The Looming Crisis in Antitrust Economics

Herbert J. Hovenkamp

University of Pennsylvania Law School

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

Part of the Antitrust and Trade Regulation Commons, Economic Policy Commons, Economic Theory Commons, Industrial Organization Commons, Law and Economics Commons, Law and Politics Commons, Policy Design, Analysis, and Evaluation Commons, Public Policy Commons, and the Supreme Court of the United States Commons

Repository Citation
Hovenkamp, Herbert J., "The Looming Crisis in Antitrust Economics" (2020). Faculty Scholarship at Penn Law. 2151.
https://scholarship.law.upenn.edu/faculty_scholarship/2151

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

Herbert Hovenkamp*

Contents

INTRODUCTION ................................................................. 1
APPLE V. PEPPER AND PASSED-ON HARM ........................................ 2
   Why an Overcharge?......................................................... 4
   Unwarranted Exceptionalism in Antitrust Damages ......................... 7
   Innovations in the Computation of Passed on Damages .................... 10
AMERICAN EXPRESS AND RATIONAL ECONOMICS .......................... 12
   Balancing Harms and Benefits on Two-Sided Markets .................... 13
   Market Definition and Extra-Market Effects ............................ 15
   Assessing Power on Two-Sided Platforms ................................ 22
   Inferring Power from Conduct ........................................... 27
   Market Power in Vertical Cases ......................................... 29
   The Meaning of Free Riding .............................................. 34
   Marginal vs. Total Effects ................................................ 35
   Competition and “Welcome Acceptance” .................................. 41
ANTITRUST AND THE PROGRESSIVE WING OF THE PRESIDENTIAL CAMPAIGN ... 43
   Mergers and Consumer Welfare ........................................... 43
   Segregating Platform Sales .............................................. 46
CONCLUSION ........................................................................... 52

INTRODUCTION

As in so many areas of law and politics in the United States, antitrust’s center is at bay. It is besieged by a right flank that wants to limit antitrust even more than it has been limited over the last quarter century. On the left, it faces revisionists who propose significantly greater enforcement.

*James G. Dinan University Professor, Univ. of Pennsylvania Law School and the Wharton School.
One thing the two extremes share is denigration of the role of economics in antitrust analysis. On the right, the Supreme Court is increasingly revealing that fundamental economic analysis no longer occupies the central role that it once had. On the left, some proposals by Democratic presidential contenders seem to be uninformed or indifferent about how their proposals will affect important participants in the economy.

The antitrust laws speak of the conduct they prohibit in unquestionably economic terms, such as “restraint of trade,” “monopoly,” or lessening of “competition.” They do not embrace any particular economic ideology, such as the Chicago School or institutionalism. Nor do they require the use of any particular economic model, such as perfect competition or monopolistic competition. This openness gives policy makers a great deal of room, but it is not an invitation to economic nonsense. Antitrust economics should be a tool for determining how a practice affects competition, which requires an assessment of who is injured by the practice, how, and by how much. Economics should not be a tool for picking a winning interest group and then manipulating the doctrine to get that result.

This paper first examines the way that the Supreme Court’s emergent, more conservative majority addresses issues of antitrust economics, focusing on its two most recent decisions at this writing. Then it looks at the sharply contrasting approaches of some of the Democrat presidential candidates for the 2020 election.

APPLE V. PEPPER AND PASSED-ON HARM

In Apple, Inc. vs. Pepper both the majority opinion and the dissent were detached from the economic issue that has dominated indirect purchaser antitrust jurisprudence in the United States for forty years – namely, how should the law reflect that injuries from a cartel or monopoly overcharge are passed down through the distribution
chain from one purchaser to the next, although in varying degrees.¹ The questions that the Supreme Court confronted in *Illinois Brick Co. v. Illinois*² more than forty years earlier had to do with difficulties in estimating passed on damages, and the impact of alternative rules on deterrence of antitrust violations.

Since that time we have made important advances in the measurement of indirect purchaser damages, many of which do not require the stage-by-stage computation of pass-on at all.³ Several American states⁴ as well as the EU and its member states have embraced various methodologies for addressing the problem. Right now the state of EU policy on the question is far more advanced than in the United States.⁵ The EU has approached the problem as an empirical one of efficient and reasonably accurate damages measurement. It has largely avoided the ideological baggage that has weighed down indirect purchaser jurisprudence in the United States.

¹Apple, Inc. v. Pepper, 139 S.Ct. 1514 (2019).
²*Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Court held that its decision followed logically from *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), which had held that a defendant in an antitrust case could not reduce its liability by showing that the plaintiffs had not absorbed the entire overcharge but rather passed it down to its own purchasers. On the economics and law of *Illinois Brick*, see 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP, ROGER D. BLAIR & CHRISTINE PIETTE DURRANCE, ANTITRUST LAW ¶346 (4th ed. 2015).
⁴On state antitrust indirect purchaser rules, see 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶2412d (4th ed. 2019).
⁵See Guidelines for National Courts on How to Estimate the Share of Overcharge which was Passed on to the Indirect Purchaser, 2019 O.J. (C 267), available at https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html.
By contrast, the Supreme Court’s suggestion in *Illinois Brick* that limiting damages to direct purchasers would improve deterrence has never been validated and must be counted as dubious. It seems more doubtful today than it was when the Supreme Court stated it in 1977. Overall, the economic case for the indirect purchaser rule is significantly weaker today than it was at that time. A distinctive feature of the Supreme Court’s indirect purchaser rule is that it turns into a question of law what is rightfully a question of factual economic analysis. A troublesome thing about *Apple vs. Pepper* is not that the court was incorrect in its interpretation of economic developments subsequent to *Illinois Brick*, but that it did not engage them at all. For all intents and purposes, *Apple v. Pepper* broke the link between the indirect purchaser rule and the economics of passed on damages.

*Why an Overcharge?*

One technical problem with the law of purchaser damages actions under *Illinois Brick*, is the nearly universal assumption that damages should be measured at each stage by an overcharge and not for lost profits based on reduced sales. The statute does not compel this result. Section 4 of the Clayton Act merely authorizes recovery

---

for “injury … sustained” by the violation and gives a damages action to “any person.” For intermediaries in the distribution chain – that is, for purchasers other than the final consumer -- lost output is typically a more accurate measure of injury and generally does not require apportioning among the parties.8

When a cartel or monopolist increases a product’s price it also reduces output.9 Just as the price increase, that output reduction is passed on through the distribution chain. All downstream firms are affected by both the loss in volume and perhaps by a reduced margin, or markup, on their sales of the cartelized good. In fact, the output reduction is a surer thing than the margin reduction. Further, in most cases measuring the passed on output reduction is easier than measuring the passed on overcharge because it remains more uniform as it passes through the distribution chain.

For example, suppose a distribution chain contains four stages: a manufacturer, distributors, dealers, and consumers. If a manufacturing cartel covering the entire market increases price, the distributor and the dealer will each pass on something between zero and more than 100% of that overcharge depending on markup policies and the amount of competition they face. The phrase “more than 100%” is apt. If a firm uses a standard markup formula it may actually increase its margin as a result of the cartel. For example, suppose a grocer routinely adds 30% to the wholesale price of canned vegetables. If the wholesale price is competitive at $2.00 it will add 60 cents. However, if the wholesale price is secretly cartelized to $2.50 it will add 75 cents. Far from absorbing part of the overcharge, this retailer actually obtains higher margins under the cartel and thus passes on more than 100% of the overcharge. How much it actually passes on is

8Hovenkamp, Apple vs. Pepper, supra note __.
9See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §1.2a (6th ed. 2020), or any text in basic microeconomics or price theory.
an empirical question readily subject to expert testimony, but it will vary from one situation to another.

By contrast, if this same cartel reduces output from a competitive level of 100 units to 80 units, the aggregate distributors’ sales will go from 100 units to 80 units, as will the retailers’, all the way down to the final consumer. Sometimes substitution and variable proportions will complicate this result. For example, the grocer might respond to reduced sales volume of canned beans by allocating more shelf space to peas or carrots. An overcharge measure will not reflect these substitutions because it looks only to the bean purchases. Likewise, if a cartel of bicycle manufacturers reduces the number of bicycles by 20% from the previous competitive level, their aggregate distributors would resell 20% fewer bicycles, as would the retailers below them. However, these firms might make up their losses by selling more scooters or roller skates.10 By contrast, a lost profits measure will consider how the dealer’s behavior overall changed its profits, accounting for both lost margin and lost sales.

