Seattle University School of Law Digital Commons

Faculty Scholarship

2020

Antitrust and Two-Sided Platforms: The Failure of American Express

John B. Kirkwood

Follow this and additional works at: https://digitalcommons.law.seattleu.edu/faculty

Part of the Antitrust and Trade Regulation Commons

ANTITRUST AND TWO-SIDED PLATFORMS: THE FAILURE OF *AMERICAN EXPRESS*

John B. Kirkwood†

Two-sided platforms serve two sets of customers and enable them to interact with each other. The five most valuable corporations in America—Amazon, Apple, Facebook, Google, and Microsoft—operate two-sided platforms. But despite their growing power, the Supreme Court's American Express *decision has made it harder to stop them from stifling competition. This Article systematically exposes the flaws in the Court's reasoning and identifies the principles that should govern future cases.*

The Court's most fundamental error was to require plaintiffs in rule of reason cases to make an initial showing of consumer harm that weighs the effects of the defendant's conduct on both sides of its platform. This unprecedented approach will discourage antitrust litigation. It is also flawed antitrust policy because it allows a firm to exploit customers on one side of its platform to benefit customers on the other side. I argue that such conduct by a platform should only be permissible in the face of a market failure—an obstacle that prevents the market from maximizing consumer welfare. Without a market failure—and American Express (Amex) could not demonstrate one—competition will produce the optimal allocation of benefits across a platform.

† Professor of Law, Seattle University School of Law; American Law Institute; Executive Committee, AALS Antitrust and Economic Regulation Section; Advisory Board, American Antitrust Institute; Advisory Board, Institute for Consumer Antitrust Studies. This Article was presented at the annual meeting of the AALS Antitrust Section and the Antitrust Scholars Forum at University of California, Irvine School of Law. I want to thank the participants for their comments, especially Rebecca Haw Allensworth, Christine Pedigo Bartholomew, Aaron Edlin, Harry First, Christopher Leslie, John Newman, Steve Salop, Sean Sullivan, and Tod Zywicki. In addition, Rebecca Allensworth, Christine Pedigo Bartholomew, Brooke Coleman, Charlotte Garden, Warren Grimes, Keith Leffler, John Newman, and Heather Kirkwood read or discussed an earlier draft and provided excellent suggestions.

The Article shows why the Court was wrong to treat Amex's two sets of customers—cardholders and merchants—as a single market. Instead, it offers a better approach to discerning market power in antitrust cases, based on the likely effects of the defendant's conduct. Under this approach—and contrary to the Court's conclusion—Amex possessed market power, as its steering ban almost certainly enabled it to maintain its merchant fees above the competitive level. The Article concludes that American Express *was deeply flawed, and that courts should confine it to its facts and follow the principles set forth in this Article.*

TABLE OF CONTENTS

INTRODUCTION 1807
I. PROPER ANALYTICAL FRAMEWORK 1817
  A. *Price Changes on One Side of a Platform* 1818
  B. *Conduct that Restrains Rivalry* 1820
II. MARKET POWER AND ANTICOMPETITIVE EFFECTS 1825
  A. *Prices Above the But-For Level* 1826
  B. *Repeated Fee Increases* 1829
    1. Increased Value 1830
    2. Price Above the Competitive Level 1831
    3. Actual Anticompetitive Effects 1833
    4. Output Expansion 1835
    5. Conclusion 1836
  C. *Market Definition* 1837
    1. Court's Ruling 1837
    2. Amex's Market Share 1838
    3. Reasons for a Two-Sided Market 1838
    4. Superiority of a One-Sided Market 1841
III. JUSTIFICATIONS 1846
  A. *The Market Failure Requirement* 1847
  B. *The Asserted Negative Externality* 1849
IV. THE PATH FORWARD 1853
  A. *Market Power* 1853
    1. Likely Anticompetitive Effects 1853
    2. Actual Anticompetitive Effects 1856

3. Market Definition and Market Share..1856
B. *Justifications* 1857
CONCLUSION...1858

INTRODUCTION

Two-sided platforms are intermediaries that bring two sets of customers together, providing valuable services to each and enabling them to interact with each other.[1] Newspapers sell information to readers and space to advertisers and thereby allow advertisers to communicate with readers. Likewise, credit card networks furnish services to both merchants and cardholders, enabling the two sets of customers to transact efficiently with each other.

Two-sided platforms are not new. But today, computers, smart phones, and the Internet have made two-sided platforms much more common and much more important in the economy. Microsoft's operating system is a two-sided platform because it allows computer users to interact with independent applications like Google's search engine.[2] Similarly, the iPhone permits users not only to make phone calls but to invoke Apple's applications and independent services like Uber and Facebook. Indeed, thanks to the Internet, two-sided platforms like Uber, Facebook, Netflix, Airbnb, and Amazon have proliferated. The five most valuable corporations in America—Apple, Amazon, Google, Facebook, and Microsoft[3]—all operate two-sided platforms.

1 *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018) (stating that a two-sided platform "offers different products or services to two different groups who both depend on the platform to intermediate between them"); Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 COLUM. BUS. L. REV. 35, 37 (2019) ("[A] two-sided platform is a business that depends on relationships between two different, noncompeting groups of transaction partners.").

2 In fact, Windows is a three-sided platform because it interfaces with the computer that it operates and thus allows interactions among the hardware manufacturer, applications developers, and computer users. To simplify the discussion, I'll use the more common term—two-sided platform—to cover multi-sided platforms as well.

3 *See, e.g.*, Farhad Manjoo, *Stumbles? What Stumbles? Big Tech Is As Strong As Ever*, N.Y. TIMES (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/technology/big-tech-earnings-stumbles.html [https://perma.cc/LF66-MPYN].

Since 2000 the literature on two-sided platforms has exploded, with foundational articles by Nobel Laureate Jean Tirole and Jean-Charles Rochet,[4] numerous essays by David Evans and Richard Schmalensee,[5] and many other contributions by legal and economic scholars.[6] This literature focuses on the distinctiveness of two-sided platforms—the ways in which these platforms differ from ordinary products or services. Most fundamentally, a two-sided platform must bring two sets of customers together in order to perform its function.[7] Because these sets normally do not have the same price sensitivity, the platform typically charges one set a relatively high price and the other set a relatively low price.[8] This type of price discrimination not only helps the platform maximize profits, it also serves another purpose: the low price brings more customers to the platform. This is valuable because two-sided platforms commonly create "indirect network effects"—the utility of the platform to customers on one side depends on the number of customers on the other side.[9] As a

---

4 Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 991 (2003); Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006) [hereinafter Rochet & Tirole (2006)].

5 *See, e.g.*, David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 668 (2005); David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 667 (2008); David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, *in* 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 404 (Roger D. Blair & D. Daniel Sokol eds., 2015).

6 *See, e.g.*, Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMP. L & ECON. 293 (2014); Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571 (2006); Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515 (2005).

7 As Rochet and Tirole put it, platforms must design their price structure so as to "bring both sides on board." Rochet & Tirole (2006), *supra* note 4, at 665.

8 *See* Evans & Noel, *supra* note 5, at 681 (stating that "[t]he optimal prices" for a two-sided platform depend in part on the "price elasticities of demand on both sides"); Klein et al., *supra* note 6, at 573–74 (noting that credit card systems generally charge merchants more than cardholders "because demand sensitivity generally is much greater on the cardholder side of the market than on the merchant side of the market").

9 *See* Evans & Schmalensee, *supra* note 5, at 405; *see also* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2281 (2018) ("A credit card, for example, is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it."). For some scholars, indirect network effects are a defining characteristic of two-sided platforms. *See, e.g.*, Muris, *supra* note 6, at 517 ("Three conditions must be present in a two-sided market: (1) two

result, a platform typically has an incentive to charge a very low or even negative price to customers on one side in order to lure more higher paying customers to the other side.[10]

These basic features of platform economics imply that a two-sided platform must address the needs of both sets of its customers. It cannot focus on one side only. Indeed, if the platform is a two-sided transaction platform, which enables customers on one side to transact with customers on the other side, it cannot function at all unless at least one customer on each side participates.[11] This means that when a two-sided platform competes with similar platforms, it must consider its offerings on both sides of its platform. If it increases price to one set of its customers, it may have to reduce price or provide benefits to the other set. For example, imagine that Uber lowers the amount that drivers earn on each trip they complete. That change might send drivers to work for Lyft, which could drive up wait times for Uber riders. As a consequence, riders might decide to use another ride hail service—unless Uber lowers ride prices to keep those customers happy.

In *Ohio v. American Express Co.*,[12] the Supreme Court relied on this dynamic to conclude that antitrust courts cannot analyze a platform's conduct without weighing its effects on both sides of the platform. Addressing a two-sided platform for the first time in sixty years,[13] the Court held that a plaintiff cannot prevail unless it proves, as part of its

---

distinct groups of customers; (2) the value obtained by one group increases with the size of the other; and (3) an intermediary connects the two."); Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2150 (2018); Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. 713 (2019).

10 *See* Evans & Schmalensee, *supra* note 5, at 405 (asserting that Rochet and Tirole had the "fundamental insight" that the optimal strategy for a two-sided platform may "entail pricing below the marginal cost of provision to one side and above the marginal cost of provision to the other side"). A platform charges a negative price when it provides benefits to one set of customers (e.g., cardholder rewards) that exceed any fees they pay.

11 *See Am. Express Co.*, 138 S. Ct. at 2280 ("The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other."). A credit card network is a two-sided transaction platform.

12 *Id.* at 2274.

13 The Court last considered the distinctive features of a two-sided platform in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

initial burden, that anticompetitive effects on one side of the platform outweighed procompetitive effects on the other.[14]

American Express arose because the federal government and multiple states challenged the anti-steering provisions that Amex inserts in its contracts with merchants. These provisions prohibit merchants from inducing customers to use a credit card with a lower merchant fee.[15] On their face, they restrict price competition on the merchant side of a credit card platform. A rival credit card network like Discover cannot gain business by cutting its merchant fee since consumers are unlikely to know about merchant fees and merchants cannot steer their customers toward Discover. Merchants cannot post signs that say "We Prefer Discover" or offer discounts for using a Discover card.[16] In short, the anti-steering provisions removed the financial incentive to reduce merchant fees.[17] Focusing on this harm, the district court defined the relevant market as credit card services provided to merchants.[18] It also held that the plaintiffs had met their burden of showing anticompetitive effects by proving that the anti-steering provisions had raised merchant fees.[19]

The Supreme Court rejected this approach. In a 5–4 decision, it held that the relevant market must include both sides of a credit card platform,

---

14 *See Am. Express Co.*, 138 S. Ct. at 2281–82, 2286–88.

15 *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 150 (E.D.N.Y. 2015) ("[P]ursuant to Amex's [NDPs], merchants who accept American Express are not permitted to encourage customers to pay for their transaction with credit cards that cost the merchants less to accept."), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom. Am. Express Co.*, 138 S. Ct. 2274. American Express refers to its steering restrictions as Non-Discrimination Provisions (NDPs). *See id.* at 149.

16 *See id.* at 165.

17 Likewise, the anti-steering provisions removed the incentive of *consumers* to choose a cheaper credit card, since a merchant could not reward consumers for making this choice. *See* Hovenkamp, *supra* note 1, at 45.

18 Specifically, the district court defined the relevant market as "the market for general purpose credit and charge card network services." *Am. Express Co.*, 88 F. Supp. 3d at 170. These services "include the core enabling functions provided by networks [to] merchants." *Id.* at 171. The court declined to include services provided to cardholders, noting, among other things, that "the court is aware of no authority . . . that requires the court to define the relevant product market to encompass the entire multi-sided platform." *Id.* at 174. I will refer to both credit and charge cards as credit cards.

19 *See id.* at 208 ("Proof of anticompetitive harm to merchants . . . is sufficient to discharge Plaintiff's' burden in this case."); *id.* at 224 ("[T]he NDPs . . . result in higher prices for merchants and their customers.").

the cardholder side as well as the merchant side.[20] It also ruled that the plaintiffs had not shown that Amex's fee increases constituted actual anticompetitive effects because the plaintiffs had focused on the impact of these increases on merchants,[21] ignoring or downplaying the benefits Amex furnishes cardholders, such as a generous rewards program and "welcome acceptance" at merchants,[22] which may account for the higher fees. Indeed, the Court stated: "Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price."[23] In the Court's view, benefits to cardholders may explain—and justify—Amex's behavior on the merchant side.

This decision would make sense if all Amex had done was increase its merchant fees in order to expand its rewards program. As the new literature makes clear, a platform may change its terms on one side in order to enhance the value it realizes on the other side, and the result may be desirable for the platform and for its customers as a whole, increasing output and strengthening competition.[24] But this procompetitive theory did not explain *American Express*. Amex did not just charge high merchant fees and increase them repeatedly in order to expand its rewards programs and create a more loyal and valuable set of cardholders. It also used exclusionary conduct to prevent other credit card networks from undercutting its fees.

Such conduct requires a different analytical framework. When a two-sided platform takes steps to reduce rivalry, it is not appropriate to define a two-sided market or force the plaintiff to show that the adverse effects of this conduct on one side of the platform exceed the benefits on

---

20 *Am. Express Co.*, 138 S. Ct. at 2286 ("[C]ourts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.").

21 *Id.* at 2287 ("Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone.").

