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Disaggregating Market Definition: *AmEx* and a Plural View of Market Definition†

ABSTRACT

The orthodox view of market definition in antitrust cases is that the same principles of market definition should apply at all stages of an antitrust analysis, and, in particular, that markets should be defined for virtually all purposes by reference to demand-side substitutability. Commentators have struggled to reconcile the Supreme Court's recent decision in Ohio v. American Express Co.*—in which the majority combined services to cardholders and services to merchants into a single antitrust market, despite the evident lack of substitutability between them—with that familiar view.*

In this short Article, we suggest that this effort at reconciliation may be unnecessary, and perhaps even undesirable. Against the orthodox view, we claim that market definition should be "disaggregated" such that the correct approach to market definition may vary depending on the element of the antitrust analysis for which it is being used. Thus, while market definition based on substitutability is an appealing tool for the assessment of market power, it may not be appropriate for the evaluation of competitive effects in all cases under Section 1 of the Sherman Act. The majority opinion in AmEx *can (and perhaps should) be understood as an implicit—albeit cryptic—endorsement of a disaggregated approach to market definition.*

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I. INTRODUCTION

The decision of the U.S. Supreme Court in *Ohio v. American Express Co.* (*AmEx*) has sparked a surge of interest in the antitrust analysis of multisided platforms.[1] The case concerned agreements between American Express and merchants that accept American Express cards, prohibiting those merchants from "steering" customers away from American Express cards.[2] The Court's decision evaluated the claims of a set of government plaintiffs that such "antisteering" provisions violated Section 1 of the Sherman Act.

The distinguishing (if, arguably, not quite unique[3]) feature of the decision lies in the fact that the American Express credit card network is a "multisided platform." The two sides of the American Express platform serve, respectively, the cardholders and merchants participating in the network. While lower courts have previously grappled with antitrust analysis in the context of platforms,[4] *AmEx* represents the Supreme Court's first modern foray into this space, triggering an outpouring of scholarly literature[5] as well as considerable attention in the popular press.[6]

1. Ohio v. Am. Express Co. (*AmEx*), 138 S. Ct. 2274 (2018).
2. *See infra* Part II.
3. *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (discussing violation of the Sherman Act by newspaper company that refused to publish advertisements for companies that were also advertising on a local radio station).
4. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
5. *See, e.g.*, Erik Hovenkamp, *Platform Antitrust*, J. CORP. L. (forthcoming 2019); Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018); Oscar Borgogno & Giuseppe Colangelo, *Antitrust Analysis of Two-Sided Platforms After* AmEx*: A Transatlantic View* (Stanford-Vienna Transatlantic Tech. Law Forum, Working Paper No. 41, 2019); *see also* Andrew I. Gavil & Jordan L. Ludwig, *The Many Sides of* Ohio v. American Express Co., 33 ANTITRUST 8, 15 (2018) (introducing a collection of contributions dealing with the *AmEx* decision).
6. *See, e.g.*, Associated Press, *Supreme Court Sides with* AmEx *in Lawsuit over Rules for Merchants*, WASH. POST (June 25, 2018), https://www.washingtonpost

In his opinion for the Court, Justice Thomas concluded for a five-member majority that the plaintiffs had failed to make a prima facie showing—as required at the first stage of rule of reason analysis—that the defendant's antisteering provisions gave rise to an anticompetitive effect, thus foreclosing liability under Section 1 of the Sherman Act. Justice Breyer's dissent for four members of the Court accused the majority of ignoring elementary antitrust principles and neglecting an ample record of anticompetitive effects.

While the two opinions diverge on a number of issues, the most significant disagreement relates to market definition. Specifically, a majority of the Court held that the relevant market for the antitrust assessment of the antisteering provisions should include services and customers on both sides of the platform: that is, both merchant and cardholder services.[7] The dissent protested that this market definition violated the cardinal antitrust principle that relevant markets can include only substitutable products and services.[8] By this logic, because cardholder services are not substitutable for merchant services, the relevant market in *AmEx*—and the assessment of prima facie competitive effects—should have included only the merchant side of the platform.[9]

These dueling opinions have sparked a minor cottage industry in *AmEx* exegesis (in which this Article gladly participates), as scholars and practitioners attempt to work out what the decision implies for future Sherman Act cases involving multisided platforms (and cases *arguably* involving multisided platforms[10]). Although the *AmEx* majority restricted the scope of its analysis to cases involving "transaction platforms" for which a sale on one side of platform must occur simultaneously with a sale on the other side of a platform, readers

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.com/business/economy/supreme-court-sides-with-amex-in-lawsuit-over-rules-for-merchants/2018/06/25/c6118978-7887-11e8-80be-6d32e182a3bc_story.html?noredirect=on&utm_term=.ada1ed3f3037 [https://perma.unl.edu/9GZ9-FALP]; Tim Wu, *The Supreme Court Devastates Antitrust Law*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html [https://perma.unl.edu/RBD7-3J39]; Chris Sagers, Ohio v. American Express*: Clarence Thomas Sets Sail on a Sea of Doubt, and, Mirabile Dictu, It's Still a Bad Idea*, PRO-MARKET (June 27, 2018), https://promarket.org/ohio-v-american-express-clarence-thomas-sets-sail-sea-doubt-mirabile-dictu-still-bad-idea/ [https://perma.unl.edu/TEQ6-AY8A].

7. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–87 (2018).
8. *Id.* at 2299 (Breyer, J., dissenting).
9. *Id.* at 2299–300.
10. A sound definition of a multisided platform is surprisingly difficult to devise and apply in practice. *See* Katz & Sallet, *supra* note 5, at 2148–51 (identifying difficulties in defining the term); *see also* Brief of Open Markets Institute as Amicus Curiae in Support of Petitioners at 9, Ohio v. American Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454) ("Pegging a fundamental inquiry in antitrust analysis to a concept that has no clear parameters is dangerous. It will encourage a wide swath of firms to seek shelter under this more permissive approach.").

from Justice Breyer onward have noted that the logics of the majority opinion may not easily be confined to such platforms.[11] Thus, *AmEx* appears to have raised more questions than it has answered. And, as multisided platforms are ubiquitous in commerce, those questions cast a long shadow over a wide variety of industries, including (in addition to credit and payment cards): online dating sites, online search, cable television, online marketplaces, physical marketplaces, operating systems, applications software, social media, newspapers and magazines, smartphones, medical conferences, vacation rental networks, job search networks, insurance networks, restaurant reservation systems, and ride-sharing services.