In principle, there is no reason to think that output losses downstream are more difficult to measure than margin losses. Further, in a wide variety of situations intermediaries are able to pass on close to 100% of the price increase, but they will nearly always suffer as a result of the output reduction. For nearly all intermediaries, injury is best measured not by an overcharge but rather by lost profits – that is, the money that they would have made on the unmade sales. This measure of harm is common in all antitrust cases alleging exclusionary

---

10 Other intermediaries might substitute in more complex ways. For example, in response to a steel cartel, automakers might use fewer steel parts and more plastic or aluminum parts. However, overcharge damages measurement will be affected in the same way.
practices.\textsuperscript{11} It is also common in a wide range of nonantitrust statutory and common law claims that involve injured business plaintiffs.\textsuperscript{12}

Lost profits are theoretically measured by the reduction in sales multiplied by the margin on the unmade sales. That measure picks up both changes in the markup and the quantity. This number would then have to be adjusted for changes in expenses, plus perhaps an offset for substitute products.\textsuperscript{13} In practice experts often rely on “before-and-after” or “yardstick” models, which compare the situation in the violation market to some other market setting.\textsuperscript{14} The Restatement of Torts calls for similar measures for business injuries.\textsuperscript{15}

\textit{Unwarranted Exceptionalism in Antitrust Damages}

When it comes to losses by business plaintiffs, \textit{Illinois Brick} is a piece of obsolete legal exceptionalism that came out of a period when many judges and scholars believed that antitrust was overdeterrent and that courts needed to apply the brakes to broad damage claims. That is hardly the case anymore today. Indeed, in the particular case of price fixing the law is significantly underdeterrent.\textsuperscript{16} Thanks to four decades

\textsuperscript{13}See 2A Areeda, Hovenkamp, Blair & Durrance id., ¶397.
\textsuperscript{14}See discussion infra, text at notes __.
\textsuperscript{15}E.g., Rest. (2d) Torts §549 (lost profit damages for fraudulent misrepresentation); §774A (lost profit damages for tortious interference with contract); §821C (public nuisance); §937 (conversion).
\textsuperscript{16}E.g., see OECD, Cartel Sanctions Against Individuals (2003); Peter G. Bryant & E. Woodrow Eckard, Price Fixing: The Probability of
of litigating under state antitrust law and a large economic literature, it seems clear that it is time for the law of damages to treat plaintiffs in antitrust cases in the same way it treats injured parties in the more general run of business cases. While measuring lost profits in all these cases present complexities, they are no greater in antitrust cases than for other types of injuries.

Antitrust policy needs to be less categorical and more empirical about assessing passed-on injury from monopolistic or cartel conduct. Depending on the types of evidence that are available and given a wide variety of market facts, the optimal methodology will vary from case to case, as the EU Guidelines on indirect purchaser damages recognize.\textsuperscript{17} In most cases except those involving final consumers, lost profits estimates will be superior to overcharge estimates because they reflect the impact of the violation on both margins and volumes. By contrast, the overcharge reflects only the impact on margins.

Perversely and incorrectly, reduced volume tends to reduce an intermediary’s damages if it is measured only by the overcharge. It can recover the overcharge only on the purchases actually made, which are fewer at the cartel or monopoly price. For example, suppose that two different cartels produce price overcharges of $1.00 per unit in a market that produced 100 units at the competitive price. One cartel yields an output reduction of 30 units while the other yields an output reduction of 40 units. By every economic measure, the second cartel causes greater harm to the economy and to the affected dealer, but that dealer will collect fewer damages because these will be limited to the overcharge on 60 (100 – 40) units rather than 70 (100-30) units.

By contrast, lost profit damages capture what is almost universally regarded as an element of injury in nearly all other business injury cases – namely, that the intermediary purchases less and thus


\textsuperscript{17}EU Guidelines, supra note __.
earns profits on a smaller number of sales. The dealer in the above example would collect lost profit damages that reflect the output reduction multiplied by the lost margin on each lost sale. This reflects the true injury caused by the cartel.

The one exception to the preference for damages based on lost profits is the final consumer who does not resell the product at all. For her, the overcharge is the best measure. There are other, more limited exceptions where the overcharge is the appropriate measure. One is where the price fixed good is a fixed cost to a business. In general, fixed costs cannot be passed on because they do not show up in marginal costs.18

For most antitrust exclusionary practices and the very large variety of damages cases involving torts, IP infringement, or other harmful activity we assess damages by permitting experts to provide models addressed to lost profits and evidence supporting them. Then judges evaluate the models for technical sufficiency and fit under the Daubert standards applied under the Federal Rules of Evidence.19


After that, the evidence can go to the fact finder. The same thing applies to indirect purchaser claims under state antitrust law.\textsuperscript{20}

\textit{Innovations in the Computation of Passed on Damages}

As litigation subsequent to \textit{Illinois Brick} has established in state antitrust cases, even when the overcharge measure is superior, the overcharge need not be computed at each stage of pass on.\textsuperscript{21} \textit{Illinois Brick} itself assumed that it did and did not even discuss alternative methodologies. Two years later William M. Landes and Richard A. Posner institutionalized that view in an article defending the decision.\textsuperscript{22}

The most common methodologies for estimating damages under both overcharge and lost profit theories are “before and after” and “yardstick.”\textsuperscript{23} In a “before and after” lost profits model, the expert typically uses regression analysis to examine profits prior to a violation, after its end, or both, discounting for other factors and estimating what the profits would have been during the violation.


\textsuperscript{21} See Hovenkamp, \textit{Apple v. Pepper}, \textit{supra} note __.


\textsuperscript{23} See 2A Areeda, Hovenkamp, Blair & Durrance, \textit{Antitrust Law, supra} note __, ¶395b (before-and-after and yardstick measures in overcharge antitrust cases cases); ¶397e,f (before-and-after and yardstick measures in lost profit exclusionary practice cases).
period. In a “yardstick” model the expert compares profits in the violation market with profits of a similarly situated firm in a different market. Neither method is necessary, however, if there are adequate data. For example, if the size of the output reduction and margins are known, estimation of lost profits is relatively straight forward.

Overcharge methodologies are similar except that the expert estimates the overcharge rather than lost profits. Once again, neither the before-and-after nor the yardstick methodologies for computing damages require that pass-on be computed at each stage. Rather, one can estimate damages directly by comparing prices at the violation level and the plaintiffs’ level in the two markets. For example, one might compare with the cartel market a different market assumed to be competitive, and then observe the differences in dealer prices in those two markets. We would then have an estimate of the amount of overcharge passed on to consumers without the need to estimate how much of the overcharge was absorbed by distributors or other intermediaries. Experts sometimes term this the “bottom across” model, rather than the “top down” model that attempts to compute pass on at each stage.

In Apple vs. Pepper, neither the majority nor the dissent engaged any of these issues. Indeed, both opinions appear to have

24See 2A Areeda, Hovenkamp, Blair & Durrance, Antitrust Law, supra, ¶397e.
25Id., ¶397f.
27For an explanation, see Hovenkamp, Apple v. Pepper, supra note __.
28Ibid.
abandoned the idea that *Illinois Brick* had anything to do with measuring passed on damages. For the majority, the only thing that mattered was that the plaintiffs purchased directly from the alleged violator. If one were to select a single buyer for damages, however, it would be more sensible to select the consumers, or the last purchasers in line, because they in most cases absorb the brunt of an overcharge and they are the only purchasers who are not in a position to pass anything on. Only for them is the overcharge a presumptively correct measure of damages. The *Apple* majority was correct to sustain the plaintiff’s action in that case, but that was a result of the pure happenstance that the alleged violator sold directly to the customer.

By contrast, the dissenters resurrected a doctrine of proximate cause that died with the marginalist revolution in economics, early in the twentieth century. Finally, neither the majority nor the dissenters ever mentioned deterrence, which is rightfully central to any economics-based theory of antitrust enforcement. In sum, the *Apple* v. Pepper indirect purchaser rule both ignored the deterrence question and seemed indifferent to who is actually injured by a cartel or monopoly overcharge.

**AMERICAN EXPRESS AND RATIONAL ECONOMICS**

The Supreme Court’s *American Express* decision\(^\text{31}\) did not turn its back on economic analysis in the way that the Court did in *Apple*. Rather, it ignored fundamentals and embraced a series of economically incoherent principles in the guise of applying antitrust economics. The majority 1) neglected the kind of transactional analysis that has become a hallmark of the economic approach to law; 2) put production complements into the same “relevant market”; 3) held that a relevant market must be defined in a vertical restraints case, even if the economic evidence supported a finding of market power based on more direct and generally more accurate measures; 4) completely


misunderstood the economics of free riding, which in the context of vertical restraints is a Chicago School invention; in this case, the defendant’s policies clearly made free riding impossible; and 5) lost sight of the fact that coherent economic analysis of any antitrust issue requires assessment of marginal rather than total effects.

**Balancing Harms and Benefits on Two-Sided Markets**

The Supreme Court majority’s analysis of two-sided platforms got off on the wrong track when it assumed that harms on one side, in the form of increased merchant prices, would be offset by benefits on the other, cardholder side.\(^{32}\) For some platform-related queries this is true. For example, measuring a platform’s costs or revenues requires looking at both sides. Over-the-air television or computer search engines that are free to users are not engaged in predatory pricing. They obtain their revenues from advertisers, which are the other side of the platform. Assessing a predation claim based on below cost pricing requires looking at both sides.

But this harm/benefit balance does not occur in every situation. Had the Court performed the kind of transactional analysis that Ronald Coase urged and that has become a hallmark of law and economics, it would have seen that the assumption of harms to merchants and offsetting benefits to cardholders did not apply in this case. In *The Nature of the Firm*, for example, Coase would identify a firm’s boundaries by looking at each transaction that the firm made, as opposed to activities it conducted inside the firm and for which no market transaction was necessary.\(^{33}\) If the Court had examined each relevant transaction in *AmEx*, it would have seen that the anti-steering rules harmed both sides.\(^{34}\)

\(^{32}\) *AmEx*, 138 S.Ct. at 2287-2288.


