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AmEx and Post-Cartesian Antitrust

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I. INTRODUCTION

The Supreme Court's 2018 opinion in *Ohio v. American Express Co.*[1] is among the most important—and divisive—antitrust opinions in the modern era of antitrust law. The simplest statement of Justice Thomas's opinion for the majority is that it saw a five Justice majority of the Court fully embrace the relatively new economic understanding of two-sided markets. Supporters of the majority opinion almost uni-

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

formly view it as an obviously correct application of important and generally accepted recent development in economic theory. Those more amenable to Justice Breyer's dissenting opinion do not necessarily reject the theory of two-sided markets, but instead would treat arguments premised on this theory as a pro-competitive justification (that is, a defense) to what could reasonably be understood as potentially anti-competitive conduct under prevailing antitrust economics.

The central argument of this Article is that both perspectives miss the forest for the trees. The Court's *American Express* opinion is not narrowly about whether (or how) antitrust law should embrace the theory of two-sided markets. Rather, I argue that this opinion is part of the Court's ongoing efforts to understand how antitrust law should evaluate markets that are not neatly "horizontal" or "vertical."

I call these efforts to understand competition in markets that are not clearly horizontal or vertical "post-Cartesian" antitrust, and describe these markets as "messy markets." At least at this moment in time, the broadest class of these markets are what are typically thought of as platforms. Some of the Court's post-Cartesian cases, however, do not involve what would ordinarily be thought of as platforms. Indeed, one of the defining characteristics of post-Cartesian antitrust is that these messy markets often defy simple classification.

Under this telling, antitrust law is currently undergoing a period of evolution comparable in importance to the period following the Court's embrace of Robert Bork's Antitrust Paradox and the consumer welfare standard in the 1970s. The adoption of the consumer welfare standard saw a rejection of the previously ascendant structure, conduct, performance (SCP) paradigm of market analysis as an overly simplistic model that did not describe many actual markets, and that was particularly inapposite to markets generally of interest to antitrust law.[2] The subsequent decade saw the development and adoption of a relatively robust framework for evaluating the competitive effects of conduct that eschewed market structure. It instead based itself upon consumer welfare analysis and constrained itself by market definition and error cost analysis.

While relatively robust, the tools and heuristics used by this framework have largely developed along the orthogonal axes of horizontal and vertical competition. These rules have served the market and American consumer exceptionally well for the past forty years. But the important antitrust cases today do not fit neatly into the mold

2. Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 311 (2019) (discussing the recognition by economists, courts, and government agencies that the SPC paradigm of market analysis lacks empirical support, and the subsequent adoption of approaches that recognize the limits of market structure information).

of either horizontal or vertical conduct. Perhaps this is because the certainty provided by clear antitrust law reduces the incidence of litigation or perhaps because the changing technologies of the marketplace have given rise to more complicated market structures—regardless the cause, simple horizontal or vertical market structures are not often the subject of antitrust litigation today. We see this in cases ranging from *Apple Inc. v. Pepper* (and the earlier Apple e-books litigation),[3] to the AT&T-Time Warner merger litigation, from *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[4] to *Federal Trade Commission v. Actavis, Inc.*,[5] and of course in *American Express*.[6] Indeed, the market structures in these cases are so different from horizontal and vertical markets that the tools developed for analysis of horizontal and vertical markets are as inapposite to them as SCP methodologies are to markets for differentiated products, markets characterized by rapid innovation, entry, or network effect, and high fixed costs. In other words, in light of the messy markets that dominate contemporary antitrust litigation, the established horizontal/vertical competition paradigm is the modern equivalent of SCP, which are too structurally simplistic and too reliant on simple heuristics to be relevant to messy markets.

Antitrust law is currently struggling to address competition concerns that may arise in messy markets. This is a good thing: we generally expect litigation to arise in areas least settled by existing law, and that over time this litigation will clarify that law. Although this author believes that the Court generally, and in *American Express* in particular, is charting a good path through these markets, it is nonetheless reasonable to acknowledge that it is possible that antitrust law may not be up to the challenge of addressing competitive concerns in all messy markets. To the extent that is the case, the appropriate response is to consider market-specific regulations to address concerns that may arise. This contrasts with proposals that would distort existing antitrust law, which has been overwhelmingly effective in addressing concerns in horizontal and vertical markets, to chase after the edge conditions that may arise in certain messy markets.

This Article proceeds in three Parts. Part II provides a brief overview of the *American Express* opinion and situates it in recent antitrust case law, arguing that most recent high-profile antitrust litigation involves messy, post-Cartesian markets. Part III looks at how competition occurs in these markets, and demonstrates how prop-

3. Pepper v. Apple Inc., (*In re* Apple iPhone Antitrust Litig.), 846 F.3d 313 (9th Cir. 2017), *cert. granted sub nom.* Apple Inc. v. Pepper, 138 S. Ct. 2647 (2018), *aff'd sub. nom.* Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).
4. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
5. Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136 (2013).
6. *AmEx*, 138 S. Ct. 2274 (2018).

erly understanding the competitive dynamics of these markets can help to avoid both false positive *and* false negatives. Part IV turns back to the *American Express* opinion to argue not only that it was correct on its own terms but that it was the necessary outcome for antitrust law to continue to develop and be relevant to modern markets.

II. SITUATING *AMERICAN EXPRESS*

This Part provides a brief overview of the *American Express* opinion and situates it in recent antitrust case law, arguing that most recent high-profile antitrust litigation involves messy, post-Cartesian markets.

A. Different Sides of the *American Express* Opinion

The majority's opinion in *American Express* clearly understands itself as being about the treatment of two-sided markets in antitrust law. It devotes significant effort to explaining the theory of two-sided markets and explaining that the credit card business is such a market.[7] The Court flatly rejects petitioners' case on the ground that it is staked entirely on the effects on a single side of this market.[8] Using the logic of two-sided markets, the Court rejects every effort petitioners make to directly demonstrate anti-competitive effects.[9] The Court clearly accepted respondent's characterization of the question presented by the case: that in two-sided markets the demonstration of seemingly anti-competitive effects on one side of a two-sided market is insufficient to make out a prima facie case under the rule of reason.[10]

Yet for all the discussion of two-sided markets—leading up to the case, in the Court's opinion, and in subsequent analysis and discussion of the opinion—the two-sidedness of the market is surprisingly irrelevant to the Court's analysis. Rather, the deciding factor in the case was that the market in question is subject to substantial indirect network effects (which were excluded by the district court decision and plaintiffs' arguments). The Court also went to lengths to note that the credit card market is a specific type of two-sided market (a "transaction platform") such that the Court's conclusions in the *American Express* opinion may not apply to other types of two-sided markets.[11] In other words, the Court's analysis applies both more broadly and narrowly than just to two-sided markets.

