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## The Impact of *Amex* and Its Progeny on Technology Platforms

Kacyn H. Fujii

*University of Michigan Law School*

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## NOTE

# THE IMPACT OF AMEX AND ITS PROGENY ON TECHNOLOGY PLATFORMS

Kacyn H. Fujii\*

*Big Tech today faces unprecedented levels of antitrust scrutiny. Yet antitrust enforcement against Big Tech still faces a major obstacle: the Supreme Court's 2018 decision in Ohio v. American Express. Popularly called Amex, the case imposed a higher initial burden on antitrust plaintiffs in cases involving two-sided markets. Two-sided markets connect two distinct, noncompeting groups of customers on a shared platform. These platforms have indirect network effects, meaning that one group of customers benefits when more of the second group of customers joins the platform. Two-sided markets are ubiquitous in the technology sector, encompassing social media, search engines, and online marketplaces.*

*Many have observed that the Amex Court's reasoning drew on questionable economic principles, contrary to the typical approach in antitrust law. This Note examines and adds to these critiques through a novel analysis of lower-court cases post-Amex. This analysis reveals that Amex has resulted in inconsistencies and confusion in the lower courts, opening the door for technology defendants to manipulate Amex's definition of two-sided markets for their own benefit. To resolve these inconsistencies, this Note proposes a two-part legislative solution to curb Amex's reach.*

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#### INTRODUCTION

After years of growing concern about Big Tech's influence over our markets, data, and society more generally, in July 2020 the House Judiciary Committee's antitrust subcommittee held an unprecedented hearing that brought the leaders of Amazon, Facebook, Apple, and Google to Washington.<sup>1</sup> At the hearing, members on both sides of the aisle expressed concern over Big Tech's power, especially during the COVID-19 pandemic.<sup>2</sup> By September, the Federal Trade Commission (FTC) had begun investigating Amazon and gearing up to file a possible antitrust suit against Facebook.<sup>3</sup> In October, the Senate

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1. Roger McNamee, *A Historic Antitrust Hearing in Congress Has Put Big Tech on Notice*, GUARDIAN (July 31, 2020, 7:42 AM), <https://www.theguardian.com/commentisfree/2020/jul/31/big-tech-house-historic-antitrust-hearing-times-have-changed> [perma.cc/6TCR-YNL2].

2. Taylor Hatmaker, *Lawmakers Argue That Big Tech Stands to Benefit from the Pandemic and Must Be Regulated*, TECHCRUNCH (July 29, 2020, 1:36 PM), <https://techcrunch.com/2020/07/29/big-tech-cicilline-pandemic-antitrust-hearing> [perma.cc/BZ]5-2SAC]; Lauren Feiner, *Tech Competitors Are 'Blown Away' by Congress' CEO Grilling and Hopeful for Antitrust Reform*, CNBC (July 31, 2020, 10:27 AM), <https://www.cnbc.com/2020/07/31/big-tech-competitors-were-blown-away-by-house-antitrust-ceo-hearing.html> [perma.cc/R8]U-VJVH].

3. Tyler Sonnemaker, *Amazon Is Reportedly Facing a New Antitrust Investigation into Its Online Marketplace Led by the FTC and Attorneys General in New York and California*, INSIDER (Aug. 3, 2020, 3:53 PM), <https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8> [perma.cc/GW5Q-7DGQ]; Brent Kendall, John D. McKinnon & Ryan Tracy, *FTC Preparing Possible Antitrust Suit Against Facebook*, WALL ST. J. (Sept. 15, 2020, 7:17 PM), <https://www.wsj.com/articles/ftc-preparing-possible-antitrust-suit-against-facebook-11600211840> [perma.cc/SS86-DXX9].

Commerce Committee unanimously voted to subpoena the CEOs of Facebook, Google, and Twitter.<sup>4</sup> Only days later, the House Judiciary antitrust subcommittee released a landmark report that concluded a sixteen-month investigation into Amazon, Facebook, Google, and Apple.<sup>5</sup> This report broke new ground by declaring that Google and Facebook had monopoly power and by indicating Congress's support for major antitrust legislation for the first time in decades.<sup>6</sup> The report also signaled that Congress would support stronger antitrust enforcement by federal and state enforcers.<sup>7</sup> The Department of Justice, the FTC, and multiple state attorneys general subsequently brought lawsuits against Google and Facebook for anticompetitive behavior.<sup>8</sup> Amid these lawsuits, Congress has continued to press forward with legislation that would make sweeping changes to antitrust law, such as a bill proposed by Senator Klobuchar in February 2021.<sup>9</sup>

Technology companies<sup>10</sup> have never faced this level of scrutiny, but existing antitrust law has limited power over Big Tech companies. Courts interpret the Sherman Act using the consumer welfare standard, which relies on economic measures like price to determine violations of antitrust law.<sup>11</sup> Typically, monopolies raise prices, which directly harms consumers. Technology companies are unique in that they offer their products for free or for very low prices making it difficult to demonstrate harm to consumers.<sup>12</sup>

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4. Brian Fung, *Senate Commerce Votes to Issue Subpoenas to CEOs of Facebook, Google and Twitter*, CNN BUS. (Oct. 1, 2020, 11:39 AM), <https://www.cnn.com/2020/10/01/tech/facebook-google-senate-subpoena/index.html> [perma.cc/P7AM-ATHV].

5. Ryan Tracy, *House Panel Says Big Tech Wields Monopoly Power*, WALL ST. J. (Oct. 6, 2020, 8:07 PM), <https://www.wsj.com/articles/house-panel-calls-for-congress-to-break-up-tech-giants-11602016985> [perma.cc/BVH2-7AWT].

6. *Id.*

7. *See id.*

8. Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> [perma.cc/79RE-9252]; David McCabe, *Google Denies Antitrust Claims in Early Response to U.S. Lawsuit*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2020/12/21/technology/google-antitrust-lawsuit.html> [perma.cc/L6HF-MZLQ].

9. Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021); see Matthew F. Tilley & David B. Hamilton, *Competition and Antitrust Law Enforcement Act Proposes Wholesale Changes to U.S. Antitrust Law*, WOMBLE BOND DICKINSON (Feb. 15, 2021), <https://www.womblebondnickinson.com/us/insights/alerts/competition-and-antitrust-law-enforcement-act-proposes-wholesale-changes> [perma.cc/86H6-NPBB].

10. The terms "Big Tech" and "technology companies" are used interchangeably in this Note.

11. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107–08 (1984) ("Congress designed the Sherman Act as a consumer welfare prescription. . . . Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." (cleaned up) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979))); Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 793–94 (2019).

12. *See, e.g., Alec Stapp, Opinion, Congress Made a Lousy Case for Breaking Up Big Tech*, MIT TECH. REV. (Oct. 9, 2020), <https://www.technologyreview.com/2020/10/09/1009999/congress-antitrust-report-big-tech-policy-opinion> [perma.cc/D6R4-882Q]; Ryan Bourne, *Opinion,*

A 2018 Supreme Court opinion presents another major obstacle to enforcing antitrust laws against technology companies.<sup>13</sup> *Ohio v. American Express Company (Amex)* created a framework for regulating two-sided markets (interchangeably referred to as two-sided platforms) under antitrust law.<sup>14</sup> In a two-sided market, two distinct customer groups create benefits for each other through their shared interest in a particular product or service. For example, platforms like Uber rely on demand from each side of the market—drivers and riders—to succeed. Two-sided platforms are ubiquitous in the technology sector and the economy in general; prominent examples include credit- and payment-card systems, search engines, online marketplaces, social media, newspapers, airline- and restaurant-reservation systems, and ridesharing services.<sup>15</sup> Under *Amex*, antitrust plaintiffs bear the additional burden of showing net anticompetitive harm on both sides of a two-sided market.<sup>16</sup> In addition, *Amex*'s broad definition of two-sided markets may shield many Big Tech companies from antitrust liability.<sup>17</sup>

Many scholars have speculated about how *Amex* will affect Big Tech and antitrust law in general.<sup>18</sup> While scholars have critiqued *Amex* and analyzed some post-*Amex* cases,<sup>19</sup> this Note is the first to examine *Amex*'s impact on Big Tech by pulling together several recent lower-court decisions. It also offers

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*Big Tech Antitrust Probe: Where's the Real Harm from Google, Amazon, Facebook and Apple?*, MARKETWATCH (July 24, 2019, 11:07 AM), <https://www.marketwatch.com/story/wheres-the-real-harm-from-google-amazon-facebook-and-apple-2019-06-18> [perma.cc/5RTU-M3XF]. The consumer welfare standard, which measures harm to consumers through economic measures like price, cannot easily account for Big Tech companies' anticompetitive behavior since they keep prices low or at zero. See Bourne, *supra*. As a result, one of the biggest debates in antitrust law today is whether the consumer welfare standard should be reformed. See, e.g., Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017). Given how entrenched the Chicago School and consumer welfare standard are in the courts, Congress has begun to consider legislative solutions to the problem. See Emily Birnbaum, *Amy Klobuchar's New Legislation Should Scare Big Tech*, PROTOCOL (Feb. 4, 2021), <https://www.protocol.com/amy-klobuchar-big-tech-antitrust> [perma.cc/4MDG-4G25].

13. Adam Liptak, *Supreme Court Sides with American Express on Merchant Fees*, N.Y. TIMES (June 25, 2018), <https://nytimes.com/2018/06/25/us/politics/supreme-court-american-express-fees.html> [perma.cc/PL89-W73M].

14. See *Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2285–87 (2018).

15. Daniel Francis & Jay Ezrielev, *Disaggregating Market Definition: AmEx and a Plural View of Market Definition*, 98 NEB. L. REV. 460, 463 (2019).

16. See *Amex*, 138 S. Ct. at 2287–90.

17. Liptak, *supra* note 13.

18. See, e.g., Tim Wu, *The American Express Opinion, the Rule of Reason, and Tech Platforms*, 7 J. ANTITRUST ENFT 117 (2019); Ben Bloodstein, Note, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187 (2019).

