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# *American Express*, the Rule of Reason, and the Goals of Antitrust

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TABLE OF CONTENTS



## I. INTRODUCTION

*Antitrust enforcement affects more than just price and output—it's part of our everyday lives, from the price of groceries at the market to the cost of prescription drugs.*

— Senator Amy Klobuchar[1]



* Charles L. Denison Professor of Law, New York University School of Law. Fellow, Innovators Network Foundation. A research grant from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law provided financial assistance for this article. I thank the participants at the NYU Classical Liberal Institute/University of Nebraska College of Law conference on "Understanding the Visible: The Undisputed Facts and Disputed Law of Platform Antitrust" for their helpful comments on an earlier draft.

1. Press Release, Amy Klobuchar, Klobuchar Introduces Legislation to Modernize Antitrust Enforcement and Promote Competition (Feb. 1, 2019), https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=A952CE13-DD98-4E27-8BBA-CACE520AF2EB [https://perma.unl.edu/W95C-MP5H] (introducing two bills to amend the Clayton Act, *see* CONGRESS.GOV, https://www.congress.gov/search?q=%7B%22congress%22%3A%22116%22%2C%22source%22%3A%22legislation%22%2C%22search%22%3A%22klobuchar%22%7D&searchResultViewType=expanded [https://perma.unl.edu/2ATE-7SU6] (last visited July 14, 2019)).

On February 26, 2018, the Supreme Court heard oral argument in *Ohio v. American Express*.[2] The Court had granted certiorari on petition of the State of Ohio and ten other state plaintiffs in a suit originally brought by the United States Department of Justice and sixteen states. Although the United States eventually joined Ohio in urging the Supreme Court to reverse the lower court's decision,[3] it was the State Solicitor of Ohio, Eric Murphy, who took the lead on oral argument.

It didn't take Justice Gorsuch long to start the questioning. One minute and six seconds into Murphy's argument, Justice Gorsuch stopped him with this:

> JUSTICE GORSUCH: We're not here to protect competitors, right, Mr. Murphy?
> MR. MURPHY: Correct.
> JUSTICE GORSUCH: Or—or necessarily even merchants. The antitrust laws are aimed at protecting consumers; you'd agree with that?
> MR. MURPHY: Correct, although in this—
> JUSTICE GORSUCH: Okay. So, given that, there's no evidence of restricted output in this case, correct?
> MR. MURPHY: I—I would agree that it's—there's—it's ambiguous. There's no [evidence] one way or the other about whether—whether it has restricted output.
> JUSTICE GORSUCH: And that's normally what the antitrust laws care about, is deadweight loss. That's the primary concern of antitrust activity, wouldn't you agree?
> MR. MURPHY: Correct. . . .[4]

Ohio lost the case. Justice Gorsuch joined the majority opinion. Justice Breyer authored the dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined. He began the dissent in a somewhat curious way:

> For more than 120 years, the American economy has prospered by charting a middle path between pure *laissez-faire* and state capitalism, governed by an antitrust law dedicated to the principle that *markets*, not individual firms and certainly not political power, produce the optimal mixture of goods and services. By means of a strong antitrust law, the United States has sought to avoid the danger of monopoly capitalism. Long gone, we hope, are the days

2. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) [hereinafter *Amex*].
3. The United States filed a brief in opposition to the petition for a writ of certiorari, *see* Brief for the United States in Opposition, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454), 2017 WL 3485653, but eventually filed a brief in support of the petitioning States, styled "Brief for the United States as Respondent Supporting Petitioners," *see* Brief for the United States as Respondent Supporting Petitioners, Ohio v. Am. Express Co., 138 S. Ct. 2274 (No. 16-1454), 2017 WL 6205804.
4. *See* Transcript of Oral Argument at 4–5, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16- 1454), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1454_o7jp.pdf [https://perma.unl.edu/E6PV-9JZA]. The recorded version of the oral argument is available at https://www.supremecourt.gov/oral_arguments/audio/2017/16-1454 [https://perma.unl.edu/VM3Z-NQGB].

> when the great trusts presided unfettered by competition over the American economy.
>
> This lawsuit is emblematic of the American approach. Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition . . . .[5]

*Ohio v. American Express* came to the Supreme Court as a fully litigated rule of reason case. The government plaintiffs had won at trial, but the Second Circuit Court of Appeals upended the district court's decision.[6] Persuaded by American Express (Amex) that the district court's market definition had not adequately taken account of the two-sided aspect of Amex's product, and without saying exactly how the market should be defined, the court of appeals held that the district court "erred in excluding the market for cardholders from its relevant market definition."[7] Given this failure, the plaintiffs had not met their "initial burden" of showing "net harm to Amex consumers as a whole—that is, both cardholders and merchants."[8]

It was these two aspects of the Second Circuit's decision—how to define the market and what proof was necessary for the plaintiffs to meet their "initial burden" of showing anticompetitive effect—that were to be the focus of the legal arguments before the Supreme Court. So why did Justice Gorsuch lead with a question on consumer welfare, output, and deadweight loss? And why did Justice Breyer lead with a spirited defense of the "American approach" to using antitrust litigation, rather than government regulation, to restrain the power of the "great trusts"?

The key to this debate between Justices Gorsuch and Breyer is history. The intriguing question is how this debate affected the decision in *American Express*. The consequential question for antitrust analysis is whether the Supreme Court's opinion got the rule of reason analysis right.

Taking the last question first, in this Article I argue that the Court's opinion muddled the rule of reason analysis instead of advancing it and misused the concept of "market" along the way. The opinion also has implications for the consumer welfare debate that is now roiling antitrust's waters, but, again, the opinion only confused our understanding of "consumer welfare" as a goal of antitrust. A correct application of the rule of reason in this case, and a clear-eyed focus on the ability of consumers to make choices in marketplace transactions,

5. *Amex*, 138 S. Ct. at 2290 (internal quotation marks omitted) (citations omitted).
6. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016).
7. *United States v. Am. Express Co.*, 838 F.3d at 197.
8. *Id*. at 205–06.

should have led the Court to a judgment in favor of the government plaintiffs.

I begin in Part II with a general discussion of the debate over the consumer welfare standard. In Part III of the Article I discuss the overall rule of reason analysis that the Court applies; Part IV examines the effect of two-sidedness on this analysis. In Part V I return to consumer welfare and its confusing use in this case.

## II. THE DEBATE OVER THE CONSUMER WELFARE STANDARD

The argument between Justices Gorsuch and Breyer is almost a literal replay of the 1960s argument between Robert Bork and Ward Bowman on one side, and Harlan Blake and William Jones on the other. It was played out initially in Fortune Magazine, subsequently in the *Columbia Law Review*, and finally one-upped by Bork in his famous book, *The Antitrust Paradox*.[9]

The heart of Bork's argument is well-known. Antitrust law has a single goal, which Bork called "consumer welfare." Catchy the phrase was, and the Supreme Court picked it up one year after the *Antitrust Paradox* was published: "Antitrust is a consumer welfare prescription," the Court wrote, citing Bork.[10] Gorsuch's opening questions are a direct echo of Bork.