7. *Id.* at 2280–82, 2285–87.
8. *Id.* at 2287.
9. *Id.* at 2287–90.
10. *Id.* at 2285–86.
11. *Id.*

1. Two-Sided Markets

It is hard to imagine that anyone reading this Article is not familiar with the economic theory of two-sided markets. Some definition of the concept is nonetheless necessary. The concept of two-sided markets is still relatively new in the economics literature. It is perhaps most closely associated with Rochet & Tirole's 2003 article *Platform Competition in Two-Sided Markets*—work that contributed in significant part to Tirole receiving the 2014 Nobel prize in economics.[12]

The general idea of a two-sided market it is made up of one or more firms (frequently referred to as platforms) that coordinate interactions between two or more distinct but related groups of consumers. The concept is readily explained by examples. Newspapers and other advertising-supported media are a classic example. Newspaper publishers sell their product to both readers and advertisers. Readers buy newspapers from the publisher; advertisers buy space in the papers from the publisher. The readers benefit from the advertisers because ads subsidize the cost of the newspaper, while advertisers benefit from the readers because they are the target audience for the ads. As another example, mobile phone operating systems (and, for that matter, any computer operating system) are platforms that bring computer users and application developers together. Programmers choose to write applications for specific operating systems based in part on how many users that operating system has, and users choose devices based in part on the applications available for the platform.

This brief description leads to a few important observations. First, one of the most important functions of platforms in two-sided markets is to balance the usage of the platform by both sides of the market. A newspaper with too many ads is undesirable for readers; one with too few may be too expensive for its readers. An operating system with no users will not attract application developers; an operating system with too few applications will not attract users. Based on these dynamics, platforms often face chicken-and-egg problems and challenges of unraveling. It can be difficult to start a new platform because neither side will want to join until the other is already there. Likewise, an established platform that miscalibrates the balance between sides can quickly unravel (consider a newspaper that loses a few anchor advertisers, which forces an increase in subscription prices, reducing readership, and making the platform less attractive to advertisers).

Prices are the most important tool that platforms use to manage the balance in usage between sides. Very often these prices take the form of subsidies. Many newspapers and other ad-supported media are given away to users for free. Some operating system platforms dis-

12. *See generally* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003).

tribute their programming tools to developers for free or may even offer training. In other cases, the platform may impose higher costs on developers to ensure a better experience for its users.

Credit card markets are one of the classic examples of a two-sided market.[13] The basic story of credit cards as a two-sided market is that in order for consumers to adopt a credit card, there must be a sufficient number of merchants accepting that card and, conversely, in order for merchants to accept a card there must be a sufficient number of users using that card. Credit card providers, therefore, face a chicken-and-egg problem: the need to attract a sufficient number of users on one side of the market in order to develop users on the other side of the market. As in most two-sided markets, this has generally been done by cross-subsidizing one side of the market from the other side. In the case of the credit card industry, credit card processors have generally charged merchants a relatively (to marginal cost) high transaction fee, which they use to subsidize the cost of credit offered to consumers (e.g., through rewards and no-fee cards).

2. *The* American Express *Opinion*

The dispute in *American Express* arises out of the mandatory "anti-steering" provision in American Express's agreement for merchants joining its network.[14] This provision prohibits merchants from suggesting to customers that they pay with a card other than an American Express card (that is, from "steering" customers to another payment option). American Express generally charges merchants among the highest transaction fees when processing payments (approximately 2.5%–3.54% of the transaction amount, as opposed, for instance, to the 1.5%–2.5% fee charged by Visa and MasterCard networks).[15]

The plaintiffs in the *American Express* litigation argue that this anti-steering provision amounts to a price restraint that increases prices charged by merchants to consumers and therefore necessarily harms consumers who are required to pay a higher price than they would pay if merchants could encourage them to pay with a different card.[16] Both plaintiffs and the district court argue this as a matter of economic theory and that it is supported by direct evidence of consumers paying higher prices and therefore experiencing economic harm.[17]

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13. Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 660–61 (2006).
14. *AmEx*, 138 S. Ct. at 2283.
15. Liz Smith, *Why Isn't American Express Accepted at More Places?*, SMARTASSET (June 27, 2018), https://smartasset.com/credit-cards/american-express-not-accepted [https://perma.unl.edu/ZC6S-2YWN].
16. *AmEx*, 138 S. Ct. at 2288.
17. *Id.* at 2283.

In particular, the district court and dissenting opinion argue that the anti-steering provision interferes with the ordinary functioning of the price-setting mechanism.[18] The district court and dissenting opinion rely heavily on the facts that this provision hampered Discover's ability to enter the credit card market by offering merchants lower transaction fees and that American Express increased its transaction fees twenty times over a five-year period without appreciable loss of market share.[19]

Importantly, the theory of two-sided markets is not dispositive as to whether the anti-steering provision is anti-competitive. Rather, it explains the dynamics of two-sided markets and makes clear that provisions such as the anti-steering provision may serve pro-competitive purposes. This frames the core issue in the *American Express* case, including the central disagreement between the majority and dissenting opinions: whether under the "rule of reason" the burden is on the plaintiff, ab initio, to demonstrate anti-competitive harm taking into account all relevant sides of a given market, or whether the plaintiff's initial burden can be met by demonstrating conduct that would be anti-competitive in a single side of a market but two-sided dynamics can then be used by the defendant to demonstrate offsetting pro-competitive rationale for the conduct.[20]

While this dispute was framed in terms of whether consideration of two-sided dynamics belongs in the prima facie case of anti-competitive effects or in the rebutting defense of procompetitive justifications under the rule of reason, the reality is that this was just an argument on which to hang the sides' respective views about competition in the credit card industry—and, more generally, the risk tolerance of each side for error. Under the majority's view, and for reasons discussed in Part III, the credit card industry is robustly competitive, which necessarily gives lie to any argument that its structure and practices should be deemed anti-competitive at all, let alone be relegated to a justification defense. Under the dissent's view, firms should not receive the benefit of the doubt: practices that have even a superficial appearance of anticompetitive effect should bear a stiff burden of demonstrating convincingly that such conduct is justified.

