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The *American Express* Opinion, Tech Platforms & the Rule of Reason

Tim Wu[†]

This commentary on the U.S. Supreme Court's *American Express* opinion is limited to two points (readers unfamiliar with the decision can read the summary in the margin).¹

First, in my view, the *American Express* opinions in both the Supreme Court and Second Circuit exemplify an unfortunate trend in the antitrust law: a tendency to elevate theory over evidence. There is some irony in this trend: there was a time, at its height during the 1970s and 80s, that critics charged the antitrust with too much pro-government bias and an indifference to realities of economy. That movement yielded the well-known turn toward a more evidence-based, "rule of reason" approach. But today, in decisions like *American Express*, matters have come full circle, so much that courts in cases like *American Express* are once again willing to disregard evidence of anticompetitive harm in favor of abstract theory.

As such, Justice Thomas's opinion in *American Express* can be seen as a mirror image of the *per se* rules that once prevailed throughout antitrust. If those *per se* cases suggested an automatic victory for the plaintiff without evidence of competitive harm, the *American Express* courts have granted dismissal for the defendant even despite good evidence of such harm. And as a result, *American Express* is an example from a retreat from the evidentiary focus supposedly motivating the Court's shift away towards a rule-of-reason analysis.

That's the first point. The second concerns the future impact of the decision. The Supreme Court's opinion does have one great merit as compared to the Second Circuit's: it is narrow, indeed far narrower than some have suggested. In particular, it claims that the decision "immunizes" the major tech platforms from antitrust scrutiny and is incorrect.² It seems clear that firms like Google, Facebook, and Twitter are not covered by the *American Express* opinion, as explained here.

It is true that an opinion creating rules for *all* two-sided platforms would have fundamentally changed much of antitrust law, by reaching so much of American

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¹ The case concerned the legality of American Express's use of "antisteering provisions." The provisions are contractual rules meant to prevent merchants who accept American Express from, nonetheless, steering consumers toward cheaper options (i.e., those with lower merchant fees). The Justice Department and seventeen states sued American Express based on the premise that the rules inhibit competition and prevent cards with lower fees, like Discovery, from gaining a competitive advantage by lowering their prices. Though the government won at the trial level, see *United States v. Am. Express Co.*, 88 F.Supp.3d 143 (E.D.N.Y. 2015), American Express prevailed before the Second Circuit and the Supreme Court. *Ohio v. Am. Express Co.*, 138 S.Ct. 2274 (2018).

² To the degree that any writings with my byline may suggest otherwise, I remind readers that the author does not control his headlines.

commerce. For the concept of a two-sided platform is open-ended enough to conceivably describe businesses as diverse as malls, sports leagues, real estate agents, stock exchanges, and most tech platforms.³ The Second Circuit's alarmingly open-ended ruling in favor of American Express shows the need for careful treatment in this area.⁴

But the Court emphasized that credit-card companies are so-called "transaction platforms," a subset of two-sided platforms.⁵ The opinion goes on to define transaction platforms as those that can't provide a service to one side of the market independently—those that, by necessity, facilitate a "simultaneous" interaction between the two sides.⁶ As such, according to the Court, transaction platforms only compete with other transaction platforms.⁷

That limitation makes *American Express* inapplicable to most major tech platforms as well as most of what are traditionally called "two-sided" platforms. Consider, for example, two firms of much interest in the present discourse: Facebook and Google. While both firms, roughly speaking, have business models based on bringing together different groups—advertisers and users—they don't exist for the sole purpose of facilitating simultaneous transactions between the two. Users do plenty of things on Google or Facebook outside of transactions with advertisers, such as interacting with other platform users, conducting searches, and so on. For that matter, the *American Express* opinion would not cover a nightclub that offers a subsidized "ladies' night"—the textbook example of a two-sided platform⁸—given that the nightclub doesn't facilitate a "simultaneous" transaction between the male and female customers, and offers more than just the facilitation of such transactions.