22 *Id.* at 2288 ("Amex uses its higher merchant fees to offer its cardholders a more robust rewards program," which not only benefits cardholders but causes them to spend more, which is "valuable to merchants"); *id.* at 2289 (steering would undermine the "welcome acceptance" of Amex cards, which would harm both cardholders and merchants).

23 *Id.* at 2288.

24 *See, e.g.*, Klein et al., *supra* note 6, at 575 (stating that when a payment system balances its prices on both sides, the effect is to "maximize payment system output").

the other side. Unless the platform can establish a market failure—a market imperfection that prevents competition from maximizing consumer welfare—its conduct would not be justified and the benefits it provides on the other side would not be cognizable efficiencies.[25] A cartel cannot legally or economically justify its higher prices by showing that it devoted the extra revenues to greater non-price competition.[26] Likewise, a two-sided platform cannot excuse rivalry-reducing conduct on one side of its platform by funneling the supracompetitive profits into a rewards program for customers on the other side.[27] By definition, this conduct creates market power and transfers wealth from consumers on one side of the platform to the platform itself. Unless the platform can show that it was correcting a market failure, it cannot justify this exploitation by using some or all of the wealth to fund benefits for customers on the other side. Those benefits are a byproduct of the anticompetitive behavior, not a reason to allow it. Consumers as a whole would have preferred the competitive outcome.[28]

The traditional rule of reason is the proper way to address these issues. It will unearth whether the platform employed anticompetitive conduct and whether a market failure might justify such conduct. Under the traditional rule of reason, as the Court explained in *American Express*,[29] the plaintiff must first show that the challenged conduct had a substantial anticompetitive effect. This will reveal whether the platform used conduct that restricted rivalry on one side of the platform.[30] If the plaintiff carries that burden, the defendant may show a justification,

---

25 *See infra* Section III.A (showing that an antitrust justification requires a market failure); *accord* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 517 (2019).

26 *See infra* Section I.B.

27 *See infra* Section I.B; *see also* Katz & Sallet, *supra* note 9, at 2161–62 (rejecting the "view that anticompetitive conduct harming users on one side of a platform can be justified so long as that harm funds benefits for users on another side of the platform").

28 Evans and Schmalensee state that "an accurate analysis of the impact of any platform decision on consumer welfare must take into account all interdependent customer groups the platform serves." Evans & Schmalensee, *supra* note 5, at 413. But the legality of a platform decision does not require such a comprehensive accounting. If there is no market failure, a platform cannot excuse a restraint on one side by showing that the restraint allowed it to increase benefits on the other side.

29 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (describing the first three steps of the rule of reason).

30 The platform must also have market power, but as explained below, that can be inferred from the anticompetitive effects of the challenged conduct.

which will disclose whether there is a market failure and whether, by correcting it, the defendant produced benefits for customers on the other side of the platform. Only if the defendant establishes a market failure, and the plaintiff cannot show there is a better way of correcting it, would the plaintiff have to prove that the adverse effects on one side of the platform outweighed the benefits on the other side.

The traditional rule of reason is not only correct analytically; it has major administrative advantages. Under the *American Express* Court's version of the rule of reason, the plaintiff must show, in the very first step, that the challenged conduct produces net harm across the entire platform. This requires the plaintiff to anticipate all the defendant's justifications and show that they do not offset the conduct's anticompetitive effects, before the defendant has established a market failure, the sine qua non of a legitimate justification.[31] Such a burden is both inefficient and counterproductive. It is inefficient because the defendant possesses the relevant information, not the plaintiff. It is counterproductive because it raises the plaintiff's costs, which will cause fewer cases to be brought, even if warranted. Finally, because it forces the judge or jury to deal in a single stage with a mass of conflicting evidence, it will increase the likelihood of error.[32]

In short, two-sided platforms do not require a "*new* antitrust."[33] They can be analyzed appropriately with the traditional rule of reason, provided it is applied with sensitivity to cross-platform effects and to the key issues: anticompetitive conduct, market failure, and market power. The Court also made several other significant errors.

First, the Court overlooked the simplest and most powerful way of establishing Amex's market power. As I showed in a recent article,[34] the best way to demonstrate market power in the vast majority of cases is through the likely effects of the challenged conduct. If the defendant's conduct is likely to enable it to raise price above the prevailing level or

31 *See infra* Section III.A.

32 *See* Hovenkamp, *supra* note 9, at 4, 6 (describing the administrative advantages of the traditional rule of reason).

33 Katz & Sallet, *supra* note 9, at 2160; *accord* Dennis W. Carlton & Ralph A. Winter, *Vertical Most-Favored-Nation Restraints and Credit Card No-Surcharge Rules*, 61 J.L. & ECON. 215, 232 (2018).

34 *See* John B. Kirkwood, *Market Power and Antitrust Enforcement*, 81 B.U. L. REV. 1169 (2018).

maintain price above the but-for level—the level to which price would otherwise have fallen—the defendant possesses market power. This method leaves no doubt that Amex exercised market power. The evidence demonstrated that Amex's anti-steering provisions almost certainly prevented its merchant fees from falling to the level that unrestricted competition would have produced.[35]

Second, the Court incorrectly defined the relevant market. It insisted on a two-sided market, even though such a broad market would often give an inaccurate picture of the defendant's market power. In this case, since Amex is a transaction platform, the error did not affect Amex's market share.[36] But in many platform cases, the state of competition and the identities of the competitors will differ on the two sides of the platform.[37] In those cases, the defendant's market share is likely to be larger on the side where it has allegedly restricted competition. A one-sided market would disclose that larger share; a two-sided market would obscure it.[38]

Third, the Court refused to accept actual anticompetitive effects as proof of market power because this was a vertical case, not a horizontal case. But the type of case is irrelevant if the plaintiff shows actual anticompetitive effects. Actual anticompetitive effects cannot occur unless the defendant has market power.

Fourth, the Court's attempt to identify a market failure that would justify Amex's facially anticompetitive conduct foundered. The Court declared that merchant steering would create a negative externality because it would reduce future use of Amex's card. This externality, however, is not a market failure; it is a consequence of price competition.

35 *See infra* Section II.A. To be sure, prices above the but-for level may not establish market power if the challenged conduct was necessary to correct a market failure. In that case, the higher prices may reflect the value created by eliminating the market failure and improving efficiency. *See* Hovenkamp, *supra* note 1, at 51 (noting that a defendant may maintain higher prices by excluding a rival, but those higher prices do not establish market power when the exclusion occurred because of superior efficiency). As Part IV shows, however, Amex could not demonstrate that its anti-steering rules corrected a market failure. *See infra* Part IV.

36 *See infra* Section II.C.2 (noting that a credit card transaction always involves both a merchant and a cardholder and thus Amex's share of transaction volume is the same on both sides of the platform).

37 *See* Katz & Sallet, *supra* note 9, at 2145.

38 As explained below, a two-sided market is not needed to take into account indirect network effects. They can be considered as part of the process of defining the scope of a one-sided market.

Amex would be losing sales only because other credit cards offered lower merchant fees.

In sum, *American Express* was deeply flawed. Its numerous mistakes, if followed strictly in future cases, will make it harder to challenge anticompetitive behavior by two-sided platforms and other firms. The Court should have adhered to the following principles:

(1) Market power should be determined, whenever possible, by the likely anticompetitive effects of the challenged conduct. If the plaintiff shows that the defendant's conduct is likely to increase price above the prevailing level, or maintain price above the but-for level, the defendant has market power.
(2) When the conduct has had actual anticompetitive effects, market power should be inferred from those effects, whether the challenged conduct is a vertical or a horizontal restraint.[39]
(3) When market power can be determined from the likely or actual anticompetitive effects of the challenged conduct, the relevant market may be inferred from that determination. Traditional market definition is unnecessary.
(4) When traditional market definition is needed, the candidate market should be the side of the platform where the conduct allegedly injured competition. The market should be expanded to the other side only when reactions on that side would prevent the exercise of market power on the first side.
(5) A defendant cannot justify benefits provided to customers on one side of its platform if the benefits were funded by using anticompetitive conduct to force customers on the other side to pay higher prices. Benefits generated through rivalry restricting behavior are not a cognizable efficiency, even if they are passed through to customers on the other side of the platform, absent a market failure.
(6) When the defendant establishes that its conduct corrected a market failure and that the benefits provided to customers on the other side resulted from that correction, those benefits may be considered. But market failures are imperfections that prevent competition from promoting consumer welfare, not

[39] For the evidence required to show actual anticompetitive effects, see *infra* Section II.B.3.

conditions that simply reduce the defendant's profits or frustrate its business model.

This set of principles should guide lower courts in their analysis of two-sided platform cases. When the platform is not a transaction platform,[40] courts should apply these principles rather than the flawed rulings in *American Express*. *American Express* should be limited to transaction platforms. As the Court itself recognized, transaction platforms are "different" from other platforms.[41] For one thing, the relationship between the customers on one side and the customers on the other side—a key issue for the Court—is closer with a transaction platform.[42] For another, a two-sided market definition is easier and more accurate with a transaction platform.[43] These differences and sound antitrust policy dictate that *American Express* should be confined to its facts.[44] That would also avoid the definitional difficulties that would arise if the case applied to all two-sided platforms.[45]

40 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018) (defining a transaction platform).

41 *See id.* at 2286.

42 *See id.* ("[T]ransaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand.").

43 *See infra* Section II.C.4.

44 *See* Hovenkamp, *supra* 1, at 88 ("On [the market definition] question, maintaining a coherent economic approach to antitrust policy requires that *Amex* be limited to its facts."); Tim Wu, *The* American Express *Opinion, the Rule of Reason, and Tech Platforms*, 7 J. ANTITRUST ENFORCEMENT 117, 124 (2019) (concluding that "the *American Express* holding is limited to 'transaction platforms'" (citation omitted)).

45 *See* Katz & Sallet, *supra* 9, at 2151 (noting that there is no consensus definition of a two-sided platform and its boundaries are "easily manipulable"). To illustrate the problem, consider whether Safeway is a two-sided platform. Unlike Amex, which does not *purchase* services from merchants and resell them to cardholders, Safeway does buy products from suppliers and resell them to consumers. It takes title to the merchandise it resells. This difference may be enough to distinguish *American Express*. *See* Hovenkamp, *supra* note 1, at 84 ("The Amex majority's approach does not apply when the merchandise is actually sold or licensed to the operator of the platform."). But Safeway also *sells* distribution services to its suppliers, such as maintaining an adequate inventory of their products, placing them in prominent locations, and administering their in-store promotional campaigns. As a result, Safeway's suppliers are also its customers, which means that Safeway has two sets of customers that it brings together: suppliers and consumers. This is enough to satisfy the Court's definition of a two-sided platform. *See Am. Express Co.*, 138 S. Ct. at 2280. But Safeway is not a two-sided *transaction* platform. It does not facilitate direct, simultaneous transactions between its suppliers and consumers. Since *American Express* ought to be limited to transaction platforms, this is a stronger reason to hold that the case does not apply to Safeway.

If a case does involve a transaction platform, the court must follow *American Express*, but it can refer to the principles set forth above and suggest that they provide an alternative and more accurate perspective on the antitrust issues. Such comments would lay the groundwork for the eventual abandonment of *American Express*.

Part I begins with the Court's most fundamental error: its misconception of the proper analytical framework for a two-sided platform case. Part II addresses market power, pointing out that the easiest way to demonstrate Amex's market power is to infer it from the likely anticompetitive effects of Amex's conduct. Part II also examines the Court's unwarranted refusal to find market power from two traditional sources of evidence: actual anticompetitive effects and market definition. Part III analyzes the Court's mistaken claim that Amex's conduct was justified. Part IV sets forth the principles that should inform future two-sided platform cases.

I. PROPER ANALYTICAL FRAMEWORK

According to the Court, the plaintiffs did not carry their burden because they did not include both sides of Amex's platform in their prima facie case. The Court stated that "competition cannot be accurately assessed by looking at only one side of the platform in isolation."[46] As a result, plaintiffs' proof of market power and their proof of anticompetitive effects were rejected. The relevant market should have included services to cardholders as well as services to merchants.[47] Similarly, Amex's fee increases did not establish market power or anticompetitive effects because "Amex uses its higher merchant fees to offer its cardholders a more robust rewards program."[48] The higher fees may have reflected the costs of its rewards program and the rewards may have increased sales. In short, plaintiffs had not proved that Amex's higher fees exceeded the competitive level or that Amex had restricted output.[49]

---

46 *Am. Express Co.*, 138 S. Ct. at 2287.

47 *Id.* at 2286.

48 *Id.* at 2288.

49 *Id.* ("This Court will 'not infer competitive injury from price . . . data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.'" (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993)).

The Court's emphasis on two-sided analysis is often appropriate. As Section I.A explains, a price increase on one side of a platform may fund greater benefits on the other side, and the net effect on competition may be positive. But Amex did not simply raise prices on one side of its platform; it used exclusionary conduct to keep rivals from undercutting its higher prices. As Section I.B shows, a one-sided analysis may be entirely adequate to condemn such conduct.

