Nebraska Law Review

Volume 98 | Issue 2 Article 6

2019

Lessons from *Amex* for Platform Antitrust Litigation

Evan Chesler
Cravath, Swaine & Moore, LLP, echesler@cravath.com

David Korn
Cravath, Swaine & Moore, LLP, dkorn@cravath.com

Evan Chesler* & David Korn**

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TABLE OF CONTENTS

I. Introduction 346
II. A Brief History of a Long Litigation 347
A. The District Court Rules for Plaintiffs Based on a One-Sided Market Definition 348
B. The Second Circuit Reverses, Applying a Two-Sided Market Definition 349
C. The Supreme Court Affirms, Embracing a Two-Sided Market Definition 349
III. Lessons from *Amex* 352
A. Lesson One: A Full Rule of Reason Analysis—Not Some Form of Relaxed Review Advocated by the Government—Applies to Vertical Agreements Between a Platform and Customers on One Side of the Platform 352
B. Lesson Two: For That Rule of Reason Analysis, a Plaintiff First Must Define a Relevant Market That Includes Both Sides of Two-Sided Transaction Platforms 353
C. Lesson Three: When the Relevant Market Is Two-Sided, a Plaintiff Must Demonstrate That the Challenged Conduct Harmed Competition in the Market as a Whole 356

* Chairman, Cravath, Swaine & Moore, LLP. For *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), an action against American Express brought by the U.S. Department of Justice and several states, Evan served as lead trial counsel in the district court and argued the successful appeals in the Second Circuit and the Supreme Court. He also represented American Express in related private litigation. For *U.S. Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43 (2d Cir. 2019), Evan represented Sabre on appeal and argued the case to the Second Circuit, which vacated a jury verdict against Sabre.

** Associate, Cravath, Swaine & Moore, LLP. David also represented American Express in the government and private actions and Sabre in its appeal.

IV. Misperceptions About *Amex* 358
A. Fallacy One: Two-Sided Market Definition Does Not Apply to "Mature" Platforms 358
B. Fallacy Two: A Platform's Conduct Should Be Condemned If Platform Consumers on One Side Are "Subsidized" by Those Who Do Not Use the Platform 359
C. Fallacy Three: *Amex* Will Complicate and Confuse Antitrust Analysis in a Wide Range of Cases 361

I. INTRODUCTION

Ohio v. American Express (*Amex*)[1] is the first case in the United States in which a court addressed the proper antitrust analysis of claims against two-sided platforms.[2] The overarching lesson from *Amex* is that the Supreme Court combined existing antitrust doctrine with modern economic analysis of multisided platforms to reach a decision that best captures economic reality.[3] In applying traditional antitrust analysis, the Supreme Court elaborated on (some critics say departed from) the canonical "rule of reason" cases in ways that can have meaning for antitrust litigation involving two-sided platforms. In some respects, what the Court said has meaning for the rule of reason more broadly.

This Article, written one year after the decision, highlights several lessons from the Court: (1) vertical agreements by two-sided platforms are reviewed using a full rule of reason analysis, not an abbreviated or relaxed approach; (2) as a threshold step to that analysis, a plaintiff *must* define a relevant market that includes both sides of two-sided transaction platforms; and (3) when the relevant market is two-sided, the plaintiff bears the burden of demonstrating harm to competition in the market as a whole, which means evidence of price and output

1. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). The authors represented American Express.
2. At least one prior Supreme Court decision, *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953), has addressed antitrust claims against a type of two-sided platform—but it was in 1953, before the economic literature discussed "two-sided platforms."
3. *See, e.g.*, David S. Evans & Richard Schmalensee, *The Role of Market Definition in Assessing Anti-Competitive Harm in* Ohio v. American Express, CPI ANTITRUST CHRON., June 2019, at 11, https://www.competitionpolicyinternational.com/wp-content/uploads/2019/06/CPI-Evans-Schmalensee.pdf [https://perma.unl.edu/VSA6-H3YT] ("Sound antitrust policy has always focused on market-specific competitive realities rather than just applying abstract theory. In markets with multi-sided platforms, new learning has made it clear that competitive realities often differ fundamentally from those in ordinary single-sided markets. New tools may well be necessary to apply traditional principles appropriately in markets with multi-sided platforms, but there is no reason to abandon those principles.").

effects on one side of the platform is not sufficient to show harm, nor is evidence of customer loyalty ("insistence") that the platform earns by paying incentives.

This Article also addresses some of the criticisms and misperceptions surrounding the decision. Namely, that a subsidy running to customers on one side of a two-sided platform is (or should be), by itself, a basis for antitrust intervention; that a two-sided market definition need not apply to "mature" transaction platforms; and that the Supreme Court's decision will create uncertainty for platforms and their customers in terms of the types of agreements that may run afoul of the Sherman Act and the burden of proof.