In this Article, we set out one account of what *AmEx* could mean for market definition in future antitrust cases. We argue that, while the conventional view of market definition (which we will call the Unitary View) holds that market definition must be approached in the same way in all the stages of an antitrust analysis—such that, for example, the correct relevant market in which to analyze market power is automatically the correct relevant market in which to assess competitive effects—the *AmEx* majority opinion suggests a different approach. We offer an alternative view (which we call the Plural View), according to which the principles of market definition may vary with the antitrust analysis being considered. Specifically, we claim that market definition for the purposes of determining market power and market definition for the purposes of measuring competitive effects need not involve the application of the same rules, and need not produce the same answers. And if market definition is ultimately an exercise in defining *which market participants and activities matter* for the purposes of antitrust analysis, our basic claim is that different sets of market participants and activities may matter for different purposes.

We reserve for another day, and for a lengthier writing, the many broader questions raised by the Plural View. In particular, we do not offer a general account of when and to what extent the principles of market definition should be differentiated. Instead, by way of a starting point, we offer here the tentative view that the "substitutability principle"—according to which an antitrust market contains reasonable substitutes from the perspective of the demand side of the market, and only such reasonable substitutes—is an appropriate yardstick when measuring market power, but it may not be an adequate measure for assessing competitive effects in every Section 1 case.

We offer an alternative market definition principle for the assessment of competitive effects in Section 1 cases. Under this principle (which we call the integrity principle), the relevant market in which to

11. *See AmEx*, 138 S. Ct. at 2297–301.

assess competitive effects must include the direct effects of the challenged conduct as well as any effects of the conduct that the defendant has the ability and incentive to engage in because of the challenged conduct. Relevant markets defined based on the integrity principle may be broader than conventional substitution-based markets. In a case involving conduct by a company operating a two-sided platform, the integrity principle implies that activities and effects on both sides of the platform should be included in a competitive effects analysis when and only when—as in *AmEx* itself—the challenged conduct on one side of the platform gives the defendant the ability and incentive to engage in conduct, impose term, or otherwise create effects on the other. We argue that this principle not only sets a logical bound to *AmEx*'s single-market approach in Section 1 cases, but that it is grounded in and consistent with existing practices with respect to the antitrust analysis of both conduct and mergers.

To be clear, we address here only the question of which activities and entities should be included in the definition of a relevant antitrust market for effects analysis under Section 1 of the Sherman Act. We do *not* argue that procompetitive benefits should be assessed in the first stage of a rule of reason analysis under Section 1. It is elementary that a plaintiff's burden at this first stage is limited to a showing of anticompetitive effects, not a rebuttal of asserted procompetitive benefits. Our argument concerns only the scope of the competitive effects analysis, not the content of the test itself. And we offer no view at all on Section 2, which differs in some important ways from Section 1.

We find in the *AmEx* decision, thus, both the seeds of a broader principle—the Plural View of market definition—and the seeds of the decision's own limiting principle—the integrity principle. We resist, in particular, the simplistic view that *AmEx* holds that "the relevant market" in a so-called "platform case," whether the platform is transactional or not, *always* includes both (or all) sides of the platform. There are no special rules for platforms, or for transactional platforms, in our reading of either Section 1 of the Sherman Act or the *AmEx* decision itself.

We set out our argument in three Parts. Part II provides basic background on the *AmEx* decision. Part III sets out the orthodox Unitary View of market definition, and explains why our Plural View is preferable. Part IV takes a first step toward working out the broader implications of the Plural View—and a guide to keeping *AmEx* within its proper domain—by explaining why the substitutability principle arguably should not serve as a complete measure of market definition in the evaluation of competitive effects. We further discuss in Part IV how the integrity principle both explains the *AmEx* outcome and meshes neatly with existing antitrust principles.

II. THE *AMEX* MAJORITY OPINION

A. Overview

AmEx concerned an antitrust challenge to American Express's antisteering rules that prohibited merchants from guiding customers away from American Express cards at the point of sale. American Express had entered into agreements with merchants that prohibited the merchants from "implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on Amex cards; or promoting other cards more than Amex."[12] A group of government plaintiffs—the United States and a number of States—challenged those restrictions as anticompetitive restraints of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the U.S. District Court for the Eastern District of New York entered judgment for the plaintiffs following a bench trial.[13] The U.S. Court of Appeals for the Second Circuit reversed, holding that the plaintiffs had failed to establish a prima facie case of anticompetitive effects in a correctly defined relevant antitrust market.[14]

The U.S. Supreme Court granted certiorari and, in the majority opinion authored by Justice Thomas, over a dissent by Justice Breyer for four members of the Court, affirmed the decision of the Court of Appeals.[15] Justice Thomas's majority opinion articulated two central holdings relating respectively to market definition and anticompetitive effects: (1) a single antitrust market should be defined to include both the services provided by American Express to cardholders and the services provided by American Express to merchants;[16] and (2) applying that market definition, the plaintiffs had failed to discharge their burden to show prima facie anticompetitive effects (as the first stage of the rule of reason analysis required), for they had relied entirely for the purpose on a showing of higher nominal prices for services to merchants, without regard to output and quality on the merchant side of the platform or to effects of any kind on services to cardholders.[17] We shall discuss each of these holdings in detail.

B. Market Definition

The Court began with the proposition that market definition is a necessary element of rule of reason analysis, at least in vertical

12. *Id.* at 2283.
13. 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).
14. *Am. Express Co.*, 838 F.3d at 195–206.
15. *AmEx*, 138 S. Ct. 2274.
16. *Id.* at 2285–87.
17. *Id.* at 2287–90.

cases.[18] The Court then undertook that exercise. The district court had determined after trial that the transactional services provided by American Express to cardholders, on the one hand, and those provided to merchants, on the other, were supplied in separate antitrust markets.[19] On the face of it, this was an unsurprising conclusion. After all, the services provided by American Express to cardholders and the services provided to merchants were different in kind, and were not substitutable for one another. Cardholders received a revolving line of credit and various collateral membership benefits, and merchants received transactional handling services.[20] Plainly, these were not substitutes: cardholders could not look to merchant services as alternatives for the service they received, nor could merchants look to cardholder services. For this reason, Judge Garaufis in the District Court—in a conclusion subsequently echoed by Justice Breyer for the dissenting Justices[21]—had concluded that the two sides of the credit card platform constituted two separate, albeit interrelated, antitrust markets.[22]

Nevertheless (and despite the incredulity of Justice Breyer's dissent[23]), a majority of the Supreme Court followed the Second Circuit in reaching the contrary conclusion,[24] holding that a single antitrust market should be defined to embrace transactional services on *both* sides of the credit card platform.[25] The majority identified three distinctive features of the services provided to merchants and the services provided to cardholders that, in the view of the Court, justified their aggregation into a single market:

- First, the Court emphasized the simultaneous and joint nature of consumption on the two sides: credit card platforms "cannot make a sale unless both sides of the platform simultaneously