A. *Price Changes on One Side of a Platform*

If there is one salient message of the new literature, it is this: A platform may change price on one side in order to adjust price or benefits on the other side, and the effect on competition and customer welfare cannot be determined without examining both sides of the platform.[50] For example, a platform may raise the price it charges to customers on one side in order to increase the benefits it offers to customers on the other side. The higher price may substantially exceed the marginal cost of serving the customers who pay that price, but this does not show that the platform is exercising market power or exploiting those customers. The additional benefits furnished to customers on the other side would bring more customers to that side and cause many of them to spend more, creating additional value to customers on the first side that may be more than sufficient to compensate them for the higher price. The cost of the additional benefits, moreover, may largely offset the extra revenues from the higher price. As a result, the platform may earn no more than a competitive rate of return from its new strategy.[51] Only if the strategy results in a supracompetitive return—total revenues that exceed total costs (including the cost of capital)—would it be appropriate to conclude that the strategy created market power.[52] And even then, it may raise overall consumer welfare. Like any desirable innovation, it may create

---

[50] *See, e.g.*, Evans & Schmalensee, *supra* note 5, at 438 ("In evaluating such changes, there is no economic reason why one would focus on losses to one group of consumers and ignore gains by another group. . . . [C]orrect analysis of multisided platforms always considers all groups served by the platform."); *id.* at 425 ("[T]he analysis needs [to] consider the welfare of all customer groups.").

[51] *See id.* at 423 ("A platform [may earn only] a competitive rate of return yet price significantly above marginal cost on one side.").

[52] *See* Klein et al., *supra* note 6, at 575 (indicating that a payment system has market power when it can "charge a total price above costs").

market power, but the additional value to consumers may be worth the higher price.

In short, one cannot conclude that a price increase on one side of a two-sided platform creates market power, reduces competition, or hurts customers as a whole without looking at the effects on both sides of the platform. In fact, one cannot even conclude that the price increase hurts the customers who have to pay it without addressing the value created for those customers by the additional patronage on the other side. In this setting—a simple price increase unaccompanied by any restriction on rivalry—a two-sided analysis is entirely appropriate.

That is equally true when a platform reduces prices on one side, even if the lower price is below the marginal cost of serving customers on that side. While the lower price could be predatory, it is not predatory merely because it is below marginal cost.[53] The lower price is likely to stimulate demand on that side of the platform, which will benefit customers on the other side and enable the platform to raise prices to them, allowing it to recoup the costs of its strategy. As Rochet and Tirole observe: "[I]t is quite common for a platform to charge [a] below-cost (perhaps zero) price[] to one side and [a] high price to the other." For example, media platforms usually give away newspapers or free TV programs not to prey on rival platforms, but to be able to charge higher markups to advertisers.[54]

Moreover, as long as that strategy is profitable in the short term, rival platforms can emulate it. As a result, it would not eliminate equally efficient competitors and would not generate supracompetitive profits.

American Express, however, did not involve a simple price increase unaccompanied by any restriction on rivalry. Amex did not merely raise its merchant fees repeatedly in order to provide a more generous rewards

---

[53] *See* Evans & Schmalensee, *supra* note 5, at 437 ("[T]he fact a multisided platform is providing goods or services to one of the groups it serves at prices that do not recover costs provides no meaningful evidence that the platform is engaging in predatory pricing.").

[54] Rochet & Tirole, *supra* note 4, at 659. These two economists "showed that the optimal prices—both from the standpoint of profit-maximization and social welfare maximization—could entail pricing below the marginal cost of provision to one side and above the marginal cost of provision to the other side." Evans & Schmalensee, *supra* note 5, at 405; *see also* Klein et al., *supra* note 6, at 595 ("[B]alancing by a payment system in a highly competitive market may even lead to a negative price on the cardholder side of the market and a price greater than total costs on the merchant side," though competition would "constrain the system to collect a total price that equals total costs").

program to its cardholders. It imposed increasingly stringent anti-steering provisions to block rival credit card networks from undercutting those higher fees. This conduct restrained competition on its face. Anti-steering provisions deprive a rival credit card network of the financial incentive to reduce merchant fees, since they prevent merchants from rewarding the network by steering additional business to it.[55] In addition, when a rival credit card already charges lower fees, as Visa and MasterCard did for years, merchants cannot pass on those lower fees to consumers. Amex's conduct, therefore, led to both higher merchant fees and higher retail prices.[56] Removing its anti-steering provisions would enhance the competitive process. Credit card networks and merchants could compete more freely with each other, and consumers would choose Amex only if they valued its rewards more than the discounts merchants offered for using a cheaper card.[57]

As the next Section explains, when a platform's behavior restricts rivalry, the plaintiff should not have to prove, as part of its initial burden, that such conduct cannot be justified.

B. *Conduct that Restrains Rivalry*

When conduct dampens competition, it is likely to increase the defendant's profit margin, the excess of its price over its marginal or average variable cost. This higher margin would increase the defendant's incentive to make additional sales, since each additional sale now brings greater incremental profits. To make those sales, the defendant may spend some of that higher margin on increased marketing or it may enhance the benefits it provides customers who purchase its product. But this spending does not justify the anticompetitive behavior. It is a consequence of that behavior, not a reason to allow it.

---

55 *See* Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 607 (2018) (noting that "customers received no incentive to switch to a less costly card," and thus, a rival credit card had no incentive to lower its fees).

56 *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 216 (E.D.N.Y. 2015) (finding that "prohibitions on merchant steering [have] enabled American Express's competitors to charge higher all-in fees"); *id.* (finding that the provisions have "resulted in increased prices for consumers . . . not only those customers who use American Express cards, but also shoppers who instead prefer to pay using a lower-rewards [credit] card, debit card, check, or cash").

57 *See* Hovenkamp, *supra* note 55, at 607.

Horizontal price fixing illustrates the point. When firms engage in naked collusion, they not only raise their prices, they also increase their profit margins. That may well increase the amount they spend on non-price competition. Each incremental sale is now worth more than before, so each firm has a greater incentive to gain market share. Firms may attempt to acquire that share by offering potential customers better service, faster shipping, larger rewards, or other incentives to purchase more. While these steps would benefit the customers who receive them, they do not excuse the price fixing. The benefits occur only because prices have been elevated to supracompetitive levels. Absent the restriction on competition, consumers would receive lower prices with fewer non-price benefits, and ordinarily, they would prefer that package. For if any firm had thought, prior to the collusion, that consumers wanted a different package—higher prices with greater non-price benefits—it was free to offer it.[58]

Non-price competition among the colluders might dissipate all the profits from collusion. But this possibility is neither likely nor a reason to allow the collusion. It is unlikely because, as George Stigler pointed out years ago, whenever non-price competition is subject to increasing marginal costs or diminishing marginal returns, firms will halt it before total profits are driven to zero.[59] Writing for the Federal Trade Commission, Terry Calvani made this point in an especially colorful way.[60] Further, complete profit dissipation would not justify the

[58] *See* Hosp. Corp. of Am., 106 F.T.C. 298, 507 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986) (rejecting the hospitals' claim that collusion on price would be harmless because it would be offset by greater non-price competition, stating: "Once hospitals have deviated through collusion from the competitive actions they would pursue independently, even increased competition in other areas would not provide a price-quality mix desired by patients, physicians and third-party payors"); *accord* 11 HERBERT HOVENKAMP, ANTITRUST LAW 273 n.10 (3d ed. 2011) (citing *Hospital Corp. of America* with approval).

[59] *See* GEORGE J. STIGLER, THE ORGANIZATION OF INDUSTRY 25–26 (1968).

[60]

> [P]rofits gained from colluding with respect to fewer than all the dimensions of hospital competition will unlikely be eradicated even by continued competition in other areas. . . . There are . . . diminishing returns to investing monopoly rents in other areas. For example, hospitals may fix a percentage price increase for services of their radiology departments. They could try to attract patients by taking that money and improving patient accommodations. But a patient needs only one television and one telephone, and the value of potted plants in the window may diminish greatly as more are added. The

collusion, since consumers would normally prefer the competitive outcome, in which prices are lower and non-price competition is limited.[61]

The same reasoning applies to platform markets. Here too, as some scholars have noted, platforms may increase prices on one side and then compete away the profits by increasing benefits on the other side.[62] But here too, such complete pass-through is unlikely.[63] Michael Katz and Jonathan Sallet state: "As a general matter, economic analysis provides no basis for assuming that price increases on one side of a platform will always fully pass through to the other side of the platform in the form of lower prices or higher quality."[64] And even if complete pass-through did occur, it would not justify a restriction on rivalry. Consumers would ordinarily prefer to let competition determine what price and non-price benefits a platform offers on each side.[65]

An exception may arise when market competition itself is flawed. When the market fails, unrestricted rivalry cannot be counted on to provide the optimal mix of price and non-price benefits, and a restraint on competition adopted by a defendant may actually improve consumer welfare. Free riding is the best-known example of a market failure in antitrust. When Dealer A free rides on the promotional efforts of Dealer B, it undercuts Dealer B's incentive to provide promotional services, preventing the market from supplying the optimal mix of price and promotional services.[66] A manufacturer can correct this market failure by imposing a restraint on rivalry between the two dealers, such as resale

> point is that the value to hospitals of increased competition on dimensions other than those anticompetitively altered will dissipate greatly before all or even many of the monopoly profits garnered from collusion are used up.

Hosp. Corp. of Am., 106 F.T.C. at 507–08.

61 *See id.* at 507.

62 *See, e.g.*, David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, in 1 ISSUES IN COMPETITION LAW AND POLICY 687, 688 (Wayne Dale Collins ed. 2008).

63 *See* Carlton & Winter, *supra* note 33, at 230 ("The Stigler principle applies not just to collusion but to any mechanism that eliminates price competition . . . .").

64 Katz & Sallet, *supra* note 9, at 2174.

65 *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 562e (Supp. 2017) (critiquing the Second Circuit decision on this ground).

66 *See* John B. Kirkwood, *Rethinking Antitrust Policy Toward RPM*, 55 ANTITRUST BULL. 423, 443 (2010).

price maintenance or exclusive territories.[67] And if the manufacturer chooses the restraint that is the least restrictive necessary to correct the market failure, the restraint may promote competition and benefit consumers, even though retail prices rise.

The burden of establishing a market failure, however, should rest on the defendant, not the plaintiff. The defendant knows why it imposed the restraint. It also typically understands the business better than the plaintiff and possesses more of the relevant information. It is in a better position, therefore, to identify the most likely market failures and support them.[68] If the burden of disproving the existence of any market failures rested on the plaintiff, it would have to raise and rebut every reasonable possibility, which would be inefficient. The higher costs would discourage antitrust enforcement. For these reasons, the defendants have the burden of establishing a justification under the traditional rule of reason.[69]

The Court's famous rejection of the claim that "anticompetitive effects in one market could be justified by procompetitive consequences in another"[70] accords with this analysis. It suggests that if the two sides of a platform are separate antitrust markets, as they should normally be,[71] a platform cannot justify a restriction on one side by benefits it provides to customers on the other. It cannot use anticompetitive conduct to extract wealth from one customer group and then justify that conduct by funneling the proceeds to another customer group.[72]

---

67 *See id.* at 445–48 (discussing alternative ways of addressing free riding).

68 *See* Hovenkamp, *supra* note 1, at 57 ("Because the defendant is the creator of its restraint and presumably knows what its motives were, it is in a far better position to provide proof of its rationale and effects."); Carlton & Winter, *supra* note 33, at 239; Rise v. Sunrise Express Inc., 217 F.3d 492, 493 (7th Cir. 2000) ("When burdens of proof are allocated, it is normally most efficient to place the burdens of production and persuasion on the party with the best access to relevant information.").

69 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (describing the "three-step, burden-shifting framework" of the rule of reason; in the second step, "the burden shifts to the defendant to show a procompetitive rationale for the restraint").

70 United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963).

71 *See infra* Section II.C.

72 *See* Katz & Sallet, *supra* note 9, at 2171 (stating that users on one side of a platform are entitled to protection from anticompetitive harm "regardless of whether the platform shares with users on some other side some of the fruits of the harm to competition"); Brief for John M. Connor et al. as Amici Curiae Supporting Petitioners at 19, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16-1454), 2017 WL 2889690 ("[T]he effects on cardholders should not be considered offsetting *procompetitive* effects. Any such benefits to cardholders flow from the merchant restraints that support the supracompetitive merchant fees."); *see also* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm*

As noted, if the defendant shows that its restraint corrected a market failure, the net benefits on both sides of its platform might justify the restraint. But in *American Express*, the Court failed to identify a true market failure.[73] Consequently, it was unnecessary to assess whether the benefits Amex provided to its cardholders could justify its anti-steering provisions.[74]

In sum, the Court's most fundamental error in *American Express* was its ruling that in a two-sided platform case, the plaintiff must show, in the first step of the rule of reason, that the defendant's conduct caused net harm to customers on both sides of its platform combined. This requirement, unprecedented in the Court's decisions, is not only substantively wrong, it will force plaintiffs in two-sided platform cases to address market power, anticompetitive effects, and justification all at once, at the beginning of their cases. This is inefficient and will result in more false negatives.[75] To take advantage of this new framework,

---

Sellers, 127 YALE L.J. 2078, 2107 (2018) ("Nor may a horizontal agreement be defended on the ground that the resulting extra profit induces or is spent on increased innovation.").

73 *See infra* Part IV.