This difference is seen in the language that the majority and dissenting opinions use to describe the stages of the rule of reason analysis. The majority requires a plaintiff to demonstrate "a substantial

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18. *Id.* at 2294 (Breyer, J., dissenting).
19. *Id.* at 2293–94.
20. Phillip E. Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law § 15.02[B] (4th ed. 2017) (discussing the standard three-step approach to rule of reason analysis); *see also* Michael Carrier, *The Four-Step Rule of Reason*, 33 Antitrust 50 (2019) (discussing the standard rule of reason and arguing that it in practice comprises four steps).

anticompetitive effect that harms consumers," whereas Justice Breyer's dissent only requires showing conduct that "has had, or is likely to have, anticompetitive effects."[21] In describing the second stage, where a defendant rebuts such anti-competitive effects by showing a pro-competitive justification, the majority says that the defendant need only demonstrate a "procompetitive rationale," whereas Justice Breyer characterizes this stage as requiring demonstrating "that the restraint in fact serves a legitimate objective."[22]

Error costs are a central tenet of contemporary antitrust law. First given name in the antitrust canon by Judge Easterbrook, the decision-theoretic error costs framework has been central to the Roberts Court's antitrust jurisprudence.[23] The one-sentence explanation of this framework is that because the market can correct judicial failures to correct anti-competitive conduct (enforcement false negatives), but harm to markets resulting from judicial decisions to intervene in markets where intervention is unwarranted can only be remedied by legislation or subsequent litigation (enforcement false positives), courts should err on the side of non-intervention except where intervention is clearly warranted. The majority opinion in *American Express* clearly follows this model; Justice Breyer's dissent, on the other hand, reverses these burdens, erring in favor of enforcement and placing a stiff burden on defendants to prove that enforcement is unwarranted.

B. The Real Issue Is Messy, Not Two-Sided, Markets

Much of the discussion following the *American Express* opinion has focused on what it means for future litigants and, in particular, how cases involving (potentially) two-sided markets should be pled.[24]

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21. *AmEx*, 138 S. Ct. at 2284, 2291 (Breyer, J., dissenting). The comparison between these competing passages of the majority and dissenting opinions was first brought to my attention in Andrew I. Gavil & Jordan L. Ludwig, *The Many Sides of* Ohio v. American Express Co., 33 ANTITRUST 8 (2018), though that piece does not recognize the relevance of these differences to the error costs discussion.

22. *AmEx*, 138 S. Ct. at 2284, 2291 (Breyer, J., dissenting) (quoting AREEDA & HOVENKAMP, *supra* note 20, at 415).

23. Joseph Scott Miller, *Error Costs & IP Law*, 2014 U. ILL. L. REV. 175, 199 (2014); Thomas Lambert & Alden Abbott, *Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies*, 11 J. COMPETITION L. & ECON. 791 (2015).

24. Hal Singer, Ohio v. American Express*: Do Monopoly Platforms Deserve Special Treatment Under Antitrust?*, FORBES (Feb. 27, 2018), https://www.forbes.com/sites/washingtonbytes/2018/02/27/do-monopoly-platforms-deserve-special-treatment-under-antitrust-review-of-ohio-v-american-express/#3f4b4ec65b1d [https://perma.unl.edu/3MYA-AXRC]; Greg Stohr & David McLaughlin, American Express *Case Could Shield Tech Giants from Antitrust Scrutiny*, BLOOMBERG (June 25, 2018), https://www.bloomberg.com/news/articles/2018-06-25/u-s-supreme-court-backs-american-express-on-credit-card-suit-jiucffg9 [https://perma.unl.edu/4GZZ-YTBN].

Randy Picker, for instance, has asked whether plaintiffs now need to identify whether a given market is horizontal, vertical, or two-sided.[25] Many writers, generally those falling into what in contemporary parlance is referred to as the "hipster" school of antitrust, have expressed concern that *American Express* establishes an impossible burden of pleading.[26] Others express concern that the Court's analysis excludes two-sided markets that are not "transactional," such that the plaintiff's pleading burden is not only to demonstrate harm under a two-sided analysis (or that a market is not two-sided), but must differentiate between markets that are relevantly two-sided.[27]

This is all a great big mess. This mess results from the framing of the *American Express* case as being squarely about two-sided markets. The *American Express* case is better understood in terms of the Court's ongoing efforts to address markets that do not fall neatly into the standard horizontal/vertical dichotomy—that is, messy markets. In this light, there are two the relevant takeaways from this case. First, and narrowly, plaintiffs need to account for relatively strong indirect network effects when alleging anti-competitive conduct.[28] And, and more importantly, is that plaintiffs bear the burden of accounting fully for the dynamics of novel or messy market structures.

This conclusion is not surprising (its correctness will be addressed in Parts III and IV), as it is the basic approach that antitrust law has taken in complex cases. The best two examples of this are the Court's opinions in *Actavis* and *Leegin*.[29] Both of these cases involved conduct that could be interpreted as price fixing in violation of Section 1 of the Sherman Act—conduct that is presumptively illegal and subject to *per se* condemnation under the Sherman Act.[30] In both cases, however, the Court found that the alleged conduct needed to be reviewed under

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25. Washington Bytes, *Will the Supreme Court's Amex Decision Shield Dominant Tech Platforms from Antitrust Scrutiny?*, FORBES (July 18, 2018), https://www.forbes.com/sites/washingtonbytes/2018/07/18/antitrust-enforcement-of-dominant-tech-platforms-in-the-post-american-express-world/#56541ea92f76 [https://perma.unl.edu/6C7S-N6NC].
26. A concern that is taken up, if briefly, and rejected below.
27. Jonathan Jacobson & Daniel Weick, *U.S. Supreme Court Tackles Two-Sided Markets:* Ohio v. American Express, JD SUPRA (June 27, 2018), https://www.jdsupra.com/legalnews/u-s-supreme-court-tackles-two-sided-75198/ [https://perma.unl.edu/9KSJ-QMNB].
28. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018) ("Most relevant here, two-sided platforms often exhibit what economists call 'indirect network effects.'"); *Id.* at 2286 ("A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor.").
29. Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136 (2013); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
30. *Actavis*, 570 U.S. at 147–48; *Leegin*, 551 U.S. at 887.

the more permissive rule of reason, requiring that reviewing courts consider pro-competitive justifications proffered by defendants.[31]

Both cases present interesting industry structures that are more complicated than traditional horizontal or vertical markets. *Leegin* involves the practice of resale price maintenance (RPM), where manufacturers prohibit retailers who sell their products from pricing them below a specified minimum price.[32] This has the hallmarks of price fixing and—as with the concerns animating the dissent in *American Express*—seems to interfere with the basic operation of the price mechanism. The *Leegin* court, however, accepted longstanding economic theory that explains that this sort of price restraint can in fact facilitate (or even be necessary for) non-price competition.[33]

From the present perspective, the more interesting aspect of *Leegin* is that it involved what may be called indirect competition. Leegin competes with other firms in the market for leather apparel and attempts to differentiate itself from its competitors by offering both higher quality products and service to consumers.[34] Their higher-end identity requires that the company be able to ensure its retail partners provide high quality customer service. Leegin therefore is competing for customers indirectly through its retailers, and its control over those retailers affects consumer demand for its products. This is not a two-sided market, but it is characterized by somewhat similar dynamics in which a firm needs to coordinate the conduct of one part of the market in order to attract the business of another part of the market.

