral contracting. Intuitively, when a buyer and seller are permitted to bargain over alternative payment platforms, their common objective is the same as that of all contracting parties: to maximize their joint-welfare and split the surplus in a way that leaves them both better off than the status quo.[20]

This is true, and so the antisteering rules are UDAAPs from the perspective of the credit card consumer, who is losing out on the ability to bargain for a piece of this surplus. She can't reasonably avoid the harm of losing some of this surplus.[21] But what the antitrust view misses in its focus on a well-defined market is that the choice of a payment instrument has important consequences for consumers *outside* of the credit card market as well. Because of antisteering rules, merchants set uniform retail prices. To process certain rewards cards, they pay more than 3 percent of total transaction value in interchange fees.[22] This fee is significantly higher than the cost of processing debit cards (capped at $0.22 plus 0.05 percent of the transaction amount) or cash (no transaction fees).[23] In low-margin businesses—for example, average general retail profits are 2 percent[24]—merchants pass large interchange costs through to consumers. Some consumers receive a

[20] Hovenkamp, *Platform Antitrust* at *36 (cited in note 16).

[21] For an example of this surplus, see Hovenkamp, 2019 Colum Bus Rev at 77 (cited in note 16) (citation omitted):

> 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 terms—for the merchant and the cardholder to strike a mutually beneficial deal.

[22] *Credit Card Processing Fees and Costs* (ValuePenguin), archived at https://perma.cc/M2Y6-7MN3.

[23] Vladimir Mukharlyamov and Natasha Sarin, *Price Regulation in Two-Sided Markets: Empirical Evidence from Debit Cards* *3 n 2 (working paper, Mar 2019), archived at https://perma.cc/ZEW6-KH9V.

[24] Aswath Damodaran, *Margins by Sector (US)* (NYU, 2019), archived at https://perma.cc/B964-JGPG.

kickback on their retail purchases in the form of credit card rewards. However, cash users bear high retail prices to cover the costs of *other people* transacting with credit cards. Cash users are disproportionately lower-income and less financially sophisticated consumers.[25] This means that the payments system engenders regressive cross subsidization of the wealthy by the poor.

This cross subsidization is unfair to non-rewards-card users and cannot be avoided by them, especially given that many who transact with cash or low-interchange debit cards do not have access to credit. This means the CFPB has the authority to prohibit card networks' antisteering provisions and restraints on merchant surcharging more broadly. This approach is not a panacea—as I discuss, many state laws restrict heterogeneous pricing. Further, even if merchants have the right to vary consumer price depending on the payment instrument used, they may choose not to do so for fear of alienating their customers. Preliminary survey evidence suggests that surcharges are unlikely to be popular in practice.

However, removing merchant surcharging restraints is a valuable first step to address the inequities in the payments market, and consumer protection authority is well-suited to the challenge, especially given recent antitrust headwinds. While antitrust has historically helped eliminate barriers to competition in payments markets, post-*AmEx* the Court will require a complex balancing act of harms to merchants relative to benefits to consumers before finding a pricing practice anticompetitive. Practically, this decision makes it much more difficult to succeed in an antitrust challenge, as even demonstrating an anticompetitive restraint is not sufficient unless the harms outweigh benefits on the other side of the market.

In addition to practical difficulties deploying antitrust going forward, there are conceptual challenges as well. Despite our historical reliance on antitrust to rein in card networks, antitrust appears confused with respect to two-sided markets in a way that consumer protection authority does not, making the latter a more theoretically defensible means of taming two-sided platforms. In important ways, the traditional antitrust conception of the relevant market for scrutiny in platform pricing cases seems too narrow. Professor Jean Tirole, a Nobel Laureate who studies two-sided

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[25] *Consumer Financial Protection Bureau Study Finds Consumers in Lower-Income Areas Are More Likely to Become Credit Visible Due to Negative Records* (Consumer Financial Protection Bureau, June 7, 2017), archived at https://perma.cc/L9V5-EKU4.

platforms, has argued that consideration of the pricing practices on only one side of a two-sided market is indefensible and can lead to distortionary regulation.[26] And yet historically—until *AmEx*—this narrow inquiry was the antitrust paradigm. And with its focus on precise market definition, antitrust fails to consider the consequences for consumers *outside* of the narrowly defined market, who may well be (and in the case of payment cards, are) suffering harm that feels importantly relevant to our consideration of how functional this market is. Consumer protection authority allows us to defend intervention—not by misapplying "one-sided logic" to "two-sided markets," as economists caution against[27]—but instead by embracing a broader definition of the market that appreciates that platform users create unavoidable externalities for all consumers, and these externalities (when sufficiently harmful) must be addressed.

This Essay focuses on payments markets, although its insights could potentially be applied to two-sided platforms more generally. Its main push is for broadening our conception of a market to appreciate that prices and pricing structures cannot be considered in isolation—either by focusing on one side of the market alone or on consumers in a particular market alone, thereby neglecting the existence of externalities that may well have broader welfare implications.

The remainder of this Essay proceeds as follows. Part I outlines the economics of two-sided platforms, explaining why consideration of one side of a two-sided market in isolation is problematic. Part II discusses payments markets specifically and the dangers of applying "one-sided economics" to this two-sided market. Part III provides background on how antitrust had successfully reined in card network pricing practices until the Court's paradigm-shifting decision in *AmEx*. Part IV argues that consumer protection authority can succeed where antitrust has failed by restricting antisteering restraints—and card network practices more generally—that lead to inequitable cross subsidization of the wealthy by lower-income, less financially sophisticated consumers. Part V contains a caveat: although consumer protection authority can restrict card network practices, barriers remain.

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26 Jean-Charles Rochet and Jean Tirole, *An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems*, 2 Rev Network Econ 69, 76–78 (2003).

27 See generally Julian Wright, *One-Sided Logic in Two-Sided Markets* (AEI-Brookings Joint Center for Regulatory Studies Working Paper No 03-10, Sept 2003), archived at https://perma.cc/FLZ8-9BWB.

For example, several states limit merchants' ability to charge different prices to consumers who transact with more and less costly payment instruments, and novel survey evidence shows consumers may shift away from merchants who surcharge.

I. NETWORK EXTERNALITIES AND TWO-SIDED MARKETS

A. Background on Two-Sided Markets

Why can you travel to Europe on airplane miles or receive a cash back refund for dining out? Card issuers spend more than $20 billion on consumer rewards annually.[28] Offering the most attractive rewards is how networks compete for customers, who choose cards primarily based on the rewards they will receive. The existence of rewards means consumers pay a negative per-transaction fee for using their credit cards.

A two-sided market involves two distinct types of users, each of whom derives value from interacting with the other.[29] At the center of these markets lies an intermediary, or a platform.[30] This intermediary must set both price levels and price structures to get the two sides of the market on board.[31] For example, Uber must (1) set fares that are not too high, or consumers will not use their service; and (2) pay drivers wages that are not too low, or they will lose drivers.

Platforms feature network externalities. The utility consumers derive from the consumption of a good in a two-sided market increases based on the number of other agents who are in a network.[32] A card network intermediates between consumers, who use cards and get rewards, and merchants, who accept cards and pay processing fees. A payment card can offer excellent rewards, but unless it is accepted by merchants, it is worthless to consumers. Similarly, a payment card can offer very low processing fees to merchants, but unless consumers use the card regularly, low-cost processing is of no value. Similarly, eBay and Amazon are

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28 *Spending on Credit Card Rewards Has Exploded in Banks' Frenzied Competition over Customers* (Business Insider, May 5, 2017), archived at https://perma.cc/28WX-S6YD.

29 Wright, *One-Sided Logic in Two-Sided Markets* at *1 (cited in note 27).

30 Jean-Charles Rochet and Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J Eur Econ Assoc 990, 995 (2003).

31 Id at 990, 1004–06.

32 See Michael L. Katz and Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am Econ Rev 424, 426 (1985).

only valuable to consumers if merchants sell products on the platform, and video game companies must simultaneously attract developers to make games and consumers to buy them.

The presence of network externalities makes the start-up phase of two-sided markets complex because the market has no value until both sides are on board. To overcome this "chicken-and-egg" problem, platforms carefully choose prices and price structures to attract both sides.[33] Platforms often choose price structures in which one side of the market is treated as a "loss leader" and the other as a "profit center."[34] This choice depends not just on how costly each side of the market is to service, but also on how competitive each side is, how sensitive demand on each side of the market is to price changes, and the relative surplus each side generates. Taking an oft-used and unfortunately heteronormative example, imagine it is more expensive for an open bar to service women because they tend to like high-end cocktails instead of cheap beer. You may think women will pay more for the open bar; however, they may pay less or even nothing, if, for example, attracting an additional woman to the club raises more surplus from the existing male patrons than attracting an additional man does for the female patrons.[35]

The choice of price structure can vary across industry. Professors Jean-Charles Rochet and Jean Tirole write extensively about the theoretical underpinnings of these markets and provide illustrations of myriad business models.[36] Social media platforms like Facebook are free to consumers (loss leader) while revenue is generated from advertising sales (profit center). Price structures can also change over time: historically, TV networks made money from ad sales and generally treated viewers as a loss leader; today, several streaming platforms charge consumers usage fees and promise ad-free viewing.

B. Two-Sided Markets and Antitrust

The nature of two-sided markets can make the traditional logic of economics—and antitrust—hard to apply, with important policy implications. In a traditional market, a price that can be sustained at a level higher than the cost of providing a product is

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33 Rochet and Tirole, 1 J Eur Econ Assoc at 990–91 (cited in note 30).

34 Id at 990–91.

35 See Wright, *One-Sided Logic in Two-Sided Markets* at *4 (cited in note 27).

36 See, for example, Rochet and Tirole, 1 J Eur Econ Assoc at 1012–17 (cited in note 30).

indicative of a market failure. To see why, imagine that it costs $0.50 to produce a jar of tomato sauce, and that the tomato sauce stand (Tomato 1) is selling its sauce for $1.00. Another company (Tomato 2) would have every incentive to set up and sell its tomato sauce for $0.99—and in so doing, would capture the entire market. The extra rents would be competed away until tomato sauce sells for exactly its $0.50 marginal cost, although perhaps not immediately—in the short run, Tomato 1 might sustain high prices while Tomato 2 enters the market and sets up production. But in the long run, prices staying at $1.00, or rising, would indicate a market failure. For example, prices may remain above cost because Tomato 1 and Tomato 2 collude to generate excess profits. As this simple example illustrates, the existence of an above-cost price serves as a flag to antitrust authorities that this market merits scrutiny.