To illustrate, suppose that a $1000 purchase incurred a 3% ($30) merchant fee on the AmEx card, but a 2% ($20) fee on a competing card such as Visa. This difference creates $10 worth of bargaining room in which both parties can make a profit. That is, the merchant’s willingness-to-pay might be greater than the customer’s willingness-to-accept. For example, the merchant might offer the customer a $5 discount for using the cheaper card. If the incremental perks from using an AmEx card rather than a different card were worth less than $5 to the customer it would accept that deal, and both parties would be better off. The merchant would pay a lower transaction fee and a customer who accepted the offer would be getting a discount that was worth more to her than any extra benefit the AmEx card might offer. By contrast, if she valued the AmEx perks by more than $5, she would not accept the offer.

However, the anti-steering rule prevented this transaction from occurring. Far from harming one side while benefitting the other, the anti-steering rule harmed both the merchant and the cardholder who was willing to make the deal. It also harmed Visa, the card issuer who was unable to make the transaction even though its price was lower and it would have been the customer’s first choice in an unrestrained market. It did benefit AmEx – but these were not network benefits that needed to be assessed against losses elsewhere on the same platform. They were simply the benefits that accrued from being able to charge a price that was higher than the added value of any provided customer services without losing a sale. This number had nothing to do with the existence of a two-sided platform.

---

37 That is, looking at the previous example, the fact that the customer would prefer the offer of a $5 discount meant that she valued use of the AmEx card by less than $5, while AmEx’s excess merchant fee over the Visa card was $10.
Market Definition and Extra-Market Effects

The AmEx Court also held that both sides of a platform needed to be placed into the same “relevant market,” in violation of one of the most cardinal principles of economics since the time of Alfred Marshall or even Augustin Cournot – namely, that markets consist of close substitutes that can steal sales from one another, such that competition forces them to move toward the same price.\(^\text{38}\)

This meaning of the term “market” is essential, not merely to antitrust analysis, but to virtually all of economics. A “market” defines the group of firms that can profit from collusion,\(^\text{39}\) the scope of sales that give meaning to the term “monopolist,”\(^\text{40}\) the range of goods and services that people might regard as good substitutes for one another; the range of producers that a firm regards as its competitors for the purposes of deciding whether or not to enter, how much to produce, or what price to charge.\(^\text{41}\) For example, the Merger Guidelines used by

\(^{38}\) E.g., ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 384 (1890) [Book Five, Ch. 1] (“The more nearly perfect a market is, the stronger is the tendency for the same price to be paid for the same thing at the same time in all parts of the market”; and id. at 385: “(the market is “the whole of any region in which buyers and sellers are in such free intercourse with one another that the prices of the same goods tend to equality easily and quickly.” Marshall was translating AUGUSTIN A. COURNOT, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH, ch. 14 (1838).


\(^{41}\) Justice Breyer’s dissent found the majority’s new approach to market definition completely unjustified:

Missing from the majority's analysis is any explanation as to why, given the purposes that market definition serves in
the antitrust Agencies define markets by identifying the range of goods that are close substitutes. 42

Conceptually, the idea of a relevant market comes from partial equilibrium analysis in microeconomics, a tool that dates to the time of Alfred Marshall to evaluate market changes that affect the producers of similar goods in a common and observable way. 43 Defining a market in this fashion involves a working assumption that output and pricing of the goods inside the market influence one another strongly, while there are no effects between goods inside and goods outside the market.

Empirically of course this is not true. Even well defined markets have porous boundaries. The goods inside are affected by imperfect substitutes outside, as well as by complements. 44 Antitrust

42 HORIZONTAL MERGER GUIDELINES, supra note __, §4 (“Market definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.”)


44 Marshall himself understood this. See ALFRED MARSHALL, PRINCIPLES OF ECONOMICS xiv ([1890], 8th ed. 1949), defending the idea that economic analysis should examine a part of the market consisting of a single “commodity” over a restricted time period, assuming that changes within the observed market had no effect on things outside:

The forces to be dealt with are however so numerous, that it is best to take a few at a time; and to work out a number of partial
writers as well as economists have recognized this from the beginning, and in a number of ways. Nevertheless, by grouping close substitutes in this way and constructing a wall between these and more distant products, courts have been able to draw important conclusions about the existence of market power. As a result, this method of assessing power has become all but conventional in antitrust analysis, although recently tools have been developed that are more accurate and that make market definition approaches unnecessary in many circumstances.  

When transactions or other events outside the defined market have a measurable impact on transactions inside the market, they must be accounted for. Over the years antitrust litigation has confronted several approaches to the question of so-called “extramarket” effects. One of the most theoretical is the theory of “second best,” which relies on general equilibrium analysis to consider the impact that a practice might have on entities or events outside of the relevant market. For example, under second best theory the data might show a welfare improvement in a defined market, but there might be significant “out of market” effects that serve to make things worse off as a whole. The solutions as auxiliaries to our main study. Thus we begin by isolating the primary relations of supply, demand and price in regard to a particular commodity. We reduce to inaction all other forces by the phrase “other things being equal”: we do not suppose that they are inert, but for the time we ignore their activity. This scientific device is a great deal older than science: it is the method by which, consciously or unconsciously, sensible men have dealt from time immemorial with every difficult problem of ordinary life.


45See discussion infra, text at notes ___.
consensus today is that the general theory of second best has little application to antitrust analysis, despite some heroic attempts to make it so.\textsuperscript{47}

Another prominent use of partial equilibrium analysis is Oliver Williamson’s well known welfare tradeoff model, which assumed a single but unspecified market in which the welfare effects of reduced competition and increased efficiency would be felt.\textsuperscript{48} In using it, Williamson acknowledged:

Our partial equilibrium analysis suffers from a defect common to all partial equilibrium constructions. By isolating one sector from the rest of the economy it fails to examine interactions between sectors.\textsuperscript{49}

Judicial examination of out of market effects in merger analysis has also occurred. For example, a merger of multimarket firms might reduce competition in one market but increase it in another.\textsuperscript{50} One legal limitation is that §7 of the Clayton Act prohibits mergers that injure competition “in any line of commerce” and in any “section of


\textsuperscript{49} Williamson, Economies, supra, 58 AM. ECON. REV. at 23.

Those statements do not appear to permit trading harms in one market against gains in a different market. If a merger injures competition “in any line of commerce,” then under the statute it literally does not matter if it also produces benefits somewhere else. The 2010 Merger Guidelines take this position by requiring a showing that a merger “is not likely to be anticompetitive in any relevant market.”

Yet another example of extramarket effects is the theory of monopoly “leveraging,” or the idea that a firm can use its power in one market to obtain an advantage in a second market. The theory had a life of several decades, although it was not frequently accepted by courts. The Supreme Court’s decision in Spectrum Sports very likely put an end to it as a theory of action by requiring that there be a dangerous probability of success of monopoly in the second market. That effectively turned leveraging into part of the law of attempt to monopolize. However, Spectrum Sports did not dispose of the basic economic theory that a firm could use its power in one market to obtain

51 15 U.S.C. § 18 (condemning mergers where “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”).


54 See, e.g., United States v. Griffith, 334 U.S. 100, 107 (1948) (accepting the theory); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979) (accepting the theory but finding it inapplicable); Virgin Atlantic Airways, Ltd. V. British Airways PLC, 257 F.3d 256 (2d Cir. 2001) (lengthy discussion but rejecting it on the facts of this case); Intergraph corp. v. Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999) (largely rejecting the theory).

advantages or even to monopolize a second market. For example, while subsequent decisions such as Microsoft never spoke of leveraging, the theory of action was that a firm used power in one market (the Windows operating system) in order to exclude or injure competition in a different but complementary market (browsers).

A related and quite frequent use of effects outside a primary market is the law of tying arrangements. The tying and tied products in tying cases are usually complements, such as salt-injecting machines and salt, printers and ink cartridges, cameras and film, or computer operating systems and browsers or other applications. The theory is typically that a firm has significant market power in a primary market, and then uses tying to distort competition in the second, or complementary, market. In such cases we do not define a single market for the tying and tied products, which would be nonsensical. Rather, courts are asked to determine whether the defendant’s power in one market is sufficient to cause anticompetitive distortions in the second market, with monopoly being the most extreme one, and then whether it has actually done so. For example, a firm with a dominant share in a computer operating system market might be able to tie an internet browser and thereby foreclose, or exclude, rivals in the browser market.

Analytically related to tying is vertical mergers, which unite firms that stand in a supplier/buyer relationship, such as a manufacturer and one of its parts suppliers or an internet or cable

---

60 E.g., Fruehauf Corp. v. FTC 603 F.2d 345 (2d Cir. 1979).
In general, condemnation requires a showing that the merger tends to exclude rivals in the secondary market or else increase their costs. As with tying, we do not define a single market for both the upstream and downstream good and it would not be enlightening to do so. The Agencies’ 2020 Draft Guidelines for vertical merger enforcement adhere to this view, although they also call for more direct approaches that do not require a market definition at all.\(^{62}\)

In sum, antitrust has been dealing with effects that occur outside the boundaries of a defined relevant market for a long time and addressing such questions is hardly exceptionsl. Concededly, we do it imperfectly. Nevertheless, it is hardly news that offsetting pressures from a complementary good might affect the strength of an inference of market power. For example, the high price of fuel might limit the market power of automobile makers, or high compensation for Uber drivers might limit ridership.

