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COMPETITION LAW AS COMMON LAW: *AMERICAN EXPRESS* AND THE EVOLUTION OF ANTITRUST

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We explore the implications of the widely accepted understanding that competition law is common—or "judge-made"—law. Specifically, we ask how the rule of reason in antitrust law should be shaped and implemented, not just to guide correct application of existing law to the facts of a case, but also to enable courts to participate constructively in the common law-like evolution of antitrust law in the light of changes in economic learning and business and judicial experience. We explore these issues in the context of a recently decided case, Ohio v. American Express*, and conclude that the Supreme Court, not only made several substantive errors, but also did not apply the rule of reason in a way that enabled an effective common law-like evolution of antitrust law.*

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INTRODUCTION

"[N]o statute," Justice Scalia observed, "can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it."[1] This is particularly true of antitrust law because the core antitrust statutes are very brief and imprecise.[2] Indeed, as the Supreme Court explained in *National Society of Professional Engineers*, "[t]he legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common law tradition."[3] Accordingly, "[f]rom the

1 Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

2 In pertinent part, the Sherman Act prohibits agreements "in restraint of trade," 15 U.S.C. § 1 (2018), and "monopoliz[ing]" or "attempt[ing] to monopolize any part of trade or commerce," 15 U.S.C. § 2 (2018); the Clayton Act prohibits mergers whose effect "may be substantially to lessen competition," 15 U.S.C. § 18 (2018); and the Federal Trade Commission Act prohibits "unfair methods of competition," 15 U.S.C. § 45 (2018). None of those terms is defined in the statutes. Because it enables flexibility, the imprecision of the statutes is probably a good thing. The antitrust laws apply to almost all commercial conduct that affects interstate commerce. Those laws must, therefore, be suitable for a vast and ever-changing array of conduct and circumstances, the effects of which might be discernable only after extensive, detailed, and case-specific factual inquiry.

3 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

beginning the Court has treated the Sherman Act as a common-law statute."[4] In effect, Congress has delegated to the courts the fleshing out of both the normative standards to be applied in assessing conduct and the process by which courts determine whether these standards are violated. This delegation "permits the law to adapt to new learning."[5]

The courts have two fundamental functions in such an institutional setting. First, the courts must identify applicable normative rules and principles, both substantive and institutional, to guide antitrust decisions. By *substantive*, we mean those that further the fundamental objectives of antitrust law, which are encompassed at present in the "consumer welfare standard."[6] By *institutional*, we mean legal rules and principles that: (a) are administrable by generalist courts; (b) base decisions on matters that are in principle provable by the kinds of evidence that are likely to be available as a practical matter; (c) tend to minimize error costs; and (d) offer predictable guidance for the public. The second function is the one commonly ascribed to the courts: to assess the facts in a case in the light of the normative rules and principles and render a decision. Antitrust courts generally rely on various forms of a structured rule of reason in fulfilling both functions.[7]

In a common law-like process, neither function can be well served by imagining a static world in which normative legal standards and institutional considerations can be taken as fixed. Both must be understood, and refined as

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4 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007). Daniel Crane recently suggested a somewhat different way of describing the process:

> [T]he antitrust laws reside in perennial tension between two fundamental impulses of the American political psyche—the romantic and idealistic attachment to smallness over bigness, and the pragmatic and often grudging realization that large scale organization may be necessary to achieve economic efficiency. Congress expresses populist idealism through legislative pronouncements reigning in big business, but then implicitly acquiesces as the courts (often in conjunction with the executive branch) read down the statutes to strike a balance between the aspirational and pragmatic impulses.

Daniel A. Crane, *Antitrust Antitextualism*, NOTRE DAME L. REV. (forthcoming 2020) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561870 [https://perma.cc/KEW7-AHHU]. In effect, "the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition . . . ." *Id.* at 36.

5 William F. Baxter, *Separation of Powers, Prosecutorial Discretion and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 666 (1982).

6 *See generally* Herbert Hovenkamp, *On the Meaning of Antitrust's Consumer Welfare Principle*, REVUE CONCURRENTALISTE (Jan. 17, 2020), https://leconcurrentialiste.com/herbert-hovenkamp-meaning-consumer-welfare/ [https://perma.cc/AW8Y-9MKV].

7 We ignore for present purposes the *per se* rule, which applies to only a very narrow range of conduct and was not implicated in the *American Express* case. That rule is, in any event, a short-cut intended to achieve the same ends as the rule of reason in specified circumstances in which more extended factual inquiry is deemed unnecessary.

appropriate, in the light of advances in economic learning and judicial experience that are relevant to the pending case while at the same time giving appropriate deference to precedent. As the Supreme Court explained in *Leegin*, "[j]ust as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions."[8]

We examine the implications of the common law nature of antitrust for the development and application of the rule of reason.[9] We argue that the antitrust rule of reason should be shaped, not just to guide correct application of existing law to the facts of the case (the second fundamental judicial function), but also to enable the courts to participate constructively in the common law-like evolution of antitrust law in the light of changes in economic learning and business and judicial experience (the first fundamental judicial function).

Recent litigation involving American Express[10] offers an excellent setting in which to examine this issue. The case raised central questions regarding the antitrust treatment of a very important business model that had not previously been addressed in antitrust cases. It culminated in the Supreme Court's decision in *Ohio v. American Express Company*.[11]

American Express acts as a "platform" that facilitates interactions between card-accepting merchants and card-holding consumers. Many of the world's most prominent firms operate similar platform business models that facilitate interactions among different groups of users. For example, Amazon joins merchants and consumers; Apple joins app sellers with iPhone and iPad users through the App Store; Facebook and Google connect advertisers with consumers engaged in social networking and online search, respectively; and Uber joins drivers and riders. Although neither the platform business model nor antitrust litigation regarding platform conduct is new,[12] the platform business

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8 *Leegin*, 551 U.S. at 899 (2007) (quoting 15 U.S.C. § 1 (2006)).

9 The rule of reason is itself a reflection of the common law nature of antitrust:

> Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911).

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

11 138 S. Ct. 2274 (2018).

12 Newspapers have long acted as platforms that allow advertisers to reach consumers, and credit and debit card networks have long served as intermediaries between merchants and consumers. For examples of major antitrust cases against platforms, see Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (reviewing an injunction against a newspaper publisher selling both

model has become increasingly prominent—especially for platforms with digital infrastructures—and there have been very significant developments in recent years in the economic analysis of platform competition.[13] Indeed, research on platform competition has been the most active area of competition economics research over the past fifteen years. And, while earlier cases involved platform businesses—including payment networks—the litigation involving American Express is the first to focus specifically on how to account for the possibility that the challenged conduct has opposing effects on user welfare on different sides of the platform, as well as the first to consider how the new economic learning about platforms should inform antitrust doctrine.

It appears likely that platform competition will be one of the most active areas of antitrust litigation over the coming decade. A healthy common law-like process would enable the law to adapt as appropriate in the light of new learning and new experience. Unfortunately, the Supreme Court in the *American Express* case applied the rule of reason in a way that hinders such adaptation.

I. THE EVOLUTION OF COMPETITION LAW

The antitrust statutes are broad and general, and antitrust law applies to almost all aspects of commerce.[14] Judicial decision making in antitrust thus needs to be able to adapt to: (a) the development of new technologies, business models, and market circumstances; (b) the evolution of economic thinking with respect to both substantive antitrust standards and fact-finding tools that is the result of new theoretical work and empirical findings; and (c) the accumulation of judicial experience with respect to the application of antitrust principles in litigation.

The broad nature of the antitrust statutes makes it relatively straightforward to account for new technologies and business models when they can be adequately assessed by generally accepted economic principles, frameworks, and techniques. And the courts are well suited to engage in the fact-intensive, case-

advertising and newspapers); United States v. Visa U.S.A., Inc., 344 F.3d 229, 239 (2d Cir. 2003) (reviewing an injunction against credit card companies serving both banks and merchants); United States v. Microsoft Corp., 253 F.3d 34, 71-72 (D.C. Cir. 2001) (en banc) (per curiam) (reviewing an injunction against an operating system serving applications developers and PC users); United States v. Florists' Telegraph Delivery Ass'n, 1956 Trade Cas. (CCH) ¶ 68,367, 1956 U.S. Dist. LEXIS 4016 (E.D. Mich. June 1, 1956) (enjoining a florist-by-wire association serving florist shops receiving orders and florist shops fulfilling orders).

13 For an overview, see generally Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006); Marc Rysman, *The Economics of Two-Sided Markets*, J. ECON. PERSP., Summer 2009, at 125.

14 *See supra* note 2.

specific inquiries required to determine how existing principles can be adapted to new business practices and market circumstances.[15]

But what happens when there is disagreement as to whether or how existing economic principles apply to new forms of conduct? And how can the courts incorporate new economic learning when there is no consensus even among economists regarding what constitutes valid new learning? These questions can arise both with respect to new forms of commercial conduct for which there are no applicable legal precedents and for familiar forms of conduct when new learning calls into question existing precedents. The latter raises the question of when fidelity to legal precedent should apply to economic reasoning embedded or assumed in legal propositions.[16]

In a common law process, the law arises inductively from decided cases, rather than deductively from statutes or other codes. In effect, courts decide individual cases, and the legal principle on which a decision is based is inferred from the decision and the facts of the case. That principle is then applicable in future cases decided by that or inferior courts. The obligation of courts to apply that principle in future cases is embodied in the notion of stare decisis. Broadly speaking, stare decisis enables courts to decide cases without rethinking legal questions that have already been addressed, helps ensure that like cases are decided in a similar fashion, and thus enhances the predictability and perceived fairness and legitimacy of the law.

But stare decisis is subject to two important limitations, which enable the law to evolve. First, the decision in an earlier case need not control a later case if the later case is different in ways that make application of the earlier decision inappropriate. Lawyers and courts thus need to determine whether the later case is *distinguishable* from the earlier case. Legal principles do not have to be cast aside whenever there are material new facts. But the extension of a legal principle to materially different circumstances is not an application of stare decisis; it is instead the creation of a new legal rule or the modification of an old one.

Second, the earlier case can be overruled—its legal principle rejected—if it no longer seems appropriate or correct.[17] This second limitation on stare

15 This is not to deny the value of experience. The examination of multiple cases may generate a better understanding of the effects of a new practice.

16 Such legal propositions include, for example: the rule that predatory pricing requires prices below an appropriate measure of cost, e.g., Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993); the rule that two products exist for tying purpose only when there is sufficient demand for unbundled components that it would be profitable for the defendant to provide an unbundled option, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22 (1984); and the use of market shares to determine whether the defendant has market power, *e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 342-43 (1963).

17 Lower courts may not overrule decisions of a higher court, but any court may overrule its own earlier decisions or decisions of lower courts.

decisis does not mean that legal precedents should be overruled whenever they are thought to be incorrect. To the contrary, in a case involving the interpretation of a federal statute, the Supreme Court explained that

> *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'[18]

Stare decisis in antitrust law is, however, somewhat different. For one thing, the courts are engaged in a common law-like process in which almost all law is judge made. Although antitrust decisions require attention to precedent, they rarely require careful attention to statutory language or legislative history.[19] The Court put it this way in *Kimble*:

> This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. Congress, we have explained, intended that law's reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences.[20]

The role of stare decisis in antitrust law is complicated also because of the role of economic analysis in antitrust law. Economics is commonly used in a wide variety of legal contexts to help resolve *factual* issues, such as quantifying damages. But antitrust law is almost unique in the extent to which *legal doctrine* is based on *economic propositions* about which generalist judges have no particular expertise. Consequently, the common law of antitrust must grapple with a question that does not generally arise in other areas: how should the courts account for new learning about economic propositions when defining

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18 Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401, 2409 (2015) (citation omitted).

19 Stare decisis is sometimes said to have more force in matters of statutory interpretation, where legislative action to correct mistaken judicial rulings might reasonably be expected, than in matter of constitutional interpretation, where correction by amendment is very unlikely. See, e.g., Ramos v. Louisiana, 140 S. Ct. 1390, 1412-13 (2020) (Kavanaugh, J., concurring in part); Agostini v. Felton, 521 U.S., 203, 235 (1997). Because the substantive antitrust statutes have been amended only very rarely and have delegated much of the law making to the courts, it is not clear that those laws are, or should be, regarded as the kinds of statutes for which legislative action to correct mistaken juridical rulings can be expected.

20 *Kimble*, 135 S. Ct. at 2412-13 (citations omitted).

or shaping the law (antitrust doctrine) itself? An important part of the answer to that question begins with the recognition that, to the extent antitrust precedents and doctrine are rooted in economics, they generally are based on empirical propositions. Even rudimentary notions, such as that demand curves slope downward, are ultimately empirical propositions.