This logic does not carry over to two-sided markets. An efficient price structure does not reflect only relative costs, but also the surplus that each side of the market derives from the other.[37] The existence of a high price-cost margin on one side of the market is not dispositive on market failure, nor is the existence of below-cost pricing dispositive on anticompetitive predation.[38] Card networks may charge consumers a negative price for card usage and merchants an above-cost processing fee to exploit merchants' inability to negotiate lower-cost terms and extract monopoly rents.[39] Or, this price structure could be fair or efficient for a perfectly competitive market.[40]

Thus, the inquiry for an antitrust authority should be whether the total revenue generated—on both sides of the market—is higher than the total cost of providing a service. Pricing dynamics on one side of the market cannot alone reveal if markets are imperfect.[41]

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[37] Id at 997–98.

[38] Wright, *One-Sided Logic in Two-Sided Markets* at *3–4 (cited in note 27).

[39] See Hovenkamp, *Platform Antitrust* at *23–24 (cited in note 16).

[40] See id at *21–27 (providing an overview of the unique antitrust considerations posed by platform economics).

[41] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J Reg 325, 359–61 (2003).

II. Canonical Two-Sided Market: Payments

A. How Does Pricing Work?

Every time you use your credit or debit card to make a retail purchase, a complex series of transactions begins among a host of market participants. Imagine a consumer uses a Chase Sapphire Reserve (a Visa credit card issued by JPMorgan Chase) to buy groceries from Mom and Pop Grocery Co, which banks with Bank of America. The groceries cost $40. This money must find its way from the JPMorgan Chase customer to the Bank of America merchant's account.

The merchant pays its bank (Bank of America) for processing these transactions (with an ironically named "merchant discount" fee). Bank of America keeps a portion of this fee and pays the card network and the customer's bank (JPMorgan Chase), which also pays the card network for intermediation.

At the end of this complex series of transactions, we are left with the following:

Example Credit Transaction

Cost of groceries	$40.00
Consumer pays	$39.60
Merchant receives	$38.60
Acquiring bank receives (net)	$0.15
Issuing bank receives (net)	$0.75
Network receives	$0.10

In this example, the merchant pays 3.5 percent of the value of the transaction ($1.40) in myriad network and bank fees (interchange fees).[42] Consumers get 1 percentage point of this 3.5 percent in the form of rewards ($0.40). The remaining 2.5 percentage points ($1.00) are split between the card network, the issuing bank, and the acquiring bank. In the United States, this same chain operates even if the issuing bank and the acquiring bank are the same, as card networks tend to require that cards be routed through their network rather than through the bank directly.

Interchange fees have historically varied depending on the payment instrument. Credit interchange fees tend to be higher

[42] Rochet and Tirole, 1 J Eur Econ Assoc at 1005 (cited in note 30).

than debit interchange fees,[43] which are subdivided into "signature debit" transactions and "PIN debit" transactions.[44] Until the early 2000s, the highest interchange fees were around 1.5 percent for Visa and Mastercard credit cards.[45] Then, in the years preceding the Great Recession, card issuers began introducing rewards cards like "Visa Signature Preferred" and "MC World High Value."[46] They set higher interchange fees (around 2.5 percent)[47] on these cards and encouraged their use through attractive rewards programs. AmEx has emerged as a competitor, and its business model involves charging the highest interchange rates—often on the order of 3.5 percent[48]—and inducing card usage through extremely attractive rewards programs for its wealthy clientele. Discover traditionally had a very different business model: trying to compete by offering low interchange fees to merchants.[49]

B. Attempts at Cost-Based Regulation

The "balancing act" networks perform to get both sides on board results in prices that have "little relationship with accountants' notions of cost allocation."[50] As explained above, this means that above- and below-cost pricing on one side of the market may not be a market power distortion, but rather, optimal to ensuring platforms to encourage participation on each side of the market and create large network externalities.

From a policy perspective, the fact that price structures can produce below-price costs on one side of a two-sided market makes cost-based regulation undesirable. However, cost-based regulation is common in these markets. In the early 2000s, Australian authorities proposed and eventually adopted a cap on

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43 Mukharlyamov and Sarin, *Price Regulation in Two-Sided Markets* at *3 n 2 (cited in note 23).

44 Ben Dwyer, *Debit Card Transaction Fees* (CardFellow, June 17, 2019), archived at https://perma.cc/46VE-MFAP.

45 Federal Reserve Bank of Kansas City, Payments System Research, *Credit and Debit Card Interchange Fees Assessed to Merchants in the United States August 2017 Update* V-1–V-3 (Aug 2017), archived at https://perma.cc/BRF4-KF2W.

46 Id.

47 Id.

48 *Credit Card Processing Fees and Costs* (cited in note 22).

49 Id. The distinction between different platforms' business models is at the core of the recent monumental Supreme Court decision in *Ohio v American Express* discussed above. See *AmEx*, 138 S Ct at 2282–83.

50 Rochet and Tirole, 2 Rev Network Econ at 70 (cited in note 26).

credit card interchange rates because these "fees [were] significantly above levels suggested by cost-based methodologies."[51]

In response to Australia's proposal, economists argued strenuously that this was the wrong way to think about prices in two-sided markets. Professors Rochet and Tirole warned that high merchant prices alone were not sufficient to justify likely distortionary regulation.[52] Instead, they asserted:

> Proponents of a regulation of the [interchange fee] must first build a theoretical paradigm that gathers broad intellectual consensus and demonstrates a clear market failure, show that the resulting distortions have a clear sign and a sizeable impact on welfare, and propose a form of regulation that . . . is better tha[n] non-intervention. . . . Misunderstanding the economics of the problem and imposing cost-based regulation could impose substantial distortions in the industry.[53]

In his article, *One-Sided Logic in Two-Sided Markets*, Professor Julian Wright made a similar admonition that efficient prices in two-sided markets can be "very different from [ ] normal marginal cost pricing. . . . Otherwise, shopping malls would charge consumers for entry . . . [and] academics would pay hefty fees when submitting their articles to journals."[54]

The limited evidence suggests that, as Professors Rochet, Tirole, and Wright predicted, the Australian intervention did not deliver consumer savings and had unintended consequences.[55] The objective was to raise the cost of transacting with credit cards, thereby reducing the use of a less efficient and more pernicious payment instrument.[56] Regulators also hoped for an

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51 Reserve Bank of Australia and Australian Competition and Consumer Commission, *Debit and Credit Card Schemes in Australia: A Study of Interchange Fees and Access* *73 (Oct 2000), archived at https://perma.cc/59YX-S5KD.

52 Rochet and Tirole, 2 Rev Network Econ at 76–78 (cited in note 26).

53 Id at 71.

54 Wright, *One-Sided Logic in Two-Sided Markets* at *23 (cited in note 27). In many cases, it feels like we do.

55 Howard Chang, David S. Evans, and Daniel D. Garcia-Swartz, *The Effect of Regulatory Intervention in Two-Sided Markets: An Assessment of Interchange-Fee Capping in Australia*, 4 Rev Network Econ 328, 349 (2005). But see Joseph Farrell, *Assessing Australian Interchange Regulation: Comments on Chang, Evans and Garcia-Swartz*, 4 Rev Network Econ 359, 361, 363 (2005) (arguing that the Chang, Evans, and Garcia-Swartz paper focuses on noisy data and the correct interpretation is "that so far the data don't show much" as to the effects of the Royal Bank of Australia's intervention).

56 Chang, Evans, and Garcia-Swartz, 4 Rev Network Econ at 350 (cited in note 55).

across-the-board reduction in consumer costs from lower merchant processing fees.[57] While Australian authorities pointed to a decrease in credit rewards—and consequently credit usage—in response to the regulation, many argue that the main effect of reform was to transfer profits to merchants, with the costs borne primarily by banks and consumers.[58]

Despite this heed, the United States recently followed suit in regulating merchant processing fees. Confusingly, the US regulation targeted debit, rather than credit, interchange.[59] The goal of the intervention (the "Durbin Amendment" or "Durbin") was to bring merchant debit interchange fees closer to the level of the cost of providing the processing service: the final legislation required that the Federal Reserve come up with rules to ensure that "the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction."[60] As in Australia, where regulation decreased consumer rewards,[61] banks abandoned debit rewards to offset losses from regulation.[62] To encourage consumers to use credit cards—left unregulated by Durbin—banks increased credit rewards, resulting in overuse of credit cards that creates expensive cycles of indebtedness.[63] Banks also increased account fees, meaning this consumer-oriented price regulation costs consumers at least $3 billion annually.[64]

So both the theoretical literature and the experience of actual regulation caution that cost-based regulation in two-sided markets can be distortionary because high costs on one side of the market do not prove market failure. However, this does not mean there is no case for regulation of two-sided platforms. Above-cost

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57 See id at 331–32.

58 Id at 339–40.

59 One result of the intervention was that banks pushed consumers toward greater credit usage, since these fees are left unregulated. This is an unintended and undesirable consequence of US interchange regulation as credit is generally thought of as a more dangerous payment instrument than debit, which decouples financial transacting and consumer borrowing.

60 Dodd-Frank Act § 1075, 124 Stat at 2068, codified at 15 USC § 1693o-2.

61 Keith Bradsher, *US Looks to Australia on Credit Card Fees* (NY Times, Nov 24, 2009), archived at https://perma.cc/5UYN-FRUJ.

62 Richard Kerr, *Where Have All the Rewards Debit Cards Gone?* (The Points Guy, June 24, 2015), archived at https://perma.cc/5D2X-27R4.

63 Mukharlyamov and Sarin, *Price Regulation in Two-Sided Markets* at *34–36 (cited in note 23).

64 Id at *53.

prices may well be suggestive—though not dispositive—of the existence of supracompetitive rents. Two-sided markets also feature unique issues for theory and regulation that are not implicated in traditional markets: consumers do not internalize the welfare impact of their platform use on others, at least directly.

III. ANTITRUST AND THE PAYMENT INDUSTRY

The pricing structure of card networks involves treating consumers as loss leaders, charging essentially negative transaction prices by providing rewards to consumers for paying with cards, and generating revenue from merchants. These fees are a rising cost for merchants for two main reasons. First, card usage has grown: cards were used in less than 15 percent of transactions in 1995[65] and around 50 percent today.[66] Second, card networks realized they could generate more revenue by offering rewards cards with even higher interchange fees than basic cards. Consequently, processing fees are a significant cost for merchants, often their highest cost of operating after labor.

Merchants, frustrated by this large and growing expense, argue that card networks engage in collusive pricing practices to extract supracompetitive rents. They contend that card networks set up barriers to entry for lower-cost competitors, meaning a few entrenched networks exploit significant market power. They also argue that because they have very little bargaining power in their relationship with card networks, their only choice is to reject cards altogether. Because customers have come to expect card acceptance, merchants suggest that even this choice is illusory because they must accept the terms offered or risk losing business.

