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Rebuilding Platform Antitrust: Moving on from *Ohio v. American Express*

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Abstract. Now that the immediate fallout from Amex has cooled, this Article aims to give a first draft of its place in antitrust history and to offer a roadmap for the next stage of the evolution of platform antitrust analysis. We focus on several issues that have not been fully analyzed in the literature. First, we argue that the Court should have permitted multi-market balancing of effects across the separate markets in which the platform was active, thereby preserving the fundamental doctrine that relevant markets must be defined on the basis of demand substitution. Second, we propose standards to implement such balancing in a principled manner, and explain how these standards could have been applied to the facts in Amex. Third, we highlight three significant omissions in the Court’s analysis that confounded its assessment of the case, and threaten to mislead future courts. In particular, we show that the Court failed to take into account that: (i) all three major card networks had parallel anti-steering rules during the period of alleged anticompetitive conduct and harm, which increased the anticompetitive harms by increasing the incentives for fee increases for each network, reducing the incentives for fee decreases by each network, and leading the Amex restraints to harm holders of other cards as well as non-cardholders; (ii) higher merchant fees caused by these parallel antisteering rules placed consumers into a prisoners’ dilemma game, which led inevitably to increased use of credit cards above the efficient, competitive level, making the volume of card transactions a poor proxy for welfare effects; and; (iii) American Express’ strategy of promising merchants access to its relatively wealthy cardholders in exchange for a high access fee shared key properties of a buyer cartel, thereby suggesting that at least some of the cardholder benefits might have been characterized as cartel rents. Finally, we suggest several options for the courts and Congress to remedy the problems caused by the Court’s faulty analysis.

INTRODUCTION

On June 25, 2018, the U.S. Supreme Court issued what may be the worst antitrust decision in many decades: Ohio v. American Express Co. (“Amex”).\(^1\) In an opinion authored by Justice Thomas for a bare majority—and over an incredulous dissent—the Court dismissed an antitrust challenge to American Express’s “antisteering” rules, despite ample evidence of harm furnished by a lengthy trial, as well as the teachings of economic theory. In doing so, the Court upended a series of legal fundamentals, inverted accepted practices in

the interpretation of evidence, and plunged platform antitrust into confusion.²

The Court’s tortured analysis has left courts, agencies, and businesses facing a host of puzzles; triggered a flurry of scholarship and commentary, mostly very critical;³ and invited a flurry of ill-conceived litigation arguments.⁴ The practical inheritance of Amex is plain to see: the burdens faced by plaintiffs have been needlessly increased, and enforcement efforts have been obstructed and deterred.⁵ At least one high-profile merger challenge has already failed as a direct result of Amex’s legacy of confusion.⁶

Now that the immediate fallout from Amex has cooled, this Article aims to give a first draft of its place in antitrust history, and offer a roadmap for the next stage of the evolution of platform antitrust analysis. We aim to draw together the teachings of litigation evidence and economic theory to give a comprehensive account of what exactly was objectionable in Amex, and to show that a better approach was (and is) available for antitrust analysis to problems like those faced by the Court. Above all, we aim to show that in more than one respect the Amex framework is simply unsustainable, and that the decision should in these respects be promptly overruled, or otherwise corrected, in favor of an approach along the lines we will propose. Grasping the nettle in this way would be infinitely preferable to condemning courts and parties to years of artful pleading and contrived argument in efforts to avoid or exploit Amex’s various errors.