This reliance of antitrust doctrine on empirical or instrumental economic propositions has two implications for the role of stare decisis. The first is that stare decisis enables antitrust cases to be tried without the parties' having to litigate basic economic principles, such as whether demand curves generally slope downward. The second is that antitrust precedents based on empirical or instrumental economic propositions—propositions that are exogenous to the legal process itself—are entitled to less deference than ordinary precedents if those economic propositions are subsequently understood to be incorrect. This is so for three reasons. First, judges are not experts in economics, and an earlier court's embrace of an empirical or instrumental economic proposition is thus entitled to less deference than its adopting normative or legal propositions. Second, a case that superficially appears to be like another might in substance be very different when the underlying economics are understood.[21] Third, economic propositions evolve over time as new theoretical and empirical research is conducted, so prior articulations of legal principles purporting to embrace economic propositions might need to be revised to account for an updated understanding of the underlying economics. A legal principle that might have made eminent sense when first adopted might thus come to be imprudent in the light of subsequent economic learning and marketplace and judicial experience.[22]

The reliance of antitrust doctrine on empirical or instrumental economic propositions has a another important implication: antitrust principles ought

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21 In the *Microsoft* case, for example, the court held that conduct that was in form like the kinds of conduct that had previously been regarded as unlawful per se should treated differently because of the different industry and economic circumstances. United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001) (en banc) (per curiam).

22 Herbert Hovenkamp argues that stare decisis should be applied to modes of analysis rather than categories of practices:

> [T]he important fact . . . is that the distinction between naked and ancillary restraints enables the court to determine early on whether and how much further inquiry is necessary. The proper role of stare decisis lies in the legal formulation that "significant and naked restraints are unlawful per se"—not in the categorical and overgeneralized conclusions that "price fixing," "tying," or "market division" are per se unlawful.

IP Ties and Microsoft*'s Rule of Reason*, 47 ANTITRUST BULL. 369, 381 (2002); *see also* Herbert Hovenkamp *The Rule of Reason,* 70 FLA. L. REV. 81 (2018) (stating that different "modes of analysis" are used to assist courts with the complexity of antitrust cases). Our analysis, however, suggests that the application of stare decisis to modes of analysis can also be problematical when the courts prematurely reach holdings with respect to them.

to be testable as part of the common law process. Some antitrust principles—such as the use of market definition and market share to assess market power—are testable at least in part by judicial experience, which can illuminate whether and how market definition and market share do or do not accurately assess market power. Others, such as a rule that defines predatory pricing as requiring proof of facts that can rarely if ever be proven regardless of the underlying reality, are not testable by judicial experience because there is no way of learning from judicial experience whether the finding of no liability reflects a failure of proof given the facts of the particular case or a substantively flawed rule.[23]

To be sure, judicial experience is far from the only source of learning that can inform the evolution of antitrust law. Business experience and academic learning are also essential sources of knowledge needed to inform antitrust law. Sometimes new academic insights about economics can themselves justify new or revised antitrust doctrine. But reliance by courts on academic insights should be cautious and humble for several reasons. First, it is sometimes difficult to determine which insights are widely understood to be sound and which are interesting but not yet established. Second, academic learning about economics usually addresses a range of analytical and empirical issues of interest to economists but rarely addresses questions about how that learning can most effectively be embodied in legal rules suitable for application by legal institutions. And judges often lack deep knowledge about economics and how to translate economic insight into sound legal rules.

The implicit premise of stare decisis must be a presumption that the existing legal rules are generally sensible, just as the implicit premise in overruling or distinguishing an existing rule must be that the later court is well-equipped to decide whether those rules are sensible or inapplicable. Both those premises would seem less applicable when courts are expected to understand economics in order to promulgate or overrule legal principles.

One might imagine replacing the historical delegation to the courts of law-making authority with regard to antitrust with a more robust role for Congress. There are several reasons to imagine that Congress might be better suited than the courts to revise antitrust law in the light of new economic learning. First, Congress has the ability to bring much greater resources to bear on an issue.

23 For example, the court in *United States v. AMR Corp.*, 335 F.3d 1109, 1117 (10th Cir. 2003), held that a combination of extrinsic evidence and various accounting proxies was not sufficient to permit an inference that the defendant's prices were below cost, or even to put a burden of production on the defendant, on the ground that none of the evidence directly measured incremental cost. If the court meant that below-cost pricing can be proved only when there is direct evidence of the defendant's incremental cost and cannot be inferred from circumstantial evidence or evidentiary proxies, even where the defendant's records include no such direct evidence, then it would as a practical matter make proof of predatory pricing impossible, regardless of the underlying reality.

Second, because it can make changes that incorporate new learning outside of reaching a decision in a specific case, Congress can give parties advance notice of changes, which reduces the degree of uncertainty that businesses face when making certain investments. Last, to the extent there is a political element in the interpretation of the statutes and the relevant economics, Congress will reflect the current political circumstances, by contrast to the courts, which are more likely to reflect the political circumstances at the time that the deciding judges were appointed.

But there are also reasons to expect Congress not to be very good at legislating detailed antitrust doctrine. Among other things, antitrust issues only rarely attract Congressional attention, so legislated rules are likely to be slow in coming and might endure long after they have ceased being useful; partisan interests often impede Congressional action; and legislators are often more motivated by constituent interests or political strategies than by sound policy analysis. Perhaps most important, Congress does not decide individual cases. It thus lacks the experience and learning that come from actual cases; and the lobbyists that seek to influence Congress, by contrast to lawyers and economists in litigation, can be expected to address issues at a level of generality that might obscure important considerations about how or whether alleged facts might be proven and the tractability of legal principles when applied in litigation.

In any event, by writing brief and imprecise statutes, Congress has established a common law-like process, and that is not likely to change. The concerns about the ability of courts to wisely embed economic propositions in legal rules might suggest some adjustments to the role of stare decisis in antitrust cases. First, when adjudicating antitrust cases, courts might be less deferential to past decisions that reached conclusions regarding economic theories and techniques through a highly imperfect process. Second, holdings that incorporate new learning should be narrowly tailored to the specific facts of the case at hand until more experience has been accumulated. In *Microsoft*, the D.C. Circuit held "that the rule of reason, rather than per se analysis, should govern the legality of tying arrangements involving platform software products" because there was not enough experience to apply a per se approach.[24] The same logic supports judicial restraint with respect to making sweeping pronouncements about how to apply new economic principles.[25]

There is also another, potentially more important means for courts to help optimize the common law evolution of antitrust law: courts should construe and apply the rule of reason, not only to aid correct application of existing legal

24 United States vs. Microsoft Corp. 253 F.3d 34, 84 (D.C. Cir. 2001) (en banc) (per curiam).

25 As we discuss below, the *American Express* Court violated this principle when it prescribed a rigid approach to market definition for a broad class of markets and appeared to make other broad rulings as well. *See infra* Parts V-VI.

principles to the facts of the case, but also to facilitate the selection and evolution of optimal legal principles.

II. THE SUBSTANTIVE MEANING THAT HAS EVOLVED IN THIS PROCESS

To provide context for our discussion of the rule of reason, we summarize the key substantive principles on which contemporary antitrust law is based. The broad objective of antitrust policy is to protect competition in order to promote economic welfare. There are two basic elements to any antitrust violation.

The first is *anticompetitive conduct*, i.e., conduct that is not "competition on the merits" and tends to diminish the competitive constraints imposed by rivals.[26] Loosely speaking, competition on the merits is conduct that increases the benefits that the defendant's product offers to customers,[27] reduces the defendant's cost of supplying its product, or reduces above-cost prices. For various reasons having to do with administrability, uncertainty, and the like, some conduct that might seem anticompetitive under this definition is not deemed to be anticompetitive for antitrust purposes.[28] We discuss the implications of such legal process concerns for the rule of reason in Section V.C below.

The second element is an increase in *market power* compared to that in the but-for world caused by the anticompetitive conduct. To oversimplify, market power is the ability of a firm to profitably increase its prices above competitive levels (or, where the firm is a buyer, to drive prices below competitive levels).

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26 *See, e.g.*, *Microsoft Corp.*, 253 F.3d at 58 ("[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* . . . ."); *id.* at 59 (defining a "procompetitive justification" for a defendant's conduct as "a nonpretextual claim that its conduct is indeed a form of competition on the merits").

27 This refers to improvement in an absolute sense. Degrading a rival's product in order to make one's own product relatively more attractive is not competition on the merits and could be anticompetitive.

28 For example, a firm that controls access to an input needed by competitors might be thought to engage in anticompetitive conduct when it refuses to make that input available to a competitor in situations where the refusal entails a profit sacrifice. But courts rarely find refusals to deal with rivals to be anticompetitive, in part, because of concerns about false positives and the difficulty of determining and enforcing appropriate terms of trade. The Court in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP* explained those concerns as follows:

> The costs of false positives counsels against an undue expansion of § 2 liability. . . . Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of § 251 may be, as we have concluded with respect to above-cost predatory pricing schemes, 'beyond the practical ability of a judicial tribunal to control.' Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: 'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. . . .'

540 U.S. 398, 414-15 (2004) (citations omitted).

The exercise of market power can diminish economic welfare. An increase in market power reflects a reduction in the effectiveness of actual or potential competitors as constraints on a firm's conduct.

In summary, for several decades there has been a consensus that the normative objective of antitrust law is to prevent anticompetitive conduct that increases market power and thereby reduces economic welfare.[29] Meeting this objective requires addressing two types of factual issues. One, finding the facts in individual cases, is not in principle unique to antitrust law. The second and more challenging entails identifying the appropriate instrumental economic propositions that link the facts of the case to the normative objectives. Thus, for example, a court needs to be able to do more than identify whether tying has occurred; it needs to be able to determine whether conditions in the case under examination are such that the tying is likely to injure competition.

III. THE RULE OF REASON

Today, most antitrust decisions are reached through application of the rule of reason, which has itself evolved over time.[30]

Based on his comprehensive review of cases over the last decade of the twentieth century and the first decade of the twenty-first, Carrier summarized a four-step rule of reason as follows:

1. First, the plaintiff must show either an actual adverse effect on competition (direct proof) or a potential adverse effect (proof of market power).
2. Second, if the plaintiff meets its initial burden, then the burden shifts to the defendant to demonstrate that it has a legitimate procompetitive justification for the challenged conduct.
3. Third, if the defendant satisfies the second step, then the burden shifts back to the plaintiff to show that the defendant's procompetitive objectives could have been achieved by conduct that was less harmful to competition.

[29] This consensus is being increasingly questioned by academics, policy advocates, and some legislators. *See, e.g.*, Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" in Practice*, COMPETITION POL'Y INT'L (April 2018), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3294&context=faculty_scholarship [https://perma.cc/N4VV-ERYW] (describing how multiple groups have attacked this consensus on different grounds). For purposes of this paper, however, we take the existing consensus as a given.

[30] For a history of the rule of reason, see Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 137-38 (2008).

4. Fourth, if the plaintiff fails to establish that the conduct was not reasonably necessary to obtain the benefits, then the court balances the anticompetitive and procompetitive effects of the conduct.[31]

The basic structure makes sense. It is appropriate in our legal system to require a plaintiff to explain the basis for its request for judicial intervention, and the plaintiff ought to have a factual basis for its concerns regarding the impact of the defendant's conduct on competition and market power. It is appropriate for the defendant to have the burden of demonstrating a procompetitive justification, both because it should know what, if any, legitimate purpose the allegedly unlawful conduct was intended to serve and because the defendant is likely to have better access to evidence about any such justification than the plaintiff. And it is appropriate to require the plaintiff to have the burden of identifying less restrictive alternatives so that the defendant is not in the position of proving a negative, i.e., that there are no such alternatives. In fact, if the burden were reversed on any of these three steps, the party with the burden would be required to prove a negative—no harm to competition, no justification, or no less restrictive alternative.[32]

The fourth step is less clear, not because of the allocation of the burden of proof, but because it is not clear what balancing or weighing means. It could mean determining whether the anticompetitive harms are larger or smaller than the procompetitive benefits in the case.[33] Alternatively, it could require application of a substantive decision rule such as the disproportionality rule

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31 Michael A. Carrier, *The Four-Step Rule of Reason,* 33 ANTITRUST 50, 50-51 (2019). Perhaps the most widely quoted judicial articulation of the current rule of reason was set forth by the D.C. Circuit in *Microsoft Corp.*, 253 F.3d at 58-59. Although there are minor differences, the two formulations appear to be substantively equivalent. The court in *Microsoft* said that the defendant must "proffer," rather than "demonstrate," a procompetitive justification; but it later rejected a proffered justification on the ground that Microsoft did not meet its "burden of showing that its conduct serves" a procompetitive purpose. *Id.* at 67. Also, although *Microsoft* said that the burden shifts back to the defendant to rebut a sufficiently asserted justification, it made no explicit mention of rebutting the justification by showing a less restrictive alternative. There is, however, no reason to think that the *Microsoft* court would have found harm to competition that was not necessary to achieve an asserted benefit to be justified by the benefit.

32 The term "rule of reason" is more often used in cases involving Section 1 of the Sherman Act than in those involving Section 2 of the Sherman Act or Section 7 of the Clayton Act. The semantic issue regarding the use of that term is immaterial for purposes of this article, in which we use the term to describe the general approach of cases when applying the antitrust laws.

33 Making such a determination can be very difficult in practice. For example, there may be no obvious way to compare the long-run harm from increased entry barriers due to the challenged conduct with short-run benefits from increased product quality due to that conduct. *See* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 36 (2008), http://www.usdoj.gov/atr/public/reports/236681.pdf [https://perma.cc/4VW2-TB5A], and references therein for a discussion of the strengths and weaknesses of this approach.