Of course, there are major tech platforms whose existence seems predicated on facilitating simultaneous transactions and little more. An obvious example is ride-sharing

³ Shopping malls bring together shoppers and stores. Geoffrey G. Parker & Marshall W. Van Alstyne, *Two-Sided Network Effects: A Theory of Information Product Design*, 51 *Mgmt. Sci.* 1494, 1495 tbl.1 (2005). Stock exchanges bring together equity purchasers and listed companies. *Id.* Residential real-estate agents bring together home buyers and home sellers. *Id.* Travel reservation websites like Expedia, Travelocity, and Orbitz bring together travelers and hotels, airlines, and rental car services. *Id.* Sports leagues bring together fans and advertisers. Helmut Max Dietl et al., *A Contest Model of a Professional Sports League with Two-Sided Markets*, 232 *J. Econ. Stat.* 336, 337 (2012).

⁴ See *infra* notes 49–53 and accompanying text.

⁵ *Id.* at 2280 ("[C]redit-card networks are a special type of two-sided platform known as a 'transaction' platform.")

⁶ *Id.* at 2280–81 (defining a "transaction" platform and noting that "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network").

⁷ *Id.* at 2287 ("Only other two-sided platforms can compete with a two-sided platform for transactions.")

⁸ See, e.g., Parker & Van Alstyne, *supra* note 12, at 1495 tbl.1 (listing "ladies' nights" as an example of a two-sided market, as the bars or restaurants act as an intermediary that brings together men's admissions and women's admissions); Julian Wright, *One-Sided Logic in Two-Sided Markets*, 3 *Rev. of Network Econ.* 44, 45–50 (2004) (illustrating fallacies that arise from applying the logic of one-sided markets to two-sided markets, using "ladies' nights" at heterosexual nightclubs as an example of the latter).

companies such as Uber, Lyft, and their brethren. However, that said, it is not entirely clear that *American Express* offers a defendant something ultimately all that different than what the defendant already might have presented as a pro-competitive justification under the rule-of-reason analysis. This further suggests that *American Express* is a case of limited long-term import.

A final point relates to the slightly unpredictable impact of the *American Express* ruling. By suggesting that the only competitors to two-sided transaction platforms are *other* two-sided transaction platforms, the logic of the decision may sometimes yield very narrow market definitions. Consider, for example, a hypothetical merger of ridesharing services Uber and Lyft, and assume, for a moment, that both are “transaction platforms.” If their only competitors are other two-sided ridesharing operations, then taxis and other forms of competition might be excluded, yielding higher market shares and making any potential merger more likely to violate the Clayton Act.

All this goes to underscore the essential folly of the decision. By mixing in unnecessarily complex economic principles into the decision, the courts are creating an antitrust law in which generalist courts, wary of the rule-of-reason’s balancing, might cherry-pick a new economic theory for each case so as to yield the result preferred. That has the impact of dragging the law further and further away from anything approaching the competitive realities of the industry in question.

1. Rule-of-Reason Analysis in American Express

The American Express opinion should be understood in the broader context of the last several decades and the ruse of “rule of reason” antitrust. As any student of antitrust knows, there was a time when American law broadly took various forms of restrictive agreements as categorically, or *per se* anticompetitive. Such agreements, including many forms of vertical agreement, were categorically condemned without any inquiry into their purpose or effects.⁹ But over the last forty years, antitrust doctrine has retreated from *per se* rules and moved toward the “rule of reason” analysis for most categories of alleged anticompetitive conduct.¹⁰ The reasons for this shift are relevant to the *American Express* decision.

The attack by courts on *per se* rules came from a desire that antitrust law analysis be more deeply grounded in evidence. As adopted by the courts, and in the

⁹ See Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 Iowa L. Rev. 1207, 1213–14, 1219–20 (2008).

¹⁰ See, e.g., *Leegin Creative Leather Prods, Inc., v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of §1.”); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“[T]his Court presumptively applies rule of reason analysis. . . .”); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“[M]ost antitrust claims are analyzed under a ‘rule of reason[.]’”); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (“Since the early years of this century a judicial gloss on this statutory language has established the ‘rule of reason’ as the prevailing standard of analysis.”); Michael Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 828 (2009) (“The rule of reason is even more crucial today than it was a decade ago. The Supreme Court has increasingly overturned *per se* rules of illegality.”) (footnote omitted).

hands of more thoughtful critics, the movement away from *per se* rules was not premised on a blanket tolerance of potentially restrictive vertical agreements. Rather, courts sought proof—and in particular, proof of harm to competition.