Similarly, in *Actavis* the Court (with Justice Breyer writing for the majority) held that reverse-payment settlements, in which patent owners payed firms authorized under patent law to bring a competing drug to market, are to be evaluated under the rule of reason.[35] This result is surprising because a monopolist paying a competitor to stay out of the market is about as naked a restraint of trade as one can imagine. The Court still recognized that these markets, intermediated as they are by an exceptionally complicated area of patent law, are exceptionally messy.[36]

We see similar dynamics in other contemporary high-profile antitrust cases. The recent *Apple Inc. v. Pepper* opinion, for instance, involves the application of the indirect purchaser rule to the Apple App

31. *Actavis*, 570 U.S. at 148–49; *Leegin*, 551 U.S. at 899.

32. *Leegin*, 551 U.S. at 883–84.

33. *Id.* at 889–92.

34. *Id.* at 882–84.

35. *Actavis*, 570 U.S. at 147–48.

36. *Id.* at 159–60, 176–77 (Roberts, C.J., dissenting) (arguing that the pervasive patent law backdrop in these markets should displace antitrust law entirely).

Store, which is another example of a classic two-sided market.[37] Although *Pepper* was not framed in terms of two-sided markets, the Court's discussion of the role of direct vs. indirect relationships between buyers and sellers has echoes of the complexities of analyzing competitive effects multi-sided markets.[38] The D.C. Circuit review of the District Court for the District of Columbia's rejection of the Department of Justice's efforts to block AT&T's acquisition of Time Warner is another case that involves a messy market. The Department of Justice litigated that case before the District Court as a straightforward challenge to a vertical merger in a single, clearly-defined market (multichannel video distribution).[39] But AT&T and Time Warner (the merging firms) successfully defended against the Department of Justice's claim, framing the plaintiff's case as failing to appreciate the changing dynamics of that market.[40] AT&T framed the merger as ensuring AT&T access to content necessary for it to successfully compete in this rapidly changing market.[41] In this new market environment, the merged company is not just competing with firms in the multichannel video distribution market—they are competing with myriad firms in the online video distribution market, both as AT&T becomes one such firm and those firms attempt to compete against AT&T.

Perhaps most telling, if we look at many of the biggest—and to this day most controversial—antitrust cases in history, we find a series of cases that are more complicated than antitrust economics' traditional characterization of markets as horizontal or vertical. *Microsoft*, the break-up of AT&T, *IBM*—these all involve businesses simultaneously participating in multiple markets, each attempting to structure their business in certain segments in order to more effectively compete in

37. Apple Inc. v. Pepper, No. 17-204, 2019 WL 2078087 (U.S. May 13, 2019).

38. *Id*., Slip Op. at 6 (discussing iPhone users purchasing apps produced by developers and distributed through the App Store not as part of a vertical supply distribution, but as instead directly purchasing apps from Apple). *See also* Geoffrey A. Manne & Kristian Stout, *The Evolution of Antitrust Doctrine After* Ohio v. Amex *and the* Apple v. Pepper *Decision that Should Have Been*, 98 NEB. L. REV. 425 (2019) (discussing the structure of the iPhone and App Store market).

39. United States v. AT&T Inc., 310 F. Supp.3d 161, 243 (D.D.C. 2018).

40. *Id.* at 244–45. *See also id.* at 163 ("If there ever were an antitrust case where the parties had a dramatically different assessment of the current state of the relevant market and a fundamentally different vision of its future development, this is the one.").

41. *Id.* at 181–82 ("defendants view the proposed merger as an essential response to . . . the increasing importance of web- and mobile-based content offerings; the explosion in targeted, digital advertising; and the limitations attendant with AT&T's and Time Warner's respective business models. . . . By acquiring Time Warner, AT&T executives testified, the company will immediately gain access to high-quality content and an extensive advertising inventory.").

others. Each of these firms could be characterized as what today we call a platform.[42]

C. The Many Messes of Modern Markets

The preceding discussion suggests both that *American Express* is part of an increasing number of cases struggling with messy markets and also that many of the most important cases in the canon of antitrust law are predecessors to this struggle. This raises a pair of related questions about antitrust law. First, if many of the defining cases of the field relate to the problem of messy markets, to what extent are messy markets a central focus of antitrust law? And second, if these challenges are demanding increased antitrust attention, is there a reason for this increase?

To the first question, I would argue that the incidence of major antitrust cases demonstrates that these cases are *not* a central focus of antitrust law. At the same time, I would also argue that these cases demonstrate that antitrust law has proven exceptionally good at addressing its core focus of preserving competition in simpler horizontal and vertical markets. The simplest explanation for this view is to cite the Priest-Klein hypothesis.[43] Whether putatively anti-competitive conduct is actually anti-competitive is sufficiently clear in most cases that either no litigation is ever brought or the parties to the litigation settle.[44] The only cases, therefore, that are litigated are those where the outcome is unclear. This resolves most cases involving horizontal or vertical conduct, leaving cases involving messy markets as a predominant source of high-profile antitrust litigation.

It is unclear whether antitrust law will ever delineate a clear set of antitrust rules for messy markets. It could be that these messy market cases are sufficiently complex that a coherent set of predictable antitrust rules will not emerge. But it also could be that these cases will remain rare enough and the rule of reason framework will prove sufficiently flexible to address the concerns that arise in these cases through litigation of sequential claims, each of which proves over time to be *sui generis*. It is also possible that the courts could effectively push these cases out of the antitrust litigation path—and, surely, the many commentators today who lament the death of antitrust would say that this is well on the way to happening. On the other hand, it is possible that the courts will develop a coherent set of heuristics and

42. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

43. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Yoon-Ho Alex Lee & Daniel Klerman, *The Priest-Klein Hypotheses: Proofs, Generality and Extensions*, 48 INT'L REV. L. & ECON. 59 (2016).

44. George Stephanov Georgiev, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, 2007 UTAH L. REV. 971, 1007 (2007) (Indicating that about 97% of all potential antitrust litigations are settled).

inferences that ultimately provide some level of certainty for understanding the likely outcomes in these cases.[45]

Regardless, it would be ill-advised to dramatically overhaul antitrust law in order to more dispositively address these cases. Antitrust law has proven remarkably effective at addressing the overwhelming majority of competition issues that arise in our economy. It is the crown jewel of our industrial policy, and the Magna Carta of our free enterprise system. We should be cautious about dramatically changing it in the interest of pursuing certainty in the cases that arise at the margin of current doctrine.

At the same time, there is some intuitive feeling that these cases are more frequent—and thus that the evolution of doctrine to respond to them is exigent, not just important. Without doubt, "platform" industries, which very often present messy markets, have come to dominate our economy: Facebook, Apple, Amazon, Netflix, and Google—the five companies collectively referred to as FAANG—are all examples of firms that engage in myriad forms of indirect competition across different market segments, structuring their business in each individual segment to maximize their average revenue across all segments.