In this Part, I first provide empirical evidence to support merchants' contentions, illustrating that the payments industry is highly concentrated and that at least small merchants are disadvantaged in the bargaining relationship. I then provide a brief history of antitrust litigation in this setting, showing how the Court's view of card networks shifts over time as payment cards

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[65] See Geoffrey R. Gerdes and Jack K. Walton II, *The Use of Checks and Other Noncash Payment Instruments in the United States* *361 (Federal Reserve Bulletin, Aug 2002), archived at https://perma.cc/AE2D-5Y8Z.

[66] See Raynil Kumar, Tayeba Maktabi, and Shaun O'Brien, *2018 Findings from the Diary of Consumer Payment Choice* *5 (Federal Reserve System Cash Product Office, Nov 1, 2018), archived at https://perma.cc/9CTL-V24W.

become more ubiquitous. Finally, I provide background on the contentious *AmEx* decision, detailing the Court's confusion about the best way to assess whether a two-sided platform is anticompetitive.

A. Evidence Supporting Merchant Claims

1. Card networks and issuers operate in highly concentrated markets.

Visa and Mastercard control essentially 100 percent of the debit market share and Visa, Mastercard, and AmEx control 96 percent of the credit card market by volume.[67] Card-issuing banks are also concentrated, although less so. The share of domestic deposits housed at the five largest banks in the United States has risen from less than 10 percent in 1990 to nearly 50 percent as of 2014.[68]

Figures 1 and 2 illustrate the market share of large card networks and card issuers using survey data collected from US consumers using Amazon's MTurk. While the survey population is of course not identical to the broader US population,[69] the trends are informative and reveal the significant concentration of the bank and card network markets.

Of those surveyed, 66 percent of consumers reported having a Visa credit card, and 49 percent a Mastercard.[70] Only 10 percent of survey responders reported *not* having a credit card from one of the large four issuers (Visa, Mastercard, Discover, and AmEx), with Discover and AmEx lagging far behind the original networks in market share. These results show the card-issuing industry to be similarly concentrated: more than 50 percent of bank customers report having an account at one of the four largest depository institutions (Bank of America, JPMorgan Chase, Wells Fargo, and Citibank).

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67 Alina Comoreanu, *Market Share by Credit Card Network* (WalletHub, Sept 2, 2019), archived at https://perma.cc/K2TF-746W.

68 Steve Schaefer, *Five Biggest US Banks Control Nearly Half Industry's $15 Trillion in Assets* (Forbes, Dec 3, 2014), archived at https://perma.cc/X26W-VM85.

69 In particular, the survey is somewhat underrepresentative of the unbanked population. Only 3 percent of the MTurk sample reports being unbanked; the Federal Reserve reports this number is closer to 5 percent. Federal Reserve Board, *Report on the Economic Well-Being of US Households in 2017* (May 2018), archived at https://perma.cc/T25G-8U2K. Similarly, only 10 percent of the MTurk population reports not having a credit card. The Federal Reserve reports this number is 17 percent. Id.

70 Consumers often have more than one card.

FIGURE 1: CONSUMER BANKING RELATIONSHIPS[71]

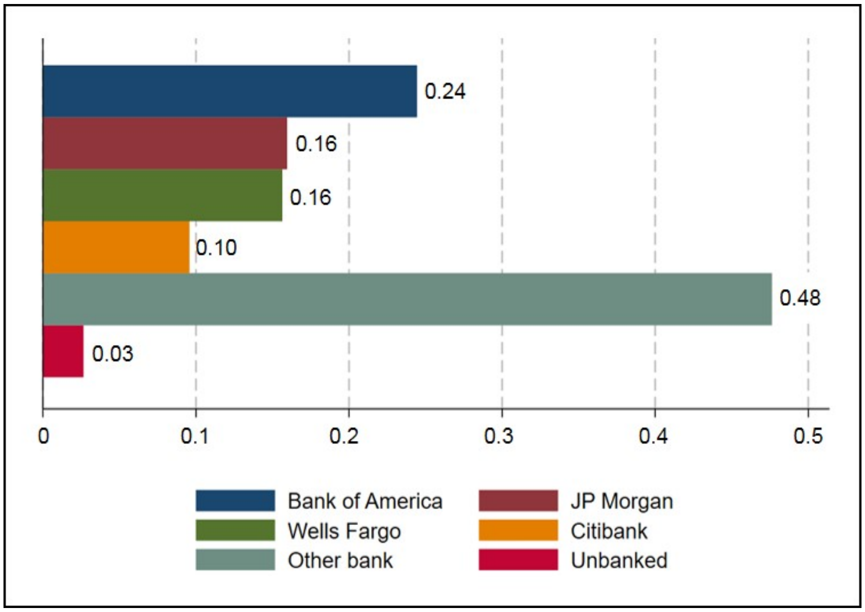
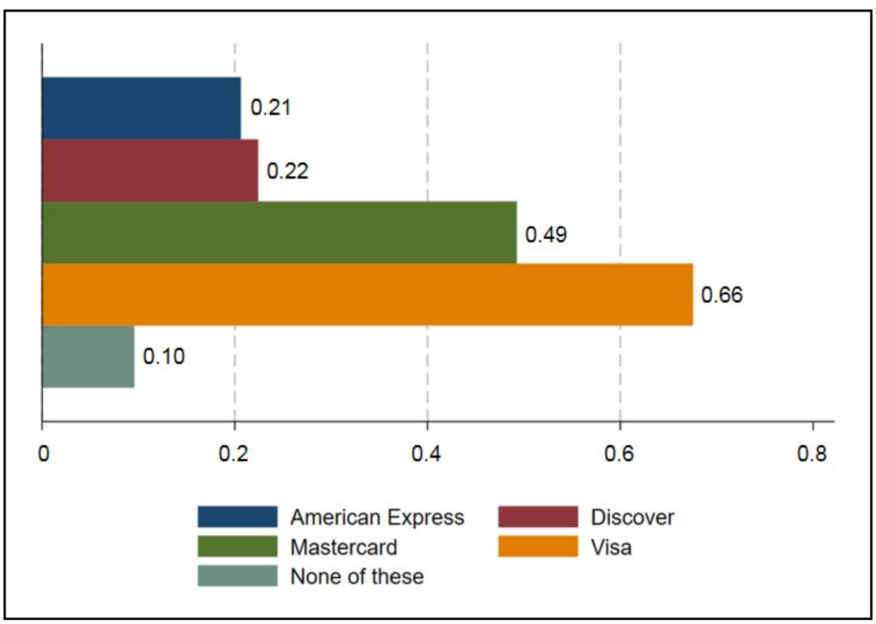


FIGURE 2: CONSUMER CREDIT CARD HOLDINGS[72]



2. Suggestive evidence that small merchants lack bargaining power.

My previous work with Professor Vladimir Mukharlyamov hints at the asymmetric bargaining power in this two-sided market.[73] We focus on Durbin, which set a cap for debit interchange fees at $0.22 plus five basis points times the transaction value.[74] Using proprietary effective interchange data made available by a leading industry payments player, we study how banks and merchants adjust to regulation.[75]

Figure 3 illustrates interchange rates for unregulated issuers (not subject to Durbin) and regulated issuers (subject to Durbin).[76] Regulated issuers (red) set the maximum debit interchange fee permitted of $0.22. Where merchants fall on the red curve depends on their average ticket size: For a $100 average transaction, $0.22 is a 0.22 percent interchange fee; for a $10 transaction, it is a 2.2 percent interchange fee.

The blue curve shows the extreme dispersion in pricing for *unregulated* issuers. So, for the same average transaction size, different merchants pay different rates. For a $25 transaction in Industry A, interchange expense ranges from $0.10 to $0.75. What explains this difference?

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71 Note: Author's calculations. Survey results from Mechanical Turk survey of nearly 1,300 consumers in the United States (data on file with author).

72 Note: Author's calculations. Survey results from Mechanical Turk survey of nearly 1,300 consumers in the United States (data on file with author).

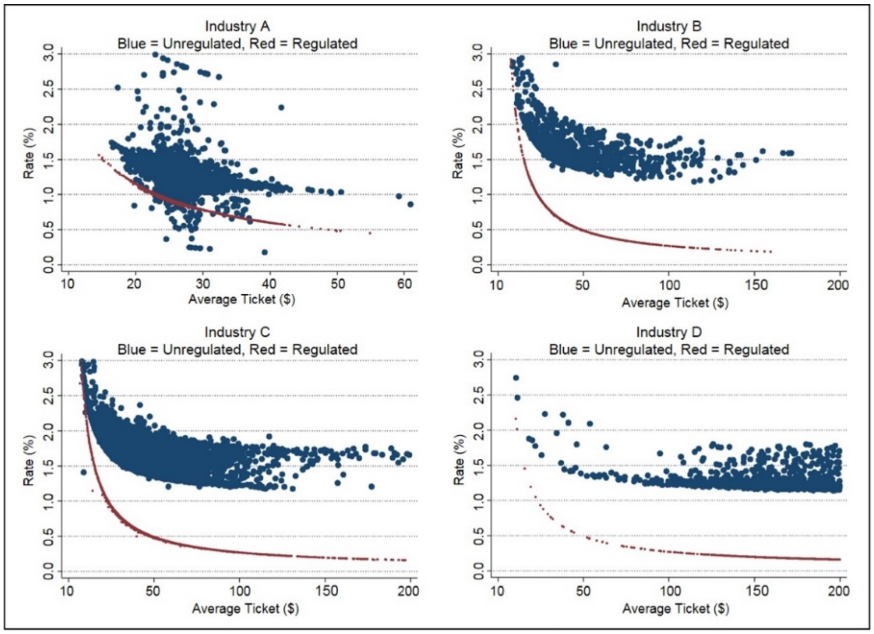
73 See Mukharlyamov and Sarin, *Price Regulation in Two-Sided Markets* at *14–17 (cited in note 23).

74 Id at *11.

75 Id at *14–15.

76 See id at *72.

FIGURE 3: INTERCHANGE RATES FOR UNREGULATED AND REGULATED ISSUERS[77]



Large merchants with market power are in a superior bargaining position with card networks. Card networks are explicit about this: Visa and Mastercard publish bulletins of interchange rates with tiers or thresholds listed describing how large retailers with significant transaction volume bear lower interchange costs.[78] For example, a small, standalone grocer pays an interchange rate of 1.65 percent on traditional Visa credit card transactions, whereas a large grocery chain with $5.82 billion or more in annual volume pays only 1.15 percent per transaction. [79] These are significant savings—on the order of tens of millions of dollars annually for the large grocer.

The published tiered pricing schedules lack the granularity to illustrate the dispersion shown in Figure 3. Large retailers

77 Adapted from Natasha Sarin and Vladimir Mukharlyamov, *The Impact of the Durbin Amendment on Banks, Merchants, and Consumers*, (working paper, Jan 2019), archived at https://perma.cc/YFP8-L3J2.