Breyer's opening paragraph is a direct echo—almost a paraphrase—of a core argument that Blake/Jones made in their response to Bork/Bowman. Blake/Jones wrote:

> The great virtue of the competitive process is that it makes possible the attainment of a viable economy with a minimum of political interference . . . Is not this the aspect of antitrust which makes it uniquely American? . . .
>
> . . .
>
> [A]ntitrust operates to forestall concentrations of economic power which, if allowed to develop unhindered, would call for much more intrusive government supervision of the economy. Reliance on competitive markets accommo-

9. *See* ROBERT H. BORK, THE ANTITRUST PARADOX (1978). For the Bork/Bowman and Blake/Jones debate, see Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138 (1963); Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Robert H. Bork, *Contrasts in Antitrust Theory I*, 65 COLUM. L. REV. 401 (1965), responded to in Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, FORTUNE, Aug. 1964, at 135; Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965) [hereinafter *In Defense of Antitrust*]; Harlan M. Blake & William K. Jones, *Toward A Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965).

10. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing THE ANTITRUST PARADOX 66 (1978)).

> dates our interest in material well-being with our distrust of concentrations of political and economic power in private or governmental hands.[11]

The debate between Bork and Bowman and Blake and Jones—and between Gorsuch and Breyer—is important for antitrust policy. Bork argued that his single goal of consumer welfare was far preferable to the "loose rhetoric" and "flabby thinking" behind the "many other benefits" that antitrust purportedly could advance.[12]

Blake and Jones, on the other hand, argued for multiple goals. In addition to the goal of avoiding more intrusive government regulation to deal with concentrated private power, Blake and Jones included: freedom of choice for consumers (as well as for entrepreneurs); efficient allocation and use of resources; "minimizing maldistributions of wealth" by preventing "sustained extractions of prices unrelated to costs"; encouraging the formation of markets and assuring ease of entry; and protecting participants in markets—"particularly small businessmen"—against exclusionary practices.[13] The bottom line for Blake and Jones was that Congress was primarily motivated by a concern for the "abusive behavior of economic giants" and "sympathy for their victims, consumers and businessmen deprived of alternatives and opportunities."[14] Is it "even conceivable," they asked rhetorically, that Congress in 1890 "would pass an emotionally charged measure like the Sherman Act out of an exclusive preoccupation with the idea that prices should always equal marginal costs?"[15]

The question of antitrust's goals is important, of course, but perhaps as consequential for the debate is the method for achieving those goals. Multiple goals could call for multiple approaches—history, psychology, economics.[16] This complicates analysis, but the problem of multiple goals is actually deeper. For many of the multiple goals there is no clear way to achieve them and no clear way to judge whether we would be better off if one goal were advanced but at the cost of another.

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11. *In Defense of Antitrust*, *supra* note 9, at 382–83. *See also* Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. REV. 575, 577 (1937) ("American business must make up its mind whether it favors the regulation by competition contemplated by our antitrust laws or the only probable alternative—government control.").
12. ROBERT H. BORK, THE ANTITRUST PARADOX 427–28 (1993 ed.) [hereinafter ANTITRUST PARADOX].
13. *See In Defense of Antitrust*, *supra* note 9, at 381, 384.
14. *Id.* at 384.
15. *Id*. For a later exposition of antitrust's goals, see Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981).
16. *See* Lawrence A. Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977).

By contrast, Bork offered a simpler tool to achieve his goal, "price theory,"[17] which required limited trade-offs and focused on a relatively simple relationship between price and output.[18] Examining the impact of *The Antitrust Paradox* fifteen years after its original publication, Bork wrote that although a major part of his argument was about antitrust law's goals, "the dispute over actual legal decisions was carried on in terms of price theory."[19]

The price theory that Bork used was not complicated. Bork pointed out that his use of price theory did not require lawyers to become "highly adept at economics."[20] The "simplest ideas are also the most powerful and entirely adequate to the tasks of the law," Bork wrote.[21] Price theory, for Bork, was less about economic theory and more about providing "a powerful tool of analysis" that made it possible "to win arguments and to do so decisively."[22] Price theory, Bork pointed out, was "a powerful form of rhetoric."[23]

In truth, "consumer welfare" was also a powerful form of rhetoric. The term was not only new to competition law discussion, but also to economics when Bork published *The Antitrust Paradox* (he didn't even use it in the Columbia Law Review debate with Blake and Jones). Economists at the time were concerned with social welfare (the welfare of all members of society) rather than only the welfare of consumers, but Bork wasn't much concerned with real consumers either.[24] Instead, he applied the label to what was really some form of total welfare—"the wealth of the nation"—and not just what would benefit real consumers.[25] As Bork later explained, he viewed consumer welfare as synonymous with "economic efficiency," and he used economic

17. For a fuller inquiry into what, exactly, price theory is and where it comes from, see E. Glen Weyl, *Price Theory*, J. ECON. LIT. (forthcoming), https://ssrn.com/abstract=2444233 [https://perma.unl.edu/Q243-GVFZ].

18. Although Bork later recognized the trade-off between losses to allocative efficiency and increases to productive efficiency, *see* ANTITRUST PARADOX, *supra* note 12, at 427, his original book was skeptical of having judges make such trade-offs in an antitrust trial, *see* BORK, *supra* note 9, at 124–29.

19. *See* ANTITRUST PARADOX, *supra* note 12, at xiii.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id*.

24. For a discussion of how the term "consumer welfare" was understood in economics, see Gregory J. Werden, *Essays on Consumer Welfare and Competition Policy* at 2–5 (2009), https://dx.doi.org/10.2139/ssrn.1352032 [https://perma.unl.edu/P4FC-3QLQ]. For an in-depth discussion of the economic theories behind "consumer welfare" and "total welfare," see Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal of Antitrust*, 63 ANTITRUST BULL. 455 (2018).

25. *See* BORK, *supra* note 9, at 90 ("Consumer welfare . . . is merely another term for the wealth of the nation.").

reasoning (via price theory) to achieve it.[26] That meant focusing on increasing output and avoiding the deadweight welfare loss that comes from a misallocation of resources. "In a word, the goal is maximum economic efficiency to make us as wealthy as possible."[27]

Bork's notion of "consumer welfare," and the bases of his economic arguments, have been constantly critiqued since the publication of *The Antitrust Paradox*.[28] An important aspect of this critique has been a disagreement over what the term "consumer welfare" should actually mean. Is it really synonymous with efficiency? Hovenkamp argues that it is not: "Under the modern (non-Borkean) consumer welfare principle, low prices are the dog and efficiency is but the tail."[29] If it's really about low prices, is it low prices just to consumers? What about intermediate buyers who are often the direct victims of price fixing cartels and are often the plaintiffs in private antitrust litigation? And if it's low prices, what about non-price effects, for example, on quality or innovation?

Courts and commentators have had little difficulty including intermediate purchasers and non-price effects,[30] but their willingness to do so suggests that "consumer welfare" sometimes functions more as a slogan than a standard. Indeed, were we applying this standard to really favor the consumer and to get low prices and high output, wouldn't we condemn excessively high pricing in itself? Doesn't such pricing have the exact effects that a "consumer welfare" standard appears to condemn, that is, resource misallocation plus a clear harm to consumers who pay more than they should were markets working properly?[31] Yet, we have been reluctant to condemn such pricing

26. *See* Antitrust Paradox, *supra* note 12, at 427.

27. *Id*.

28. *See, e.g.*, Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 142–49 (2011).

29. Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, J. CORP. L. (forthcoming 2019), https://ssrn.com/abstract=3197329 [https://perma.unl.edu/97H2-K6PK].

30. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 153 n.4 (E.D.N.Y. 2015) ("Amex-accepting merchants and Amex cardholders are both technically 'consumers' of the services provided by Defendants"). *See also* FTC v. H.J. Heinz Co., 246 F.3d 708, 719 (D.C. Cir. 2001) (proof of reduction of competition to wholesalers is sufficient to show competitive harm; no need to prove impact on end-user consumer); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 190 (3d Cir. 2005) (district court focus on consumers who used false teeth, rather than on the dealers and laboratories that purchased the teeth from the defendant manufacturer, was "clear error"); *cf.* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (harm to excluded nascent competitor; no proof of increased price to consumers).

31. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019) ("Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, 'protecting consumers from monopoly prices' has been 'the central concern of antitrust.'").

under the antitrust laws (at least in the United States), indicating that consumer welfare may be about more than just consumers and more than just economic welfare.[32]

Whatever the ambiguities of the term "consumer welfare," however, until recently it appeared that Bork had set the frame for the debate over goals and that methods more than goals were being contested.[33] Over time different economic theories, loosely labeled as post-Chicago, have been advanced to challenge Bork's easy-to-understand price theory, but the primacy of an economic approach to antitrust law and the importance of efficiency were generally accepted.[34]

Surprisingly to many, however, the current debate has shifted once again to a serious discussion of goals and away from methods. There are several reasons for the return of the goals debate. First, the data look bad for antitrust. Recent scholarship has challenged the effectiveness of antitrust enforcement, showing increasing concentration, either generally or in particular industries, increasing profit rates accompanied by a decrease in entry into profitable industries, and an increase in market power as measured by price-cost margins.[35] Further, economists have traced an increasing skew in the distribution of income and stagnant, virtually non-existent growth in wages.[36] As one

32. For a review of the arguments over applying the Sherman Act to excessive pricing, see Harry First, *Excessive Drug Pricing as an Antitrust Violation*, 82 ANTITRUST L.J. 701, 711–16 (2019).

33. *See* Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2160 (2013) ("The core debate is how to design and apply antitrust principles so that robust markets are likely to result or be preserved, not what are the goals of antitrust.").

34. For post-Chicago School economics in operation, see, e.g., Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371 (2017); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49 (2010) (reviewing development of economic analysis of merger effects).

35. *See, e.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM 13–23 (2019) (describing and explaining decades-long increase in market power); COUNCIL OF ECON. ADVISERS ISSUE BRIEF, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4–6 (2016) (discussing increasing concentration across a number of industries, increasing rents, and declining rates of entry; suggesting that "barriers to entry may have increased in many industries"), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf [https://perma.unl.edu/7JGB-4QZ7]; Hovenkamp, *supra* note 29 (citing sources); Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* 2 (Working Paper 2017) (data indicating that concentration and profitability have increased across most U.S. industries and that investment has been "weak" relative to profitability since early 2000s) (using aggregate industry data), http://pages.stern.nyu.edu/~tphilipp/papers/IK_Comp_v4.pdf [https://perma.unl.edu/U7JF-2K32].

36. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 24 (Arthur Goldhammer, tr., 2014) (rising income inequality from 1970 to 2010) (Figure 1.1); Hovenkamp, *supra* note 29 ("stagnant, virtually non-existent growth in wages").

commentator pointed out, these trends started in the 1980s, "about the same time that Bork's book was published and United States antitrust law began a significant rightward turn."[37]

The second reason for the reemergence of the goals debate is that the rise of the Internet has brought with it significant structural changes in the economy. Not only have numerous major industries been disrupted but new platform companies have increased in importance in the economy. In 2006 the five largest companies in the United States were Exxon Mobil (oil), General Electric (heavy manufacturing), Citigroup and Bank of America (financial services), and Microsoft. In 2017, four of the five were gone, replaced by technology platform companies: Alphabet, Amazon, Apple, Facebook. Only Microsoft remained on the list from 2006.[38]

These five firms, dubbed the "Frightful Five," have raised fears about excessive power and control of peoples' lives reminiscent of the fears in the Gilded Age that sparked the Sherman Act.[39] Responding to a broad range of concerns—privacy and individual autonomy, functioning of the democratic process, impact on small (and not so small) businesses—antitrust has suddenly gained a new political salience, leading to the introduction of major antitrust reform bills in Congress.[40] Commentators began looking backward for different approaches to antitrust, articulated before antitrust lost its way—to Brandeis and the progressives of the early twentieth century,[41] or to Robert Jackson and Thurman Arnold at the end of the Roosevelt Administration,[42] or to the enforcement and legislative efforts taken be-

37. Hovenkamp, *supra* note 29, at 10.

38. *See* Jonathan Taplin, *Is It Time to Break Up Google?*, N.Y. TIMES (Apr. 22, 2017), https://nyti.ms/2pPP7To [https://perma.unl.edu/E2ZX-E7Z9] (data from S&P Dow Jones Indices).

39. *See* Farhad Manjoo, *Tech's Frightful Five: They've Got Us*, N.Y. TIMES (May 10, 2017), https://nyti.ms/2pwtHtt [https://perma.unl.edu/X2F4-ZVWT] ("We are, all of us, in inescapable thrall to one of the handful of American technology companies that now dominate much of the global economy."); Christopher Mimms, *Amazon is Leading Tech's Takeover of America*, WALL ST. J. (June 16, 2017), https://www.wsj.com/articles/amazon-is-leading-techs-takeover-of-america-1497653164 [https://perma.unl.edu/X6TB-QYH6] ("America's biggest tech companies are spreading their tentacles . . . [P]ower and wealth will be concentrated in the hands of a few companies in a way not seen since the Gilded Age.").

40. *See, e.g.*, Merger Enforcement Improvement Act, S.306, 116th Cong., 1st Sess. (Jan. 13, 2019) (requiring parties to merger settlements to submit certain post-merger data for five years); Consolidation Prevention and Competition Promotion Act of 2019, S.307, 116th Cong., 1st Sess. (Jan. 13, 2019) (changing anti-merger standard and requiring merging parties in certain transactions to bear the burden of proving lack of anticompetitive effect).

41. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION LAW & PRAC. 131 (2018).

42. *See* Jonathan B. Baker, *Competitive Edge: Revitalizing U.S. Antitrust Enforcement Is Not Simply a Contest Between Brandeis and Bork—Look First to Thur-*

tween 1969 and 1979 to curb conglomerate and large mergers, to break up major corporations, and to deal with no-fault monopoly and shared oligopoly.[43]

The reemergence of the goals debate has had one ironic aspect. Some commentators have responded by vigorously defending the consumer welfare standard against those who would enlarge antitrust's remit to include a broader set of goals, now labeled as "public interest." These neo-consumer-welfarists do not argue for a limited role for antitrust, as Bork had; indeed, these commentators are generally in favor of strong enforcement. Instead, they argue that "stronger" enforcement is possible using the current analytical approach to antitrust that courts and commentators have favored since the 1970s.[44] Although these commentators would certainly not call themselves Neo-Borkeans, still they accept Bork's rhetorical and policy turn, disagreeing more on method. In an unacknowledged tip of the hat to Bork, for them, goals are one thing, but disputes over legal rules are carried on in terms of applied economic theories.

## III. APPLYING THE RULE OF REASON

### A. The General Framework

Judges may be influenced by what they view as the purpose of the laws they are interpreting, but they must mediate their policy views through the legal doctrines at their disposal. The organizing doctrine

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*man Arnold*, WASH. CTR. FOR EQUITABLE GROWTH (Jan. 31, 2019), https://equitablegrowth.org/revitalizing-u-s-antitrust-enforcement-is-not-simply-a-contest-between-brandeis-and-bork-look-first-to-thurman-arnold/ [https://perma.unl.edu/XQU5-PUYF]; Press Release, United States Department of Justice, Assistant Attorney General Makan Delrahim Delivers Remarks for the Inaugural Jackson-Nash Address, Feb. 26, 2018 (discussing Jackson's contribution to antitrust enforcement). For a full account of Arnold and his enforcement record, see SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY (2005).

