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The Evolution of Antitrust Doctrine After *Ohio v. Amex* and the *Apple v. Pepper* Decision That Should Have Been

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Geoffrey A. Manne & Kristian Stout*

The Evolution of Antitrust Doctrine After *Ohio v. Amex* and the *Apple v. Pepper* Decision that Should Have Been

ABSTRACT

If the Supreme Court's recent decision in Apple Inc. v. Pepper (Apple) *had hewed to the precedent established by* Ohio v. American Express Co. (Amex)*, it would have begun its antitrust inquiry with the observation that the relevant market for the provision of app services is an integrated one, in which the overall effect of Apple's conduct on both app users and app developers must be evaluated. A crucial implication of the* Amex *decision is that participants on both sides of a transactional platform are part of the same relevant market, and the terms of their relationship to the platform are inextricably intertwined.*

We believe the Amex *Court was correct in deciding that effects falling on the "other" side of a tightly integrated, two-sided market from challenged conduct must be addressed by the plaintiff in making its prima facie case. But that outcome entails a market definition that places both sides of such a market in the same relevant market for antitrust analysis.*

As a result, the Amex *Court's holding should also have required a finding in* Apple *that an app user on one side of the platform who transacts with an app developer on the other side of the market, in a transaction made possible and directly intermediated by Apple's App*

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Store, is similarly deemed to be in the same market for standing purposes.

Under the proper conception of the market, it is difficult to maintain that either side does not have standing to sue the platform for alleged anticompetitive conduct relating to the terms of its overall pricing structure, whether the specific terms at issue apply directly to that side or not. Both end users and app developers are "direct" purchasers from Apple—of superficially different products, but in a single, inextricably interrelated market. Both groups should have standing and should be able to establish antitrust injury—harm to competition—by showing harm to either group, as long as they can establish the requisite interrelatedness of the two sides of the market.

As we discuss, such a result would have been consistent with the way antitrust doctrine has long evolved—in both its substantive and its procedural aspects—to reflect new economic knowledge, particularly with respect to such "nonstandard" business models.

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I. INTRODUCTION

Courts adopt and apply antitrust procedure in the shadow of substantive theory. Procedural rules, especially those affecting the production and persuasiveness of evidence, map onto (or should map onto) economic theory, incorporating and defining presumptions and burdens that reflect the underlying theory and the evidence required to prove or refute it. As scholars, courts, and practitioners better understand evolving theories of harm and apply them to novel circumstances, the *process* of antitrust adjudication changes—or should change—along with substance.

As the doctrines and jurisprudence of antitrust law have evolved in their uniquely common law-like manner,[1] courts have expanded and contracted the scope of substantive liability as economic and judicial learning have developed. Thus, for example, courts have progressively shifted their treatment of resale price maintenance from one of per se illegality to virtual per se legality as their understanding of its economic implications has evolved.[2] The effect is to shape not only the contours of available arguments in court, but the procedures by which they are introduced and proven. The latter determines outcomes at least as much as the former.

Antitrust deeply depends upon evidence and expert theory in a way that perhaps no other area of law does. The statutes are terse and vague,[3] and courts fill in their content by identifying theories of economic harm and by assessing the empirical and theoretical economic consequences of business conduct. The primacy, and fluidity, of economic learning and evidentiary interpretation mean that procedural rules with respect to the admissibility and probative value of evidence, and the burdens of persuasion and proof, are of central importance. So too are mechanical rules respecting the requirements for the demonstration of harm, the ultimate consequence of which may be a determi-

1. *See, e.g.*, United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 341 (1897) (discussing the common law roots of the Sherman Act).
2. *Compare* Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *with* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007). *See also* D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003 (2014) (discussing the progression of the vertical per se legality doctrine).
3. *See, e.g.*, Sherman Act, 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy . . . ").

nation of the level of evidence required. Crucially, because these levers define the scope of permissible and prohibited conduct, they generally map onto economic understandings as well.

Thus, courts generally require antitrust plaintiffs to define the relevant market for analysis not only to circumscribe the amount of evidence and the complexity of its evaluation, but also to align the claimed injury with economic understanding—in this case, to ensure that the evidence presented and the court's analysis reflect an economically relevant set of products, consumers, sellers, and commercial dynamics.

Similarly, courts have: introduced antitrust injury requirements;[4] created a distinction between "direct" and "indirect" purchasers;[5] established a "single entity" defense;[6] further limited the scope of market definition;[7] and created the idea of "cluster markets" to capture a group of conceptually related products and services,[8] among other things. While each of these doctrines arguably presents a "procedural" rule,[9] each also affects the amount or type of evidence required. For example, courts frame antitrust injury as a standing requirement, but establishing standing entails an added burden of proof of injury for private plaintiffs to make out their prima facie case. So important are procedure and the shifting of burdens of proof to defining and refining the content of antitrust law that, not coincidentally, some of the most important principles in civil procedure generally have been developed in the antitrust context.[10]

4. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).
5. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968); Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).
6. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).
7. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
8. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963); United States v. Grinnell Corp., 384 U.S. 563 (1966); FTC v. Staples Inc., 190 F. Supp. 3d 100 (D.D.C. 2016).
9. Because of the interrelatedness of process and substance, the line between procedural and substantive doctrine in antitrust is often fuzzy. In this Article we refer to the procedural content of antitrust doctrine when we mean to reference rules with an analogue in the *Federal Rules of Civil Procedure* or *Federal Rules of Evidence*. Substantive antitrust rules, by contrast, are those that relate directly to antitrust theories of harm rooted in industrial organization (IO) economics. As noted, some antitrust doctrines, like relevant market, incorporate both.
10. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (holding that the "plain statement" standard under FED. R. CIV. P. 8(a)(2) requires the pleading of facts beyond the formulaic recitation of the elements of a cause of action); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (holding that the implausibility of plaintiff's claim—based on the economics of predatory pricing—requires the presentation of more persuasive evidence to survive a summary judgment motion under FED. R. CIV. P. 56); Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (requiring a "rigorous analysis" to establish the predominance of common issues under FED. R. CIV. P. 23(b)(3) in order to obtain class certification); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (holding that courts need

Many of these doctrines are thus anchored against antitrust's evidentiary burden-shifting framework. Even the per se doctrine may be seen as both a substantive and an evidentiary rule: once courts have enough economic theory and judicial experience to establish that certain conduct is more likely than not anticompetitive, the per se rule alleviates future plaintiffs' burdens of production. Thus, in the case of naked price fixing, where "there is no [activity] which could be made more efficient by price fixing . . . [t]here is . . . no likelihood of any consumer benefit flowing from their agreement."[11] Economic knowledge informs that the conduct is unlikely to have procompetitive benefits. Thus, it is proscribed per se, but the per se proscription also carries with it an evidentiary benefit: such conduct undertaken in the absence of market power is unlikely to cause harm, but, nevertheless, evidence of market power is not required to make out a per se case. "To make market power always an essential element of illegality would introduce the complexities of market definition into every government prosecution and effectively destroy the advantages of the per se rule in making rapid and widespread enforcement of the law possible."[12]

The error-cost framework with which these doctrines generally comport entails consideration of both accuracy and judicial economy,[13] and the levers that adjust one similarly adjust the other. Thus, the doctrines that constitute these levers vary, overlap, and interrelate in ways that allow more fine-grained adjustments reflecting both evidentiary considerations as well as substantive certainty.

An important consequence of this interrelatedness is that judicial alteration of one doctrine to accommodate new economic learning will likely affect the operation of some procedural doctrines as well. In the face of novel business conduct, novel business models, and novel economic circumstances, the degree of substantive certainty reflected in prior doctrinal rules may be eroded, as may the reasonableness of the expectation that typical evidentiary burdens accurately comport with our understanding of competitive harm. Modern technology—particularly the platform business model endemic to many modern technology firms—presents a need for courts to adjust their doctrines in the face of such novel issues, even if doing so adds additional complexity to the adjudicatory process.

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not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

11. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II*, 75 YALE L.J. 373, 385 (1966).

12. *Id*. at 386.

13. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14–15 (1984) (describing how the presumptions of the error-cost framework help courts to simultaneously focus on efficiently deterring harm, while tending to avoid wasteful litigation that would deter socially beneficial behavior).

A. *Ohio v. American Express Co.* and *Apple Inc. v. Pepper*: A Failure of Antitrust Doctrinal Evolution

Two recent Supreme Court cases, *Ohio v. American Express Co.* (*Amex*)[14] and *Apple Inc. v. Pepper* (*Apple*),[15] demonstrate both the nature of the doctrinal levers and their relationship to administrative and substantive error-costs, as well as the interrelatedness of the doctrines themselves. Both cases broadly deal with antitrust doctrine in the context of two-sided markets: *Amex* on the question of market definition in two-sided "transaction" markets, and *Apple* on the question of the antitrust standing of platform users on one side of a two-sided platform to allege injury arising out of allegedly anticompetitive actions of the platform operator.