19. See, e.g., Dennis W. Carlton, *The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error of Amex*, 2019 COLUM. BUS. L. REV. 93; Anthony W. Swisher & Jody Boudreault, *DOJ Moves to Vacate Its Loss in U.S. v. Sabre, Apparently over Fears It May Burden Merger Enforcement*, WASH. LEGAL FOUND.: LEGAL PULSE (May 26, 2020), <https://www.wlf.org/2020/05/26/wlf-legal-pulse/doj-moves-to-vacate-its-loss-in-u-s-v-sabre-apparently-over-fears-it-may-increase-the-burden-of-proving-anticompetitive-mergers> [perma.cc/2D53-EXZN].

a novel legislative compromise that would limit *Amex's* reach without overturning it outright. In doing so, this Note provides a politically divided Congress with another option to consider as they debate changing the antitrust laws. Part I overviews the evolution of antitrust law and explains how *Amex* has modified antitrust analysis for two-sided markets. Part II analyzes recent lower-court cases to illustrate *Amex's* inconsistencies and demonstrate how *Amex* makes it even harder to rein in Big Tech. Part III responds by proposing legislation to limit *Amex's* holding to a narrow set of two-sided markets that can be adjusted to meet new antitrust challenges.

## I. AMEX AND TWO-SIDED MARKETS

Given its potential impact on the technology sector, *Amex* has been called the most consequential antitrust decision of the decade.<sup>20</sup> This Part presents background on the purpose and development of antitrust law prior to the *Amex* decision. Section I.A describes the evolution of antitrust law. Section I.B introduces current modes of antitrust analysis. Section I.C explains how *Amex* modified antitrust analysis for two-sided markets.

### A. *The Evolution of Antitrust Law*

Antitrust law is governed primarily by the Sherman Act, which was passed in 1890 to promote fair competition in the economy.<sup>21</sup> The Sherman Act's broad language allowed courts to play a large role in its interpretation, effectively making it a common law statute.<sup>22</sup> Thus the Sherman Act's application has varied in accordance with changing public values and goals surrounding antitrust enforcement since its enactment.

The framers of the Sherman Act were concerned with a small number of firms having too much power.<sup>23</sup> They also wanted to make sure that firms played fairly so that small businesses would have the chance to compete.<sup>24</sup> To achieve these goals, courts first relied on structuralism, the idea that certain market structures can impede competition.<sup>25</sup> For example, when there are

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20. See, e.g., Natasha Sarin, *What's in Your Wallet (and What Should the Law Do About It?)*, 87 U. CHI. L. REV. 553, 553 (2020); Lina Khan, *The Supreme Court Just Quietly Guttled Antitrust Law*, VOX (July 3, 2018, 9:40 AM), <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony> [perma.cc/6FK7-WLHF].

21. See Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7); see also *The Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [perma.cc/BPY8-HLV8] (“Congress passed the first antitrust law, the Sherman Act, in 1890 as a ‘comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.’”).

22. Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2062 (2020).

23. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 944 (1987).

24. *Id.*

25. Khan, *supra* note 12, at 718.

fewer firms in a market, it is easier for them to collude and engage in oligopolistic behavior like price fixing.<sup>26</sup> Until the 1960s, courts blocked mergers that they determined would result in too much market concentration.<sup>27</sup>

In the 1970s, however, the Supreme Court replaced structuralism with the “consumer welfare” standard propounded by the Chicago School of economics and antitrust.<sup>28</sup> The Chicago School defines consumer welfare as allocative efficiency across both consumers and producers.<sup>29</sup> Under this standard, behavior that results in efficiency gains to either consumers or producers should be upheld under antitrust law.<sup>30</sup> This is based on the belief that firms will try to maximize profits and efficiency, which ultimately helps consumers through lower prices and better products.<sup>31</sup> In other words, even if there is no direct benefit to consumers, the Chicago School subscribes to the view that greater efficiencies for companies will eventually help consumers.

The consumer welfare standard focuses on empirical harm to the market as measured by economic indicators, especially price.<sup>32</sup> Given this focus on economics, plaintiffs must also show actual anticompetitive harm instead of merely showing that the market structure typically leads to anticompetitive behavior.<sup>33</sup> Under the Chicago School standard, it is not enough to show that Google, for example, has monopoly power—plaintiffs must demonstrate that Google’s specific behavior resulted in anticompetitive harm to the market. Moreover, vertical agreements (agreements between firms at different levels of the production chain, like manufacturers and retailers) receive less scrutiny than horizontal agreements (agreements between competitors) under the Chicago School approach.<sup>34</sup> This shift from structuralism to the Chicago School

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26. *Id.*

27. *Id.*

28. *Id.* at 718–20.

29. Reza Dibadj, *Reactionary Reform and Fundamental Error*, 39 W. ST. U. L. REV. 281, 296–97 (2012).

30. See Khan, *supra* note 12, at 720 n.38.

31. *Id.* at 719; Dibadj, *supra* note 29, at 297; Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 480 (2012) (“The Sherman Act seeks to maintain a marketplace free of anticompetitive practices . . . . The law assumes that such a marketplace . . . will tend to bring about the lower prices, better products, and more efficient production processes that consumers typically desire.” (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 909 (2007))).

32. See Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 148 (2012) (“The Chicago School of Antitrust influenced the law and policy in large part because its application of price theory and economics produced empirical studies to support an inference that Chicago School-based explanations of a given practice were more plausible than alternative, usually anticompetitive, explanations.”).

33. See Khan, *supra* note 12, at 717–19, 721.

34. See Vincent Verouden, *Vertical Agreements: Motivation and Impact*, in 3 ABA SECTION OF ANTITRUST L., ISSUES COMPETITION LAW & POLICY 1813, 1814–16 (Wayne Dale Collins ed., 2008).

approach has thus led to lax antitrust enforcement and a greater reliance on economics in antitrust law.<sup>35</sup>

### B. Antitrust Modes of Analysis

The first section of the Sherman Act reads: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>36</sup> Initially, the Supreme Court read this to prohibit all restraints of trade, defined as any activity that limited competition. However, all kinds of activities limit competition, such as agreements between small businesses to not compete with each other or to share information on employee salaries. Only one year after *United States v. Trans-Missouri Freight Association*, the Court began to recognize that some restraints of trade were reasonable,<sup>37</sup> giving rise to the “rule of reason.”<sup>38</sup>

Yet the Court maintained that some restraints were so nakedly anticompetitive that a reasonableness inquiry would be unnecessary.<sup>39</sup> In *United States v. Socony-Vacuum Co.*, the Court said, “a combination formed for the purpose and with the effect of raising, depressing, [or] fixing . . . price[s] . . . is illegal *per se*.”<sup>40</sup> This language marked the beginning of “per se” antitrust analysis.

Today, courts still apply either *per se* or rule of reason analysis to determine whether the Sherman Act has been violated.<sup>41</sup> In most cases, courts apply rule of reason analysis, in which courts must assess the economic impact of the allegedly anticompetitive behavior.<sup>42</sup> First, courts must define the “relevant market,” which provides the frame of reference for judging anticompetitive harm.<sup>43</sup> Market definition, which requires parties and courts to conduct fact-intensive economic analysis, often has an outsized impact on antitrust

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35. Letter from Herbert Hovenkamp, Prof., Univ. of Pa. Sch. of L., to Chairman David N. Cicilline and Ranking Member F. James Sensenbrenner, Jr., Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary 2 (Apr. 17, 2020) [hereinafter Hovenkamp Letter], [https://judiciary.house.gov/uploadedfiles/submission\\_from\\_herbert\\_hovenkamp.pdf](https://judiciary.house.gov/uploadedfiles/submission_from_herbert_hovenkamp.pdf) [perma.cc/KQ8E-9UPL].

36. Sherman Act, 15 U.S.C. § 1.

37. 166 U.S. 290 (1897); see *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898); see also Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1217 (2021) (“The year after rejecting the rule of reason under section 1 in *Trans-Missouri*, Justice Peckham wrote again for the Court . . . this time appearing to apply a form of the rule of reason . . .”).

38. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

39. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

40. *Id.* at 223.

41. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988).

42. See, e.g., *Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274 (2018); *Standard Oil*, 221 U.S. 1.

43. See Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 31–32 (2014).



analysis.<sup>44</sup> For example, even if Zingerman's Deli has a large market share among delis in Ann Arbor, Michigan, it would not look like a monopolist if the relevant market is defined as every restaurant in the United States. Courts may only assess anticompetitive harm to competitors within that relevant market; indeed, it would make little sense to treat a shave ice shop in Hawai'i and a deli in Michigan as competitors.

Once the relevant market is defined, rule of reason analysis involves a "three-step, burden-shifting framework."<sup>45</sup> First, the plaintiff carries the burden of showing that the restraint has a "substantial anticompetitive effect that harms consumers in the relevant market."<sup>46</sup> If the plaintiff succeeds, the defendant then bears the burden of demonstrating that the restraint has a procompetitive effect, meaning any favorable effect on the market.<sup>47</sup> If the defendant meets this burden, the plaintiff must prove either that the anticompetitive effects outweigh the procompetitive effects or that the procompetitive effects could be "reasonably achieved" in a less anticompetitive manner.<sup>48</sup>

In contrast, *per se* analysis avoids market definition or fact-intensive inquiries into economic harm.<sup>49</sup> Because of the Chicago School's influence, *per se* analysis is relegated to a narrow category of cases where the restraint is "manifestly anticompetitive,"<sup>50</sup> as with price-fixing.<sup>51</sup> For example, an agreement by San Francisco restaurants to fix prices of avocado toast at the same rate would be *per se* illegal, even without an inquiry into the relevant market.

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44. See Robert A. Rogowsky & William F. Shughart II, *Market Definition in Antitrust Analysis: Comment 2* (FTC Bureau of Econ., Working Paper No. 77, 1982), <https://www.ftc.gov/system/files/documents/reports/market-definition-antitrust-analysis-comment/wp077.pdf> [perma.cc/8K8G-8AAA].

45. *Amex*, 138 S. Ct. at 2284.

46. *Id.*

47. *Id.*

48. *Id.*

49. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed . . .").

50. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) ("We have said that *per se* rules are appropriate only for 'conduct that is manifestly anticompetitive,' that is, conduct 'that would always or almost always tend to restrict competition and decrease output.'" (cleaned up)); see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19 (1979) ("[I]n characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy . . . ." (footnote omitted)).

51. In general, price fixing is *per se* illegal under the Sherman Act. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). *But see, e.g., Broad. Music*, 441 U.S. at 7 (holding that BMI and ASCAP's blanket licenses were not *per se* illegal because of their procompetitive benefits).

### C. *The Amex Formulation*

Within rule of reason analysis, *Amex* carved out a separate rule for two-sided platforms, which are “business[es] that depend[] on relationships between two different, noncompeting groups of transaction partners.”<sup>52</sup> American Express (*Amex*) is a two-sided market because it operates a credit card transaction platform that connects merchants and customers. In *Amex*, the DOJ and several state attorneys general alleged that the “no-steering” clauses in *Amex*’s contracts with its partner merchants were anticompetitive.<sup>53</sup> These clauses said that merchants could not “steer,” or encourage, customers to use other credit cards despite *Amex*’s higher merchant fees.<sup>54</sup> The plaintiffs claimed that these provisions harmed competition since they restricted what merchants could do to offset or avoid *Amex*’s higher fees.<sup>55</sup> Since merchants were not allowed to give discounts for competitor credit cards such as Visa or Discover, customers had less of a price incentive to select these cards over *Amex*. *Amex* countered that its no-steering provisions and higher merchant fees were procompetitive because they allowed *Amex* to give large rewards to its cardholders on the other side of the two-sided market.<sup>56</sup>

Though the district court found that the no-steering provisions resulted in anticompetitive harm,<sup>57</sup> the Second Circuit reversed, claiming that the plaintiffs did not adequately prove anticompetitive harm.<sup>58</sup> The Supreme Court agreed with the Second Circuit, holding that the plaintiffs did not meet their burden of showing that *Amex*’s higher merchant fees and no-steering clause had anticompetitive effects.<sup>59</sup>

Writing for the majority, Justice Thomas explained that two-sided markets must be treated differently than other markets.<sup>60</sup> Two-sided markets, which bring together two different customer groups, are characterized by indirect network effects between the two sides of the platform.<sup>61</sup> This means that each group benefits when a customer joins on the other side.<sup>62</sup> Credit card

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52. Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 37.

53. *Amex*, 138 S. Ct. at 2283.

54. *Id.* at 2280.

55. *See id.* at 2277.

56. *See id.*

57. *Id.* at 2283.

58. *See id.* at 2277.

59. *Id.* at 2290.

60. *Id.* at 2285–86.

61. *Id.* at 2280.

62. *Id.*

networks, for example, connect merchants and customers and are more valuable to merchants when more customers join the network.<sup>63</sup> Likewise, customers benefit when more merchants accept their credit card.<sup>64</sup> The majority held that because both sides of the platform are interdependent, courts need to consider both sides of a two-sided market when conducting rule of reason analysis.<sup>65</sup> In other words, the plaintiffs had to show that both cardholders and merchants were harmed by the no-steering provisions.

Next, the majority laid out some exceptions to this rule for two-sided markets. It noted that indirect network effects might be so negligible that only one side must be taken into account in rule of reason analysis.<sup>66</sup> Newspapers, which connect readers and advertisers, are the quintessential example of a platform with weak indirect network effects.<sup>67</sup> Although advertisers benefit from more people reading the newspaper, readers are indifferent as to how many advertisers the newspaper has.<sup>68</sup> Because of weak indirect network effects, cases like this require analysis of only one side of the market.

The Court further limited the two-sided market rule to platforms that “facilitate a single, simultaneous transaction between participants.”<sup>69</sup> It viewed the credit card market as a single two-sided market “suppl[ying] only one product’—transactions.”<sup>70</sup> For two-sided transaction markets like credit card networks, courts can consider the net effect of the restraint on this single market of transactions.<sup>71</sup> Since the *Amex* plaintiffs did not prove net harm on both sides of the market, they failed to demonstrate anticompetitive effects.<sup>72</sup>

In sum, *Amex* instructs courts that they must take both sides into account when the two-sided market involves simultaneous transactions, has non-negligible indirect network effects, and can be viewed as a single market dealing in transactions.

## II. PROBLEMS WITH AMEX

*Amex* has sparked vigorous debate among antitrust and economics scholars. Some praised the decision for taking contemporary economic theory of

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63. *Id.* at 2281.

64. *Id.*

65. *Id.* at 2285–86.

66. *Id.* at 2286.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (alteration in original) (quoting Benjamin Klein, Andres V. Lerner, Kevin M. Murphy & Lacey L. Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 580 (2006)).

71. *See id.* at 2278 (“Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole.”).

72. *Id.*

two-sided markets into account,<sup>73</sup> while others said it “devastates antitrust law.”<sup>74</sup> This Part outlines two major categories of concerns with the *Amex* decision. Section II.A discusses problems with how *Amex* modified antitrust analysis. Section II.B reveals problems with *Amex*'s definition of two-sided markets and, by extension, its applicability beyond payment platforms.

#### A. *Amex's Application to Antitrust Analysis*

*Amex* requires collapsing two-sided markets into a single market and proving net anticompetitive harm by taking into account both sides of the market. For example, if *Amex*'s no-steering provision benefited customers more than it harmed merchants, then the provision would not be anticompetitive under *Amex*. This requirement, which increases the plaintiff's burden in the first step of rule of reason analysis, has been controversial among scholars. This Section explains why collapsing the market and looking at the net effect creates problems. First, there is no consensus in the economic literature about the Court's approach, and antitrust law pre-*Amex* was already equipped to handle two-sided markets. Second, the burden *Amex* places on plaintiffs is too high and is inconsistent with the goals of antitrust law. Third, *United States v. Sabre*'s holding on competition between two-sided and one-sided markets could further stifle competition if adopted by other courts.<sup>75</sup>

##### 1. Net-Effects Analysis Versus Separate-Effects Analysis

Modern antitrust law relies heavily on economics.<sup>76</sup> Yet *Amex* did not rely on settled economic principles. In fact, there is vigorous debate in the economic literature about how to analyze two-sided markets.<sup>77</sup> Currently, the two leading approaches outlined in the literature are net-effects analysis and separate-effects analysis.<sup>78</sup>

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73. See, e.g., David S. Evans & Richard Schmalensee, *The Role of Market Definition in Assessing Anti-competitive Harm in Ohio v. American Express*, CPI ANTITRUST CHRON., June 2019, at 19, [https://www.competitionpolicyinternational.com/wp-content/uploads/2019/06/AC\\_June\\_2.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2019/06/AC_June_2.pdf) [perma.cc/ZE6Q-GLLS]; Evan Chesler & David Korn, *Lessons from Amex for Platform Antitrust Litigation*, 98 NEB. L. REV. 345 (2019).

74. Tim Wu, Opinion, *The Supreme Court Devastates Antitrust Law*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html> [perma.cc/VN9N-ZXKJ] (cleaned up).

75. 452 F. Supp. 3d 97 (D. Del. 2020), *vacated as moot*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

76. E.g., Khan, *supra* note 12, at 718–22.

77. Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2145 (2018) (comparing net- and separate-effects analysis).

78. *Id.*

*Amex* adopted net-effects analysis,<sup>79</sup> an approach advanced by Lapo Filistrucchi.<sup>80</sup> Under this approach, the consumer welfare standard treats consumers on both sides of the market equally.<sup>81</sup> In *Amex*, this meant that the harm to merchants could be directly balanced against the benefit to cardholders.<sup>82</sup> Thus, even if *Amex*'s behavior resulted in cognizable anticompetitive harm to merchants, there was no violation of the antitrust laws so long as there was an offsetting benefit to cardholders. Put another way, anticompetitive harm on one side of the platform would not be actionable if it were outweighed by the benefits to the other side.<sup>83</sup> Since net-effects analysis involves directly weighing harms and benefits to each customer group, this approach assumes that each customer group has equal importance when assessing anticompetitive harms.<sup>84</sup>

By contrast, other scholars advocate for separate-effects analysis, which requires that each side of the platform be considered separately.<sup>85</sup> Under separate-effects analysis, two-sided platforms are treated as multiple separate but interrelated markets and cannot be collapsed.<sup>86</sup> If applied to *Amex*, it would mean that plaintiffs would only need to show harm to either merchants or cardholders. In other words, separate-effects analysis allows each group of consumers on either side of the platform to benefit from competition under antitrust law.<sup>87</sup>

Separate-effects analysis avoids the assumptions upon which net-effects analysis relies, namely, that each side of the market has equal weight and can be directly compared. Although these assumptions may hold for platforms with strong indirect network effects like payment systems, they should not be applied indiscriminately to two-sided markets for which these assumptions may not make sense. Collapsing both sides of the platform into one "obscure[s] the underlying economic forces" that drive this relationship<sup>88</sup> and renders "any coherent economic analysis of the relevant market impossible."<sup>89</sup>

Advocates for the net-effects approach claim that traditional rule of reason analysis, which uses the separate-effects approach,<sup>90</sup> cannot adequately account for anticompetitive harm since it does not explicitly take both sides of

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79. *Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2286–87 (2018).

80. Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 301–02 (2014).

81. Katz & Sallet, *supra* note 77, at 2162.

82. *See Amex*, 138 S. Ct. at 2287.

83. *See* Katz & Sallet, *supra* note 77, at 2145–46.

84. *Id.* at 2145.

85. *E.g., id.* at 2161–66.

86. *See* David S. Evans, *The Antitrust Economics of Multi-sided Platform Markets*, 20 YALE J. ON REGUL. 325, 339–40 (2003).