II. A BRIEF HISTORY OF A LONG LITIGATION

In October 2010, U.S. Attorney General Eric Holder announced that the Department of Justice and seventeen states were suing Visa, MasterCard, and American Express based on provisions in the credit card networks' contracts with merchants. Specifically, the government alleged that non-discrimination provisions (NDPs) in each network's contracts with merchants harmed competition by preventing merchants from steering customers to other forms of payment at the point of sale. A decade earlier, Visa and MasterCard lost a significant antitrust challenge brought by the government to those networks' exclusivity arrangements with card-issuing banks. This time, Visa and MasterCard settled immediately and agreed to change their rules. Amex, however, took the position that the government's case against it was seriously flawed and that the NDPs allowed Amex to compete on an even playing field with the dominant Visa and MasterCard brands.

The government's theory focused almost entirely on merchants, but for Amex the key to the case was the government's exclusion of the cardholder. The government argued that Amex's rules violated the antitrust laws because they prevented price competition at the merchant point of sale, where merchants were unable to steer to credit card networks that offered lower merchant rates. Amex argued that the government's theory missed the way credit card networks compete. Amex and other networks are two-sided platforms that connect one merchant and one cardholder in a simultaneous transaction. Demand between the two sides is interconnected: if a network struggles to gain acceptance on one side of the platform, it will have a tough time keeping consumers on the other side. But if a network expands on one side, it becomes more attractive to the other. Amex's business model sparked heated competition in the credit card industry by providing generous rewards and benefits to cardholders, which were funded with merchant fees. But to fully appreciate that competition, it is essential to examine both sides of the Amex platform. Although eco-

nomic analysis of two-sided platforms has become well-established in the academic literature in the last two decades, before the *Amex* case it had not been commonly used in the courtroom.

A. The District Court Rules for Plaintiffs Based on a One-Sided Market Definition

At a 2014 bench trial in the Eastern District of New York, the government's expert agreed that "an assessment of market definition, market power and competitive effects should account for the two-sided nature of the market" and testified that "[i]t is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market."[4] The district court found that credit card networks are simultaneous two-sided platforms with two sides that "are inextricably linked with one another."[5] However, the court concluded that the relevant market was limited to "network services"—the half of the platform where credit card networks compete for merchant acceptance—because "conflat[ing] these separate avenues of competition into a single product market for 'transactions' that is coextensive with the platform itself" would "take[ ] the concept of two-sidedness too far" and "impermissibly and unnecessarily frustrate the court's analysis."[6]

Based on a one-sided market definition, the district court concluded that the government met its burden to demonstrate harm to competition in two ways. First, the court made a finding of market power not because of Amex's market share (26% of transaction volume), but instead due to "cardholder insistence" (i.e., consumer loyalty that could cause cardholders to shop less at merchants that did not accept Amex cards).[7] Second, the court focused on direct evidence of what it characterized as harm to competition in the form of increased rates charged to merchants, although the court noted that the government presented no empirical evidence that the NDPs had resulted in a higher "two-sided price" (the price charged across Amex's entire platform, accounting for both discount revenue and the expense of providing cardholder rewards).[8]

4. Joint Appendix at 249–50, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454), 2017 WL 6206252.

5. United States v. Am. Express Co., 88 F. Supp. 3d 143, 173 (E.D.N.Y. 2015).

6. *Id.* at 172–73; *see also id.* at 151 ("[T]he court concludes that the relevant market for its antitrust analysis in this case is the market for [general purpose credit and charge] card network services.").

7. *Id.* at 191.

8. *Id.* at 215.

B. The Second Circuit Reverses, Applying a Two-Sided Market Definition

On appeal, the Second Circuit found that the district court erred by excluding cardholders from its market definition. Noting the "commercial realities" of the market, including the joint and simultaneous nature of cardholder and merchant demand, the Second Circuit concluded that "[s]eparating the two markets here—analyzing the effect of Amex's vertical restraints on the market for network services while ignoring their effect on the market for general purpose cards—ignores the two markets' interdependence" and "allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-expanding such activities may be."[9]

Applying a two-sided relevant market definition, the Second Circuit also disagreed with the district court's conclusions that Amex possessed sufficient market power to affect competition adversely in the relevant market and that the nondiscrimination provisions had an actual adverse effect on competition. As for market power, the Second Circuit rejected insistence as a basis for market power because cardholder loyalty simply reflects "competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards."[10] As for direct evidence of harm to competition, the Second Circuit held that the district court "erroneously elevated the interests of merchants above those of cardholders" because plaintiffs did not present evidence of "the two-sided net price [that] account[s] for the effects of the [nondiscrimination provisions] on both merchants and cardholders," particularly in light of undisputed evidence of increasing output and higher-quality cardholder benefits.[11]

C. The Supreme Court Affirms, Embracing a Two-Sided Market Definition

Several states sought review in the Supreme Court. Although the United States led the case throughout, it opposed certiorari because the Second Circuit's decision did not directly conflict with any Supreme Court or Court of Appeals decision. Before *Amex*, the U.S. Solicitor General argued, "the Court has not squarely considered questions of market-definition or proof of anticompetitive effects in cases involving two-sided platforms as such . . . . [N]o other court of appeals has specifically considered the application of the Sherman Act to two-sided platforms either" and "[f]urther percolation in the lower courts may be especially useful because of the idiosyncratic character of the agree-