Take, for example, the problem of vertical pricing restraints, also known as retail (or resale) price maintenance. Such restraints might serve the salutary purpose of promoting peace among retailers or protecting a value-added retail model.¹¹ But these benign motives are not the only possible explanation. Courts and commentators are also willing to consider that what is facially described as merely a means for ensuring peace among retailers may turn out, on further investigation, to an anticompetitive scheme. For instance, the restraints could be the means by which the retailers to create their own pricing cartel.¹² The premise of a rule-of-reason analysis is to find, as opposed to assume an answer, or so Justice Kennedy's opinion in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹³ suggests. *Leegin* and similar cases promised antitrust law that was smarter than *per se* rules were—antitrust law that targeted only *proven* harms to the competitive process.

American Express violates that promise—not explicitly, but in its method. After inviting the government to present evidence of harm under a rule-of-reason framework, the Court effectively moved the goalposts at the point of appeal, demanding something far more challenging to prove. In other words, it suggested that direct evidence of harm to competition was not enough. In that undertaking, the Court committed the same mistakes that the vertical *per se* rules did at their worst, by choosing to ignore evidence in favor of theory.

We can show this more explicitly by considering the steps in a rule of reason analysis and how they interacted with the American Express litigation. The prima facie rule-of-reason case under Section 1 of the Sherman Act asks the plaintiff to show two elements: proof of an agreement in restraint of competition, and proof of an anticompetitive effect.¹⁴ In the burden-shifting analysis, the defendant may then offer procompetitive rationales.¹⁵ The fact-finder—i.e., the trial court—then determines whether the anticompetitive effect on competition was demonstrated.

The antisteering provisions are a facially restrictive agreement designed—successfully—to insulate American Express against competition from other credit card providers at the point of sale. This was no secret. American Express sought to prevent merchants from steering consumers toward less expensive alternatives, and in that

¹¹ See Robert H. Bork, *The Antitrust Paradox* 280–89 (1st ed. 1978).

¹² See *Leegin*, 551 U.S. at 893 (describing the risk of vertical price restraints being used to organize cartels at the retail level); see also *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 765–66 (1983) (describing behavior that would amount to a retail cartel).

¹³ In holding that vertical price restraints should be judged under the rule of reason, Justice Kennedy emphasized the importance of evidence in determining the effects of the restraints. See *Leegin*, 551 U.S. at 889–90 (explaining that vertical price restraints may be procompetitive in some cases but anticompetitive in others, and discussing various kinds of proof a court might use to reach either conclusion).

¹⁴ See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1502 (4th ed., 2017).

¹⁵ See *id.*

manner, prevent the company from losing market share to cards with lower merchant fees. For pro-competitive rationales, American Express justified the restrictions by arguing that its business model depended on both higher merchant fees and more benefits for its cardholders.¹⁶

At the *American Express* trial, the government presented significant evidence tending to support the premise that the antisteering rules did inhibit price competition between credit card companies.¹⁷ For instance, as Justice Breyer noted in his dissent, the antisteering provisions stifled the attempt of a competing credit card company to innovate in favor of lower prices.¹⁸ Discover tried a business model during the 1990s that offered much lower fees to merchants.¹⁹ But the antisteering provisions of American Express and other credit-card companies meant that merchants couldn't communicate to customers a preference for Discover.²⁰ Over time, Discover ultimately gave up on price competition and decided to raise its merchant fees as well.²¹ This outcome tends to suggest a failure of the competitive process along with an industry-wide lack of price discipline.

Importantly, American Express's practices suggested that it felt little or no competitive pressure to lower its prices. The company was able to raise its prices twenty times during the disputed five-year period without losing the business of any large merchants, suggesting further that its antisteering rules affected competition.²² This outcome is not surprising, given the intent of the restrictions.

Nonetheless, if the Second Circuit or Supreme Court believed that American Express should have won based on the evidence, the appropriate remedy within the rule-of-reason framework would have been to credit American Express's procompetitive justifications. The courts could have found the district court too dismissive of the importance of the anti-steering rules to its distinctive business model. The appellate courts could have concluded that the anticompetitive antisteering rule was, despite harming competitive, nonetheless justified because it made possible the company's particular model of prestigious, reward-intensive card.