87. Katz & Sallet, *supra* note 77, at 2145.

88. Carlton, *supra* note 19, at 105.

89. Hovenkamp, *supra* note 52, at 53.

90. Sarin, *supra* note 20, at 557–58.

the platform into account.<sup>91</sup> Yet traditional rule of reason analysis would have sufficiently captured anticompetitive harm even on the facts of *Amex*. Justice Breyer's *Amex* dissent pointed to the harms that Discover suffered as a result of Amex's no-steering provisions.<sup>92</sup> Discover had tried to lower its merchant fees to encourage adoption, but Amex's no-steering provisions prevented merchants from encouraging customers to use Discover over Amex.<sup>93</sup> Since there was no price difference between the two credit cards from the customer's perspective, customers had little incentive to switch to Discover. When Discover's lower merchant fees did not result in greater adoption, Discover abandoned this strategy and raised its merchant fees to match the other credit card companies.<sup>94</sup> As a result, merchants uniformly had to pay higher fees.<sup>95</sup> Higher merchant fees hurt the merchant directly unless the merchant decided to pass on these costs to its customers. Given that merchants and consumers could be directly harmed through higher prices, the harm from Amex's no-steering provision would have been captured under traditional rule of reason analysis.

That wasn't the only direct evidence of anticompetitive harm in *Amex*. Amex had also increased its merchant fees on twenty different occasions within five years without increasing its cardholder rewards.<sup>96</sup> Notably, Amex did not lose any major merchants after these fee increases.<sup>97</sup> Amex's ability to keep these merchants after numerous fee increases shows that Amex's no-steering provision allowed it to exercise market power in a way that resulted in market inefficiencies.<sup>98</sup> This direct evidence of anticompetitive harm would have been captured by the traditional rule of reason approach. Thus, *Amex* itself demonstrates that traditional rule of reason analysis, which relies on the separate-effects approach, can adequately capture anticompetitive behavior in two-sided markets.<sup>99</sup>

*Amex's* adoption of the net-effects approach also creates problems in the technology context. Many Big Tech companies have both one-sided and two-sided markets, which makes analyzing the market as one unit a challenging undertaking. Even if the assumptions of net-effects analysis apply to payment systems, extending this framework to complex technology platforms goes too far.

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91. Jean Tirole, *Regulating the Disrupters*, PROJECT SYNDICATE (Jan. 9, 2019), <https://www.project-syndicate.org/onpoint/regulating-the-disrupters-by-jean-tirole-2019-01> [perma.cc/9RCS-QGV7].

92. *Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2293–94 (2018) (Breyer, J., dissenting).

93. *See id.* at 2304.

94. *Id.* at 2293–94.

95. *See id.* at 2294.

96. *Id.* at 2293.

97. *Id.*

98. John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 CARDOZO L. REV. 1805, 1813–14 (2020).

99. Scholars agree with Justice Breyer that the Court could have looked at the market from the perspective of either the merchant or consumer and performed its typical rule of reason analysis. *See, e.g.,* Carlton, *supra* note 19, at 105; Kirkwood, *supra* note 98, at 1813.

Amazon is one example of a company with both two-sided and one-sided platforms. Amazon Marketplace is a two-sided platform because it facilitates transactions between third-party sellers and customers; by contrast, Amazon's business of selling directly to customers is one-sided. Interestingly, Amazon competes directly with third-party sellers as a participant on its own platform.<sup>100</sup> Collapsing this system into a single market and calculating the net anticompetitive harm ignores the company's dual role as both platform and participant.<sup>101</sup> Moreover, Amazon's participation in its own marketplace may result in weaker indirect network effects for the third-party two-sided market.<sup>102</sup> Since Amazon can lower its prices to undercut its competition, competing third-party sellers are less likely to see the benefits of more buyers joining the platform.<sup>103</sup> This interaction highlights the importance of capturing Amazon's role as a participant in Amazon Marketplace.<sup>104</sup> Reducing this complicated relationship into a single market would fail to capture all of the important market forces at play.<sup>105</sup>

Amazon is not an anomaly. Other technology companies follow Amazon's model of participating in their own platforms. For example, Google promotes its own products over others in its search engine. If the user searches for a flight, Google can make Google Flights appear at the top of the list of search results,<sup>106</sup> while competitors like Expedia are demoted within the results.<sup>107</sup> Likewise, the Google search engine promotes its own restaurant listings over Yelp listings<sup>108</sup> and places Google ads at the top of the results page.<sup>109</sup> Similar to the Amazon example, collapsing the Google ecosystem into a single market would ignore the anticompetitive effect it exerts as a participant on its own platform. Thus, even if net-effects analysis is correctly applied to payment systems, it should not apply to complex technology platforms.

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100. See Bloodstein, *supra* note 18, at 224.

101. See *id.* at 224–25.

102. *Id.*

103. *Id.*

104. *Id.*

105. See *id.*

106. Rolfe Winkler & Brody Mullins, *How Google Skewed Search Results*, WALL ST. J. (Mar. 19, 2015, 7:25 PM), <https://www.wsj.com/articles/how-google-skewed-search-results-1426793553> [perma.cc/PTX2-4UAA].

107. Justin Bachman, *Expedia Books a Painful Trip Down Google's Search Results*, BLOOMBERG (Jan. 23, 2014, 10:41 AM), <https://www.bloomberg.com/news/articles/2014-01-23/expedia-books-a-painful-trip-down-googles-search-results> [perma.cc/BP2R-ZHTP].

108. See Lauren Feiner, *Yelp Gives Senators Its List of Grievances Against Google in Antitrust Hearing*, CNBC (Mar. 10, 2020, 3:27 PM), <https://www.cnbc.com/2020/03/10/yelp-testifies-against-google-in-antitrust-senate-hearing.html> [perma.cc/22CZ-33BL]; Josh Constine, *Leaked Documents Show How Yelp Thinks It's Getting Screwed by Google*, TECHCRUNCH (July 9, 2014, 6:12 PM), <https://techcrunch.com/2014/07/09/yelp-google-anti-trust> [perma.cc/7KEC-U8D7].

109. Geoffrey A. Fowler, *How Does Google's Monopoly Hurt You? Try These Searches.*, WASH. POST (Oct. 20, 2020, 3:22 PM), <https://www.washingtonpost.com/technology/2020/10/19/google-search-results-monopoly> [perma.cc/S5PS-RZ7C].

## 2. Plaintiff's Burden

*Amex* places too high a burden on plaintiffs.<sup>110</sup> In traditional rule of reason analysis, anticompetitive and procompetitive effects are weighed only after both parties have a chance to make their case.<sup>111</sup> *Amex* changed that for two-sided markets.<sup>112</sup> Under *Amex*, plaintiffs challenging two-sided markets must show net anticompetitive harm on both sides of the platform at the first step of the rule of reason analysis.<sup>113</sup> This raises a few concerns.

First, there are practical challenges that make it difficult for plaintiffs to prove net anticompetitive harm on both sides of a two-sided platform.<sup>114</sup> Generally, defendants, not plaintiffs, have the best understanding of their own platforms and pricing structures, as well as of how consumers on either side of the platform interact.<sup>115</sup> Thus, *Amex's* burden imposes a higher cost on plaintiffs than it does on defendants. This cost is even greater for complicated technology platforms that require specialized knowledge to understand their operations. In contrast, traditional rule of reason analysis requires that defendants bear the burden of proving procompetitive justifications because they best understand how the challenged conduct results in efficiencies.<sup>116</sup> The analysis for two-sided platforms should follow a similar principle by placing the burden on defendants since they typically have the lowest cost of producing evidence.<sup>117</sup>

Second, weighing the anticompetitive harm to each side should not take place in the first step of rule of reason analysis. One of the goals of antitrust law is to promote competition.<sup>118</sup> Each side of the platform should have the opportunity to receive protection from anticompetitive harm.<sup>119</sup> Typically, procompetitive and anticompetitive effects are weighed in the final step of rule of reason analysis.<sup>120</sup> Under *Amex*, however, the burden of weighing anticompetitive effects for two-sided platforms is instead located at the first step.<sup>121</sup> Since anticompetitive harm to one side could be outweighed up front by the procompetitive benefits to the other side, the higher initial burden makes it harder to protect each side from anticompetitive harm.

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110. Hovenkamp Letter, *supra* note 35, at 2.

111. *See id.*

112. *See Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2287 (2018).

113. *See supra* Section I.C.

114. Katz & Sallet, *supra* note 77, at 2174.

115. *See id.*

116. *Id.* at 2172–73.

117. *Id.* at 2173.

118. *See supra* Section I.A.

119. Katz & Sallet, *supra* note 77, at 2173.

120. *See supra* Section I.B.

121. *See supra* Section I.C.



This high upfront burden on plaintiffs provides an incentive for defendants to claim their platforms are two-sided markets.<sup>122</sup> Although they have been largely unsuccessful thus far, defendants in lower courts have already begun to claim that they are two-sided or multi-sided markets despite not meeting *Amex*'s definition.<sup>123</sup> For example, in *In re National Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Litigation*, the NCAA's expert witness claimed that universities are multi-sided platforms because of their many constituencies, including student-athletes, alumni, coaches and staff, the institution, and the community.<sup>124</sup> The court rightfully rejected this claim because the NCAA failed to describe the product, price, or economic interactions between these different constituencies.<sup>125</sup> Similarly, the *In re Delta Dental Antitrust Litigation* defendant failed to demonstrate that the dental-insurance market was two-sided.<sup>126</sup>

Finally, this burden on plaintiffs is even more concerning in the technology context since it is difficult to show net anticompetitive harm. Many technology companies like Google and Facebook offer their products to users for free. They would argue that any anticompetitive behavior on the seller side of the market is offset by these low prices. This would give these companies an extra defense.

### 3. Competition Between Two-Sided and One-Sided Markets

*United States v. Sabre Corp.* considered whether it is possible to define the relevant market as including both two-sided and one-sided competitors under *Amex*. Even though the case was vacated by the Third Circuit and is therefore

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122. Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. 713, 752 (2019) (“[W]e can expect an outpouring of defendants emphatically claiming to be two-sided . . . . It will thus become necessary to filter out the pretext.”).

