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John B. Kirkwood
Seattle University School of Law

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MARKET POWER AND AMERICAN EXPRESS

John B. Kirkwood*

The Second Circuit ruled that American Express did not have market power because it operated in a two-sided market and any leverage it exercised over merchants derived from its successful competition for cardholders. As a result, the relevant market had to include both sides of a credit card transaction, the company's market share was modest, and it could not exploit both merchants and cardholders. In Market Power and Antitrust Enforcement (forthcoming in B.U. L. REV.), I propose a new approach that infers market power from the likely effects of the challenged conduct. This approach shows that American Express clearly exercised market power. Its conduct prevented merchants from steering customers to cheaper credit cards and thus maintained merchant fees above the competitive level. I also explain why these high fees were not justified by the rewards programs the company provided to its cardholders.

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* Professor of Law, Seattle University School of Law; Executive Committee, AALS Antitrust and Economic Regulation Section; Senior Fellow, American Antitrust Institute; Advisory Board, Institute for Consumer Antitrust Studies; Member, American Law Institute.

INTRODUCTION

The federal government and seventeen states sued American Express ("Amex") because it insisted on inserting anti–steering provisions in its contracts with merchants.[1] These provisions prohibited merchants from inducing a consumer with an Amex credit card to use another credit card with a lower merchant fee.[2] The antitrust concern with these provisions was obvious: they removed the incentive for a competing credit card company to cut its merchant fees since a merchant could not steer additional business to it if it did so. Amex's anti–steering provisions, in short, were a restraint on price competition.

In order to challenge such a restraint, the plaintiffs had to show that Amex had market power. The anti–steering provisions were *vertical* restraints—embodied in agreements between Amex and its customers (merchants), not between Amex and its competitors—and a vertical restraint cannot be condemned unless the court can find market power. Put differently, vertical restraints must be evaluated under the Rule of Reason,[3] and the first step of this balancing test requires direct or indirect proof of market power.[4] The issue appeared complex because the market is two–sided (a credit card company deals with merchants on one side and cardholders on the other) and the sides are interrelated (Amex's value to merchants depends on its value to cardholders). Under these circumstances, market definition—the traditional first step in market power determination—is difficult, and the lower courts split.[5]

This Article suggests a better way. In *Market Power and Antitrust Enforcement*,[6] I propose that courts infer market power (and its larger variant, monopoly power) from the likely effects of the challenged conduct. Specifically, courts should find market power if the challenged conduct is likely to cause prices to increase significantly above the *prevailing level* or to prevent prices from falling significantly to the *but–for level*, the level that would exist in the absence of the challenged conduct.[7] This approach has numerous advantages over the traditional

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1 *See generally* United States v. American Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015), *rev'd,* 838 F.3d 179 (2d Cir. 2016), *cert. granted sub nom.* Ohio v. American Express Co. (U.S. Oct. 16, 2017) (No. 16–1454).

2 *See American Express Co.*, 88 F. Supp. 3d at 160–67 (describing what Amex calls Non–Discrimination Provisions ("NDPs")).

3 *See id.* at 167.

4 *See id.* at 168–69 (indicating that a plaintiff can show either that the defendant had market power or that the restraint caused actual anticompetitive effects from which market power can be inferred).

5 *See infra* Part II.

6 John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. REV. (forthcoming 2018), http://ssrn.com/abstract=2942315.

7 If the price change is likely to be *substantial*, the court should find *monopoly* power.

approach, as my earlier article demonstrates. In this Article, I show that it also simplifies the determination of Amex's market power.

Part I of the Article defines market power and briefly describes the traditional ways of proving it. Part I also sets forth my new approach and summarizes the reasons why it is preferable to the traditional approach. Part II applies this new approach to *American Express*. It concludes that Amex plainly exercised market power by adopting anti–steering provisions that allowed it to maintain merchant fees significantly above the but–for level. Part III addresses the customary approach to identifying market power—defining a relevant market and measuring the defendant's market share—and explains that while it is suggestive of Amex's market power, it cannot resolve the issue. Part IV analyzes Amex's asserted justifications and find them inadequate. Amex argued, in essence, that its higher merchant fees funded its generous rewards programs, but absent a market failure this non–price benefit cannot excuse a restraint on price competition.