In brief, *Amex* focuses on whether the burden of producing evidence of competitive effects arising out of challenged conduct occurring on the other side of a two-sided market properly belongs to the plaintiff (as part of its prima facie case); the defendant (as a part of a procompetitive effects defense); or neither (as "out-of-market" conduct irrelevant to the decision).[16] *Apple* concerns whether the *Illinois Brick* indirect purchaser doctrine precludes consumers of unaffiliated (i.e., non-Apple) iOS apps purchased through Apple's App Store from bringing an antitrust action for alleged overcharge against Apple.[17]

As we discuss further below, we believe that the *Amex* Court correctly decided that effects falling on the other side of a tightly integrated, two-sided market from challenged conduct must be addressed by the plaintiff in making its prima facie case.[18] But, as the *Amex* Court made clear, that outcome entails a market definition that places both sides of such a market in the same relevant market for antitrust analysis. As a result, the *Amex* Court's holding should also have required a finding in *Apple* that an app user on one side of the platform who transacts with an app developer on the other side of the market, in a transaction made possible and directly intermediated by Apple's App Store, should similarly be deemed in the same market for standing purposes.

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14. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) [hereinafter *Amex*].
15. Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).
16. *Amex*, 138 S. Ct. at 2284–85 ("To assess . . . evidence [of anticompetitive effects], we must first define the relevant market."); United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) (rejecting the idea that, at least for mergers, "anticompetitive effects in one market could be justified by procompetitive consequences in another").
17. *Apple*, 139 S. Ct. at 1514–15.
18. For a more expansive discussion of the propriety of the Court's analysis and decision in *Amex*, see Geoffrey A. Manne, *In Defence of the Supreme Court's 'Single Market' Definition in* Ohio v. American Express, 7 J. ANTITRUST ENFORCEMENT 104 (2019).

The Court in *Apple* failed to recognize this connection, however. In deciding the case in favor of the respondents, the Court reached the correct result, but its failure to tie its standing analysis to the underlying substantive doctrine of *Amex* is problematic. In particular, the Court announced a rule that permits more plaintiffs to establish standing, but it did not direct lower courts to assess standing within the proper analytical frame. By expanding standing in a manner unmoored from the underlying economics of the case, the Court has driven a wedge between interrelated antirust doctrines, doubtless ensuring future uncertainty, avoidable costs, and erroneous outcomes.

II. THE NEXUS BETWEEN PROCEDURE AND SUBSTANCE IN ANTITRUST LAW

The history of modern antitrust is guided by the development of doctrine under the error-cost framework. In Judge Easterbrook's terminology, courts apply "filters" to select the cases for enforcement, evaluate the evidence in those cases, and minimize the combined cost of erroneous decisions and wasteful litigation.[19] This approach serves as a legal heuristic that optimizes enforcement and reduces what would otherwise be an unnecessarily large, complicated caseload.

An excessive adherence to formalism, however, enshrines outdated economic thinking and impedes the common-law development of antitrust law in concert with evolving business practices, technology, and economic learning. The substantive evolution of antitrust doctrine, in other words, is partially realized through the adaptation of procedural doctrines to new business realities. Indeed, the development of many antitrust doctrines reflects the courts' eventual realization of this.

To take one key example, over time courts relaxed their application of the procedural per se rule to certain nonstandard contractual relationships as the advent of more advanced industrial organization economics—most notably, transaction costs economics—led to the realization that per se condemnation is inappropriate for many forms of conduct even though they depart from a traditional "perfect competition" model.[20] Rather than persist in the reflexive application of the per se rule, courts developed other heuristic doctrines to mitigate the administrative costs that more complex substantive analysis entailed

19. Easterbrook, *supra* note 13, at 14 ("Courts should use the economists' way out. They should adopt some simple presumptions that structure antitrust inquiry. Strong presumptions would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability. They would reduce the costs of litigation by designating as dispositive particular topics capable of resolution.").

20. *See generally* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77 (2003) [hereinafter *Price Theory*].

as more conduct became susceptible to full-blown effects analysis under the rule of reason.[21]

In the early period of antitrust jurisprudence, however, courts routinely condemned as per se illegal conduct that was nonstandard and thus poorly understood.[22] The per se rule served as a sensible and relatively efficient procedural limitation for courts, given that the economics of the time remained rooted in undeveloped theories of the firm.[23] For instance, in *United States v. Topco Associates*:[24]

> [T]he Supreme Court declared the restraints [against territorial exclusivity] per se unlawful. The Court was not troubled by the absence of consumer injury: it was enough for the majority that the voluntary contractual restraints purportedly limited the "freedom" of each member of the Association to choose where and how it would sell Topco-brand products.[25]

This decision was a product of its time, however. The prevailing neoclassical economics orthodoxy held that efficiencies could be produced only by "constant technological rivalry between autonomous firms, unconstrained by so-called nonstandard contracts; that is, agreements that constrain the discretion of purchasers and competitors."[26] "Within this tradition, contractual restraints on purchasers after title passed were viewed as an anomaly—inexplicable except on the hypothesis of 'leverage' or other forms of exclusion."[27] Under this undeveloped economic paradigm, the per se doctrine functioned as a filtering mechanism; it was simply known that every contractual restraint that a firm imposed on a downstream customer was likely the result of market power.

As the theory of the firm developed, however, it came to be widely known that firms engage in a wide variety of contractual relationships in an effort to manage transaction costs.[28] A proper understanding of

21. *See infra* sections I.A and I.B for discussion of some of these doctrines.
22. *See* R.H. Coase, *Industrial Organization: A Proposal for Research*, in POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59, 67 (Victor R. Fuchs ed., 1972) ("[I]f an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on a monopoly explanation, frequent."). This is the so-called "inhospitality tradition" in antitrust. *See* Easterbrook, *supra* note 13, at 4; OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 19 (1985).
23. *See* Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 471 (2001) [hereinafter *Farewell to Quick Look*].
24. United States v. Topco Assocs., 405 U.S. 596 (1972).
25. *Farewell to Quick Look*, *supra* note 23, at 470.
26. *Price Theory*, *supra* note 20, at 80.
27. *Farewell to Quick Look*, *supra* note 23, at 468.
28. *See* Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548 (1981); *see also* R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–91 (1937) ("The cost of negotiating and concluding a separate contract for each exchange transaction which takes place on a market must

business conduct undertaken to address the consequences of doing business in the face of transaction costs means that apparent restraints should not be condemned outright, even if they appear to raise prices or reduce output from the status quo ante, because the status quo itself may not be optimal. Once transaction costs were better understood, many of the apparently restrictive contractual obligations that were previously presumed to be per se violations came to be understood as (at least sometimes) procompetitive.[29] Perhaps most famously, in *Leegin Creative Leather Products v. PSKS, Inc.*, the Court overturned the longstanding rule that vertical price agreements were per se illegal, noting that, "as we have stated, a 'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.'"[30] Where, as here, antitrust doctrine properly evolves, greater economic learning can, and does, lead to changes in antitrust procedure.

A. Quick Look and the Evolution of the Standards of Antitrust Review

Take, for example, the court's creation of the quick look doctrine in *Broadcast Music Inc. v. Columbia Broadcasting* Systems (*BMI*) and *National Collegiate Athletic Association v. Board of Regents* (*NCAA*).[31] The quick look doctrine grew out of the Court's attempt to adapt antitrust standards of review to the novel organizational arrangements of performing rights organizations (PROs) and amateur sports leagues. In *NCAA*, for example, schools were not organized in a traditional firm hierarchy, nor were they making decisions entirely separately and contracting at arms' length in the market.

Confronted with the unique structure of amateur sports markets, the court neither declined to apply antitrust law nor did it woodenly apply the per se doctrine against what otherwise looked like price fixing by a cartel. Instead, it altered the process of antitrust review to

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also be taken into account. Again, in certain markets, e.g., produce exchanges, a technique is devised for minimising these contract costs . . . .").

29. *See, e.g.*, Cont'l T.V. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (stating dealer restraints on purchasers no longer per se unlawful); Broad. Music Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979) (describing price-fixing agreement among horizontal competitors facilitated market for blanket music licensing); State Oil v. Khan, 522 U.S. 3 (1997) (applying rule of reason to maximum resale price maintenance); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007) (stating minimum resale price maintenance subject to rule of reason).

30. *Leegin*, 551 U.S. at 887.

31. *See Broad. Music*, 441 U.S. at 16–17; Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101–03 (1984).

ensure that its analysis reflected a proper consideration of the actual competitive effects of such restraints.[32]

BMI presented a similar opportunity for the Court. The American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Inc. sought to create a market for "blanket" music licensing where negotiations among rightsholders and small businesses that wished to publicly preform their compositions were otherwise too costly to occur.[33] The transaction costs associated with individual artists each negotiating with individual establishments that wished to play their music were extremely burdensome and, in the absence of a cost-reducing intermediary like a PRO, resulted in suboptimal outcomes.[34] Although PROs are collusive enterprises at heart, the Court believed it would have been a mistake to condemn their conduct under the per se rule and thereby incur the social loss that would occur were the blanket licensing market strangled in its crib.[35]

In the face of this economic reality, the Court acknowledged a new form of antitrust review: quick look review. The quick look process introduced a new procedural element to courts' review of seemingly anticompetitive conduct: a preliminary, truncated, substantive assessment of whether the conduct at issue "might plausibly be thought to have a net procompetitive effect or possibly no effect at all on competition."[36] Importantly, this tailored doctrine does not necessarily cut in favor of either defendants or plaintiffs: the *NCAA* failed the test, while *BMI* met the test.