9. United States v. Am. Express Co., 838 F.3d 179, 198 (2d Cir. 2016).
10. *Id.* at 202.
11. *Id.* at 204.

ments at issue here."[12] Nevertheless, the Supreme Court granted certiorari.[13]

In June 2018, in a 5–4 decision, the Supreme Court affirmed. Writing for the majority, Justice Thomas concluded that "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market."[14] As he explained, "[t]wo-sided platforms differ from traditional markets in important ways," in particular, because they "often exhibit what economists call 'indirect network effects,'" which "exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate."[15] "Striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals."[16] Because of that interconnection, "the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing."[17] The majority held that, "[i]n two-sided transaction markets, only one market should be defined" because "[a]ny other analysis would lead to mistaken inferences of the kind that could chill the very conduct the antitrust laws are designed to protect."[18]

Based on that two-sided market definition, the majority concluded that Amex's NDPs do not violate federal antitrust law.[19] The Government's main argument—that Amex's NDPs increase merchant fees—"wrongly focuses on only one side of the two-sided credit-card market . . . because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone."[20] Instead, "[t]o demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market."[21]

12. Brief for the United States in Opposition at 19–20, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454), 2017 WL 3485653.
13. Ohio v. Am. Express Co., 138 S. Ct. 355 (2017).
14. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018).
15. *Id.* at 2280.
16. *Id.* at 2281.
17. *Id.* at 2285–86.
18. *Id.* at 2287 (citations omitted).
19. *Id.* at 2280.
20. *Id.* at 2287.
21. *Id.*

The majority explained that the Government made none of these showings. Regarding price, "[t]he plaintiffs did not offer any evidence that the price of *credit-card transactions* was higher than the price one would expect to find in a competitive market" and "failed to offer any reliable measure of Amex's transaction price or profit margins."[22] With respect to output, the volume of credit-card transactions "grew dramatically from 2008 to 2013, increasing 30%," and the Government presented no evidence that output would have grown any faster without the challenged rules.[23] On the subject of quality, "Amex's business model spurred Visa and MasterCard to offer new premium card categories with higher rewards" and "increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served."[24] Accordingly, the plaintiffs failed to "prov[e] that Amex's anti-steering provisions have anticompetitive effects. Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions. And it is the promotion of interbrand competition, after all, that is the primary purpose of the antitrust laws."[25]

Justice Breyer dissented. Like the district court, he would have limited the relevant market definition to the network services provided by credit card networks to merchants, because he believed the services Amex provided to participants on each side of its platform were "different but related card services" that were complements, not substitutes for each other.[26] Because "[t]he two categories of services serve fundamentally different purposes . . . it is difficult to see any way in which the price of shopper-related services could act as a check on the card firm's sale price of merchant-related services," and therefore "there is no justification for treating shopper-related services and merchant-related services as if they were part of a single market."[27] Regardless, Justice Breyer would have found that the issue of market definition was irrelevant because of evidence of actual anticompetitive harm, including what he considered to be some evidence of harm to competition even with a two-sided market definition. In the end, Justice Breyer would have held that Amex could have presented evidence about effects on the consumer side of its platform at step two of the rule of reason analysis, as proof of procompetitive benefits, but the burden to make that showing should rest with Amex. To him, the plaintiffs were not required to account for the cardholder side at step

22. *Id.* at 2288 (emphasis added).
23. *Id.*
24. *Id.* at 2289.
25. *Id.* at 2290 (citations omitted).
26. *Id.* at 2291 (Breyer, J., dissenting).
27. *Id.* at 2296 (Breyer, J., dissenting).

one by establishing a prima facie case of harm to competition on the merchant side.[28]

III. LESSONS FROM *AMEX*

A. Lesson One: A Full Rule of Reason Analysis—Not Some Form of Relaxed Review Advocated by the Government—Applies to Vertical Agreements Between a Platform and Customers on One Side of the Platform.

An important starting point for the analysis in *Amex* is that a challenge to provisions in contracts between a defendant that operates a two-sided platform and the customers on one side of that platform are properly reviewed under the rule of reason as vertical agreements. A shorthand review in the form of a *per se* rule or "quick look" rule of reason analysis is inappropriate.

In the Supreme Court, the government and certain amici argued that the agreements at issue between Amex and merchants who agree to accept Amex cards were not purely vertical arrangements and, therefore, could be subject to a form of abbreviated rule of reason analysis. For example, the United States noted that, because "Amex and the merchants that accept Amex cards stand in a vertical rather than a horizontal relationship, the parties and the courts below treated those contracts as vertical agreements subject to rule-of-reason analysis." But the United States argued that the "agreements also have a meaningful horizontal aspect . . . since they restrict the terms on which merchants may deal with non-Amex as well as Amex customers and effectively prevent price competition among competing credit-card networks."[29]

Based on that proposition—that Amex's vertical NDPs "have horizontal effects on interbrand competition"—the states argued that the Supreme Court "should subject them to more careful scrutiny than would apply to a lone producer's vertical restraint restricting intrabrand competition."[30] Amici supporting the Government similarly argued that the Court should apply an analysis to the two-sided platform in this case that relaxed the plaintiffs' burden because, for example, "[t]here is substantively no economic difference between the dissipation of profits from merchant fees propped up by the Amex re-