123. See Letter from Tim Wu, Prof., Colum. L. Sch., to Chairman David N. Cicilline and Ranking Member F. James Sensenbrenner, Jr., Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary 2 (Apr. 25, 2020), [https://judiciary.house.gov/uploadedfiles/submission\\_from\\_timothy\\_wu.pdf](https://judiciary.house.gov/uploadedfiles/submission_from_timothy_wu.pdf) [perma.cc/L648-9Z2D] (“Already, companies accused of anti-competitive conduct have begun to seize upon *American Express* like a talisman, or some kind of get-out-of-jail-free card issued by the Court. That the case is often willfully misinterpreted is not the point—it does its damage by its very existence.”).

124. See 375 F. Supp. 3d 1058, 1066 n.8 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021); see also Ted Tatos, *Relevant Market Definition and Multi-sided Platforms After Ohio v. American Express: Evidence from Recent NCAA Antitrust Litigation*, 10 HARV. J. SPORTS & ENT. L. 147, 148 (2019).

125. *Id.* at 150.

126. 484 F. Supp. 3d 627 (N.D. Ill. 2020). The Court rejected Delta Dental's claim that it was a two-sided transaction market for three reasons. First, *Amex* is applicable to rule of reason analysis and does not preclude a claim of per se illegality. *In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d at 636. Second, the agreement was horizontal, not vertical like in *Amex*. *Id.* at 637. Third, the platform did not meet the simultaneous-transaction test because dental insurers get paid at a different time than the patient receives services. *Id.*

not precedential, it still provides a useful roadmap for technology defendants in other circuits.<sup>127</sup>

*Sabre* involved a merger between two companies, Sabre and Farelogix.<sup>128</sup> Sabre makes a global distribution system that connects travel agents and airlines.<sup>129</sup> Farelogix provides software systems only to airlines.<sup>130</sup> Despite recognizing that “Sabre [a]nd Farelogix [v]iew [e]ach [o]ther [a]s [c]ompetitors” and that “[t]he record reflects competition between” Sabre and Farelogix in software for airlines, the district court held that the two companies could not compete in the same relevant market.<sup>131</sup> This was because Sabre was two-sided while Farelogix was not.<sup>132</sup> To support its holding, the district court cited dicta from *Amex*, which noted that “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.”<sup>133</sup>

This decision marked the first time that *Amex* was applied in a horizontal merger context.<sup>134</sup> This is notable because *Amex* was previously thought to only apply to vertical restraints under Section 1 of the Sherman Act.<sup>135</sup> Even more concerning is the court’s holding that two-sided platforms cannot compete with one-sided platforms in the same relevant market. This could lead to economically confusing and unintuitive results. In his submission to the House Judiciary Committee’s 2020 antitrust investigation, Herbert Hovenkamp observed that “[t]housands of traditional taxicab companies and drivers who have been injured by Uber, Inc., would be surprised to hear that Uber and taxicabs cannot be competitors.”<sup>136</sup> The *Sabre* decision was also made as a matter of law, meaning that factual questions about the markets remain “outside the reach of fact finding.”<sup>137</sup>

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127. United States v. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020), *vacated as moot*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

128. *Id.* at 103.

129. *Id.* at 108.

130. *Id.* at 112–13.

131. *Id.* at 117–18; *see also* Swisher & Boudreault, *supra* note 19.

132. *Sabre*, 452 F. Supp. 3d at 136.

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

134. Joseph M. Miller, Bruce D. Sokler, Shawn N. Skolky & Tinny T. Song, *In Application of American Express to Horizontal Merger Challenge, District Court Allows Merger of Airline Ticket Platforms*, NAT’L L. REV. (Apr. 22, 2020), <https://www.natlawreview.com/article/application-american-express-to-horizontal-merger-challenge-district-court-allows> [perma.cc/B6SA-J5WF].

135. *See* FTC v. Surescripts, LLC, 424 F. Supp. 3d 92, 103 (D.D.C. 2020); Irving Scher, *Ohio v. American Express Co.: The Supreme Court Addresses Anti-steering*, HAUSFELD (Aug. 16, 2018), <https://www.hausfeld.com/what-we-think/competition-bulletin/ohio-v-american-express-co-the-supreme-court-addresses-anti-steering> [perma.cc/G6UB-Z67B].

136. Hovenkamp Letter, *supra* note 35, at 4 n.10.

137. *Id.*; *see also* Andrew Ewalt, *Two Sides to Every Story: Growing Tensions Between Legal Rules and Economic Realities for Platform Industries*, COMPETITION POL’Y INT’L (Aug. 9, 2020), <https://www.competitionpolicyinternational.com/two-sides-to-every-story-growing-tensions-between-legal-rules-and-economic-realities-for-platform-industries> [perma.cc/5TRK-2V4F] (“*US Airways and Sabre/Farelogix* illustrate how, if the first case to apply *Amex* to a particular business holds

In addition, *Sabre* based its decision on misinterpreted dicta from *Amex*. The *Amex* majority's statement that only other two-sided platforms can compete with a two-sided transaction platform was dicta because neither the case nor the parties asked the court to decide this point.<sup>138</sup> Further, as Andrew Ewalt points out, *Amex*'s statement misreads an article written by Lapo Filistrucchi and cited by the Court.<sup>139</sup> While Filistrucchi's article did say that two-sided platforms should be distinguished from other two-sided platforms, it did not say "that two-sided transaction platforms only compete with other two-sided platforms."<sup>140</sup>

Soon after *Sabre* was decided, the DOJ filed a motion to vacate the district court's opinion, citing concerns about the case's effects on competition involving technology platforms.<sup>141</sup> While the Third Circuit did ultimately vacate the decision,<sup>142</sup> there is still a blueprint for defendants to follow when presenting similar arguments in the future.<sup>143</sup> This could have wide-reaching effects on antitrust law, especially for technology platforms. Given the prevalence of two-sided platforms in the technology sector, it would be dangerous to say that two-sided platforms cannot be in the same relevant market as one-sided businesses.

#### B. *Amex's Characterization of Two-Sided Markets*

Just as there is a lack of consensus on how to analyze two-sided markets, there is also no consensus on how to define them.<sup>144</sup> Instead of relying on an

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as a matter of law that the business operates a two-sided transaction platform, other courts may be heavily influenced, or even bound, by that determination, however uncomfortable the result.").

138. Ewalt, *supra* note 137.

139. *Id.*

140. *Id.*

141. Swisher & Boudreault, *supra* note 19.

142. *United States v. Sabre Corp.*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020) (vacating without expressing opinion on the merits due to Sabre mooted the case pending appeal). Just days after the district court approved the merger between Sabre and Farelogix, the United Kingdom's Competition and Markets Authority (CMA) blocked it. Subsequently, the companies abandoned the merger deal. The DOJ took the CMA's decision as evidence that the merger was anticompetitive and brought the motion to vacate. See Press Release, U.S. Dep't of Just., Statement from Assistant Attorney General Makan Delrahim on Sabre and Farelogix Decision to Abandon Merger (May 1, 2020), <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-sabre-and-farelogix-decision-abandon> [perma.cc/LX67-AB5].

143. Swisher & Boudreault, *supra* note 19.

144. Under Rochet and Tirole's definition, a market is two-sided if the volume of transactions would be affected by a price increase to one side of the market and an equally offsetting price decrease to the other side of the market. Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 646 (2006). Another definition, advanced by Katz and Sallet, says that a firm is multisided when cross-platform network effects occur in at least one direction, the firm facilitates interactions between two or more groups of users, and the firm has market power over the groups and can set distinct prices for each group. Katz & Sallet, *supra* note 77, at 2150.

economist's definition, the *Amex* majority formulated its own.<sup>145</sup> Recognizing that there are many platforms that exhibit indirect network effects, the *Amex* Court defined two-sided markets as “transaction platforms” that deal in simultaneous transactions and have non-negligible indirect network effects.<sup>146</sup> While other scholars have critiqued *Amex*'s definition of two-sided markets, this Section contributes novel analysis of post-*Amex* cases to supplement these critiques and demonstrate how lower courts' interpretations of *Amex* raises enforcement concerns for Big Tech platforms.

### 1. Simultaneous-Transaction Requirement

*Amex* limited its holding to platforms where the two customer groups interact through transactions that occur at the same time for both groups.<sup>147</sup> This simultaneous-transaction requirement suffers from a number of defects. The requirement is unsupported by antitrust precedents or the economic literature.<sup>148</sup> The Court justified the addition of this requirement by explaining that two-sided transaction platforms “exhibit more pronounced indirect network effects” and have “interconnected pricing and demand.”<sup>149</sup> Yet the majority opinion failed to explain why transaction platforms tend to have stronger indirect network effects than other two-sided platforms.<sup>150</sup>

Some scholars contend that the simultaneous-transaction requirement prevents *Amex* from being applied too broadly.<sup>151</sup> They view *Amex*'s additional requirement as a safeguard that ensures courts will not treat companies like Google and Facebook as two-sided platforms.<sup>152</sup> But although *Amex*'s holding was narrower than the Second Circuit's, which omitted the simultaneous-transaction requirement,<sup>153</sup> *Amex*'s definition of two-sided markets is still broader than that of most economists.<sup>154</sup> In fact, Justice Breyer's dissent

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145. Oscar Borgogno & Giuseppe Colangelo, *Antitrust Analysis of Two-Sided Platforms After AmEx: A Transatlantic View* 6 (Stanford-Vienna Transatlantic Tech. L.F., Working Paper No. 41, 2019), [https://www-cdn.law.stanford.edu/wp-content/uploads/2019/02/borgogno\\_colangelo\\_wp41.pdf](https://www-cdn.law.stanford.edu/wp-content/uploads/2019/02/borgogno_colangelo_wp41.pdf) [perma.cc/48AQ-4S8C].

146. See *supra* Section I.C.

147. See *Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2280, 2286–87 (2018).

148. *Id.* at 2298 (2018) (Breyer, J., dissenting); Hovenkamp, *supra* note 52, at 81–82.

149. *Amex*, 138 S. Ct. at 2286.

150. Richard M. Brunell, *Ohio v. Amex: Not So Bad After All?*, ANTITRUST, Fall 2018, at 16, 17 [perma.cc/7Y5L-DTUT].

151. See, e.g., Wu, *supra* note 18, at 123; ROGER ALFORD, AM. ANTITRUST INST., HOW TO APPROACH MARKET DEFINITION AFTER *OHIO V. AMERICAN EXPRESS* 3 (2020), <https://www.antitrustinstitute.org/wp-content/uploads/2020/06/alford.pdf> [perma.cc/2KKT-ECVP].