More generally, ever since Ronald Coase told us that transaction costs impose a lower limit on the size of a firm, economists have puzzled over what puts an upper limit on the size of a firm.[46] One curious hypothesis about the current moment in our economy is that the same information and communications technologies created by AT&T and IBM in the early twentieth century and Apple and Microsoft in the late twentieth century have dramatically increased the maximum efficient size of firms outside of the traditional technology sectors. Thus, we have Amazon taking the retail market by the storm of scale, and Netflix doing the same in the video entertainment market (and firms like AT&T's current incarnation struggling to redefine itself).

To the extent that either of these perspectives is correct—that platform-based industries are increasingly important to the US economy or that information and communications technology has dramatically increased the maximum efficient size of firms in industries across the economy to the point that many industries are now predisposed to oligopolistic structures—one may fairly concede that some form of regulation may be necessary (even if only as a tax on these industries to assuage the consumer of ill-founded concerns on monopoly abuses). But such regulation should not be built on the back of, and at the expense of, existing antitrust law.

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45. *See infra* notes 60–61 (discussing the inferences that lower courts have developed following the Supreme Court's *Actavis* opinion).

46. Per L. Bylund, *The Firm vs. the Market: The Transaction Cost Theories of Coase and Williamson Dehomogenized*, 2015 ACAD. MGMT. PROC. 12853 (arguing the cost of governance as the upper limit).

III. COMPETITION IN MESSY MARKETS

This Part asks why messy markets pose such a challenge for the Court and for antitrust law. It starts by discussing how competition is "supposed to work"—that is, models of competition in horizontal and vertical markets. Complexity is added to this discussion when looking at some (but certainly not all) of the ways that competition is different in messy markets. Frequently, these messier forms of competition may superficially seem anti-competitive. The discussion in this Part ends by exploring how seemingly anti-competitive conduct in these markets can, in fact, be pro-competitive.

A. Simple Competition in Simple Markets

Antitrust law is generally concerned with the horizontal or vertical relationships between firms. Firms in a horizontal relationship are direct competitors with one another, selling products that are generally identified by consumers as similar enough to be substitutes for one another. Coke and Pepsi are horizontal competitors—for most consumers they are substantially similar and would be accepted as rough substitutes for each other. Firms in a vertical relationship are generally part of a supply chain of complementary products and services. Raw ore is an input into the aluminum refining industry that produces sheets of aluminum that are, in turn, an input into the can production industry that produces cans that are, in turn, an input into the soft drink industry.

Horizontal and vertical relationships are of interest to antitrust law because in well-functioning, competitive markets, the horizontal and vertical interactions between firms tend to benefit consumers—and, conversely, a disruption of such interactions can harm consumers. Because the Coca-Cola Company knows that consumers view Pepsi as a rough substitute for Coke, the company knows that if it wants to make money it needs to offer consumers either a lower cost or higher quality product. And Pepsi knows the same. So both Coca-Cola and Pepsi are constantly trying to improve the quality or lower the prices of their respective products. The defining concern of antitrust law is that horizontal competitors like Coke and Pepsi will collude, agreeing not to compete so that they can raise their prices (or lower their quality), which will allow them to increase their profits by harming consumers.

Competition in vertical markets is more complicated but similarly canonical—and ultimately reduces to horizontal competition. Firms at each stage in a vertical supply chain face horizontal competition from other firms at that same stage, so they are constantly working to lower their costs or improve their quality. The additional consideration in the vertical context is that a firm may be able to hurt its hori-

zontal competitors by affecting the supply chain. For instance, if Coca-Cola were able to buy up all of the aluminum ore (or just the lowest-cost ore), or to enter an exclusive deal for refined aluminum from the largest refiners, it may be able to increase Pepsi's production costs.[47] This leads to concerns that firms will compete with their horizontal rivals by trying to increase those rivals' costs or reducing their quality (e.g., by forcing them to use lower-quality materials for cans). Unlike competition that lowers costs or increases quality, this approach to competition would harm consumers instead of benefiting them.

The vast majority of firms are in neither a horizontal nor a vertical relationship with one another. Coca-Cola and Ford, for instance, do not compete with one another. Because what happens in one of these firms has exceptionally little (if any) impact on the other, antitrust law does not touch the agreements between them. This would even be true if, for instance, Coca-Cola entered into a deal with Ford to paint new Ford trucks "Coca-Cola Red" at the same time that Pepsi entered into a deal with Toyota to put pictures of Toyota cars on its cans.

B. More Complex Competition in Messier Markets

While antitrust law is largely focused on horizontal and vertical markets, the reality is that the relationship between most firms is not clearly either horizontal or vertical. And, similarly, most contemporary precedential antitrust litigation does not fall squarely into either camp.[48] Indeed, there is some measure of irony in the extent to which contemporary antitrust analysis is driven by the structure of firms within the market, given the extent to which it developed in response to the failures of the earlier SCP model. Contemporary antitrust law outperforms the SCP model along nearly every dimension—but it is nonetheless built upon structural presumptions that do not capture the realities of most markets.

Most markets are messier than simple characterizations of horizontal and vertical competition allow, and the modalities of competition in them are similarly messier. To take but one example, most "horizontal" competition involves differentiated and even monopolistic markets. There are significant differences between the cars that Ford and Toyota and Porsche and Tesla sell, from price to quality to suitability to different tasks. At some level, an F150 pickup truck is a com-

47. For a discussion of the economic theory of raising rival costs, see Steven C. Salop & David T. Scheffman, *Raising Rivals Costs: Recent Advances in the Theory of Industrial Structure*, 73 AM. ECON. REV. 267 (1983).

48. Importantly, this could be either because cases involving such firms are more likely to present complicated antitrust issues that can only be resolved through litigation or because the antitrust rules governing firms more clearly in horizontal or vertical relationships are sufficiently clear that litigation is unlikely to result.

petitor to a Tesla. At the same time, they are in many ways not competitors at all. This is a standard form of competition—one often called (contradictorily enough) monopolistic competition. Rather than competing to offer the best or cheapest of near-perfect substitutes, firms compete by offering the only of a unique offering within a class of products. At each point along the continuum between a pickup truck, an SUV, a hatchback, a coupe, a Prius, and a Tesla, we find competitive substitutes; at each point we also find "best-in-class" products that are clearly superior to the offerings from competitors. Despite the pickup and Tesla being only one or two consumers away from being direct competitors, few consumers would seriously consider them even the same product. Are Ford and Tesla competitors?

One can go through myriad iterations of this question. Are soy milk and cow milk (also known as "milk") competitors? Are satellite radio and terrestrial radio competitors? What about AM and FM radio? Does Netflix compete with HBO? I can even think of one consumer (me) who would say that Coke and beer are closer competitors than Coke and Pepsi.