(which finds a violation only if the harms substantially outweigh the benefits).[34]

In practice, courts almost never actually engage in the kind of explicit balancing contemplated by the fourth step in the rule of reason.[35] In his review of 222 instances in which a federal court reached a final judgment that was at least in part decided under the rule of reason between February 2, 1999, and May 5, 2009, Carrier found that 215 were decided on the ground that the plaintiff failed to show anticompetitive effect and only 5 reached the balancing stage.[36] Other commentators have suggested, however, that balancing might occur in more subtle and informal ways.[37]

IV. *UNITED STATES V. AMERICAN EXPRESS*

When a consumer makes a purchase from a merchant and uses an Amex card as payment, American Express charges the merchant a fee equal to a percentage of the transaction value.[38] In many cases, American Express also provides financial rewards and other benefits to the cardholder.[39] American Express often charges merchants higher fees than do other credit and charge card networks.[40]

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34 *See id.* at 45 and references therein for a discussion of the strengths and weaknesses of this approach. A different substantive decision rule, the no-economic-sense test (which requires that the conduct would not be profitable—and would thus make no economic sense for the defendant—but for the anticompetitive benefits it generates for the defendant), could also be characterized as a kind of balancing rule, but it is more often thought of as an alternative to balancing. *See id.* at 39 and references therein for a discussion of the strengths and weaknesses of this approach.

35 *See* Carrier, *supra* note 31, at 51 (finding that balancing happens in only four percent of cases). Andrew Gavil describes this balancing as a myth:

> Such "rule of reason balancing" is perhaps the greatest myth in all of U.S. antitrust law. It is almost always described as the final step in the rule of reason analysis, yet few, if any, decisions turned on a true balancing of pro- and anticompetitive effects. Instead, most cases turn on the strength and weight of the evidence of effects or efficiencies.

Supra note 30, at 147.

36 Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828-829 (2009). For an examination of earlier data, see generally Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, which summarizes outcomes of "rule of reason" cases based on survey results.

37 *See, e.g.,* Louis Kaplow, *Balancing Versus Structured Decision Procedures: Antitrust, Title VII Disparate Impact, and Constitutional Law Strict Scrutiny*, 167 U. PA. L. REV. 1375, 1405-07 (2019).

38 United States v. Am. Express Co., 88 F. Supp. 3d 143, 157 (E.D.N.Y. 2015) ("The merchant discount fee paid by the merchant generally consists of an *ad valorem* element—i.e., a percentage discount rate multiplied by the purchase price—but may include additional flat fees."). *Id.* at 158 ("American Express charges a single discount rate for all Amex credit and charge products, in addition to certain flat fees charged on a per transaction basis.").

39 These reward structures vary from "the high-rewards Platinum Card, the 'bedrock of [Amex's] brand,'" to "its cards with less generous rewards, like the Green Card or EveryDay Credit Card." *Id.*

40 *Id.* at 200.

Consequently, merchants may want to try to induce Amex cardholders to make purchases using alternative networks.[41] Between eighty and ninety percent of Amex cardholders also carry other general purpose credit cards.[42]

Subject to limited exceptions, American Express refuses to authorize merchants to accept its cards unless they agree not to try to "steer" their customers to competing general purpose credit and charge cards.[43] American Express's no-steering provisions forbid a merchant that accepts American Express cards from, among other things, offering the merchant's customers a discount or some form of reward in return for using a competing credit or charge card operating on the Discover, MasterCard, or Visa networks that charges a lower merchant fee.[44] The no-steering provisions also limit merchants' ability to use written or oral communications to influence consumers' choices among competing general purpose credit and charge cards.[45] For example, American Express's rules prohibit a merchant from saying to a customer at the point of sale "you are welcome to use your Amex card to pay for your purchase, but we would like you to know that it will cost us more than if you use a credit card issued on another network."[46]

The United States and seventeen States sued American Express, alleging that its no-steering rules violate §1 of the Sherman Act because they have excluded rivals, diminished price competition among card issuers, and directly harmed merchants.[47] The specific mechanism alleged is that the rules reduce the incentives for credit and charge card networks to offer favorable terms to merchants because, absent the no-steering provisions, merchants might respond to better terms by steering their customers to the network offering those improved terms, thus increasing the incentives of networks to offer such terms.[48]

American Express argued that its no-steering rules protect its ability to pursue a "differentiated business model" under which it competes by charging high merchant fees to fund cardholder benefits, and that this business model

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41 *Id.* at 150 ("[A] given merchant might prefer that a customer carrying both a Visa card and an Amex card in her wallet use the Visa card, since the cost of the transaction is likely to be lower for the merchant.").

42 *Id*. at 191.

43 *Id.* at 162-64.

44 *Id.* at 165 (listing examples of merchant steering behavior prohibited by American Express's rules).

45 *Id.* at 162-63 (summarizing the limitations on merchant steering behavior under American Express's standard terms).

46 Such a statement would be prohibited by the provision that a merchant may not "indicate or imply that [it] prefer[s], directly or indirectly, any Other Payment Products over [Amex's] Card." *Id.* at 162.

47 *Id.* at 149-150.

48 *Id.* at 210 ("In effect, Amex's [anti-steering rules] deny its competitors the ability to recognize a 'competitive reward' for offering merchants lower swipe fees, and thereby suppress an important avenue of horizontal interbrand competition.").

drives increased innovation and competition.[49] American Express also argued that its no-steering rules prevent competing networks from free riding on American Express's investments in providing certain benefits to cardholders and merchants and, thus, preserve American Express's incentives to make these investments.[50]

The district court found for the plaintiffs.[51] The court found, among other things, that the rules: (i) reduce incentives for American Express and its rivals to compete with respect to merchant fees because merchants are prohibited from encouraging their customers to use lower-cost networks, which otherwise would have increased the benefits to networks from cutting their prices;[52] (ii) for the same reason exclude Discover and other rivals that seek to compete on the basis of low merchant fees;[53] (iii) result in higher merchant fees charged by Amex and its credit card rivals;[54] (iv) do not lead to offsetting improvement in benefits or services for Amex cardholders;[55] and (v) thus result in both higher merchant fees and a higher "net" (or "two-sided") price for American Express's services.[56] The district court also found that American Express's no-steering rules harm consumers in general.[57]

The Second Circuit reversed.[58] The court held that the district court erred in defining the relevant market[59] and asserted that "[p]laintiffs bore the burden in this case to prove net harm to Amex consumers as a whole—that is, both cardholders and merchants—by showing that Amex's nondiscriminatory provisions have reduced the quality or quantity of credit-card purchases."[60] The court pointed to "evidence showing that the quality and output of credit cards across the entire industry continues to increase," which it took to be proof that Amex's conduct had harmed neither competition nor consumers.[61]

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49 *Id.* at 225.

50 *Id.* at 234-235.

51 *Id.* at 238.

52 *Id.* at 207-08.

53 *Id.* at 213-14.

54 *Id.* at 213-15.

55 *Id.* at 196, 215-16.

56 *Id.* at 215.

57 *Id.* at 208 ("In this case, Plaintiffs additionally are able to show harm to those same merchants' customers on the other side of the [general purpose credit and charge card] platform, as inflated merchant discount rates are passed on to all customers—Amex cardholders and non-cardholders alike—in the form of higher retail prices.").

58 United States v. Am. Express Co., 838 F.3d 179, 184 (2d Cir. 2016).

59 *Id.* at 196-200.

60 *Id.* at 206-207.

61 *Id.* at 207. The court also asserted, "[t]his evidence of increased output is . . . also consistent with evidence that Amex's differentiated closed-loop model, supported by its [challenged conduct], has *increased* rather than *decreased* competition overall within the credit-card industry." *Id.* at 206.

V. *OHIO V. AMERICAN EXPRESS*

Eleven of the plaintiff states filed a petition for certiorari in the Supreme Court.[62] The United States did not join in that effort and, to the contrary, expressed to the Court the view that the case was not a suitable vehicle for certiorari review because the conduct at issue was "idiosyncratic," there was no conflict among the circuits, and the courts had had essentially no experience with the issues raised in the case.[63] Also, there remained disagreements among economists regarding the implications of academic learning about platforms for antitrust issues.[64] Nevertheless, the Court granted certiorari.[65]

The issue in the case was whether the plaintiffs had carried their burden under the first step in the rule of reason of "proving that Amex's antisteering provisions have an anticompetitive effect."[66] Because the case involved both sides of the two-sided market, it implicitly, but importantly, raised the question of how a court should decide a case of first impression under the antitrust laws.

A. *The Court's Decision to Grant Certiorari*

Outsiders can only speculate about why the Court decided to issue the writ of certiorari and review the Second Circuit's decision. As the United States had argued, the case presented none of the ordinary reasons for certiorari review. There was no conflict among the circuits. The issue regarding the lawfulness of the no-steering rules was not one of urgent national importance. And, one might surmise from the Court's affirmance of the Second Circuit, the case did not even involve a mistake that the Court thought needed to be corrected.

Moreover, it was a case of first impression that—as will be seen—involved new, difficult, and incomplete academic learning about both the underlying

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The court's reasoning on this point was deeply flawed. The antitrust issue was whether the defendant's conduct had made that growth less than it otherwise would have been or was likely to have that effect in the future.

62 Petition for Writ of Certiorari, Ohio v. Am. Express Co., 138 S. Ct. 2274 (No. 16-1454), 2017 WL 2472075.

63 Brief for the United States in Opposition, Ohio v Am. Express Co., 138 S. Ct. 2274 (No. 16-1454), 2017 WL 3485653. The United States subsequently filed a merits brief in support of petitioners. Brief for the United States as Respondent Supporting Petitioners, Ohio v. Am. Express Co., 138 S. Ct. 227 (No. 16-1454), 2017 WL 6205804.

64 For example, Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018), and JENS-UWE FRANCK & MARTIN PEITZ, CTR. ON REGULATION IN EUR., MARKET DEFINITION AND MARKET POWER IN THE PLATFORM ECONOMY 26-27 (2019), conclude that it is more appropriate to define two, interrelated markets rather than a single, two-sided market, while Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets*, 10 J. COMPETITION L. & ECON. 293, 302 (2014), recommend defining a single, two-sided market for transaction platforms.

65 Ohio v. Am. Express Co., 138 S. Ct. 355 (2017).

66 Ohio v. Am. Express Co., 138 S. Ct. at 2284.

economics and, more important, how to reflect the economic learning in legal doctrine.[67] Although some earlier antitrust cases had involved credit card systems, none explicitly addressed the issues regarding two-sided platforms and transaction markets that were central to the *American Express* case.[68]

On its face, therefore, the decision to review the case seems misguided. It suggests a lack of the kind of caution and humility that the common law of antitrust requires; and it invites speculation that at least some of the Justices saw the case as an opportunity to make new law to their liking, rather than to decide a specific case in furtherance of a healthy common law-like process.

B. *The Court's Reformulation of the Rule of Reason*

This case was properly not regarded as a per se case, in part because it was one of first impression. The five-Justice majority (hereinafter, the Court) described the rule of reason as follows:

1. The plaintiff bears the "initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market;"[69]
2. "If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint;"[70] and
3. If the defendant meets its burden, then the "burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[71]

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67 There has been research on transaction platforms at least since William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 *J.L. & ECON.* 541 (1983). But substantial research on the subject did not begin until the late 1990s, and little was published before the early 2000s. The freshness of the research raises the question of how quickly courts should rely on new academic learning. One would expect the answer to depend at least in large part on the degree of consensus among economists, as well as on whether academic researchers have addressed questions the that courts care about and answered them in a form that courts can use.

68 The closest was United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003), which involved rules of the Visa and MasterCard systems that permitted member banks of one system to serve as directors of the other but prohibited members from issuing competing American Express or Discover cards. *Id.* at 234. The *Visa* court found a credit card market and a separate network services market. *Id.* at 239 ("Whereas in the market for general purpose *cards*, the issuers are the sellers, and cardholders are the buyers, in the market for general purpose card *network services,* the four networks themselves are the sellers, and the issuers of cards and merchants are the buyers."). The court did not address the concept of a transaction market, which as will be seen was central to the Court's decision in *American Express*, or whether market definition or injury to competition might be affected by whether the business involved a two-sided platform.

69 Ohio v. Am. Express Co., 138 S. Ct. at 2284.

70 *Id.*

71 *Id.* The Court said that "the parties agree that a three-step, burden-shifting framework applies" under the rule of reason, *id.*; but neither party embraced the particular formulation of the rule of reason set forth by the Court. *See* Brief for Petitioner and Respondents Nebraska, Tennessee, and Texas at 26-30, Ohio v. Am. Express Co., 138 S. Ct. 227 (No. 16-1454), 2017 WL 6205796; Brief

On the surface, the first two steps of the majority's formulation are broadly consistent with the standard approach described in Part III above. On a closer look, however, there are important differences.

Consider the first step. The *American Express* formulation requires that harm be shown in a "relevant market." As we discuss below, this requirement reflects the Court's view that formal market delineation is needed to analyze the competitive and consumer-welfare effects of the challenged conduct.[72] The standard formulation does not require proof of a relevant market. In fact, the Court acknowledged later in its opinion that direct proof of harm can suffice without market definition in cases involving horizontal restraints.[73] It is not clear whether the Court intended to define a rule of reason for vertical restraints different from that used in all other antitrust cases or did not realize that its description of the rule of reason was inconsistent with both prior statements of the rule of reason and its own understanding of the law applicable to horizontal restraints.