152. Borgogno & Colangelo, *supra* note 145, at 36; see also Wu, *supra* note 18, at 124; ALFORD, *supra* note 151, at 3.

153. Wu, *supra* note 18, at 123. Interestingly, Tim Wu also observed that the Court's narrowing of *Amex* via the simultaneous-transaction requirement signals its reticence to overrule past cases dealing with two-sided markets. *Id.* at 124.

154. Borgogno & Colangelo, *supra* note 145, at 6.

argued that the majority's formulation was overbroad.<sup>155</sup> The dissent contended that each element of the majority's "two-sided transaction platform" definition is in fact commonplace.<sup>156</sup> Many businesses—including farmers markets, travel agencies, and internet retailers—connect two groups of customers to each other in simultaneous transactions and have indirect network effects.<sup>157</sup> Thus, it is more than plausible that *Amex's* definition of two-sided markets is broad enough to include Big Tech platforms.

In addition to being overly broad, the simultaneous-transaction requirement is also susceptible to framing. First, the simultaneity of the transaction can easily be manipulated. For example, when someone makes a search query in Google, there are no obvious simultaneous transactions between this user and an advertiser.<sup>158</sup> If Google charged its advertisers upfront, similar to newspaper or television advertisements, this would be an accurate assessment. But if Google charged the advertiser at the moment the user clicked on the search result, then this assessment would be inaccurate because such a scheme would satisfy the simultaneity requirement.<sup>159</sup>

Uber is another example of the simultaneous-transaction requirement's susceptibility to framing. Uber used to charge customers after their ride was complete, calculating the price based on the actual time and distance traveled.<sup>160</sup> Since the customer hailed the ride and paid at different times, Uber transactions would not meet the simultaneity requirement. Later, Uber began charging its customers when they requested a driver instead of after the ride.<sup>161</sup> Under *Amex*, this seemingly small design change classifies this transaction as simultaneous since payment is made at the same time as the ride request. Thus, companies only have to change when money is exchanged in order to satisfy simultaneity. Google and Uber illustrate the ease with which technology companies can manipulate the simultaneity of their transactions without changing the competitive effect of their actions.

The simultaneity requirement can also produce unintuitive results. For example, Amazon might seem like a paradigmatic two-sided transaction platform,<sup>162</sup> but purchases fulfilled by Amazon itself do not meet the simultaneity requirement. This is because Amazon's suppliers sell products to Amazon

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155. See *Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2298–99 (2018) (Breyer, J., dissenting).

156. See *id.*

157. *Id.* at 2299.

158. See ELEANOR M. FOX & DANIEL A. CRANE, *CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT* 698 (4th ed. 2020).

159. *Id.*

160. Alison Griswold, *Uber Is Going Back in Time to Prove Its Drivers Aren't Employees*, QUARTZ (Jan. 20, 2020), <https://qz.com/1784804/uber-drops-upfront-pricing-to-prove-drivers-are-contractors> [perma.cc/93VN-9TAQ] ("Price estimates were the norm on Uber until the company quietly introduced upfront pricing in 2016.").

161. *Id.*

162. Bloodstein, *supra* note 18, at 221.

long before the user purchases it.<sup>163</sup> Thus, the sale spans two distinct transactions that do not occur simultaneously. By contrast, transactions with third-party Amazon Marketplace sellers meet the simultaneity requirement since the sellers and users transact directly and simultaneously on the Amazon platform.<sup>164</sup> Although there is little difference between buying a product from a third-party Marketplace seller and buying one directly from Amazon from the shopper's perspective, the two transactions come out differently under *Amex*.

Another problem with *Amex*'s simultaneous-transaction requirement is that it is sometimes difficult to define the relevant transaction. Returning to the Uber example, the "transaction" took place when the customer requested and simultaneously paid for the ride. But the transaction could just as easily be framed as "occurring" upon completion of the ride; since the customer paid for transportation to a particular destination, the transaction is concluded only when she receives the service she paid for. This framing affects whether the transaction is considered simultaneous. If the transaction "occurs" upon completion, Uber's upfront pricing scheme would not be simultaneous while the post-ride pricing scheme would be. There is little guidance from *Amex* about what constitutes a transaction,<sup>165</sup> creating uncertainty about whether a scheme like Uber's would qualify. This could lead to an increase of technology defendants intentionally shifting what constitutes a "transaction" in their business.<sup>166</sup>

Because of *Amex*'s lack of guidance, lower courts have treated the simultaneous-transaction requirement inconsistently, potentially opening the door to a broader application that would encompass Big Tech platforms. In another case involving Sabre, *U.S. Airways, Inc. v. Sabre Holdings Corp.*, the Second Circuit considered a "global distribution system" that allows travel agents to book flights for their customers.<sup>167</sup> When an agent books a flight on Sabre's platform, Sabre collects a booking fee from the airline and gives the agent an incentive payment once the agent has met the threshold number of bookings.<sup>168</sup> Sabre argued that its platform was a two-sided transaction platform under *Amex*, with travel agents on one side and airlines on the other.<sup>169</sup> The court agreed, citing all of *Amex*'s elements, including indirect network effects, simultaneous transactions, and a single market of transactions.<sup>170</sup>

While the court correctly referenced *Amex*'s formal elements, this outcome is nonetheless inconsistent with *Amex* because it misinterprets the simultaneity requirement. When the travel agent makes the booking, the airline pays Sabre, but the travel agency only receives an incentive payment after

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163. *Id.* at 220.

164. *See id.* at 220–21.

165. *See Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2286 (2018).

166. *See Khan, supra* note 12, at 716.

167. 938 F.3d 43, 49 (2d Cir. 2019).

168. *U.S. Airways*, 938 F.3d at 50.

169. *Id.* at 53.

170. *Id.* at 57–59.

reaching a certain booking threshold.<sup>171</sup> Since there is no transfer of money between airlines and agents until the threshold is met, this scheme does not actually satisfy the simultaneity requirement. *U.S. Airways'* incorrect holding exemplifies the confusion of lower courts attempting to apply *Amex's* simultaneous-transaction requirement.

Other lower courts seem to ignore the simultaneous-transaction requirement altogether. In *Viamedia, Inc. v. Comcast Corp.*, the Seventh Circuit found the “Interconnect,” a clearinghouse for television providers to pool advertising resources, to be a two-sided market because of the indirect network effects between advertisers and retail customers.<sup>172</sup> It explained that advertisers benefit when more television providers—and thus, more retail customers—participate in the market.<sup>173</sup> Significantly, it did not mention the simultaneous-transaction requirement in its discussion. Coupled with its ambiguity, the simultaneous-transaction requirement’s uneven treatment by lower courts signals that some courts will apply *Amex* too broadly, especially in the technology context. Lower courts’ confusion thus far means that technology defendants can capitalize on this confusion for their own benefit.

Finally, *Amex's* simultaneous-transaction requirement is problematic in that it serves as a poor proxy for platforms with strong indirect network effects, like payment systems.<sup>174</sup> The Court relied on the assumption that transaction platforms were generally more likely to have strong indirect network effects,<sup>175</sup> which is not necessarily true. Although payment systems are unique for their strong indirect network effects, there are nontransaction platforms with strong indirect network effects and transaction platforms with weaker indirect network effects.<sup>176</sup> For example, Amazon Marketplace is a transaction platform with weak indirect network effects.<sup>177</sup> Amazon shoppers are unlikely to care how many sellers there are on Amazon as long as they can buy the product they seek, making the platform closer to a newspaper than a payment system under *Amex*.<sup>178</sup> In sum, the simultaneous-transaction requirement is problematic for several reasons: it is overbroad, ambiguous, and a poor proxy for the strength of indirect network effects.

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171. *Id.* at 50.

172. 951 F.3d 429, 438–39 (7th Cir. 2020).

173. *Viamedia*, 951 F.3d at 439.

174. See Joshua D. Wright & John M. Yun, *Ohio v. American Express: Implications for Non-transaction Multisided Platforms*, CPI ANTITRUST CHRON., June 2019, at 29, 32–34, [https://www.competitionpolicyinternational.com/wp-content/uploads/2019/06/AC\\_June\\_2.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2019/06/AC_June_2.pdf) [perma.cc/23EW-ZFJG].

175. *Id.*

176. See *id.*

177. *Id.*

178. See *id.*

## 2. Strength of Indirect Network Effects

*Amex's* second requirement—that the platform has non-negligible indirect network effects—also suffers from a lack of clarity that could extend *Amex* to Big Tech. Although *Amex* used payment systems and newspapers as examples of strong and weak indirect network effects, respectively,<sup>179</sup> the Court did not provide guidance on where to draw the line for anything in between.<sup>180</sup> Even in the economic literature, there is no bright-line rule that establishes how strong a platform's indirect network effects must be in order to qualify as two-sided.<sup>181</sup> This may be why the Court turned to a seemingly more concrete test like the simultaneous-transaction requirement. This lack of a bright-line rule opens the door for defendants to falsely claim that their platforms have strong indirect network effects and should be treated as two-sided markets.

In some cases, defendants have argued that there are strong indirect network effects because consumers benefit from lower prices. In *Delta Dental*, the umbrella insurance company pointed to the mutual benefits that member companies and patients enjoy as evidence of strong indirect network effects.<sup>182</sup> It argued that member companies benefited from having more patients, and patients likewise benefited from lower premiums when more companies joined Delta Dental.<sup>183</sup> Similarly, in *Viamedia*, the court determined that the indirect network effects of the “Interconnect” were strong enough for Comcast's advertising clearinghouse to be considered two-sided.<sup>184</sup> It reasoned that the clearinghouse's indirect network effects were strong because advertisers benefit from having more consumers on the platform, and consumers benefit because having more advertisers allows Comcast to subsidize prices.<sup>185</sup>

Such reasoning contradicts well-established knowledge about two-sidedness. Drawing the line between strong and weak indirect network effects—and, by extension, determining two-sidedness—cannot depend solely on companies' benevolence in passing discounts on to customers. For example, as *Amex* itself recognized, newspapers are the quintessential example of platforms with negligible indirect network effects.<sup>186</sup> Newspapers connect advertisers with readers, and readers are generally indifferent as to how many

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179. *Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2286 (2018).