74 Comparing benefits on both sides of Amex's platform would have been difficult given the differences in wealth on each side. *See* Harry First, American Express, *the Rule of Reason, and the Goals of Antitrust*, 98 NEB. L. REV. 319, 340 (2019) (pointing out that "all consumers, even those who pay with cash, are affected on the merchant side, at least to some extent, but only Amex cardholders are benefited on the issuance side, certainly a group that is different, smaller, and likely wealthier"). Some scholars oppose cross-market tradeoffs because they can be difficult to implement and may undermine political support for the antitrust laws. *See* JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 192 (2019). It was unnecessary to address the force of these objections in *American Express* because there was no reason to make a cross-market tradeoff.

75 Some scholars agree with this ruling. *See* Joshua D. Wright & John M. Yun, *Burdens and Balancing in Multisided Markets: The First Principles Approach of* Ohio v. American Express, 54 REV. INDUS. ORG. 717, 730 (2019) ("[W]ithin the three-step rule of reason analysis a plaintiff cannot establish its *prima facie* burden of anticompetitive harm without an assessment of both sides."); Brief for Professor David S. Evans & Prof. Richard Schmalensee as Amici Curiae Supporting Respondents at 6, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16-1454), 2018 WL 798389 ("There is simply no way to know . . . whether a practice is anticompetitive without at least considering both types of customers. . . . That analysis must, therefore, happen at the first stage of the rule of reason to assess whether the conduct is anticompetitive or not."). This view is plainly not correct when the challenged conduct restricts rivalry on one side of the platform and the defendant cannot establish a market failure that might justify the restraint. For example, if the four major credit card companies conspire to fix their merchant fees, the plaintiff can establish that the collusion is anticompetitive without addressing whether it resulted in an increase in cardholder rewards.

moreover, numerous defendants are likely to claim that they operate two-sided platforms, further inhibiting antitrust enforcement.[76] The Court overlooked all of these problems.[77]

The Court's other significant mistakes also threaten to undermine effective antitrust enforcement. Part II addresses market power and anticompetitive effects. Part III discusses justifications.

II. MARKET POWER AND ANTICOMPETITIVE EFFECTS

The plaintiffs tried to establish Amex's market power through the customary route first: they defined a relevant market and calculated Amex's market share. They argued that the relevant market was credit card services provided to merchants,[78] and that Amex's share of this market was 26.4%.[79] Since that share is below the usual threshold for market power, they contended that Amex nevertheless had power because its brand was differentiated from other credit card brands due to "cardholder insistence," the strong preference of many Amex cardholders to use their Amex card rather than some other card.[80] The plaintiffs also

---

[76] *See* Hovenkamp, *supra* note 9, at 48 ("[U]nder the *AmEx* standard, we can expect an outpouring of defendants emphatically claiming to be two-sided . . . .").

[77] Perhaps the Court increased the plaintiff's burden of proof because it feared that otherwise antitrust actions would chill procompetitive conduct. The Court expressed a similar concern when it insisted on a two-sided market definition. *See Am. Express Co.*, 138 S. Ct. at 2287 ("Any other analysis would lead to 'mistaken inferences' of the kind that could 'chill the very conduct the antitrust laws are designed to protect.'" (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993)). But that would be puzzling. The Court has pointed out many times that antitrust enforcement against vertical restraints threatens to chill procompetitive conduct. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007); State Oil Co. v. Khan, 522 U.S. 3, 18 (1997); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 41–42 (1977). Yet the Court has never required a plaintiff challenging a vertical restraint to refute potential justifications as part of its initial burden.

[78] *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 170–75 (E.D.N.Y. 2015).

[79] *Id.* at 188. In contrast, Amex maintained that the relevant market should be defined in terms of transactions, not services. Since a credit card transaction always involves a merchant and a cardholder, Amex's position would "collapse all services provided to merchants and cardholders . . . into a single antitrust market." *Id.* at 172. Amex's market definition, however, would not change its market share. *See infra* Section II.C.2.

[80] *See Am. Express Co.,* 88 F. Supp. 3d at 191 ("Amex's market share alone likely would not suffice to prove market power . . . were it not for the amplifying effect of cardholder insistence."); *id.* (describing cardholder insistence as the "segment of Amex's cardholder base who insist on

rested heavily on Amex's repeated increases in its merchant fees during the period 2005 to 2010. They asserted that these fee increases demonstrated Amex's market power and showed that its anti-steering provisions were anticompetitive.[81]

The Supreme Court refused to find market power or conclude that the fee increases were anticompetitive. The following Sections explain why these conclusions were incorrect. The first applies an approach to market power that neither the Court nor the parties considered. Recommended in a recent article,[82] it asks whether the defendant's conduct likely caused prices to rise above or remain above the competitive level. The second Section addresses whether Amex's fee increases showed market power. The third Section discusses market definition.

A. *Prices Above the But-For Level*

In a recent article, I proposed that courts infer market power from the likely effects of the defendant's conduct. Specifically, if the challenged conduct is likely to raise prices significantly above the prevailing level or maintain prices significantly above the but-for level, a court should find market power.[83] The prevailing level is the price level that existed prior to the challenged conduct. The but-for level is the price level that would have existed had the challenged conduct not occurred, the price level that unfettered competition would have produced. Both measures of the competitive level are theoretically appropriate, generally practical, and a short step from existing precedent. It is well-established that courts may infer market power from the actual anticompetitive effects of the challenged conduct.[84] This proposal would simply extend the inference

paying with their Amex cards and who would shop elsewhere or spend less if unable to use their cards of choice").

81 *See id.* at 195–97, 215–17.

82 *See* Kirkwood, *supra* note 34, at 1172.

83 Monopoly power should be found if the conduct would produce a substantial difference between the current price and either measure of the competitive level. *Id.* at 1173.

84 *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 465 (1992); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986); NCAA v. Bd. of Regents, 468 U.S. 85, 99 (1984); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899); Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 500 (2d Cir. 2004); PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101,

to the likely anticompetitive effects of this conduct, a step many scholars have endorsed.[85] The approach would not only make market power determination simpler, more direct, and more reliable, it would also enhance antitrust enforcement. Courts could determine market power and anticompetitive effects at the same time, while inferring the relevant market from the result, increasing the efficiency of antitrust law.[86]

In *American Express*, this approach would have readily demonstrated Amex's market power. As the Supreme Court recognized and the district court found, Amex's anti-steering provisions enabled it to preserve higher merchant fees—fees that exceeded the but-for level, the level that would have prevailed had merchants been able to steer customers to cheaper credit cards. The Supreme Court's review of Amex's business strategy made clear that the goal of its steering ban was to maintain higher fees. The Court noted that "[w]hile Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, . . . Amex instead earns most of its revenue from merchant fees."[87] Amex's business model was "spend-centric," not "lend-centric."[88] To encourage the necessary cardholder spending, "Amex provides better rewards than other networks,"[89] and to finance these rewards, "Amex must charge merchants higher fees than its rivals."[90] Merchants, of course, "would prefer not to pay the higher fees,"[91] and to "try to avoid them," they would like to steer their customers to credit cards with lower merchant fees.[92] Amex prevents this by prohibiting steering.[93] In short,

---

107 (2d Cir. 2002); Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000); Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016–19 (6th Cir. 1999); Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97–98 (2d Cir. 1998).

85 *See* Kirkwood, *supra* note 34, at 1178 n.38, 1179 n.42.

86 When market power can be determined from the likely effects of the challenged conduct, courts do not need to define a relevant market. But since precedent still requires market definition, courts can save time—and increase the efficiency of antitrust litigation—by inferring the relevant market from their conduct analysis. *Id.*

87 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2282 (2018).

88 *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 159 (E.D.N.Y. 2015).

89 *Am. Express Co.*, 138 S. Ct. at 2282.

90 *Id.*

91 *Id.* at 2283.

92 *Id.*

93 *Id.*

Amex's steering ban was intended to protect its higher merchant fees from erosion.[94]

The district court was even clearer. It found—in findings not disturbed on appeal—that Amex's anti-steering provisions caused merchant fees to be "higher"[95] and that, without these provisions, fees would be "lower."[96] The court noted that the provisions "reduce American Express's incentive—as well as those of Visa, MasterCard, and Discover—to offer merchants lower discount rates."[97] The provisions thus "vitiat[e] an important source of downward pressure on Defendants' merchant pricing [and produce] higher profit-maximizing prices across the network services market."[98] Amex executives "testified that the network would face increased pressure to reduce its rates if merchants could shift share to a less expensive network."[99] Discover's experience was particularly notable. In the late 1990s it embarked on a "major campaign"[100] to grow its market share by emphasizing to merchants that it charged the lowest fees. But "due to the anti-steering rules maintained at the time by Visa, MasterCard, and American Express,"[101] merchants could not shift business to Discover. As a result, it abandoned the campaign[102] and subsequently raised its merchant fees.[103] Given this evidence, the district court concluded that eliminating Amex's anti-steering provisions would "foster greater interbrand competition among the . . . networks and restore downward pressure on their merchant prices."[104] That in turn would "result in lower swipe fees charged to merchants by American Express and its competitors."[105]

---

94 *See* Wu, *supra* note 44, at 121 (stating that Amex justified its ban "by arguing that its business model depended on . . . higher merchant fees").

95 *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 209 (E.D.N.Y. 2015).

96 *See id.* at 219.

97 *Id.* at 207; *accord* Hovenkamp, *supra* note 9, at 33 (stating that restraints on steering remove the "strategic impetus for a price cut").

98 *Am. Express Co.*, 88 F. Supp. 3d at 209.

99 *Id.* at 220.

100 *Id.* at 213.

101 *Id.* at 214.

102 *Id.*

103 *Id.* at 213–14.

104 *Id.* at 218.

105 *Id.* at 219.

In sum, Amex's steering ban almost certainly resulted in merchant fees above the but-for level.[106] The proposed approach is thus the simplest and clearest way of demonstrating Amex's market power.[107] The next most potent evidence is the fee increases that Amex imposed on merchants during the mid-to-late 2000s. These price increases were critical to the plaintiffs' attempt to show power and impact. Indeed, the Supreme Court asserted that the "plaintiffs stake their entire case on proving that Amex's agreements increase merchant fees."[108] While the Court did not accept this evidence, it should have.

B. *Repeated Fee Increases*

Starting in 2005 and continuing until 2010, Amex repeatedly increased its merchant fees.[109] This initiative, which Amex called its Value Recapture program, involved over twenty separate price hikes,[110] and Amex accomplished them without losing any of its large merchant customers.[111] The plaintiffs argued that Amex's ability to increase merchant fees with such impunity showed that it had market power. The

---

106 Before the Supreme Court, Amex claimed that "the record contradicts the premise that the nondiscrimination provisions cause merchants to pay higher fees." Brief for Respondents Am. Express Co. & Am. Express Travel Related Servs. Co., at 28, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454). Amex did not, however, contest any of the district court's contrary findings. Instead, Amex supported its assertion with a single industry fact: after Visa and MasterCard abandoned their anti-steering provisions, fees did not fall at merchants that did not accept Amex. *Id.* These merchants, who were no longer bound by any steering ban, could have steered their customers to cards with lower fees. But as the district court pointed out, the vast majority of these merchants are very small and may well have concluded that they would gain too little to incur the costs of a steering campaign. *See Am. Express Co.*, 88 F. Supp. 3d at 222–23.

107 As noted, the district court found that Amex's conduct not only preserved its high merchant fees but also kept retail prices higher at merchants that accepted its card. This, too, shows that Amex had market power. *See* Hovenkamp, *supra* note 1, at 50 ("That finding alone was sufficient to establish the defendant's power, as well as anticompetitive effects."). The Supreme Court ignored this finding, as it ignored many other findings below. *See id.* at 55–56, 89.

108 *Am. Express Co.*, 138 S. Ct. at 2287.

109 *See Am. Express Co.*, 88 F. Supp. 3d at 195.

110 *Id.* at 196.

111 *Id.* at 195 (stating that Amex implemented Value Recapture "without losing a single large merchant and losing relatively few small merchants . . . .").

plaintiffs also claimed that the fee increases constituted actual anticompetitive effects, which showed both power and impact.

The Supreme Court dismissed these arguments on multiple and overlapping grounds. It concluded (1) that Amex's higher fees reflected an increase in the value of its services;[112] (2) that plaintiffs had not shown that the higher fees exceeded the competitive level;[113] (3) that plaintiffs could not establish market power from actual anticompetitive effects because this is a vertical case;[114] and (4) that industry output grew dramatically, which is inconsistent with anticompetitive fee increases.[115] All of these rulings were incorrect.

1. Increased Value

The Court's claim that Amex's fee increases reflected an increase in the value of its services, not an exercise of market power, is inconsistent with the timing and stated reason for the increases. Amex raised its fees during the period 2005 to 2010.[116] Why then? What explains this timing? It was not because Amex had just expanded its rewards program. To the contrary, the causation went in reverse: after Amex raised fees, it poured some—but not all—of the additional revenue it made into higher rewards.[117] Likewise, it was not because Amex had just tightened its anti-steering provisions. That had occurred more than a decade earlier.[118] In short, neither a simple procompetitive theory—Amex raised fees because it had increased cardholder rewards and its cardholders were therefore more valuable to merchants—or a simple anticompetitive theory—Amex raised fees because it had strengthened its anti-steering provisions—applied. Instead, Amex was reacting to the erosion of its historical price premium. As the Court noted, Amex had historically charged the highest

---

112 *See Am. Express Co.*, 138 S. Ct. at 2286–88; *see also supra* note 23 and accompanying text. .

113 *See Am. Express Co.*, 138 S. Ct. at 2286–88.