In *California Dental Associations v. Federal Trade Commission* (*Cal. Dental*), the Court made it clear that quick look is an appropriate means of by-passing the rule of reason when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[37] But, in the same case, the Court adopted a truncated analysis in order to determine that rule of reason review was, in fact, required.[38]

32. This approach was consistent with the Court's earlier discussion in *National Society of Professional Engineers v. United States*, where it opined that its analysis should be guided by a careful consideration of the actual competitive effects of a restraint. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).
33. *See Broad. Music Inc.*, 441 U.S. at 19–21.
34. *Id.* at 20–21.
35. *Id.* 21–23.
36. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999).
37. *Id.* at 770 (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692).
38. *Id.* at 775 n.12 ("The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the

In the end, the process reflects the degree to which the underlying conduct presents novel or nuanced economic circumstances for which past presumptions and burden-shifting rules may not be appropriate; it is the substance driving the process. As the Court noted in *Cal. Dental*:

> Although we have said that a challenge to a "naked restraint on price and output" need not be supported by "a detailed market analysis" in order to "requir[e] some competitive justification," it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating per se from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "per se" condemnation is justified.[39]

B. The Interplay of Procedure and Substance in the Doctrines of Antitrust Standing

The choice between following an overarching, per se rule of reason or quick look process reflects the interrelation between substance and process at a high level. But less all-encompassing doctrines similarly reflect this interrelatedness. Most relevant to *Amex* and *Apple*, courts have developed more sophisticated approaches to standing (reflected in both the antitrust injury requirement and the indirect purchaser doctrine) and market definition to better comport with more complex and nuanced economic analysis.

Properly accommodating the benefits of novel business models does not require abandoning careful analysis or the use of all heuristics to reduce administrative costs; it just means shifting the way they are incorporated into the court's analysis.

1. Antitrust Injury and Antitrust Standing

Much like the per se standard, the antirust injury doctrine serves as a filter meant to minimize the cost of adjudicating likely meritless claims, within the substantive limits of economic theory that defines which plaintiffs are most likely to have viable causes of action. Unlike the per se standard, however, antitrust injury does not impose a filter based on the superficial characteristics of challenged conduct. Rather, antitrust injury requires a causal relationship between the harm alleged and the defendant's conduct, as well as a determination that the

theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive.").

39. *Id*. at 779 (citations omitted) (emphasis removed).

alleged harm is proximately related to the sort of conduct that the antitrust laws address.[40]

Not all conduct that causes a plaintiff to overpay, for example, constitutes antitrust injury. To the contrary, it is well established that all antitrust plaintiffs, including those that allege per se violations, must prove that their injuries stem from a "competition-reducing aspect or effect" of the defendant's behavior.[41]

In *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc*., the Court first developed the standards that should be applied to guide (and limit) recovery of treble damages under Section 4 of the Clayton Act. Crucial to the *Brunswick* Court's reasoning is the notion that "[t]he antitrust laws . . . were enacted for 'the protection of competition not competitors'. . . . It is inimical to the purposes of these laws to award damages for the type of injury claimed here."[42] Thus, the antitrust injury doctrine introduced in *Brunswick* was intended to address the scope of potential litigation, limiting it to a set of cases cognizable under the antitrust laws, and unlikely to amount to the subversion of antitrust laws to benefit competitors.

The judicially developed doctrine seems at least partly intended to address the threat of excessive litigation by private plaintiffs attracted by the lure of large damage awards.[43] Moreover, when a party alleges antitrust harm, courts require the demonstration of antitrust standing.[44] This requirement ensures that firms are not merely com-

40. *See, e.g.*, Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1058 (9th Cir. 1999) ("[I]t is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff.").

41. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990) [hereinafter *ARCO*]; *see also* Gatt Commc'ns Inc. v. PMC Assocs., 711 F.3d 68, 76 (2d Cir. 2013) ("It is not enough for the actual injury to be 'causally linked' to the asserted violation.").

42. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). The Court has subsequently held the antitrust injury limitation in *Brunswick* to apply in Sherman Act and other antitrust cases, as well. *See* Blue Shield of Va. v. McCready, 457 U.S. 465 (1982) (applying the antitrust injury rule to a claim brought under the Sherman Act); *ARCO*, 495 U.S. 328 (imposing the antitrust injury requirement on every private antitrust case, irrespective of the statutory source of liability).

43. William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 467–69 (1980).

44. *See ARCO*, 495 U.S. at 339 ("Antitrust injury does not arise for purposes of § 4 of the Clayton Act . . . until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct"); *Brunswick*, 429 U.S. at 486 n.10 ("The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.'") (citations omitted); Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 689 (6th Cir. 2016) ("Every private antitrust plaintiff, includ-

plaining about normal competition (e.g., by requiring a demonstration that complained-of prices are "predatory" and not just "low").

Implicit in both doctrines is the understanding that courts now seek to more accurately parse challenged conduct in order to ensure that enforcement targets actually harmful conduct and does not deter socially useful behavior: "The interest of private plaintiffs is to remediate an injury they have suffered or may suffer. The interest of the government is to 'prevent and restrain' violations of the antitrust laws along with the attendant social costs such violations can cause."[45] A private plaintiff must show more than simply harm to itself, which might arise from procompetitive behavior, and the government must show the likelihood of anticompetitive effects beyond mere harm to a particular competitor. In both cases, however, the procedural element of standing is a function of the underlying economic understanding of the conduct at issue. For injury to be deemed an injury "to competition, not competitors" requires an understanding of the substantive economics. In fact, in some cases, a form of market definition analysis is a requisite component of the antitrust standing analysis:

> In order to have antitrust standing, the plaintiff must "have suffered its injury in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury."
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> . . . .
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> . . . A "narrow exception" exists to this "market participant" requirement "for parties whose injuries are 'inextricably intertwined' with the injuries of market participants" or with "the injury the conspirators sought to inflict."[46]

This proximity determination is thus dependent upon identification of the relevant market and an understanding of the economic relationship among the actors in that market.

Importantly, for the procedural rules of antitrust standing and antitrust injury to make sense, the same economic understanding that undergirds their determination must apply throughout the antitrust analysis (if a case proceeds). In other words, a preliminary factual and economic determination must be made to address standing, even though the full presentation of evidence and the economic analysis remain the province of later stages of the court's review. Whether it is the later, fuller analysis that follows from the economic and factual assumptions upon which standing—and indeed the entire theory of the case—is based, or whether it is the initial determination that an-

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ing those challenging an agreement as unlawful under § 1, must include in its complaint allegations of 'antitrust injury.'").

45. *In re* Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 60 (1st Cir. 2016).

46. Lorenzo v. Qualcomm Inc., 603 F. Supp. 2d 1291, 1300 (S.D. Cal. 2009) (quoting Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1057 (9th Cir. 1999) (citing *McCready*, 457 U.S. 465 (1982)).

ticipates the later analysis, the point remains: the two must be consistent.

2. *The Indirect Purchaser Doctrine*

The indirect purchaser doctrine also addresses standing, but, at first glance, it appears to be less connected to the underlying economics. Indeed, the indirect purchaser doctrine is often conceived of as a factual inquiry regarding basic contractual relationships between parties, and not one that turns on the economic consequences of their relationship.[47] However, in the face of nonstandard contracting, the indirect purchaser doctrine also cannot escape the interrelatedness of process and substance.

The indirect purchaser doctrine arose in *Illinois Brick Co.* v. *Illinois*, a case that considered whether a plaintiff, who was not an immediate purchaser, could recover damages from a firm allegedly acting anticompetitively.[48] The plaintiffs sought to recover the "passthrough" overcharge—that portion of the price that the actual direct purchaser did not absorb but instead passed along to the plaintiff (called "offensive passthrough").[49] The Court ultimately held that, for reasons of administrability, only the original purchaser could recover for anticompetitive overcharges, regardless of the extent of passthrough.[50]

A significant impetus for *Illinois Brick*'s prohibition on recovery for offensive passthrough was *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*[51] The *Hanover Shoe* Court had denied defendants the use of defensive passthrough to claim that the plaintiffs had not in fact been harmed, but had passed on any increased costs to their own customers. As in *Illinois Brick*, the *Hanover Shoe* Court concerned itself with the impractical task of accounting for all the intricacies that would have attended tracking price increases in the face of potential passthroughs.[52]

47. *See, e.g.*, Cynthia Urda Kassis, *The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to* Illinois Brick, 32 AM. U. L. REV. 1087, 1110 (1983) ("In *Illinois Brick* the Supreme Court sacrificed fairness for expediency by focusing on a formality such as privity rather than on determining who actually had suffered an injury. The Court ignored the issues of compensation and deterrence, the underlying objectives of the treble damage remedy.").
48. Ill. Brick Co. v. Illinois, 431 U.S. 720, 726 (1977).
49. *Id.* at 726–27.
50. *Id.* at 746–47.
51. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
52. *Id.* at 493 ("Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability.").