78 See, for example, *Visa USA Interchange Reimbursement Fees: Visa Supplemental Requirements* *7, 9 (Visa Public, Apr 13, 2019), archived at https://perma.cc/M36Q-TA9T.

79 Id.

negotiate much more attractive pricing terms than non-chain retailers because the potential loss of merchant acceptance is a significant threat to the network. Costco's history with interchange illustrates this point anecdotally.[80] Prior to 2016, Costco accepted only AmEx cards, and transitioned in 2016 to accepting only Visa and debit cards.[81] This was a market-moving event: AmEx's stock fell by 6.4 percent the day Costco announced the separation; Visa's stock increased by 14 percent after the announcement.[82] Prior to this shift, AmEx had offered Costco an interchange rate of around 0.6 percent, well below its 3 percent average across retailers; following the shift, its interchange rate from Visa is near zero.[83]

Smaller merchants argue that the lower interchange rates that their larger counterparts negotiate reflect how disadvantaged they are in bargaining with card networks. When networks and merchants are on more equal footing, the interchange rates that prevail in markets are much lower than those faced by small non-chain retailers. The lack of bargaining power impedes small retailers' ability to offer low prices and attract market share, thus lessening competition in the retail market as well.

B. Antitrust Challenges

1. History of antitrust.

The existence of highly concentrated card networks and asymmetries in the card network/merchant bargaining relationship prompted significant antitrust scrutiny in the payments arena. Initially, card networks were able to successfully defend scrutinized practices as necessary to build up both sides of these markets.[84] In reaching these early decisions, courts were clear that the infancy of the market influenced their embrace of network practices, noting that "[l]ike any major economic transition,

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80 See Abigail Stevenson, *Cramer: Real Winner of the Costco Credit Card Shake-Up (Hint: Not Visa)* (CNBC, June 20, 2016), archived at https://perma.cc/QZ3J-RZSU.

81 Id.

82 Id.

83 Elizabeth Dexheimer and Matt Townsend, *Costco to Pay Almost Zero to Accept Credit Cards* (Bloomberg, Apr 17, 2015), online at https://www.bloomberg.com/news/articles/2015-04-17/costco-seen-paying-almost-zero-to-accept-cards-in-citigroup-deal (visited Jan 31, 2020) (Perma archive unavailable).

84 See, for example, *National Bancard Corp v Visa USA Inc*, 596 F Supp 1231, 1240, 1265 (SD Fla 1984) (finding that Visa's offering discounts for "on-us" transactions—in which the card issuing and acquiring bank were the same—may impede competitors like National Bancard Corp who only service one side of the market, but are procompetitive overall).

the movement from cash to cashless payment systems is not without growing pains."[85]

The relatively recent explosion of card usage and the growing profitability of card networks makes practices once viewed as key to creating network externalities today appear as impediments to competition. Historically, Visa and Mastercard restricted their member banks from issuing cards from competitor networks. Networks contended that allowing members to issue competitor cards would be "tantamount to forcing Burger King to sell Big Macs."[86] This argument was ultimately unpersuasive, with the courts eventually determining that exclusivity restrained competition from new competitors like Discover and AmEx, with these anticompetitive effects outweighing any procompetitive value.[87]

Merchants also successfully challenged card networks. They argued against "honor all cards" rules—which required merchants who wanted to accept any Visa and Mastercard payment instruments to accept all of them.[88] Thus, merchants could not accept only debit cards (with lower processing fees) from these networks. Networks eventually agreed to decouple debit and credit acceptance, although this was not a full victory: merchants who accept some credit cards from a network must accept all of them.[89]

A third class of antitrust cases involves card networks' antisurcharge rules. Card networks are incentivized to ensure their cards will be used by customers and accepted by merchants. This means they are opposed to differential pricing for different payment instruments, which could encourage consumers to use a payment form that will not be surcharged or pay with another form and get a discount. Merchant contracts historically featured explicit prohibitions on differential pricing:

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85 Id at 1236.

86 Max B. Knudson, *Appeals Court Reverses Jury's Decision on Visa USA* (Deseret News, Sept 24, 1994), archived at https://perma.cc/V4SU-XJJQ.

87 *United States v Visa USA Inc*, 163 F Supp 2d 322, 399 (SDNY 2001), affd 344 F3d 229 (2d Cir 2003).

88 Dennis Green, *Stores and Credit-Card Companies Are in an All-Out War over Fees* (Business Insider, Sept 27, 2018), archived at https://perma.cc/2ACG-78U7.

89 Large merchants opted out of a recent settlement with Visa and Mastercard largely to challenge this practice. See id.

> You [the seller] agree that the prices (including any service or other charges) charged to our Cardmembers including advertised sales will not be greater than those charged to other customers.[90]

For more than three decades, merchants have been challenging these clauses as illegal restraints on trade. Card networks made concessions, first agreeing that merchants can offer cash discounts.[91] And recently, Visa and Mastercard settled with merchants to allow surcharging of up to 4 percent on credit transactions.[92] Merchants are now allowed to add a surcharge at the "brand level" to all Visa/Mastercard products, or to particular types of credit card transactions at the "product level" (for example, traditional versus rewards cards).[93] Surcharges can differ depending on the product line and are capped at the actual processing fee merchants pay on a payment instrument.[94] However, merchants that accepted AmEx cards (AmEx did not settle in this case, but eventually brought it to the Supreme Court) remained practically barred from surcharging because those merchants could only surcharge Visa and Mastercard if they surcharged all cards with "equal or higher"[95] processing costs. Since AmEx charges the highest interchange fees, this means that a merchant who accepts cards from all three networks was unable to surcharge consumers; even after Visa and Mastercard allowed surcharging in theory, though not in practice.[96]

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90 Edmund W. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J Law Econ & Org 217, 219 n 4 (1990) (alteration in original).

91 This proved complicated in practice because the Truth in Lending Act at the time required that any difference between a cash and credit price be converted to an "annual percentage rate" to be easily understood. Id at 221. A 5 percent surcharge would then be a 60 percent rate, which could trigger state usury statutes. Id. Congress then amended the Truth in Lending Act to permit discounts for those who do not transact with credit cards. It also deemed these charges would not constitute a finance charges and thus be subject to the APR disclosure. Id at 226.

92 Melissa Johnson, *Your Complete Guide to Credit Card Surcharges* (Merchant Maverick, Feb 2, 2017), archived at https://perma.cc/DE9V-AKSN.

93 Id.

94 Id.

95 Phil Hinke, *U.S. Merchants Can Now Charge for Credit Card Transactions* (Practical Ecommerce, Jan 31, 2013), archived at https://perma.cc/SDJ8-SS9K.

96 Robb Mandelbaum, *Visa and MasterCard Settle Lawsuit, but Merchants Aren't Celebrating* (NY Times, Aug 8, 2012), archived at https://perma.cc/7VB4-GH5K.

2. *Ohio v American Express*.

Ohio v American Express is seen by many antitrust experts as the most significant antitrust case in a decade.[97] The case considers whether antisteering provisions are anticompetitive.[98] These provisions ban merchants from surcharging AmEx users to recover the expense associated with processing these transactions and even bar merchants from expressing a preference that consumers use cards with lower processing fees.[99]

a) Factual determination of lower court. A key issue that *AmEx* addressed, likely unsatisfactorily, is how to think about the relevant market in determining the existence of anticompetitive harm. At issue in the case was whether restrictions that caused harm on one side of the market (antisteering provisions that restricted merchants' ability to steer consumers toward cheaper forms of payment) could be offset by benefits on the other side of the market (attractive rewards that consumers receive for transacting with AmEx cards).[100] In essence: is this one market, or two? The district court said two:

> [T]he court agrees with Plaintiffs that this two-sided platform comprises at least two separate, yet deeply interrelated, markets: a market for card issuance, in which Amex and Discover compete with thousands of Visa- and MasterCard-issuing banks; and a network services market, in which Visa, Mastercard, Amex, and Discover compete to sell acceptance services.[101]

The legal standard governing the case was a rule-of-reason analysis requiring a three-step inquiry:[102] (1) plaintiffs bear the

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97 See, for example, Lina Khan, *The Supreme Court Just Quietly Gutted Antitrust Law* (Vox, July 3, 2018), archived at https://perma.cc/4KZ2-JWQX.

98 As described above, Visa and Mastercard were initially part of this antitrust litigation as well but chose to settle.

99 Specifically, under AmEx's standard antisteering provisions, a merchant that decides to accept AmEx cards may not "indicate or imply that they prefer" a non-AmEx form of payment; "try to dissuade" a customer from using an AmEx card; "try to persuade or prompt . . . any other method of payment"; "impose any restrictions, conditions, disadvantages, or fees" on AmEx cards "that are not imposed equally on" other payment products, "except for electronic funds transfer, or cash and check." *American Express Merchant Reference Guide—U.S.* *14 (American Express, April 2019), archived at https://perma.cc/J6WE-Q6WS.

100 See *AmEx*, 138 S Ct at 2286.

101 *United States v American Express Co*, 88 F Supp 3d 143, 151 (EDNY 2015).

102 Id at 168.

burden of showing restraints have an "adverse effect on competition as a whole in the relevant market,"[103] either by "show[ing] an actual adverse effect on competition" or by "establishing that [the defendant] had sufficient market power to cause an adverse effect on competition";[104] (2) if plaintiffs can discharge the initial burden, it shifts to the defendants to offer evidence of procompetitive effects; and (3) if the defendants demonstrate procompetitive effects, the burden shifts back to the plaintiffs to show that any "legitimate competitive benefits"[105] could have been achieved through "less restrictive" means.[106]

The lower court determined that plaintiffs met the burden of proof with respect to the market for "credit and charge card network services" (the merchant side of the market) both directly (showing an adverse effect on competition) and indirectly (showing significant market power).[107] As a precise illustration of the anticompetitive harm, the court pointed out that AmEx antisteering provisions block low-cost alternative business models, like that of Discover, which set low prices to compete for merchant business but failed to gain market share since customers could not be steered to their cards.[108] Consequently, Discover moved from a "Low Cost Provider Strategy" to a "Close Competitive Gap" strategy, increasing merchant fees and consumer rewards to more closely resemble the business model of the other networks.[109] The lower court concluded that

> the failure of Discover's low-price value proposition is emblematic of the harm done to the competitive process by Amex's rules against merchant steering. . . . [A] supplier in the network services market cannot realistically expect to receive any competitive benefit for offering a price below that

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103 Id, quoting *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc*, 386 F3d 485, 506–07 (2d Cir 2004).

104 *American Express Co*, 88 F Supp 3d at 169, quoting *Tops Markets, Inc v Quality Markets, Inc*, 142 F3d 90, 96 (2d Cir 1998) (alteration in original).