43. *See* Harry First, *Woodstock Antitrust*, CPI ANTITRUST CHRONICLE 1 (Apr. 2018), *available at* https://ssrn.com/abstract=3180878 [https://perma.unl.edu/WJZ5-6D3M].

44. *See, e.g.*, *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition & Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. 5 (Dec. 13, 2017) (testimony of Diana Moss, President, American Antitrust Institute) (arguing for vigorous enforcement using a "consumer welfare" standard and rejecting "populist claims"; "the consumer welfare standard is fully capable of meeting the challenges of the modern economy"), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Moss_SJC-Sub-comm-Hearing_Consumer-Welfare_12.13.17.pdf [https://perma.unl.edu/GYB4-65UP]; BAKER, *supra* note 36, at 202–09 (suggesting a number of political and legal arguments to deal with market power, but urging litigants to "rely heavily on arguments rooted in modern economics"); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018), *available at* http://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf [https://perma.unl.edu/3V9G-M9HK].

available in the *American Express* case was the rule of reason, antitrust's preferred decisional tool since the Court moved away from per se rules in 1977 in *Sylvania*.[45]

The contractual restraint at issue in the *American Express* litigation was Amex's "nondiscrimination provision" (NDP), which the parties and the Court generally referred to as an "antisteering" provision.[46] When a merchant accepts an Amex card the merchant pays Amex for "merchant services" that Amex provides in clearing the transaction and crediting the merchant with funds from the customer's purchase. Generally, Amex's charges to merchants for these services are higher than Visa's or MasterCard's.[47] Under the NDP, a merchant could not attempt to attract or "steer" a customer to use the merchant's preferred card network by, for example, offering a 10% discount for using a Visa card, or free shipping for using a Discover card.[48] The NDP did not forbid offering customers a discount for using cash or checks or debit cards, but this is a requirement of federal law that Amex cannot change.[49]

Justice Thomas, writing for the 5–4 majority, begins his analysis with what appears to be a noncontroversial statement of the rule of reason framework. "The parties agree that a three-step, burden-shifting framework applies," he writes.[50]

Step One: The plaintiff "has the initial burden to prove that the challenged restraint has a *substantial* anticompetitive effect that *harms consumers* in the relevant market."[51] For this proposition he relies on the Areeda and Hovenkamp treatise,[52] which does not mention either "substantial" or "consumers," Von Kalinowski,[53] which

45. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (explaining that the rule of reason is the "prevailing standard of analysis").
46. *See, e.g.*, *Amex*, 138 S. Ct. 2274, 2293 (2018) (Breyer, J., dissenting).
47. *See id*. at 2280, 2282.
48. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 149, 165 (E.D.N.Y. 2015).
49. For a history of federal legislative intervention into discounts and surcharges for cash, see *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1147 (2017). The Durbin Amendment to the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 extended these provisions to debit cards, but only where the merchant "does not differentiate on the basis of the issuer or the payment card network." *See* 15 U.S.C. § 1693o-2 (2012). For the language of American Express's nondisclosure provision, see American Express Merchant Reference Guide–U.S.at § 3.2 (2019), https://www.americanexpress.com/content/dam/amex/us/merchant/merchant-channel/US_RefGuide_October_2018-Final.pdf [https://perma.unl.edu/5CCZ-86T5].
50. *Amex*, 138 S. Ct. at 2284.
51. *Id*. (emphasis added).
52. *Id.* (citing P. Areeda & H. Hovenkamp, Fundamentals of Antitrust Law § 15.02[B] (4th ed. 2017)).
53. *Id.* (citing 1 J. Kalinowski, Antitrust Laws and Trade Regulation § 12.02[1] (2d ed. 2017)).

mentions "substantial" but not "consumers," and a private Second Circuit case, which does not mention "substantial" or "consumers."[54]

Step Two: The burden then "shifts to the defendant to show a procompetitive rationale for the restraint."[55]

Step Three: If the defendant satisfies this burden, the burden then shifts back to the plaintiff to show that the "procompetitive efficiencies could be reasonably achieved through less anticompetitive means," that is, a less restrictive alternative.[56]

The dissenting Justices seem to go along with this three-step approach. Justice Breyer begins his dissent by saying that "I agree with the majority and the parties" that the restriction should be evaluated under the "three-step 'rule of reason.'"[57] He puts Step One this way: "[A] court looks first at the agreement or restraint at issue to assess whether it has had, or is likely to have, anticompetitive effects."[58] No "substantial," no "consumers." For his phrasing Justice Breyer cites to the Court's decision in *Indiana Federation of Dentists*, but that case does not quite use his language.[59] Instead, the Court there asked whether the restraint had the "potential for genuine adverse effects on competition."[60] Justice Breyer then adds a bit more to Step One (Step 1 ½?), pointing out that the Court normally asks whether the restraint may "tend to impede competition" and whether the parties to the restraint "have sufficient economic or commercial power for the agreement to make a negative difference."[61] For Step Two, Justice Breyer relies on Areeda and Hovenkamp: the burden then shifts to the defendant to show that the restraint "serves a legitimate objective."[62] Then comes Step Three: the plaintiff can "still carry the day" by showing that the "legitimate objective" can be met "in less restrictive ways" or perhaps that "the agreement 'on balance' remains unreasonable" (Step 3 ½?).[63]

If we compare the two statements of the rule of reason, we find that the majority has three steps, but leaves out a step that is both necessary and has been the subject of some criticism—the need to net pro- and anti-competitive effects[64]—which really makes four steps.

54. *Id*. (citing Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F. 2d 537, 543 (2d Cir. 1993)).
55. *Id.*
56. *Id.*
57. *Id*. at 2290 (Breyer, J., dissenting).
58. *Id.* at 2291.
59. *See id*. at 2291.
60. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986).
61. *Amex*, 138 S. Ct. at 2291 (Breyer, J., dissenting).
62. *Id.*
63. *See id*.
64. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001).

The dissent actually seems to have five steps, not three. Why both sides seem so intent on saying they have three steps is mysterious.

Although both parties present their rule of reason framework as if their statements are noncontroversial and well-accepted, in fact they are not. In the last Supreme Court case to apply the rule of reason, *FTC v. Actavis*, we find Justice Breyer's majority opinion leaving it to the lower courts to structure antitrust litigation so as to answer the "basic question" in a rule of reason analysis—"the presence of significant unjustified anticompetitive consequences"[65]—thereby mushing together all three (five?) steps of the rule of reason analysis. In his dissent in *California Dental Association*, Justice Breyer saw these three steps: (1) whether the restrictions "have the potential for genuine adverse effects on competition," quoting *Indiana Federation of Dentists*;[66] (2) whether the restrictions might be justified by "procompetitive tendencies or redeeming virtues," a burden borne by the defendant;[67] and (3) whether the restrictions "would likely have made a real difference in the marketplace,"[68] that is, did the parties "have sufficient market power to make a difference?"[69] No net, no less restrictive alternative, and no mention of harm to consumers.

Is it any wonder then that Chief Justice Roberts in his dissent in *Actavis*, joined by Justices Thomas and Scalia, complained about the "amorphous rule of reason"?[70]

### B. Step One

The Court in *American Express* never got past Step One, "In sum, the plaintiffs have not satisfied the first step of the rule of reason."[71] Why not? Because they "have not carried their burden to prove anticompetitive effects in the relevant market."[72]

The Court gave three reasons for why the plaintiffs did not satisfy Step One: (1) they litigated the wrong market; (2) they focused on price, but the wrong price; and (3) they did not prove a reduction in output. At each of these steps the Court was wrong.