Hanover Shoe sought to limit the scope of the antitrust inquiry to a single, somewhat arbitrary but conceptually simpler, level of analysis: that of the plaintiffs who made a purchase from a defendant, regardless of whether or not they actually absorbed the anticompetitive overcharge. Such a limitation would enable courts to adjudicate antitrust cases without excessive and often-pointless administrative expense. And *Illinois Brick* created symmetry with *Hanover Shoe* by ensuring that defendants who are unable to point to passthrough as a means of avoiding litigation are not then beset by duplicative, difficult-to-analyze claims brought by both direct and indirect purchasers:

> A one-sided application of Hanover Shoe substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by presuming that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever.[53]

The refusal to account for passthrough (both defensively and offensively) is an administratively minded rule, but it is grounded in the business realities that were before the Court: a classic vertical separation between levels of production and distribution. In *Illinois Brick*, for example, a concrete manufacturer sold allegedly anticompetitively priced concrete products to builders and other resellers who, in turn, used those concrete products in their construction projects. The indirect purchaser doctrine was designed to operate in a traditional, familiar business environment with a strong temporal and course-of-commerce separation between production, distribution, and consumption.

In this context, limiting the availability of recovery to only direct purchasers serves judicial economy without excessively constraining enforcement in theoretical, nonstandard situations. With clear lines of separation and a familiar division of activities within a vertical supply chain, the prospect of deterring recovery by an actually injured party that does not transact directly with the defendant is unlikely—but it is not impossible. As we discuss more fully below, nonstandard structural or contractual arrangements are increasingly common.[54]

If the indirect purchaser doctrine is to maintain its function as an error-cost reducing filter, it cannot be applied without regard to context. As nonstandard business arrangements disrupt the reliability of the implicit assumption of a linear relationship upon which the indi-

53. *Ill. Brick*, 431 U.S. at 730–31.

54. These arrangements are where intermediaries do not simply incorporate inputs in a direct supply chain, process them, and pass them on in an end-product to consumers, but rather facilitate or mediate interactions between other users. In arrangements like these the "direct" and "indirect" purchaser filters are much less accurate and much less appropriate.

rect purchaser doctrine was based, it should be revised to reflect that shift. Indeed, a less formalistic approach to *Illinois Brick* would be consistent with other doctrinal shifts (including those discussed above) that have followed from a better understanding of the economic implications of novel business arrangements:

> The unqualified nature of the current indirect purchaser rule places it at odds with the general body of current antitrust law. Modern antitrust, reflecting the influence of the so-called Chicago School, eschews inflexible formalist rulings that rest on categorical distinctions and instead favors a functionalist approach designed to maximize social welfare. As economic understanding and awareness of market conditions have improved, and as alternative scenarios arise within different market conditions, courts have adapted antitrust law to account for and adjust to the different applications. This trend has eliminated many per se rules in favor of evaluative rules of reason, and has shifted away from adherence to legal category and stare decisis and instead explicitly pursues functional objectives.[55]

III. NONSTANDARD CONTRACTS AND ANTITRUST DOCTRINE: ACCOMMODATING THE ECONOMICS OF TWO-SIDED MARKETS IN ANTITRUST PROCEDURE

Critical to the arguments presented in this Article is that two-sided platforms often incorporate poorly understood commercial arrangements that warrant a reconsideration of how established antitrust doctrines apply in order to avoid their wrongful condemnation.

In the face of evolving facts, procedural consistency and substantive accuracy require that legal doctrines change. Two-sided markets present novel business arrangements, the competitive dynamics and implications of which are incompletely captured by existing antitrust doctrines. The *Amex* Court's opinion moved the process of incorporating the economics of two-sided markets into antitrust doctrine forward in important ways, adjusting the way courts should assess the relationships between certain economic actors. Thus, as we discuss below, following *Amex*, certain "out of market" effects should become "in market" effects"; actors on either side of the platform should frequently be considered part of the same relevant market; and, critical for cases like *Apple*, many parties that were once considered "indirect purchasers" should gain standing as "direct purchasers."

55. Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 So. Cal. L. Rev. 69, 81 (2007).

A. The Basic Economics of Two-Sided Markets

A two-sided platform[56] is a business model that creates value by reducing the transaction costs of direct interactions between two or more types of users in ways that mere resellers cannot replicate.[57] A critical feature of multi-sided platforms is that the demand of platform participants is interdependent—the extent of participation by one set of users on a platform depends on the participation of one or more other sets of users.[58] A multi-sided platform uses both pricing and design choices to achieve critical mass. Without critical mass on all sides, the positive feedback effect, which enables the platform's unique matching abilities, cannot be achieved.

Further, interdependent demand on platforms often leads to situations where efficient pricing involves below marginal cost pricing on one side and above marginal cost pricing on another.[59] As a result, inferences drawn from the traditional indicia of competition—price and output effects—may be inapposite, particularly when they are assessed on only one side of a multi-sided market or without consideration of the effects on the platform itself.[60]

It is a well-accepted proposition in the literature that application of traditional antitrust reasoning is often misapplied to two-sided platforms,[61] and vertical restraints on multi-sided platforms can be either procompetitive or anticompetitive depending on a host of complicated interactions among the platforms' users. Thus, rule of reason scrutiny is normally appropriate in assessing the effects of a vertical restraint in any particular case.[62]

Procompetitive vertical restraints on multi-sided platforms may fall into one or more of at least three broad categories: (1) achieving

56. Two-sided platforms are sometimes called "two-sided markets" and "multi-sided markets." We use these terms interchangeably.

57. For a more thorough discussion of the nature of two-sided platforms, see generally David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, *in* OXFORD HANDBOOK ON INTERNATIONAL ANTITRUST ECONOMICS 405 (Roger Blair & Daniel Sokol eds., 2013).

58. *See, e.g.*, David S. Evans, *Economics of Vertical Restraints for Multi-Sided Platforms*, Univ. of Chi. Inst. for Law & Econ. Olin Res. Paper No. 626 (Jan. 2, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195778 [https://perma.unl.edu/T5CP-QECW].

59. *See* Evans & Schmalensee, *supra* note 57, at 6.

60. For a greater discussion of this limitation on antitrust analysis, see *infra* notes 61–63 and accompanying text.

61. *See* Evans & Schmalensee, *supra* note 57, at 2 ("[I]t is not possible to know whether standard economic models, often relied on for antitrust analysis, apply to multi-sided platforms without explicitly considering the existence of multiple customer groups with interdependent demand . . . [A] number of results for single-sided firms, which are the focus of much of the applied antitrust economics literature, do not apply directly to multi-sided platforms.").

62. *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 887–89 (2007).

economies of scale that provide large benefits to consumers overall; (2) helping platforms deal with coordination and expectation problems to the benefit of platform users; and (3) providing benefits to one side of the platform that increase consumer welfare overall.[63] These procompetitive effects are a function of the particular structure of such two-sided markets and necessitate adjustments to antitrust doctrine to ensure that presumptions and evidentiary burdens properly reflect the more complicated economic relationships among the parties involved.

B. *Amex*, Market Definition, and Effects Analysis

The *Amex* case, the Court's first sustained look at market definition in the context of two-sided markets, resulted in a holding that: (1) the relevant market must be defined prior to an effects analysis, and (2) the proper market definition for many two-sided markets encompasses both sides of the market.[64]

First, by requiring the market to be defined prior to the assessment of anticompetitive effects, the Court acknowledges that assessing competitive effects entails "a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect on competition."[65] This in turn requires a market definition: "Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition."[66] This reflects the Court's realization that "[d]efining which transactions are actually affected by alleged anticompetitive behaviour is necessary for properly identifying anticompetitive effects."[67]

Second, by acknowledging that both sides of a two-sided market will often be considered part of the same, unified market:

> [T]he Court's rule ensures that the price, quality, and output of the relevant product are properly considered. This is especially important because, while output of a two-sided platform may often be measured looking at only one side (particularly for two-sided transactional platforms where it is presumed that a transaction on one side also entails a transaction on the other side), price and non-price product characteristics generally will not be properly measured by doing so.
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> . . . [D]efining the market to include both sides ensures that the full price and quality attributes of the product are considered. Where a single, two-sided product is at issue, the price may be spread across users on both sides of the

63. *See* Evans, *supra* note 58, at 8–9.
64. *Amex*, 138 S. Ct. 2274, 2285 (2018). For a more thorough analysis of the case, see Manne, *supra* note 18.
65. *Amex*, 138 S. Ct. at 2284 (quoting Copperweld Corp. v. Indep. Tube Corp. 467 U.S. 752, 768 (1984)).
66. *Id.* at 2285 (quoting Walker Process Equip., Inc. v Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965)).
67. Manne, *supra* note 18, at 106.