I. MARKET POWER

While judges and scholars may differ in their readiness to find market power, they do not dispute what it is. Market power is the power to profitably raise price above the competitive level. This definition appears in the classic articles,[8] the leading economics textbook on industrial organization,[9] and the vast majority of the cases that define market power.[10] But despite its widespread acceptance, this definition is incomplete: it does not specify the competitive level. That is a serious problem since one cannot rigorously say that a firm has market power unless one can identify the competitive level and show that the firm's price exceeds it.

Antitrust has never fully solved this problem. Many scholars have argued, as Amex does in this case, that *marginal cost* (the short–run cost

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8 *See* William Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981); Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 444 (2010).

9 *See* Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 119 (4th ed. 2005).

10 *See, e.g.,* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 235 (1993) (referring to the ability "to exert market power" by raising "prices above a competitive level"); NCAA v. Board of Regents of Okla., 468 U.S. 85, 108 n.38 (1984) ("Market power is the ability to raise prices above those that would be charged in a competitive market."); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1070 (10th Cir. 2013) (Gorsuch, J.) ("To prevail on a section 2 claim, a plaintiff generally must show the defendant possessed sufficient market power to raise prices substantially above a competitive level without losing so much business that the gambit becomes unprofitable.").

of producing one additional unit) is the competitive level,[11] since price would equal marginal cost if the market was "perfectly competitive."[12] But marginal cost is difficult to calculate and, more importantly, marginal cost pricing is infeasible in many industries (e.g., media, prescription drugs, and software).[13] For example, the marginal cost of downloading one additional copy of Windows is essentially zero.[14] If Microsoft had to sell Windows at marginal cost, it could not afford the research and development necessary to create it. Some scholars have therefore argued that a better measure of the competitive level is *full economic cost* (the opportunity cost of all inputs, including financial capital), which is equivalent to an *economic profits* test. Yet that measure is even more difficult to calculate than marginal cost.[15]

Because of these flaws, courts virtually never determine market power by calculating the defendant's marginal cost or full economic cost and comparing that figure to its price. Instead, they define a "relevant market" and measure the defendant's share of that market.[16] This approach—the market definition/market share paradigm—is the presumptive, if not obligatory, method of measuring market power in antitrust law.[17] In theory, it may be skipped if the plaintiff establishes that the defendant's conduct has caused *actual anticompetitive effects*.[18] But in practice, courts

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[11] *See, e.g.,* Brief for American Express in Opposition at 40, Ohio v. American Express Co., No. 16–1454 (U.S. Aug. 21, 2017) [hereinafter Brief for Respondent]; Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, IIB ANTITRUST LAW 147 (3d ed. 2007) [hereinafter AREEDA–HOVENKAMP TREATISE]; Carlton & Perloff, *supra* note 9, at 119.

[12] F.M. Scherer & David Ross, INDUST. MKT. STRUCTURE AND ECON. PERFORMANCE 20 (3d ed. 1990).

[13] *See* Kirkwood, *supra* note 6, at 18–19.

[14] *See* United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001).

[15] *See* Kirkwood, *supra* note 6, at 21–25.

[16] *See* AREEDA–HOVENKAMP TREATISE, *supra* note 11, at 114 ("Instead of trying to measure the degree by which a profit–maximizing monopoly price exceeds the competitive price, courts traditionally attempt to infer market power from the defendant(s)' market share.").

[17] Some decisions indicate that market definition is necessary. *See, e.g.,* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) ("Without a definition of [the relevant] market there is no way to measure [defendant's] ability to lessen or destroy competition."); McWane, Inc. v. FTC, 783 F.3d 814, 828 (11th Cir. 2015) ("Defining the market is a necessary step in any analysis of market power . . . .") (quoting U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir. 1993)). Other decisions state that market definition is the ordinary or first step in determining market power. *See, e.g.,* Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 935 (6th Cir. 2005) ("The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market.") (quoting Eastman Kodak Co. v. Image Tech Servs. Inc., 504 U.S. 451, 464 (1992); Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004) ("Evaluating market power begins with defining the relevant market.").