Yet they did not, as we've seen, and instead opted for a far more confusing and theoretically complex approach.²³ Why take a more complicated approach? While one can only speculate, one reason is that the Courts may have been wary of the "balancing" called for by the rule of reason after a procompetitive rationale is credited.²⁴ Literature

¹⁶ See *United States v. Am. Express. Co.*, 88 F.Supp.3d 143, 224–38 (E.D.N.Y. 2015)

¹⁷ *Id.* at 238.

¹⁸ See *Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2293–94 (2018) (Breyer, J., dissenting).

¹⁹ See *Am. Express. Co.*, 88 F.Supp.3d at 213–14.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 195–97.

²³ Because the Court found that the government had not proven anticompetitive harm per the rule of reason's first step, it did not reach the second step of crediting the defendant's procompetitive justifications. See *Am. Express Co.*, 138 S.Ct. at 2290.

²⁴ Judges are often not comfortable with the task of balancing harms and benefits in antitrust cases. C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Colum. L. Rev. 927,

suggests that courts are uncomfortable with such balancing to the point that they almost never do it.²⁵ Sometimes courts avoid the challenge of balancing by using the “less restrictive alternative” test: comparing the action to a hypothesized alternative and asking whether the alternative action is “less restrictive” and hence less harmful.²⁶ Perhaps, then, the strange path taken in the *American Express* case was a reflection of that anxiety.

Instead of balancing, the Court disposed of the case by adjusting the market definition for transactional platforms to include “both sides” of the market.²⁷ This creates an incoherent market. Market definitions are determined by evaluating available substitutions,²⁸ yet somehow the credit card market includes services that could not possibly be substitutes. (How can cardholder and merchant services be interchangeable?) Perhaps more charitably, it redefined the product as the entire transaction, yielding a market for transaction facilitators, and then searched for evidence—on appeal—that competition between networks had been damaged.

The fact that this demand regarding the market definition was imposed on appeal is important. Had the government known it needed to show harm to competition with that market definition, it might have done so. Even taking into account a better ability to reach consumers, the government could argue that the antisteering rules were *still* anticompetitive. But none of this was developed at trial. Instead, the Court’s approach allowed it to make its own *de novo* findings.

At bottom, the approach announced the Court is unprecedented, procedurally indefensible, unnecessarily complex, and ultimately incoherent. The *per se* rules were at least honest about what they were doing. Their mirror-image counterpart in *American Express* takes the less-appealing approach of using complex economic theory to create near-impossible burdens of proof—burdens particularly hard to meet when they emerge on appeal. At worst, they offer a highly jazzed-up way of getting around some awfully damaging facts.

The danger inherent in the *American Express* decision’s deviation from the rule of reason lies in its arbitrariness. As everyone knows, it is nearly always possible to

947–951 (2016). As Hemphill suggests, they are generalists who see antitrust cases comparatively rarely; they have a limited fact-finding capacity, which is hampered by the adversarial nature of antitrust litigation; and they can sometimes feel as though the values at stake are incommensurable. *Id.*

²⁵ For instance, a study of 222 rule-of-reason cases (decided by judges as opposed to juries) over a decade showed courts disposing of 97% of cases at the first stage of the burden-shifting framework, on the grounds that there was no anticompetitive effect. See, e.g., Carrier, *supra* note 20 at 828–829. Judges balanced in only 2% of the cases. *Id.*

²⁶ See Hemphill, *supra* note 36 at 952–55 (describing how judges turn to the less restrictive alternative test due to anxiety about balancing).

²⁷ *Am. Express Co.*, 138 S.Ct. at 2286.