Read literally, the first two steps incorporate the standard and prudent practice of putting the burden on the plaintiff to prove harm and the burden on the defendant to prove procompetitive benefit. As will be seen, however, the Court applied the rule of reason in *American Express* by requiring the plaintiffs to prove net harm in a single market defined to include both sides of the platform: cardholders and merchants. It thus, in substance, required the plaintiffs to prove no offsetting benefit, instead of permitting the plaintiff to prove harm on one side and requiring the defendant to prove offsetting benefit on the other side.

As to the second step, in contrast to the *Microsoft* court, the *American Express* Court did not provide guidance as to what is meant by a "procompetitive rationale."[74] As will be seen, its analysis of that issue was imprecise and flawed.

Perhaps the most notable point in the Court's formulation of the rule of reason is that it omits the fourth, balancing, step that is generally included in the formulation of the rule of reason.[75] The three-step formulation described

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for Respondents American Express Company and American Express Travel Related Services Company, Inc. at 32-33, 41, Ohio v. Am. Express Co., 138 S. Ct. 227 (No. 16-1454), 2018 WL 481636.

72 *See infra* Section V.C.1.

73 *See* Ohio v. Am. Express Co., 138 S. Ct. at 2285 n.7 ("Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive.").

74 *Cf.* United States vs. Microsoft Corp. 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (per curiam) (defining a procompetitive justification as "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal").

75 *See, e.g.*, *id.* ("[I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."). Other lower court opinions have omitted the balancing step from their summaries of the rule of reason. *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*,

by the Court seems to mean that the defendant wins if it can show "a procompetitive rationale" that cannot be achieved by less competitive means regardless of the magnitude of the procompetitive benefit relative to the magnitude of the harm to competition, and regardless whether the rationale motivated the conduct or was substantial enough to make the conduct profitable for the defendant absent its harmful effect on competition.[76] If so, the formulation describes, without discussion or analysis, a new substantive rule of decision.[77]

It is conceivable that the Court intended to incorporate balancing in the second step of the rule of reason by requiring that the defendant prove benefits sufficient to outweigh the harms proven by the plaintiff in the first step. Nothing in the Court's discussion of the rule of reason or elsewhere in the opinion, however, supports this reading. To the contrary, the Court referred to showing a "procompetitive rationale,"[78] a term that does not suggest any balancing of the benefit against the harm.

The Court's application of the rule of reason in this case to require the plaintiffs to prove a net price increase or output decrease might be thought to suggest that the Court did have balancing in mind and might even require the defendant to engage in similar balancing in step two. But the Court's later discussion of American Express's proffered procompetitive justification makes clear that net price and output effects do not exhaust the kinds of justifications that the Court thought might be cognizable and did not include any discussion of balancing the proffered justification against possible harms.[79]

The Court purported to address in substance only the first step of the rule of reason.[80] To the extent that it described a new rule of reason with respect to matters other than the first step, its opinion is dicta. But in describing new legal rules in dicta, and especially in doing so without reflecting on the ways they differed from past understandings and the reasons for doing so, the Court departed from good common law practice, in which legal rules are

116 COLUM. L. REV. 927, 976-79 (2016). But the Court did not discuss those cases, purport to resolve a circuit conflict, or set forth any other reason for its omission.

76 *See also* Carrier, *supra* note 31, at 53 (discussing how in *American Express*, "[t]he majority ignored balancing, even though that was an essential element of the rule of reason framework").

77 As noted, courts rarely reach the balancing stage in antitrust litigation. Arguably, therefore, the *American Express* Court's formulation might simply reflect the reality of how courts apply the rule of reason. But nothing in the Court's opinion suggests that that is what it had in mind, and an assessment of the real-world impact of the rule of reason would have to take into account cases that are settled in the shadow of the law, including the traditional balancing step, rather than litigated to judgment.

78 Ohio v. Am. Express Co., 138 S. Ct. at 2284.

79 *See infra* Section V.C.4.

80 Ohio v. Am. Express Co., 138 S. Ct. at 2284 ("Here, the parties ask us to decide whether the plaintiffs have carried their initial burden of proving that Amex's antisteering provisions have an anticompetitive effect.").

induced from the facts and in which courts prescribe broad rules only on the basis of substantial judicial experience and learning.

C. *Specific Holdings*

In this Section, we examine four specific holdings in the case in which the Court applied the rule of reason as described by it. We explain how, even accepting the Court's general formulation, the Court applied the rule of reason in way that undermined the common law process of antitrust law.[81] It made important new law but did not address either the *substantive* or the *institutional* considerations that a court should address in resolving normative issues in a common law-like process.

1. Vertical Restraints Must Be Assessed Within a Formally Defined Antitrust Market

The Court held that antitrust challenges to vertical restraints must be assessed within the context of a formally defined antitrust market and that the plaintiff had the burden of defining and proving that market.[82] The Court made new law by distinguishing a line of Supreme Court cases holding that harm to competition can be proven by direct evidence without proof of a relevant market.[83] The Court reasoned that the earlier cases involved horizontal restraints and that vertical restraints "often pose no risk to competition."[84] On

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81 Both of us have criticized the *American Express* decision elsewhere, as a matter of substantive antitrust law, on several specific grounds. *See* Michael L. Katz, *Platform Economics and Antitrust Enforcement: A Little Knowledge Is a Dangerous Thing*, 28 J. ECON. & MGMT. STRATEGY 138, 146 (2019) [hereinafter Katz, *Platform Economics*] (criticizing the holdings in *American Express* that competition and consumer welfare can be harmed only if the conduct at issue raises the two-sided price or reduces output); Katz & Sallet, *supra* note 64, at 2150 (concluding that courts should use a multiple-markets approach—in which different groups of users on different sides of a platform belong in different product markets—rather than be required to use the single-market approach as held in *American Express*); A. Douglas Melamed, *The* American Express *Case: Back to the Future*, 18 COLO. TECH. L.J. 1, 19 (2020) ("The most problematic part of the Court's decision was its approach to assessing competitive effects. The Court focused on the *intrabrand* vertical efficiency and gave short shrift to the anticompetitive *interbrand* effects that were the subject of the litigation."); A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741, 759 (2019) (discussing how the *American Express* majority "analyzed the issues too abstractly and formalistically and did not directly address important facts found by the district court or the material factual questions"); Michael L. Katz, Ohio v. American Express*: Assessing the Threat to Antitrust Enforcement*, CPI ANTITRUST CHRON., June 2019 (finding that, because *American Express* offers a vague definition of transaction platform but makes the legal treatment of a defendant strongly dependent on whether it is a transaction platform, the opinion threatens to have adverse consequences, both intended and unintended, in a wide range of cases).

82 *See* Ohio v. Am. Express Co., 138 S. Ct. at 2285 n.7.

83 *Id.*

84 *Id.*

its face, that distinction is unsound because horizontal restraints, too, "often pose no risk to competition."[85] Moreover, the Court ignored economic learning that demonstrates that, like horizontal restraints, vertical restraints can harm competition when the firms involved possess significant market power.[86]

In making new law in this way, the Court also departed from optimal common law process. In the first place, the Court should have focused on, but did not address, the substantive and institutional purposes of the earlier cases holding that a market need not be defined in all cases. Those cases rested on the notions that market definition is only an aid to assessing market power by indirect evidence, that proving relevant markets adds additional issues and complexity to antitrust litigation, and that direct evidence of harm to competition can in some cases be both more reliable than indirect inferences from market shares and far more economical for courts and litigants.[87]

By approaching the issue in a formalistic way unconnected to the purpose of defining markets, the Court removed from the case an opportunity to assess the role of market definition in antitrust cases in a way that might enhance the evolution of sound antitrust doctrine.[88] In particular, although the Court elsewhere emphasized that the two-sided nature of the platform is fundamental to the case and requires unusual analytical steps, it made no

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85 *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979)(noting that "[n]ot all arrangements among actual or potential competitors that have an impact on price are . . . unreasonable restraints" and that horizontal mergers, joint ventures and other cooperative arrangements are "not usually unlawful").

86 Two recent papers are examples of such learning. *See* John Asker & Heski Bar-Isaac, *Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals*, 104 AM. ECON. REV. 672, 673 (2014) (exploring how a manufacturer can use vertical practices such as retail price maintenance and slotting allowances to deter entry even without entering into exclusive contracts with retailers); Giacomo Calzolari & Vincenzo Denicolò, *Exclusive Contracts and Market Dominance*, 105 AM. ECON. REV. 3321, 3322 (2015) (showing that exclusive dealing contracts can be both profitable and anticompetitive). For a survey of modern economic theories of vertical restraints, see Patrick Rey & Thibaud Vergé, *Economics of Vertical Restraints in* HANDBOOK OF ANTITRUST ECONOMICS 353 (Paolo Buccirossi, ed., 2008).

87 *E.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects . . .' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'") (citation omitted); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 (1984) ("As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output."); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35 (D.C. Cir. 2005) ("[A] court must make 'an enquiry meet for the case, looking to the circumstances, details and logic of a restraint,' which in some cases may not require a full-blown market analysis.") (citation omitted).

88 The Court emphasized the alleged importance of market definition, in part by citing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466-67 (1992), for the proposition that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Ohio v. Am. Express Co., 138 S. Ct. at 2285. Ironically, the Court's insistence on a specific, bright-line market definition was, in fact, exactly what the quotation describes as disfavored.

effort to connect its requirement of proving a market to the fact that this case was about a two-sided platform.

The Court failed to address the *substantive* issues in an appropriate common law-like way in other respects as well. For example, the Court did not address the question whether direct evidence might be a more reliable way to prove harm to competition than indirect proof obtained by defining a relevant market. The Court should have asked how defining a market would affect the accuracy of decisions whether the conduct at issue did or was likely to injure competition.

The Court appeared to think that a market needs to be defined in order to determine whether the defendant has market power.[89] But the two sources cited for that proposition state only that market power might be needed in order for competition to be injured; they make no mention of the need to *define a market*.[90] The Court ignored long-standing economic learning that both market power and harm to competition often can be assessed without formally defining markets.[91] As Justice Breyer explained in his dissent, proof of harm to competition makes separate proof of market power unnecessary.[92]

American Express argued that its market share was so low that it could not have market power.[93] This argument ignores both the fundamental nature of two-sided markets (e.g., that a user on one side of a platform industry may

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89 *See* Ohio v. Am. Express Co., 138 S. Ct. at 2285 n.7 ("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.").

90 *See id.* (quoting statements by Leegin Creative Leather Prods., Inc. v. PSKS, Inc. 551 U.S. 877, 898, that resale price maintenance "may not be a serious concern unless the relevant entity has market power" and Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 160 (1984), that a vertical restraint can be anticompetitive "only if there is market power.").

91 *See, e.g.*, Timothy F. Breshnahan, *Empirical Studies of Industries with Market Power*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION 1011, 1049 n. 44 (Richard Schmalensee & Robert D. Willig, eds., 1989) (surveying econometric techniques for estimating market power, none of which relies on market definition); Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 131 (2007) ("But market definition may not be required when market power or anticompetitive effect can be demonstrated directly through means other than inference from the number, size distribution, and other characteristics of firms.").

92 *See* Ohio v. Am. Express Co., 138 S. Ct. at 2296-97 (Breyer, J., dissenting) ("Doubts about the District Court's market definition analysis are beside the point in the face of the District Court's findings of actual anticompetitive harm."). This is, of course, not a novel observation. For example, see *FTC v. Indiana Fed'n of Dentists,* 476 U.S. at 460-61 (1986).

This point has been recognized specifically for credit card networks. *See* United States v. Visa U.S.A., Inc., 344 F.3d 229, 240 (2d Cir. 2003) ("In short, Visa U.S.A. and MasterCard have demonstrated their power in the network services market by effectively precluding their largest competitor from successfully soliciting any bank as a customer for its network services and brand."); *see also* Herbert J. Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 COLUM. BUS. L. REV. 35, 47 (stating that anticompetitive effects could be shown directly by "proof of actual detrimental effects on competition") (quoting Ohio v. Am. Express Co., 138 S. Ct. at 2284).

93 United States v. Am. Express Co., 88 F. Supp. 3d 143, 189 n.23 (E.D.N.Y. 2015).

be entirely dependent on a specific platform to reach certain users on the other side) and the effects of product differentiation, both of which can enable the exercise of market power even by platforms with modest market shares. More important, even if market shares might be relevant to American Express's *defense,* there was no reason to *require the plaintiff* to define and prove a market in *all* cases involving vertical restraints without considering how such a requirement would further the purposes of the rule of reason or enable its evolution in the light of new learning and commercial practices, such as those at issue in *American Express*.

Finally, the Court completely ignored the *institutional* issues. It did not ask how requiring proof of a relevant market would affect complexity in antitrust cases, litigation burdens for the parties and the courts, or the predictability of antitrust law. Where there is sufficient direct evidence of harm to competition, requiring proof of a relevant market in addition to the direct evidence necessarily increases complexity and litigation burdens. And by creating an additional element that the plaintiff must prove, the requirement also tends to bias outcomes in favor of defendants. Specifically, a plaintiff might lose a case because it fails to satisfy its burden with respect to relevant markets even in circumstance in which direct evidence alone is sufficient to establish harm to competition and market definition is superfluous.