But defining a relevant market for “automobiles/gasoline” or for “drivers/passengers” will not contribute one whit to our understanding of the situation, and will only serve to throw us off track. Defining the market the way the Court did in \textit{AmEx} simply made the market definition incoherent. It promises to expose the judicial system to thousands of dollars in wasted resources dealing with such questions as whether Uber drivers and Uber passengers, or physicians and patients, or search engine users and advertisers, are in the same relevant market. Further, it does this in perverse ways that contributes nothing of value, and undermines rather than strengthens the analysis of power. For example, if we began with a group of Uber drivers in St. Paul, the knowledge that there are 1000 additional drivers in nearby

\(^{61}\text{E.g., United States v. AT&T, 916 F.3d 1029 (D.C. Cir. 2019).}\)

Minneapolis would serve to weaken the inference of their power. By contrast, the knowledge that there were 1000 additional passengers in Minneapolis would serve to strengthen it. Putting all in the same market would require us to treat these two groups in the same way, even though their effects are precisely the opposite. This is worse than useless.

But the main point is that if one looks at the impact of the anti-steering rule there were no losses on the merchant side to be traded against gains on the cardholder side. There were only losses on both sides.

**Assessing Power on Two-Sided Platforms**

How should power be assessed for antitrust purposes in markets for two-side platforms such as AmEx? The inquiry needs to be manageable even though it can be quite technical. Further, the existence of different effects on the two sides of a digital platform, including feedback effects, can complicate the assessment. It is worth noting that we have always tolerated a significant amount of inaccuracy in market definition methodologies. Insistence on precision can become a costly rule of nonliability to the extent it produces too many false negatives. In this case the danger of false negatives must certainly be counted as greater than the danger of false positives. Further, traditional methodologies that require determination of a relevant market, as the Supreme Court required in this case, are predictably inaccurate, particularly in differentiated markets.

Traditional methods of estimating power on the basis of market share of a defined relevant market are termed “indirect.” As courts use them they do not really measure market power at all, but rather rely on an intuitive link between market share and market power. In fact, measuring power from share requires additional information about the elasticity of demand of the market in which the firm sells, plus the

---

63 *See* discussion *infra*, text at notes __. 

Electronic copy available at: https://ssrn.com/abstract=3508832
elasticity of supply of competing or fringe firms. Because most litigation does not produce these numbers and judges rarely discuss them in any technical way, our inferences of power from market share alone are necessarily crude.

Both elasticity numbers are relevant, however, and cannot be ignored. Further, many decisions discuss them, although almost always by using different terminology. For example, when a court doubts that a market is well defined because there seem to be good substitutes from outside the proposed market, it is talking about the market’s elasticity of demand. This was an issue in the Whole Foods merger case, where the court struggled mightily with the question whether there was a well-defined market for “premium natural and organic supermarkets” (PNOS), or whether more traditional grocers should also be included. To the extent customers were sensitive to price and substituted back and forth between PNOS and traditional markets in response to price changes, the justification for defining such a market is weaker.

When a court discusses low barriers to entry or mobility, it is speaking about elasticity of supply. For example, in Rebel Oil the Ninth Circuit concluded that self-service gasoline was not an appropriate relevant market for evaluating a predatory pricing claim.

65 FTC v. Whole Foods Market, Inc., 548 f.3d 1028, 1037 (D.C. Cir. 2008) (concluding that the narrower market was factually justified). Similar situations include Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591 (8th Cir. 2009) (relevant market for medical delivery could not be limited to patients who had private insurance); United States v. Oracle Corp., 331 F.Supp.2d 1098 (N.D.Cal. 2004) (disagreeing with government that relevant market should be limited to “high function” financial management software).
While customer might have strong preferences for self-service vs. full-service gas, suppliers could readily switch between the two.66

Drawing inferences of power from market share when the firms operate on two-sided platforms presents its own problems.67 Most such markets are differentiated, making market share estimates less reliable. When differentiated products are placed into the same market, as is typical, the result is to understate market power because it treats the firms as if they were perfect competitors. Of course, not all platforms are differentiated to the same degree. For example, many people may regard Uber and Lyft as closely similar to one another, making price competition particularly important. People can download apps for both companies at no charge, and readily compare prices before settling on a driver.68 While some users may have preferences, for the most part they appear to operate as close competitors in those towns where both are available.

Clearly there is no basis, however, for putting drivers and riders into the same “market.” It adds nothing to the analysis. Uber’s share could be measured either by ridership, the most intuitively correct measure for most cases, and ridership would be compared with other market candidates, including Lyft and perhaps traditional cab drivers. For some purposes, particularly those involving restraints on drivers, the number of drivers might also be used. For example, if Uber should

66E.g., Rebel Oil co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995) (low entry barriers into alleged market for self-serve gasoline undermined antitrust claim); Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90 (2d Cir. 1998) (low entry barriers precluded claim that defendant monopolized market for grocery store sites).
68See https://www.ridester.com/uber-vs-lyft/ (comparing prices and features of Uber and Lyft).
impose exclusive dealing on its drivers by forbidding them from driving for Lyft or a traditional taxicab company, the challenged restraint would be in the market for drivers and the questions would properly focus on Uber’s ability to suppress driver earnings or limit the opportunities of competitors to acquire sufficient drivers. The number and availability of riders could certainly be relevant. For example, the scarcity of riders might make an exclusive agreement more damaging to a rival, while an ample supply of riders would make it less so. But placing riders and drivers into the same “relevant market” would not be a sensible way to address this question. Indeed, it would make coherent analysis of the problem impossible.

By contrast to market share measures, “direct” measures of market power need not require definition of a relevant market at all.69 In addition to their other advantages, two things point in favor of more direct measurement when the market in question is a two-sided platform. One is that the markets are nearly all digital and as a result they preserve fairly complete records of transactions. This means that there are typically useful data about prices, quantities, and shifts in response to changes. One of the most serious limitations on the use of direct measurement of power is inadequacy of data. Second, the markets are differentiated, some significantly so. This tends to make market share methodologies unreliable, giving more direct measures a comparative advantage.

Traditional market definition approaches in product differentiated markets are always wrong. Putting differentiated products into separate markets exaggerates power because it treats the two goods as if they do not compete with each other at all. By contrast, putting them into the same market treats them as if they were perfect competitors. For example, the so-called “Cellophane fallacy,” named after a monopolization case involving that product, occurs when the Court places highly differentiated products into the same market and

then simply computes market share by adding up their output on the premise that these diverse goods are perfect competitors.\textsuperscript{70} On the other hand, putting two products such as cellophane and wax paper into separate markets treats them as if they do not compete at all – a conclusion that is equally wrong. For many goods cellophane and wax paper may be viable alternative wrapping materials. Market definition approaches to the assessment of market power are necessarily binary, which means that a particular group of sales must be counted as either inside or outside of the relevant market, but not something in between. By contrast, demand responses to changes in costs or prices can be observed and metered as finely as the data permit. As a result, if the data are available they give a much more accurate assessment of a firm’s market power.

In the AmEx case, direct measures indicated that AmEx had significant power.\textsuperscript{71} First, as the government showed, AmEx was able to increase its price repeatedly without losing sales. Taken in isolation that fact is insufficient, because it says nothing about what is occurring on the other side of the platform. In combination with other information, however, it could be decisive. For example, were the merchant price increases matched by simultaneously increased perks to customers? Or were there other offsetting cost increases that justified the price increases? If these cost increases were common to the industry, then price increases would not necessarily result in a loss of share. On the other hand, if merchant price increases were not accompanied by changes on the cardholder side of the market, this suggests that AmEx was seeking out its profit maximizing price by raising prices until too many merchants defected.\textsuperscript{72} Even with the anti-steering rule in place, Amex would not have infinite power to increase


\textsuperscript{72}See Franck & Peitz, Market Definition, supra note __, §3.6.1, p. 63.
merchant fees. Although under an anti-steering rule AmEx customers would be indifferent to higher merchant fees, merchants would not be. At some point the merchants’ costs to carry the AmEx card would become so high that the merchants themselves would drop it, foregoing whatever prestige or convenience value the card offered.

To state this a little differently, as American Express increased its merchant fees beyond the fees charged by competing cards, the merchants’ incentive to steer also increased. The anti-steering rule forbad this practice, putting the merchants to the choice of either paying AmEx’s higher fees or else dropping the card. To the extent they did the former, it showed AmEx’s power. Further, that number could be assessed by measuring the rate of merchant defection in response to a merchant fee increase.

Inferring Power from Conduct

Assessing market power in antitrust cases is not an abstract proposition. It needs to be assessed differently for different purposes. In the AmEx case the antitrust question was a limited one: was the no-steering rule anticompetitive? That rule reduced customer substitution by making card users indifferent to which card they were using, notwithstanding higher merchant costs for the AmEx card.

Power can often be inferred from the conduct itself. A good example of this is naked price fixing. We can infer power from conduct in cases of naked price fixing because market power is an essential ingredient in making price fixing profitable. Given its significant risks, firms would not do it unless they believed that they could profit from it. To be sure, the firms might be mistaken, believing that they had power when in fact they did not. But setting that aside, the existence of naked price fixing indicates power. Indeed, we generally define a naked restraint as one that depends on market power for its success. 73 We need not be too concerned about those cases in

which the putative cartel overestimates its power because in the case of naked collusion overdeterrence is not much of a problem.