18. *Id.* at 2285–87.
19. United States v. Am. Express Co., 88 F. Supp. 3d 143, 171–75 (E.D.N.Y. 2015).
20. *AmEx*, 138 S. Ct. at 2280.
21. *Id.* at 2297–301 (Breyer, J., dissenting) ("The relevant question is whether merchant-related and shopper-related services are *substitutes,* one for the other, so that customers can respond to a price increase for one service by switching to the other service. As I have explained, the two types of services are not substitutes in this way.").
22. *Am. Express Co.*, 88 F. Supp. 3d at 171–75 ("[E]ach constituent product market in this industry is distinct, involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers.").
23. *See, e.g.*, *AmEx*, 138 S. Ct. at 2299 ("Nothing in antitrust law, to my knowledge, suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good.").
24. United States v. Am. Express Co., 838 F.3d 179, 196–200 (2d Cir. 2016).
25. *AmEx*, 138 S. Ct. at 2278.

agree to use their services,"[26] and the service provided is "jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment."[27]

- Second, the Court emphasized the existence of close and bidirectional interrelation of price and demand on the two sides: "to optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants," given that "two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand."[28]
- Third, the Court emphasized the fact that inter-platform competition is the dominant mode of competitive interaction: "[o]nly other two-sided platforms can compete with a two-sided platform for transactions. . . . A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex."[29]

C. Analysis of Competitive Effects

Having defined a single market for credit card services, the Court then turned its attention to the appraisal of competitive effects in that market. The Court went on to hold that the mere showing of an increase in nominal price to purchasers on one side of the American Express platform (here, "all merchants," in a market that had been defined to include both merchants and cardholders) did not, absent any evidence of effects on the other side of the market, suffice to discharge the plaintiffs' burden to show prima facie anticompetitive effects in the market as a whole.[30]

The Court began its analysis of this issue with the proposition that an anticompetitive effect can be shown either directly or indirectly, with different requirements of pleading and proof in each case:

> The plaintiffs can [show anticompetitive effects] directly or indirectly. Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition . . . such as reduced output, increased prices, or decreased

26. *Id.* at 2286; *see also id.* ("These platforms facilitate a single, simultaneous transaction . . . . [Platforms] cannot sell transaction services to either cardholders or merchants individually.").
27. *Id.* (quoting Benjamin Klein, Andres V. Lerner, Kevin M. Murphy, & Lacey Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 580 (2006)).
28. *Id. But see id.* at 2300 (Breyer, J., dissenting) (noting that the role of this element is not clearly specified by the Court despite its foundational importance in the literature).
29. *Id.* at 2287 (citation omitted).
30. *Id.*

> quality in the relevant market . . . . Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.[31]

Crucially, the Court explained that the plaintiffs in *AmEx* itself had "rel[ied] exclusively on direct evidence"—and, particularly, proof of increased prices to merchants—to show anticompetitive effects.[32] The Court was at pains to emphasize that plaintiffs had chosen to "stake their entire case on proving that Amex's agreements increase merchant fees."[33]

The majority went on conclude that the plaintiffs had failed to meet their burden under the first stage of rule of reason analysis—which requires a prima facie showing of anticompetitive effects[34]—in two critical respects. First, the Court explained, the plaintiffs failed to adduce evidence of adverse output and quality effects *upon the services provided to merchants*, leaving open the prospect that increased fees—that is, higher nominal prices—could have simply reflected superior quality, increased costs, and/or increased demand.[35] The fact that the fees of American Express's competitors, Visa and Mastercard, had also increased over time suggested to the Court that merchant fee increases occurred because of increased competition for cardholders among credit card networks.[36] "[D]ramatic" increases in demand for credit card transactions—a 30% increase between 2008 to 2013—provided another, competitively benign, explanation for the increase in fees.[37] The Court also found that the provision of a "more robust rewards program" than those offered by competitors provided an equally plausible explanation for American Express's higher merchant fees.[38] Thus, the mere evidence of higher nominal merchant fees was not probative of pricing that was actually supracompetitive.

Second, the plaintiffs had failed to adduce evidence of price, output, and quality effects upon *cardholders*—which, based on the

31. *Id.* at 2284 (second alteration in original) (citations omitted).
32. *Id.* at 2284–85.
33. *Id.* at 2287.
34. *See, e.g.*, *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 271–72 (6th Cir. 2014) (describing the first step of the rule of reason analysis in detail); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).
35. *AmEx*, 138 S. Ct. at 2288 ("Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price.").
36. *Id.* ("Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted and, thus, Amex's antisteering provisions do not apply. This suggests that the cause of increased merchant fees is not Amex's antisteering provisions, but rather increased competition for cardholders and a corresponding marketwide adjustment in the relative price charged to merchants.") (citations omitted).
37. *Id.* at 2288–89.
38. *Id.* at 2288 ("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.").

Court's market definition holding, were consumers in the very same market.[39] This left open the prospect that while prices had risen for some purchasers (i.e., merchants), they might have fallen for others (specifically for cardholders), and in fact might have remained flat or fallen considering the market as a whole.[40] As a general matter, the mere allocation of pricing burden from one subset of purchasers in a market to another subset of purchasers is, of course, not evidence of anticompetitive effects or of reduced output overall.[41] As a result, the Court concluded, there was no basis on which to conclude that credit card transactions were priced at a supracompetitive level.[42]

In a final section, the Court went further and appeared to consider whether the plaintiffs had established—as would be required in order to prove anticompetitive effects *indirectly*—whether the provisions had "stifled competition," by which the Court appeared to mean something like the infliction of harm to, or distortion of, the competitive process itself, rather than a change to familiar outcomes like price, output, and quality.[43] Here, the Court denied that the record provided evidence of harm to the competitive process, noting in qualitative terms that credit card platforms were engaging in what appeared to be vigorous inter-platform competition undeterred by the anti-steering rules: Visa and MasterCard had been "spurred" to offer new premium cards and increase the availability of card services; "fierce competition" had constrained Amex's ability to raise fees, and on occasion forced it to lower them; and Visa, MasterCard, and Discover had, by charging lower fees, won acceptance at roughly three million more locations than American Express.[44]

The Court finally considered whether there was anything "inherently anticompetitive" about the anti-steering rule that would justify

39. *See supra* section II.B.

40. *AmEx*, 138 S. Ct. at 2287 ("Focusing on merchant fees alone misses the mark 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. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power.").

41. *Id.* at 2288 ("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.") (citation omitted); *see generally* Benjamin Klein & John Shepard Wiley Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599 (2003).

42. *AmEx*, 138 S. Ct. at 2288 ("The 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.* As the District Court found, the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins.") (emphasis added) (citation omitted).

43. *Id.* at 2289–90.

44. *Id.* at 2289.

an inference of competitive harm notwithstanding this qualitative evidence of robust competition. It concluded that there was not, as the provisions helped to protect investments in the American Express network and to discourage conduct by members that undermined its value, without preventing competing platforms from offering lower fees or otherwise attracting merchants.[45] Having thus concluded that neither direct nor indirect evidence supported a prima facie finding of anticompetitive effects, nothing was left but to affirm the Second Circuit.