114 *See id.* at 2285 n.7.

115 *See id.* at 2288.

116 *See Am. Express Co.*, 88 F. Supp. 3d at 195; *see also supra* note 109 and accompanying text.

117 *See Am. Express Co.*, 88 F. Supp. 3d at 196 (noting that the fee increases "were not paired with offsetting adjustments on the cardholder side of the platform").

118 Amex's anti-steering provisions originated in the 1950s and were strengthened in the late 1980s and early 1990s, long before the fee increases in question. *See id.* at 161.

merchant fees, a reflection of its relatively affluent and high-spending cardholders.[119] In the early 2000s, Visa and MasterCard increased their merchant fees and Amex had not kept pace.[120] As a result, Amex had unexploited pricing power: its cardholders were still more valuable as a group than Visa's and MasterCard's but Amex was no longer charging for this added value. It could therefore recapture this value without losing significant numbers of merchants, just as the name of its program implied ("Value Recapture").[121]

By its very nature, then, Amex's initiative represented the exercise of market power. It enabled Amex to exert pricing power it had temporarily left dormant. It was reclaiming the pricing premium it had previously commanded. The Court completely missed this; it thought that Amex's serial fee increases were explained by the higher value Amex was supplying merchants. But the timing and stated goal of Amex's strategy made clear that Amex was not raising price because it had created new value; it was recapturing existing value.[122]

2. Price Above the Competitive Level

The Court also objected to the plaintiffs' proof of market power because the plaintiffs had supposedly not shown that Amex's price exceeded the competitive level.[123] The Court did not define the competitive level but strongly suggested that it could be measured by either value or cost: "Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price."[124] The first part of this statement is incorrect: value does not measure the competitive level. Whether a firm is charging a monopoly price or the competitive price, the value of its product must exceed that price or consumers would not buy it. In

---

119 *Am. Express Co.*, 138 S. Ct. at 2282.

120 *See Am. Express Co.*, 88 F. Supp. 3d at 195–96.

121 *See id.* at 195.

122 To some degree, Amex was creating new value. It used some of the additional revenue it generated from the fee increase to fund even greater rewards. But this extra value was a partial and secondary consequence of its primary goal—to re-establish its historical price premium.

123 *Am. Express Co.*, 138 S. Ct. at 2288.

124 *Id.*

contrast, cost is a valid measure of the competitive level. If a firm spends two dollars on a product improvement and that improvement creates ten dollars in value, the firm can exercise market power. It can charge ten dollars for an improvement that cost just two dollars to make. The improvement is of course not an antitrust violation; it is an innovation, and innovations are virtually immune from antitrust liability.[125] But it does create market power because it enables the firm to price above cost, and cost is the most common measure of the competitive level.[126]

More precisely, marginal cost and average total cost (including the cost of capital) are the standard cost measures of the competitive level.[127] In *American Express*, the plaintiffs did not establish either figure; the district court made no findings that identified Amex's marginal cost or its full economic cost.[128] But the plaintiffs did prove two things that helped show that Amex was pricing above cost. First, they showed, and the district court found, that Amex devoted only part of its extra revenues to cardholder rewards.[129] This means that Amex's merchant fees exceeded a significant component of its marginal cost—the marginal cost it incurs when a cardholder uses her card and earns a reward. Second, the plaintiffs proved, and the district court found, that the Value Recapture program increased Amex's pre-tax net income by $1.3 billion[130] and was profitable on a return-on-investment basis.[131] These findings demonstrate that the program generated revenues that exceeded its full accounting costs. While accounting costs are not identical to economic

---

125 *See, e.g.*, Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 39 (2015) (asserting that bona fide innovation is "essentially immunized regardless of its anticompetitive effect"); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (declaring that it is contrary to the "prime object" of the Sherman Act to condemn a firm that gains monopoly "merely by virtue of . . . superior skill, foresight and industry").

126 *See* Kirkwood, *supra* note 34, at 1174–75.

127 *See id.*

128 "Full economic cost" is a shorthand for average total cost (including the cost of capital) since that benchmark is meant to represent economic average total cost. *See* Kirkwood, *supra* note 34, at 1188. When a firm prices above full economic costs, it earns economic profits. *Id.*

129 *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 215 (E.D.N.Y. 2015); *see also id.* at 216 (noting that plaintiff's expert "concluded that American Express spends less than half of the discount fees it collects from merchants on cardholder rewards").

130 *Id.* at 197.

131 *Id.*

costs, they do include virtually all categories of economic cost.[132] So if Amex's higher fees exceeded its full accounting costs, they may have exceeded its full economic costs and generated supracompetitive profits.

Proof of these propositions should have shifted the burden to Amex. Once the plaintiffs demonstrated that Amex's fee increases not only exceeded a significant part of its marginal costs but more than covered its full accounting costs, the courts should have shifted the burden to Amex to show that it was not in fact pricing above marginal or full economic cost. This shift makes sense since Amex has the relevant cost data and the resources necessary to produce credible estimates.[133] Because Amex did not rebut the plaintiff's evidence, the Court could have concluded that Amex's fee increases resulted in a price above both cost benchmarks.[134]

3. Actual Anticompetitive Effects

The plaintiffs also asserted that Amex's fee increases constituted actual anticompetitive effects and thus established market power directly. This implication had been well accepted. Numerous courts had ruled that when a plaintiff shows that the challenged practice causes actual anticompetitive effects, market power can be deduced from that fact.[135] In *American Express*, however, the Court held, for the first time, that this inference does not apply to vertical cases. As a result, the plaintiffs could not show market power without defining a relevant market.[136]

This ruling was bizarre. If a plaintiff establishes that a vertical restraint caused actual anticompetitive effects, it is unnecessary and inefficient to require the plaintiff to show in addition that the defendant had a substantial share of a relevant market. Why ignore direct proof of market power and insist on indirect proof, when the indirect method—

---

132 The only economic cost that is not included in accounting costs is the competitive cost of capital. *See* Kirkwood, *supra* note 34, at 1188.

133 *See* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 383–84 (1998) (recommending that the burden on profitability be placed on the defendant).

134 *See* United States v. Microsoft Corp., 253 F.3d 34, 57 (D.C. Cir. 2001) (strongly suggesting that Microsoft had been charging the long-term monopoly price—a price in excess of full economic costs—because Microsoft had not contended otherwise).

135 *See supra* note 84.

136 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 n.7 (2018).

the market definition/market share paradigm—is widely criticized as frequently complex, time-consuming, and unreliable?[137] Moreover, actual anticompetitive effects cannot occur—in any type of case—without market power. The Court did not address either point. Its only rationale was that vertical restraints, unlike horizontal restraints, do not "involve agreements between competitors not to compete in some way."[138] While that is, of course, true, it does not explain why proof of actual anticompetitive effects does not imply market power in vertical cases.[139]

Perhaps the Court thought that the risk of false positives was greater in vertical cases. But if so, the Court should have articulated this proposition and furnished evidence to support it.[140] Moreover, even if the proposition were true, it does not follow that evidence of actual anticompetitive effects should be discarded altogether. The Court could have insisted that plaintiffs establish actual anticompetitive effects by stronger evidence. Perhaps the Court was motivated by a different concern. Perhaps it thought that market failures are more likely in vertical cases, and when they occur, higher prices alone may not show actual anticompetitive effects, since the defendant's conduct, by correcting the market failure, may have produced both higher prices and greater services. But if that was the concern, the Court could have made clear that the plaintiff's obligation depends on the defendant's proof. If the defendant establishes a market failure, then the plaintiff cannot show actual anticompetitive effects unless it demonstrates both that the defendant's conduct caused higher prices and that the resulting harm exceeded the benefits of greater services.[141]

---

137 *See* Kirkwood, *supra* note 34, at 1174, 1176–78.

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

139 The Court also stated 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." *Id.* This is also wrong. In the first place, market power can be evaluated without market definition when the defendant's conduct has caused, or is likely to cause, anticompetitive effects. *See* Kirkwood, *supra* note 34, at 1179–80. Further, if market definition is always required to prove market power, then actual anticompetitive effects cannot be used to establish power in a horizontal case. That would completely abolish the doctrine, further undercutting antitrust enforcement.

140 *See* Hovenkamp, *supra* note 1, at 52 (finding it alarming that the Court cited no literature or empirical evidence whatsoever in support of its view that market power cannot be inferred from actual anticompetitive effects in a vertical case).

141 *See infra* Part III.

In *American Express*, Amex did not establish a market failure.[142] As a result, the plaintiffs could show actual anticompetitive effects simply by supplying substantial evidence that Amex's fee increases were not driven by cost increases, a burden they carried.[143] Moreover, the plaintiffs also established that Amex's anti-steering provisions facilitated those fee increases. Without these provisions, the district court found, merchants would have directed transactions to non-Amex networks, "moderat[ing] its efforts to increase discount rates."[144] Large merchants confirmed this at trial, testifying that "were [they] able to do so, they would have attempted to steer customers away from American Express to blunt the effect of Amex's price hikes."[145] Thus, the district court concluded: "In preventing such mitigation, the NDPs were integral to American Express's Value Recapture increases and thereby caused merchants to pay higher prices."[146]

4. Output Expansion

The Court also refused to accept the fee increases as proof of market power or anticompetitive effects because industry output "grew dramatically from 2008 to 2013, increasing 30%."[147] The Court noted that when "output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand."[148] The record makes clear, however, that growing product demand was not responsible for the fee increases. As noted, Amex raised merchant fees to recapture its historical price premium.[149] Later, output expanded across the entire credit-card industry because all the credit card networks

142 *See infra* Part III.

143 *See supra* Sections I.B, II.B.2

144 *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 215 (2015).

145 *Id.*

146 *Id.*

147 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288 (2018).

148 *Id.* at 2288–89 (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993)).

149 *See supra* Section II.B.1.

decided to invest more heavily in cardholder rewards.[150] The fee increases and the output expansion occurred at different times[151] and for different reasons. Amex did not raise fees because the demand for its credit cards had risen.

Likewise, the output expansion does not show that Amex's anti-steering provisions were procompetitive. These provisions had existed since the 1950s and Amex had last tightened them in the late 1980s and early 1990s,[152] more than fifteen years before the output expansion began.[153] Amex made no attempt to show that the output expansion was linked to its steering restrictions, a disconnect that Justice Breyer emphasized: "The fact that credit-card use in general has grown over the last decade . . . says nothing about whether such use would have grown more or less without the nondiscrimination provisions."[154]

5. Conclusion

Amex's repeated fee increases in 2005 to 2010 showed that it had market power. Amex embarked on them not to cover cost increases but to restore its historical price premium. At the end of its Value Recapture Program, moreover, Amex's merchant fees likely exceeded its marginal and full economic costs, the traditional benchmarks of competitive pricing. While the plaintiffs did not establish either figure, they introduced evidence that supported this conclusion, and Amex did not rebut it. The Court claimed that the fee increases did not establish market power because market power cannot be inferred from actual anticompetitive effects in a vertical case. But that is nonsense. Actual anticompetitive effects cannot occur without market power, whether the

---

150 *See Am. Express Co.*, 838 F.3d at 206 ("[C]redit-card networks are offering more and better cardholder benefits than ever before, including enhanced fraud-protection services, airline miles, and cash-back rewards. Increased investment in cardholder rewards has accompanied a dramatic increase in transaction volume . . . .").

151 Amex raised fees from 2005 to 2010. *See supra* note 109 and accompanying text. The output expansion took place from 2008 to 2013. *See Am. Express Co.*, 138 S. Ct. at 2288.

152 *See Am. Express Co.*, 88 F. Supp. 3d at 161.

153 *See Am. Express Co.*, 138 S. Ct. at 2288.

154 *Id.* at 2302 (Breyer, J., dissenting). At oral argument, Chief Justice Roberts made the same point, noting that an increase in transactions "has so many factors . . . if the economy grows, then the output of your product, credit card transactions, grows, right?" Transcript of Oral Argument at 41–42, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16-1454).

restraint is vertical or horizontal. The Court also asserted that Amex's fee increases might simply have been a response to rising demand, yet Amex had largely completed its fee increases prior to the rise in industry output.

These mistakes were compounded by the Court's insistence that in a two-sided platform case, the relevant market must include both sides of the platform.

C. *Market Definition*

This Section summarizes the Court's ruling, points out that it had no effect on Amex's market share, and shows that the Court's reasons for requiring a two-sided market were inadequate. It also shows that a one-sided market is likely to give a more accurate picture of the defendant's market power and its scope is likely to be easier to determine. In short, from every angle, the Court's insistence on a two-sided market was unwarranted.

1. Court's Ruling

The Supreme Court rejected the plaintiffs' market definition and held that a two-sided market was required, a market that combined services to cardholders with services to merchants. The Court asserted that such a broad relevant market was required for three reasons. First, the competitive effects of a fee increase cannot be determined without examining the cardholder side of the platform, since higher merchant fees could lead to greater cardholder rewards, which would benefit consumers.[155] Likewise, the profitability of a fee increase entails a two-sided assessment, because an increase in merchant fees could cause a number of merchants to drop Amex, which could lead fewer consumers to carry the card.[156] Finally, a credit card transaction cannot occur unless both a cardholder and a merchant participate,[157] which forces credit card networks to compete for business on both sides of their platforms.[158] None of these propositions, however, justifies a two-sided market.