And, in many markets, competition is even more complicated—and, critically, this comes with the challenge that it is also more complicated to understand. This calls to mind Ronald Coase's famous quip that "if an economist finds something—a business practice of one sort or other—that he does not understand, he looks for a monopoly explanation."[49] For instance, firms regularly increase revenues through price discrimination—that is, by charging consumers who they identify as willing to pay more for their products more than they charge others. Price discrimination has an icky feeling, and a terrible name. But the reality is that by charging *more* to customers that are willing to pay more (knowingly or not), a firm is able to charge *less* to customers who are unable to pay more. For example, by charging exceptionally high prices (that cover both fixed and variable costs of operating an airplane) to business class customers, airlines are able to charge economy class customers lower fares (that only cover their operating costs). Similarly, because it can be more costly to offer service to multiple categories of customers (e.g., professional and amateur), firms can reduce their costs by imposing costs one group of consumers as part of focusing on another group, which allows them to offer a better or lower cost service to that other group. Intuitively, that may suggest that the first group is harmed—but this creates opportunities for other firms to cater to that other group.[50]

49. R.H. Coase, *Industrial Organization: A Proposal for Research*, *in* 3 POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59, 67 (Victor R. Fuchs ed., National Bureau of Economic Research, Cambridge, MA, 1972).

50. Note that with this strategy we have effectively recreated product differentiation! Some consumers may find it objectionable that Tesla does not sell a battery-pow-

Another example of such messy competition is firms competing to achieve efficient scale. Many industries are characterized by high initial costs to get into a market, followed by decreasing average costs as those initial fixed costs are amortized across a growing customer base. It may cost $10,000 to buy a commercial pizza oven, but that oven may be able to cook 200 pizzas a night. In markets like these firms may compete to increase scale even more than they compete on more traditional quality or price metrics. And, indeed, in such markets it may be preferable for consumers to have fewer than more firms competing, because ultimately it's the consumers who will be paying for those pizza ovens.

This leads to a last example that complexifies the competition in vertical markets. Antitrust law typically treats vertically-related firms as complementary, not as substitutes—and therefore not as competitors. But every firm faces a make-or-buy choice with its suppliers. A firm like Coca-Cola, which depends significantly on aluminum cans for its business, can either contract with a can manufacturer or it can produce its own cans. This means that every firm is a potential competitor to the firms that it buys from or sells to. As with the continuum of competition between Ford and Tesla, it is unlikely that Coca-Cola would get into the aluminum mining business—but there is potential competition across any given margin of the aluminum can supply chain.

This is not an exhaustive set of examples by any means. Such a list, in fact, would be contradictory to the purpose of this discussion. Competition in most markets is more complicated than is captured by the models of conduct in simple horizontal or vertical markets. In most markets, seemingly anti-competitive conduct actually results from, and is necessary to, how firms compete, and this competition is ultimately beneficial to consumers. Conversely, there are times in which seemingly competitive conduct disrupts competitive structures and is ultimately harmful to consumers. No one ever said that antitrust is easy—and anyone who thinks it is easy is probably doing it wrong.

C. *American Express*: The Competition Is in the Pudding

American Express is, unsurprisingly, an example of the messy and counter-intuitive competition described above. On its face, American Express's anti-steering requirement seems like a clear agreement in restraint of trade: it is an agreement that prohibits merchants from

ered pickup truck. But if Tesla were to try to do that, they would probably end up offering both low quality trucks and lower quality cars (compared to their current offerings), leaving few people better off and many worse off.

steering consumers to competitive alternatives that cost both consumers and the merchants themselves less.

It does not take much, however, to see that there are potential pro-competitive and pro-consumer justifications for American Express's anti-steering requirements. As an initial matter, American Express only has about a 22% share of the credit card processing market—it has nowhere near significant market share, especially compared to Visa (which has more than 50% market share).[51] This lack of market power tells us a few things. First, both merchants and consumers have alternatives to using American Express. Few consumers have only an American Express card, and almost no merchants accept only American Express. If American Express were not creating value for both merchants and consumers, they would not be able to maintain even their current market share.

Rather, American Express has competed for consumers by offering higher-value rewards to their customers. As with Ford and Tesla, American Express offers a differentiated product, targeting higher-income consumers by offering them higher-value rewards. Indeed, while this has long been American Express's strategy, in recent years Visa and MasterCard have also attempted to attract the same customers, with the result being significant competition between the three companies.[52] One need only look at the business news coverage of the credit card industry over the past decade to see how much competition there is for consumers.

To see the nature of competition on the merchant side of the market, one need only ask why merchants would bother accepting American Express cards at all. After all, most consumers that have American Express cards have other cards as well, and all merchants know that they pay higher fees to accept American Express credit cards. The answer is simply that accepting American Express cards is valuable to merchants. For instance, by advertising that one accepts American Express, one is advertising to American Express cardholders, who are generally understood to be higher-income consumers. One could spend that same money purchasing advertising or moving

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51. *AmEx is Likely to Become the Second Largest U.S. Card Processing Company this Year*, FORBES (May 29, 2018), https://www.forbes.com/sites/greatspeculations/2018/05/29/amex-is-likely-to-become-the-second-largest-u-s-card-processing-company-this-year/#2cf2d3264fa0 [https://perma.unl.edu/5YVX-BSPQ].

52. Robert Harrow, *Consumers Win Big as Banks Compete on Credit Cards*, FORBES (Apr. 7, 2016), https://www.forbes.com/sites/robertharrow/2016/04/07/consumers-win-big-as-banks-compete-on-credit-cards/#2a9bb3714412 [https://perma.unl.edu/4HY3-W4B4]; AnnaMaria Andriotis & Emily Glazer, *Rewards Credit Cards Gained a Fanatic Following—Now Banks Are Pulling Back*, WALL ST. J. (Jan. 1, 2019), https://www.wsj.com/articles/rewards-credit-cards-gained-a-fanatic-followingnow-banks-are-pulling-back-11546365926 [https://perma.unl.edu/MFD9-SVNC].

to a higher-cost retail district. The choice to pay higher merchant fees is part of a merchant's decision about how to maximize new revenue. Similarly, indicating that one accepts American Express is an indicator to consumers that a merchant is profitable and therefore more likely a high-quality merchant. Just as some merchants hire more knowledgeable (and most costly employees), the ability of a merchant to pay higher transaction fees can be a valuable indicator that the customer is getting a good value money.[53]

The purpose of the anti-steering provision is to prevent free riding—to prevent merchants from getting the benefits of advertising that they accept American Express but then not paying for the costs of those benefits. Doing so undermines American Express's ability to offer its differentiated product and ultimately would cause the market to unravel and consolidate into a blended equilibrium in which either American Express-style products are not offered, or in which those merchants who do not free ride would face even higher merchant fees. The story is even worse for consumers. American Express users would face both higher fees and the uncertainty of not knowing whether a merchant advertising that they accept American Express is a high-quality, non-steering merchant, or a low-quality, free riding merchant.