III. *AMEX* AND A "PLURAL VIEW" OF MARKET DEFINITION

On its face, *AmEx* appears to be a brazen—almost outrageous—departure from the settled law of market definition. It is the most familiar of antitrust fundamentals that a properly defined antitrust market must be defined to include reasonable substitutes, and *only* reasonable substitutes, for a particular product or service.[46] Before the *AmEx* opinion came down, one could have been forgiven for thinking, as Richard Brunell put it, that "any Supreme Court Justice with a modicum of antitrust expertise would recognize the error of the Second Circuit's combining complementary products in the same relevant market, especially with Professor Hovenkamp explaining the mistake in his treatise and in a professors' amicus brief."[47]

And yet a majority of the Supreme Court found that merchant and cardholder services—services that are clearly not substitutes—should be analyzed in a *single* antitrust market, even though no merchant could or would look to a cardholder service as a substitute for what it was receiving, or had been receiving, *qua* merchant.[48] In doing so, the

45. *Id.* at 2289–90.

46. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956) (Reed, J., for a plurality of the Court) ("In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal."); *accord* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 37 n.7 (1984) (Brennan, J., concurring); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); Mylan Pharm. Inc. v. Warner Chilcott Public Ltd. Co., 838 F.3d 421, 435–36 (3d Cir. 2016); Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 237–38 (2d Cir. 2008); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES] ("Market definition focuses solely on demand substitution factors[.]"); *id*. at § 4.1 ("[A] relevant product market consists of a group of substitute products[.]").

47. Richard M. Brunell, Ohio v. Amex*: Not So Bad After All?*, 33 ANTITRUST 1, 16 (2018).

48. As the dissent noted: "Merchants upset about a price increase for merchant-related services cannot avoid that price increase by becoming cardholders, in the way that, say, a buyer of newspaper advertising can switch to television advertis-

Court appears to have violated the substitutability principle. Unsurprisingly, the Court's approach to market definition has featured prominently in the decision's many critical treatments.[49] Tim Wu's reaction is representative: "Market definitions are determined by evaluating available substitutions, yet somehow the credit card market includes services that could not possibly be substitutes. (How can cardholder and merchant services be interchangeable?)"[50]

But this view—on which market definition is, and should simply be, about reasonable substitutability, and on which the Court decision was simply wrongheaded—may be misleading.[51] In its place, this Part sets out a more appealing account, on which *AmEx* suggests a refinement of fundamental principles of market definition, rather than a flat challenge to them. Specifically, we claim that the majority opinion can be understood as a challenge to the notion (the Unitary View) that there should be a single consistent definition of "*the* relevant market" in an antitrust case, and as an intimation that, in place of that notion, we should appreciate that different principles of market definition may apply depending on the purpose of the market definition exercise (the Plural View).

We acknowledge that one could, with some difficulty, shoehorn the *AmEx* opinion into compatibility with the substitutability principle (by leaning hard on the putative "transactional" nature of the platform, and the associated claim that American Express was only supplying a single product—transactions—that was consumed jointly and simultaneously by merchant-cardholder pairs), but we think that effort unnecessary for reasons that we explain below. Instead, we offer

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ing or direct mail in response to a newspaper's advertising price increase." *AmEx*, 138 S. Ct. at 2296.

49. *See, e.g.*, Katz & Sallet, *supra* note 5, at 2155 (criticizing the "single market" conclusion as "violating the principle of substitution."); Sagers, *supra* note 5; Tim Wu, *The* American Express *Opinion, Tech Platforms & the Rule of Reason*, J. ANTITRUST ENFORCEMENT (forthcoming 2019) (manuscript at 6) (on file with author) ("At bottom, the approach announced [by] the Court is unprecedented, procedurally indefensible, unnecessarily complex, and ultimately incoherent."); Pallavi Guniganti, AmEx *Ruling is an "Economic Nightmare," Hovenkamp Says*, GLOB. COMPETITION REV. (Sept. 7, 2018), https://globalcompetitionreview.com/article/usa/1173902/amex-ruling-is-an-"economic-nightmare"-hovenkamp-says [https://perma.unl.edu/S8EC-MD9U].

50. Wu, *supra* note 49, at 6.

51. Others have, of course, offered alternative readings of what "really" drove the outcome in *AmEx*. *See, e.g.*, Joshua H. Soven & Thu Hoang, *More Old News than New News in* American Express 33(1) ANTITRUST 22, 22 (Fall 2018) (arguing that the government's case in *Ohio v. Am. Express Co.* was deficient in several respects, including Amex's low market share, lack of specific evidence of consumer harm, a plausible procompetitive rationale, and the plaintiffs' abstract, complex theory of harm).

the Plural View as a well-fitting, aptly justified reading—that is, an appealing interpretation—of the *AmEx* majority opinion.[52]

A. The Unitary View

We start with the standard view of market definition, the Unitary View, which can be introduced briefly in the following terms. The definition of a relevant antitrust market is the first and foundational step in everyday antitrust analysis, setting aside cases of *per se* illegality and other anomalies. In most antitrust cases, a court or antitrust agency starts by considering the relevant product(s) or service(s) provided by the defendant. It then defines a market (or a set of markets) to include reasonable substitutes for each such relevant product or service and determines whether or not the defendant has significant market power in a market thus defined. It proceeds in light of that conclusion to evaluate whether the challenged conduct or transaction has or will have exclusionary or other anticompetitive effects in some market that was defined in the initial market definition step, in light of any proven efficiencies in that market (efficiencies or other benefits in *other* markets being, of course, generally immaterial in standard antitrust analysis[53]).

This thumbnail sketch is brief and inadequate in a variety of ways, but the crucial point for present purposes is that market definition(s) remain(s) constant throughout all stages of the antitrust analysis. The Unitary View is the premise that it would be an analytical and doctrinal error to define, in a single case, a market one way for one purpose and another way for another purpose. If Coke and Dr. Pepper, lemons and limes, or trains and planes are in the same market for one purpose in an antitrust case, they are in the same market for all purposes in that antitrust case. A lower court, antitrust agency, or litigant doing anything else would be vulnerable to the criticism of inconsistency in the fundamentals of its antitrust analysis. And it is virtually axiomatic that plaintiffs guilty of inconsistency in their market definitions

52. *See* RONALD DWORKIN, LAW'S EMPIRE 67 (1998) (discussing fit and justification as objectives of interpretation).

53. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) ("If anticompetitive effects in one market could be justified by pro-competitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."); Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir.1994) (stating "it seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market."); *see also* United States v. Topco Assocs., Inc., 405 U.S. 596, 611 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this . . . is a decision that must be made by Congress and not by private forces or by the courts.").

can expect dismissal, and that courts adopting them can expect reversal.[54]

The everyday work of the federal district courts is full of examples of the view that a single market definition must apply throughout an antitrust case, embracing both the assessment of market or monopoly power and the appraisal of competitive effects. The following statements in court decisions are just some of the examples:

- "In antitrust cases, the purpose of considering a plaintiff's proposed relevant market is to determine whether the plaintiff has plausibly alleged that the defendant has restrained trade in *the market* through its unlawful actions or maintains monopoly power over *that market*."[55]
- "[A] plaintiff [in a rule of reason case] must show that the defendants' conduct has an anticompetitive effect in *a relevant market*, and that the defendants have market power *in that market*."[56]
- "In a Rule of Reason analysis, *a precise market definition* is required for the petitioner to be able to demonstrate that a defendant wields sufficient market power to establish an unlawful conspiracy. . . . [Even under the quick look approach] the petitioner still has the burden to identify the 'rough contours' of *the market*, . . . so that a court can determine whether the respondent's actions have anticompetitive effects *on that market*."[57]
- "Determining *the relevant market* enables the court to assess whether the defendant has monopoly power *in that market*, what the area of competition is, and whether the allegedly unlawful acts have anticompetitive effects *in that market*."[58]

But this is not just a matter of the language used in antitrust cases; it is also part of the received understanding of how antitrust doctrine works—how, in fact, it is taught and learned. Treatises and articles routinely consider "market definition" as a free-standing topic, unitary in its conception, without suggesting that the right approach to the market definition question—meaning both the answer and the

54. *See, e.g.*, TechReserves Inc. v. Delta Controls Inc., No. 13 Civ. 752(GBD), 2014 WL 1325914, at *5 (S.D.N.Y. Mar. 31, 2014) (dismissing an antitrust complaint where plaintiff described the relevant product market in "varying, inconsistent, and imprecise terms").

55. Process Controls Int'l, Inc. v. Emerson Process Mgmt., No. 4:10CV645 CDP, 2011 WL 403121, at *3 (E.D. Mo. Feb. 1, 2011) (emphasis added).

56. United States *ex rel.* Blaum v. Triad Isotopes, Inc., 104 F. Supp. 3d 901, 923 (N.D. Ill. 2015) (emphasis added).

57. Acuity Optical Labs, LLC v. Davis Vision, Inc., 14-cv-03231, 2016 WL 4467883, at *12 (C.D. Ill. Aug. 23, 2016) (citations omitted) (emphasis added).

58. Cupp v. Alberto-Culver USA, Inc., 310 F. Supp. 2d 963, 969 (W.D. Tenn. 2004) (emphasis added).

rules applied to find it—might depend on the stage of the antitrust analysis at which one asks the question. For example, the ubiquitous (and invaluable) two-volume standard practitioners' text *Antitrust Law Developments* addresses "Relevant Market" in a free-standing chapter of its own, without suggesting that the principles of market definition might vary according to the element of an antitrust case for which it is being applied.[59]

In virtually all its manifestations, the Unitary View of market definition involves the primacy of the principle of *demand-side reasonable substitutability*. This substitutability principle is, as Justice Breyer accurately put it, the principle that:

> Once a court has identified the good or service directly restrained, it will sometimes add to the relevant market . . . other goods or services that are reasonably substitutable for that good or service. . . . The reason that substitutes are included in the relevant market is that they restrain a firm's ability to profitably raise prices, because customers will switch to the substitutes rather than pay the higher prices.[60]

A chorus of federal courts, including, on more than one occasion, the U.S. Supreme Court, have emphasized the primacy of the substitutability principle.[61] So too have the U.S. antitrust agencies in their operative merger guidelines.[62]

We acknowledge that the Court may have intended to reconcile its market definition in *AmEx* with the Unitary View, and with the substitutability principle, by emphasizing the transactional nature of credit card networks. The key analytical move in this direction is to treat American Express as supplying a single product or service—essentially, credit card transactions—to pairs of cardholders and merchants who have already agreed to transact with one another and who now, in some sense, go out jointly and simultaneously to choose a payment method. Under those circumstances, the platform is hardly two-sided at all. On this view, American Express just faces a single demand curve in which the consumers are *cardholder-merchant pairs*. The reasonable substitutes for American Express's credit card transactions are therefore whatever alternatives those cardholder-merchant pairs might so consider. The Court seems to have made at least some efforts to be understood in this vein:

59. 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 579–630 (ABA ed., 8th ed. 2017).
60. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2295 (2018) (Breyer, J., dissenting) (citation omitted).
61. *See supra* note 46 (citing cases).
62. HORIZONTAL MERGER GUIDELINES, *supra* note 46, at 7 ("Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.").

> [T]wo-sided transaction platforms . . . facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually . . . .
>
> Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as supplying only one product—transactions. . . . In the credit-card market, these transactions are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment.[63]

This is just about colorable enough to serve the turn for those who wish to defend the Unitary View and the substitutability principle within it. But it is an awfully strained reading. For one thing, the notion that cardholders and merchants jointly and simultaneously consume credit card transaction services is false.

The decision about which payment method to use is taken neither jointly, nor is it a simultaneous decision taken after some antecedent agreement-to-transact (as if simultaneity mattered; it is hard to see why it would). Rather, at time 1 a merchant makes a decision about whether to become a member in the network (and thus to avail itself of American Express's payment acceptance services qua accepting merchant, in light of the benefits and costs of doing so) in light of the alternatives. At time 2, a cardholder makes a decision about whether to carry an American Express card in light of the alternatives. At time 3 a cardholder chooses whether or not to purchase some article or service from the merchant and unilaterally elects a payment method from among those accepted by the merchant. The cardholder is purchasing the credit card transaction-handling services "jointly" with the merchant only in the sense that the cardholder is also "jointly" purchasing whatever inputs went into whatever article or service the merchant chooses to offer and the consumer chooses to buy: the nails in the furniture, the baseband processor in the cellphone, or the labor in the garment. This is hardly a basis for antitrust special treatment, as Justice Breyer was right to observe.[64]

Moreover, the notion that American Express supplies a single product (transactions) to consumers who are cardholder-merchant pairs, and that it faces a single demand curve in supplying those transactions, is arguably at odds with the analytical treatment of American Express as a two-sided platform. Instead, a two-sided platform connects users on opposite sides of the platform by charging each

63. *AmEx*, 138 S. Ct. at 2286 (internal quotation marks, brackets, and citations omitted).
64. *Id.* at 2297–301 (Breyer, J., dissenting).

side its own price for its own product or service. In fact, the key element of a two-sided platform is that price *structure*—not just overall price level—matters for platform demand.[65] Thus, the platform sets prices to users on each side based on the distinct demand curves that it faces on each side.

The Court, which relies heavily on American Express being a two-sided platform in its market definition finding, also highlights the importance of balancing prices between the two sides of a credit card network: "To optimize sales, the network must find the *balance* of pricing that encourages the greatest number of matches between cardholders and merchants."[66] If American Express really faced a single demand curve of jointly consuming pairs there would be no two-sided dynamics in play at all. It is the very fact that the business sees two demand curves, not one, that puts two-sided dynamics at issue.