²⁸ *United States v. E.I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. 377, 395 (1956) (holding that the relevant market must include all products “reasonably interchangeable by consumers for the same purposes”).

manipulate market definition to justify deciding a case in a particular direction.²⁹ The existence of direct evidence of harm to competition serves as one of the checks on that possibility. The promise of cases decided on the basis of good, direct evidence is at the core of the rule of reason, as discussed earlier. But if a court can ignore direct evidence of harm to competition by demanding something else be proven, the whole analysis is—once again—open to the whims of the judiciary. Any case can be decided by adopting an economic theory tailored to the facts at hand, yielding

All this said, the Court's deviation from a typical rule-of-reason analysis also limits its relevance as a decision. The five justices in the *American Express* majority certainly did not overrule landmark cases that describe the rule of reason and how it is meant to function, such as *Board of Trade of the City of Chicago v. United States*,³⁰ *National Society of Professional Engineers v. United States*,³¹ *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI)*,³² *California Dental Association v. Federal Trade Commission*,³³ and *Leegin*.³⁴ To the contrary, the *American Express* decision claims to be following the rule-of-reason framework.³⁵ Accordingly, the case ultimately falls in the category of what a Supreme Court clerk would call “fact-bound error.”

2. “Transaction Platforms” in *American Express*

As already mentioned, the *American Express* holding is much narrower than it might have been. The Second Circuit and some amici suggested an approach that could have had sweeping implications by potentially establishing a new form of market-definition analysis for any case involving a two-sided platform.³⁶ And the concept of a two-sided platform is expansive. Consider that businesses at issue in many landmark antitrust cases could be thought of as two-sided platforms. An oil refinery like that in *Standard Oil Co. of New Jersey v. United States* brings together crude oil producers and gasoline buyers;³⁷ a rights association like that in *BMI* brings together composers and media outlets;³⁸ a sports league like that in *National Collegiate Athletic Association v. Board of Regents of the Univ. of Oklahoma* brings together sports fans and sponsors;³⁹ an operating system like that in *United States v. Microsoft Corp.* brings together

²⁹ See, e.g., *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 922 (5th Cir. 1964) (“[T]he term ‘relevant market’ is a rather evanescent term which can be skillfully manipulated somewhat in the manner of an accordion.”); Louis Altman & Mark Pollack, Callmann on Unfair Competition, Trademarks, and Monopolies, § 4:31 (4th Ed.).

³⁰ *Bd. of Trade of the City of Chi. v. United States*, 246 U.S. 231 (1918).

³¹ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978).

³² *Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1 (1979).

³³ *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756 (1999).

³⁴ *Leegin Creative Leather Prods, Inc., v. PSKS, Inc.*, 551 U.S. 877 (2007).

³⁵ *Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2284 (2018) (stating that “like nearly every other vertical restraint, the antisteering provisions should be assessed under the rule of reason”).

³⁶ The Second Circuit opinion addressed two-sided platforms more generally. See *United States v. Am. Express Co.*, 838 F.3d 179, 185–186, 196–200 (2nd Cir. 2016).

³⁷ See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 32–33 (1911).

³⁸ See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1, 4–5 (1979).

³⁹ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 88–89 (1984).

application makers and computer users.⁴⁰ Hence, a decision applicable to *any* two-sided platform might have shaken American antitrust law to its core.

Instead, the *American Express* holding is limited to “transaction platforms,” explicitly excluding “nontransaction platforms” from its analysis.⁴¹ This narrow approach may have reflected discomfort from members of the majority as well as an unwillingness to explicitly overrule prior cases.⁴² The term “transaction platform” is new to antitrust,⁴³ but the Court defines it as a two-sided market in which the platform “facilitate[s] a single, simultaneous transaction between participants.”⁴⁴ This means platforms that, by their nature or design, offer only services of simultaneously conducting a transaction between parties on each side of the market—platforms that “cannot sell transaction services to either [one side or the other] individually.”⁴⁵ In such a setting, the Court reasoned, platforms “exhibit more pronounced indirect network effects and interconnected pricing and demand.”⁴⁶

The limitation is still abstract but suggests that the *American Express* decision wouldn’t apply to most two-sided markets, and in particular, wouldn’t apply to most major tech platforms. Accordingly, some of the claims about the case’s relevance to the tech field are overstated. As described above, an enormous range of firms operate what might be called two-sided platforms, but only a small subset are transaction platforms.