2. The Conduct of a Transaction Platform Must Be Examined in a Single Market Encompassing Both Sides of the Platform

The Court held that the competitive effects of conduct by a "transaction platform"—which the Court found American Express to be—must be assessed within the context of a single, two-sided antitrust market.[94] In the Court's view, the defining feature of a transaction platform is that it facilitates direct transactions between users on its different sides and "cannot make a sale to one side of the platform without simultaneously making a sale to the other."[95] Thus, the Court asserted, transaction platforms are better understood as "'suppl[ying] only one product'—transactions."[96]

The idea that the distinctive feature of transaction platforms is that they provide a single product—transactions—seems to be at the core of Court's analysis of market definition and, as will be seen, injury to competition and

94 Ohio v. Am. Express Co., 138 S. Ct. at 2287.

95 *Id.* at 2280.

96 *Id.* at 2286 (citation omitted). Elsewhere, the Court described a transaction platform as "a special type of two-sided platform" and said that, "[a]s the name implies, a two-sided platform offers *different* products or services to two different groups who both depend on the platform to intermediate between them." *Id.* at 2280 (emphasis added).

procompetitive justifications. It might also be a source of what, as will be explained, appear to be serious mistakes in the Court's analysis.

As discussed above, there were no controlling precedents regarding market definition in cases involving two-sided transaction platforms. Although there had been earlier two-sided market cases that involved cross-platform feedback effects and transaction platforms, those cases predated the development of modern platform economics and did not focus on how to account for the possibility that the challenged conduct has opposing effects on the welfare of users on different sides of the platform.[97]

In such circumstances, sound, common law-like adjudication requires proceeding cautiously, with careful attention to the facts of the case and the lack of judicial experience and learning. The Court might, for example, have made a very fact- and case-specific ruling, and it might even have suggested that whether the market should include one or both sides of the platform should be decided on a case-by-case basis. A ruling of that type would have enabled the law to evolve in the light of judicial experience and would have respected the new and unsettled nature of economic learning about platforms.[98] Alternatively, the Court might have established a rebuttable presumption that the market should include both sides and thus left open the possibility that subsequent experience would teach whether a more unequivocal rule would be prudent.

Instead, the Court adopted a sweeping legal rule and based that rule on its highly imperfect understanding of the economic literature. The reliance on academic learning should have provided an even greater reason for humility and caution, both because the Justices are not economic experts and because economists were—and are—divided on the question of whether a single market should be defined for both sides of a transaction platform.[99]

97 For example, cross-platform network effects were central issues in both *Microsoft* and *Visa U.S.A.*: "[I]n the market for general purpose card *network service*, the four networks themselves are the sellers and the issuers of cards and merchants are the buyers." *Visa U.S.A., Inc.*, 344 F.3d at 239.

98 In a case addressing very different issues, Justice Gorsuch dissented from a passage in the Court's majority opinion on the ground that, while the passage was correct, it could be read to suggest that only specific factual circumstances "are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are 'governed by general principles, rather than ad hoc improvisations.'" Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring) (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 25 (2004)). Whatever the wisdom of that observation in the matters of First Amendment law at issue in that case, sound antitrust adjudication requires more attention to facts and more caution before embedding in legal rules economically-based—and therefore contingent and often impermanent—"general principles."

99 The Court cited Filistrucchi et al., *supra* note 64, which argued that a single, two-sided market should be defined. Ohio v. Am. Express Co., 138 S. Ct. at 2287. The Court also cited Evans and Noel, who argued for the need to consider effects on both sides of a platform. *Id.* (quoting David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005

Although it was appropriate to rely in part on academic learning, especially given the lack of other relevant learning, a common law approach to the issues would have counseled conducting a broad review of the relevant literature, noting any areas of disagreement, and deciding the case narrowly while deferring—until the accumulation of more judicial experience and learning—the prescribing of broad legal rules to govern future cases.

Had the Court applied the rule of reason in a way well-suited for the common law evolution of antitrust law, it would have proceeded differently in other ways as well. It would have asked whether including both sides in a single market would make sense as a *legal* rule, addressing both institutional and substantive considerations.

With respect to the *institutional* considerations that should have informed its decision, the Court should have asked whether its new legal rule would reduce or increase the administrative burden on parties and courts, and

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COLUM. BUS. L. REV. 667, 671 (2005), which noted that "[f]ocusing on . . . one dimension of competition tends to distort the competition that actually exists among [two-sided platforms]" (alterations and omissions in original)). But, as the cited passage itself makes clear, Evans and Noel did not say that the courts should always define a single, two-sided market. To the contrary, they stated the opposite elsewhere in the cited article. *See* Evans & Noel, *supra*, at 697 (stating that courts should implement "a looser form of market definition: one that is less insistent on defining sharp boundaries and that considers the degree of constraints" and cautioning that "industries with [two-sided platforms] are sufficiently complex that mechanical market definition exercises are particularly likely to obscure market realities").

The Court ignored one of the foundational articles in the two-sided platform literature, which stated that, for transaction-platform industries in which users multi-home on one side and single-home on the other, "it does not make sense to speak of the competitiveness of 'the market.' There are two markets: the market for single-homing agents which is, to a greater or lesser extent, competitive, and a market for multi-homing agents where each platform holds a local monopoly." Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. ECON. 668, 680 (2006). Although users on both sides of credit card platforms multi-home, there is a much a greater degree of multi-homing by merchants. Moreover, as discussed *infra* note 110, card users make choices transaction-by-transaction, while merchants either accept all of a network's transactions or none. Both of these sources of asymmetry support Armstrong's point that the degree of competition for users can be very different on the two sides of a platform, and these differences are obscured by defining a single, two-sided market.

Based in part on Armstrong's analysis, Wismer et al. concluded that defining a transaction platform as operating in a single, two-sided market is "feasible only if . . . substitutability of the service from the perspective of each customer group does not differ substantially." Sebastian Wismer et al., *Multi-Sided Market Economics in Competition Law Enforcement*, 8 J. EUR. COMPETITION L. & PRAC. 257, 260, 260 n. 15 (2017).

For recent discussions of reasons why even a transaction platform is better viewed as operating in multiple separate, yet deeply interrelated, markets, see FRANCK & PEITZ, *supra* note 64, at 26, which stated that "adopting the single-market approach may lead to neglecting close substitute offers on one side of the market, which merely shows that there is not a single market since substitutable product offerings are very different for the two sides" (emphasis omitted) and Katz & Sallet, *supra* note 64, at 2158, which stated that "the single-market approach fails to accurately account for product substitution and competitive conditions in multisided platform industries. Such a reality lends strong weight to the conclusion that a more fine-grained analytical framework, namely the multiple-markets approach, is necessary."

whether it would make antitrust decisions more predictable. As to the former, including both sides of a transaction platform in a single market greatly complicates defining and proving the relevant market and thus increases the litigation burdens for both the parties and the courts.

Market definition focuses on demand substitution—on identifying the alternative sellers that constrain the defendant's behavior.[100] For many multi-sided platforms, however, the competitive alternatives are not the same on the different sides.[101] That is true, with less frequency, even for transaction platforms.[102] For example, Uber would seem to fit the Court's definition of a "transaction platform" because Uber is in the business of matching drivers and riders.[103] The alternatives on the two sides are, however, not the same.[104] Riders' alternatives are different forms of transportation, such as Lyft, taxis, car sharing services such as Zipcar, public transportation, bikes, scooters, and walking. Drivers' alternatives are other occupations, including driving for Lyft or other ride-hailing platforms, working for food-delivery services, or possibly unskilled jobs that do not involve driving.[105] Whether all of the alternatives should be included in the same antitrust market is an empirical question that cannot be answered by determining whether the alternatives are

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100 *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [https://perma.cc/RQ3T-3X4A] [hereinafter 2010 HMG] ("Market definition focuses solely on demand substitution factors . . . .").

101 Obvious examples include newspapers and advertiser-supported television and radio news broadcasters. The alternatives to an advertiser are other forms of advertising, including advertising on entertainment media, billboards, and direct mail. None of those is a suitable alternative to consumers looking for news content.

102 In addition to the example of Uber considered here, see the discussion of competition between Sabre and Farelogix *infra* Part VI.

103 *See* Joshua D. Wright & John M. Yun, Ohio v. American Express*: Implications for Non-Transaction Multisided Platforms*, CPI ANTITRUST CHRON., June 2019, at 6 ("Uber is a transaction platform that competes with non-platforms, to one degree or another, including taxis, subways, and buses—as well as other platforms such as Lyft.").

104 Because the alternatives are different, defining a single, two-sided market risks overlooking some of the alternatives—especially those that are not themselves transaction platforms or do not constrain the platform on both sides—and thus defining the market too narrowly.

105 Evans and Schmalensee argue that a single market encompassing both sides should be defined for any platform that sells a single service that is "jointly consumed." DAVID S. EVANS & RICHARD SCHMALENSEE, ANTITRUST ANALYSIS OF PLATFORM MARKETS: WHY THE SUPREME COURT GOT IT RIGHT IN *AMERICAN EXPRESS* 63 (2019). Understanding that the transportation and occupation alternatives on the two sides of the Uber platform differ illustrates a major flaw in their argument. Even when a platform's service is jointly consumed—when provided by that platform—it does not follow that all of the competitive alternatives available to users on the two sides of the platform themselves involve joint consumption by the same two sets of users.

properly characterized as "platforms" or even "transaction platforms." The Court appears not to have focused on these commercial realities.[106]

Including both sides of the platform in a single market would thus require determining which combinations of possibly very different competitive alternatives on the two sides, including alternatives on one side that are not meaningful alternatives to buyers on the other side, would constitute a market.[107] That complicated exercise would often be unnecessary. Consider, for example, a case alleging the exclusion of a rival on one side of the platform. A court might be able to assess the impact of that exclusion by considering the market on only that side of the platform and assessing feedback effects to and from the other side, without the complex task of identifying the sellers on the other side that should be included in the market.

In addition to increasing administrative costs, requiring proof of a single, two-sided market for transaction platforms almost surely reduces the predictability of antitrust decisions because of the added complexity and, as discussed below, the diminished accuracy in a wide range of cases.

With respect to the *substantive* considerations, the Court should have asked whether its new legal rule will, as a practical matter, increase the accuracy of antitrust decisions. The Court did not ask that, and it is entirely possible that the new rule will decrease decision accuracy.

First, it is difficult to see how defining a single market could enhance judicial accuracy. To be sure, economists agree that feedback effects between the two sides should be taken into account when they are significant.[108] But it is not necessary to define a single market to assess those effects. Feedback effects can be examined directly by determining, for example, how increased cardholder benefits might affect cardholder purchasing behavior and thus

106 The Court asserted that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions." Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287 (2018). It is not clear what the Court meant by that statement. If the term "transactions" is intended to refer only to transactions on two-sided platforms, the statement would be tautological and irrelevant to antitrust analysis. It is conceivable that the statement is intended to limit, as a matter of law, the definition of a transaction platform to those platforms that compete only with other platforms; but the Court neither said that nor set forth any explanation of why that would make sense as a legal rule. If—as seems likely from the context of the statement within the opinion—the statement is intended to mean that two-sided platforms do not, in fact, compete with suppliers that are not platforms, then as explained above the statement is incorrect, even with respect to transactions offered on the platforms. As will be seen, the ambiguity in this statement has already led at least one district court astray. *See infra* Part VI.

107 Alternatively, the court could make a threshold determination as to whether the platform was suitable for defining a single market. But that would require the court to determine whether the alternatives and products are the same on both sides—in effect to define a market on each side—in order to determine whether it could sensibly define a single market that encompasses both sides.

108 Although economists agree that feedback effects should be taken into account where they are significant, economists do not agree on whether both sides should be included in a single market. *See, e.g.*, EVANS & SCHMALENSEE, *supra* note 105; FRANCK & PEITZ, *supra* note 64; Filistruchi et al., *supra* note 64; Katz & Sallet, *supra* note 64.

merchants, or how increased merchant fees might reduce the number of merchants accepting Amex cards and thus harm cardholders. Antitrust law often takes into account effects that are outside the relevant market.[109]

Not only is including both sides in a single market unnecessary to assessing feedback effects, but there are reasons to think that requiring definition of a single two-sided market for transaction platforms will reduce judicial accuracy. For one thing, the added complexity of defining the market could increase the likelihood of error. So, too, could the additional issue created by the Court's decision—whether the business at issue is properly regarded as a "transaction platform." The Court did not offer a precise definition of what constitutes a transaction platform. In fact, it is not even clear that American Express meets the definition of a transaction market, both because it derives substantial revenues from both annual card fees and the issuance of credit rather than direct transaction fees, and because it sells merchants "acceptance services" rather than individual transactions.[110] Given the importance the Court attaches to being labeled a transaction platform, it is no surprise that whether a defendant is a transaction platform has already become a matter of contention in several litigations.[111]

109 *See* Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics* 21 (Univ. Pa. Law Sch. Inst. Law & Econ. Research Paper No. 20-15, 2020) ("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 [sic].").