We claim that the effort to reconcile *AmEx* with the Unitary View and with the substitutability principle is at best unnecessary and is in fact misguided. Rather, with a little work—for we acknowledge that the majority opinion is, undeniably, "exceedingly murky"[67] on this point—*AmEx* can be understood as highlighting a challenge to the Unitary View by demonstrating the operation of an alternative that we call the Plural View, and exemplifying why the substitutability principle is an undesirable standard when we are concerned with the evaluation of competitive effects.

B. The Plural View

On the Plural View, which we offer in place of the Unitary View, the right approach to market definition is a function of the *purpose* for which a market is being defined; in particular, the Plural View indicates that there is at least a distinction between market definition for the purposes of finding market power, on the one hand, and market definition for the purposes of determining whether some relevant conduct has caused anticompetitive effects, on the other. Our claim is that, because the *purpose* of market definition is different in (at least) these two contexts, the *desirable rules* for market definition may likewise be different.

The Unitary View—that the substitutability principle should govern market definition for all purposes—is orthodox today, but it was not always so. Courts did not adopt the substitutability principle for

65. *See, e.g.*, Rochet & Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 1018 (2003) (stating that "markets in which only the total per transaction price charged by the platform matters and not its decomposition between end users" should be treated as one-sided).

66. *AmEx*, 138 S. Ct. at 2286 (emphasis added).

67. Brunell, *supra* note 48, at 17.

relevant market definition until the early 1950s.[68] And before *United States v. Grinnell Corporation*, scholars and courts mused on the problem of whether market definition in Clayton Act cases should be the same as in Sherman Act cases;[69] the Supreme Court eventually settled the debate by holding that the same market definition principles apply in both Clayton Act and Sherman Act cases.[70]

The crux of our argument for the Plural View is that the logic of the use of the substitutability principle in cases involving the assessment of market power does not always extend to market definition for the purpose of assessing competitive effects of challenged conduct. As many have observed, market definition is a tool of antitrust analysis and not an end in itself.[71] Other than the virtue of simplicity, we see no good reason to insist that the best tool for market definition in one context is invariably the best in another. Tools should serve the needs of analysis, not vice versa. In an antitrust case, the process of market definition is not a process of finding a "correct market definition" that just *is*, out there in the world; it is a process of defining a contour around a set of entities and practices on which we decide to focus *for some reason*. The "right" approach to market definition is therefore a function of that reason and this may counsel different approaches if market definition is being undertaken in service of different objectives.

The measurement of market power and the measurement of competitive effects do indeed serve different objectives in an antitrust case. Specifically, we measure market power primarily as a screening exercise. The point is essentially to determine whether a defendant (in a conduct case) or transactional party (in a transactional case) is *able* to inflict competitive harm on some set of customers, such that further analysis into the nature and effects of challenged conduct or a challenged transaction—including an evaluation of the efficiency-based justifications for any actual or anticipated anticompetitive effects—is warranted.[72] The analysis of market power serves a gatekeeping func-

68. Gregory Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 124 & 128–29 (1992). *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Grinnell Corp., 384 U.S. 563 (1966).

69. Werden, *supra* note 68, at 141–48.

70. *Grinnell Corp.*, 384 U.S. at 573 ("We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act.").

71. *See, e.g.*, Katz & Sallet, *supra* note 5, at 2152; Robert Harris & Thomas Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CAL. L. REV. 1, 4 (1984).

72. *See, e.g.*, Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004) ("The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws") (citations omitted).

tion to ensure that it is worth putting the adjudicator and the parties to the considerable trouble of parsing (and/or defending) the actual impact of the challenged practice against some counterfactual world. We look at the status of the entity qua supplier to ask whether it is necessary to go to the trouble of isolating and evaluating the effects of specific conduct in which that supplier has engaged. Analysis of market power, in sum, is a "screen."[73]

By contrast, the purpose of measuring competitive effects is to determine whether a specific challenged practice or transaction is, in fact, harmful in the ways that the antitrust laws aim to avoid.[74] In other words, it serves as a measure of the overall legality of the conduct in question.

Not only do the analysis of market power and the analysis of competitive effects serve different functions in the abstract, but they also take place in the shadow of different concerns as part of the litigation process. The role of competitive effects analysis in a Section 1 case is not to screen but to scrutinize: at this stage we are asking about the concrete effects of the practice in order to be sure that we are neither condemning blameless conduct (i.e., false positives to the liability question) nor rubber-stamping conduct that is genuinely harmful (i.e., false negatives). The goal in service of which market definition is undertaken here is an accurate appraisal of actual overall economic effects.[75]

The error costs here are considerable in both directions: the cost of a false positive is not merely the imposition of liability (treble damages, no less, and perhaps far-reaching injunctive relief as well) on a defendant that violated no law and/or inflicted no significant harm, but also the deterrence of future welfare-enhancing conduct; the cost of a false negative includes not only the continuation, but perhaps also the express validation (and thus the active encouragement), of harmful and unlawful conduct. When assessing competitive effects, we are (or should be) strongly committed to the enterprise of figuring out whether the challenged conduct is truly harmful in the ways that the antitrust laws care about: we should be very concerned to avoid pun-

73. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 418–19 (5th Cir. 2010) ("A market-power screen is thus compatible with *Leegin* and our precedent and that of our sister circuits. To allege a vertical restraint claim sufficiently, a plaintiff must plausibly allege the defendant's market power."). *See also* Alden F. Abbott & D. Bruce Hoffman, Ohio v. American Express *and the Continued Evolution of Economic Reasoning in Supreme Court Jurisprudence*, 33 ANTITRUST 37, 41 (2018) (emphasizing that market definition, if correctly conducted, "tends to reduce error costs—both false positives and false negatives.").

74. *See generally* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (defining antitrust injury).

75. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977) (noting that the primary concern of antitrust rules is "demonstrable economic effect").

ishing procompetitive or benign conduct and very concerned to avoid endorsing harmful conduct.

Furthermore, it is also fairly clear that the analysis of competitive effects is grounded in a concern with *overall* increase in price or an *overall* loss of output, and that an analysis limited to an arbitrary subset of affected participants will not do the trick. Could a plaintiff successfully discharge its burden under the first stage of the rule of reason by simply pointing to a price increase across a handful of cherry-picked inelastic consumers? We would surely say no. If pressed to explain why, we might say that a market-wide effect is necessary.[76] But, then we would remember that "market definition is not an end in itself but rather a tool"[77] and so to justify this answer in terms of a requirement of a posited need for a "market-wide effect" would be to beg the question. After further reflection, our better response would be that the rule of reason is aimed at an evaluation of the *overall* effects of a challenged practice,[78] and, therefore, the parties' pleadings, arguments, and evidence must, at each stage of the three-step burden-shifting framework, be aimed at those overall effects, not the effects on a cherry-picked arbitrary subset of customers whose experience of the challenged practice was most favorable to one's own case.