[18] *See, e.g., American Express Co.*, 88 F. Supp. 3d at 168–69.

never skip it. No court to my knowledge has ever resolved the market power issue without at least a rough market definition. Moreover, whenever courts describe the amount of market power required for a particular antitrust violation, they always describe it in terms of a minimum market share.[19] Yet such a heavy reliance on market definition is deeply questionable. In many circumstances, market definition is complex and uncertain, making the resulting market share finding unreliable.[20] Some scholars want to do away with market definition altogether.[21] At oral argument in *American Express*, Justice Breyer referred to it as "one of the most difficult problems in antitrust law."[22]

The approach I propose would avoid these difficulties. In the ordinary case, courts would not calculate costs or define a market; they would instead focus on the central issue in an antitrust case—the challenged conduct. They would find market power if the challenged conduct is likely to raise price significantly above the prevailing level or prevent price from declining significantly to the but–for level.[23] This approach would have major benefits for antitrust enforcement, since it would streamline antitrust litigation by allowing tribunals to resolve two critical issues—market power and anticompetitive effects—at the same time, while inferring the relevant market from the result. Courts follow this approach now whenever they determine that the challenged conduct has caused actual anticompetitive effects. But where the effects of the disputed conduct are probable, rather than actual, courts very rarely infer market power from those effects. In particular, no court, to my knowledge, has identified the but–for level and concluded that the defendant exercised market power because its conduct prevented price from falling to that level. In *American Express*, however, the but–for level provides a simple and accurate measure of Amex's market power.

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[19] *See* Louis Kaplow, *Market Definition and the Merger Guidelines*, 39 REV. IND. ORG. 107, 111 (2011) ("All [guidelines, court opinions, legal treatises, or other sources] state that there is a market power requirement, and all denominate it in terms of [market share].").

[20] *See* Kirkwood, *supra* note 6, at 9–10, 43–45.

[21] *See* Kaplow, *supra* note 8, at 440 ("[T]he market definition process should be abandoned.").

[22] *See* Transcript of Oral Argument at 43, Ohio v. American Express Co., No.16–1454, (U.S. Feb. 26, 2018) (adding that "the answer to that [depends] on a lot of different circumstances and what you're up to.").

[23] If the challenged conduct would *substantially* raise price or forestall a *substantial* price decline, the court would find monopoly power.

II. MARKET POWER IN *AMERICAN EXPRESS*

It is clear that Amex's anti–steering provisions enabled Amex and the other credit card companies to hold merchant fees significantly above the but–for level, the level that would exist without those provisions. Had merchants been able to steer their customers to credit cards with lower merchant fees, then other credit card companies would have had a financial incentive to lower their fees and Amex would have faced increased pressure to lower its own.[24] The result would be significantly lower merchant fees and consumer prices.[25] In short, the anti–steering provisions allowed Amex to exercise market power.

To be sure, lower fees would make it more difficult for Amex to fund its rewards programs. Indeed, Amex contends that its generous incentive programs justify the higher merchant fees since the fees directly benefit consumers who use its card. But regardless of whether that is a legitimate justification, there is no doubt that Amex's merchant fees are greater than they would be without the provisions. That is its goal. Amex's very justification for its anti–steering provisions *assumes* that higher merchant fees will result.

This fundamental fact—that the NDPs allow Amex to maintain elevated merchant fees—is widely recognized. Amex itself acknowledged it. In its brief to the Supreme Court, it asserted that its rewards programs are "funded by higher merchant fees."[26] Amex also acknowledged that without its anti–steering provisions, fees would be lower since "steering reflects merchants' preference for lower fees . . . ."[27] Likewise, Amex executives testified that if steering was allowed, Amex "would face increased pressure to reduce its rates."[28] As a result, the district court found that Amex's restraints have resulted in "higher all–in merchant prices across the network services market . . . ."[29] If the restraints were abolished, the "restoration of downward competitive pressure on merchant prices would . . . result in lower swipe fees charged to merchants by American Express and its competitors."[30] Even the Second Circuit, which

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24 *See American Express Co.*, 88 F. Supp. 3d at 207 ("[B]y disrupting the price–setting mechanism ordinarily present in competitive markets, the NDPs reduce American Express's incentive—as well as those of Visa, MasterCard, and Discover—to offer merchants lower discount rates . . . .").

25 *See id.* at 213 (finding that the anti–steering provisions "[i]mpede modes of competition that likely would benefit consumers on both sides of the GPCC platform.").

26 Brief for Respondent, *supra* note 11, at 28.

27 *Id.* at 29.

28 *American Express Co.*, 88 F. Supp. 3d at 220.