> market. Moreover, non-price product characteristics will necessarily differ between different sets of users. In fact, it is often the case that product quality is adjusted to users on one side of a platform in order to offer them an effectively negative price. Given the differential incidence of price and quality across a platform, it is impossible to capture the competitive dynamics and to measure the competitive effects by viewing only the partial price on one side.[68]

1. Implications for the Consideration of "Out-of-Market" Effects

The pro-competitive behaviors mentioned above emerge as a function of the interconnectedness of two-sided platforms. This interconnectedness complicates the antitrust analysis. In particular, both the predisposition of a *United States* v. *Philadelphia National Bank* (*PNB*) and *Topco* analysis to truncate consideration of "out-of-market" efficiencies,[69] as well as *Illinois Brick*'s focus on a traditional, manufacturing-supply-chain division between production, distribution, and consumption, are poor fits in the context of two-sided platforms.

The logic of *PNB* restricts an efficiencies analysis of costs and benefits generated "in-market," and refuses to consider countervailing effects in related markets. But with two-sided markets, there is a tight relationship between both sides of a platform, suggesting that the efficiencies on both sides of the platform are necessarily interlinked and should be considered together. Maintaining their separation not only risks misunderstanding the nature of the relevant product market at issue, but it arbitrarily excludes consideration of some of the countervailing, procompetitive effects of allegedly anticompetitive conduct.

The district court in *Amex* held that the case involved separate markets,[70] and, citing *Topco* and *PNB*, noted that "[a]s a general matter . . . a restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market."[71] Similarly, relying on *Topco*, Justice Breyer concluded in his *Amex* dissent that a rule of reason analysis would not permit consideration of both sides of the market because: "A Sherman Act § 1 defendant can rarely, if ever, show that a procompetitive benefit in the market for one product offsets an anticompetitive harm in the market for another."[72]

It is unclear whether *Topco* applies the logic of *PNB*—which nominally relates only to merger cases—to Sherman Act cases.[73] But the

68. Manne, *supra* note 18, at 108–09 (citing Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 583 (2006)).
69. United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).
70. United States v. Am. Express Co., 88 F. Supp. 3d 143, 171 (E.D.N.Y. 2015).
71. *Id.* at 229 (citing *Topco*, 405 U.S. at 610 and *PNB*, 374 U.S. at 370).
72. *Amex*, 138 S. Ct. 2274, 2302 (2018) (Breyer, J., dissenting).
73. For further consideration of this question, see Manne, *supra* note 18, at 115.

untested assumption that it does so reflects an inappropriate adherence to doctrinal formality over the evolution of doctrine to reflect economic substance.[74] As noted above, a proper effects analysis is performed only after a market is defined and market power is assessed.[75] Thus, *PNB* and *Topco* considerations aside, properly defining which transactions are actually affected by alleged anticompetitive behavior is necessary for identifying anticompetitive effects and judging antitrust standing.

The market-definition approach in *Amex* will frequently lead to the conclusion that a different product market, with different participants, is at issue. The superficially appropriate market separation that might otherwise result from a different market definition is inapplicable—and so is the *PNB*-like resistance to considering countervailing effects across those markets. In *Amex*, the product at issue was not "payment acquisition services provided to merchants," but "platform services facilitating transactions between cardholders and merchants."[76] Under the former definition, efficiencies afforded to cardholders would be out of market; under the latter, both merchants and cardholders are participants in the same market and the totality of the effects of allegedly anticompetitive conduct by the platform on both must be evaluated.

The clear benefits of an early and proper market definition are that it provides substantive accuracy and a better understanding of the issues throughout all stages of the adjudicatory process. Indeed, "[a]lleging the relevant market in an antitrust case does not merely identify the portion of the economy most directly affected by the challenged conduct; it identifies the competitive process alleged to be harmed."[77] Particularly where, as in *Amex*, the relevant economic relationships have been hardly (if at all) considered by the courts, a consistent and accurate market definition is necessary to determine "what the nature of [the relevant] products is, how they are priced and on what terms they are sold, what levers [a firm] can use to increase its profits, and what competitive constraints affect its ability to do so."[78]

74. *See, e.g.*, Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2171 (2018).
75. *See supra* notes 62–65 and accompanying text.
76. Manne, *supra* note 18, at 109; *see also Amex*, 138 S. Ct. at 2286 ("These platforms facilitate a single, simultaneous transaction between participants . . . . Transaction platforms are thus better understood as 'suppl[ying] only one product'—transactions." (quoting Klein et al., *supra* note 68, at 580)).
77. Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 741 (2013).
78. Manne, *supra* note 18, at 106; *see also Amex*, 138 S. Ct. at 2287 ("Evaluating both sides of a two-sided transaction platform is also necessary to accurately assess competition.").

C. The Relationship Between Market Definition and Standing

In order to establish that allegedly anticompetitive conduct constitutes antitrust injury (i.e., a cognizable harm to competition), the product or service at issue must be properly defined and the contours of the relevant market understood.[79]

Market analysis is part of a chain of antitrust doctrines similarly linked to the underlying economics of the markets at issue, including: standing doctrines, market power assessments, the determination of single entity status, and the choice between per se and rule of reason analysis. The factual and economic determinations made at earlier steps in the adjudicatory process inform the subsequent steps and vice versa. As Alan Meese has observed with respect to the relationship between the determination of whether a case is amenable to per se analysis and the subsequent rule of reason analysis if it is not: "[T]he standards employed at the first step do more than define the class of restraints subject to immediate condemnation; they also implicitly determine the nature of those restraints that are 'left over' and thus subject to more thorough scrutiny under the second step's Rule of Reason."[80] The same is true of other aspects of antitrust process: "Because [many] steps involve the same ultimate inquiry, the methodology employed in [prior steps] should help shape the approach taken in [later ones]."[81]

To fully grasp the relationship between *Amex* and *Apple*, it is crucial to understand that the distinction between "direct" and "indirect" made by the *Illinois Brick* Court implies a particular product market definition, whether the product market is specified by the parties and the court or not. Given the linear relationship between the parties and the simplicity of the relevant products involved, this implied product market may generally be accurate. But in more complex, nonstandard circumstances—particularly where intermediaries form precisely to address the transaction costs that impede direct, linear relationships—the relationships between the parties may be nonlinear, and the actual product or service relevant to the underlying claim may be different than the one implied by traditional direct/indirect filters. In other words, under a different, more-accurate market definition, the

79. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) ("[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantially can be determined only in terms of the market affected." (quoting United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957))).

80. *Price Theory*, *supra* note 20, at 94.

81. *Id.*

"direct" and "indirect" labels don't necessarily reflect either business *or* antitrust realities.

As we address further below, market definition and antitrust standing are interrelated. It is illogical to adhere to a restrictive reading of the latter, if it connotes an economically improper understanding of the former. It does not matter that the standing determination comes first; it should be incumbent upon courts to evaluate standing in an economic context that reflects the underlying economic realities.

Following the Court's approach to market definition in *Amex*, consistency requires that other doctrines change as well. In *Amex*, as we discussed above, "out of market" effects become "in market" effects and actors on either side of the platform become part of the same analytical market. This result is critical to cases like *Apple* because, had the Court decided it with the economics of two-sided markets in mind, it would surely have deemed the users it identified as "indirect" and "direct" purchasers (as if in a traditional, linear relationship) as, in fact, direct participants on either side of the same market. And, had it done so, the court on remand would be confronted with analyzing the effect of the allegedly anticompetitive conduct on both sets of users, as in *Amex*. Such a posture would entail a manifestly different analysis than the one the Court actually identified.

IV. THE COURT'S FAILURE TO INCORPORATE THE ECONOMICS OF TWO-SIDED MARKETS IN ITS *APPLE INC. V. PEPPER* DECISION

Apple presented the Court with its first opportunity to apply the reasoning underlying its *Amex* decision in a subsequent case.[82] Remarkably, however, neither the decision nor the dissent mentioned *Amex*, or even the two-sided market context in which the transactions at issue in both cases take place (save for one passing reference to Apple's "platform" in the dissent).[83] Instead, the Court characterized the app-user plaintiffs as direct purchasers in a traditional retail context, stating: "It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization."[84]

While the Court's approach may constitute a facially accurate application of *Illinois Brick's* indirect purchaser doctrine, it is inconsistent with the *Amex* Court's approach to market definition, as well as

82. The Court's decision in *Apple* was released almost a full year after the Court's *Amex* decision, even though it was argued before the Court just three months after the Court heard oral arguments in *Amex*.
83. *Apple*, No. 17-204, slip op. at 5 (U.S. May 13, 2019) (Gorsuch, J., dissenting).
84. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).

the spirit of *Illinois Brick*, which does not stand for the proposition that any administrative cost reduction is justified, regardless of its effect on accuracy.

On the first of these, the Court in *Amex* held that, in order to assess direct evidence of harm, "we must first define the relevant market."[85] The Court similarly noted that "[v]ertical 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."[86] In *Apple*, however, the Court assumed the adequacy of its traditional, retail-market conception, which it adopted without reflection. As a result, the Court implicitly defined both the product market and the relationship between the alleged buyers and sellers in that market: "The 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."[87]

The Court never discussed the relevant product market; instead, it simply asserted: "we have consistently stated that 'the immediate buyers from the alleged antitrust violators' may maintain a suit against the antitrust violators."[88] But of *what* product or service are the plaintiffs the "immediate buyers" from Apple?