Importantly, the alternative world—which is the world in which we currently live, in which anti-steering provisions are enforceable—is not a world in which non-American Express consumers are necessarily harmed. By and large, non-American Express consumers can shop at almost any store. Indeed, in some markets they may even be able to get discounts by paying cash instead of credit.[54] Some consumers may themselves choose to free ride on the American Express brand, choosing to shop at stores that accept the card that they do not have and expecting those stores to be higher quality than those that do not accept American Express. Other consumers may choose to avoid stores that accept American Express, on the expectation that such stores will offer slightly lower prices. And it is important that merchants are free to *not* accept American Express—and even to advertise this fact. One could imagine a company competing by advertising on its storefront: "We save you money because we don't accept American Express"—and one could even imagine Visa or MasterCard providing the materials for these ads.

This is all to say that even though American Express's anti-steering provision may seem on its face a clear example of a harmful re-

53. Richard E. Kihlstrom & Michael H. Riordan, *Advertising as a Signal*, 92 J. POL. ECON. 427 (1984).

54. *See, e.g.*, Melissa Klein & Dean Balsamini, *New Yorkers Are Furious Over Sneaky Credit Card Surcharges*, N.Y. POST (Apr. 27, 2019), https://nypost.com/2019/04/27/new-yorkers-are-furious-over-sneaky-credit-card-surcharges/ [https://perma.unl.edu/Z63P-EECC].

straint on trade, it may in fact be a pro-competitive restraint that facilitates competition along margins more important than merchant transaction fees, and ultimately yields a more diverse range of product offerings targeted to a more diverse range of consumers.

IV. THE MANY SIDES OF *AMEX*'S RIGHTNESS

The takeaway from Part III is that competition is complicated, especially in messy markets. Frequently, seemingly anti-competitive conduct is actually beneficial to consumers—and seemingly pro-consumer conduct can, in fact, be harmfully anti-competitive. The facts of *American Express* demonstrate both of these circumstances.

The discussion in Part III suggests that the Court reached the correct result on the facts of the case.[55] But the Court's opinion is broader than the facts of the case, holding that plaintiffs making out their prima facie case must consider all sides of a market where the impacts of indirect network effects between those sides are not minor.[56] Here, too, the Court's opinion is sound. As discussed below, as a matter of practice and procedure, as well as the development of antitrust law, this allocation of burden leads to the substantively best outcomes.

A. A Burden Best Born by Plaintiffs

Perhaps the most contentious criticism of the Court's opinion in *American Express* argues that it effectively established *per se* legality for conduct in multi-sided markets, and in particular that this effectively immunizes large tech platforms from antitrust liability.[57] The basic gist of these arguments is that requiring plaintiffs to take into consideration the effects of conduct on and across all sides of a multi-sided market places an impossible burden on them. While in principle an antitrust claim may be viable, the argument is that the Court's opinion in *American Express* makes such claims impossible in practice.

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55. More precisely, because the lower courts only considered the affirmative case against American Express based upon its agreements on one side of the market but did not consider the pro-competitive justifications for those agreements, the factual record in the case did not support a finding that plaintiffs had met their burden of proof.

56. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018) ("[C]ourts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.").

57. Tim Wu, *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 [https://perma.unl.edu/E8QY-NLQA]; Lina M. Kahn, *The Supreme Court Case That Could Give Tech Giants More Power*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/opinion/the-supreme-court-case-that-could-give-tech-giants-more-power.html [https://perma.unl.edu/5DV4-9CVG].

This argument is unavailing for at least three reasons. First, as a general matter, American law generally places the burden of establishing a viable claim on the plaintiff. This is seen in the so-called "*Twiqbal*" cases—one of which (*Twombly*) is, coincidentally enough, an antitrust case.[58] *Twombly* held that a civil antitrust claim "requires a complaint with enough factual matter (taken as true) to suggest that" the relevant antitrust law was violated.[59] *Iqbal* expands upon *Twombly* outside of the antitrust context, explaining that:

> Two working principles underlie our decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.[60]

Although the Court did not frame its analysis in *American Express* in these terms (because the case was not about a motion to dismiss), the holding is nonetheless consistent with it. Pleading facts that (if taken as true) demonstrate conduct that could be anti-competitive *if constrained to one side of a two-sided market* only demonstrates the possibility of anti-competitive conduct—that someone did something that might have violated the law. It is akin to alleging that someone was driving *really* fast without including the speed limit, or that a vendor cancelled an order without alleging that they were under an obligation to fulfill it.

American Express's anti-steering agreement may not violate antitrust law if analyzed from the perspective of both sides of the market—the complete multi-market analysis is not a mere pro-competitive justification or affirmative defense that justifies otherwise harmful conduct, but an abnegation of the alleged harm necessary to demonstrate anti-competitive conduct. Alleging anti-competitive conduct on only one side of the market, therefore, fails to meet the plausibility requirement necessary to survive a motion to dismiss under *Twiqbal*. While the *American Express* case did not arise from a motion to dismiss, it is nonetheless the case that it is implausible to argue that an evidentiary burden that would allow a claim that could not survive a motion to dismiss is sufficient to carry a claim through judgment.

Second, even if the Court were to allow plaintiffs to plead harm on a single side of a multi-sided market, the net result of the rule of reason process would be to require the plaintiff to make out a claim sustainable across all sides of the market. The defendant would offer its

58. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
59. *Twombly*, 550 U.S. at 545.
60. *Iqbal*, 556 U.S. at 678–79 (citations omitted).

multi-sided analysis in response to the single-sided allegation, and the parties would proceed iteratively back and forth through discovery and motion practice until the case was heard before a judge. To the extent that multi-sided claims can be made out, the outcome is the same. To the extent that they impose an impossible burden on plaintiffs (or defendants), that burden will ultimately remain an impossible hill to overcome.

Here, the subsequent history of the Court's *Actavis* opinion is instructive. In that case, the Court expressly did not specify what was necessary for parties to allege to demonstrate a claim under the rule of reason in reverse patent settlement cases, instead leaving it to the lower courts to determine what parties had to plead in order to make out viable claims under the rule of reason.[61] Over the subsequent years, the lower courts did just this, hearing cases that gave rise to inferences used to ascertain the plausibility of anti-competitive harm arising from the sort of conduct at issue in *Actavis*.[62]

More generally, as between placing significant (or even impossible) burdens on plaintiffs as opposed to defendants in antitrust cases, an error-costs analysis (or even just simple statistics) strongly suggests that it is better to err on the side of disadvantaging plaintiffs in rule of reason cases over disadvantaging defendants. The alternative to placing the burden on plaintiffs to demonstrate harm in what are often novel, new technology industries, using new and rapidly developing economic theories, is to place that same burden on defendants. But these economic theories generally develop over generations of academic work, and that is the right setting for these theories to evolve. The courtroom is not the right place to adjudge their validity, and a judge is not the right party to do the work of academic reviewers.