Evans and Schmalensee have recently defended the *American Express* decision based on their understanding of the rule of reason. EVANS & SCHMALENSEE, *supra* note 105, at 27. They argue that defining a market on one side "means, as a practical matter, the court [is] ignoring pro-competitive benefits" on the other side. This argument overlooks the fact that feedback effects generated by changes in benefits and costs for users on one side of a platform certainly can and should be taken into account if they affect competition in a relevant market defined on the other side. Their argument also overlooks the fact that the district court in *American Express* did look at the claimed benefits on the cardholder side and rejected them as a matter of fact. *See infra* Section V.C.4.

The Horizontal Merger Guidelines make clear that the federal antitrust agencies will take efficiency benefits into account, even if they do not affect the defined relevant market, so long as they are "inextricably linked" to the harms in the affected market. *See* 2010 HMG, *supra* note 97, at § 10 n.14 ("Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall."). If the benefits are not inextricably linked, they can by definition be achieved without the harm to the relevant market and therefore ought not be used to justify those harms.

In any event, Evans and Schmalensee's argument begs the question of whether the best way to take account of effects on the other side of the platform is to define a two-sided market or to ensure that those effects are taken into account even if they do not occur in the relevant market. Evans and Schmalensee do not address that question.

110 That is, instead of purchasing individual card transactions from American Express, merchants purchase the right (and the obligation) to hold themselves out to the public as accepting any valid American Express card presented to them. Similarly, cardholders buy a bundle of rights, including the right to select American Express transactions at Amex-accepting merchants, as well as benefits such as airline lounge access. United States v. Am. Express Co., 88 F. Supp. 3d 143, 160-64 (E.D.N.Y. 2015).

111 *See infra* Part VI.

In addition, defining a single, two-sided market might reduce the accuracy of judicial decisions by making market definition less useful as an aid to the ultimate decision. Markets are often defined in antitrust cases because doing so allows the calculation of the market shares of the competing sellers, which are then used as proxies for the degree of market power. There are, however, often significant differences between the competitive conditions on the two sides of a transaction platform attributable to differences in the availability of substitutes, product differentiation, vertical integration, user sophistication, and user multihoming. Because a single share based on a market that encompasses both sides of a platform cannot possibly capture these differences in competitive conditions on the two sides, defining a single market encompassing both sides reduces the usefulness of market-share information and thus of market definition.

3. In Order to Prove Harm to Competition Directly, Plaintiffs Must Prove That the Challenged Conduct Increased the Two-sided Price Above the Competitive Level or Reduced Output in the Market

The district court found that the no-steering provisions injured competition on the basis of direct evidence showing that the provisions: reduced competition among card systems; thwarted rivals—particularly, Discover—from competing against American Express's high-price/high-benefits business model with a low-price, high-benefits model; and resulted in increased merchant fees that were not offset by increased cardholder benefits.[112] These findings were sufficient to establish harm to competition as an economic and factual matter.

The Supreme Court concluded, however, that the facts found by the district court were insufficient to show harm to competition.[113] This was a substantive mistake. Indeed, the Court seemed to have a fundamental misunderstanding about the meaning of harm to competition. The Court emphasized that the "antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance."[114] But the issue is not whether the rules "prevent" competitors from reducing price or even whether the rules directly restrain competitors. It is enough that the rules cause materially less price competition by reducing the incentives of competitors to reduce price. The district court found that the rules not only reduced that incentive but specifically deterred Discover from pursuing a

112 *See* United States v. Am. Express Co., 88 F. Supp. 3d at 195-96, 212-17.

113 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287-90 (2018) ("The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market.").

114 *Id.* at 2290.

low-merchant-price, high-cardholder-benefits strategy because the rules prohibited merchants from passing on the lower fees to cardholders and thereby prevented Discover and other card networks from using reduced merchant fees to generate increased card usage.[115] The Supreme Court identified no evidence to contradict this finding.

The Court compounded that mistake by departing from what a good common law antitrust court would have done if it had concluded that the facts were insufficient to show harm to competition. That court would have proceeded humbly and with caution, being mindful of the novelty and difficulty of the issues and of the lack of judicial experience in dealing with them. It might have affirmed on the ground that the plaintiff had failed to prove harm to competition. It might have remanded to give the lower courts the opportunity to explore issues addressed in the record but not in the district court findings. It might have acknowledged that it had little basis to prescribe the kinds of rules that are appropriate for a common law court only after substantial judicial experience. In support of this disposition, it could have cited its many prior decisions that have made clear that per se rules—which generally aid plaintiffs—are appropriate only after the court can confidently determine that such a rule is appropriate on the basis of well-founded knowledge.[116]

Instead, the Court went further and, in effect, set forth a requirement for proof of injury to competition among two-sided transaction platforms. Specifically, the Court held that "plaintiffs must" prove that prices of credit card transactions were elevated above the competitive level, that the number of such transactions was reduced, or that the no-steering rules "otherwise stifled competition in the credit card market."[117] Notably, the Court cited in

115 The court said that,

> the failure of Discover's low-price value proposition is emblematic of the harm done to the competitive process by Amex's rules against merchant steering. Since customers can neither independently access nor account for the costs of different forms of payment when deciding which to use, a lowest-cost provider strategy cannot succeed in the network services market if merchants are unable to shift share among the various networks.

United States v. Am. Express Co., 88 F. Supp 3d at 214 (footnote omitted).

116 *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 263 (1963) ("We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain."); *see also* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977) ("The Court's refusal to endorse a *per se* rule in *White Motor Co.* was based on its uncertainty as to whether vertical restrictions satisfied those standards."); United States vs. Microsoft Corp. 253 F.3d 34, 84 (D.C. Cir. 2001) (en banc) (per curiam) ("We hold that the rule of reason, rather than per se analysis, should govern the legality of tying arrangements involving platform software products. . . . There being no close parallel in prior antitrust cases, simplistic application of per se tying rules carries a serious risk of harm.").

117 Ohio v. Am. Express Co., 138 S. Ct. at 2287. The "otherwise stifled competition" notion appears to have been something of a throw-away line. The Court neither discussed what that meant nor explained why the facts found by the district court, such as the manifest reduction of competition

support of this proposition a predatory pricing case that did *not* involve a two-sided platform.[118] It is perhaps not surprising then that, as we will now explain, the Court's tests for injury to competition are substantively wrong, as well as poorly suited from an institutional perspective, when applied to transaction platforms such as America Express.

a. *The Court's Two-Sided Price Test*

The Court held that harm to competition could be inferred based on prices if and only if the plaintiffs proved that the defendant's conduct elevated the platform's *two-sided* price (i.e., the sum of the prices it charges to the two sides for a transaction) above the competitive level.[119] In the Court's view, if a transaction platform sells a single product—transaction facilitation—that is jointly purchased by consumers and merchants, then there is only a single price to consider. The Court appeared to believe that this implies that changes in consumer welfare can be assessed by the change in a single, two-sided price.[120]

This holding is incorrect as a *substantive* matter. Although it claimed to be applying modern platform economics, the Court in fact ignored one of the fundamental findings of that work: because users on different sides of a platform generally have divergent interests, the consumer welfare and efficiency effects of a platform's conduct cannot be understood solely by examining the effects of that conduct on the two-sided price—it is critical to

with respect to merchant fees and the impact of the no-steering rules on the low-fee business models, such as Discover's, failed to establish that the rules "stifled competition."

118 *Id.* at 2288 (holding that harm to competition will not be inferred from price and output data absent evidence that "output was restricted or prices were above a competitive level.") (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993)).

119 The court said that,

> Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost [i.e., two-sided price] of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.

Ohio v. Am. Express Co., 138 S. Ct. at 2287.

Because the relation between the actual price and the competitive price does not depend on the boundaries of the market, the Court's holding that proof of elevated prices would suffice to show harm to competition demonstrates that there is no need to define a market in all cases involving vertical restraints.

120 As noted above, the Court did not spell out what a defendant must show in the second step of the rule of reason to meet its burden of establishing a procompetitive justification. *See* text accompanying note 71. Presumably, however, in order to be cognizable, a proffered procompetitive justification would have to provide a net benefit after taking into account both sides of the platform. It would be senseless to permit a defendant to justify harms on both sides by showing beneficial effects on one side that might be much less or even harmful overall when both sides are taken into account.

examine the individual prices charged to the different sides.[121] Indeed, the need to examine the individual prices charged to users on the different sides of the platform rather than solely the two-sided price has been identified as the defining feature of a transaction platform by one of the seminal papers on the subject, authored by a Nobel laureate and cited (but in this regard, ignored) by the Court.[122]

Although some have likened treating consumer and merchant payment services as a single product to treating pairs of left shoes and right shoes as a single product, there is a critical difference.[123] A payment transaction is purchased by two distinct parties—a consumer and a merchant—who have distinct and non-congruent interests. By contrast, a left shoe and a right shoe are bought in a pair by the same person.

A shoe buyer cares only about the total price paid for the pair; it is a matter of indifference if the right shoe notionally costs more or less than the left shoe. In the terminology of the academic literature, a shoe buyer cares only about the price *level*, not the price *structure*. By contrast, credit card users and merchants care very much about the component prices, not just the two-sided price. With the no-steering rules in effect, consumers make card-use decisions in large part based on cardholder rewards without regard to the fees charged to merchants. And merchants' economic welfare depends primarily on the fees that they are charged, not the two-sided price.

For a shoe buyer, a $1 increase in the price of left shoes coupled with a $1 decrease in the price of right shoes would almost certainly have no effect on the buyer's choice of how many pairs of shoes to buy or on his or her welfare. But a $1 increase in Amex's credit-card rewards (the equivalent of a $1 price reduction to cardholders) coupled with a $1 increase in merchant fees can matter in several ways. For example, card-holders might benefit from the increased rewards, and the transaction volume on American Express cards could rise as consumers choose to use those cards more frequently. The change in price structure could, however, reduce the economic welfare of users on one or both sides of the platform even though the price level remains constant.

If the set of merchants accepting credit cards stays the same, then consumers will be better off, but merchants may well be worse off due to the

121 The Court's confusion may be a consequence of the majority's insistence that a transaction platform offers only a single product. *See* Ohio v. Am. Express Co., 138 S. Ct. at 2286 n.8 ("[C]redit card companies are best understood as supplying only one product—transactions—which is jointly consumed by a cardholder and a merchant."). If the Court had recognized two closely interrelated, but distinct markets, it would have been forced to consider the different prices to the two sides and, thus, might have taken a more complete view of competition.

122 *See id.* at 2281 (citing Rochet & Tirole, *supra* note 13).

123 *See, e.g.,* EVANS & SCHMALENSEE, *supra* note 105, at 33 (making this argument in the context of market definition and missing the critical distinction described in the text).

increase in the fees they are required to pay. In principle, merchants might benefit from additional consumer purchases stimulated by the increase in consumer rewards. But any such gains must be weighed against the increase in fees paid by merchants for transactions that would have occurred using American Express even if the price structure had been left unchanged. Moreover, it is plausible that some of the *additional* American Express transactions induced by the increased rewards are for purchases that the consumer otherwise would have made using alternative payment methods equally or less costly to merchants. The change in the price structure could thus increase the merchant's fees while generating little increase in merchant sales and might, on balance, harm merchants. Notably, even though the two-sided price remains constant, the losses (which economists call reduced surplus) suffered by merchants might outweigh the gains (increased surplus) enjoyed by consumers from the increased rewards.[124] In fact, the overall effect on consumer and merchant welfare might be negative even when the two-sided price falls.[125]

Moreover, if some merchants stop accepting American Express cards and their acceptance was sufficiently valued by cardholders, then cardholders could be worse off from the reduced ability to use their cards even though the rewards rate has increased and the two-sided price has remained constant or even fallen. Because a lower two-sided price can correspond to lower welfare for both merchants and users, the Court's price test lacks a sound basis in economics.[126]

The Court's treatment of price effects also failed to take account of the *institutional* factors it should have considered. The Court insisted on evidence that the two-sided price was above the competitive level.[127] However, calculating the competitive two-sided price from first principles (i.e., based on cost and demand conditions) is unlikely to be feasible given the factual record of most cases and the current state of platform economics. In principle,

124 This possibility arises when the increase in rewards leads consumers to choose American Express for transactions that would have generated higher *joint* benefits using different payment methods. In the absence of no-steering rules, the merchants would have been able to share those benefits with consumers (such as by charging lower retail prices when the alternatives are used) to induce consumers to make different payment choices. If the benefits a merchant offers a consumer for using a different payment method exceed the value of the additional American Express rewards to the consumer, then the consumer will choose the alternative method, and both the consumer and the merchant will be better off.

125 For an algebraic example demonstrating that aggregate user surplus may be lower when a transaction platform lowers its two-sided price, see Katz, *Platform Economics*, *supra* note 81, at 145.

126 We are not saying that the change in the two-sided price could *never* be informative regarding changes in user welfare. Instead, we are making the point that economists and courts *do not yet know* the set of conditions under which looking solely at the two-sided price is sufficient, and therefore the Court erred in promulgating a sweeping rule.

127 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287 (2018) ("[P]laintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level . . . .").

one might rely on the price that prevailed prior to the challenged conduct as a benchmark, but the plaintiffs challenged no-steering provisions that American Express (and, previously, other credit card networks) had insisted upon for decades. Therefore, on the plaintiffs' theory, there was no competitive market to observe as a benchmark.