28. *Id.*
29. Brief for the United States in Opposition, *supra* note 12.
30. Brief for the Petitioners and Respondents Nebraska, et al. at 34, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2017) (No. 16-1454), 2017 WL 6205796 (citation omitted); *see also id.* at 45 ("Unlike other vertical agreements, Amex's agreements have the horizontal effect of restricting interbrand price competition between all competitors, and so trigger the primary purpose of the antitrust laws." (citation omitted)).

straints compared to the dissipation of profits from price fixing,"[31] and because of "the profound effect that the NDPs have on horizontal price competition in the relevant market for merchant network services."[32]

The Supreme Court declined to relax the full rule of reason analysis based on supposed horizontal *effects*. Amex and other two-sided platforms have vertical relationships with consumers on each side of the platform, and vertical restraints "often pose no risk to competition."[33] As Justice Thomas explained, "[a] horizontal agreement between competitors is markedly different from a vertical agreement that incidentally affects one particular method of competition."[34]

B. Lesson Two: For That Rule of Reason Analysis, a Plaintiff First Must Define a Relevant Market That Includes Both Sides of Two-Sided Transaction Platforms.

A broader implication of the Supreme Court decision concerns how courts carry out the rule of reason analysis. In seeking *certiorari* review, the states claimed that litigants generally had an "increasing need for guidance on the rule of reason" because "the Court has not had a recent opportunity to provide concrete guidance over the rule of reason's structure."[35]

One respect in which the Court provided guidance was by describing market definition as a prerequisite to the rule of reason analysis for vertical agreements. The traditional rule of reason analysis follows a "three-step, burden-shifting framework." First, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[36] Second, "[i]f the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint."[37] Third, "[i]f the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[38] The dispute in *Amex* primarily concerned the first step. Although the plaintiffs contended that they showed sufficient harm to

31. Brief for Amici Curiae John M. Connor et al. in Support of Petitioners at 23, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2017) (No. 16-1454), 2017 WL 6492474.
32. Brief of 28 Professors of Antitrust Law as Amici Curiae Supporting Petitioners at 15, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2017) (No. 16-1454), 2017 WL 6492850.
33. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2285 n.7.
34. *Id.* at 2290 n.10.
35. Petition for Writ of Certiorari at 12, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2017) (No. 16-1454), 2017 WL 2472075, at 24.
36. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2284.
37. *Id.*
38. *Id.*

competition in a one-sided market, they also argued that, because they presented "direct evidence" of harm to some anticompetitive features of the NDPs, no precise market definition was required.

The majority instead explained that plaintiffs bear a threshold burden to define a relevant market, and that this is a critical element of step one of the rule of reason analysis applied to vertical restraints.[39] The Court instructed that, at the first step, a plaintiff must "prove that the challenged restraint has a substantial anticompetitive effect that harms consumers *in the relevant market*."[40] That showing can be made through either indirect or direct evidence of harm to competition, but either path begins by defining a market. The indirect route calls for "proof of market power"—which requires a defined market—"plus some evidence that the challenged restraint harms competition."[41] The direct route requires "proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality *in the relevant market*."[42] The government contended that, because it was appealing only the lower court's holding on the direct evidence case, and did not challenge any ruling below about market power and indirect evidence, it was not necessary to define a relevant market, and any deficiency in the market definition proof was irrelevant to the issues on appeal. Contrary to the government's position, the majority concluded that, to assess direct evidence, "we must first define the relevant market," which made it "clear that the plaintiffs' evidence is insufficient to carry their burden."[43]

The dissent considered the market definition requirement a striking departure from precedent: "[t]he majority thus, in a footnote, seems categorically to exempt vertical restraints from the ordinary 'rule of reason' analysis that has applied to them since the Sherman Act's enactment in 1890."[44] But the dissent's analysis would put the cart before the horse, suggesting that plaintiffs can show harm to market-wide competition without ever defining what market was supposedly impacted by that harm. As a result, the majority took a different route: "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market. Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition."[45] Although the government pointed to earlier cases in which the Court found harm to competition based on direct evidence without defining a relevant market, the majority dis-

39. *Cf.* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).
40. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2284 (emphasis added).
41. *Id.* at 2284 (emphasis added) (citation omitted).
42. *Id.*
43. *Id.* at 2285.
44. *Id.* at 2297 (Breyer, J., dissenting).
45. *Id.* at 2285 (citation omitted).

tinguished the precedents as involving horizontal restraints that were more suspect because, by definition, they "involve[d] agreements between competitors not to compete in some way."[46]

In explaining how to define the relevant market, the Supreme Court left no doubt that a two-sided market definition applies to analysis of vertical agreements by two-sided platforms that connect consumers for a joint, simultaneous transaction. Most observers agree that, under *Amex*, a two-sided relevant market definition will apply to antitrust claims challenging vertical agreements by two-sided transaction platforms that share the characteristics of the credit card market identified by the majority: platforms that "facilitate a single, simultaneous transaction between participants," which creates a single product—a transaction—that is "jointly consumed by" consumers on each side.[47]

But what about non-transaction platforms?[48] *Amex* involved a transaction platform, and at the time of the decision there was little precedent in the lower courts addressing a broader range of two-sided platforms (Amex and the United States had opposed *certiorari* in part for that reason). But the majority did not expressly limit its rule to transaction platforms; it explained that two-sided analysis may apply when "indirect network effects" exist, meaning when "platforms cannot raise prices on one side without risking a feedback loop of declining demand."[49] By contrast, the Court said, "[a] market should be treated as one-sided when the impacts of indirect network effects and relative pricing in the market are minor."[50] By specific example, the Court indicated that two-sided analysis may not extend to "the market for newspaper advertising," which does not involve "a single, simultaneous transaction between participants" and which exhibits "weak indirect network effects" with less pronounced "interconnected pricing

46. *Id.* at 2285 n.7.