Second, the Court acknowledged three primary, underlying concerns that animated its adoption of the indirect purchaser doctrine in *Apple*: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants."[89] Based on its presumed, simplistic nature of Apple's relationship to App Store purchasers, the Court asserted that "the three Illinois Brick rationales—whether considered individually or together—cut strongly in the plaintiffs' favor here, not Apple's."[90]

But the Court confused the necessary conditions for the application of the indirect purchaser doctrine—the above-quoted administrability concerns—with the sufficient conditions of its application. Merely because the Court's approach might support the underlying efficiency concerns does not mean that all such cases should be decided on that basis. Indeed, the Supreme Court has elsewhere held that the "eco-

85. *Amex*, 138 S. Ct. 2274, 2285 (2018) (emphasis added).
86. *Id*. n.7 (citing Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889 (2007)).
87. *Apple*, 139 S. Ct. at 1520.
88. *Id.* (quoting Kansas v. UtiliCorp United Inc., 497 U. S. 199, 207 (1990)) (emphasis added).
89. *Id.* at 1524.
90. *Id*.

nomic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case."[91] Platform economics introduces just such a basis for reevaluating the applicability of those underlying economic assumptions.

Third, and crucially, *Illinois Brick* does not stand for the proposition that courts should sacrifice accuracy for administrability along all margins. In fact, the first of the three underlying concerns attributed to *Illinois Brick* by the Court in *Apple* is the "effective enforcement of the antitrust laws.[92] While the explicit concern in *Illinois Brick* was that "the 'massive evidence and complicated theories' involved in attempting to . . . trace the effect of the overcharge through each step in the distribution chain . . . would [impair] the effective enforcement of the antitrust laws,"[93] antitrust is equally ineffective if limited to *inapposite* evidence and *over-simplified* theories.

The dissent in *Illinois Brick* focused much of its attention on what the holding would mean for optimal deterrence if, as the dissent surmised, the Court's approach foreclosed evidence and theories of harm raised by the parties *actually* injured by allegedly anticompetitive conduct:

> For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.[94]

The same disconnect between standing and injury—and thus the same impediment to effective antitrust enforcement—will hold true where, as in *Apple*, the Court adopts a formalistic standing determination divorced from the economic realities underlying the relationship between the parties and the service or product over which they transact. *Illinois Brick* (and *Hanover Shoe*) was born out of a particular business reality in which businesses structured themselves in relatively simple, linear production and distribution chains. The Supreme Court adopted the indirect purchaser rule as a prudential doctrine aimed at optimizing the judicial oversight of such cases. It seems strangely nostalgic to reflexively try to fit new business methods into old legal constraints when prudence and reality dictate otherwise.

It hardly matters that the Court reached the superficially correct outcome by allowing the plaintiffs in *Apple* to proceed with their suit.

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91. *Kansas*, 497 U.S. at 217.
92. Ill. Brick Co. v. Illinois, 431 U.S. 720, 732–41 (1977) (discussing the concern with effective enforcement of antitrust laws).
93. *Id.* at 741.
94. *Id.* at 749 (Brennan, J., dissenting).

In fact, the Court reached the *worst* possible outcome: it announced a rule that permits more plaintiffs to establish standing, but it did so without an appropriate limiting principle. After *Apple*, virtually all platform users are direct purchasers of a platform in cases alleging antitrust harm arising from transactions with other platform users mediated by the platform. But this could be both under- and over-inclusive if unmoored from a proper understanding of the relevant product market. Moreover, if *Apple*'s disconnect between standing and market definition extended to the determination of antitrust injury under *Brunswick* and its progeny, antitrust standing may not serve to mitigate the error by limiting the scope of standing to cases in which the plaintiff's injury constitutes harm to competition arising from the defendant's conduct.

Instead, *Apple* simply expands standing in a manner unmoored from the relevant economic—and, indeed, judicial—context. The result will surely be more enforcement, but it will just as surely not be more effective enforcement.

A. *Campos v. Ticketmaster* and the Error of Doctrinal Formalism

In *Campos v. Ticketmaster Corp.*, the Eighth Circuit anticipated the problem with the Supreme Court's failure to connect *Amex*'s market definition analysis to *Apple*'s standing analysis.[95] Indeed, the dissent in that case looms large in the Ninth Circuit's decision,[96] which was overturned by the Supreme Court in *Apple*.[97]

In *Ticketmaster*, plaintiffs—a proposed class of popular music fans and concert-goers—alleged that Ticketmaster abused its monopoly in ticket distribution services to force supracompetitive charges on concert venues—a practice that allegedly led to anticompetitive prices for concert tickets.[98] Although not prosecuted as a two-sided market, the business model is strikingly similar to the App Store model. According to the plaintiffs, Ticketmaster entered into exclusive contracts with either (or both) concert promoters or concert venues, giving it effective monopoly control over ticketing for any large-scale concert at any major venue. "Ticketmaster uses that control, according to the complaint, to extract from the plaintiffs supracompetitive fees for ticket distribu-

95. Campos v. Ticketmaster Corp., 140 F.3d 1166 (8th Cir. 1998).

96. Pepper v. Apple Inc., (*In re* Apple iPhone Antitrust Litig.), 846 F.3d 313 (9th Cir. 2017), *cert. granted sub nom.* Apple Inc. v. Pepper, 138 S. Ct. 2647 (2018), *aff'd sub. nom.* Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).

97. The authors note that one of the authors of this Article, Geoffrey A. Manne, worked on the dissent in *Ticketmaster* as a law clerk to Eighth Circuit Judge Morris S. Arnold.

98. *Ticketmaster*, 140 F.3d at 1168.

tion services,"[99] which it charges concert goers when it facilitates ticket purchases between venues and concert goers.

Unlike the Court in *Apple*, the Eighth Circuit first undertook a brief market definition analysis holding that the relevant product market was the market for ticket purchases not, as the plaintiffs contended, "ticket distribution services."[100] And "ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first."[101] Thus, the venues were the parties directly harmed, and any damage suffered by plaintiffs was a result of passthrough from the venues, who were unable to avoid the monopolistic overcharges.[102] For the Eighth Circuit, "such derivative dealing is the essence of indirect purchaser status, and it constitutes a bar under the antitrust laws to the plaintiffs' suit for damages" under *Illinois Brick*.[103]

Important to the Eighth Circuit's holding, it was immaterial to the court that Ticketmaster collected its fee directly from consumers rather than from the venues: "[T]he actual purchase price and the cost of the service fees amount to the single cost of attending the concert, regardless of how that cost is divided into actual purchase price and service fees."[104] Instead, the Eighth Circuit held: "we do not find billing practices to be determinative of indirect purchaser status."[105]

This, of course, is the same species of argument made by the Court in *Apple*, although without the benefit of any antecedent market definition discussion:

> Apple's theory is that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party . . . .
>
> . . . .
>
> . . . Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a "who sets the price" rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers . . . .
>
> . . . .
>
> . . . Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct.[106]

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99. *Id*. at 1169.
100. *Id*. at 1171.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id*.
105. *Id*.
106. *Apple*, No. 17-204, slip op. at 7–9 (U.S. May 13, 2019).

The problem with this approach, in both cases, is that it effectively rejects consideration of the unique, underlying economics of the relationship between the parties—the nonstandard business model by which the allegedly monopolized services are offered. Further, this approach is directly at odds with the approach the Court took in *Amex*, which makes clear that the court should tailor its antitrust analysis to the underlying market realities:

> Because "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law," courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market . . . .
>
> . . . Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.

To be sure, the Eighth Circuit in *Ticketmaster* and the Supreme Court in *Apple* were correct to reject the simplistic strawman that would point to the superficial directness of a relationship to establish standing: it would not be appropriate to determine either that "a party who hands the cash over to the defendant is a direct purchaser," nor that "a party who pays a price set by the defendant is a direct purchaser." But it is also inappropriate to ignore the more complicated dynamics of the transaction to which these different arrangements may point.

While the majority in *Ticketmaster* failed to fully appreciate the relevance and the larger implications of the atypical transaction at issue in the case, the dissent pointed squarely at the problem:

> The monopoly product at issue in this case is ticket distribution services, not tickets. Ticketmaster supplies the product directly to concert-goers; it does not supply it first to venue operators who in turn supply it to concert-goers. It is immaterial that Ticketmaster would not be supplying the service but for its antecedent agreement with the venues. But it is quite relevant that the antecedent agreement was not one in which the venues bought some product from Ticketmaster in order to resell it to concert-goers. More important, and more telling, is the fact that the entirety of the monopoly overcharge, if any, is borne by concert-goers. In contrast to the situations described in *Illinois Brick* and the literature that the court cites, the venues do not pay any portion of the alleged monopoly overcharge—in fact, they receive a portion of that overcharge from Ticketmaster.
>
> An unhappy result of the holding in this case is that it is now likely that no one can bring a Section 4 suit against Ticketmaster in this circuit. The plaintiffs in this appeal (and other similarly situated "indirect purchasers") are the only parties who are actually injured by Ticketmaster's alleged illegal price-fixing, if any. The venues themselves, the parties whom the court seems to favor as candidates for bringing this Section 4 suit, are not injured, and therefore cannot bring an action at all.[107]

107. *Ticketmaster*, 140 F.3d at 1174–75 (Arnold, J., dissenting).