We proceed in four Parts. Part I sets out the evidentiary record (including critical facts ignored or marginalized by the Court), as well as the holdings of the Amex courts upon that record. Part II crystallizes the Amex Court’s analytical errors—both legal and economic—and outlines a better approach to platform antitrust cases: one that accurately reflects economic realities in platform cases while preserving antitrust’s legal fundamentals. Part III

² Note that the Court used the terms "two-sided market" and "platform" interchangeably. To avoid confusion with the antitrust concept of a relevant product market, we refer to "platforms" in this article, using the term "market" when discussing antitrust market definition.
⁵ See US Airways, Inc. v. Sabre Holdings Corp, 938 F.3d 43 (2d Cir. 2019).
⁶ The reasoning of the district court in United States v. Sabre Corp. was strongly influenced by the Amex decision, as discussed infra.
demonstrates the utility of our proposed approach by applying it to Amex itself. Finally, Part IV briefly outlines the three routes back to a sensible platform antitrust framework: a clean course-correction by the Supreme Court; limiting decisions by lower courts that would take seriously the many limiting conditions that were expressed and implied in the Amex majority opinion; and a surgical fix by Congress.

I. AN ANTITRUST TALE OF WOE

A. The Origin of Antisteering

The modern generation of credit card companies emerged in the mid-20th century, supplanting an earlier generation of “charge cards” issued by department stores and banks. American Express entered the payment cards industry in 1958 with a focus on “travel and entertainment” charge cards. Visa and Mastercard followed in the mid-1960s, offering general credit and charge cards and inspiring American Express to follow suit.

The economics of each card network are different. Visa and Mastercard operate as networks connecting financial institutions that offer Visa- or Mastercard-branded credit cards to cardholders (known as “issuing banks”) with financial institutions that offer payment acceptance services to merchants (known as “acquiring banks”). Unlike Visa and Mastercard, American Express typically also has direct relationships with cardholders and merchants rather than working exclusively through issuing and acquiring banks.

When a cardholder uses a credit card, a merchant pays a fee. For Visa and Mastercard payments, this merchant fee (sometimes called a “merchant discount rate”) is allocated among three parties: the issuing bank that gave the card to the cardholder; the acquiring bank that owns the merchant relationship; and the credit card network itself. For American Express payments, the merchant fee is generally retained in full by American Express. American Express’s revenue stream depends primarily on this fee;

10 Id. at 157. Note that financial institutions can, and often do, act as both issuing and acquiring banks.
11 Id; see also United States v. Visa USA, Inc., 344 F.3d 229, 236 (2d Cir. 2003).
12 Credit card companies sometimes describe merchant fees as “merchant discount rates,” on the ground that the fee is a “discount” from the profit that the merchant would otherwise earn.
13 Id. at 157.
14 Id.
those of Visa and Mastercard depend primarily on offering credit services to their cardholders, for which they charge an interest rate.\textsuperscript{15}

As credit card use grew after the 1960s, American Express, Visa, and Mastercard competed for both merchants and cardholders.\textsuperscript{16} By 1990, Amex accounted for 25% of the dollars processed by all the credit card networks.\textsuperscript{17} In response to American Express’s expansion, Visa and Mastercard launched a series of marketing campaigns seeking to encourage cardholders to use their own cards instead, highlighting American Express’s smaller network of merchants and its higher merchant fees.\textsuperscript{18} These campaigns were effective: for example, the District Court found that a “We Prefer Visa” campaign contributed to a 25–45% shift in card volume from American Express to Visa.\textsuperscript{19} By 1995, American Express’s share of dollars processed had dropped to 20%.\textsuperscript{20}

American Express responded by taking aim at steering: it introduced contractual restraints preventing merchants from steering customers to lower cost cards like Visa or Mastercard.\textsuperscript{21} These “antisteering” rules, which American Express refers to as “Non-Discrimination Provisions,” prohibit merchants from “attempting to influence their customers’ card choices” by: offering a discount, free services, gift cards, or any other monetary incentive; providing customers with priority check or boarding, or any other non-monetary incentive; posting a sign signaling a preference for a non-Amex payment card; posting a sign disclosing the merchant’s actual cost of accepting each network’s cards; or answering a customer’s inquiry into its credit card costs, or in any way signaling that the merchant’s retail prices might be lower if it were better able to control its credit card costs.\textsuperscript{22}