To take a few important examples, firms like Google, Facebook, and Twitter are not covered by the *American Express* opinion. Their business models depend on attracting users and ultimately reselling their audiences to advertisers.⁴⁷ Users do plenty of things on each of these platforms that doesn’t involve making a transaction with an advertiser. Indeed, the lure of Facebook and Twitter is actually interactions with other users, while Google, in its original conception, primarily offered a means of finding content on the web.

To that end, by the Court’s own implication, Google, Facebook, and Twitter are covered by the rule of *Times-Picayune Publishing Co. v. United States*⁴⁸ and not *American Express*. The Court makes this point clearest in a footnote distinguishing “nontransaction platforms” (and also implicitly recognizes the existence of attention

⁴⁰ See *United States v. Microsoft Corp.*, 253 F.3d 34, 51–54 (D.C. Cir. 2001).

⁴¹ *Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2285–87, 2287 n.8 (2018).

⁴² For instance, the Court had previously ruled that for analyzing a two-sided platform in the case of a newspaper, dominance in one side of the market—not both—is key. See *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 610 (1953) (holding that for a newspaper, a “dual trader” connecting advertisers and readers, “dominance in the advertising market, not in readership, must be decisive in gauging the legality” of the conduct). In contrast, in *American Express*, the Court used a newspaper to illustrate the concept of a nontransaction platform. See *infra* notes 63–64 and accompanying text.

⁴³ A Westlaw search for federal and state cases that used both the terms “transaction platform” and “antitrust” returns nothing prior to the June 2018 *American Express* decision.

⁴⁴ *Am. Express Co.*, 138 S.Ct. at 2286.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Tim Wu, *Blind Spot, The Attention Economy and the Law*, Antitrust L. J. (forthcoming).

⁴⁸ *Times-Picayune Publ’g Co.*, 345 U.S. 594 (1953).

markets⁴⁹): “Nontransaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers.”⁵⁰ Consistent with this, *Times Picayune* had established earlier that the market definition for a newspaper should focus on the entity’s dominance in advertising, not readership.⁵¹ The implication is clear for firms like Google, Facebook, and Twitter, which do compete for digital advertising but do not directly compete for users in the relevant attention markets: *American Express* only applies to firms that are both transactional and in competition on both sides of the platform

A firm like Amazon might seem at first like a closer case, given that the e-commerce giant clearly facilitates transactions between its users and sellers. That said, it seems clear that the Court in *American Express* could not have intended for every retail operation to be treated as a “transaction platform” in the meaning of the opinion. Stores that bring together buyers and sellers can face competition from stores that exclusively carry their own goods. For example, Best Buy, which sells many brands of computers, still competes with the Apple store, which sells computers only of its own brand. There is far more to the business of Amazon and other retailers than the simultaneous facilitation of a transaction. Indeed, credit card companies are often the entities that complete the retail transaction, suggesting that they are distinct from the retailers themselves.

Among platforms of much antitrust discussion nowadays, the *American Express* decision would seem to be most relevant to Uber and Lyft. Such ridesharing firms primarily owe their existence to the market for facilitation of transactions between drivers and riders. So if Uber were accused of anticompetitive practices, *American Express* offers it an opportunity to argue that even in the face of direct evidence of harm, a court must take into account the goal (if any) of making Uber’s services more attractive to its passengers.

Imagine that Uber sought to hurt its rivals in the competition for drivers by trying to sabotage Lyft’s recruitment of new drivers. (A real-world example: In a ridesharing version of the “ding-dong ditch,” Uber employees reportedly ordered and canceled thousands of Lyft rides to suggest to Lyft drivers that Lyft was unreliable.⁵²) After *American Express*, Uber may be able to suggest that its conduct was ultimately in the interest of making its product more appealing to consumers. Uber customers benefit from lower wait times if Uber has more drivers available. It seems hard to argue that

⁴⁹ See generally Tim Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (2016).

⁵⁰ *Am. Express Co.*, 138 S.Ct. at 2287 n.8.

⁵¹ See *Times-Picayune Publ’g Co.*, 345 U.S. at 610.