The plaintiffs sought to prove that there was a market for merchant services. Credit card companies and merchants negotiate around the price for these services, that is, how much merchants will pay and what services the credit card company will provide. Those ne-

65. FTC v. Actavis, Inc., 570 U.S. 136, 160 (2013).
66. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 784 (1999) (Breyer, J., dissenting) (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986)).
67. *See id*. at 786, 788.
68. *Id*. at 788.
69. *Id*. at 782.
70. *Actavis*, 570 U.S. at 160.
71. *Amex*, 138 S. Ct. 2274, 2290 (2018).
72. *Id*. at 2287.

gotiations also involve detailed requirements that merchants must observe; these too are subject to some negotiation depending on the type and size of the merchant. Credit card companies do, or could, compete around those terms with other credit card companies; this competition could take the form of efforts to provide merchants with better terms as a way to enter the market and compete with other credit card companies, which is what Discover tried to do. This sounds like a market.

Defining markets is not just a descriptive exercise. "Market" is a concept, an analytical tool to enable antitrust courts to focus on the effects with which the antitrust laws are concerned. Presumably, the core adverse effect is the ability to raise price without being disciplined by competitors. This, of course, is exactly what the plaintiffs proved. Under what Amex called its "Value Recapture" program, Amex raised prices at least twenty times between 2005 and 2010, in different amounts to different industry segments, depending on the different elasticities of demand these different merchants had for the Amex card.[73] Airlines saw a 7% to 15% increase over four years, increasing Amex's pre-tax income by more than $90 million.[74] "Everyday spend" merchants, like supermarkets and retailers, saw their rates increase; 280,000 restaurants had their rates increased; and over one million small merchants saw price increases.[75] In all, Amex increased its profits by more than $1.3 billion over a five-year period.[76] This is not just proof of the existence of market power, as shown through market share and entry barriers. This is proof of its exercise.

The Court acknowledged that Amex increased its prices to merchants, although the Court made it seem small to the casual reader by stating that the average price increase in the merchant rate over the period was 0.09% (which it was).[77] Still, that was not proof of anticompetitive effect for several interconnected reasons. The market was not merchant services, it was "credit cards";[78] in this market "only one product" is supplied, "transactions";[79] the plaintiffs did not

73. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 195–96 (E.D.N.Y. 2015).

74. *Id.* at 196.

75. *See id*.

76. *Id*. at 197.

77. *See Amex*, 138 S. Ct. at 2288.

78. *See, e.g.*, *id*. at 2283 (noting that the district court treated "credit-card market" as two separate markets).

79. *Id*. at 2286 (quoting Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 580 (2006)).

prove that the net price of transactions increased;[80] and plaintiffs did not prove a restriction in the output of transactions.[81]

The factual key to this line of reasoning is the idea that the product that Amex is selling is transactions, a point that counsel for Amex hammered home in oral argument.[82] Looked at this way, the Court saw credit card issuance and credit card acceptance as continuous, even though issuance and acceptance are sold to different parties at different prices and at different times.[83] This led the Court to ask a question that literally no one could answer: How much does a transaction cost? Presumably this would be the net of the price charged to merchants (in individual transactions?) and whatever price consumers pay for the card (amortized membership fee minus rewards per transaction). But who knows what that is since it appears nowhere and Amex itself suppresses information regarding the amount merchants pay by forbidding its merchants from offering customers a better deal if they use a cheaper card. The economics experts who testified at trial for both sides made individual stabs at what the net price might be, but even they couldn't figure it out to the district court's satisfaction.[84] If two PhD economists are unable to say what the price of a transaction is, how can we expect consumers to do so at the point of sale?

Transactions are not sold in any market. Transactions are engaged in (as in, engaging in a real estate transaction) but they are not the product that is bought and sold (it's the real estate). Sellers do charge for the service of providing transactions (a real estate broker's commission), which is what Amex did on the merchant side. The beauty of prices and markets is that they provide buyers with information and alternatives. Focusing on unpriced "transactions" that are not bought and not sold provides neither.

Once the Court accepted the idea that transactions are the unit on which to focus, however, the plaintiffs' case fell apart. Increased prices at the end of the transaction told the Court nothing because the increase did not account for what happened at the beginning, even leading the Court to disregard the district court's finding that cardholder benefits did not increase during the time that Amex was raising prices

80. *Id*. at 2288 ("[P]laintiffs failed to offer any reliable measure of Amex's transaction price or profit margins").

81. *See id*.

82. *See* Transcript of Oral Argument, *supra* note 4, at 37, 41, 44, 50, 61–62, 65 ("[A]nd what I've said over and over again here is the product is the transaction").

83. *See Amex*, 138 S. Ct. at 2285–86.

84. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 215 (E.D.N.Y. 2015) ("[N]either party has presented a reliable measure of American Express's two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders.").

to merchants (which would mean that the "net price," whatever it was, must have increased by at least some amount).[85]

Further, if the plaintiffs were right that prices increased, shouldn't output have decreased? The Court pointed out, however, that the number of transactions actually increased during this period,[86] and took from that the idea that American Express couldn't have had market power because market power comes only from the ability to raise price "*by restricting output*."[87] In oral argument Chief Justice Roberts demolished the idea that the increase in transactions tells us something about Amex's power to raise price, "[T]hat has so many factors . . . [I]f the economy grows, then the output of your product, credit card transactions, grows, right?"[88] Nevertheless, the increase in transactions allowed the Court to shift its emphasis from price effects to output effects and conclude that the plaintiffs had not shown anticompetitive harm.

### C. Muddying the Waters

After writing that plaintiffs had "not satisfied the first step of the rule of reason" and had "not carried their burden of proving . . . anticompetitive effects," the Court added, "Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions."[89] But why is the Court discussing interbrand competition? Aren't effects on interbrand competition procompetitive justifications to be raised by a defendant in Step Two?

But wait, there's more. In the immediately preceding paragraph the Court wrote this:

> Lastly, there is nothing inherently anticompetitive about Amex's antisteering provisions. These agreements actually stem negative externalities in the credit-card market and *promote interbrand competition*. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance"—the promise of a frictionless transaction. A lack of welcome acceptance at one merchant makes a card-

85. *Compare id*. (concluding that evidence showed that Amex's "price increases were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and resulted in a higher net price") *with Amex*, 138 S. Ct. at 2288 ("Even assuming the plaintiffs are correct" that the increase was not entirely spent on cardholder rewards).

86. *See Amex*, 138 S. Ct. at 2288 ("[O]utput of credit-card transactions grew dramatically from 2008 to 2013"). Counsel for Amex hammered home this point in oral argument. *See, e.g.*, Transcript of Oral Argument, *supra* note 4, at 41 ("Output of the product has soared.").

87. *Amex*, 138 S. Ct. at 2288 (quoting the Areeda and Hovenkamp treatise, but adding emphasis).

88. Transcript of Oral Argument, *supra* note 4, at 41–42.

89. *Amex*, 138 S. Ct. at 2290.

> holder less likely to use Amex at all other merchants. This externality endangers the viability of the entire Amex network.[90]

Again, the promotion of interbrand competition is an issue normally handled at Step Two in the analysis, procompetitive justifications. Even more curiously, to support its argument that "welcome acceptance" endangers the viability of Amex's network, the Court cites to the district court opinion at the very page where the district court calls the "welcome acceptance" argument "Amex's primary pro-competitive justification for the restraints."[91]

Finally, and even more curiously, the Court takes what might be a plausible argument for a procompetitive justification that a defendant could put forward to justify applying a rule of reason and presents it as if it were proved true. But this was not a case about whether the rule of reason should be applied, like *BMI*, *California Dental*, or *Leegin*.[92] This case was fully litigated under the rule of reason, not as a per se case, and the defendant was given the opportunity to prove that its contractual restriction actually advanced competition.