This makes it important to consider the question of harms and benefits in AmEx. As noted previously, the AmEx majority simply assumed that the no-steering rule caused harm to merchants for the benefit of cardholders. However, the anti-steering rule actually harmed both merchants and all those card holders who were affected – namely, that who would have switched absent the rule.\textsuperscript{74} In the absence of power AmEx could not pull off such a restraint.

The anti-steering rule made it impossible for a merchant to steer people to a less costly card with respect to those transactions where a card holder would be inclined to accept the invitation to steer. In a competitive market the effect of the rule would be that the merchant would drop that card. But the merchants who carried AmEx felt that they needed the AmEx card notwithstanding its higher costs. How much they needed it presents a question of degree, but the fact that AmEx repeatedly increased merchant prices without significant defections indicates power.

If the data permit, another way to infer power from the conduct itself is to examine fees and perks with and without a no steering rule. Here, the relevant question is, did AmEx’s higher merchant acceptance fees reflect nothing more than the cost of delivering more valuable cardholder benefits that were fully justified by consumer demand? Or were they higher fees that would not be justified by consumer demand if the consumers were able to make their demand known? For example, a BMW might cost more than an equivalently sized Toyota Corolla, but that is not necessarily an indicator of great power; the proportion of price to costs might be identical for the two vehicles. However, if merchant fees came down when the anti-steering rule was removed, ceteris \textit{paribus} that would indicate that a sufficient number of

\textsuperscript{74}See discussion \textit{supra}, text at notes __.
customers preferred the lower prices to the perks. That would indicate that the anti-steering rule is an exercise of market power.

**Market Power in Vertical Cases**

The *AmEx* Court held – without citing any economic evidence or literature – that a relevant market must be established in a vertical case even if alternative methods of estimating power were available. The Court’s complete statement on this issue, including both analysis and conclusion, is contained in this footnote:

> The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition-- namely, increased merchant fees. We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition .... Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need precisely define the relevant market to conclude that these agreements were anticompetitive .... But vertical restraints are different. Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market.75

In his dissent, Justice Breyer was clearly flummoxed by this statement – as if the majority did not understand that defining a relevant market and direct measurement are *alternative* mechanisms for assessing market power.76

Over the last several decades the usefulness and robustness of “direct” and more econometric measures of power that do not depend

---

75 *AmEx*, 138 S. Ct. at 2285 n.7.
76 *Id.* at 2297 (Breyer, J., dissenting) (“One critical point that the majority's argument ignores is that proof of actual adverse effects on competition is, *a fortiori*, proof of market power.”).
on a market definition have become much more practical and prominent.\textsuperscript{77} They are widely used to evaluate horizontal mergers threatening anticompetitive unilateral effects.\textsuperscript{78} The recently issued draft vertical merger guidelines indicate the same approach for analyzing the unilateral anticompetitive effects of vertical mergers.\textsuperscript{79}

Direct measures of firm responses to changes in demand or cost require transaction information, so one limitation on their use is the availability of data. But in the \textit{AmEx} case all of the relevant credit card transactions were digitized. Obtaining the data should not pose a significant problem. In any event, direct measures of power are very likely superior to inferences drawn from market share, particularly where the products in question are differentiated, as they were in \textit{AmEx}.\textsuperscript{80}

Fortunately, there are ways to limit the damage resulting from the Court’s requirement of a market definition in a vertical case. Direct methodologies can usually be translated into a conclusion about market boundaries. After all, a market is a grouping of sales for which

\textsuperscript{77}\textit{See} discussion \textit{supra}, text at notes \_\_\_; and the methodologies described in 2B \textsc{Phillip E. Areeda, Herbert Hovenkamp} \& \textsc{John L. Solow}, \textit{Antitrust Law} ¶\textsuperscript{515}-521 (4th ed. 2014); \textsc{Louis Kaplow}, \textit{Why (Ever) Define Markets}, 124 \textit{Harv. L. Rev.} 437 (2010) (discussing relative strengths and methodologies).

\textsuperscript{78}\textit{Joseph Farrell} \& \textit{Carl Shapiro}, \textit{Antitrust Evaluation of Horizontal Merger: An Economic Alternative to Market Definition}, 10 \textit{B.E. J. Theoretical Econ.} 1 (2010). \textit{See also} \textsc{Phillip E. Areeda} \& \textsc{Herbert Hovenkamp}, \textit{Antitrust Law} ¶\textsuperscript{913a} (4\textsuperscript{th} ed. 2017) (discussing case law and other literature).


\textsuperscript{80}\textit{See} discussion \textit{supra}, text at notes \_\_\_.

\section*{References}

\textsuperscript{77}\textsc{See} discussion \textit{supra}, text at notes \_\_\_; and the methodologies described in 2B \textsc{Phillip E. Areeda, Herbert Hovenkamp} \& \textsc{John L. Solow}, \textit{Antitrust Law} ¶\textsuperscript{515}-521 (4th ed. 2014); \textsc{Louis Kaplow}, \textit{Why (Ever) Define Markets}, 124 \textit{Harv. L. Rev.} 437 (2010) (discussing relative strengths and methodologies).

\textsuperscript{78}\textit{Joseph Farrell} \& \textit{Carl Shapiro}, \textit{Antitrust Evaluation of Horizontal Merger: An Economic Alternative to Market Definition}, 10 \textit{B.E. J. Theoretical Econ.} 1 (2010). \textit{See also} \textsc{Phillip E. Areeda} \& \textsc{Herbert Hovenkamp}, \textit{Antitrust Law} ¶\textsuperscript{913a} (4\textsuperscript{th} ed. 2017) (discussing case law and other literature).


\textsuperscript{80}\textit{See} discussion \textit{supra}, text at notes \_\_\_.

\section*{Appendices}

\section*{Appendix A: \textit{AmEx} and Market Definition}

\section*{Appendix B: \textit{Direct} Measures of Power}

\section*{Appendix C: \textit{Unilateral} Effects of Vertical Mergers}

\section*{Appendix D: \textit{Limitations} on \textit{Direct} Measures}

\section*{Appendix E: \textit{Draft Vertical Merger Guidelines}}
the firm(s) that control them could sustainably exact a non-cost-justified price increase above the competitive level. Delineating a relevant market is one way of producing an answer to this question, although indirectly from inferences about market share. However, more direct measures can answer the same question as well, through such devices as estimating the residual elasticity of demand that faces the firm. A “residual” elasticity is an estimate of the demand facing an individual firm after the demand for all of its competitors’ goods has been excluded.81

In that case, however, direct measure not only assesses the firm’s power, but can also define the boundary of a relevant market. For example, if price change and response data show that a firm has enough power to charge a monopoly price for product Alpha, we can express that conclusion directly by saying that the maker of Alpha has a certain amount of power because the residual elasticity of demand it faces is relatively low. Alternatively, we can say that the firm’s profit-maximizing price is at a monopoly level in relation to its costs. However, we can also express that conclusion by saying that product Alpha constitutes a relevant market if the difference between cost and price is sufficiently large.

Economic experts assessing unilateral effects merger cases do a version of this, which courts have come to recognize, even though they generally go through the formality of requiring a market definition as well. On the one hand, the methodologies that are used to assess the price effects of a particular merger in a product

differentiated market do not require a market definition. On the other hand, once this methodology is used to predict a price increase of the necessary magnitude, we can say that the grouping of sales in question constitutes a relevant market.

Although the economist need not reach this additional conclusion about the boundaries of a relevant market in order to predict the price effects of the merger, he or she may have to do it in order to satisfy the legal requirement that the price increase occur in some “line of commerce” and “section of the country,” as §7 of the Clayton Act requires. In its Brown Shoe decision the Supreme Court equated “line of commerce” with a product market and “section of the country” with a geographic market. Another way of stating this proposition is that a conclusion about market power based on an econometric measure such as residual elasticity becomes evidence of the proposition that the grouping of sales whose residual elasticity is low is a relevant market.

The court in United States v. H & R Block, a merger challenge, was particularly candid about this approach:

“As a matter of applied economics, evaluation of unilateral effects does not require a market definition in the traditional sense at all.” This is so because unilateral effects analysis focuses on measuring a firm’s market power directly by “estimating the change in residual demand facing the post-

---

82 15 U.S.C. § 18 (condemning a merger “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”).


84 Quoting 4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 913a, at 66 (4th ed. 2016)
merger firm. ‘Residual demand’ refers to the demand for a firm’s goods after the output of all other competing firms has been taken into account.” If market power itself can be directly measured or estimated reliably, then in theory market definition is superfluous, at least as a matter of economics, because “[i]dentifying a market and computing market shares provide an indirect means for measuring market power.”85 The 2010 revisions to the Merger Guidelines also appear to reflect this understanding. See Merger Guidelines § 4 (“The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.”). As a legal matter, however, a market definition may be required by Section 7 of the Clayton Act. See Brown Shoe, 370 U.S. at 324 (“[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’ Substantiality can be determined only in terms of the market affected. The ‘area of effective competition’ must be determined by reference to a product market (the ‘line of commerce’) and a geographic market (the ‘section of the country’); see also Heinz, 246 F.3d at 719 n. 17 (“Courts interpret ‘line of commerce’ [in the language of the Clayton Act] as synonymous with the relevant product market.”). The Court is not aware of any modern Section 7 case in which the court dispensed with the requirement to define a relevant product market….