The district court found as a factual matter that the no-steering provisions directly harmed the competitive process and led to higher merchant fees that were not fully offset by increases in cardholder benefits, thus raising the two-sided price.[128] The Supreme Court failed to recognize that these findings, in the absence of evidence that the initial prices were below competitive levels, also demonstrated that American Express was able to charge supracompetitive prices.[129] In ignoring this evidence, the Court seemed to require direct proof of the competitive price as a benchmark and thus to require proof of something that could not have been proven in the *American Express* case—not because it might not have been true, but for evidentiary and procedural reasons.

b. *The Court's Output Test*

The Court held that evidence showing merchant fee increases without fully offsetting cardholder reward increases did not demonstrate that prices were above competitive levels or even that plaintiffs had sufficient market power to increase prices profitably; as noted above, the Court reasoned that "rising prices are equally consistent with growing product demand" absent evidence that output is falling and that "[m]arket power is the ability to raise price profitably *by restricting output*."[130] In effect, therefore, the Court held that, at least absent direct proof of the often unobservable competitive price, proof of harm to competition requires proof of reduced output. As Justice Breyer put it in his

128 The court found that

> Plaintiffs have established, for instance, that American Express's prohibitions on merchant steering aided the network's efforts to profitably raise its discount rates on merchants accounting for 65% of the network's annual U.S. charge volume as part of its Value Recapture initiatives in the late 2000s. . . . Plaintiffs have provided sufficient circumstantial evidence and expert testimony for the court to conclude that Amex's Value Recapture price increases were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and resulted in a higher net price.

United States v. Am. Express Co., 88 F. Supp. 3d 143, 215 (E.D.N.Y. 2015) (citations omitted).

Notably, American Express's market power enabled it to increase prices to merchants while causing only a very few large and medium-sized merchants to cease accepting Amex cards. *Id.* at 197.

129 The Court did suggest that the price increase might have reflected increased demand for credit card services rather than market power, *Ohio v. Am. Express Co.*, 138 S. Ct. at 2288, but it made no effort to connect that speculation to the facts in the case.

130 *Id.* (citations omitted).

dissent, "the majority retreats to saying that even [two-sided] price increases do not matter after all, absent a showing of lower output."[131]

The Court did not explain the rationale for focusing on output. The Court cited only authorities that concerned traditional, non-platform markets. The Court might have assumed that, if transaction platforms sell only a single product—transactions—then the welfare effects of output increases or decreases must be the same as the effects of changes in the output of other products, even if sold by firms that are not two-sided platforms. Whatever the explanation, the Court appeared not to recognize that the relationship between output and consumer welfare can be very different in transaction-platform markets from that in other markets.[132]

As a *substantive* matter, platform output is not a good test of economic welfare or of whether competition has been increased or decreased. Like the Court's two-sided price test, the Court's output test is flawed because it fails to account for the fact that consumers and merchants have distinct economic interests. In a one-sided market, an increase in output, holding quality constant, typically corresponds to an improvement in consumer welfare, at least absent price discrimination. Intuitively, a consumer will buy more only if the supplier makes additional purchases more attractive. But in a two-sided market, changes in transaction volumes and changes in user welfare can diverge because the interests of the users on the two sides are not aligned, and a platform may be able to exploit this fact to increase its profits in ways that increase output but harm competition and the platform's users.[133]

The no-steering rules—which prevent merchants from taking actions to align consumers' and merchants' interests—are one way for a platform to do that.[134] American Express's merchant contracts require a participating merchant to accept any request by a consumer to use an American Express card to pay even if the merchant would be better off not accepting an American Express card for that particular transaction. And the no-steering rules prevent the merchant from doing anything to influence the cardholder's decision. If the cost of an additional American Express transaction to the merchant exceeds the

131 *Id.* at 2302 (Breyer, J., dissenting).

132 Evans and Schmalensee also assert that a court applying the rule of reason should focus, "ultimately, on the overall output of the jointly consumed service". EVANS & SCHMALENSEE, *supra* note 105, at 40 & n.81 (arguing that increased output is "a central virtue of competition" and its loss is one of the "standard signals of competitive harm").

133 For a technical demonstration, see Katz, *Platform Economics*, *supra* note 81, at 146-148.

134 Both Edelman and Wright and Schwartz and Vincent have shown that this type of restraint can lead to excessive use of the platform. *See generally* Benjamin Edelman & Julian Wright, *Price Coherence and Excessive Intermediation*, 130 Q.J. ECON 1283 (2015); Marius Schwartz & Daniel R. Vincent, *The No Surcharge Rule and Card User Rebates: Vertical Control By a Payment Network*, 5 REV. NETWORK ECON. 72 (2006).

gain to the cardholder, then overall user welfare is reduced even if the number of such transactions increases.

As Edelman and Wright have explained, there are three related mechanisms through which policies such as no-steering rules can harm competition and users while promoting overconsumption of the transaction service.[135] First, under the no-steering rules, every one of a merchant's customers pays higher retail prices as the merchant passes on some or all of the fees that American Express charges it, and the amount of the pass through to any given customer is the same whether or not that customer uses American Express to facilitate the purchase transaction.[136] This passing-on effect is tantamount to a "tax" on those customers who do not use American Express, which defrays some of the costs the merchant incurs serving customers who do use American Express.[137] Because an Amex cardholder does not incur an additional cost for using the platform, he or she will tend to use it even if the actual costs associated with the platform exceed the benefits that the customer and merchant derive from using it. Second, an increase in the fees that a platform charges merchants has no effect on consumers' incentives to use the platform as long as merchants continue to accept its cards.[138] By contrast, if steering were allowed, merchants could be expected to respond to the higher fees by increasing their steering efforts, which would place additional competitive pressure on the platform. Third, a platform can use some of the increased merchant fees to finance consumer rewards that promote increased overutilization of the platform.[139] The costs of the incremental transactions to merchants may exceed the benefits of the incremental transactions to consumers, so that, on net, user welfare falls. In the presence of the no-steering rules, a merchant has no way to induce a consumer to forgo platform transactions that destroy value from the joint perspective of the consumer and merchant. This situation stands in stark contrast to purchasing shoes, where an additional purchase will be made only if the combined benefits of the left and right shoe purchases exceed the combined costs.

The allegation in *American Express* was, and the district court found, that the no-steering provisions harm merchants by reducing price competition on the merchant side among credit card networks and by making it unprofitable for rival credit and charge card networks (notably Discover) to compete by charging low merchant (and cardholder) fees.[140] It is unclear whether on balance the no-steering provisions increase or decrease output. On the one

135 Edelman & Wright, *supra* note 134, at 1285.

136 *Id.*

137 Schwartz & Vincent, *supra* note 134, provide an analysis of how no-steering provisions enable a card network to tax merchants' customers who do not use that payment card.

138 Edelman & Wright, *supra* note 134, at 1285.

139 *Id.*

140 United States v. Am. Express Co., 88 F. Supp. 3d 143, 213-14 (E.D.N.Y. 2015).

hand, the provisions are likely to increase the use of Amex cards because the provisions prohibit merchants from discouraging the use of Amex cards. On the other hand, the provisions are likely to reduce use of competing cards; and, because the no-steering provisions reduce competition among card networks, they might prevent output increases driven by price and quality improvements that might otherwise result from increased competition among the networks. In any event, the change in output has not been shown to be an economically valid measure of the effects of the rules on consumer welfare.

Given the novelty of the issues before the Court, it was premature for the Court to hold that an output test based on one-sided logic should be applied to two-sided transaction platforms. Good common law practice would have been to limit the opinion to asserting that the plaintiffs had failed to demonstrate harm in this particular instance, perhaps noting that, among other things, plaintiffs had not demonstrated that American Express's conduct restricted output.

The Court also failed to consider *institutional* factors that should have informed its decision with respect to an output test. Because the no-steering provisions had been in effect for more than 60 years, there was no good before-and-after benchmark against which to assess output effects, so focusing on changes in output would not help the court determine whether the no-steering rules themselves increased or decreased output.[141] The Court should have looked to measures of competitive effects that were susceptible to proof as a practical matter.

* * *

In summary, if as a matter of substance the competitive effects of the no-steering provisions could be assessed only by comparing the total two-sided price to the competitive price or by determining whether the provisions had reduced output compared to the but-for world, then the Court's focus on those matters would have created a powerful default rule favoring defendants; but it might have been defensible as a means of avoiding arbitrary decisions

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141 The Court seemed to think that the no-steering provisions had led to increased output because the number of credit card transactions had increased in recent years. But the provisions had been in effect since the 1950s. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283 (2018). Clearly, many factors unrelated to the no-steering provisions have caused an increase in output in recent years. The issue was not whether output had increased over time, perhaps because of increased population, consumer spending, and other factors unrelated to the no steering provisions. The issue was whether output had increased more or less than it would have absent those provisions. Moreover, it can be inferred—from the district court's finding that the no steering provisions excluded innovative, low-price competition to American Express—that the provisions might have prevented an increase in output that would otherwise have occurred. The absence of that increase would not be reflected in a decrease in output over time, which is what the Court required the plaintiff to prove.

and false positives. However, the price and output tests on which the Court focused are themselves flawed and are as a substantive matter not reliable ways of assessing competitive effects. Moreover, even if the price and output tests the Court had in mind were sound in theory, the Court's approach was flawed because it failed to consider important institutional factors. Theoretically sound tests are not useful if they cannot as a practical matter be applied using the kinds of evidence that are available in litigation. The Court should have asked whether, under the circumstances, plaintiffs' evidence and the district court's fact-finding were enough to meet the plaintiffs' burden to show injury to competition in the first step of the rule of reason.

4. The No-Steering Rules Protected Amex Good Will and Prevented Free Riding

Although the Court described the issue in the case as whether plaintiffs had met their burden under step one of the rule of reason,[142] the Court discussed American Express's purported justifications for the no-steering provisions, which ordinarily are a matter for step two. In what might therefore have been dicta, the Court asserted that steering by some merchants would make consumers reluctant to use Amex cards generally, giving rise to an "externality" that "endangers the viability of the entire Amex network" and "undermines the investments that Amex has made to encourage increased cardholder spending."[143]

In support of its assertion, the Court cited an earlier case that had noted the unexceptional proposition that, under certain circumstances, "vertical restraints can prevent retailers from free riding."[144] The Court cited neither evidence showing that the no-steering rules solved or ameliorated an actual free riding problem nor evidence in support of its assertion that the viability of the Amex network was threatened or that eliminating the rules would reduce cardholder rewards. In fact, evidence presented at trial indicated that the Amex network would remain viable if the no-steering rules were prohibited and that American Express might respond to merchant steering by *increasing* cardholder rewards because of the increased competitive pressure it would face.[145]

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142 *Id.* at 2284 ("[T]he parties ask us to decide whether the plaintiffs have carried their initial burden of proving that Amex's antisteering provisions have an anticompetitive effect.").

143 *Id.* at 2289.

144 *Id.* at 2289-90 (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890-91 (2007)).

145 *See* United States v. Am. Express Co., 88 F. Supp. 3d at 238 ("[A]s one Amex executive testified, the network may choose to *increase* its investments in rewards in order to make its cardholders more resistant to merchants' efforts to steer them to other card brands."). The court also cited an American Express business document identifying increased rewards as a response to steering toward debit cards. *Id.*

With regard to the possibility of free riding, the district court correctly acknowledged that prevention of free-riding is a legitimate, pro-competitive justification for vertical restraints, but it found that American Express's free-riding arguments were not supported by the facts.[146] More generally, while the district court said that it is unclear whether, and if so under what circumstances, benefits on one side of a platform can as a matter of law offset or justify harm on the other side, it held that American Express had failed in any event to prove such benefits:

> However, even if such cross-market balancing is appropriate under the rule of reason in a two-sided context, here Defendants have failed to establish that the [no-steering provisions] are reasonably necessary to robust competition on the cardholder side of the [general purpose credit and charge] platform, or that any such gains offset the harm done in the network services market.[147]

Moreover, not only did the Supreme Court's assertions about the benefits of the no-steering rules lack factual support, they also reflected a failure by the Court, once again, to address the *substantive* question of what kinds of purported justifications are relevant to determining whether the challenged no-steering provisions harm competition. Plaintiffs alleged that the provisions harmed *interbrand* competition by reducing the incentive of American Express and rival credit card networks to compete on price.[148] The justifications credited by the Court, however, focused solely on the effect of the provisions on American Express. The Court focused on the platform, rather than on the market. In effect, the Court made the fundamental antitrust error of confusing harm to a competitor (American Express if the rules were prohibited) with harm to competition.[149]

Given the district court's findings that the no-steering provisions reduced price competition and led to higher merchant fees, however, a cognizable justification would have to show that the provisions had offsetting benefits for competition among credit card providers as a whole. The Court did not

146 *See id.* at 235. The district court stated,

> The Supreme Court has recognized that prevention of free-riding is a legitimate, pro-competitive justification for vertical restraints on trade. . . . Here, however, to the extent Defendants have identified potential avenues of free-riding foreclosed by its [no-steering rules], the court finds that the competitive benefits . . . do not offset the significantly more pervasive harms done to interbrand competition by the same restraints.

Id. (citations omitted).