Here, Ticketmaster provides an intermediary service (perhaps not quite a two-sided market, but something close) that stands outside a traditional manufacturing supply chain. Were it offered by the venues themselves and bundled into the price of concert tickets, there would be no question of standing (nor would market definition matter much as both tickets and distribution services would be offered as a joint product by the same parties in fixed proportions).

But when unbundled, offered by a third party, priced by the third party, and sold directly to end-users, it hardly matters that concert-goers purchase tickets, sold incident to another transaction, from venues. As noted by the dissent, if there is a monopoly overcharge then concert-goers bear its effect, and apportionment is not a significant issue.[108] And even though, at the end of the day, the total amount concert-goers will pay for tickets plus distribution services is the same regardless of who sells each, the antecedent transaction can be seen as one in which Ticketmaster and concert venues divvy up Ticketmaster's monopoly spoils—not one in which the venues absorb their share of Ticketmaster's monopoly overcharge. Properly assessing competitive effects, requires a broader view: one that incorporates the inextricably interrelated relationships, prices, and products on both sides of Ticketmaster's services "platform."

1. *The Consequences of the Formalistic Application of* Illinois Brick *to New Business Models*

The consequences of the Eighth Circuit's failure to apply the aforementioned "broader view" approach, and thus of its failure to grant standing for end purchasers, is, contra *Illinois Brick*, ineffective antitrust enforcement. Indeed, as the *Ticketmaster* dissent notes, such an approach may actually insulate anticompetitive behavior. And consequently, it may even encourage the adoption of nonstandard commer-

108. Concert-goers do not necessarily bear the full overcharge (if any); venues or concert promoters surely bear some of the overcharge. But, as we discuss below, if Ticketmaster compensates them from its *full* monopoly proceeds (if it is indeed charging supracompetitive prices), they do not likely lose profit on net. And this is likely the case because, if they did lose profits from the relationship with Ticketmaster, they could distribute tickets on their own (as most did before Ticketmaster came along) or through other channels. Indeed, as one commentator notes:

> However, venues do have a choice in who sells their tickets, and if a venue wants they can still sell their tickets through their own sales channels. . . . TicketMaster didn't invent convenience fees, but the money they promised the venues did get funded from new service fees. In the 1980s TicketMaster charged an additional $2 on top of the ticket price; $1 went to the venue and $1 went to TicketMaster.

Brett Goldberg, *How the Ticket Industry Works: From the Artist to Ticketmaster to Brokers to You*, TICKPICK (Mar. 28, 2014), https://blog.tickpick.com/ticket-industry-ticket-resale-ticketmaster/ [https://perma.unl.edu/R2N5-YQPL].

cial arrangements designed precisely to engage in anticompetitive behavior:

> Under *Illinois Brick*, an upstream cartel can prevent private litigation as long as it assures that its direct purchasers downstream benefit more from the existence of the cartel than they can claim antitrust damages for. *Illinois Brick* is instrumental in making this possible . . . By ruling out lawsuits by indirect purchasers, *Illinois Brick* enables the cartel to focus side payments on only the affected parties with standing to sue. The direct purchasers benefit with the cartel members at the expense of the rest of the chain of production and final consumers. The cartel is effectively shielded from exposure through private litigation by an "Illinois Wall" of direct purchasers.[109]

Similarly, those who argue in favor of applying *Illinois Brick* to prevent the standing of app users in *Apple* assert that Apple's allegedly restrictive pricing injures app developers themselves (while users receive only passthrough injury).[110] Therefore, so the argument goes, it is app developers, not end-users, who should bring suit. But *would* they do so, even if Apple were charging supracompetitive prices?

"The rationale of *Illinois Brick* . . . assumed that, if direct purchasers were given the full overcharge, the direct purchasers would actually sue, and the indirect purchasers would not."[111] While app developers may not allege cartel-like behavior in the context of Apple's App Store, it remains the case that, taking account of the full spectrum of benefits offered by Apple to app developers and the extent of their ability to pass on Apple's 30% commission to consumers, they are unlikely to bring suit.

The possibility of compensation running to direct purchasers sufficient to deter their bringing suit is far from fanciful. Indeed, some scholars have suggested that exactly this dynamic was at play in the follow-on class-action antitrust cases against *Microsoft* in which "[i]ndirect purchasers brought damage actions against Microsoft Corp. where state law gave them standing—and Microsoft escaped many where they did not. Yet, none of the original equipment manufacturers (OEMs) [i.e., Microsoft's direct purchasers] did [so]."[112] Had the Court in *Apple* denied standing to app users, it would plausibly have left no group of plaintiffs with both the ability and the incentive to challenge the allegedly anticompetitive conduct.

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109. Maarten Pieter Schinkel et al., *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, 39 RAND J. ECON. 683, 684–85 (2008).

110. Brief of Petitioner at 24–25, *Apple*, slip op. (No. 17-204).

111. William H. Page, *Class Certification in the* Microsoft *Indirect Purchaser Litigation*, 1 J. COMP. L. & ECON. 303, 334 (2005).

112. Maarten Pieter Schinkel et al., *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, 39 J. ECON. 683, 695 (2008); *see also In re* Microsoft Corp. Antitrust Litig. 218 F.R.D. 449, 451 (D. Md. 2003) ("No OEM or other member of the putative class presently in business has instituted an antitrust overcharge suit against Microsoft."); Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 941–42 (2003) (reviewing RICHARD A. POSNER, ANTITRUST LAW (2001)).

The *Illinois Brick* approach runs the risk of error in the platform (and platform-like) context, regardless of whether the court grants or denies the plaintiff standing under a simplistic application of its direct/indirect purchaser distinction. The better approach—and the one the Court sadly failed to consider in *Apple*—is the one taken by the Court in *Amex*: reconsideration of both substantive and procedural antitrust doctrine to take account of the economics of novel business relationships. The dissent in *Ticketmaster* was ahead of its time insofar as it recognized that the majority's formal description of the ticket market was an artifact of viewing what was actually something much more like a ticket-services platform service operated by Ticketmaster through the inapt categories established decades earlier.

V. WHAT THE PROPER PROCEDURAL ANALYSIS IN *APPLE INC. V. PEPPER* WOULD HAVE LOOKED LIKE

Properly considered, the relevant market analysis for the provision of app services is an integrated one in which the overall effect of Apple's conduct on both app users and app developers must be evaluated. But, of course, a crucial implication of the *Amex* decision is that participants on both sides of a transactional platform are part of the same relevant market, and the terms of their relationship to the platform are inextricably intertwined. Under this conception of the market, it is difficult to maintain that either side does not have standing to sue the platform for the terms of its overall pricing structure, whether the specific terms at issue apply directly to that side or not.

Thus, both end users and app developers are direct purchasers—even though they are purchasers of different products, they interact in a single, inextricably interrelated market. Both groups should have standing. More controversially, the logic of *Amex* dictates that both groups should also be able to establish antitrust injury—harm to competition—by showing only harm to either group and interrelatedness.[113]

Some clear implications for antitrust procedure follow from the preceding sections:

1. A plaintiff has a choice to either allege that a defendant operates as a two-sided market or not during the pleading stage.
2. If the plaintiff so alleges, then, to demonstrate standing, the plaintiff must show that cognizable injury occurred to some subset of platform users with which the plaintiff is inextricably interrelated. Crucially, the plaintiff would *not* need to demonstrate injury to herself, nor allege net harm, nor establish the "directness" of its relationship with the defendant.

113. *Amex*, 138 S. Ct. 2274, 2287 (2018).

3. In response, a defendant can contest standing by challenging the interrelatedness of the plaintiff and the group of platform users with whom the plaintiff claims interrelatedness.
4. If the defendant does not challenge the allegation that it operates a two-sided market, it cannot challenge standing by showing indirectness, that the plaintiff has not alleged personal injury, or that the plaintiff has not alleged a net harm.
5. Once past a determination of standing, if the court accepts that the defendant is operating a two-sided market, the parties would be bound to frame their allegations and defenses in arguments consistent with the economics of two-sided markets, and defendants would not be barred from presenting efficiencies defenses based on benefits enjoyed by interrelated users on any side of the market.
6. This is critical because, whereas alleging a two-sided market may make it easier for plaintiffs to demonstrate standing, *Amex*'s requirement that net harm be demonstrated across interrelated sets of users makes it more difficult for plaintiffs to make out a prima facie case. The net effect should be more effective antitrust enforcement. Whether the net effect is *more* enforcement is unclear.
7. Finally, a plaintiff who pleads a two-sided market would not be able to later withdraw this allegation to lessen the attendant legal burdens.

It may seem premature to consider aspects of the case on the merits in addressing standing.[114] But the structure of the market the court considers must be consistent throughout its analysis. It would make no sense, for instance, to consider standing in a case as if the plaintiffs operated in a traditional, vertical supply chain, only to later evaluate the defendant's conduct at the merits stage as if it operates in a two-sided market constrained by the holding in *Amex*. As a result, the court must make the standing determination in the context of two-sided markets in anticipation of the subsequent, substantive determinations. Demands for consistency and the error-cost framework of the overall analysis, which runs throughout the stages of an antitrust case, connect the two doctrines.