At this task, Amex failed. First, the district court rejected Amex's argument that any diminution of "welcome acceptance" caused by steering would lead to a "downward spiral" in Amex's business as customers deserted the Amex card for its competitors' cards. No "direct evidence" from experts or financial analysts established that without NDPs Amex would "cease to be an effective competitor" and even the testimony from various Amex executives regarding the "viability of Amex's current business model in a market in which merchant steering is permitted was notably inconsistent."[93] Second, the NDP suppressed interbrand competition on the merchant side (among Visa, Mastercard, and Discovery) as well as intrabrand competition (among other merchants accepting Amex). This made it unlike other cases justifying distribution restraints (which involved a tradeoff between intra- and inter-brand competition) and revealed a deficiency in Amex's proof: "Defendants' argument that net competition in the credit card industry will decline if its NDPs are eliminated fails to consider the likely increase in inter-brand competition on the merchant side . . . that would result from unlocking price competition in the network ser-

90. *Id*. at 2289 (quoting United States v. Am. Express Co., 88 F. Supp. 3d 143, 156 (E.D.N.Y. 2015)) (emphasis added).

91. *See id*. (citing *United States v. Am. Express Co.*, 88 F. Supp. 3d at 156).

92. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (rule of reason should be applied, rejecting per se rule); Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) (rule of reason should be applied, rejecting quick look); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) (rule of reason should be applied, rejecting per se rule).

93. *United States v. Am. Express Co.*, 88 F. Supp. 3d at 231 (E.D.N.Y. 2015). Justice Breyer picked up this point in his dissent, noting that the majority had ignored the district court's factual finding. *See Amex*, 138 S. Ct. at 2303.

vices market."[94] Third, the district court saw the argument about "ready acceptance" as an argument relating to competition "in the interrelated card issuance market," a "separate, though, intertwined, antitrust market."[95] This would then require out-of-market balancing, which the district court viewed as impermissible under Supreme Court precedent.[96] "[E]ven if such cross-market balancing is appropriate under the rule of reason in a two-sided context," the district court wrote, Amex "failed to establish that the NDPs are reasonably necessary to robust competition on the cardholder side of the [credit card] platform, or that any such gains offset the harm done in the network services [merchant] market."[97]

The Court's discussion of Amex's procompetitive justification, even though the Court purported to stop at Step One of the rule of reason analysis, had important consequences for the decision in the case. The reason for the separate steps in the rule of reason analysis is to allocate properly the burdens of proof in antitrust litigation to the parties best able to address them. Plaintiffs should not be tasked with dreaming up and disproving all possible justifications that a defendant could raise in support of restraints that have proven adverse effects on competition. If there is a really good justification for a restraint, let the defendant prove it. The burden will still be on the plaintiff to show that, on balance, competition is harmed.

### D. The Bottom Line: An Analytical Mess

The Court did not follow its own analytical roadmap in deciding the case. It actually could have. Having defined the market to include effects on merchant services and card issuance, and having found no proof of anticompetitive effect in that market because output increased, why didn't the Court just stop there?

The answer may be that the Court added a reference to the promotion of inter-brand competition because it was Amex's narrative that actually drove its decision, not the facts proved in the litigation and not the three-step analytical approach and the doctrinal contours of the rule of reason. That narrative was actually simple. Amex competes with Visa and Master Card. Its business model is different and relies on big spenders who get various "rewards" for their spending, rather than relying on impecunious card holders who can't pay off their bills each month and end up paying high finance charges.[98] Amex needs

94. *United States v. Am. Express Co.*, 88 F. Supp. 3d at 228 n.52, 230.
95. *See id*. at 226, 229.
96. *See id*. at 229, n.54 (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963)).
97. *See id.* at 229–30.
98. *Id*. at 159 (explaining that Amex's "lend-centric" competitors generate more than half their revenue from interest charged on revolving balances).

high prices to merchants to make all this work, which means that without the high prices interbrand competition would suffer. The Court eventually fit this narrative into its analysis, paying no attention to the dissent's point that the Court's decision protected competitors, not competition.[99]

Analytical structures are intended to produce careful analysis. By muddying the waters of the basic structure of the rule of reason, the Court ended up with an opinion that did not carefully answer the core questions of the case: How were consumers hurt? How should we weigh harm to some consumers (merchants, as intermediate buyers, and their customers) against possible gains to others (consumers who buy credit cards)?

## IV. THE RULE OF REASON AND MULTI-SIDED PLATFORMS

Most economists who have written about platforms have done so in broad terms; they also do not necessarily distinguish closely between two-sided "platforms" and two-sided "markets." Rochet and Tirole, for example, acknowledge that two-sidedness exists in many industries and that "the crucial challenge for the platforms is to get both sides of the market 'on board,' while making a profit overall."[100] Determining the optimal price on both sides, they point out, is a "business decision" that "is quite complex."[101]

Economists worry about how to model economic phenomena and whether their models work. They do not necessarily worry about legal issues and how their models should be reflected in the issues on which antitrust courts must focus. The Supreme Court in *American Express*, however, had to take the economists' models and fit them to antitrust law. In doing so the Court tried to confine its decision to what it termed a two-sided transaction platform, one with "more pronounced indirect network effects and interconnected pricing and demand,"[102] rather than have the decision apply to all to industries that could be described as "two-sided." As a result, it will now be the task of lawyers in future litigation to argue about which platforms will be considered transactional ones, and, thus, single markets according to *American Express*, and which platforms will still be seen as involving separate markets on separate sides of the platform.[103]

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99. *See Amex*, 138 S. Ct. 2274, 2303 (2018) (Breyer, J., dissenting).

100. Jean-Charles Rochet & Jean Tirole, *An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems*, 2 REV. NETWORK ECON. 69, 72 (2003).

101. *Id*.

102. *See Amex*, 138 S. Ct. at 2286 (2018).

103. *Compare* US Airways, Inc. v. Sabre Holdings Corp., 2019 U.S. App. Lexis 27358 (2d Cir. 2019) (holding that, under *Amex*, computerized network used by travel agents to book airline flights is a "transaction platform" that must include both

Defining the market is not the end of the inquiry that *American Express* has set us on. The next question will involve assessing the net effect on both sides of market. If the platform is seen as a two-sided market (*American Express*), then the plaintiff will bear the initial burden of proving the net effect. If the platform is seen as two markets, then the question of how (or whether) to net the benefits will not arise until Step Three, and only after the defendant has shown in Step Two that there are competitive benefits and that these benefits survive a less restrictive alternative test.

No matter how the burden of proof is allocated, however, netting the benefits is complicated, but we do have some guidance on this issue from outside the United States on how to net the benefits in platform litigation. In 2014 the European Court of Justice decided two cases involving payments systems platforms. One case involved the interchange fee that MasterCard charged to acquiring banks, which then became part of the merchant charge (and was passed on to consumers who bought from merchants).[104] The other case, decided the same day, involved a pricing rule of a French association managing bank card issuance and ATM business, adopted to incentivize card issuers to expand their acquisition business and thereby increase the size of the network accepting the cards.[105]

There are three key points in comparing the EU approach to the Supreme Court's approach in *American Express*. First, the European Court of Justice analyzed these cases as involving separate markets, not one.[106] Second, although the legal issues in the two European cases were different,[107] the Court of Justice in both cases wrote that the competitive analysis must take account of effects in both markets.