147 *Id.* at 229-30 (footnotes omitted).

148 *Id.* at 208-12 (explaining how the no-steering rules reduce incentives of credit card networks to compete on price).

149 As the Supreme Court famously put it, the antitrust laws "were enacted for 'the protection of competition, not competitors,'" Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc,, 429 U.S. 477, 488 (1977) (Brown Shoe Co. v. United States, 370 U. S., 294, 320 (1962)).

focus on that issue[150] and also failed to address whether, if there were a potential free-riding problem, less-restrictive alternatives could have solved it.

The Court's treatment of justifications was not only *substantively* inappropriate but also inappropriate in the light of *institutional* considerations that should have informed its decision. By presuming efficiencies without evidentiary support, the Court in effect placed on plaintiffs the burden of proving the absence of such efficiencies. Doing so reduced the likelihood of a sound decision because it put on the party with inferior access to evidence a burden of proving a negative. The Court's own description of the rule of reason correctly and wisely stated that "the burden shifts to the defendant to show" efficiency justifications.[151]

VI. *APPLE V. PEPPER* AND THE UNCERTAIN LEGACY OF THE *AMERICAN EXPRESS* CASE

In the light of the facts that *American Express* affords favorable treatment to defendants found to be transaction platforms and that the underlying definition of transaction platform is imprecise, it is not surprising that antitrust defendants argue that their cases involve transaction platforms that should be governed by the new rules set forth by the Court in *American Express*. In *Steward Health Care System LLC v. Blue Cross & Blue Shield of Rhode Island*, for example, the defendant argued in a motion for reconsideration that, "[t]his market clearly satisfies the Court's criteria for a transaction-platform market. Health plans intermediate transactions between subscribers and providers, and both sides of the market are characterized by network effects; subscriber demand is a function of provider breadth, and provider demand is in turn a function of subscriber volume."[152]

Defendants have made similar arguments in numerous other cases.[153] And in *U.S. Airways, Inc. v. Sabre Holdings Corp.*, the court overturned a jury verdict

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150 The Court did say that "Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions." Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290 (2018). However, it cited in support of that proposition only evidence that the percentage of consumers holding credit cards increased between 1970 and 2001 and that industry sales increased between 2008 and 2013. *Id.* at 2288-89. Those facts prove little given that much of the challenged conduct had been in effect since the 1950s. *Id.* at 2283. The Court made no attempt to assess what growth rates for either cardholding or credit card transactions would have been in the absence of that conduct.

151 *Id.* at 2284.

152 Motion for Reconsideration of Blue Cross & Blue Shield of R.I. at 26, Steward Health Care Sys. LLC v. Blue Cross & Blue Shield of R.I., No. 13-cv-405 (D.R.I. July 2, 2018).

153 *See* Victoria Graham, *Goldman, NCAA Test Limits of AmEx Two-Sided Antitrust Defense*, BLOOMBERG L. (Feb. 26, 2020, 3:15 AM), https://news.bloomberglaw.com/mergers-and-antitrust/goldman-ncaa-test-limits-of-amex-two-sided-antitrust-defense [https://perma.cc/D46F-

in favor of the plaintiff and remanded the case for retrial in the light of the new rules set forth in *American Express*.[154]

In a different case involving Sabre, the district court applied its understanding of the *American Express* decision to a proposed merger.[155] Sabre operates a platform that, among other things, connects airlines with travel agencies for online reservations.[156] It proposed to acquire Farelogix, which sells to airlines products that facilitate direct communications and transactions between airlines and travel agents.[157] The court found that, as a matter of fact, Sabre and Farelogix were actual and potential competitors[158] and that each regarded the other as a competitor.[159] Nevertheless, the court held that, "as a matter of antitrust law, Sabre, which is a two-sided platform facilitating transactions between airlines and travel agencies, does not compete with Farelogix, which indisputably only interacts with airlines and is not a two-sided platform," in a relevant market![160] That holding runs directly counter to the purpose of defining a relevant market, which is to identify the sources of competition faced by the firm under consideration. The court based that holding on its interpretation of the assertion in the *American Express* decision that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions."[161] As we observed above, it is not clear what the Supreme Court meant by that statement.[162] It does seem clear, however, that the conflict between the Sabre court's factual findings and its interpretation of the Supreme Court's statement in *American Express* reflects at least in part the abstract and incautious nature of the opinion in *American Express*. The Court made broad statements not rooted in the facts of the case and appears not to have considered how its broad statements might be understood or applied by courts in future and different cases and whether they might give rise to unintended consequences, such as defining markets too narrowly.

It is thus not hard to imagine that *American Express* could wind up being a very important turning point in the application of the antitrust laws to two-sided markets because of the Court's broad, prescriptive language and relative inattention to the particular facts found by the district court. At the same time,

XEES] (describing litigation arguments by Goldman, Barclays and more than a dozen other investment banks; Delta Dental; and the NCAA).

154 U.S. Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43 (2d Cir. 2019).

155 United States v. Sabre Corp., C.A. No. 19-1548-LPS, 2020 WL 1855433, at *32-35 (D. Del., April 7, 2020).

156 *Id.* at *6.

157 *Id.* at *3.

158 *Id.* at *16.

159 *Id.* at *15.

160 *Id.* at *32.

161 *Id.* (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287 (2018)).

162 *See supra* note 101.

the significance of *American Express* is in doubt in the light of the very next antitrust case decided by the Supreme Court, *Apple Inc. v. Pepper*.[163]

The plaintiffs in *Apple* were consumers who alleged that Apple had unlawfully monopolized the sale of apps for Apple devices through its App Store and had used that power to charge excessive prices for apps.[164] It is difficult to imagine how the App Store could fail to be a transaction platform if American Express's credit and charge card network is one. Each facilitates transactions between buyers (app purchasers and card-carrying consumers, respectively) and sellers (app producers and merchants, respectively) and keeps a percentage of the sales price of the transactions completed over the platform.[165]

Although *Apple* involved a transaction platform, neither the majority nor the dissent in that case mentioned *American Express*. Nor did either address the question whether *Apple* involved a two-sided transaction market.

The majority in *Apple* seemed to reject the holding of *American Express* that the relevant price is the "two-sided" price.[166] Although the majority noted that Apple charged app developers an annual membership fee,[167] it characterized the case as a "retailer commission case,"[168] described the alleged harm to competition as Apple exercising "monopoly power in the retail market for the sale of apps . . . to force iPhone owners to pay Apple higher-than-competitive prices for apps,"[169] and said that, if the plaintiffs "prevail, they will be entitled to the *full amount* of the unlawful overcharge that they paid to Apple."[170] The majority did not refer to the two-sided price or consider the possibility that the increased commission might have been offset by a reduced app developer fee.[171]

The Court was, to be sure, addressing a different issue. The issue in *Apple* was whether, in the light of the Court's earlier decision in *Illinois Brick*,[172] the plaintiffs could collect damages from the platform if the conduct was illegal;

163 139 S. Ct. 1514 (2019). Our discussion of *Apple* is intended only to identify tensions with *American Express*. We are offering no views of the merits of either the majority opinion or the dissent in *Apple*.

164 *Id.* at 1518.

165 *Id.* at 1519.

166 Ohio v. Am. Express Co., 138 S. Ct. at 2287.

167 *Apple*, 139 S. Ct. at 1519.

168 *Id.* at 1524.

169 *Id.* at 1520.

170 *Id.* at 1525 (emphasis in original).

171 The majority might have understood Apple to be a distributor of apps that it purchased from app developers and resold to consumers. If so, the majority would not have perceived the case as one involving a transaction platform. The majority, however, neither said that nor described the transaction in way to suggest that Apple ever owned the apps in any meaningful sense. In any event, it is not clear that *American Express* can sensibly be distinguished on that basis because the merchants in that case could be characterized as purchasing payment and credit services from American Express and reselling them to customers.

172 Ill. Brick Co. v. Illinois, 431 U.S. 160 (1976).

the issue in *American Express* was whether the conduct of the platform was illegal. But in its discussion of the *Illinois Brick* issue the majority in *Apple* notably ignored *American Express*:

> Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*.[173]

To the contrary, if the *American Express* Court were correct in its holding that a transaction platform sells a single product—transactions—and that the price of the product is an aggregate of the prices charged to users on both sides of the platform, then unlawfully high prices would by definition establish a common fund, the size of which would depend on the extent to which the unlawful conduct increased the two-sided price. Under the *American Express* standard, an overcharge on the consumer side would not, in isolation, be a proper measure of antitrust injury.[174]

Moreover, the majority opinion exhibits an even deeper conflict with the *American Express* approach. In examining American Express's conduct, the Court focused on the price and output of its transaction service, which facilitates interactions between consumers and merchants. The *American Express* court did not focus on the prices charged by the merchants for the products or services they were selling. By contrast, in *Apple,* the majority focused on the "retail price charged to consumers" for the products that were sold through transactions facilitated by the platform (i.e., apps sold through the App Store), rather than focusing on the price of the transaction service itself.[175]

There is also tension between the dissent in *Apple* and the decision in *American Express*. The dissent ignored the fact that, under *American Express,* users on both sides of a transaction platform are direct purchasers. Instead, the dissent focused on the formality of who initially pays the commission, asserting that:

> The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it. Plaintiffs can be injured *only* if the

173 *Id.* at 1525. According the majority, "[t]he plaintiffs' allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps." *Id.* at 1520.

174 *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (holding that to recover damages, plaintiffs "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful").

175 *Apple*, 139 S. Ct. at 1521.

developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control.[176]

In addressing only the passing on of the nominal overcharge, the dissent ignored the issue of the two-sided price. The dissenting Justices (all of whom were in the majority in *American Express*) did not question whether an overcharge on one side (the 30% commission initially falling on developers) might itself constitute antitrust injury, nor did they inquire whether the allegedly inflated commission was accompanied by a change in the price charged to consumers.[177]

It is too early for any real conclusion, but the absence of any consideration of *American Express* by either the majority or the dissent in *Apple* certainly casts doubt on the significance of *American Express* to the common law evolution of antitrust law. If so, one reason might be the *American Express* Court's departure from sound antitrust adjudication—in particular, its prescribing broad rules that were not well grounded in either judicial experience or academic learning and its failure to take account of the institutional considerations that should figure importantly in antitrust decisions.[178]

CONCLUSION

American Express made new law that resolved matters as to which there were no precedents. We believe that the Court made several major substantive errors, but our primary point in this Article is that, regardless of whether the Court reached the right result, it did not do a good job of participating in the common law-like process for the evolution of antitrust law that Congress created and the courts have used for more than 100 years.

In a common law process, cases are decided on the facts, and legal principles are induced from such decisions. In such a process, the Supreme Court might prescribe broad rules when they reflect both accumulated judicial experience and, at least in antitrust law (which is unique in the extent to which legal doctrine itself embodies empirical and often contingent economic propositions), substantial consensus about the relevant economic learning and how best to reflect that learning in legal rules. Absent such experience and consensus, a wise common law court, including the Supreme

176 *Id.* at 1528 (Gorsuch, J., dissenting).

177 Apple might, for example, have chosen to charge a transaction fee directly to consumers if it had charged a lower fee to app developers.

178 In 1967, the Supreme Court ruled that some types of vertical territorial restraints are unlawful *per se*. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 373 (1967). That ruling was overruled by the Court just ten years later because, among other things, the ruling had been, like many of the rulings in *American Express*, "abrupt and largely unexplained." Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47 (1977).

Court, should proceed cautiously, pay careful attention to the facts of the case, and decide cases narrowly.

In *American Express*, the Court prescribed broad, new principles (for example, its characterization of the rule of reason, the requirements that a market must be defined in all vertical cases and that the market must include both sides in a transaction-platform case, and the Court's broad statement about what must be proven to establish harm to competition) in the absence of significant relevant judicial experience and on the basis of academic scholarship that neither constituted a consensus view nor adequately addressed the key question of how the economic insights might best be reflected in legal rules. The Court lacked humility in prescribing new rules in a case of first impression and in cavalierly distinguishing the closest precedents. The Court made new law without addressing how its new rules might further the substantive purposes of the law in future antitrust cases and without asking whether its new rules would increase judicial accuracy, avoid unnecessary complexity and burdens, and increase predictability of the law.

As it happens, every one of the Court's controversial rulings and departures from sound common law adjudication benefitted the defendants. Its decision to review the case extended the precedential significance of the Second Circuit's decision. Its restatement of the rule of reason added the implication that the defendant wins if it can show any procompetitive benefit, no matter how insignificant and no matter how great the harm to competition caused by its conduct. The Court's requirements that relevant markets must be proven in all cases involving vertical restraints and that the market must include both sides of a transaction platform put an additional and very likely difficult and often unnecessary burden on plaintiffs. Its requirement that harm to competition in a transaction-platform case requires proof of two-sided prices above competitive levels or of reduced output places what can be an impossibly difficult burden of proof on plaintiffs and rejects the likely possibility that harm to competition can in some transaction-platform cases be shown by other kinds of proof. Finally, its readiness to credit defendant's purported justification without serious factual inquiry makes defending against claimed justifications very difficult.

An outside observer might speculate that the majority was motivated more by a desire to embed its preconceptions in the law than by a desire to decide the case before it as a participant in the common law-like evolution of antitrust law.