47. *Id.* at 2286, n.8 (citation omitted).

48. *Compare* FTC, HEARINGS ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY: THE IDENTIFICATION AND ANALYSIS OF COLLUSIVE, EXCLUSIONARY, AND PREDATORY CONDUCT BY DIGITAL AND TECHNOLOGY-BASED PLATFORM BUSINESSES (hereinafter, FTC HEARINGS), Tr. 262:1–15 (Oct. 15, 2018) (Joanna Tsai) ("[M]y reading of [*Amex*] is that it specifically is applicable to transaction platforms, and other multi-sided platforms may be different . . . ."), *with id.* at 267:5–10 (Catherine Tucker) ("I don't read *Amex* as being limited to transaction platforms. I think it would have been odd to read the decision in that way given the many cites . . . to the economic literature, which, of course, is much broader in terms of the way it characterizes two-sided markets.").

49. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2285.

50. *Id.* at 2286.

and demand."[51] Ultimately, this analysis will turn on the "commercial realities" of the industry in question.[52]

C. Lesson Three: When the Relevant Market is Two-Sided, a Plaintiff Must Demonstrate That the Challenged Conduct Harmed Competition in the Market as a Whole.

In the context of two-sided platforms, Justice Thomas explained that it is easy to confuse price effects that are consistent with competition with those that are the result of anticompetitive restraints. This danger is not new for two-sided platforms. As Justice Kennedy wrote in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993), "rising prices do not themselves permit an inference of" anticompetitive conduct because if "output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." But the concept has particular significance for platforms that compete by balancing prices across their two sides. As Justice Thomas put it,

> the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services.[53]

The Supreme Court made clear that, in the context of two-sided platforms, courts should carefully scrutinize evidence of increased prices to ensure that the price effects are linked to reduced output. The Supreme Court held that, "[e]ven assuming the plaintiffs are correct" and "evidence shows that the price of Amex's transactions increased" when considering both sides of its platform, "this evidence does not prove that Amex's anti-steering provisions gave it the power to charge anticompetitive prices."[54] After all, indirect network effects "limit the platform's ability to raise overall prices and impose a check on its market power" because they "encourage companies to take increased profits from a price increase on side A and spend them on side B to ensure more robust participation on that side."[55]

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51. *Id.*
52. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2285; *see also* Joshua D. Wright & John M. Yun, Ohio v. American Express*: Implications for Non-Transaction Multisided Platforms*, CPI ANTITRUST CHRON., June 2019, at 7, https://www.competitionpolicyinternational.com/wp-content/uploads/2019/06/CPI-Wright-Yun.pdf [https://perma.unl.edu/FDH3-9BCW] ("We argue that the Court's distinctions between transaction and non-transaction platforms do not, nor should they, prohibit the application of the economic logic to the ruling on non-transaction platforms.").
53. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2285–86 (citation omitted).
54. *Id.* at 2288.
55. *Id.* at 2281 n.1.

Thus, price increases are competitively significant only if they demonstrate that the defendant is able to raise prices profitably by *restricting output*. Justice Thomas explained that, even if the government had presented some evidence that Amex at one point raised merchant fees without using all of the increase on cardholder rewards, it would not prove that Amex's NDPs "gave it the power to charge anticompetitive prices."[56] To make that showing, a plaintiff must establish that increased prices in fact resulted from output-restricting effects of the conduct at issue. Although the dissent thought this standard set the bar too high,[57] the majority disagreed, finding that the risk of "mistaken inferences" from price effects on one side of a platform would "chill the very conduct the antitrust laws are designed to protect"—that is, competition with other platforms.[58]

A final feature from the *Amex* litigation has received less attention because the states chose not to challenge it and the Supreme Court did not directly address it. But in affirming the decision below, the Supreme Court left intact the Second Circuit's rejection of "cardholder insistence" as a basis for market power.

In *Amex*, the government's theory of market power was based on so-called insistent cardholders, or those who were loyal to Amex because of incentives funded by prices charged to merchants on the other side of the platform. The Second Circuit panel held that this theory of market power failed because it did not adequately account for competition on both sides of the platform. What looked to merchants like "insistence" by cardholders in fact was the product of intense competition among card issuers on the other side of network platforms. The fact that Amex must compete with other networks' cards to offer "robust rewards programs" and other benefits to cardholders "indicates, if anything, a lack of market power."[59] Although the government did not press their market power theory in the Supreme Court, Justice Thomas noted the same dynamic:

> Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants. That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends.[60]

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56. *Id.* at 2288.
57. *Id.* at 2302 (Breyer, J., dissenting) ("[B]ecause the relevant question is a comparison between reality and a hypothetical state of affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the Sherman Act does not apply at all.").
58. *Id.* at 2287 (quoting Brooke Grp. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993)).
59. United States v. Am. Express Co., 838 F.3d 179, 203 (2d Cir. 2016) (internal emphasis omitted).
60. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2289.