105 *American Express Co*, 88 F Supp 3d at 169, quoting *Geneva Pharmaceuticals*, 386 F3d at 507.

106 *American Express Co*, 88 F Supp 3d at 169.

107 Id at 207. Proof of market power comes both from overall transaction volume (AmEx accounts for more than 25 percent of the credit card market) and from the ability of AmEx to raise interchange fees repeatedly while gaining market share. Id at 190, 195.

108 Id at 213–14.

109 Id at 214–15.

of its competitors, even if such a move would benefit merchants and their customers alike.[110]

b) Confused market definition. On appeal, the Second Circuit overturned the lower court's decision, finding that it "erred in excluding the market for cardholders from its relevant market definition."[111] The argument was that merchant pricing was only "one half of the pertinent equation," and that the determination of harm in this market required weighing the harm to merchants against the benefits that accrued to cardholders on the other side of the credit card transaction at issue.[112] Thus, the appellate court ruled that the plaintiffs had not carried their burden to prove anticompetitive effects in the relevant market, determining that "[t]his evidence of increased output is not only indicative of a thriving market for credit-card services but is also consistent with evidence that Amex's . . . model, supported by its [nondiscriminatory provisions], has *increased* rather than *decreased* competition overall within the credit-card industry."[113]

Many legal academics found the Second Circuit's reasoning deeply problematic.[114] Traditionally, direct proof on anticompetitive harm—as offered by the District Court—shows that "whatever the relevant market might be, American Express had enough power in that market to cause that harm."[115] As Justice Breyer's dissent in the Supreme Court case suggests and critics in the academy argue—this means that, whether the market was two-sided or one-sided, properly or improperly defined by the lower courts, the factual finding of anticompetitive harm was sufficient to sustain the antitrust challenge.

The Supreme Court oral arguments in *AmEx* reveal significant consternation about what should and should not be properly included in the market definition for a two-sided market. Justice Elena Kagan asked, "[W]hy doesn't [the cardholder side of the market] enter into the question of how you define the market in the first place?"[116] Justice Anthony Kennedy voiced concern that it would be a "dangerous step for this Court to take to analyze . . .

110 *American Express Co*, 88 F Supp 3d at 214.

111 *United States v American Express Co*, 838 F3d 179, 197 (2d Cir 2016).

112 Id at 202.

113 Id at 206.

114 See, for example, Hovenkamp, 2019 Colum Bus L Rev at 58–60, 67–70 (cited in note 16); Hovenkamp, *Platform Antitrust* at *31–32, 35 (cited in note 16).

115 *AmEx*, 138 S Ct at 2297 (Breyer dissenting).

116 *AmEx* Transcript at *20 (cited in note 1).

this two-sided market, to say that we're going to . . . look at just one side."[117] Justice Breyer complained that the "jargon" of two-sided markets was needlessly confusing and found it strange to think about consumer benefit in the antitrust setting.[118] Consumers benefit from an agreement to set high toy prices that enable taking care to avoid selling "poisoned toys"—but this is still an antitrust violation.[119]

The dissent makes clarifying arguments that fit with the views of many in the academy. The first is that "a discussion of market definition was legally unnecessary at step 1" of the rule of reason inquiry.[120] The second is that, even if the Court had chosen to define a market, it should have followed the precedent for two-sided markets set by *Times-Picayune Publishing Co v United States*[121] that courts should begin "definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint."[122] The Court explained that

> every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space. . . . This case concerns solely one of those markets. . . . For this reason, dominance in the advertising market, not in readership, must be decisive.[123]

Professor Herbert Hovenkamp explains the rationale for one-sided analysis in two-sided markets as follows: although when defining markets it makes sense to consider the existence of substitute products, which restrain a firm's ability to charge higher prices, the same is not true in the credit card market.[124] The two sides of the platform involve complementary products—card usage and merchant acceptance are not interchangeable but instead go hand-in-hand. Thus, one side of this market cannot discipline the other.

Some competition scholars go beyond disagreement with market definition in this case and argue broadly for abandonment

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117 Id at *21.
118 Id at *22–23.
119 Id at *23.
120 *AmEx*, 138 S Ct at 2296 (Breyer dissenting).
121 345 US 594 (1953).
122 *AmEx*, 138 S Ct at 2295 (Breyer dissenting).
123 Id, quoting *Times-Picayune*, 345 US at 610.
124 See Hovenkamp, 2019 Colum Bus L Rev at 57–64 (cited in note 16).

of this kind of market evaluation altogether. In a seminal article, *Why (Ever) Define Markets?*, Professor Louis Kaplow argues that

> the market definition process should be abandoned. The central, conceptual argument is that there does not exist any coherent way to choose a relevant market without first formulating one's best assessment of market power, whereas the entire rationale for the market definition process is to enable an inference about market power.[125]

This suspicion of the usefulness of market inquiry fits with Justice Breyer's view in *AmEx*, stated more colorfully: "I thought that if . . . three people agree upon their prices . . . I would have thought you just said that's anticompetitive. That's anticompetitive. There's no need to look at this gizmo called market power, which is a nightmare."[126]

IV. A SOLUTION: CONSUMER FINANCIAL PROTECTION AS AUTHORITY

A. Broadening the Conception of Consumer Harm

Despite legitimate critiques, the *AmEx* decision is law and has implications at the very least for all platforms that facilitate "single, simultaneous transaction[s]."[127] Future antitrust litigation will have to consider both sides of the market in determining whether a platform's pricing is anticompetitive.

It is worth remembering that consideration of both sides of the market—although disfavored by some antitrust scholars—fits with economists' view of platforms. As discussed above, what distinguishes two-sided markets from one-sided markets is that the intermediary chooses not only a price but also a price structure. Thus, two-sided platforms often use one side of the market as a loss leader and the other as a profit center. The mere observation that price levels are high and rising on one side of the market does not indicate a failure of competition. An increase in price on one side of the market could be to collect monopoly rents (as the plaintiffs in *AmEx* suggest) or it could be in response to changes in elasticities on the consumer side of the market that require AmEx to give even more generous rewards to maintain its customer

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125 Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv L Rev 437, 440 (2010).
126 *AmEx* Transcript at *55 (cited in note 1).
127 *AmEx*, 138 S Ct at 2286.

base. Therefore, it is difficult in this context to think of price increases as direct proof of harm as plaintiffs and the District Court assert.[128]

Regardless of the merits, it is clear that as long as the *AmEx* precedent governs, it will be more challenging for two-sided platforms to use antitrust to rein in card networks. In the first stage of the rule-of-reason inquiry, a plaintiff alleging a vertical restraint will have to show that the harm on one side of the market (for networks like Discover that cannot compete because of antisteering provisions) is not outweighed by benefit on the complementary side of the market (that is, AmEx customers get attractive rewards). To take a series of relevant examples: it will be hard to bring an antitrust case against ride-sharing platforms for under-paying drivers without showing that this harm is not offset by consumer benefit, and Amazon "can continue to squeeze the suppliers and retailers reliant on its platform with little worry about being charged with the abuse of monopsony power."[129]

Beyond the legal difficulties with using antitrust to rein in two-sided platforms going forward, there are conceptual issues as well. It is not clear that competition policy is the right tool to address concerns about platform pricing. There are myriad issues with merchants not being able to steer/surcharge consumers for using more expensive forms of payment. One issue, which the *AmEx* discussion focuses on, is that these restraints can impede competition and restrict credit consumers from bargaining with merchants for surplus if costs are lower when steering is permitted.

That is true, but it misses another kind of consumer harm—to a consumer who is not in this credit card market at all. Imagine two consumers buy \$100 worth of groceries. One pays with a debit card (with low processing fees) and one with an AmEx. The inability to steer or surcharge the AmEx consumer leads to uniform pricing in this retail market—despite the fact that merchants pay only \$0.22 to process the debit transaction and \$2.00 to process the credit card transaction. In a perfectly competitive market

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[128] The Court concluded that anticompetitive effects can be shown either directly by "proof of actual detrimental effects [on competition]," id at 2284, quoting *Federal Trade Commission v Indiana Federation of Dentists*, 476 US 447, 460 (1986) (alteration in original), which could include "reduced output, increased prices, or decreased quality in the relevant market," or indirectly, by proving "market power plus some evidence that the challenged restraint harms competition." *AmEx*, 138 S Ct at 2284. That said, the antisteering rules clearly restrain competition, as detailed at length by Hovenkamp. See Hovenkamp, 2019 Colum Bus L Rev at 77–81 (cited in note 16).

[129] Khan, *The Supreme Court Just Quietly Gutted Antitrust Law* (cited in note 97).

with no restraints on merchant pricing, price will be the marginal cost of providing groceries to each consumer—meaning the price for the card user will be adjusted to capture the extra $1.78 in processing fees. Antisteering provisions prohibit such price adjustment.

The antisteering restraints at issue in *AmEx* mean that, practically, merchants that accept credit cards must decide from a set of second-best alternatives: They can price as they would have if transaction costs were zero and pay transacting fees out of their revenue; they can *lower* prices and hope sales volume, and thus profits, will rise enough to cover their transacting costs; or they can raise prices for all consumers, regardless of the payment instrument used. They could also refuse to accept cards issued by high-cost networks, but merchants argue that this is a false choice because they risk losing their consumer base if they do not accept rewards cards. It is especially difficult to reject AmEx cards because AmEx's business model is premised on providing valuable rewards to wealthy consumers who transact frequently. This is an especially important customer segment for merchants. Importantly, the option unavailable to merchants is price differentiation depending on the kind of card consumers use.

Profit margins in the retail industry average around 2 percent.[130] Credit interchange rates for grocers are also in the range of 1–1.5 percent for basic cards, and even higher for rewards cards.[131] This means that interchange is a very large portion of retail margins—in many cases, their second-highest cost of operating after labor[132]—so simply paying transaction fees out of profits is not a viable option for retailers.[133] Instead, as merchants

130 Damodaran, *Margins by Sector* (cited in note 24).

131 See *Mastercard 2018–2019 U.S. Region Interchange Programs and Rates* *2 (Mastercard, Apr 13, 2018), archived at https://perma.cc/9KH2-VP7L; *Visa USA Interchange Reimbursement Fees: Visa Supplemental Requirements* at *7 (cited in note 78).

132 Brief of Amicus Curiae Retail Litigation Center, Inc. in Support of Petitioners, *Ohio v American Express Co*, No 16-1454, *11 (US filed July 6, 2017) (Retail Litigation Center Brief) (citations omitted), quoting *American Express Co*, 88 F Supp 3d at 221:

> "The costs associated with accepting credit and charge cards are among many merchants' highest," as the district court found after extensive testimony. Merchants pay billions of dollars in fees each year to accept credit cards. An airline testified that its credit card costs were *twice* as much as its domestic labor costs. Ikea testified that the only costs that exceed credit card costs are labor, advertising, and rent.