85 Quoting 2B Id. ¶ 532a at 242–43; and ¶ 521c.
Thus in a vertical case, as in a merger case, a court could consider direct evidence of market power, which was strong in *AmEx*, but express that conclusion in terms of a relevant market.

As noted above, the Agencies state in the 2020 Draft Vertical Merger Guidelines that they will employ methodologies that “need not rely on market definition.” That conclusion seems to contradict the Supreme Court’s statement in *AmEx* that a market definition is required in a vertical case. To be sure, *AmEx* involved a vertical restraint rather than a vertical merger. It is hard to see, however, why vertical restraints and vertical mergers should be treated any differently on this point. In any event, the Agencies may already be signaling that they intend not to qualify the Supreme Court’s indication that a relevant market must be defined in a vertical case.

*The Meaning of Free Riding*

The *AmEx* majority also misunderstood how free riding works. It suggested that rival card issuers might be taking a free ride on *AmEx*’s business model, which relied on high merchant fees with high offsetting rewards to customers. The Court apparently believed that a Visa card holder could free ride on *AmEx*’s benefits simply by acquiring a Visa card and keeping it in his pocket. What the Court overlooked is that one can obtain the *AmEx* rewards only by actually using the *AmEx* card, and the amount of the award is tied to the amount of the *AmEx* card transaction.

Justice Breyer’s dissent noted the error: “plainly investments tied to card use … are not subject to free-riding…. For example, free riding occurs when one dealer is able to profit from a second

---

87 Draft Vertical Merger Guidelines, *supra* note __.
88 See discussion *supra*, text at notes __, quoting *AmEx*, 138 S. Ct. at 2285 n.7
89 *AmEx*, 138 S.Ct. at 2290.
90 Cf. Chicago Professional Sports Ltd. Partnership v. NBA, 95 F.3d 593, 675 (7th Cir. 1996) (when payments are made in proportion to how services are delivered the “ride is not free”).
91 *AmEx*, 138 S.Ct. 2304 (Breyer, J., dissenting).
The economics of free riding has been used to champion relaxation of antitrust rules respecting vertical restraints such as resale price maintenance, and with good results. But an essential ingredient in those situations is an investment whose returns can be captured by someone else. The classic example is point-of-sale retailer services that must be provided prior to sale and can be priced only through the product. That enables a competitor to steal the sale by inducing customers to obtain the services from the full service dealer, but then to purchase the product at a lower price from the free rider. Resale price maintenance can address this problem by requiring both dealers to charge the same minimum price. As a result, the customer has no incentive to switch. When the benefits can be obtained only through purchase of the product, however, there is no opportunity for free riding.

**Marginal vs. Total Effects**

Competition occurs at the margin. Marginalism is the late nineteenth and early twentieth century’s most important contribution to economic analysis. Measuring effects at the margin means that one cannot simply look at totals or averages. Rather, the question is how much a particular act changes a particular outcome. Speaking

---

94 For a history, focusing on the United States, see HERBERT HOVENKAMP, OPENING OF AMERICAN LAW, supra note __, Chs. 1 & 2.
about the importance of marginal analysis in law, Frank Easterbrook observed that “The Court’s efforts to influence future conduct are doomed unless it appreciates how incentives work.... [P]eople look at marginal rather than average effects.” Marginalism in economics is not one of those things that divides the political left and the right. It has become fundamental to economic analysis of all kinds. Marginalism in economics enables modern price theory and industrial organization, cost-benefit analysis, and economic analysis of social cost and externalities.

Antitrust’s rule of reason is in fact a stylized variation of cost-benefit analysis, with the important qualifier that the fact finder must determine not merely whether a practice reduces welfare, but whether it does so by limiting competition. In a rule of reason antitrust case such as NCAA, for example, the court must determine whether the competitive harm from a particular rule, such as limiting teams to four nationally televised games per year, is justified by some offsetting benefit. Because of limitations in our fact finding ability we try to do

---

95 Frank H. Easterbrook, The Court and the Economic System, 98 Harv. L. Rev. 4, 13 (1984) (criticizing courts that “see only the gross effects—averages rather than the margins on which people are trading”). See also id. at 33:

The Court’s efforts to influence future conduct are doomed unless it appreciates how incentives work.... [P]eople look at marginal rather than average effects. They substitute among opportunities until they receive approximately the same reward from each of their activities (whether buying or doing). They buy or do a little more of one thing and a little less of something else until it is not worthwhile to make further changes. At that point the marginal gains of each activity are approximately the same. Change the returns of the margin and people alter their behavior; change the returns somewhere inside the margin and people are unlikely to alter their behavior in the desired way—if at all.
this without “balancing,” but the all important thing is that we are looking at incremental harms and benefits. For example, the important antitrust question in the NCAA case is not whether the NCAA as an institution is so competitively harmful that it must be dissolved. That might be the question in a per se challenge to a cartel. Neither can we say, however, that because the NCAA is a good thing its rule limiting the output of televised games is just fine. One must gauge the marginal effects of the challenged rule against any benefits offered for it. The burden-shifting framework developed for the rule of reason is an effort to conduct this cost-benefit analysis.

The AmEx majority lost sight of the fact that effects at the margin are what counts. This would involve, first, assessing the marginal harms to competition caused by the anti-steering rule; and then looking for offsetting benefits from that rule that might serve to justify it. What marginalist analysis does not do is look at the entire enterprise or business model, proclaim it a good thing, and be done.

The AmEx majority wrote:

Amex’s higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants ....On the other side of the market, Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants ....That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends.97

However, the challenge in this case was not to AmEx’s overall business model, which we can presume offered cardholders in the aggregate overall value in excess of overall costs. For example, in the

NCAA case, the challenge was not to the existence or legitimacy of the NCAA as an association, which no one was challenging. Rather, it was to the effect of a limitation on each member team’s televised games.\(^\text{98}\)

By the same token, the question in *AmEx* was not whether AmEx’s business model requiring higher fees in exchange for larger cardholder benefits was anticompetitive. Rather, it was whether the anti-steering rule produced *incremental* harms to competition that were greater than incremental benefits. The people affected by steering would be those *marginal* customers who would have accepted a steering offer had it been made, as well as those merchants who would have profited by incentivizing a customer to switch to a lower price card.

The Second Circuit had also confused the question of total versus marginal effects by stating that

[b]ecause the NDPs\(^\text{99}\) affect competition for cardholders as well as merchants, the Plaintiffs’ initial burden was to show that the NDPs made all Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall.\(^\text{100}\)

But “all customers” is clearly wrong. As with any restraint, many customers were not affected at all. For example, the restraint on game televising in the NCAA case did not affect those who did not watch televised games at all. Rules imposing resale price maintenance affect only discounters that would otherwise charge a lower price. Standard setting and other boycott rules affect only producers at risk of violating

---


\(^{99}\) The Second Circuit used the term “nondiscriminatory provisions,” or NDPs to describe AmEx’s policies “barring merchants from (1) offering customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) expressing preferences for any card, or (3) disclosing information about the costs of different cards to merchants who accept them.” *AmEx*, 838 F.3d 179, 184 (2d Cir. 2016).

\(^{100}\) *Id.* at 205 (italics in original).
The marginal cardholders in the AmEx case were those who would have switched in response to a steering offer because they valued the switch by more than the foregone AmEx perks.

When the government is seeking an injunction against a practice rather than complete destruction of the defendant’s business method, then the issue is limited to the competitive effect of that particular rule. Here, the affected customers were those that would have switched to a less costly card but for the anti-steering rule. The value that they placed on the defendant’s perks was less than the incremental price to merchants of using the AmEx card.102

As the district court observed, other AmEx cardholders would decline the merchant’s offer to switch, because for them the value of the perks were at least as high as the merchant’s acceptance fee, or at least as high as that portion of the fee that the merchant offered them for switching.103 Of course, these cardholders were unaffected by the anti-steering rule. Cardholders whose behavior was actually changed by the rule were worse off, thus creating lost value on both sides of the platform.

Even if the market were defined as including both sides, the way the majority defined it, competitive harm was apparent: at the margin, cardholders, merchants, and the rival platform were all injured by an output-reducing restraint.

The only beneficiary of the anti-steering rule was AmEx. It was able to preserve transactions to itself at a price clearly in excess of the value that the affected cardholders placed on use of the card.104 By contrast, a cardholder switch to Visa would produce both higher cardholder and merchant value, as well as higher output in the product market. One fact finding that the Supreme Court did not disturb was that merchants passed on AmEx’s higher fees through higher product prices across the board. Because merchants could not price discriminate between customers who used an AmEx card and those

---

102 See discussion supra, text at notes __.
104 See E. Hovenkamp, Platform Antitrust, supra.
that used a cheaper card, these higher prices affected even people who did not use the AmEx card at all. To be sure, the loss of these transactions would cost AmEx revenue, but that is simply the result of competition.