IV. MISPERCEPTIONS ABOUT *AMEX*

A. Fallacy One: Two-Sided Market Definition Does Not Apply to "Mature" Platforms.

In other litigation, plaintiffs have argued that a two-sided market definition should not apply to markets that are "mature." This theory—which the Government did not highlight but which amici presented to the Supreme Court—posits that,

> as two-sided platforms mature, the externalities from each side to the other can become unimportant and insignificant, rendering the two-sidedness of no relevance. For example, a mature flight reservation system may not attract another airline if it adds more users, and vice versa. If so, there are no remaining significant two-sided externalities.[61]

On this basis, before the Supreme Court decision, one district court concluded that a one-sided relevant market definition was appropriate for a platform that travel agents use to search for and book airline flights. The district court allowed the jury to decide that the relevant market was one-sided, reasoning that, "[w]hen the market becomes mature, it ceases to be interdependent and two-sided in the economic sense."[62]

However, after *Amex*, the Second Circuit overturned the jury verdict and judgment because the one-sided market definition was "fundamentally at odds" with the Supreme Court's decision.[63] The Second Circuit read *Amex* to require two-sided treatment in all cases where a business "cannot make a sale to one side of the platform without simultaneously making a sale to the other."[64] After all, nothing the Supreme Court said about two-sided transaction platforms was related to market-wide maturity. Instead, when analyzing a two-sided transaction platform, what matters are network effects at the *platform* level, not the market level.[65] Two-sided platforms use their individual two-sided characteristics to compete: "[s]triking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals."[66] Whether the indirect network effects of these platforms impact the size of the market as a whole is irrelevant. When

61. Brief for Amici Curiae John M. Connor et al., *supra* note 31, at 10 n.11.
62. U.S. Airways, Inc. v. Sabre Holdings Corp., No. 11-CV-2725 (LGS), 2017 WL 1064709, at *10 (S.D.N.Y. Mar. 21, 2017).
63. U.S. Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43 (2d Cir. 2019).
64. *Id.* (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. at 2280).
65. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2286 (describing the relevant market for credit card networks as "two-sided platforms" where "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market."); *Sabre*, 938 F.3d at 57 ("In cases involving two-sided transaction platforms, the relevant market must, as a matter of law, include both sides of the platform.").
66. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2281.

platforms use those effects to compete with each other, *Amex* dictates that the GDS market is two-sided. That conclusion also matches Justice Breyer's reading of the majority's rule, which leaves no room for a mature market exception.[67]

In addition to the Second Circuit, the only other court to consider the question after the Supreme Court's decision agreed that "market maturity" is no exception to *Amex*. In recent proceedings in another case against Amex challenging the NDPs brought by a group of merchants, plaintiffs argued for a one-sided relevant market definition, notwithstanding the Supreme Court decision:

> [B]ecause Amex, like Visa, MasterCard and Discover, has existed for decades and is mature . . . . Once a system is mature . . . with tens of millions of people already using the card and the fixed costs of accepting cards already incurred, there is no additional indirect network effect flowing to the merchant side of the platform from the increased use of Amex cards.[68]

The district court also rejected that argument, explaining that, although the Supreme Court decision did not directly engage with the market maturity theory, "the Court still held that 'two-sided transaction platforms exhibit more pronounced indirect network effects'" and thus that both sides of the platform must be included in the relevant-market analysis.[69]

B. Fallacy Two: A Platform's Conduct Should Be Condemned If Platform Consumers on One Side Are "Subsidized" by Those Who Do Not Use the Platform.

One critique of the NDPs leveled by the government and its amici was that they harm consumer welfare because they cause "customers paying with cheap credit cards [to] subsidize the rewards of high-cost customers."[70] According to the government's amici, this subsidization

67. *Id.* at 2298 (Breyer, J., dissenting) (Justice Breyer interpreted the majority decision to mean that a two-sided relevant market definition is now required for businesses with four features and stated "they (1) offer different products or services, (2) to different groups of customers, (3) whom the 'platform' connects, (4) in simultaneous transactions.").

68. Plaintiffs' Response To Defendants' Motion To Dismiss Or In The Alternative For Summary Judgment With Respect To The Individual Plaintiffs' One-Sided and Amex-Only Relevant Markets at 9, *In re* Am. Express Anti-Steering Rules Antitrust Litig. (II), 361 F. Supp. 3d 324 (E.D.N.Y. 2019).