133 Empirically, evidence suggests that when merchants accept payment cards, they raise prices. See Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv J Legis 1, 28 (2008) ("The limited empirical evidence on how products

themselves point out, these high costs of interchange are "reflected" in the high retail prices that consumers pay.[134]

The inability to adjust prices to reflect the costs of interchange harms consumers in two ways. First, within the credit card transaction, card users are "deprived of the right, as economic actors, to decide for themselves whether the benefit of rewards is worth increased prices."[135] Practically, this leads to an overuse of credit cards because consumers do not internalize the actual cost of credit when making the transacting decision. Professor Adam Levitin makes this point: "[C]onsumers never internalize the costs of their choice of payment system. Merchant restraints thus encourage more credit card transactions at higher price than would occur in a perfectly efficient market."[136]

Second, restraints on merchant price discrimination harm consumers because they lead to cross subsidization by those who transact with cheaper payment instruments (cash, check, debit) of those who transact with credit, who tend to be richer and more financially sophisticated.[137]

The cross subsidization of credit users by their non-credit counterparts has devastating consequences. It is regressive: in the extreme, "a lower-income shopper who pays for his or her groceries with cash or through [food stamps] . . . is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base."[138] The magnitude of this cross subsidy is significant; every year, households who earn more than $150,000 annually receive an estimated subsidy of $756 from households earning less than $20,000 through credit card rewards.[139] But the harm to these consumers from contractual and legal barriers to differentiated retail pricing cannot be captured by antitrust analysis because they are outside of the credit card market, however broadly it is defined.[140]

are priced indicates that when merchants accept credit cards, they are likely to raise prices for all consumers, and that this creates a highly regressive cross-subsidization among consumers.")

134 Retail Litigation Center Brief at *11 (cited in note 132).

135 Id at *12.

136 Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L Rev 1321, 1404–05 (2008).

137 Id at 1356.

138 *American Express Co*, 88 F Supp 3d at 216–17.

139 Kristina Cooke, *Credit Card Fees Transfer Wealth to Rich, Study Finds* (Reuters, July 26, 2010), archived at https://perma.cc/98XM-56ZM.

140 Perhaps because they use cash or debit cards, which are substitutes for credit, they "count" from the perspective of the antitrust inquiry. But even the consideration of

The cross subsidization by cash and check consumers of their credit counterparts means that, absent any antitrust considerations, the merchant restraints at the heart of the *AmEx* decision can be reined in on consumer protection grounds.[141]

B. UDAAP Authority

Section 1031 of the Dodd-Frank Act provides the CFPB with the authority to intervene to prohibit "unfair, deceptive, or abusive acts or practices" (UDAAPs).[142] Practices can be unfair, deceptive, and abusive, but each is governed by a different standard. If the CFPB observes a UDAAP, it can proceed by commencing litigation in a federal court or before an administrative law judge under the Administrative Procedure Act.[143]

1. Unfair practices.

An act or practice is unfair when (1) it "causes or is likely to cause substantial injury to consumers," (2) the injury "is not reasonably avoidable by consumers," and (3) the "injury is not outweighed by countervailing benefits to consumers or to competition."[144] Substantial injury typically means monetary harm, and

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substitutes is not as a potential source of consumer harm; but instead whether consideration of a properly defined group of substitutes "might strengthen or weaken any inference of power drawn from market share." Hovenkamp, 2019 Colum Bus L Rev at 59 (cited in note 16).

Large merchants are opting out of the settlement with Visa and Mastercard to sue for the right to accept basic cards and reject rewards cards, focusing precisely on this issue:

> Amazon and Target have a surprising argument to make: The proliferation of rewards-rich credit cards is bad for consumers. They are suing for the right to pick and choose which Visa and Mastercards they accept. They want to be able to reject the richest rewards cards—cards like Chase Sapphire Reserve, which offer generous cash back, points, and other perks, and which come with the highest transaction fees charged to merchants. They say, if they obtain this right, they'll be able to charge lower prices to shoppers.

Josh Barro, *Are Other People's Credit-Card Rewards Costing You Money? Amazon and Other Retailers Believe So, and They're Going to War Against High-End Cards* (New York Magazine, Oct 16, 2018), archived at https://perma.cc/B2RS-XYSC.

141 Professor Levitin alludes to this in *Priceless? The Social Costs of Credit Cards*: "Although merchant restraints should be banned on antitrust grounds alone, there is also a separate consumer protection and social policy case to be made against them." Levitin, 45 Harv J Legis at 27 (cited in note 133).

142 See 12 USC § 5531.

143 Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev Bank & Fin L, 321, 358 (2013).

144 12 USC § 5531(c)(1)(A)–(B).

a risk of concrete harm is often sufficient to merit UDAAP intervention.[145] These injuries cannot be offset by countervailing benefits, which could include "lower prices to the consumer or a wider availability of products and services."[146]

CFPB enforcement actions shed light on the types of practices that are considered unfair. In one case, the CFPB alleged that GE Capital engaged in an unfair practice by failing to ensure its subsidiaries accurately conveyed information about the cost of credit (they misstated the terms of promotional credit offerings).[147] In another, JPMorgan engaged in an unfair practice by selling "Identity Protection Products" in which the bank, through third-party vendors, monitors information reported at credit agencies.[148] Many consumers who bought the product did not complete enrollment and so were paying for a product without receiving its benefits.[149] In yet another enforcement action, the CFPB contended that AmEx unfairly marketed its "Lost Wallet" products.[150] These too required additional activation, and yet, although initial solicitation calls were made in Spanish to Puerto Rican customers, follow-up materials were sent only in English.[151] Consequently, only 40 percent of customers who enrolled registered any additional items.[152]

These examples suggest how merchant restraints can be challenged as "unfair" card network practices as well as the pitfalls of this approach. On the one hand, these examples demonstrate that the standard for "substantial injury . . . not reasonably avoidable" is a broad one.[153] The CFPB successfully relied on this authority to enter into consent orders with substantial financial penalties and new industry requirements even in cases when

145 Consumer Financial Protection Bureau, *Unfair, Deceptive, or Abusive Acts or Practices* *2 (Oct 1, 2012), archived at https://perma.cc/4BW3-M8QH.

146 Id at *3.

147 Consent Order, *In the Matter of GE Capital Retail Bank, CareCredit LLC*, No 2013-CFPB-0009, *2–6 (CFPB filed Dec 10, 2013), archived at https://perma.cc/QQP2-4JVF.

148 Consent Order, *In the Matter of JPMorgan Chase Bank, NA and Chase Bank USA, NA*, No 2013-CFPB-0007, *3–5 (CFPB filed Sept 19, 2013) (available on Westlaw at 2013 WL 9008326).

149 Id at *4–5.

150 Consent Order, *In the Matter of American Express Centurion Bank Salt Lake City, Utah*, No 2013-CFPB-0011, *4–10 (CFPB filed Dec 24, 2013) (available on Westlaw at 2013 WL 9008329).

151 Id at *9–10.

152 Id at *10.

153 See 12 USC § 5531(c)(1)(A).

harm seems to be reasonably avoidable, for example by completing enrollment to activate products purchased.[154]

Substantial harm often means monetary harm. Antisteering provisions cause substantial harm to consumers in the credit card market because these consumers lose out on the opportunity to bargain with merchants to capture the surplus from lower interchange costs.[155] They also cause substantial harm to consumers *outside* the credit card market. These monetary losses are quantifiable: the average consumer whose income is less than $20,000 loses more than $20 annually from restrictions on differential pricing for payment instruments.[156] The six largest card issuers spend around $25 billion per year on credit card rewards.[157] This is a direct transfer to the wealthy, who transact with these cards and receive generous kickbacks from the poor, who do not.

Two aspects of the analysis will be less clear-cut. First, when a financial institution practice is targeted as unfair, the inquiry tends to focus on whether substantial harm is caused *to the consumer of the allegedly unfair product*. There does not appear to be precedent for a practice being unfair for the substantial harm it imposes on consumers generally rather than those specifically in a product market. Second, it will be challenging to weigh this substantial harm against the benefits that accrue to consumers in this market in the form of credit card rewards. Doing so will be a novel use of UDAAP authority, but the CFPB can argue that the relevant consumer can be outside of the direct credit card transaction being regulated. For that consumer, there will be no need to weigh countervailing benefits because that consumer definitionally cannot avail herself of any of the benefits of rewards cards if she is transacting with a payment method (cash, check, debit card) that is cheaper for merchants to process. Theoretically, the consumer could avoid this harm by herself transacting with a rewards cards, but this seems unlikely to meet the "reasonable avoidance" threshold because many of the harmed consumers do not qualify for attractive rewards cards.

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154 See Consent Order, *In re JPMorgan Chase Bank, NA* at *4–5 (cited in note 148).

155 See Hovenkamp, *Platform Antitrust* at *11–12 (cited in note 16).

156 See Cooke, *Credit Card Fees Transfer Wealth to Rich, Study Finds* (cited in note 139).

157 *Spending on Credit Card Rewards Has Exploded* (cited in note 28).

2. Deceptive practices.

An alternative is the use of authority to regulate deceptive practices. This is the most commonly cited UDAAP that prompts CFPB enforcement actions,[158] but it is less obvious how this authority applies in the merchant restraint context. A practice is deceptive when there is a "representation, omission, act, or practice that misleads or is likely to mislead the consumer."[159] Examples include material misrepresentations, such as advertising that insurance would cost "only a few pennies a day" when the average cost is $12.55;[160] enrolling consumers in add-on credit offerings without obtaining clear affirmative consent and providing information about the terms and conditions of the product;[161] or misrepresenting to consumers that they are receiving a "courtesy call" when in reality the bank is making an outbound sales call.[162] In the merchant restraint context, card networks are not misrepresenting processing costs to either merchants or consumers.

Some card networks, like American Express, tend to be less public about the rates they charge merchants that accept their cards. This could potentially give the CFPB grounds for action because, historically, omissions can be deceptive as well: omitting the material fact that enrolling in "Payment Protection" or "Identity Theft Protection" programs constituted agreement to purchase these products constitutes a deceptive act;[163] so too does telling consumers a promotional card is a "no interest" card rather than a deferred-interest card.[164] However, this can be complicated, as it is unclear that withholding a price from consumers causes harm in the same way telling consumers "a card has no interest" rather than "requires deferred interest payments" does. Even if made aware of the price *to the merchant* of transacting

158 See Levitin, 32 Rev Bank & Fin L at 365 (cited in note 143).

159 CFPB, *Unfair, Deceptive, or Abusive Acts or Practices* at *5 (cited in note 145).

160 Consent Order, *In re Dealers' Financial Services, LLC, Lexington, Kentucky*, No 2013-CFPB-0004, *5 (CFPB filed June 26, 2013) (available on Westlaw at 2013 WL 9008325).