29 *Id.* at 215.

30 *Id.* at 219; *see also id.* at 230 ("Without the NDPs in place, . . . 'Discover would aggressively pursue a strategy of lowering [its] prices and providing incentive to merchants that would steer incremental volume to Discover.'") (quoting a Discover executive).

thought that Amex's higher fees were needed to fund its rewards programs,[31] agreed that its merchant fees were higher as a result of its anti–steering provisions. These provisions, the court stated, protect "the critically important revenue that Amex receives from its relatively high merchant fees."[32]

In sum, it is plain that Amex exercised market power. It adopted anti–steering provisions that crippled price competition between the credit card networks, which allowed Amex and its competitors to hold their merchant fees above the competitive level—the but–for level. It makes no difference to this conclusion that Amex funneled the extra revenues it received from its higher merchant fees into its incentive programs. While that diversion might justify the higher fees—a questionable proposition discussed below—it does not negate the fact that the challenged conduct enabled Amex to maintain its merchant fees above the competitive level, the essence of market power.

III. MARKET DEFINITION AND MARKET SHARE

The district court began its analysis of market power by defining a relevant market, calculating Amex's share of that market, and citing a factor ("cardholder insistence") that suggests Amex has more market power than its share alone would dictate.[33] This is the traditional approach to power determination and, as noted earlier, it is often fraught with difficulties. The first major issue in *American Express* was whether the relevant market should be limited to the provision of services to merchants or also include the other side of this two–sided industry, the provision of services to cardholders. The district court limited the market to the merchant side and the Second Circuit held that this was a fatal error. The relevant market must include both sets of Amex's customers: cardholders and merchants.[34]

The appellate court's reasoning is incorrect. The ultimate issue is whether Amex has the power to charge a price above the competitive level. If that is true for one set of its customers, it does not matter that it is not true for another set. If the benefits Amex furnishes to the second set (cardholders) outweigh the harm it imposes on the first set (merchants), Amex's behavior may be legitimate. But that does not negate the

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[31] *See* United States v. American Express Co., 838 F.3d 179, 206 (2d Cir. 2016) ("Though merchants may desire lower fees, those fees are necessary to maintain cardholder satisfaction . . . .").

[32] *Id.* at 205.

[33] *See American Express Co.*, 88 F. Supp. 3d at 170–95.

[34] *See American Express Co.*, 838 F.3d at 196–97.

conclusion that Amex exercises market power over the first set. In addition, as the United States explains in detail, markets are defined by goods or services that are reasonable substitutes for each other, and cardholder services are not substitutes for merchant services.[35]

The second major issue was whether Amex could exercise market power when its share of total transaction volume was just 26.4%. Since a credit card transaction simultaneously involves both a cardholder and a merchant, the parties and the courts thought that 26.4% was a fair measure of Amex's market share regardless of whether the relevant market was limited to merchant services or included both merchant services and cardholder services. The problem was that courts do not normally regard a 26.4% share as sufficient to confer market power.[36] In this instance, the district court was willing to make an exception because so many of Amex's cardholders insist on using their Amex card. When coupled with other factors (high barriers and a concentrated industry), this "cardholder insistence" allowed an inference of market power.[37]

The Second Circuit rejected this conclusion because cardholder insistence is driven by the generosity of Amex's rewards programs.[38] Without those, Amex's appeal to both cardholders and merchants would dissipate. Because Amex must continue to invest in its rewards programs in order to preserve its market share and brand appeal, it cannot exercise market power; to the contrary, its ability to charge high merchant fees requires that it continuously compete for cardholders.[39]

This reasoning, though plausible on the surface, is mistaken. Any firm with a distinctive product must invest in maintaining the distinctive features of that product in order to preserve its appeal.[40] By itself, that investment in product quality neither proves nor disproves the existence of market power. To resolve that issue, one has to go back to the definition of market power—the ability to profitably price above the competitive

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35 *See* Brief of United States as Respondent Supporting Petitioners at 35–40, Ohio v. American Express Co., No. 16–1454 (U.S. Dec. 7, 2017) [hereinafter Brief for United States].

36 *See* Brief for Respondent, *supra* note 11, at 37.

37 The court also relied on evidence of actual anticompetitive effects. *See American Express*, 88 F. Supp. 3d at 188 ("[Amex's] ability to impose significant price increases . . . without any meaningful merchant attrition.").