This is in marked contrast with the role of the market power test, which is essentially a test of possibility (*can* this defendant wield the kind of power that could be applied to generate anticompetitive effects?).[79] If the defendant *cannot* injure the competitive process, there is no need to go further and dig into the complexities and burdens of working out whether it has in fact done so. Notice that error costs in the analysis of market power are lower in both directions as compared to the competitive effects assessment. The costs of a false negative again include the validation of the harmful conduct, although this time without a court's active endorsement and encouragement of the challenged practice (for, after all, what may be lawfully done by a competitor without market power may not always be lawfully done by a monopolist[80]). And, crucially, the costs of a false positive are much

76. *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001) ("We have consistently held an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market.") (citations omitted).

77. Katz & Sallet, *supra* note 5, at 2152.

78. *See, e.g.*, *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 317 (3d Cir. 2010) (rule of reason measures the "overall reasonableness of the restraint") (internal quotation and citation omitted).

79. *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986) ("[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition").

80. This is trivially true under Section 2, which is aimed only at those holding monopoly power or with a dangerous probability of obtaining it. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). It is also true in appropriate

lower than those in the appraisal of competitive effects: here we do *not* leap straight to the imposition of liability, the exaction of supra-compensatory damages from a blameless defendant, and the swing of the injunctive sword.

Rather, we simply proceed to the next stage of the analysis. Taking the parties through that next step is no small thing: as the Supreme Court most recently reminded us in *Twombly*, there are real costs to allowing "a plaintiff with a largely groundless claim . . . to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."[81] But those costs are certainly smaller than those of a liability finding. Second, and more importantly, it is analytically unobjectionable to terminate the analysis at the point where we have established *impossibility* of competitive harm. If the defendant *cannot* injure the competitive process, there is no need to go further and dig into the complexities and burdens of working out whether it has in fact done so.

This difference of purpose and context between the assessment of market power and the assessment of competitive effects implies a difference of methodology in the definition of a relevant market. The substitutability principle is apt when defining a market for the purposes of market power assessment because overall anticompetitive effects are unlikely when the defendant faces significant competitive constraint from reasonable substitutes. By contrast, when defining a market for the purposes of competitive effects analysis, we are really asking *which entities we should count* in measuring the actual or predicted harms and benefits of challenged conduct. And there is nothing inherent in the normative foundations of the antitrust system that tells us in some *a priori* sense that only those trafficking in reasonable substitutes "count" in the relevant sense.

IV. *AMEX* AND THE INTEGRITY PRINCIPLE

AmEx can be read as an illustration of the Plural View in action, and specifically as a demonstration that the substitutability principle may not be suitable for every stage of an antitrust analysis. On this view, where a court evaluates the competitive effects of challenged conduct under Section 1 of the Sherman Act, as in *AmEx* itself, the integrity principle provides a better foundation for market definition. As we discussed earlier, the relevant market under the integrity principle must incorporate the direct effects of the challenged conduct as well as any effects of conduct that the defendant has the ability and

cases under Section 1. *See, e.g.*, PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 418–19 (5th Cir. 2010) (explaining that market power is a necessary element of liability in a challenge to a vertical restraint).

81. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (internal quotation and citations omitted).

incentive to engage in because of the challenged conduct. The integrity principle offers an appealing and simple explanation of the outcome in *AmEx*, sets an appropriate limit on *AmEx*'s single-market analysis, and coheres with existing antitrust principles.

When assessing competitive effects, we are generally concerned with the overall effects of a challenged practice. As a matter of pure principle, the natural starting point is *all* those affected by the practice, regardless of whether they are buying or selling reasonable substitutes or not. Focusing only on a subset of those harmed or benefited will distort the measurement of the effects of a challenged practice, just as the measurement of market power would be distorted by focusing only on subset of consumers with inelastic demand.[82]

Importantly, this holds true *both* with respect to the all-things-considered evaluation of competitive effects required of a court answering the ultimate liability question *and* with respect to the prior question of whether a plaintiff has made a prima facie showing of anticompetitive effects. A mere increase in price to an arbitrary subset of customers is not enough to show, even prima facie, that challenged conduct is harmful overall. This is not just a sound rule: it is indispensable to avoid absurd overbreadth.

The question, then, is: what conduct and which entities are to be included in the assessment of competitive effects in a Section 1 rule of reason case? Our tentative answer is the following: those affected by the challenged conduct *or* by conduct in which the defendant has the ability and incentive to engage as a result of the challenged conduct. In the context of a two-sided platform, when the challenged practice on one side causes the defendant to have the ability and incentive to engage in certain conduct on the other side, the integrity principle requires that the appraisal of competitive effects must include the conduct on *both* sides. If no such link is established, only the conduct on one side matters. The burden of proving such a link falls wherever it normally falls as part of the effects analysis: in the first stage of the rule of reason, the plaintiff must prove on the balance of probabilities that there is an overall anticompetitive effect across the set of relevant activities and entities; in the second stage, the defendant must prove offsetting benefits; in the third stage, the plaintiff must show that the asserted benefits are too small or too far removed from the anticompetitive restraint to justify the competitive harm.

82. *See, e.g.*, Benjamin Klein & John Shepard Wiley Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599, 630–31 (2003) ("[I]t is unlikely the courts meant to suggest that market power existed when a small firm happened to face a downward-sloping demand curve because of some unique characteristics of its products and price above its marginal cost.").

We see three reasons to recommend this view. First, by ensuring that the analysis includes those experiencing economic effects caused—in both a legal and an economic sense—by the challenged conduct, regardless of on which "side" of the platform they happen to be located, it better serves the overall-welfare-measuring function of the competitive effects appraisal.

Second, the proposition that an assessment of the competitive effects of a restraint should include the effects of other actions that a defendant has the ability or incentive to undertake because of the restraint is consistent with established antitrust principles. For example, under the rule of reason, an otherwise anticompetitive provision may be justified by reference to procompetitive benefits only if the former was reasonably necessary to achieve the latter.[83] In practice, this means that a court must assess whether the defendant would have had the ability and incentive to achieve the latter without the former—essentially, the test we propose. Likewise, in the appraisal of a merger or acquisition, courts and agencies consider whether, as a result of the transaction, the merged firm would have the ability and incentive to engage in certain conduct (such as foreclosure of competitors). If so, the competitive effects of such conduct are included in the antitrust assessment of the transaction.[84] And, in order for an efficiency benefit to be included on the other side of the ledger, the benefit must be shown to be "merger-specific"—that is, that the merger caused the parties to access these efficiencies when otherwise they would have lacked the ability or incentive to do so.[85] The Horizontal Merger Guidelines also recognize that antitrust enforcement agencies may in appropriate cases consider, in an assessment of a transaction's effects, efficiencies that fall outside the relevant market if such efficiencies are "inextricably linked" to the transaction.[86] In all these

83. *See, e.g.*, Suture Express, Inc. v. Owens & Minor Distrib., Inc., 851 F.3d 1029, 1038 (10th Cir. 2017); King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp., 791 F.3d 388, 412 (3d Cir. 2015); Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 336–37 (7th Cir. 2012).