69. *In re* Am. Express Anti-Steering Rules Antitrust Litig. (II), 361 F. Supp. 3d 324, 339 (E.D.N.Y. 2019). The district court further explained that "[t]he relevant question in this instance is whether the Court discussed, and issued a holding on, whether Amex is a two-sided transaction platform and whether the 'relevant market' for antitrust purposes contains both sides of the platform. Because the Court did so, the question of whether this holding incorporated the MPs' maturity theory is irrelevant." *Id.* at 339 n.8.

70. Brief for the Petitioners and Respondents Nebraska et al., *supra* note 30, at 10 ("[Without the NDPs], retailers would pass on much of the savings from credit-

results in "inefficient pricing and adverse impacts on consumers" that "occur even if Amex passed on all its high merchant fees to cardholders through higher rewards" and "are amplified when other credit card platforms increase their merchant prices and cardholder benefits in response to the [NDPs]."[71] As the states put it, "[a]llocative efficiency and consumer welfare are not enhanced if Discover cardholders pay higher prices at the gas station to subsidize an Amex cardholder's frequent-flyer miles."[72] Some have suggested that antitrust analysis in cases like *Amex* should consider whether "a platform creates negative externalities for consumers not using the platform."[73] And in dissent, Justice Breyer noted that cross-subsidization in the credit-card market could "limit the usual relationship between price and output," which allowed the challenged provisions to "disrupt the marketplace by extracting anticompetitive profits," even though they "have only a limited effect on credit-card transaction volume."[74]

The majority's analysis gave no weight to the subsidization argument. Justice Thomas described potential direct evidence of harm—price, output and quality in the relevant market as a whole—without accounting for supposed subsidies among groups of consumers within the market. This approach is consistent with the Supreme Court's precedents, which instruct that the purpose of antitrust is advancing consumer welfare by protecting competition, and "[c]ourts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'"[75] The possibility that increased credit card use imposes an indirect burden on those who do not use credit cards raises questions of welfare redistribution that are ill-suited for courts. In fact, in other countries, similar arguments to those made by the government have been fielded by legislators and regulators, not judges. As one commentator observed, "[w]e regulate debit card fees in this country" but "we don't regulate credit card fees. It's hard for me to see that as an antitrust concern."[76]

It would be a tall task for courts to unpack subsidization arguments that could be made for countless markets throughout the economy because consumers frequently bear some cost for services they do

card competition to consumers, typically in the form of a price decrease. With steering, merchants could seek preference pricing and look to return some of those savings to their customers." (citations omitted)).

71. Brief for Amici Curiae John M. Connor et al., *supra* note 31, at 25.
72. Brief for the Petitioners and Respondents Nebraska et al., *supra* note 30, at 49.
73. FTC HEARINGS, *supra* note 48, Tr. at 20:10–13 (Oct. 17, 2018) (Judith Chevalier).
74. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2302 (2018) (Breyer, J., dissenting).
75. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1121 (2009) (quoting Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S. Ct. 872, 875 (2004)).
76. FTC HEARINGS, *supra* note 48, Tr. at 35:25–36:10 (Oct. 17, 2018) (Richard Schmalensee).

not use. Shoppers who use public transportation may "subsidize" those who use free parking; shoppers who make only small purchases subsidize those who use shopping carts, etc. The majority in *Amex* declined to use the rule of reason to regulate two-sided platforms on the basis that they benefit some consumers more than others.

C. Fallacy Three: *Amex* Will Complicate and Confuse Antitrust Analysis in a Wide Range of Cases.

Justice Breyer's dissent warned that the characteristics identified by the majority as requiring a two-sided market definition in fact are "commonplace" and are shared by, for example, "farmers' markets," "travel agents," and "internet retailers." Since the decision, some commentators have predicted that courts in many cases will be forced to spend significant time grappling with hard questions about two-sidedness, at the risk of "getting stuck unnecessarily in dealing with the complexities of two-sided platforms" and doing analysis "rigidly and mechanistically" as "a distraction from the important issues."[77]

One year after the Supreme Court decision (and more than two years after the Second Circuit ruling), only a handful of disputes about two-sided market definition have emerged in the lower courts:

- In one of the first cases, *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*,[78] the defendants' expert opined that the relevant market was "a multi-sided market for college education in the United States" in which colleges balance their pricing to many constituencies. Among other things, the district court concluded that *Amex* did not compel a multi-sided market definition in part because "the relevant interactions are not transactional or simultaneous and the restraints at issue are not vertical."[79]

77. FTC HEARINGS, *supra* note 48, Tr. at 255:19–256:1 (Oct. 15, 2018) (Tasneem Chipty); *see also, e.g.*, FTC HEARINGS, Tr. at 101:10–101:12 (describing "the view that already there's been defendants filing" to say "we need to start this case over, we're a transaction platform"); *id.* at 219:19–22 (Oct. 16, 2018) (A. Douglas Melamed) ("AmEx could be dangerous if it unleashed a series of arguments that would say, well, what I'm doing benefits the other side."); *id.* at 251:22–252:9 (Eric Citron) (predicting that lower courts' post-*Amex* analysis could "devolve[ ] into a kind of abstract question about the two-sidedness or eight-sidedness of *AmEx*," which "will be pointless and very likely to confuse.").

78. *In re* Nat'l Collegiate Athletic Ass'n Grant-In-Aid Cap Antitrust Litig., 311 F.R.D. 532 (N.D. Cal. 2015).