155 *See Am. Express Co.*, 138 S. Ct. at 2286.

156 *Id.* at 2285.

157 *Id.* at 2286–87.

158 *Id.* at 2287.

2. Amex's Market Share

The ordinary way that courts determine market power is by defining a relevant market and calculating the defendant's market share.[159] The goal of the exercise is to determine the defendant's market share since market share is typically the principal gauge of a firm's market power.[160] In fact, whenever market power is an element of an antitrust offense,[161] all court opinions, legal treatises, agency guidelines, and other authorities state the minimum amount of market power required in terms of market share.[162]

In *American Express*, however, the Supreme Court did not calculate Amex's market share. While it insisted on a two-sided market, it did not identify Amex's share of that market. It did note that Amex's share of total credit card transaction volume was 26.4%,[163] and that the industry measures market share by transaction volume.[164] But the Court's failure to use this share (or any other share) in its antitrust analysis is puzzling. Perhaps the Court was aware that the market share of a two-sided transaction platform is the same whether the market consists of transactions by one side or transactions by both sides combined.[165] This means, though, that if the goal was to determine Amex's market share, the debate over the definition of the relevant market was irrelevant.

3. Reasons for a Two-Sided Market

The Court's first reason for requiring a two-sided market is that a price increase on one side of a platform may lead to a benefit increase on the other side. As a result, the full impact of the price increase on all of Amex's customers cannot be determined without examining both sides

159 *See* Kirkwood, *supra* note 34, at 1206.

160 *See id.*

161 *See id.* at 1173 (pointing out that market power is an element of most antitrust offenses).

162 Louis Kaplow, *Market Definition, Market Power*, 43 INT'L J. INDUS. ORG. 148, 153 (2015).

163 *See Am. Express Co.*, 138 S. Ct. at 2282.

164 *See id.* at 2286.

165 That is because a transaction always involves a customer on one side and a customer on the other side.

of the platform.[166] While that proposition is correct, it misstates the proper legal test. As shown above, the proper legal treatment of a practice is not identical to a complete inventory of its effects. The correct approach under the rule of reason, as the Court's own precedent made clear, is a multi-step, burden shifting framework, in which the inquiry progresses to the next step only if the party with the burden in the prior step carries it.[167]

In the first step, the plaintiff must establish that the challenged practice "has a substantial anticompetitive effect that harms consumers in the relevant market."[168] If the plaintiff makes that showing, the "burden shifts to the defendant to show a procompetitive rationale for the restraint."[169] The defendant cannot establish a procompetitive rationale, however, without demonstrating the existence of a market failure.[170] Absent a market failure, the restraint would not be justified, and any increase in benefits it produces on the other side of the platform (e.g., an expansion in cardholder rewards) would not count in the rule of reason balance. Those benefits would not offset the restraint's harms.[171]

In the first step of the rule of reason, therefore, a plaintiff need not tote up all the effects of the defendant's conduct and show that harms on one side of the platform outweigh benefits on the other side. This showing is required only if (a) the defendant first demonstrates a market failure and (b) the plaintiff fails to show in the third step that the market failure could be corrected "through less anticompetitive means."[172] Under the well-established structure of the rule of reason, all the plaintiff needs to prove in the first step is that the challenged practice is likely to cause a substantial anticompetitive effect on one side of the platform.

The relevant market, then, should be limited to that side of the platform. If the plaintiff establishes market power and anticompetitive effects there, it will carry its initial burden. And if the defendant fails to demonstrate a market failure, there is no reason to examine effects on the

166 *See Am. Express Co.*, 138 S. Ct. at 2286.

167 *See id.* at 2284.

168 *Id.*

169 *Id.*

170 *See infra* Part III.

171 *See supra* Section I.B.

172 *Am. Express Co.*, 138 S. Ct. at 2284.

other side of the platform. If the defendant proves a market failure, the inquiry may need to include the other side of the platform. But the court can examine effects on the other side without broadening the definition of the relevant market. The district court did exactly that in *American Express*. It limited the relevant market to the merchant side of Amex's platform, but repeatedly addressed the impact of Amex's conduct on cardholders.[173]

The Court's second reason for insisting on a two-sided market was that a price increase on one side of a platform is likely to reduce the number of customers on that side, which is likely to diminish the number of customers on the other side. As a result, the profitability of a price increase on one side of a platform cannot be evaluated without considering customer attrition on both sides.[174] While that is true, it does not require a two-sided market. All that is needed is that the court take into account indirect network effects in evaluating the profitability of a price increase on one side of the platform.[175] The district court recognized this:

> [A] price increase imposed by a firm on only one set of consumers in a two-sided platform may appear profitable when one considers only the direct effect of that practice on demand among the targeted consumers. Yet in reality, the suppression of demand on one side of the market may, by virtue of indirect network effects, trigger a response among consumers on the other side of the platform that, on the whole, renders the practice unprofitable.[176]

After considering these indirect network effects, the Court found that a significant merchant fee increase would not be unprofitable. The relevant market, therefore, was the provision of network service to

173 *See, e.g.*, *supra* note 129 and accompanying text (addressing how much of the extra revenue Amex made from higher merchant fees was passed on to cardholders in the form of greater rewards); *see also infra* notes 176–178 and accompanying text (asking whether a merchant fee increase would be rendered unprofitable because of cardholder reactions).

174 *See Am. Express Co.*, 138 S. Ct. at 2285–86.

175 *See* Katz & Sallet, supra note 9, at 2159–60 (noting that a court must "consider cross-platform network effects when applying [the] Hypothetical Monopolist Test to a multisided platform" but "there is nothing" in single-sided market definition that prevents this).

176 United States v. Am. Express Co., 88 F. Supp. 3d 143, 175 (E.D.N.Y. 2015).

merchants, not the provision of credit card transactions to both merchants and cardholders.[177] In short, a court can "account for the two-sided features of the credit card industry"[178] without defining a two-sided market.

The Court's final argument was that a credit card transaction requires the participation of both a cardholder and a merchant, and, as a result, credit card networks compete for both sets of customers. Although that is correct, competition for cardholders would not normally invalidate a merchant-side market. Competition for cardholders would cause a fee increase on the merchant side to be unprofitable only if it would quickly and completely dissipate the profits from the fee increase. But that is highly unlikely. If Amex raised its merchant fees, other credit card companies may raise theirs too, and the higher margins they all realize may prompt them to expand their cardholder rewards. Yet even if this eventually consumes all the higher profits they made, that would take time to occur, and the fee increases would be profitable in the interim. Moreover, as shown above, non-price competition is unlikely to eat up all the profits from supracompetitive pricing.[179] When Amex raised its merchant fees repeatedly, it did not devote all the extra margin to greater rewards. It channeled a significant portion to its bottom line.[180]

In sum, the Court's reasons for requiring a two-sided market were insufficient. The proper course is to limit the relevant market to the side of the platform on which the anticompetitive effects are alleged to occur. As the next Section demonstrates, that is also the most accurate and practical way of using market definition to measure the defendant's power.

4. Superiority of a One-Sided Market

As noted, the primary point of market definition is to calculate the defendant's market share. A larger share suggests greater market power, and courts always specify the minimum amount of market power

---

177 *See id.* ("Notwithstanding the two-sidedness of the credit card industry . . . the court finds inadequate cause to depart from" a market limited to merchant services).

178 *Id.* at 174–75.

179 *See supra* notes 60–64, 129 and accompanying text.

180 *See Am. Express Co.*, 88 F. Supp. 3d at 215–16.

required in terms of market share.[181] The critical issue, then, is whether a one-sided market or a two-sided market is likely to produce a market share that more accurately depicts the defendant's market power.

In some cases, it does not matter. If the platform is a transaction platform, the defendant's market share will be the same whether the relevant market is one-sided or two-sided.[182] That means that a court can define a one-sided market without fear that a two-sided market would give a more accurate picture of the defendant's market power. In a transaction platform industry, a one-sided market share is every bit as accurate as a two-sided market share.

Where the platforms are not transaction platforms, the market definition will matter since the defendant's market share would rarely be the same on both sides of the platform. Consider Windows, which is a two-sided platform since it serves computer manufacturers on one side and app developers on the other side. It is not a transaction platform, however, because Microsoft can license Windows to a particular hardware manufacturer without simultaneously connecting that manufacturer to a specific app. Consequently, Microsoft's market share is unlikely to be the same on both sides of the platform. On the hardware side, the D.C. Circuit famously concluded that the relevant market was Intel-compatible PC operating systems and Microsoft's share exceeded ninety-five percent.[183] On the application side, Microsoft's share was likely smaller since app developers could write applications for other operating systems, such as Apple's Mac OS and IBM's OS/2, as well as for Windows.[184] Let us assume that Microsoft's share on the app side was fifty percent.[185] Calculating a two-sided market share would require knowing the sales volumes on each side. If we assume they are equal,[186] Microsoft's share of the two-sided market is just over seventy percent. This two-sided

---

181 *See supra* note 162 and accompanying text.

182 *See supra* Section II.C.2.

183 *See* United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) (upholding district court findings).

184 *See id.* at 52–55 (discussing Mac OS and IBM's OS/2 and applications written for them).

185 In other words, assume that app developers in the aggregate earn half of their revenues by selling or licensing apps for Windows.

186 That is, the total sales revenues earned from selling or licensing Intel-compatible PC operating systems is equal to the total sales revenues earned from selling or licensing apps for any operating system.

market share is misleading: it overstates the amount of competition Microsoft faces on the hardware side and understates the amount of competition it faces on the app side. As a result, insisting on a two-sided market, as the Supreme Court did in *American Express*, would obscure reality. It would produce a market share that would not accurately depict market power on either side of the platform.[187] The market share of interest is the market share on the side of the platform where competition is allegedly restricted. Since Microsoft was accused of excluding middleware in order to protect its operating system monopoly, the market share that matters is its market share on the hardware side (ninety-five percent). Neither its market share on the app side nor its two-sided market share would indicate so clearly its ability to demand a supracompetitive price from PC manufacturers.[188]

A defendant might claim that it would never raise price on one side of its platform because, if it did so, it would immediately and completely dissipate the resulting profits competing for customers on the other side. But evaluating that claim would not require a two-sided market. To the contrary, when the court assesses competition on the other side of the platform, it would look at the defendant's market share on that side, not its share in a two-sided market. Moreover, as shown earlier, the claim itself is highly implausible.[189] Microsoft never advanced such an argument.

In short, a two-sided market definition is generally undesirable. It is likely to produce a market share that understates the defendant's market power on one side of the platform and overstates its market power on the other side. A two-sided market is also likely to be more difficult to define than a one-sided market. The normal way to determine the breadth of a relevant market—and thus the size of the defendant's market share—is to apply the Hypothetical Monopolist Test, which asks whether a putative sole seller of the candidate product would find it profitable to impose a

---

187 *See* Katz & Sallet, supra note 9, at 2155 (stating that where "competitive conditions . . . differ on the two sides of a platform," combining the two sides into a single market may "lead to a confusing or incomplete picture of competition").

188 *See infra* note 191 (providing another example of an industry in which a platform's market share on one side differs from its market share on the other side).

189 *See supra* notes 59–60, 64 and accompanying text.

significant price increase.[190] To apply this test, a court needs to pick a candidate product, identify its current price, and ask whether that price could be profitably increased. A two-sided platform, however, does not usually offer a single product and charge a single price for it. Instead, the platform offers a set of products and services to customers on one side of the platform and another set of products and services to customers on the other side.[191] Likewise, the platform charges an array of prices to customers on one side and a different array to customers on the other side. In the face of this variety, the Hypothetical Monopolist Test is likely to be impossible to apply.

If the defendant operates a transaction platform, a candidate product could be identified. As the Court noted, a transaction platform can be viewed as selling a single product—transactions.[192] Yet this would only solve part of the problem: it would select a candidate product, but it would not determine the product's price. The price of a transaction can be determined only if the platform's charges are assessed on a per-transaction basis. If significant charges are assessed on some other basis (e.g., annually or when joining the platform), the price of a transaction cannot be identified. In Amex's case, the district court found that Amex's merchant fees were entirely imposed on a per-transaction basis.[193] As a result, the court could calculate the price that Amex charged merchants

---

190 *See* U.S. DEP'T JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.1.1 (2010).

191 *See, e.g.*, ABA SECTION OF ANTITRUST LAW, MARKET DEFINITION IN ANTITRUST: THEORY AND CASE STUDIES 448 (2012) ("[S]oftware platforms, such as Sony PlayStation, provide game developers with software code to help them write games and supply users with game consoles and software enabling them to play games. Although games users and game developers rely on the same code and hardware, they pay different prices and are receiving different services. No single market share metric accurately summarizes the position of Sony or of competing video console makers. To understand market dynamics, one must consider both the competitors' shares of video console sales and their shares of game sales.").

192 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018) (noting that the essential service a credit card platform provides to a merchant and a cardholder is the opportunity to engage in a transaction with each other).

193 *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 158 (E.D.N.Y. 2015) (stating that Amex charges merchants a "single discount rate" on each transaction and "certain flat fees charged on a per transaction basis").

for a transaction.[194] In contrast, Amex's cardholder benefits (the negative price Amex charges cardholders) were assessed partly on a per-transaction basis and partly not.[195] In consequence, the court could not determine Amex's price to cardholders, and thus could not determine its two-sided price—the combined price that merchants and cardholders pay for a transaction.[196] In short, the Hypothetical Monopolist Test could not have been used to define the scope of a two-sided market, even though Amex operates a transaction platform.