38 *See American Express Co.*, 838 F.3d at 202–03.

39 *See id.* at 203 ("That Amex might not enjoy market power without continuing investment in cardholder benefits indicates, if anything, a *lack* of market power.").

40 *See American Express Co.*, 88 F. Supp. 3d at 195 ("American Express cannot avert a finding of market power premised on cardholder insistence merely because that loyalty and its current market share would dissipate if the company were to stop investing in those programs that make its product valuable to cardholders. Of course it would, as would the share of any company that abandoned a core element of a successful business model.").

level. Amex has market power if it can price profitably above marginal cost or, better yet (given the problems with marginal cost), full economic cost.[41] Accordingly, the question is not whether Amex needs to invest in rewards programs or other features of its product to maintain cardholder insistence, but whether that investment, and the resulting cardholder insistence, gives it the ability to price above marginal cost or full economic cost. Unfortunately, none of the parties addressed that issue.[42] As a result, it is not possible to determine whether Amex's market share, coupled with cardholder insistence, allowed it to price above the competitive level. Once again, the traditional tools for evaluating market power come up short. It is much easier to decide whether Amex's exclusionary conduct enabled it to maintain merchant fees above the but–for level.

IV. JUSTIFICATION

Amex contends that even if its anti–steering provisions allow it to exercise market power, the higher merchant fees that result are justified by the rewards programs they support. In other words, even if its NDPs produce supracompetitive merchant fees, Amex funnels the extra revenue into rewards programs for its cardholders, benefiting them and increasing non–price rivalry among credit cards.

This asserted justification faces two initial difficulties and a fundamental objection. First, Amex has not poured all the revenue it receives from its merchant fees into its rewards programs.[43] As a result, the losses it imposes on merchants are not fully offset by the benefits it provides to cardholders. Second, the higher merchant fees that Amex and the rest of the industry charge are passed on to consumers in the form of

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41 It makes sense to use cost–based measures of the competitive level here because the issue is not whether the challenged conduct gave Amex market power but whether its need to invest in product quality shows that it did not possess market power. That is not so. Amex would have market power if its investment enabled it to price above cost.

42 *See American Express Co.*, 838 F.3d at 205–06 ("A finding that not every dime of merchant fees is passed along to cardholders says nothing about other expenses that Amex faces, let alone whether its profit margin is abnormally high . . . . Plaintiffs might have met their initial burden under the rule of reason by showing . . . that Amex's pricing was set above competitive levels within the credit–card industry (*i.e.*, supracompetitive pricing). At trial, however, they offered no such proof.").

43 *See id.* at 205 ("Indeed, evidence on the record suggests—and Amex conceded at oral argument—that not all of Amex's gains from increased merchant fees are passed along to cardholders in the form of rewards."); *see also American Express Co.*, 88 F. Supp. 3d at 216 ("[Plaintiffs' expert] further concluded that American Express spends less than half of the discount fees it collects from merchants on cardholder rewards.").

higher retail prices,[44] and many consumers who pay those prices use cash, checks, debit cards, or credit cards with few if any rewards.[45] These consumers are unambiguously hurt by the anti–steering provisions. They pay higher prices but receive little or nothing in return.

The fundamental objection to this asserted justification is that it assumes it is acceptable to force one set of customers to pay higher prices so long as the revenues are distributed to another set of customers in the form of non–price benefits. That is incorrect. A robber who took $100 from one person cannot excuse the theft because he later gave the $100 to another person. The coerced transfer of wealth from the victim to the robber is itself the crime. Similarly, a group of competitors cannot agree to raise prices to certain consumers and then justify their collusion on the ground that they provided an equivalent amount of "rewards" to other consumers. Such conduct is also a coerced transfer of wealth, and it distorts the competitive process. Instead of letting competition decide whether consumers prefer lower prices and lower rewards to higher prices and higher rewards, the colluders have made the choice themselves.[46]

The only way to justify a restraint that produces higher prices and greater non–price benefits, like the anti–steering provisions, is to show that the market is subject to a market failure—an imperfection that prevents it from maximizing consumer welfare—and that the restraint corrects this market failure in the least restrictive way possible and thereby improves consumer welfare.[47] If that is true, the restraint does not distort the competitive process, but rather enhances it. Amex did attempt to show a market failure at the trial level. It alleged that some of its merchant services and some of its investments in product quality were subject to free–riding, an externality that can stunt competition. The district court rejected all of Amex's free–riding theories,[48] however, and Amex did not appeal from these conclusions.