84. *See, e.g.*, United States v. AT&T Inc., 310 F. Supp. 3d 161, 206 (D.D.C. 2018) (discussing ability and incentive to foreclose competitors); United States v. Northrop Grumman Corp., No. Civ.1:02CV02432, 2003 WL 21659404, at *15 (D.D.C. June 10, 2003) ("Absent the protections afforded by the proposed consent decree, Northrop would have [the] incentive and ability post-merger to deny its competitors access to either its prime contractor or payload capabilities.").

85. *See, e.g.*, FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27 (D.D.C. 2018).

86. *See, e.g.*, HORIZONTAL MERGER GUIDELINES, *supra* note 46, at n.14 ("The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market

cases, practices and effects that are causally linked are analyzed together.

Third, our approach provides an appropriate limiting principle to the Court's most controversial move in *AmEx*: the inclusion of *both* sides of the platform in the appraisal of competitive effects. In particular, it clarifies that the Court's analytical move was appropriate because—and *only* because—the challenged conduct (the antisteering rules) had the effect of giving American Express the ability and incentive to engage in more favorable treatment of cardholders. The Court was at pains to note the close and complex causal relationship in that case between the platform's conduct on one side of the market and the platform's profit-maximizing response on the other: first, when setting out the factual background of the decision,[87] and then again, when explaining why the analysis of competitive effects should include both sides of the platform.[88] And the Court went on to emphasize that, simultaneously with the challenged conduct, American Express appeared to have been engaged in beneficial conduct on the cardholder side. The Court was clearly suggesting a causal relationship between the two: "[The plaintiffs] have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects. *Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions.*"[89]

We are suggesting that *AmEx*'s treatment of market definition in competitive effects analysis in a Section 1 case can be—and should be—read in a way that puts front and center this basic substantive question of *whether particular practices and effects are causally connected*, rather than the formalistic question of *whether the defendant is a platform (or a "transactional" platform).* On our reading, the Court concluded that the plaintiffs' error in proving anticompetitive effects (even prima facie) was that, having chosen to stake their entire case on direct evidence,[90] they then failed to make a showing of overall anticompetitive effects—including either a reduction of output or an increase in quality-adjusted prices[91]—arising from what was really a unitary "package" of behavior: that is, the challenged antisteering provisions along with the conduct in which *AmEx* had the ability or incentive to engage only as a result of those provisions.

without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.").

87. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280–81 (2018).

88. *Id.* at 2286–87.

89. *Id.* at 2290 (emphasis added).

90. *Id.* at 2284–85.

91. *Id.*

To be clear: the problem, on our reading, was not that the plaintiff had to rebut procompetitive benefits at the first stage and failed to do so. Rather, it was that the plaintiff failed to make a prima facie anticompetitive effects case across the set of relevant activities and purchasers. That distinction may seem to be a fine one, but the difficult nature of the anticompetitive effects/procompetitive benefits threshold is independent of the question of market definition. The same fine (and/or blurry) line is presented under Section 1 whenever some challenged agreement seems to have increased both quality and price.

Notice that, on the reading we offer here, *AmEx* does not stand for the proposition that in a Section 1 "platform case," transactional or otherwise, a relevant market should *always* be defined to include both (or all) sides of the platform. Nor does it stand for the proposition that platforms, transactional or otherwise, are governed by special antitrust rules that do not apply to other business models or other markets. Rather, *AmEx* simply teaches that in all markets, platforms or not, the evaluation of competitive effects follows the causal footprint of the challenged conduct. In some platform cases, this will mean that participants and activities on the other side of the platform will be relevant; in others, they will not. What matters for the appraisal of competitive effects is simply, in each case, whether the analysis embraces not just the challenged conduct but *also* other conduct in which the defendant has the ability and incentive to engage as a result of the challenged conduct.

Others read *AmEx* differently. Katz and Sallet, for example, argue that harms on one side of the platform alone should *always* suffice to establish a prima facie case. They claim that "users on each side of a platform are entitled to the benefits of competition . . . ."[92] But this claim seems to commit the cardinal antitrust crime of inferring harm to competition from the fact of anecdotal injury to specific persons.[93]

Erik Hovenkamp argues that the *AmEx* majority "collaps[ed] the entire rule of reason analysis—and all of its intermediate inquiries—into the plaintiff's initial burden," leading to a "major alteration of the rule of reason's burden shifting framework."[94] But a plaintiff can *never* discharge its burden under the first step of the rule of reason by showing merely that nominal prices paid by an arbitrarily defined subset of affected customers have increased, and remaining silent as

92. Katz & Sallet, *supra* note 5, at 2173.
93. *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001) ("We have consistently held an individual plaintiff personally aggrieved by an alleged anticompetitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market.") (citations omitted); *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (emphasizing that antitrust laws aim at the protection of competition, not individual competitors).
94. Hovenkamp, *supra* note 5, at 6–7.

to the rest. *AmEx* simply establishes what should already have been obvious: that this conclusion holds just as true in the (somewhat) novel, multisided, context as it is in the familiar, single-sided, one. This acknowledges the force in Dennis Carlton's and Ralph Winter's comment that there would be something unwelcome in the existence of "different legal rules for the same economic conduct depending on whether the market can be described as one-sided or two-sided,"[95] particularly given the difficulties in separating those categories in practice.[96] On our view, the rules are the same regardless of whether a business self-identifies as (or is labeled) a "platform."

V. CONCLUSION

Our argument is simple. We offer a reading of *AmEx* as authority for two appealing and sensible propositions. The first of these is that the right way to undertake "market definition" in an antitrust case is a function of the purpose for which one is defining the market: the right market in which to measure market power need not be the right market in which to measure competitive effects, and vice versa, even in the same case. The second is that a measurement of the competitive effects of a challenged practice should *also* include the effects of whatever other practices the defendant will have the ability and incentive to engage in as a result of the challenged practice. This may, but need not, include practices and effects that manifest on both sides of a platform business. Neither of these propositions is specific to platform cases (or even to "transactional" platform cases), and neither of them does any violence to established principles of antitrust law or economics. To the contrary, each has much to recommend it. We reserve a fuller development of what we have called the Plural View—and a treatment of the difficulties and complexities that it raises—for another occasion.

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95. Dennis W. Carlton & Ralph A. Winter, *Vertical Most-Favored-Nation Restraints and Credit Card No-Surcharge Rules*, 61 J.L. & ECON. 215, 242 (2018).

96. Katz & Sallet, *supra* note 5, at 2148–51 (noting difficulties in distinguishing one- and two-sided businesses).