180. Will Rinehart & Pranjali Drall, *Platform Competition and the Implications of Amex*, AM. ACTION F.: COMMENTS FOR THE REC. (Aug. 21, 2018), <https://www.americanactionforum.org/comments-for-record/platform-competition-and-the-implications-of-amex> [perma.cc/ZRU5-R4RJ].

181. Borgogno & Colangelo, *supra* note 145, at 6.

182. *In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d 627, 637 (N.D. Ill. 2020).

183. *Id.*

184. *See Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 439 (7th Cir. 2020).

185. *Id.*

186. *See Ohio v. Am. Express Co. (Amex)*, 138 S. Ct. 2274, 2286 (2018).



advertisers take out ads.<sup>187</sup> *Amex* would have rejected the claim that a newspaper has strong indirect network effects because having more advertisers enables the newspaper to lower its prices for subscribers.<sup>188</sup> Similar to newspapers, the customers in *Delta Dental* and *Viamedia* would likely be indifferent to the number of insurers or advertisers on the platform, even if they were to get lower premiums or prices. Despite this, *Viamedia* implied that Comcast's platform had strong enough indirect network effects to be two-sided, and only for other reasons did *Delta Dental* hold that the platform was one-sided.<sup>189</sup> This confusion in the lower courts demonstrates the problems that come with extending *Amex* beyond payment systems.

Despite being analytically incorrect, these arguments could provide a roadmap for future technology defendants because of confusion in the lower courts. As an example, Google could argue that its platform has strong indirect network effects because the more advertisers it accepts, the more easily it can keep consumer prices at zero. This argument ignores the fact that most Google users are indifferent to how many advertisers Google has on its platform, so long as their queries are correctly answered. Even though this reasoning is technically incorrect, confusion in the lower courts means that Big Tech defendants might eventually succeed with such an argument. As more lower courts begin to grapple with *Amex*, this is one area of potential inconsistency that deserves further scrutiny.

In conclusion, *Amex*'s definition of two-sided markets is overbroad, ambiguous, and susceptible to manipulation by technology companies and other antitrust defendants. These flaws open the possibility of lower courts' extending *Amex*'s protections to Big Tech.

### III. SOLUTIONS

The Court's analysis in *Amex* is problematic, both because of how it modifies antitrust analysis and because of its potential applications beyond payment systems. In response, Part III proposes a two-part legislative solution to limit *Amex*'s application to future cases. Section III.A remedies issues raised by *Amex*'s tenuous formulation with a novel compromise solution: replacing the simultaneous-transaction requirement with narrow categories of two-sided markets. Section III.B proposes additional legislation to explicitly override *Sabre*, which extended *Amex* in mistaken and dangerous ways. Finally, Section III.C contends that legislative solutions are appropriate to remedy problems in judge-made antitrust law.

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187. *Id.*

188. *See id.*

189. *Viamedia*, 951 F.3d at 439; *see In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d 627, 637 (N.D. Ill. 2020).

A. *Replacing the Simultaneous-Transaction Requirement with Narrow Categories of Two-Sided Markets*

This Section proposes legislation that would replace the simultaneous-transaction requirement with enumerated categories of two-sided markets. Even if *Amex's* net-effects analysis is the better approach for some platforms like payment systems, it should only apply to narrow categories of platforms. Net-effects analysis assumes that one can directly weigh the harms and benefits to each customer group directly.<sup>190</sup> Recognizing that it might not be possible to directly weigh harms and benefits for all types of two-sided markets, the *Amex* majority limited its holding only to simultaneous-transaction platforms.<sup>191</sup> However, the simultaneous-transaction requirement is overbroad and prone to manipulation.<sup>192</sup> Recognizing this requirement as a proxy for strong indirect network effects does not solve the problem because there is no clear line delineating strong and weak indirect network effects in antitrust law.<sup>193</sup>

Because of its flaws, legislators, scholars, and practitioners alike have advocated for overturning or narrowing *Amex*.<sup>194</sup> However, only the Supreme Court has the authority to overturn its own precedent and it is unlikely that the Court would overturn a case decided as recently as 2018. Alternatively, lower courts could limit *Amex's* reach by interpreting it narrowly. Courts could achieve this by noting that the simultaneous-transaction requirement is simply trying to capture markets like payment systems with strong indirect network effects. They could also reason that, given the unique nature of payment systems, *Amex* should be limited to its facts.<sup>195</sup>

Yet curbing *Amex* in the lower courts brings its own set of challenges. As this Note demonstrates, lower courts have not applied *Amex* uniformly.<sup>196</sup> They have ignored aspects of the *Amex* formulation and, at times, even misapplied *Amex* outright.<sup>197</sup> A judicial approach would take years to play out in the lower courts, with many hiccups along the way. Meanwhile, our ever-increasing reliance on technology, accelerated by the COVID-19 pandemic, means that Big Tech companies will continue to solidify their positions of power in the global economy.<sup>198</sup>

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190. See Katz & Sallet, *supra* note 77, at 2162.

191. *Amex*, 138 S. Ct. at 2286.

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

193. See, e.g., Rinehart & Drall, *supra* note 180.

194. See, e.g., Khan, *supra* note 20; MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 398–99 (Comm. Print 2020) [hereinafter ANTITRUST SUBCOMMITTEE REPORT].

195. See Borgogno & Colangelo, *supra* note 145, at 6.

196. See *supra* Part II.

197. See *supra* Part II.

198. Daisuke Wakabayashi, Jack Nicas, Steve Lohr & Mike Isaac, *Big Tech Could Emerge from Coronavirus Crisis Stronger than Ever*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/technology/coronavirus-facebook-amazon-youtube.html> [perma.cc/ZKN8-DV39].

Given the challenges of limiting *Amex* judicially, the House Judiciary Committee called for legislative change in its recent report on Big Tech and antitrust.<sup>199</sup> The report recommended overriding *Amex* by crafting legislation that clarifies that “cases involving platforms do not require plaintiffs to establish harm to both sets of customers.”<sup>200</sup> Even more recently, Senator Klobuchar proposed an expansive antitrust reform bill with similar language to override *Amex*.<sup>201</sup> These recent developments signal political desire to change antitrust laws. However, Senator Klobuchar’s bill would fundamentally change many aspects of antitrust law unrelated to platforms, and it remains unclear how much support such a wide-reaching bill will garner.<sup>202</sup>

In light of these potential political challenges, combined with continued disagreement on how to analyze two-sided markets, this Note proposes a compromise solution: legislatively replacing the simultaneous-transaction requirement with enumerated categories of two-sided markets. Accounting for the vigorous debate on whether to employ the net-effects versus separate-effects approaches, this solution would restrict net-effects analysis only to the platforms where it makes the most sense—those with strong indirect network effects. For example, legislators could statutorily define two-sided markets as platforms that belong to specifically enumerated categories, including payment systems. The list would initially include payment systems since these are well understood to have strong indirect network effects.<sup>203</sup> As economists reach a consensus about the two-sidedness of other platforms, they too could be added to the list.

This solution avoids overbreadth by starting with a narrow statutory definition that can expand as economic understanding evolves. Such an approach would ensure that plaintiffs are not required to prove net anticompetitive harm for novel technology platforms that economists have not yet studied. Given *Amex*’s high upfront burden on plaintiffs,<sup>204</sup> it is better to err on the side of being too narrow than being too broad.

A narrow approach would also solve *Amex*’s susceptibility to framing and confusion in the lower courts. Instead of relying on the simultaneous-trans-

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199. See ANTITRUST SUBCOMMITTEE REPORT, *supra* note 194, at 398–99.

200. *Id.* at 399.

201. Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 9 (2021) (“[S]uch violation does not require finding . . . that when a defendant operates a multi-sided platform business, the conduct of the defendant presents an appreciable risk of harming competition on one more than 1 side of the multi-sided platform.”).

202. Hamilton & Tilley, *supra* note 9; Ryan Tracy, *Amazon Is the Target of Small-Business Antitrust Campaign*, WALL ST. J. (Apr. 6, 2021, 8:17 AM), <https://www.wsj.com/articles/merchant-groups-target-amazon-in-new-political-campaign-11617701401> [perma.cc/M43E-V9QL] (“Competition policy and antitrust reform is the likeliest potential legislation affecting the tech sector that this Congress could pass, and yet I still think it’s below 50% odds . . . It’s a tall order for any advocates and groups to compel Congress to actually enact material changes to the statute.”).

203. See Borgogno & Colangelo, *supra* note 145, at 6 & n.14.

204. See *supra* Section II.A.2.

action requirement, which can be easily manipulated by technology platforms,<sup>205</sup> *Amex* would only apply to a set of clearly defined categories. This clarity is important, as it will reduce frivolous arguments by defendants like those in *Delta Dental* and the NCAA antitrust litigation.<sup>206</sup> This solution also addresses concerns about judicial expertise.<sup>207</sup> It would ensure that judges do not have to grapple with increasingly difficult economic questions related to complicated technology platforms. Instead, decisions about two-sidedness would shift to Congress, which has the ability to consult economic and technical experts throughout its deliberations. Since Congress and economists would do the difficult work of defining two-sidedness, this solution would relieve judges from their present obligations of finding the blurry line between strong and weak indirect network effects and applying the tenuous simultaneous-transaction requirement. Other countries have acknowledged these economic complexities by enacting laws tailored to regulating payment platforms.<sup>208</sup> It is time for the United States to follow suit.