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44 *See American Express Co.*, 88 F. Supp. 3d at 216 ("Merchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices.").

45 *See id.* ("Higher retail prices affect not only those customers who use American Express cards, but also shoppers who instead prefer to pay using a lower–reward GPCC card, debit card, check, or cash.").

46 *See* Brief of Amicus Curiae Economists in Support of Certiorari at 6, Ohio v. American Express Co., No. 16–1454 (U.S. Jul. 6 2017) ("Nearly *any* firm dealing with merchants could offer the appellate court's improper analysis that a restraint that raises the firms' wholesale price to the merchants passes antitrust muster as long as the restraint provides the firm with revenue that it spends on enhancing the quality of the products if offers to the 'other side.'").

47 If there were no market failure, unrestricted competition would best promote consumer welfare.

48 *See American Express Co.*, 88 F. Supp. 3d at 234–38.

At the Supreme Court, Amex argued that its anti–steering provisions were essential to its business strategy. But that hardly justifies them. The issue is not what works best for Amex; the issue is what works best for consumers. And absent a market failure, a competitive market produces the optimal results for consumers; Amex's restraints would only interfere with this process.[49] Amex also argued that output—credit card transaction volume—has exploded over the last decade, which suggests that consumers prefer a market subject to anti–steering provisions. At oral argument, Justice Gorsuch emphasized this output increase in his aggressive questioning of plaintiffs' counsel.[50] As Chief Justice Roberts pointed out, however, Amex had not proved that the output increase was caused by its anti–steering provisions, as opposed to more general macroeconomic factors like GDP growth or consumer confidence.[51] As a result, the rise in credit card transaction volume does not establish that the NDPs improved overall consumer welfare.[52]

CONCLUSION

Amex convinced the Second Circuit that it does not have market power because its leverage over merchants comes from the rewards and prestige it provides to its cardholders. Its anti–steering provisions do not reduce competition because Amex uses the higher merchant fees they generate to fund its rewards programs. In short, its power in the marketplace is constrained—indeed, eliminated—by the need to compete for cardholders. That view is incorrect. If market power is determined, as it ought to be, by the effects of the challenged conduct, then it is clear that Amex possesses market power. By its own admission, its anti–steering provisions have allowed it to maintain merchant fees significantly above the but–for level, the level that unrestricted competition would have produced.

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[49] *See* Brief for United States, *supra* note 35, at 45–46 ("Under the Sherman Act, . . . the optimal mix of goods and services is set through market competition . . . . As the leading treatise explains, the Second Circuit erred in this case by failing to recognize that 'under antitrust policy *competition* should choose the optimal mix of revenue as between the two sides' of Amex's platform.").

[50] *See* Transcript of Oral Argument at 4, Ohio v. American Express Co., (U.S. Feb. 26, 2017) (No.16–1454) ("[T]here's no evidence of restricted output in this case, correct?").

[51] *See id.* at 41 ("Output of the product has increased, that has so many factors that go into that besides the nature of the particular product, right? I mean, if the economy grows, then the output of your product, credit card transactions, grows, right?") (Roberts, C.J.).

[52] *See* Reply Brief for the United States at 17, Ohio v. American Express Co., No. 16–1454 (U.S. Feb. 15, 2018) (noting that "transaction volume is influenced by many factors" and that transaction volume grew rapidly following Australia's *prohibition* of anti–steering rules).

Amex argues that even if it did impose supracompetitive prices on merchants—and thereby exercise market power—its conduct promoted rather than reduced competition because it enabled Amex to provide generous rewards programs that benefited its cardholders. But absent a market failure (and Amex could not establish a significant one at trial), higher cardholder rewards cannot justify the exploitation of merchants. Any time a defendant, or group of defendants, adopts a restraint that raises price to one set of customers, it can funnel the proceeds to another set of customers in the form of non–price benefits. But that does not excuse the restraint. It forces the first set of customers to pay a supracompetitive price and prevents the competitive process from deciding whether customers as a whole (or particular sets of customers) would prefer lower prices and lower rewards to higher prices and greater rewards.