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travel agents and airlines; remands for retrial based in evidence presented to jury of net harm to airline company plaintiff even accounting for benefits to travel agents) *with In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 2018 U.S. Dist. LEXIS 153318, *27–29 (N.D. Cal. Sept. 3, 2018) (rejecting economist's proposed "multi-sided market for college education" that balances pricing to "numerous constituencies"; "not analogous" to two-sided market recognized in *American Express*) (suit alleging NCAA and member conferences fixed prices for payments made to student athletes).

104. Case C-382/12 P, Mastercard v. Comm'n, 2014 EUR-Lex CELEX LEXIS 0382 (Sept. 11, 2014).

105. Case C-67/13 P, Carte Bancaire v Comm'n, 2014 EUR-Lex CELEX LEXIS 0067 (Sept. 11, 2014).

106. *See Mastercard*, 2014 EUR-Lex CELEX LEXIS 0382 at ¶ 11 (finding three markets, an inter-systems market, an issuing market, and an acquiring market); *Carte Bancaire*, 2014 EUR-Lex CELEX LEXIS 0067 at ¶¶ 8, 76–78 (not disagreeing that the issuance of payment cards could be a relevant market).

107. *Mastercard* involved the applicability of the first condition of Article 101(3), which exempts a restraint from Article 101(1) if it "contributes to improving the production or distribution of goods." *See, e.g.*, *Mastercard*, 2014 EUR-Lex CELEX LEXIS 0382 at ¶ 230. *Carte Bancaire* involved the question whether the network's rule should be considered a restriction by object (per se) or by effect (re-

The Court reasoned that if as a general matter "interactions" between a relevant market and a "different related market" must be considered, then "all the more so" when the interactions are between "two facets of a two-sided system."[108] Third, where there is interaction between the two sides of a system, an assessment must be made as to "whether such advantages [on one side] are of such a character as to compensate for the disadvantages which that measure entails for competition."[109] Still, this does not involve a netting of the benefits in one market against the harm in the other, but rather an assessment of whether the benefits in one market provide "appreciable objective advantages" in the restrained market, particularly "where the consumers on those markets are not substantially the same."[110]

The imprecise language regarding tradeoffs that the Court of Justice used in *Mastercard* has been taken to mean that there is only a "limited scope" for considering cross-market efficiencies under EU law particularly where different groups of consumers are affected.[111] Similarly, European Commission guidelines recognize that although negative effects in one market normally cannot be balanced against positive effects in another, where "two markets are related," efficiency tradeoffs are possible but only where the "group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same."[112]

U.S. antitrust law and practice has viewed cross-market tradeoffs either with caution or as completely improper.[113] Although the reason for not making such tradeoffs has sometimes been viewed in administrability terms,[114] the deeper reason is that tradeoffs between different groups of consumers are inherently problematic. We might be willing to make the tradeoff in inter/intrabrand settings, where the

quiring proof of economic effect). *See, e.g.*, *Carte Bancaire*, 2014 EUR-Lex CELEX LEXIS 0067 at ¶¶ 29, 87–88.

108. *Carte Bancaire*, 2014 EUR-Lex CELEX LEXIS 0067 at ¶ 79. *See Mastercard*, 2014 EUR-Lex CELEX LEXIS 0382 at ¶ 237.

109. *See Mastercard*, 2014 EUR-Lex CELEX LEXIS 0382 at ¶ 237.

110. *Id.* at ¶ 242.

111. *See* Cyril Ritter, *Antitrust in Two-Sided Markets: Looking at the U.S. Supreme Court's* Amex *Case from an EU Perspectiv*e, 10 J. EUR. COMPETITION L. & PRAC. 172, 178 (2019).

112. Commission Notice, Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, 103 ¶ 43 (refers to the Treaty on the Functioning of the European Union; note that Article 81(3) is now Article 101(3)).

113. *Cf.* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES at 30 n.14 (2010) (explaining that in considering merger efficiencies, the Agencies, at their discretion, will consider "efficiencies not strictly in the relevant market, but so inextricably linked" that divestiture would sacrifice them).

114. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.").

group of consumers is roughly the same (all television set buyers, for example). In cases like *American Express*, however, that easy congruence is not present because all consumers, even those who pay with cash, are affected on the merchant side, at least to some extent, but only Amex cardholders are benefited on the issuance side, certainly a group that is different, smaller, and likely wealthier.

## V. MISSING IN ACTION: THE CONSUMER WELFARE STANDARD

The debate over the goals of antitrust—consumer welfare v. public interest—did have its effect on the Court's decision in *American Express*. On one level, the Court's decision appears to embrace the consumer welfare standard. Closer examination, however, shows some confusion about what this standard means and even how to advance consumer welfare in the context of antitrust litigation.

The Court's emphasis on output effects, and its conclusion that output actually increased while the antisteering restriction was in effect,[115] certainly echoes Justice Gorsuch's opening point about the importance of restrictions on output and the deadweight welfare loss. Justice Gorsuch's almost throw-away point about not protecting merchants also showed up in the Court's disregard for the increased prices that merchants paid for the services Amex provided.[116]

Is this the "consumer welfare" standard Bork argued for? If consumer welfare is really all about efficiency, as Bork suggested, then how can one disregard the increase of input prices to intermediate sellers? Doesn't this assume that we don't care whether intermediate sellers engage in inefficient input substitution (say, dropping Amex as a form of payment)? If it's about deadweight welfare loss, isn't simple price theory powerful enough to allow us to assume that output will be affected, at least to some extent, in downstream markets as retailers spread their increased costs for Amex cards over all customers?[117] A price increase of $1.3 billion to merchants over a five-year period is not nothing.[118] Why don't we count this as an adverse effect on output? Indeed, why doesn't the Court consider the merchants to be "consumers" whose welfare deserves protection, particularly in light of its view

115. *See supra* text accompanying notes 86–88.

116. *See supra* text accompanying notes 73–77.

117. Both the district court and the dissent made this point about price effects in downstream markets, *see Amex*, 138 S. Ct. 2274, 2302 (2018); United States v. Am. Express Co., 88 F. Supp. 3d at 216 ("Merchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices.").

118. *See supra* text accompanying note 76.

that cardholders and merchants "jointly consume a single product, payment card transactions"?[119]

What is even more dissonant in terms of the consumer welfare goal is the Court's invocation of the benefits that Amex has provided to poor people in today's "credit-card market." The Court wrote that Amex had "influenced" the credit-card market by making card-payment services available to "low-income individuals, who otherwise could not qualify for a credit card and could not afford the fees that traditional banks charge."[120] The Court did not particularly elaborate on this point, not explaining what type of product Amex provided (presumably at a profit) or how such efforts related to the antisteering restriction, which, after all, is intended to keep wealthy big spenders happy with merchants' "ready acceptance" of their Amex cards.[121]

Why did the Court include this reference to Amex's effort to help the unbanked? It is probably safe to assume that the Court did not advance this argument on distributional grounds, something that would be more consistent with a "public interest" standard than a "consumer welfare" standard. Indeed, were that what the Court had in mind, it would surely have paid more attention to the price increases Amex imposed on small businesses and "everyday spend" retailers, where poorer customers might spend their money, and it would have paid more attention to the regressive consequences of taxing relatively poor cash payers to fund travel to Tahiti by relatively rich Amex card holders.[122]

Closer examination of the Court's opinion indicates that the Court referred to Amex's effort to reach out to low-income consumers as a way to show that output increased and quality improved during the antisteering regime, both effects presumably being consistent with a

119. *Amex*, 138 S. Ct. at 2286 (internal quotation marks omitted) (quoting Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 583 (2006)). The district court explicitly treated merchants as consumers, *see supra* note 30.