161 Consumer Financial Protection Bureau, *Marketing of Credit Card Add-on Products*, CFPB Bulletin 2012-06 *1 (July 18, 2012), archived at https://perma.cc/3B64-GQ28.

162 Joint Consent Order, Order for Restitution, and Order to Pay Civil Monetary Penalty, *In the Matter of Discover Bank, Greenwood, Delaware*, No FDIC-11-548b; FDIC-11-551K; 2012-CFPB-0005, *3 (FDIC & CFPB filed Sept 24, 2012) (available on Westlaw at 2012 WL 11430188).

163 Id at *1–3.

164 Consent Order, *In the Matter of GE Capital Retail Bank* at *3 (cited in note 147).

with this payment instrument, absent any ability of the merchants to surcharge them for the processing costs, this omission does not cause the card-using consumer direct harm. In fact, the card-using consumer benefits relative to those who transact with other payment methods because she receives rewards.

Interestingly, some contend that price differentiation by merchants may be deceptive to consumers. For example, if a sticker price listed the cash price of a product, but the merchant was permitted to (and chose to) surcharge consumers, the surprise upcharge for credit consumers may be deceptive. These worries are overstated.[165] Should this be a concern, there is a relatively straightforward "fix": the approach taken in New York is that merchants can surcharge only if they post the cash price of goods without also posting the higher (surcharge) price charged to credit customers.[166]

3. Abusive authority.

Dodd-Frank makes it unlawful for service providers to engage in "abusive" acts or practices that "materially interfere[ ] with the ability of" consumers to understand terms of consumer financial products or take unreasonable advantage of "a lack of understanding on the part of the consumer."[167] The abusive prong is the most "novel" of the CFPB UDAAP authorities.[168] Some argue it "opens wide all manner of after-the-fact excuses for rewriting conditions of transactions entered into by customers who had complete information and competitive alternatives."[169] In reality, most "abusive" practices also tend to be either unfair or deceptive,

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165 Said another way by Levitin, "Ultimately, however, this argument should be rejected as a red herring. Consumers deal with such price differentials on a regular basis. Consumers constantly confront sales, coupons, and special offers." Levitin, 45 Harv J Legis at 21 (cited in note 133).

166 Barbara S. Mishkin, *Parties in Case Challenging Constitutionality of NY "No Credit Card Surcharge" Law Jointly Seek Dismissal of Complaint and Appeal* (JDSupra, Jan 11, 2019), archived at https://perma.cc/7PUJ-3ZSK. This is an interesting resolution in this case. Merchants are free to surcharge consumers as long as they post baseline and surcharge prices; but the state's anti-surcharge law remains on the books and is not overturned as an unconstitutional infringement on free speech.

167 12 USC § 5531(d).

168 See Levitin, 32 Rev Bank & Fin L at 337 (cited in note 143).

169 Id at 337 n 84 (quoting Leslie R. Andersen of the American Bankers Association). In fact, recently former CFPB Director Mick Mulvaney commenced rulemaking requiring that the CFPB define the abusive standard as he proclaimed that "[r]egulation by enforcement is done." Hannah Lang, *CFPB Writing Rule to Define "Abusive" Standard: Mulvaney* (American Banker, Oct 15, 2018), archived at https://perma.cc/7F64-TZZA.

making this prong operationally less important than critics contend.[170]

In our particular setting, it is conceivable that an abusive practices argument could be made against surcharge restraints. The structure of interchange markets mean that consumers pay higher retail costs because they (collectively, as a group) do not understand the costs of payment processing. This may lead to socially inefficient overuse of credit cards. Since credit cards link transacting and borrowing, the result could be more indebtedness than a consumer who understood the full cost of credit transacting would undertake. However, surcharging restraints are not as obviously "abusive" as they are "unfair."

V. CAVEATS

Even if consumer protection authority can be used to tackle card network prohibitions on surcharging—like the antisteering provisions at the heart of *AmEx*—limits on the ability of merchants to pass processing costs through to consumers remain, both legally and practically.

A. Legal Restraints on Surcharging

Amendments to the Truth in Lending Act[171] permit merchants to offer discounts for not transacting with credit cards.[172] In contrast, federal law previously banned surcharging for card usage explicitly, arguing that this ban is necessary to "allow[ ] the competitive free market to operate" and prevent consumer exploitation, so that the price they see posted is the one they pay and there is no possibility of being surprised at the register.[173] Although this surcharge ban expired in the 1980s,[174] several states enacted their own statutes to make it challenging for merchants to price differentially.

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170 Adam J. Levitin, *CFPB "Abusive" Rulemaking?* (Credit Slips, Oct 17, 2018), archived at https://perma.cc/RQQ5-LDWR. Levitin pointed out when Mulvaney announced the rule-making that "the CFPB has brought some 206 enforcement actions to date. Of these, the CFPB brought 'abusive' claims in only 27 cases, and in all but one of those cases, the actions alleged to be abusive were also alleged to be either unfair or deceptive." Id.

171 Title I of the Consumer Credit Protection Act (Truth in Lending Act), Pub L No 90-321, 82 Stat 146 (1968), codified as amended at 15 USC § 1601 et seq.

172 Kitch, 6 J L Econ & Org at 226 (cited in note 90).

173 Id at 227, quoting S Rep No 97-23, 97th Cong, 1st Sess 4 (1981), reprinted in 1981 USCCAN 74, 77.

174 Kitch, 6 J L Econ & Org at 226–28 (cited in note 90).

Today, these statutes are on the books in eleven jurisdictions: California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma, Texas, and Puerto Rico.[175] Interestingly, ten states (many of these same surcharge banners) explicitly allow consumers to receive discounts for cheaper payment instruments like cash (already permitted at the federal level), debit card, or check.[176]

Economically the surcharge versus discount debate is puzzling because there is no distinction between these pricing practices. If a pair of shoes costs $100, and one customer buys shoes with cash (no interchange fee) and another with credit ($2 interchange fee), the merchant receives only $98 from the card-paying customer but the full $100 from the cash payer. The merchant could set the $100 price and pass the cost of interchange to the card payer through a surcharge of $2, or list the price as $102 and give $2 as a discount to the cash payer. In a world where merchant discounts for transacting with low-cost payment instruments are permissible, it is not obvious that legal restraints on surcharges for transacting with high-cost payment instruments are relevant.

Yet some consumer advocates argue that merchants are more reluctant to offer discounts than charge surcharges because, under a discount system, they must advertise a higher credit price; under a surcharge system, they can advertise a lower cash price.[177] They further assert that consumers' behavioral responses show that discounting and surcharging are not equivalent: because of loss aversion, consumers react more to potential losses, and so "credit-card surcharges are more effective than cash discounts at discouraging credit-card use among consumers."[178] This perhaps explains why, in the United States, discounts for transacting with cheaper forms of payment are uncommon, despite being legal. The exception to this general trend is the gasoline industry, in which cash discounts are commonplace.

[175] *Credit or Debit Card Surcharges Statutes* (National Conference of State Legislatures, Oct 13, 2016), archived at https://perma.cc/TGW8-ME8Z.

[176] California, Colorado, Connecticut, Maryland, Massachusetts, Nevada, Oklahoma, Washington, Wisconsin, and Wyoming (as well as Puerto Rico). Id.

[177] See Kitch, 6 J L Econ & Org at 225 (cited in note 90).

[178] *Expressions Hair Design v Schneiderman*, 808 F3d 118, 122 (2d Cir 2015).

B. Practical Difficulties with Surcharging

It is worth noting that, even as we advocate for consumer protection authority to be used to provide merchants the ability to surcharge those who transact with expensive rewards cards, it is not obvious how consumers will respond to such differential pricing. Many argue consumers respond more to potential losses and so are most likely to switch to forms of payment with low or no merchant processing fees (for example, cash) when they are told that they will be up-charged rather than told that they will receive discounts.[179]

However, when merchants are permitted to surcharge, they tend to be slow to do so. In Australia, the Reserve Bank removed impediments to surcharging in 2003; yet by 2006, only 7 percent of merchants surcharged consumers, due to fear of "public backlash" and "reputation[al] damage."[180] In the United States, despite settlements with Visa and Mastercard that allow surcharging to some extent, large merchants like The Home Depot, Walmart, and Target are explicit that they have no plans to increase prices for credit users because doing so feels punitive and is likely to drive away customers.[181] A restaurant executive voiced the following concern: "[C]ustomers might see it as another way you're trying to get at them."[182] Instead of surcharging credit users, he suggested that "you have to take the [interchange] hit, or make it up by adjusting your prices."[183]

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179 Id.

180 Joanna Stavins and Huijia Wu, *Payment Discounts and Surcharges: The Role of Consumer Preferences* *3 (Federal Reserve Bank of Boston Research Department Working Paper No 17-4, Feb 14, 2017), archived at https://perma.cc/323Z-ULPJ.

181 See Lorraine Mirabella and Eileen Ambrose, *Retailers May Charge Fee to Customers Paying with Credit Cards* (Baltimore Sun, Feb 24, 2013), archived at https://perma.cc/MBY4-Z3MC.

182 Stephanie Clifford and Stephanie Strom, *Merchants Considering Credit Card Surcharges* (NY Times, July 16, 2012), archived at https://perma.cc/5QFE-NM98.

183 Id.

Survey evidence confirms that merchants are appropriately skeptical of the desirability of surcharging. Consumers were asked versions of the following two questions:

1. Imagine that you are planning to buy $10 (or $100, depending on the survey variant) of groceries with a credit card. The grocer tells you that if you pay in cash instead, you will receive a 5% *discount*.
2. Imagine that you are planning to buy $10 (or $100, depending on the survey variant) of groceries with a credit card. The grocer tells you that if you pay with a credit card, a 5% *surcharge* will be added to your bill.[184]

If you do not have cash, how will you pay? (Figures 4 and 5 below)
If you have cash, how will you pay? (Figures 6 and 7 below)

[184] It is important to point out that these are not perfectly economically equivalent cases. In the first question, the cheaper option is paying with cash, which results in groceries costing $95, versus $100 with a credit card. In the second question, the cheaper option means that groceries cost $100, versus $105 with a credit card. The dollar savings are of course identical in both cases. I chose this option rather than alternatives, for example, "You are planning to buy $95 of groceries. The grocer tells you that if you pay with cash, a $5 surcharge will be added to your bill." The issue with this approach is that survey respondents may (mistakenly) believe that a $5 flat fee is the consequence of credit usage, which is a much more punitive surcharge than a 5 percent fee.