It is even more difficult to apply the Hypothetical Monopolist Test when two-sided platforms are not transaction platforms. In such cases, it is normally not possible to identify either a candidate product or its price. By definition, these platforms do not sell transactions; they offer distinct products and services on each side of the platform. Moreover, they sell them in units of volume that are generally not comparable. A newspaper, for example, offers subscriptions to readers and individual ads to advertisers. Microsoft licenses copies of Windows to PC manufacturers and provides a package of services to app developers. Neither offers a single product or service, and neither offers all their products and services in a standard unit of volume that could serve as a basis for calculating a net price across the platform. It is highly unlikely, therefore, that the Hypothetical Monopolist Test could be used to define the scope of a two-sided market where the defendant operates a non-transaction platform.[197]

194 *See, e.g.*, *id.* at 197 (calculating the impact of Amex's fee increases on its "weighted average discount rate. . . ."); *id.* at 200 (calculating Amex's pricing premium over other credit card networks, currently and historically).

195 *See id.* at 160 (stating that Amex's rewards programs consist of a "combination of per transaction benefits," such as cash back and frequent flyer miles, "as well as other membership benefits," such as purchase protection and rental car insurance, which are not awarded on a per transaction basis). If Amex charged some cardholders an annual fee, the indeterminacy would be even greater.

196 *See id.* at 204 (rejecting Amex's expert's "two-sided price" calculations, in part because of the "sharp disagreement" between the parties' experts on "the proper measure of payments made to cardholders"); *id.* at 215 (stating that "neither party has presented a reliable measure of American Express's two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders"); *see also* Hovenkamp, *supra* note 9, at 741 ("[T]here simply is no concrete, objective two-sided price.").

197 As Michael Katz & Johnathan Sallet point out, moreover, neither merchants nor cardholders care about the two-sided price. *See* Katz & Sallet, *supra* note 9, at 2158 ("[F]or any given credit card transaction, the merchant would rather pay a lower fee to the network, while the consumer would rather receive a higher reward; neither party is interested in the net, two-sided price.").

These practical problems constitute another reason to restrict the relevant market to one side of the defendant's platform. In contrast, the district court had no difficulty using the Hypothetical Monopolist Test to delineate the scope of a one-sided market.[198]

Finally, a two-sided market is likely to be flawed because it will typically include products that are not substitutes for each other, like merchant services and cardholder rewards. This would be a fundamental error. The purpose of market definition is to separate the products that constrain the defendant's prices from those that do not, and products that are not substitutes for the defendant's products do not constrain its prices. A merchant could not persuade Amex to lower its merchant fees by threatening to take out an Amex card and use it to get cardholder rewards. Cardholder rewards are not substitutes for merchant services. Including these two services in the same relevant market was a basic mistake.[199]

III. JUSTIFICATIONS

The issues that dominated the Court's discussion were market definition, market power, and anticompetitive effects. In this case, though, the ultimate issue was justification. Even if Amex had market power, and even if its conduct raised merchant fees, this behavior might

---

198 *See Am. Express Co.*, 88 F. Supp. 3d at 176–79.

199 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2295–96 (2018) (Breyer, J., dissenting); Hovenkamp, *supra* note 55, at 607 ("Markets are always properly limited to reasonably close substitutes and there is no reason to deviate from that principle in this case."); Hovenkamp, *supra* note 1, at 57 (describing the Court's market definition as "economic nonsense . . . ."). Courts can include products that are not substitutes when they define a cluster market. For example, the relevant market for analyzing a hospital merger may be the cluster of acute care services provided by hospitals in the area, even though many of these services (e.g., kidney dialysis and hip replacements) are not substitutes. Such a market does not violate the principles of market definition when (1) customers want to contract for a cluster of services and (2) the services are substitutes in production. A hospital cluster market would meet both conditions. Insurance companies and employers want to contract with hospitals that provide multiple services and, as a result, hospitals compete to furnish an attractive and reasonably priced array. In addition, many of these services are substitutes in production. A hospital can reduce the size of its dialysis center and use the space for more hip surgeries if a rival hospital has increased its price for hip surgeries. *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 595–99 (7th ed. 2012) (discussing cluster markets).

have been justified if it had led to such large benefits for cardholders that customers on both sides of the platform were, in the aggregate, better off. As emphasized above, however, Amex could not, legally or economically, lay the groundwork for such a justification merely by showing that its anti-steering provisions increased cardholder rewards. Amex also needed to establish a market failure. Section III.A explains why this is a fundamental requirement of a procompetitive justification. Section III.B addresses the Court's claim that Amex's conduct did correct a market failure and shows that the Court did not understand the issue.

A. *The Market Failure Requirement*

A procompetitive justification cannot exist without a market failure. While this requirement is not yet explicit in the case law, many court decisions are consistent with it.[200] More important, it is dictated by simple logic. A market failure is a market characteristic that prevents the market from maximizing consumer welfare.[201] If the relevant market has no market failure, then the market is, by definition, maximizing consumer welfare and there is no antitrust justification for a restraint on competition. Unfettered competition is already achieving antitrust's ultimate objective.[202] To justify a restraint, the defendant(s) must

---

200 *See* Newman, *supra* note 25, at 517 ("Antitrust doctrine generally supports the view that a restraint is procompetitive if—but only if—it alleviates a market failure."); *see also id.* at 518–26 (analyzing cases).

201 *See id.* at 509–11 (stating that a "market failure occurs when the relevant market produces outcomes that are less efficient than they might be" and that "judicial references to 'efficiency' are best understood vis-à-vis a market's impact . . . on consumer welfare").

202 The basic objective of antitrust law is preserving competition. As the Supreme Court famously stated, the antitrust laws are designed for "the protection of competition, not competitors." Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). Competition, however, is not self-defining. Consider a merger that lowers the costs of the merging firms and drives out a rival. Is the merger anticompetitive because it reduces the number of competitors or is it procompetitive because it enhances the merged firm's ability to compete? That question cannot be answered simply by saying that the purpose of antitrust law is to promote competition or the competitive process. One must look at the effect of the merger.

In recent years, it has become increasingly clear that the effect that matters is the effect on consumers. Conduct is not anticompetitive unless it both reduces rivalry among firms and harms consumers. The ultimate objective of antitrust law, in other words, is consumer welfare. Many scholars have adopted this understanding. *See, e.g.*, Einer Elhauge, *Tying, Bundled Discounts, and*

establish a market imperfection—a reason why consumers would benefit from the restraint.

Market failure is a well-known concept in economics. It means that the market has not achieved an efficient outcome, usually because it exhibits one or more features inconsistent with perfect competition.[203] The classic sources of market failure are information asymmetries, externalities, public goods, and monopoly.[204] Where one of these market imperfections is present, the market would not reach the efficient result on its own and government intervention or private corrective action may be warranted. But where there is no market failure, neither government intervention nor private restraint would be justified. They would only reduce economic efficiency. The antitrust concept of market failure is analogous. The only difference is that the ultimate goal in antitrust is consumer welfare, not economic efficiency.[205]

As noted, a market failure requirement makes sense as a matter of elementary logic. If there is no market failure, how could a private restraint improve consumer welfare? But there are other reasons as well.

---

the Death of the Single Monopoly Profit Theory, 123 HARV. L. REV. 397, 435 (2009) ("The Antitrust Standard is Consumer Welfare, Not Total Welfare."); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013); Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2477 (2013) ("In sum, antitrust policy in the United States follows a consumer welfare approach in that it condemns restraints that actually result in monopoly output reductions, whether or not there are offsetting efficiencies and regardless of their size."); John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425 (2013). More important, the courts have adopted this objective too. While they sometimes mention other goals, whenever they have to resolve a conflict between another goal (e.g., economic efficiency) and consumer welfare, they always choose consumer welfare. *See* Hovenkamp, *supra*; John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 225 (2008). There is but one exception. In a case challenging anticompetitive conduct by a buyer, the welfare that matters is the welfare of the suppliers that may be harmed by the buyer's exercise of monopsony power. *See* Kirkwood, *supra*, at 2429.

203 *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 38 (6th ed. 2012) (stating that a market cannot achieve productive and allocative efficiency unless it is perfectly competitive and this "essential condition" cannot be attained if the market exhibits market failures).

204 *See id.* at 38–42 (describing the principal market failures as monopoly and market power, externalities, public goods, and severe informational problems).

205 *See supra* note 202.

As John Newman shows, the leading decisions on justification are better explained by a market failure test than any other requirement.[206] He also shows that this test is superior to any alternative at minimizing erroneous results. Einer Elhauge and Damien Geradin use the concept to explain why professional self-regulation may be warranted. They point out that "professionals have traditionally engaged in self-regulation designed to correct the sort of market failures that government agencies normally regulate in nonprofessional markets."[207] In *Continental T.V., Inc. v. GTE Sylvania Inc.*,[208] the Supreme Court relied on market failure to justify non-price vertical restraints. It stated that vertical territorial restrictions could mitigate "market imperfections such as the so-called 'free rider' effect."[209] And in *American Express*, the Court asserted that Amex's anti-steering provisions were procompetitive because they eliminated a "negative externality,"[210] a well-known market failure. While the Court's analysis of this market failure was incorrect, *American Express* itself stands as precedent for the requirement.

B. *The Asserted Negative Externality*

Amex's conduct did not in fact eliminate a market failure. Steering does create a negative externality, but not all externalities are market failures. When Firm A takes business from Firm B, it imposes a negative externality on Firm B, but that is not a market failure. It is competition. Conduct that causes a negative externality is a market failure only when it both imposes costs on another firm and reduces consumer welfare. Steering does not meet the second test: it improves consumer welfare. It makes the market work better. It increases price competition, benefits consumers, and corrects two real market failures. It was Amex's ban on steering that caused the market to fail.

---

206 *See* Newman, *supra* note 25.

207 EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 63 (2007).

208 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

209 *Id.* at 55.

210 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2289 (2018).

A negative externality occurs when a firm imposes a cost on others but does compensate them for the damage.[211] The classic example is a polluting factory that does not compensate the surrounding community for the costs of its pollution. This causes the market to fail because the polluting firm is not forced to pay for the harms it imposes and, as a result, its marginal costs do not reflect the full social costs of its activities.[212] Consequently, the firm produces too much pollution and the market produces too little social welfare. In the antitrust context, where the measure of welfare is consumer welfare, a market failure reduces consumer welfare.

The negative externality in *American Express* does not pass this test. The Court claimed that merchant steering creates a negative externality because, by undermining the "welcome acceptance" of Amex cards, it is likely to cause Amex cardholders to use their Amex cards less frequently in the future.[213] This is a negative externality—an uncompensated adverse effect on a third party. Amex, a third party, is hurt when merchants steer consumers to other credit cards and consumers use their Amex cards less frequently in the future. But this adverse effect results from behavior that increases competition and benefits consumers. Competition is intensified and consumers benefit when they receive a discount or other reward for using a cheaper credit card. Consumers also benefit from their use of cheaper credit cards because it allows merchants to reduce their retail prices across the board, intensifying competition at the retail level.

In sum, steering does not cause a market failure. It enhances competition. Steering enables credit card companies that want to lower their merchant fees to gain business as a result, increasing their incentive to compete. The five-justice majority seemed to think that whenever a firm cuts price and takes customers from a rival, it imposes an

---

211 *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 737 (3d ed. 2000) (defining an "externality" as "the direct effect on the well-being of a consumer or the production capability of a firm from the actions of other consumers or firms").

212 *See* COOTER & ULEN, *supra* note 203, at 39 ("The reason the market fails in the presence of external costs is that the generator of the externality does not have to pay for harming others . . . .").

213 *See Am. Express Co.*, 138 S. Ct. at 2289 ("When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of 'welcome acceptance'—the promise of a frictionless transaction. A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants.").

objectionable externality on that rival. But that would make price competition illegal.[214]

Steering also corrects two market failures. First, it provides consumers with truthful information about the costs of rival credit cards, reducing an information asymmetry.[215] Second, steering forces Amex to internalize the costs of its higher merchant fees, removing a negative externality that reduces consumer welfare. When anti-steering provisions are in place, merchants have to pass on the costs of Amex's higher fees to all their customers, not just customers who use Amex.[216] This imposes a negative externality on large numbers of consumers: they pay higher retail prices but Amex does not compensate them for doing so.[217] Steering allows merchants to eliminate this consumer harm; consumers would pay higher prices only when they charge with an Amex card. While Amex is likely to lose business as a result, that is a consequence of its pricing strategy; it could solve the problem by lowering its fees.[218]

The Court also asserted that steering would harm consumers because it would reduce Amex's profits and force it to curtail its investment in cardholder rewards, which benefit consumers.[219] The Court even asserted that steering "endangers the viability of the entire Amex network."[220] But Amex cannot justify its steering ban on the ground that it allows Amex to make more money, which it uses to expand its cardholder rewards. Absent a market failure, that asserted justification is not cognizable.[221] Put differently, Amex cannot protect its business model, its investment in cardholder rewards, and the viability of its network by preventing other firms from competing with it.[222] Amex can

214 *Cf.* Hovenkamp, *supra* note 1, at 67 (pointing out that any time a merchant tells a consumer that Seller B is offering a better deal than Seller A, it reduces the "welcome acceptance" of Seller A's product, but "competition of any sort does that").