120. *Id.* at 2282. The Court made a second similar reference, *see id*. at 2289 (Amex has "increased the availability of card services, including free banking and card payment services available to low-income customers who otherwise would not be served.").

121. The Court may have been referring to Amex's "Blue Bird" card, co-branded with Walmart, that provides certain banking and credit-card services to consumers without bank accounts. *See* Brief for Respondent at 5, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454) (provides services "to people 'in poor communities where traditional banks do not want to serve them.'"). The Blue Bird card is a pre-paid cash card, with a variety of benefits. *See* BLUE BIRD, https://www.bluebird.com/ [https://perma.unl.edu/66Y5-LZK7] (last visited July 5, 2019). The district court's opinion made no reference to services to low-income consumers or to the Blue Bird card.

122. A point made by the district court, *see* United States v. Am. Express Co., 88 F. Supp. 3d 143, 216–17 (E.D.N.Y. 2015).

consumer welfare standard.[123] But this only serves to underline the point that the consumer welfare standard is ambiguous at its core, inviting open-ended litigation over how to define and measure output and quality. Having accepted serving poorer consumers as a quality improvement, does this mean that the Court would then count the issuance of environmentally friendly cards as a plus for consumer welfare because the "quality" of the card had improved? Or higher wages for workers in the credit card industry, which might lead to more workers qualifying for credit cards, thereby increasing output? Could these be justifications for anticompetitive restraints (or worse, arguments that a plaintiff will need to disprove at Step One)?

The real mystery with the consumer welfare standard, however, is its application in a way that ignores consumers. This is nowhere more evident than in the *American Express* case itself. Justice Breyer started out his opinion extolling markets as the institution that decides the optimal mix of goods and services in the economy, not government and not business. Markets do not make decisions, consumers do. If markets are to work, consumers need price information so that they can decide and so that they can make choices. Not once does the dissent mention consumer sovereignty, however; nor does the dissent draw support from prior cases where the denial of information critical to making an economic choice was found to violate the antitrust laws.[124] With so much attention being paid to the broad trade-off between prices to merchants and benefits to cardholders, attention to the importance of decisions by actual consumers got lost.

Justice Sotomayor saw the point clearly in oral argument, however. In a colloquy with counsel for Amex, Justice Sotomayor pointed out that as a consumer "if I go to a cash register and the merchant says to me, I'll give you a 1% discount today if you don't use Amex, I sit there and think to myself, do I need the airplane rewards or the train rewards, or do I want the 1%?" Counsel for Amex responded that choosing the discount means that she would have fewer rewards in total and so would have "paid a price increase," to which Justice Sotomayor responded, "You're making my choice for me. You're not

123. *See Amex*, 138 S. Ct. at 2289 (arguing that Amex's antisteering provision had not "stifled competition among credit-card companies," noting Amex's "business model" had increased the availability of card services, including services to low-income customers) (citing D. EVANS & R. SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 88–89 (2d ed. 2005)).

124. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (boycott to prevent insurance companies from getting information relevant to insurance coverage); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (agreement to prevent engineers from including price information when bidding on jobs to customers).

giving me the choice. And that's what price competition is about, my choice, not your choice."[125]

Had the Court paid more attention to this aspect of consumer welfare, the case would have looked quite different. Individual consumers should be able to make individual choices between Amex's rewards and some other credit card company's rewards. Some would certainly still use their Amex card, others might have different preferences. Amex's card would succeed in the marketplace if it attracted more consumers than it repelled. How is that not the essence of consumer welfare?

## VI. CONCLUSION

The epigraph with which this Article begins encapsulates the real consumer welfare prescription for the antitrust laws today. When Senator Klobuchar writes that "antitrust enforcement affects more than just price and output," I think she means that antitrust is not just about an abstract proposition of welfare economics. It is about "our everyday lives, from the price of groceries at the market to the cost of prescription drugs."

The concern that the consumer welfare standard expresses is a concern for consumers. The core of this concern is price, not output. It is not by chance that Senator Klobuchar talks about our everyday lives and, particularly, prescription drugs. If the antitrust laws were only about output restrictions, in fact, we might not even care so much about high drug prices because the demand for pharmaceutical drugs, like the demand for other necessities, is highly inelastic. This would lead to the perverse result of downplaying high drug prices because these high prices might have little effect on output.[126] Surely output effect, in itself, cannot be the goal of the antitrust laws.

Nevertheless, it is not enough to argue that antitrust should be concerned with low prices just because low prices are good for consumers' pocketbooks. Bork chose the phrase "consumer welfare" as a

125. Transcript of Oral Argument, *supra* note 4, at 34–37. The district court also made this point. *See United States v. Am. Express Co.*, 88 F. Supp. 3d at 220 ("Ultimately, and essentially, it is the customer's decision whether to accept the merchant's offer or to pay with his or her card of choice.").

126. The possibility that deadweight loss in the economy from monopoly pricing is small is an old criticism of antitrust, *see* Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. PAPERS & PROCEEDINGS 77 (1954), criticized in Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27, 43–45 (2003). Glick points out that the common law took the opposite view, condemning monopolies with low elasticities where dead-weight loss would be low. *See* Glick, *supra* note 24, at 491–92. *See also* Harry First, *Private Interest and Public Control: Government Action, The First Amendment, and the Sherman Act*, 1975 UTAH L. REV. 9, 11–15 (1975) (describing early regulation of rates of monopoly public utilities).

polemicist, not as an economist, because he recognized that associating his antitrust outcomes with what is good for consumers made his arguments more powerful. He appealed to something that sounded like it would be good for all of us.

The appeal to "all of us" should today be taken as an appeal for a more democratic antitrust, one that looks not just to growing the economy but to distributing its benefits more widely.[127] Some of the benefits of a consumer welfare approach are economic. Lower prices ensure that the consumer surplus is in the pockets of consumers, not producers. Some of those benefits, however, also have to do with economic liberty, the ability of consumers to make private choices as to what they think is in their best interest.

The goals of antitrust cannot be divorced from economics and economic outcomes, but they also should not be divorced from democratic concerns, particularly individual choice and a more democratic distribution of economic gains.[128] As the debate between Justice Gorsuch and Justice Breyer reminds us, a narrow view of consumer welfare did not always hold sway in interpreting the antitrust laws. As the Court's opinion in *American Express* makes evident, this narrow view of consumer welfare does not even provide sure guidance for deciding specific cases.

*American Express* was a good case for advancing the real interests of consumers. It is one of those rare cases fully litigated under the rule of reason; it is one of those rare Section 1 civil cases brought by the Justice Department. The district court's findings made clear how consumers were hurt, both financially and in terms of their ability to choose the products they want. It is unfortunate that the Supreme Court allowed its interpretation of the latest economic theories to distort the application of the rule of reason and reach a result that harms, not helps, the consumers that the antitrust laws were intended to protect.

127. *See* Glick, *supra* note 24, at 489 (preventing redistribution of consumer surplus to producers can be justified as a way to diminish "the negative social consequences from income inequality").

128. For the argument that the Sherman Act was intended to prevent the redistribution of consumer surplus to firms with market power, see Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 94, 96 (1982) (explaining that higher prices to consumers were condemned "because they unfairly extracted wealth from consumers" and Congress "also condemned the unequal distribution of wealth resulting from monopolistic overcharges").