Under steering, cardholders and customers could negotiate to their joint maximizing position. Consumers who placed a small value on AmEx’s benefits could use a cheaper card. For their part, merchants could bargain by discounting the price, or offering collateral services, such as free delivery, to reflect the merchant costs of a particular payment form. The important thing is that everything would be discounted into the purchase price. One important principle is that payment systems should be “neutral” and transparent, permitting the parties to negotiate to a mutually beneficial maximum. In the

---


Neutrality in payment systems. The choice of an interchange fee paid by the merchant’s bank, the acquirer, to the cardholder’s bank, the issuer, is irrelevant if the following conditions are jointly satisfied: First, issuers and acquirers pass through the corresponding charge (or benefit) to the cardholder and the merchant. Second, the merchant can charge two different prices for goods or services depending on whether the consumer pays by cash or by card; in other words, the payment system does not impose a no-surcharge rule as a condition for the merchant to be affiliated with the system. Third, the merchant and the consumer incur no transaction cost associated with a dual price system.
process of injuring its own card holders, AMeX’s anti-steering rule also excluded rival card platforms that were ready to offer better terms.

**Competition and “Welcome Acceptance”**

One of the most fundamental principles of economics is that market participants including consumers are rational actors, which means that they maximize within the array of choices that they are presented.\(^{107}\) Given appropriate information they will make decisions that maximize their own value. In defending the anti-steering rule, the Court concluded that for a dealer to offer a customer a discount for purchasing with an alternative card “undermines the cardholder’s expectation of ‘welcome acceptance’—the promise of a frictionless transaction.”\(^{108}\) “A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants.”\(^{109}\) The Court described this lack of welcome acceptance as an “externality” that “endangers the viability of the entire Am[E]x network.”\(^{110}\)

It would be hard to come up with a more anti-market rationale than this one. Providing a customer with truthful information about the availability of a cheaper alternative is neither an externality nor an affront to consumer rationality. It is in fact fundamental to the workings of competitive markets. To be sure, informing a customer that an available alternative B is cheaper than alternative A might hinder the customer’s “welcome acceptance” of A. That is actually the way that competition works.

The “welcome acceptance” argument is impossible to harmonize with the premise that consumers make choices in a way that maximizes their own welfare. “Welcome acceptance” in this case apparently

As Rochet and Tirole observe, in a properly functioning market merchants and customers would move to a wealth-maximizing equilibrium. But the minimum conditions are that the parties are free to bargain (i.e., there is no prohibition on steering) and that they have adequate information about the gains that would be available from trading. *Id.* at 649.


\(^{108}\) *AmEx*, 138 S. Ct. at 2289 (citing 88 F. Supp. 3d at 156).

\(^{109}\) *Ibid*.

\(^{110}\) *Ibid*. 

Electronic copy available at: https://ssrn.com/abstract=3508832
meant that the buyer should be prevented from even knowing that a cheaper alternative was available. The Second Circuit had decided that permitting consumers to make informed choices about options was generally desirable but that “welcome acceptance” could be a viable defense on a credit card platform because loss of a sale via steering could have a negative impact on both sides.¹¹¹

Certainly, loss of “welcome acceptance” on one product could undermine a firm’s business model by impairing earnings elsewhere. For example, a consumer induced to buy an electric automobile after a dealer’s comparisons of gasoline and electric vehicles might certainly have an impact on the market for gasoline. The Court seemed to think that interfering with a consumer choice in a primary good was a bad thing if it had an impact on some secondary good. By contrast, the district court took the economically rational view of the situation that “[a]llowing merchants to actively participate in their customers’ point-of-sale decisions would remove the artificial barrier that now segregates merchant demand from the price of network services…”¹¹²

* * * *

Do Apple and AmEx signal a new direction among the majority of the Supreme Court, in which fidelity to fundamental economics is no longer important? It may be too early to say, but these two opinions are not very encouraging. The Supreme Court in the 1960s was rightfully accused of torturing the economics to any degree necessary to achieve a preconceived outcome. Today it seems to be doing a different version of the same thing, but that is not the way that good antitrust economics is supposed to work.¹¹³

¹¹¹See 838 F.3d at 191: “Although merchants across various industries regularly try to “steer” their customers toward certain purchasing decisions via strategic product placement, discounts, and other deals, steering within the credit-card industry can be harmful insofar as it interferes with a network’s ability to balance its two-sided net price.”

¹¹²AmEx, 88 F. Supp. 3d at 220–21.

¹¹³See Herbert Hovenkamp and Fiona M. Scott Morton, Framing the Chicago School of Antitrust Analysis, __ UNIV. PENN. L. REV. __

Electronic copy available at: https://ssrn.com/abstract=3508832
ANTITRUST AND THE PROGRESSIVE WING OF THE PRESIDENTIAL CAMPAIGN

Antitrust policy’s leftward tail, made plain in statements by some 2020 Democratic Presidential candidates, also suffers from deficiencies in economic reasoning, although very different ones. In their favor, they do a much better job than the right does of acknowledging that the United States is experiencing a monopoly problem, reflected in unreasonably high price-cost margins, a declining share of labor participation, and higher concentration.114 They are also correct to think that antitrust policy needs a serious new look, and that the issues it presents are worthy ones in a presidential campaign. However, some of the proposed solutions are policy misfires, likely to make the problem worse rather than better.

Mergers and Consumer Welfare

Presidential candidate Senator Amy Klobuchar and former candidates Kirsten Gillibrand and Cory Booker have proposed merger legislation115 that is focused far too much on increased concentration


for its own sake, and too little on the threat of higher prices.116 Indeed, one portion of the bill would pursue mergers of very large firms simply because they are large, regardless of concentration or predicted impact on prices, and even if the firms are not competitors.117


117 Consolidation Prevention Act, supra, note __:

§3. Unlawful Acquisitions

In a case brought by the United States, the Federal Trade Commission, or a State attorney general, a court shall determine that the effect of an acquisition described in this section may be materially to lessen competition or create a monopoly or a monopsony if—

“(B) (i) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $5,000,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2020, in the same manner as provided in section 8(a)(5) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2019); or

“(ii) (I) the person acquiring or the person being acquired has assets, net annual sales, or a market capitalization greater than $100,000,000,000 (as so adjusted and published); and

“(II) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $50,000,000 (as so adjusted and published)…."

Id. at 2023.

Electronic copy available at: https://ssrn.com/abstract=3508832
Such a bill needs a coherent theory of economic harm, or else explicit recognition that it is giving up on an economic approach to merger law altogether. On the one hand, the link between concentration and high margins is provable and proven. The link between absolute size and prices is not proven. The economic basis for pursuing pure conglomerate mergers is weak, but in any event a basis is not articulated in this Bill.\textsuperscript{118}

One problem with the theories under which conglomerate mergers were condemned in the past is that they involved mainly mergers of complementary products. Such mergers can definitely create advantages over rivals. Just as vertical mergers, they eliminate the need for market transactions and much of the coordination that use of the market entails. What they need at this stage, however, is some theory such as that developed in the draft Vertical Merger Guidelines (2020)\textsuperscript{119} to explain when such mergers can result in reduced output and higher prices. Otherwise they should be more candid in admitting that protection of consumers is not the rationale. The first and most

\footnotesize{\textsuperscript{118}One possibility is “portfolio theory,” accepted in one case by the European Commission but not in the United States. See Case No. Comp/M.2220, General Electric/Honeywell (July 3, 2001) [hereinafter GE/Honeywell], at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf. See Gotz Drauz, Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law, 25 FORDHAM INT’L L. J. 885 (2002). For a less favorable assessment, see Eric S. Hochstadt, The Brown Shoe of European Union Competition Law, 24 CARDOZO L. REV. 287 (2002). Another possibility is some variation of the “potential competition” doctrines, which do not reach all conglomerates but only those that eliminate the opportunities for potential competition. In any event, those theories have not been applied in the United States for decades. See V PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶1121-1135 (4th ed. 2017) (assessing the “perceived potential entrant” doctrine and the “actual potential entrant” doctrine).\textsuperscript{119}Note __, supra.}
obvious consequence of mergers of complements is better coordination and reduced costs, and thus benefits to consumers.

Such mergers were occasionally condemned in the 1960s. One example was Allis-Chalmers Mfg. Co. v. White Consolidated Industries, Inc., which condemned the merger of a firm that made steel rolling mills and a firm that made the electric wiring installations for such mills. These were product complements. A complete installation required one mill plus one wiring harness. The court offered the theory that the merger would create “the only company capable of designing, producing and installing a complete metal rolling mill,” and this “would raise higher the already significant barriers to the entry of others.”

**Segregating Platform Sales**

Senator Elizabeth Warren’s antitrust policy has focused less on mergers and more on dominant firms – in particular, the large digital platforms. She proposes that large internet sellers such as Amazon be prevented from selling both their own products and those of competing sellers on the same platform. It is hard to believe that much thought was given to considering the impact of such a policy on competition or – for that matter – even to identifying who is injured when a firm such as Amazon sells both its own house brands and the brands of rivals in close comparison on the same site.

Many of the brands that compete with Amazon’s own brands are sold by large firms, and often at margins that are significantly higher than Amazon’s margins. For example, Amazon sells its own AmazonBasics batteries in competition with brands that include

---

120 414 F.2d 506, 517-18 (3d Cir. 1969).
121 *Id.* at 517-518. The GE-Honeywell decision, *supra* note __, in the EU was somewhat similar.
122 See Elizabeth Warren, *It’s Time to Break up Amazon, Google, and Facebook* (March 8, 2019), available at https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.
Delco, Duracell, Energizer, and Rayovac. It sells AmazonBasics
toasters in competition with Black & Decker, Hamilton Beach, and
KitchenAid (owned by Whirlpool). It sells AmazonBasics plastic
storage containers in competition with brands that include
Rubbermaid, Glad, and Anchor Hocking; and AmazonBasics office
supplies sell in competition with 3M Corp., whose competing products
include Scotch Tape and Post-It notes.