FIGURE 4: NO CASH, RESPONSE TO 5% DISCOUNT/SURCHARGE, ALL PURCHASES[185]

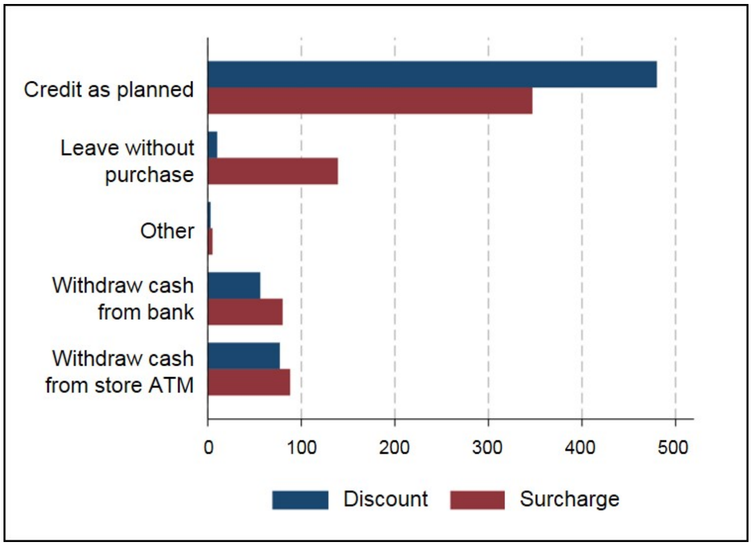
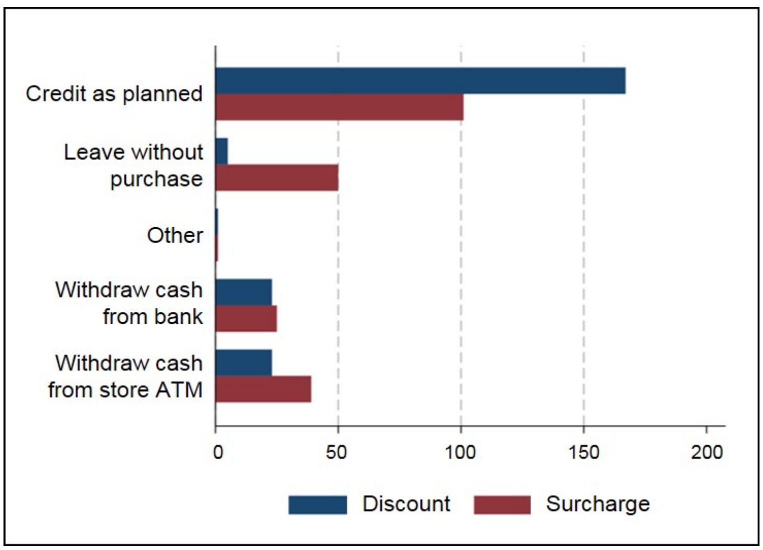


FIGURE 5: NO CASH, RESPONSE TO 5% DISCOUNT/SURCHARGE, $100 PURCHASE[186]



[185] Note: Author's calculations. Survey results from Mechanical Turk survey of nearly 1,300 consumers in the United States (data on file with author).

[186] Note: Author's calculations. Survey results from Mechanical Turk survey of nearly 1,300 consumers in the United States (data on file with author).

Consumer responses reveal interesting patterns that illustrate the complexity of surcharging in practice. Recall that surcharging credit users and giving cash payers a cash discount are economically equivalent. However, almost all consumers who miss out on the discount are unbothered and complete their transactions using available credit cards, despite missing out on a 5 percent discount: Fewer than 3 percent leave the store without completing their transaction because they will miss out on a cash discount. In contrast, nearly 20 percent of consumers leave the store rather without completing their transaction if it results in a 5 percent surcharge.

As such, merchants are correctly concerned that surcharging means losing customers, at least in a world where surcharging is not universal. The unpopularity of surcharging is interesting given the tremendous investment by merchants to fight antisurcharging statutes in credit card contracts as well as state and federal laws. One plausible rationale is that surveys of consumers today capture reaction to current pricing practices where merchants rarely surcharge consumers; consumers can therefore avoid rare surcharges by purchasing from a different merchant. If surcharging becomes the norm, however, credit users will have no choice but to bear higher fees or switch payment instruments. This is substantially the case in Australia,[187] and was also in Europe until recent regulation.[188] However, if large domestic retailers shy away from differential pricing for fear of antagonizing their customers, it is possible that more aggressive interventions—like banning the consumer loyalty programs that precipitate use of expensive payment instruments—may be justified.

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187 Despite the slow introduction of surcharging, by 2010, nearly 40 percent of large Australian merchants surcharged consumers using credit. See Stavins and Wu, *Payment Discounts and Surcharges: The Role of Consumer Preferences* at *3 (cited in note 180).

188 Recent regulation banned surcharging but also capped credit interchange rates at levels significantly below those that prevail in the United States. See Claer Barrett, *Credit Card Surcharge Ban Comes into Force* (Fin Times, Jan 12, 2018), online at https://www.ft.com/content/e1bdfc9a-f6f7-11e7-88f7-5465a6ce1a00 (visited Jan 31, 2020) (Perma archive unavailable). See also *All You Need to Know About the EU Interchange Cap* (Adyen, Oct 14, 2015), archived at https://perma.cc/83VX-72MY.

FIGURE 6: HAVE CASH, RESPONSE TO 5% DISCOUNT/SURCHARGE, ALL PURCHASES[189]

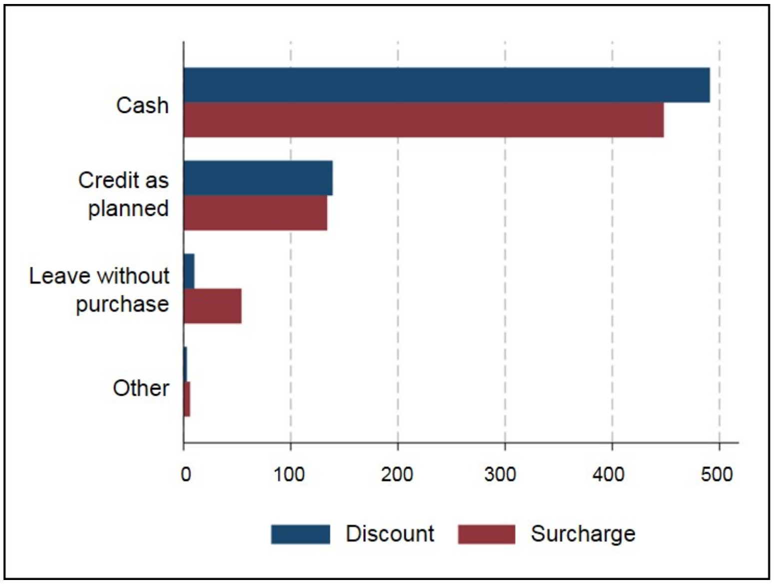
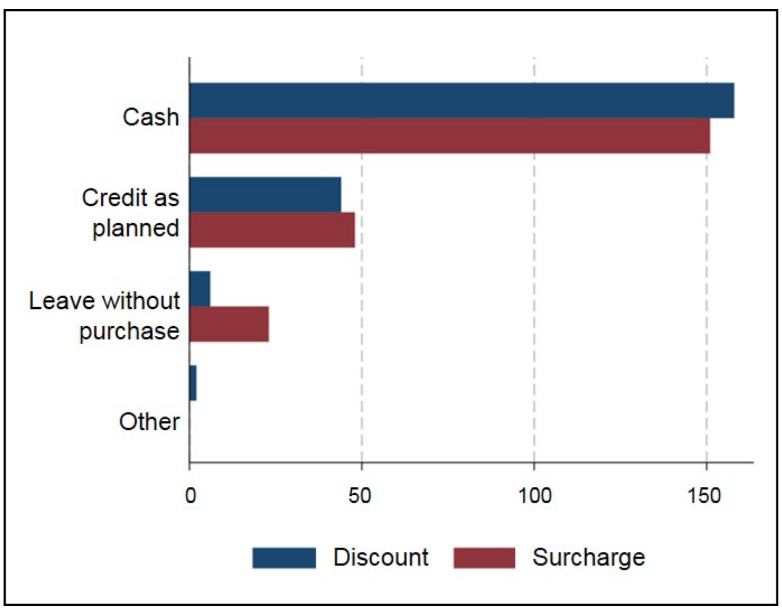


FIGURE 7: HAVE CASH, RESPONSE TO 5% DISCOUNT/SURCHARGE, $100 PURCHASE[190]



[189] Note: Author's calculations. Survey results from Mechanical Turk survey of nearly 1,300 consumers in the United States (data on file with author).

[190] Note: Author's calculations. Survey results from Mechanical Turk survey of nearly 1,300 consumers in the United States (data on file with author).

Economists and antitrust scholars have long debated how best to assess competition in two-sided markets, which are distinct from traditional markets because platforms must choose both a price and a price structure. Practically, in two-sided markets, high or rising prices on one side of the market are not necessarily indicative of an anticompetitive market failure. Instead, consideration of total revenue and total cost on both sides of the market is necessary, lest we mistakenly apply one-sided logic to two-sided markets.

The Supreme Court's decision in *AmEx* embraced this broader market definition, shifting the antitrust paradigm for platform cases. Despite resounding criticism by eminent antitrust scholars, *AmEx* is law and makes it unlikely that antitrust is the most promising tool to rein in two-sided platforms going forward.

This Essay advocates that, at least in the payments market, consumer protection authority is best equipped to tame this two-sided market. Dodd-Frank provided the CFPB with broad authority to restrict "unfair, abusive, or deceptive" acts and practices. The antisteering provisions at the heart of *AmEx* are unfair both to consumers in the credit card market—who lose out on potential retail savings from using lower-interchange cards—and consumers outside of the credit card market, who subsidize the rewards that credit users receive. This regressive cross subsidization is an important consequence of card networks' pricing practices, but one that antitrust necessarily ignores in its focus on narrowly defined product markets.

Of course, the payments market is but one example of a two-sided platform implicated by the Court's recent decision in *AmEx*. It will be harder to bring antitrust cases against Uber, eBay, and Amazon as well, or against essentially any two-sided market where there is a "simultaneous transaction" that links both sides. The CFPB's authority is not a panacea because its power is limited to providers of consumer financial services.

That said, the general push of this Essay—to broaden our conception of a two-sided market—applies to platforms beyond payment networks. Just as it is a mistake to consider one-side of a two-sided market in isolation, it is a mistake to think of one set of consumers in isolation. Determining whether a market is well or poorly functioning requires engaging with externalities—both positive and negative—on consumers outside of the market. Consumer protection, rather than competition policy, is well suited to this far-reaching analysis.