This argument is strongly supported by statistics on the disposition of rule of reason cases. Michael Carrier has compiled extensive statistics on the outcomes of these cases. His statistics show that (depending on the period) in between 84% (1977–1999) and 97% (1999–2009) of cases plaintiffs fail to demonstrate anti-competitive effect under the first step of the rule of reason.[63] In the majority of the small fraction of cases that do survive this first step, defendants are

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61. Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136, 160 (2013) (leaving it to the lower courts to structure the rule of reason analysis of reverse patent settlement cases).

62. *See* Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *The* Actavis *Inference: Theory and Practice*, 67 RUTGERS L. REV. 585 (2015).

63. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265; Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009) [hereinafter *Empirical Update*].

able to provide a pro-competitive justification for their conduct.[64] Only in a small fraction of cases have courts historically even reached the point of balancing pro- and anti-competitive effects.[65]

In other words, plaintiffs have an exceptionally bad track record of pleading competitive harms, and defendants have a strong track record of demonstrating pro-competitive justifications for the small fraction of conduct that does have anti-competitive effect. This strongly suggests that courts, when faced with novel allegations of anti-competitive harmful conduct, should view plaintiff claims with skepticism and place any heightened burden on plaintiffs as opposed to defendants.

B. Economic Theory as a Question of Law or of Fact?

A related issue is the interaction of antitrust economics and antitrust law, and how the evolution of antitrust economics over time translates into antitrust law. Antitrust law is unique among areas of federal law in that it continues to develop through common law mechanisms, and particularly in that it continues to develop to keep apace of the ongoing evolution of economic theory.[66] But, had the Court's opinion in *American Express* gone the other way—and, in particular, had it tracked Justice Breyer's dissenting opinion—the outcome of rule of reason analysis would have been fact-bound and, therefore, effectively unreviewable. This, in turn, would have effectively led to stasis in antitrust law, leaving it to lower courts to interpret the current state of the art in antitrust economics without those interpretations being reflected in broader antitrust doctrine.

The peril of this approach is seen in the district court's opinion in this case—and Justice Breyer's adherence to the factual findings in that opinion. The lower court framed its opinion entirely in terms of a single side of the market and purported to find anti-competitive effects based solely on those findings. The incoherence of these findings—that is, that American Express's anti-steering requirements do not harm consumers and have substantial pro-competitive functions—is demonstrated in Part III, above. But it was demonstrated even more poignantly when Justice Kennedy asked at oral argument: "Does output include premiums or rewards to consumers?" and counsel for the

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64. *Empirical Update*, *supra* note 62, at 827 (explaining that they fail to do so in 3% of cases in the 1977–1999 period, and 0.5% of cases in the 1999–2009 period).

65. *Id.* (finding courts reached the point of balancing pro- and anti-competitive effects in 4% of cases in the 1977–1999 period, and 2% of cases in the 1999–2009 period).

66. *See, e.g.*, Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191 (2014); Thomas A. Piraino, Jr., *An Antitrust Common Law for the Twenty-First Century*, 2009 UTAH L. REV. 635 (2009); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982).

states responded, "Yeah."[67] If the plaintiff does not have a burden to plead all sides of a multi-sided market, the factfinder has the prerogative to find that effects on other sides of the market are not relevant to the antitrust harm. The result is that lower court judges can find anti-competitive effects, as a matter of fact, that would not be supportable were they required, as a matter of law, to consider all sides of the market. The different standards of review—and, in general, the broad deference given to the finder of fact over questions of fact—both hampers the development of antitrust law and places an indefensible burden on defendants to prove their conduct is not anti-competitive (a burden whose contrapositive should be places on plaintiffs).

This is precisely the dynamic that was seen in *American Express*, where Justice Breyer suggested that the district court need not have considered evidence of pro-competitive justifications from conduct on the other side of the market,[68] and would have given significant weight to the district court judge's finding of "direct evidence"—a finding that would have precluded any need for the lower court to consider the definition of the market at all.[69] Erroneous analysis such as this is particularly likely in multi-sided markets where the very nature of the market is that the platform, in order to maximize the value of the platform for all users, will charge above-marginal cost prices on one side of the market to cross-subsidize below-marginal cost prices on the other side of the market. A judge looking at *either* side of such a market could find direct evidence of anti-competitive conduct by virtue of platform charging above- or below-marginal cost prices. Leaving such cases subject to review only for clearly erroneous factual error is a recipe for multiple error costs—this, in addition to such an approach stifling the development of antitrust law to match evolving economic theory.

V. CONCLUSION

The modern economy is built around markets that are structurally more complicated than those around which antitrust law has developed. As technology has broken down vertical production chains and enabled new forms of interactions across platforms, the hard ques-

67. *Transcript of Oral Argument in* Ohio v. Am. Express Co. at 12:5–7, SUPREME COURT OF THE UNITED STATES (Feb. 26, 2018), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1454_f2ah.pdf [https://perma.unl.edu/AVM6-SVYZ].

68. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2302 (2018) (Breyer, J., dissenting) ("A Sherman Act § 1 defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another.").

69. *Id.* at 2296 ("[A] discussion of market definition was legally unnecessary at step 1. That is because the District Court found strong *direct* evidence of anticompetitive effects . . . .") (emphasis in original).

tions of antitrust law increasingly involve firms moving laterally across their vertical silos into those of their competitors or facilitating horizontal interactions between market participants by means of their intermediary platforms.

This creates challenges for antitrust law. Contemporary, Cartesian antitrust law is very good at addressing competitive issues in traditional horizontal and vertical markets. The relative paucity of antitrust litigation involving such markets demonstrates this well. But it is not well tailored to addressing concerns that may arise in post-Cartesian markets. Much, possibly most, contemporary antitrust litigation deals with how to adapt antitrust law to address concerns that may arise in these markets. This challenge is fraught with error costs: how to disambiguate anti- and pro-competitive conduct in these markets and to curtail the former without jeopardizing the latter, and how to do this without harming antitrust law's current effectiveness in simpler horizontal and vertical markets.

The best approach may be caution: do not break current antitrust law in a vain attempt to address competitive concerns that are beyond what antitrust law is suited to address. Such an approach is sure to dissatisfy those who feel antitrust law must be a universal hammer, a tool that can be wielded against any competitive harm. But antitrust law, like a hammer, is necessarily a blunt tool. Surely economic theory will continue to evolve and improve our understanding of conduct in these messier markets. As it does, antitrust law may develop greater ability to address competition concerns that surely can arise in such markets. But it is up to economics to answer these questions and the law to follow. The alternative only risks creating a greater mess.