215 *See* Newman, *supra* note 25, at 543.

216 Otherwise, the merchants would be discriminating against consumers who use Amex.

217 *See* Hovenkamp, *supra* note 1, at 68 (noting that Amex free rides on the subsidies merchants provide to purchases with its cards).

218 *See Am. Express Co.*, 138 S. Ct. at 2303–04 (Breyer, J., dissenting).

219 *See id.* at 2289 (majority opinion).

220 *Id.*

221 *See supra* Section I.B.

222 As noted, antitrust law protects competition, not individual competitors. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market . . . . The law directs itself not against conduct

restrict competition only if its restraint corrects a market failure, and the negative externality the Court identified is not one. At trial, Amex attempted to show a genuine market failure, but failed.[223]

The bankruptcy of Amex's position at the Supreme Court is illustrated by a simple example. Suppose that Colgate and Crest compete in the sale of toothpaste and that Colgate charges a higher wholesale price than Crest. If the shelf price of the two products were the same, a retailer like Safeway would want to encourage consumers to purchase Crest rather than Colgate. It could steer them in that direction by posting signs declaring that "We Prefer Crest" or by giving a discount each time a customer buys a tube of Crest.[224] Under Amex's logic, however, Colgate could prohibit the signs and the discounts because they undermine the "welcome acceptance" of Colgate, subject it to a "negative externality," and threaten the viability of its business model. At bottom, of course, what undermines consumers' positive view of Colgate is not Safeway's behavior but Colgate's prices. Safeway merely told consumers about those prices. Blocking this truthful information would impede the working of the market, stifle price competition, and harm consumers.

In sum, the Supreme Court's analysis in *American Express* was a failure. It failed to recognize Amex's market power, disregarded valid evidence of anticompetitive effects, insisted on an overbroad market definition, and accepted an invalid justification. To avoid these errors in the future, courts should follow the principles set forth below. They can do so when the case does not involve a transaction platform, since, as noted, *American Express* involved a transaction platform and should be limited to transaction platforms. When a case does involve a transaction platform, lower courts must use the Court's approach, but they can

which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.").

223 Amex claimed that if steering were permitted, some of its merchant services and some of its investments in product quality would be subject to free riding. The district court, however, rejected all of Amex's free riding theories and Amex did not appeal. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 234–38 (E.D.N.Y. 2015); *see also* Newman, *supra* note 25, at 543 ("[B]ecause American Express could have—*and sometimes did*—charge merchants for these services, there was no externality. Where the ride is not free, there is no free-rider market failure."). Amex did not assert the "welcome acceptance" externality until it reached the Supreme Court.

224 In fact, Safeway would lower the shelf price of Crest, but a discount at the cash register achieves the same price reduction and produces a closer analogy with Amex.

identify the correct analysis, explain why it is better, and recommend that it be adopted in the future.

IV. THE PATH FORWARD

The first three principles address methods of proving market power. The final two concern the validity of a justification. With few exceptions, these principles should also be followed in cases that do not involve two-sided platforms.

A. *Market Power*

Market power can be established through (1) the likely anticompetitive effects of the challenged conduct, (2) the actual anticompetitive effects of the challenged conduct, or (3) the defendant's market share in a relevant market. A plaintiff may demonstrate market power in other ways, such as by showing that the defendant's price exceeded marginal cost or that the elasticity of its demand was low, but courts rarely rely on such direct economic evidence.[225]

1. Likely Anticompetitive Effects

Whenever possible, market power should be inferred from the likely anticompetitive effects of the challenged conduct. If the plaintiff shows that the challenged conduct is likely to increase price significantly above the prevailing level, or maintain price significantly above the but-for level, the plaintiff has established that the defendant possesses market power.[226]

225 *See* Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 733 n.17 (2013) ("[T]he courts typically find insufficient any direct evidence of market power."). Indeed, one court stated that even if there were direct economic evidence of power, the plaintiff would still have to define a market, at least roughly. *See* Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 737 (7th Cir. 2004) (declaring that "rough contours of a relevant market" must be identified, since "[e]conomic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market").

226 If the defendant's conduct would raise price substantially above the prevailing level or maintain price substantially above the but-for level, the defendant possesses monopoly power. For definitions of the "prevailing level" and the "but-for level," see *supra* Section II.A.

The relevant market can be defined based on the analysis. This approach, proposed in a recent article,[227] has considerable scholarly support.[228]

Courts already use similar logic when the plaintiff shows that the challenged conduct caused actual anticompetitive effects. If the defendant's behavior actually raised prices or reduced output, it is obvious that the defendant had the power to cause those effects. Many courts, therefore, have been willing to infer market power from actual anticompetitive effects.[229] The new approach would simply extend this logic to cases in which the challenged conduct is likely to elevate price above the competitive level.

The Supreme Court used similar logic in a recent case. In *FTC v. Actavis, Inc.*[230] the Court observed that a firm without market power is unlikely to pay a large sum to induce a competitor to stay out of the market.[231] Such a payment would only be profitable if it enabled the firm to maintain a price above the competitive level.[232] In other words, by paying to prevent entry, the firm is paying to prevent price from falling to the but-for level. Courts can infer market power from that conduct.

This approach would not only simplify the assessment of market power, it would also strengthen antitrust enforcement. It would allow courts to determine anticompetitive effects and market power at the same time, while inferring the relevant market from their findings.[233] As a result, it would streamline antitrust litigation and enhance its deterrence impact. The approach would also improve the accuracy of antitrust enforcement by avoiding complex and confusing decisions about the scope of the relevant market. It would prevent courts from committing the *Cellophane* fallacy,[234] and it would broaden the reach of antitrust law,

---

227 *See* Kirkwood, *supra* note 34, at 1178–79.

228 *See id.* at 1178 n.38, 1179 n.42 (citing works from economists Steven Salop, Dennis Carlton, Lawrence White, Phillip Nelson, and Gregory Werden, and law professors Daniel Crane, Thomas Krattenmaker, and Robert Lande).

229 *See supra* note 84 (citing nine decisions, including four Supreme Court opinions).

230 FTC v. Actavis, Inc., 570 U.S. 136 (2013).

231 *Id.* at 157.

232 *Id.*

233 *See* Kirkwood, *supra* note 34, at 1198 (explaining how a court can use its conduct analysis to define the relevant market).

234 *See id.* at 1198–99 (describing the *Cellophane* fallacy and how the new approach would eliminate it).

enabling plaintiffs to challenge parallel exclusionary conduct that would otherwise be immune.[235] For all these reasons, the approach would contribute to more aggressive antitrust enforcement, a goal that many have endorsed.[236]

The approach would be workable. Courts already have plenty of experience determining whether a disputed practice would increase price significantly above the prevailing level. That is the central issue in virtually every horizontal merger case.[237] While determining the but-for level may sometimes be more challenging, there are multiple sources of relevant information: an entrant's prediction of its future market share, an incumbent's assessment of the impact of entry, an entrant's introductory prices, an incumbent's response to entry, and the incumbent's behavior in a more competitive geographic market. These sources, plus the evaluations of economic and industry experts, would normally enable a judge or jury to generate a reasonable estimate.[238]

In short, the proposed approach would be a simple, practical, and efficient way to evaluate market power in an antitrust case. Since it is not yet the accepted approach, lower courts could not use it without also defining a relevant market and calculating the defendant's market share. But they could point out its advantages over the traditional approach and build a case for its eventual acceptance.

In a two-sided platform case, a plaintiff can carry its initial burden by showing likely anticompetitive effects—and thus market power—on one side of the platform. The plaintiff need not attempt to determine whether benefits furnished on the other side of the platform "offset" those anticompetitive effects. As noted, a defendant may use supracompetitive profits earned on one side of the platform to fund benefits on the other side, yet those benefits do not constitute cognizable efficiencies unless the defendant shows that its conduct corrected a market failure. Absent a

---

235 *See id.* at 1199 (showing that the market power required to condemn such conduct could not be found in certain circumstances except through the new approach).

236 *See id.* at 1170–72 (noting that leading senators, progressive organizations, the democratic party, and prominent scholars have called for more vigorous antitrust enforcement).

237 *See* U.S. DEP'T JUST. & FED. TRADE COMM'N, *supra* note 190, § 1 (stating that the purpose of merger enforcement is to prevent mergers that would enhance market power, that greater market power leads to higher prices or other types of consumer harm, and that the agencies generally analyze mergers in terms of their "price effects").

238 *See* Kirkwood, *supra* note 34, at 1200–03.

market failure, market power and anticompetitive effects on one side of the platform are sufficient to trigger liability.

2. Actual Anticompetitive Effects

If market power can be inferred from the likely anticompetitive effects of challenged conduct, it makes even more sense to infer market power from the conduct's actual anticompetitive effects. While *American Express* rejected this inference in vertical cases,[239] that ruling was incorrect. Actual anticompetitive effects establish market power whether they are caused by a horizontal restraint or a vertical restraint. Those effects could not occur unless the defendant had market power.

The only qualification is that a price increase on one side of a platform may not constitute an actual anticompetitive effect if the challenged conduct corrects a market failure and thereby produces benefits on the other side of the platform. In that situation, the plaintiff must show that the size of the price increase exceeded the cost of the benefits, just as in a resale price maintenance case.[240]

3. Market Definition and Market Share

In a two-sided platform case, *American Express* preempted the result of the normal market definition process. The Court held that the relevant market must be two-sided, regardless of what the normal tools of market definition would indicate.[241] As discussed, this rigid approach is mistaken. If the defendant has injured competition on one side of the platform, the best measure of its market power is its market share on that

---

239 *See supra* note 138 and accompanying text.

240 A firm may employ resale price maintenance to correct a market failure and stimulate additional point-of-sale services. Retail prices would then increase, but the increase would not establish market power unless the magnitude of the increase exceeded the cost of the additional services. Otherwise, the price increase would not be above the competitive level.

241 *See supra* Section II.C. The Court allowed for an exception where the defendant's behavior on one side of its platform would have only minor effects on the other side. For example, the terms a newspaper offers its advertisers are unlikely to have much effect on the willingness of consumers to subscribe. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018). In such cases, the relevant market may be limited to one side of the platform. But where indirect network effects are significant, as they would normally be in a platform case, the relevant market must be two sided.

side of the platform, not its market share on both sides combined. In addition, the scope of a two-sided market is likely to be difficult to determine, since the standard method, the Hypothetical Monopolist Test, is likely to be impossible to use.

Given these problems, a court should not attempt to define a two-sided market unless it is practical to do so. That by itself is likely to limit *American Express* to transaction platforms. Moreover, even when it is practical to define a two-sided market, courts should define a narrower market as well—a market limited to the side of the platform where the competitive injury allegedly occurred. Such a market would be more accurate and easier to define, and as courts recognize these benefits, the narrower market may eventually displace the two-sided market altogether.

B. *Justifications*

The most fundamental flaw in the Court's opinion was not its misguided market definition, or its cursory disregard of Amex's fee increases, but its assumption that benefits provided to cardholders must always be counted in the rule of reason balance. That is incorrect. Once cartel members raise their prices, they have an incentive to engage in more non-price competition, but the resulting benefits do not excuse the collusion. They are simply funded by it. Consumers would have preferred lower prices. Likewise, if a platform engages in anticompetitive behavior on one side of its platform, harming customers on that side and earning supracompetitive profits as a result, the platform cannot justify this restraint by increasing the benefits it provides to customers on the other side. Competition between platforms should determine the mix of price and non-price benefits that a platform offers.

To justify a departure from competition, a defendant must establish a market failure, a reason why unrestrained competition would not maximize consumer welfare. Even then, the plaintiff may undercut the justification in two ways. It may show that there is a less restrictive alternative or that the defendant's conduct reduced consumer welfare overall. But the defendant cannot show any procompetitive rationale for the restraint unless it demonstrates a market failure.

CONCLUSION

The Supreme Court misunderstood the economics of two-sided platforms. The majority thought that because a platform may increase prices to customers on one side in order to provide greater benefits to customers on the other side, any price increase on one side can be justified by benefits furnished on the other side. But that is mistaken. If the platform can raise prices on one side only because it prevents its rivals from undercutting those prices, the extra revenues it makes on that side are supracompetitive profits, which cannot be justified by diverting some or all of them to customers on the other side.

Likewise, the majority thought that the relevant market had to encompass both sides of a platform since a platform's actions on one side are likely to cause responses on the other side. But that, too, is incorrect. If the platform allegedly engages in anticompetitive behavior on one side, its power to reduce competition is best depicted by its market share on that side. While responses on the other side need to be considered in defining such a market, they do not require a two-sided market.

The majority also overlooked more powerful evidence of market power. It ignored evidence of actual anticompetitive effects because this was a vertical case, not a horizontal case. But that is illogical: if a platform's conduct caused actual anticompetitive effects, the platform had to have the market power. Similarly, the Court overlooked the significance of the restraint's likely anticompetitive effects. Extensive testimony showed that Amex's steering ban almost certainly enabled it to maintain its merchant fees above the but-for level, the level that unrestricted competition would have produced. The gap between its actual fees and its but-for fees demonstrated market power.

Two-sided platforms are increasingly important in today's high-tech economy. But if antitrust law is to prevent them from suppressing competition and harming consumers and workers, it has to apply the correct analysis.