⁵² See Erica Fink, *Uber’s Dirty Tricks Quantified: Rival Counts 5,560 Canceled Rides*, CNN (Aug. 12, 2014), <https://money.cnn.com/2014/08/11/technology/uber-fake-ride-requests-lyft/> (reporting on allegations by Lyft that Uber employees canceled 5,560 Lyft rides between October 2013 and August 2014); see also Laurie Segall, *Uber Rival Accuses Car Service of Dirty Tactics*, CNN (Jan. 24, 2014), <https://money.cnn.com/2014/01/24/technology/social/uber-gett/> (describing similar allegations that Uber employees in New York canceled rides with Gett, a rival ridesharing application).

sabotaging a rival might accomplish that, but stranger arguments have been made in federal court.

As this illustration suggests, what *American Express* offers Uber in terms of a defense is not really all that different from the rule of reason's procompetitive rationales. This further indicates that much of the mess created by the *American Express* case could have been minimized: If the appellate courts were convinced that the antisteering provisions actually benefited competition among cards as between consumers, they should have found "clearly erroneous" the district court's assessment of American Express's procompetitive justifications. Just as hard cases make bad law, so does a fear of the rule of reason's balancing.

The Uber-Lyft discussion also helps demonstrate some of the unpredictable implications of the *American Express* decision. The Court suggests that two-sided transaction platforms really only compete with each other, and not with one-sided businesses. That points suggests that, in some cases, the Court's analysis might yield much narrower market definitions that might ordinarily be the case. It might suggest that, in a hypothetical merger of Uber and Lyft, that traditional competitors like taxis, or black cars are not actually competitors to the ride-sharing firms, yielding a much narrower market definition, and a higher likelihood of presumptive illegality. All this underscores the inherent incoherence of the analysis.

Afterword

At a public hearing of the Federal Trade Commission in 2018, panel members were asked whether the *Microsoft* case⁵³ would have reached a different outcome if it had been decided after *American Express*. Back in 2001, the D.C. Circuit found that Microsoft had maintained a monopoly in the operating-system market in violation of Section 2 of the Sherman Act.⁵⁴ At the time, there was fear that Microsoft would kill the then-up-and-coming challenger Netscape, monopolize the browser market, and use that point of control to dominate the coming age of the web.⁵⁵

Factually, though *Microsoft* dealt with a two-sided platform,⁵⁶ this alone would not be enough to assume that *American Express* would cause a different result. As I've explained here, the *American Express* holding's self-imposed limits suggest it is not directly relevant to two-sided platforms generally—only transactional platforms. The operating system at issue in *Microsoft* is a two-sided platform, but not one of a transactional nature.

⁵³ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

⁵⁴ *Id.* at 64, 71, 74, 78. Early on, it seemed like the remedy would be for Microsoft to be broken into two companies: one for the Windows operating system and one for other products. See *United States v. Microsoft Corp.*, 97 F.Supp.2d 59, 64–74 (D.D.C. 2000). Ultimately though, the company was allowed to stay whole, albeit with some limitations on its behavior. See *United States v. Microsoft Corp.*, No. Civ. A. 98-1232, 2009 WL 1348218 (D.D.C. Apr. 22, 2009) (modifying the judgment for a second time).

⁵⁵ Richard Blumenthal & Tim Wu, *What the Microsoft Antitrust Case Taught Us*, N.Y. Times (May 18, 2018), <https://www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html>.

⁵⁶ See *Microsoft Corp.*, 253 F.3d at 51–54.

But of course, in another way, *American Express* could have procedural consequences. In cases like this, the Court is creating opportunities for appellate courts to work around the Justice Department and a district court that have turned up clear and unmistakable evidence of harm to competition. Any halfway-decent lawyer can find an economic theory that could account for all but the most blatantly anticompetitive acts. At that point, a court—if allowed to convert a procompetitive justification into a burden of proof—gains a new way to dismiss any case. For example, in *Microsoft*, a hostile appellate court might have demanded proof not just that Netscape was excluded (and hence that competition was compromised), but to prove the impossible: that the entire ecosystem was damaged as a consequence, or something along those lines. *American Express* suggests that a judge can keep demanding more proof, in concentric lines, until the government's lawsuit collapses.

Here we have the opinion most pernicious attribute. At bottom, it offers appellate courts the comfort of the Supreme Court's support in finding novel ways to throw out antitrust cases with strong evidence of anticompetitive effects.