Here, the two-sided market approach in *Amex* properly understands that conduct by a platform has relevant effects on both sides of its interrelated two-sided market. But that stems from the actual eco-

114. *See* Bruce H. Kobayashi & Joshua D. Wright, *What's Next in* Apple Inc. v. Pepper*? The Indirect-Purchaser Rule and the Economics of Pass-Through*, CATO SUP. CT. REV. 249, 268 (forthcoming 2019) (arguing that "the lower court properly accepted the plaintiffs' alleged market definition" for purposes of the 12(b)(6) motion before it).

nomics of the platform; it is not merely a function of a judicial construct. It thus holds true at all stages of the analysis.

The implications for standing are that users on both sides of a two-sided platform may suffer similarly direct (or indirect) injury because of the platform's conduct, regardless of the side to which that conduct is nominally addressed. The consequence, then, of *Amex*'s market definition approach is that more potential plaintiffs—specifically, plaintiffs on both sides of a two-sided market—may claim to suffer antitrust injury.

Moreover, because of the *Amex* approach, the problem of analyzing passthrough that gave rise to *Illinois Brick*'s indirect purchaser doctrine is either mitigated or inevitable. In other words, either the users on the different sides of a two-sided market suffer direct injury without passthrough under a proper definition of the relevant market or their interrelatedness is so strong that, complicated as it may be, the needs of substantive accuracy trump the administrative costs in sorting out the incidence of the costs and courts cannot avoid them.[115]

That said, *Illinois Brick*'s administrability concerns are well-taken and not made irrelevant by a proper, post-*Amex* standing evaluation. It is entirely possible, for example, that this approach to *Illinois Brick* would lead to platforms and courts being inundated with a surfeit of expensive and difficult to manage lawsuits. If the net effect of *Amex* plus a properly decided *Apple* were duplicative or poorly founded suits leading to excessive litigation or overdeterrence, it might well be appropriate to adopt other standing limitations or procedural rules like mandatory joinder to address the problem.[116]

A. Procedure Does Not Determine Substantive Outcomes

Although courts must consider some elements of a decision on the merits in properly evaluating standing in the face of nonstandard business arrangements, this does not mean that the standing determination is outcome determinative. Indeed, on the merits, it seems that Apple should prevail in *Apple*.

On the merits of the case, the petitioner in *Apple* appears to have had the stronger argument, particularly considering *Amex*. Had the Court properly recognized that the App Store is a species of a two-sided transaction market, *Amex* directs that respondent has the burden of accounting for harms and efficiencies across both sides of the market. At least based on the facts as presented in the case thus far,

115. Or, in this case, the complexity of pass-through analysis is absent. *See id.* at 262 ("To the extent that the marginal costs of producing and distributing another copy of the app is zero, the theoretical calculation of the markup is far from complete—it is simple.").
116. *See, e.g.*, Richman & Murray, *supra* note 55, at 101–03.

respondents have not remotely met their burden of proving anticompetitive effects in the relevant market.[117] In fact, if the court on remand properly follows *Amex*, it seems that respondents have not alleged facts sufficient to withstand summary judgment.

The core substantive issues in *Apple* are clouded by *Illinois Brick*; however, at the root of the *Apple* complaint in *Apple* is that Apple monopolized the iPhone app market with the effect that it is able to charge supracompetitive prices to app developers (which are then, to some extent, passed on to iPhone users). Respondents argue, for instance, that:

> Apple's intentionally closed system prevents competition in the aftermarket for iPhone apps. iPhone owners who want to unlock the range of functions on their iPhone have no choice but to shop for apps in the App Store, which enables the App Store to collect a higher price per app than if Apple were forced to entice app seekers in a competitive market.[118]

But this does not demonstrate anticompetitive harm. The app prices charged to iPhone owners are only a part of Apple's overall pricing structure and, on their own, indicate nothing about the competitive effects of Apple's pricing. And while the alleged mechanism of monopoly overcharge turns on the price of the commission Apple charges to app developers, that price—whether passed through or not—is not the sum of the effects of Apple's business model.

What is material is whether Apple's overall pricing structure reduces output by deterring app developers from participating in the market or users from purchasing apps (or iOS devices at all) because of the amount of the app developer commission. This case has not demonstrated or alleged that yet.

Most importantly, Apple's development and maintenance of an integrated operating system incorporating third-party apps, as well as its tight control over iPhone users' access to apps through the App Store, confer enormous benefits on users (and, indirectly, on app developers). Apple is competitive in the market because it offers a valuable product to consumers at an (apparently) attractive price.

But Apple was wrong when it tried to distinguish its overall platform benefit from app-specific pricing and app-specific charges to app developers; they are part of the same whole. Apple asserted that:

> Apple does require iOS developers to submit iOS apps to Apple for review for malware and similar issues. Approved native iOS apps are then distributed solely through the App Store (otherwise developers could circumvent the approval process). And for paid apps (many are free), Apple charges developers a 30% commission. However, the developer always independently sets its app prices. Apple does not set app prices for third-party developers.[119]

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117. *See id.* at 269 ("Our pass-through analysis demonstrates that, on remand, the plaintiffs should not, and are unlikely to, prevail . . . .").
118. Brief for Respondents at 6, *Apple*, slip. op. (No. 17-204).
119. Brief of Petitioner at 3, *Apple*, slip op. (No. 17-204).

This may be true—just as it is true that merchants who accept American Express cards independently set the retail prices of the products they sell—but it is not the entire story. Rather, Apple's overall pricing structure includes a component whereby Apple allows app developers to set app prices, but it also includes relevant prices and terms set by Apple, including: the price of iOS devices; the commission charged to app developers; the price of its own iOS apps; the (unavoidable) ability for app developers to charge for services outside of the iOS ecosystem (without paying the thirty percent commission); and the structure, price, and availability of app marketing in the App Store.

Adopting the Court's approach in *Amex* does not necessarily mean that *Apple* should reach the same outcome, however. There are important differences between *Amex* and *Apple*. First, and most obvious, the posture of the cases and the doctrines at issue are different. In *Apple*, "[r]espondents' theory is that Apple is charging *developers* too much for app distribution, causing the *developers* to raise app prices."[120] In *Amex*, by contrast, the theory was that American Express imposed anticompetitive terms on merchants, enabling American Express itself to raise the price of its services. Moreover, the plaintiff in *Amex* was the government, whereas in *Apple* the plaintiff was a putative class of private litigants. While determination of government and private antitrust actions on the merits should be essentially the same, they are each subject to different procedural rules and, in particular, considerably different standing requirements.

More importantly, unlike American Express, Apple does provide the but-for mechanism for app users to purchase apps. That is, without iOS and iOS devices, there would be no market at all for iOS apps.[121] By contrast, American Express does not provide the platform upon which retail transactions take place; it provides only a payment mechanism to facilitate those transactions.

Whatever the implications of these distinctions for the ultimate resolution of the antitrust questions presented in each case, if the lower court(s) considering *Apple* follow the logical implications of *Amex* going forward, they do not alter the need for the plaintiffs in *Apple* to allege injury and present their prima facie case consistently with the economic realities of the two-sided market at issue.

120. Brief of Petitioner at 18–19, *Apple*, slip op. (No. 17-204) (emphasis in original).

121. Of course, iOS does compete with Android, and absent iOS there would still be a market for Android versions of the apps. Moreover, the presence of Android imposes a powerful competitive constraint on Apple's conduct. But, while crucial for understanding the competitive conditions confronting Apple, these are still manifestly different than those confronting American Express.

VI. CONCLUSION

The Court's fundamental lapse in *Apple* was its failure to properly account for the implications of Apple's nonstandard, two-sided business model in assessing the plaintiffs' antitrust standing. The Supreme Court's decision in *Amex* lays the groundwork for the correct basis for granting standing in *Apple*, which suggests that all stages of antitrust adjudication should properly account for the unique economic realities of the markets at issue. Thus, the Court managed to reach the right holding in *Apple*, but for the wrong reason.

Critics have accused the Court of making antitrust cases virtually unwinnable against two-sided platforms thanks to *Amex's* requirement that a prima facie showing of anticompetitive effects requires an assessment of effects on both sides of a two-sided market and proof of a net anticompetitive outcome.[122] While this claim is certainly overblown on its face, it also misses a necessary corollary of such an "expanded" market definition in that, relative to previous standing doctrine, a greater number of prospective parties should have standing to sue. *Apple*, although nominally limited to the indirect purchaser doctrine, presented the Court with an opportunity to grapple with this logical implication of its *Amex* decision. It failed to do so.

122. *See, e.g.*, *Open Markets Statement on* Ohio v. American Express *Decision*, OPEN MKTS. INST. (June 25, 2018), https://openmarketsinstitute.org/releases/open-markets-statement-ohio-v-american-express/ [https://perma.unl.edu/39K2-C72X].