79. Order Reaffirming Exclusion of Certain Expert Testimony by Dr. Elzinga at 10, *In re* Nat'l Collegiate Athletic Ass'n Grant-In-Aid Cap Antitrust Litig., No. 4:14-md-02541-CW, 2018 WL 4241981 (N.D. Cal. Sept. 3, 2018). In the alternative, the court excluded defendants' expert's testimony because he did not "perform[ ] any economic analysis" which the court found "particularly problematic in light of the undefined number of sides (i.e., constituencies) in [the expert's] proposed multi-

- In *U.S. Airways v. Sabre*, the Second Circuit overturned a jury verdict that was based on an erroneous one-sided market definition.[80] As discussed above, in that case, an airline brought federal antitrust claims against Sabre, which operates a platform that travel agents use to search for and book airline flights. Before *Amex*, the jury found that the relevant market was one-sided and entered a verdict for the airline.[81] On appeal after *Amex*, the Second Circuit vacated the judgment because, "in a case whose subject is a transaction platform . . . the jury must be instructed to consider both sides of the platform being evaluated; the relevant market for such platforms must, *as a matter of law*, always include both sides."[82]
- As mentioned above, the district court in subsequent merchant litigation against Amex granted summary judgment to Amex with respect to plaintiffs' proposed one-sided or single-brand (Amex only) market definitions, rejecting arguments by plaintiffs that new facts not presented in the government litigation could lead to a different market definition.[83]
- Otherwise, parties and courts have alluded to the *Amex* litigation without directly invoking its market definition holding. For example, in *Dreamstime.com, LLC v. Google LLC*,[84] Google stated *Amex* raised "more acute" concerns about plaintiffs' one-sided market definition of "search advertising," but asked the court not to address "the complex market definition issues" for purposes of Google's motion to dismiss.

In fact, the most recent antitrust case decided by the Supreme Court, *Apple Inc. v. Pepper*,[85] also involved a two-sided platform, but neither of the parties nor the Court cited *Amex* or directly discussed the significance of two-sidedness. That case asked whether consumers on one side of a platform—iPhone users—have standing to challenge certain alleged restraints imposed by the platform on participants on the other side—app developers. Apple argued that only app developers had standing under the rule in *Illinois Brick Co. v. Illinois*,[86] which limits antitrust standing to direct purchasers. In a 5–4 decision, Jus-

sided market; the number of sides or constituencies apparently is so large that [the expert] does not even claim to provide an exhaustive list in his report." *Id.*

80. U.S. Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43 (2d Cir. 2019). The authors were counsel to Sabre for its appeal.
81. *See* U.S. Airways, Inc. v. Sabre Holdings Corp., 11 Civ. 2725 (LGS), 2017 WL 1064709 (S.D.N.Y. Mar. 21, 2017).
82. *Id.* (emphasis in original).
83. *In re* Am. Express Anti-Steering Rules Antitrust Litig. (II), 361 F. Supp. 3d 324, 347 (E.D.N.Y. 2019). The authors were counsel to Amex.
84. Dreamstime.com, LLC v. Google, LLC, No. 3:18-cv-01910-WHA (N.D. Cal. June 24, 2018).
85. Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).
86. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

tice Kavanaugh wrote for the majority that iPhone users did have standing because they "purchased apps directly from Apple and therefore are direct purchasers under *Illinois Brick*."[87] The dissent, written by Justice Gorsuch, disagreed because "an antitrust plaintiff can't sue a defendant for overcharging *someone else* who might (or might not) have passed on all (or some) of the overcharge to him," and allowing "convoluted 'pass on' theories of damages" would require "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge."[88] Although two-sidedness was not explicitly mentioned and *Amex* was not cited, the economic characteristics of the defendant's two-sided platform bore on the key questions identified by both sides: because Apple connects iPhone users and app developers for a transaction, consumers on both sides are direct purchasers from Apple (which the majority found dispositive), but the interconnectedness between the two sides makes disentangling potential damages theories difficult (which greatly concerned the dissent).

Now that the Supreme Court provided some guidance on the question of standing in *Apple v. Pepper*, the method of apportioning antitrust damages in two-sided markets could have great significance. In *Sabre*, the Second Circuit recently shed light on that question by discussing the distinction between damages in one- and two-sided markets: "In a market encompassing both sides of the platform . . . if prices charged to [consumers on one side] are less—or incentive payments made are greater—than those that would be observed in a competitive market, then that difference must be accounted for in determining . . . damages" sought by consumers on the other side.[89] In other words, for a two-sided platform, payments made by the platform to consumers on one side "necessarily reduce any damages" that consumers on the other side could claim, which meant that "[t]wo-sided damages must . . . be lower than one-sided damages would have been."[90]

These recent decisions make clear that, although *Amex* is not causing confusion, antitrust questions for two-sided platforms are not going away. *Amex* provides a sensible framework for answering them.

87. *Pepper*, 139 S. Ct. at 1519.
88. *Id.* at 1525–27 (Gorsuch, J., dissenting).
89. U.S. Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 59 (2d Cir. 2019).
90. *Id.*