Forcibly separating Amazon’s brands from the offerings of
these companies will almost certainly reduce downward pricing
pressure on these national name brands, resulting in higher prices for
consumers. Few small firms will be benefitted. Most of the benefits
will accrue to companies like 3M (the largest maker of office supplies
in the United States); Berkshire Hathaway (who owns Duracell); Black
& Decker (America’s largest manufacturer of small appliances and
power tools); or Samsonite (the world’s largest luggage manufacturer,
which competes with AmazonBasics luggage).

At the same time, under the Warren proposal Amazon could
sell AmazonBasics or its other store brands only on a separate website.
If it chose to do so, there would of course be less competitive pressure
on their prices as well. As a result, prices on both the third party
website and the Amazon products website would rise. Of course, each
platform would be smaller to the extent that it did not carry the
products on the other platform.

I doubt very much that Senator Warren is consciously pursuing
a policy of enriching Berkshire-Hathaway, 3M, or Black & Decker at
the expense of consumers. More likely, I suspect, her advisors were
so fixated on the rhetoric of bigness that they never sat down to figure
out who was getting harmed or benefitted by this proposal.

To be sure, some small sellers would fare better if Amazon’s
website did not offer their goods in competition with Amazon brands.
Senator Warren’s proposal includes as an example, a laptop computer
stand sold on Amazon by Rain Design, a relatively small firm, at a
price that hovers between $40 and $43.\textsuperscript{123} Amazon has its own, somewhat different rival stand at about half that price, $19.99.\textsuperscript{124} Several other companies offer similar stands on Amazon, most of them cheaper than the Rain Design stand. A search for “adjustable laptop stand” reveals more than twenty similar although distinguishable products ranging in price from roughly $19 to roughly $45. Rain Design is near the top of that range and the Amazon product near the bottom. While the products perform the same general function, they are differentiated, which means that different customers might value one over the other.

Several things are wrong with Senator Warren’s proposal. First, there is no evidence indicating whether the most likely competitors of Amazon’s store brands are small firms like Rain Design, or much larger firms such as 3M, Berkshire-Hathaway, or Samsonite. There does not appear to be a good study of the issue. However, basic economics suggests that Amazon will introduce its own house brands in areas that offer promising entry opportunities. These would be markets characterized by a large sales volume and high margins in relation to the entry investment. The promise of high volume and a high markup on existing products are common inducements to entry. Further, the market for household batteries or consumer luggage is undoubtedly many times larger than the market for laptop stands.


\textsuperscript{124}See https://smile.amazon.com/Rain-Design-mStand-Laptop-Patented/dp/B000OOYECC/ref=sr_1_1?keywords=rain+design+laptop+stand&qid=1577046924&sr=8-1 (Rain Design stand); and https://smile.amazon.com/AmazonBasics-DSN-01750-SL-Laptop-Stand-Silver/dp/B00WRDS0AU/ref=sr_1_11?keywords=rain+design+laptop+stand&qid=1577047065&sr=8-11 (AmazonBasics stand).
Second, no claim is made that the AmazonBasics’ laptop stand infringes a utility patent, a design patent, or any other intellectual property right owned by Rain Design. Before we can declare as “unfair” one firm’s design of a lower cost (or lower margin) product we must have some criterion of fairness. In this case, protecting consumers from high prices does not appear to be one of them, but protecting a seller’s high margins from rivals willing to sell a non-infringing product for less apparently is.

A third point is critical: suppose we enacted the Warren proposal and forced Amazon to drop either the Rain Design stand or the AmazonBasics stand from its website. Amazon would almost certainly dump Rain Design. The principal impact would be that Rain Design could no longer sell its stand on the Amazon website. No one seems to have thought about that. Indeed, it replays an error that antitrust well wishers have committed time and time again. In an effort to protect small businesses, the courts fashioned harsh rules condemning such practices as exclusive dealing or maximum resale.

---

125 The Amazon entry for the Rain Design stand indicates that it is patented but does not claim infringement against Amazon. However, Rain Design has sued another firm for trademark, trade dress, copyright, and patent infringement of a product identified as a laptop stand. See Rain Design, Inc. v. Spinido, Inc., 2018 WL 4904894 (N.D. Cal. Oct. 9, 2018) (dismissing complaint on jurisdictional grounds). For more details, see Memorandum of Points and Authorities in Support of Motion for Default Judgment, Rain Design, Inc. v. Spinido, Inc., 2018 WL 7138290 (N.D.Cal. Sep. 6, 2018).

126 Cf. the well known Supreme Court decision in Fashion Originators Guild of America v. FTC, 312 U.S. 457 (1941) (condemning effort by fashion manufacturers to create their own intellectual property system and enforce it via store boycotts).

price maintenance\textsuperscript{128} where no injury to competition was in sight. The effect of these antitrust rules was to make dealing with independent small firms so costly that the larger businesses opted instead not to deal with them at all. The result was to make life even more difficult for the small businesses that the courts intended to protect.

Amazon’s practice of selling both its own products and those of rivals in close juxtaposition will almost certainly benefit consumers by permitting close price comparisons. When Amazon introduces a product such as AmazonBasics alkaline batteries in competition with Duracell, prices will go down. There is no evidence to suggest that the practice is so prone to abuse or so likely to harm consumers in other ways that it should be categorically condemned. Rather it is an act of partial vertical integration similar to other practices that the antitrust laws have confronted in the past. One close analogy is dual distribution, which occurs when a firm sells through both independent franchisees and its wholly owned stores.\textsuperscript{129} Such practices nearly always increase output, benefitting consumers and typically even independent competing firms.

An important lesson from the history of antitrust enforcement is that one must always consider how a firm will respond to an antitrust injunction. For example, telling a firm such as Amazon that it may no longer sell its own AmazonBasics toaster on its website in competition with toasters made by Cuisinart, Black & Decker, or Sunbeam requires Amazon to choose among several options: (1) it might produce a second website, offering its own products on one and products sold by third party vendors on the other; (2) it might exit from the market for

\textsuperscript{128}Albrecht v. The Herald Co., 390 U.S. 145 (1968) (condemning newspaper’s limits on prices charged by delivery agents). \textit{See} Hovenkamp, \textit{Law of Vertical Integration}, supra note __ at 907 (“\textit{Albrecht} virtually guaranteed that large numbers of manufacturers would simply stop using independent dealer networks and switch to ownership vertical integration”).

\textsuperscript{129}\textit{See} HOVENKAMP, FEDERAL ANTITRUST POLICY, supra note __, §11.6e.
its own brands and sell only the brands of other firms; (3) it might do just the opposite, terminating its sales arrangements with third-party firms and selling only its house brands. Amazon would take the most profitable course. Option (1) would benefit the outside sellers because they would no longer have to compete with Amazon on the same website. Option (2) would also clearly benefit the outside sellers because they would not have to compete with Amazon at all. Option (3) would harm the outside sellers because they could no longer sell on any Amazon website. None of these options benefits consumers. Output is likely to go down and prices up under all of them, for each reduces the amount of competition between Amazon and outside vendors.

Antitrust under the consumer welfare standard would find all of these options, if forced by a court decree, unacceptable. Prices would be higher under all of them. Under a different standard, such as protecting third party businesses, different outcomes would affect them in different ways. Here, it is important to keep in mind that most of these businesses are not small, although they are smaller than Amazon. Second, we would not know how they would be affected unless we could predict which of these options Amazon would choose.¹³⁰ That is very a likely a problem in predicting Amazon’s profit-maximizing option or options. For that, economics would be essential no matter what our underlying goal.

Finally, while no case can be made for structural separation of inside and outside sales, agreements that involve third party vendors are still subject to §1 of the Sherman Act and, in some cases, §§3 and 7 of the Clayton Act. Here the antitrust laws can exercise essential control, and practices such as exclusive dealing, loyalty discounts, or MFNs are remediable, as are anticompetitive acquisitions. The result

in nearly all cases finding an antitrust violation would be an injunction. These solutions are less dramatic but likely to be much more effective.

CONCLUSION

To circle back to the main point, when used correctly and without excessive ideology, economics is a powerful, neutral tool for helping people identify injuries to competition and appropriate fixes. Indeed, that is the first and best use of antitrust economics. It does not always require difficult mathematics or highly technical analysis, but sometimes just informed common sense about how markets work and who is affected by policy changes. Both of the sides described above have ignored the first rule of rational antitrust policy: figure out who is getting hurt, and how.

Neither the majority nor the dissenting opinions in Apple vs. Pepper paid much attention to the question of who is harmed as an injury is passed along from a cartel or monopolist to its successive purchasers. The majority in *AmEx* seemed so taken with two-sided markets, the latest shiny object among market theories, that they did not do serious market analysis in order to assess harms and benefits. The progressive proposals for mergers and platform separation do no better. Proposals like the one calling for the separation of platforms and third party markets seem calculated to harm precisely the people they are intended to benefit.