### B. *Clarifying the Relationship Between One- and Two-Sided Markets*

Section III.A proposed a compromise solution to *Amex* that takes into account opposing economic views of two-sided markets. However, that solution only solves problems with *Amex*'s framework and does not address the issues that *Sabre* created. *Sabre* incorrectly extended *Amex*'s holding beyond vertical restraints and held that two-sided markets could not exist in the same relevant market as one-sided markets.<sup>209</sup> In effect, *Sabre*'s holding meant that two-sided technology platforms could only be successfully challenged by other two-sided platforms under antitrust law. This mistaken and dangerous holding has spurred the House Judiciary antitrust subcommittee to advocate for a legislative clarification that would ensure *Sabre* does not repeat itself in the lower courts.<sup>210</sup> This Section joins them in advocating for a legislative override of *Sabre* to supplement the compromise solution in Section III.A.

From the economic and legal perspectives alike, *Sabre*'s holding is utterly incoherent.<sup>211</sup> *Sabre* held that Farelogix and Sabre could not compete within

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

206. See *supra* Section II.A.2.

207. See, e.g., RANDY M. STUTZ, AM. ANTITRUST INST., WE'VE SEEN ENOUGH: IT IS TIME TO ABANDON AMEX AND START OVER ON TWO-SIDED MARKETS 5 (2020), <https://www.antitrustinstitute.org/wp-content/uploads/2020/04/Amex-Commentary-4.21.20-Final.pdf> [perma.cc/BS84-RYZP]; Khan, *supra* note 12, at 758–59, 765; JESSE LEIGH MANIFF & YING LEI TOH, FED. RSRV. BANK OF KAN. CITY, STILL ON TRIAL? THE COURT'S USE OF ECONOMIC ANALYSIS IN THE AMERICAN EXPRESS CASE (2020), <https://www.kansascityfed.org/documents/7582/psrb20manifftoh0401.pdf> [perma.cc/AS3G-2ERD].

208. Maniff & Toh, *supra* note 207.

209. See *supra* Section II.A.3.

210. See, e.g., ANTITRUST SUBCOMMITTEE REPORT, *supra* note 194, at 399.

211. See Steven C. Salop, *Dominant Digital Platforms: Is Antitrust Up to the Task?*, 130 YALE L.J.F. 563, 584–85 (2021) (“[T]his . . . defective approach . . . would lead to ludicrous results.”).

the same relevant market because Sabre was a two-sided platform and Farelogix was not.<sup>212</sup> The court based its holding on dicta from *Amex* that misinterpreted a single source—hardly representative of the economic literature at large.<sup>213</sup> Since antitrust law relies heavily on market definition,<sup>214</sup> the *Sabre* court's finding that Sabre and Farelogix were not participants in the same relevant market insulated their merger from antitrust oversight.<sup>215</sup> Michael Katz and Douglas Melamed have observed that *Sabre*'s holding "runs directly counter to the purpose of defining a relevant market, which is to identify the sources of competition faced by the firm under consideration."<sup>216</sup> Indeed, in *Sabre* itself, the court did not factor into its analysis that the parties considered themselves competitors.<sup>217</sup>

Not only is *Sabre* inconsistent with antitrust doctrine, but it also risks providing far too much protection for technology defendants.<sup>218</sup> For example, under *Sabre*, Uber could not possibly be in the same relevant market as taxi companies since taxi companies only operate on one side of the market and Uber is considered two-sided.<sup>219</sup> Similarly, under *Sabre*, Amazon Marketplace could not be in the same relevant market as traditional retailers like Target. Unlike Amazon Marketplace, which is two-sided because it facilitates transactions between third-party sellers and customers through its platform, Target is one-sided because it deals directly with customers. Since rule of reason analysis only considers harm to competitors that are in the same relevant market, *Sabre*'s rationale would prevent taxis from suing Uber, or Target from suing Amazon Marketplace, for anticompetitive conduct. Yet we intuitively recognize Uber and taxis, and Target and Amazon, as competitors. If other courts adopt *Sabre*'s confused reasoning, two-sided technology platforms may escape antitrust liability to their one-sided competitors.

Given *Sabre*'s implications for technology platforms, it must be overridden. This is best accomplished through legislation. Specifically, this Note calls for statutory language that explicitly asserts that multi-sided platforms can compete in the same relevant market as one-sided firms. This legislation is necessary because even though the Third Circuit later vacated *Sabre*, it did not reverse it.<sup>220</sup> So, while *Sabre* is not technically precedential, its reasoning has not been affirmatively rejected and thus provides defendants with a tempting blueprint to raise in other courts.<sup>221</sup>

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212. *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 136–37 (D. Del. 2020), *vacated as moot*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

213. *Id.* at 138; Ewalt, *supra* note 137.

214. *See supra* Section I.B.

215. *Sabre*, 452 F. Supp. 3d at 136–37.

216. Katz & Melamed, *supra* note 22, at 2102.

217. *Sabre*, 452 F. Supp. 3d at 117–18.

218. *See Hovenkamp Letter*, *supra* note 35, at 3–4.

219. *Id.* at 3 n.10.

220. *United States v. Sabre Corp.*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

221. *See Swisher & Boudreault*, *supra* note 19.

Further, clarifying that *Sabre* was decided incorrectly is best left to Congress rather than the courts. With the recent bipartisan support for antitrust reform and broad agreement regarding *Sabre*'s flaws, a legislative fix would likely be faster and clearer than going through the courts. Especially with the high burden that *Amex* places on plaintiffs,<sup>222</sup> awaiting judicial self-correction poses considerable risks. It would give more time for technology platforms to become even more dominant in our economy. Thus, a legislative clarification specifying that one-sided and two-sided markets can compete in the same relevant market, together with the compromise solution from Section III.A, will go a long way toward curbing *Amex*'s damage.

### C. *Legislative Solutions Are Consistent with the Intent of the Sherman Act*

This Note's proposed legislative solutions align with Sherman Act's intent because they would bring the law more in line with antitrust's original goals. Scholars may argue that legislative narrowing of *Amex* would take power away from the courts, in violation of Congress's intent when drafting the Sherman Act. It is true that, with its broad statutory language, the Act is widely viewed as a congressional delegation to the courts.<sup>223</sup> However, the Sherman Act was also intended to prevent monopolies from forming and to allow small businesses to compete in a fair market.<sup>224</sup>

Under the Chicago School, current antitrust law has strayed from both the language and the intent of the antitrust statutes.<sup>225</sup> Antitrust law has become far less interventionist than the drafters of the Sherman Act would have intended.<sup>226</sup> *Amex* is a prime example of this. Before *Amex*, the rule of reason already discouraged antitrust enforcement through a high upfront burden on plaintiffs.<sup>227</sup> *Amex* made that burden on plaintiffs even higher, furthering this trend towards non-interventionism.<sup>228</sup> In addition, *Amex* did not follow antitrust law's adherence to a cautious, fact-based, common law-like approach.<sup>229</sup> Instead, it "prescribed broad, new principles" based on controversial and evolving economic scholarship.<sup>230</sup> Thus, even if the Sherman Act was intended

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222. See *supra* Section II.A.2.

223. Crane, *supra* note 38, at 1205–06.

224. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 909 (2007) (Breyer, J., dissenting) ("The Sherman Act seeks to maintain a marketplace free of anticompetitive practices, in particular those enforced by agreement among private firms.").

225. Crane, *supra* note 38, at 1207.

226. *Id.* at 1212–13 ("[O]ver antitrust law's 130-year history, the courts have consistently deviated from text and purpose in a single direction—toward reading down the antitrust statutes in favor of business interests and against populist anti-bigness sentiment." (footnote omitted)).

227. See *supra* Section II.A.2.

228. See *supra* Section I.B.

229. Katz & Melamed, *supra* note 22, at 2085; see also Douglas Melamed, *The American Express Case: Back to the Future*, 18 COLO. TECH. L.J. 1, 18 (2020).

230. Katz & Melamed, *supra* note 22, at 2106.

as a broad delegation to courts, a legislative solution that remedies *Amex* would only serve antitrust law's original goals.

Further, Congress has previously intervened when courts strayed too far from its intent with antitrust laws. For example, Congress passed the McCarran-Ferguson Act in 1945 after the Supreme Court's *United States v. South-Eastern Underwriters Association* decision.<sup>231</sup> *South-Eastern Underwriters* held that the Commerce Clause permitted federal regulation for the insurance industry.<sup>232</sup> Since the insurance industry was subject to federal laws, it was also subject to the Sherman Act.<sup>233</sup> This decision "precipitated widespread controversy and dismay,"<sup>234</sup> leading to the passage of the McCarran-Ferguson Act. The Act exempted the insurance industry from the antitrust statutes, including the Sherman Act.<sup>235</sup>

Another example is the Sports Broadcasting Act of 1961, which Congress passed after a lower court held the NFL's attempt to pool the television broadcasting rights of its member teams illegal under the Sherman Act.<sup>236</sup> In response, Congress passed the Sports Broadcasting Act, which established an antitrust exemption for professional sports leagues.<sup>237</sup>

In sum, courts' interpretations of antitrust laws have departed from the Sherman Act's original goals. Historically, Congress has pushed back against court decisions with which it disagreed through new legislation. Thus, if Congress deems *Amex* to be in conflict with the goals of antitrust law, a legislative solution is appropriate.

#### CONCLUSION

As this Note's analysis of *Amex*'s progeny has demonstrated, *Amex*'s formulation is overbroad, prone to framing, and insufficiently based on current economic understanding. Inconsistent application of *Amex* by the lower courts opens the door for Big Tech to exploit lower courts' confusion to their advantage. Given antitrust law's limited power over Big Tech, *Amex*'s additional protections for technology companies must be curbed. This Note's two-part legislative solution promotes clarity and consistency in the courts and contributes to the broader effort to rein in Big Tech's growing power over our society.

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231. 322 U.S. 533 (1944); see Alan M. Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 85-88 (1983).

232. Anderson, *supra* note 231, at 84-85.

233. *Id.*

234. *Id.* at 85.

235. *Id.* at 88-89.

236. See *United States v. Nat'l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961), *superseded by statute*, Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732; see also Philip A. Garubo, Jr., Note and Comment, *The Last Legal Monopoly: The NFL and Its Television Contracts*, 4 ENT. & SPORTS L.J. 357, 374 (1987).

237. Garubo, *supra* note 236, at 358, 364.