This drew an interesting response from Visa and Mastercard. Rather than attempt to tempt merchants away with fee reductions, they instead followed suit, tightening their own antisteering rules.\textsuperscript{23} And with merchants now prohibited from steering away from American Express, Mastercard, or Visa, the three networks all implemented merchant fee increases.\textsuperscript{24} While American Express’s fee hikes took place largely under a so-called “Value

\begin{flushleft}
\textsuperscript{15} Id. at 159.
\textsuperscript{16} Id. at 161.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 165.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 201-02.
\end{flushleft}
Recapture Program,” those from Visa and Mastercard involved new premium cards with higher merchant fees that were aggressively marketed to cardholders by issuing banks.25

In 1999, Discover tried the high road: offering lower merchant fees, combined with a marketing campaign to encourage merchants to steer customers to use their Discover card.26 But the web of antisteering restraints would not be broken. Discover was soon advised by a number of merchants that their hands were tied because of antisteering provisions in their contracts with the other networks.27 Discover’s discount-based challenge was effectively repelled.28

A decade later, in 2010, the U.S. Department of Justice (“DOJ”) finally filed a complaint in the Eastern District of New York challenging Visa, Mastercard, and American Express’s antisteering rules, alleging that all three credit card networks violated Section 1 of the Sherman Act by requiring merchants to agree to these provisions.29 Visa and Mastercard rapidly settled with DOJ in 2011 and agreed to abandon their antisteering rules, albeit only for a period of ten years.30 But American Express refused to follow suit.31 At the time, American Express was the largest single card issuer in the United States, and American Express-branded cards accounted for a significant share of credit card transaction volume.32 Moreover, by American Express litigating, Visa and Mastercard also gained. The American Express rules effectively also prevented merchants who accepted that card from engaging in the type of steering permitted by the Visa and MasterCard consent decrees.33

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25 Id.
26 Brief for Discover Financial Services as Amicus Curiae Supporting Petitioners at 7, Ohio v, Am. Express Co. (Dec. 14, 2017) (No. 16-1454) (hereinafter "Discover Brief Amicus Curiae").
27 Id. at 8.
28 Id. at 8-9.
30 Visa-MasterCard Settlement. The agreement clarifies that "nothing in this Final Judgment shall prohibit MasterCard or Visa from adopting, maintaining, and enforcing Rules that prohibit Merchants from disparaging its Brand." Id.
32 Visa, 344 F.3d at 237. Visa-branded cards (issued by multiple banks) accounted for a larger transaction share. Amex was still the largest issuer at the time of the Supreme Court decision in Amex, but as of 2020 has fallen behind Chase. Top Issuers of General Purpose Credit Cards in the U.S., NILSON REPORT no. 1192 (Feb. 2021).
33 Visa-MasterCard Settlement.
In 2015, following a seven-week bench trial, Judge Garaufi of the U.S. District Court for the Eastern District of New York held that American Express’s antisteering rules constituted an anticompetitive restraint in violation of Section 1 of the Sherman Act. The District Court reasoned that the antisteering rules constitute non-price vertical restraints, and as such should be adjudged under the rule of reason.

The District Court’s reasoning applied a traditional rule-of-reason framework. In step one, the plaintiff bears the burden of “demonstrating that the challenged restraints have had an adverse effect on competition as a whole in the relevant market.” The plaintiff may do so directly, by “show[ing] an actual adverse effect on competition caused by the restraint in the relevant market, such as increased prices or a reduction in output,” or indirectly, by “establishing that [the defendant] had sufficient market power to cause an adverse effect on competition” and that “there are other grounds to believe that the defendant’s behavior will harm competition market-wide.” In step two, the burden shifts to the defendant to offer “evidence of the pro-competitive effects of their agreement.” Finally, in step three, the burden shifts back to the plaintiff to “prove that any legitimate competitive benefits proffered by Defendants could have been achieved through less restrictive means.”

At step one, the court held that the plaintiffs had established harm to competition through both direct and indirect evidence.

The court’s analysis of the indirect case proceeded from a market definition that separated the two faces of American Express’s business. In particular, and following an earlier Second Circuit decision, the court held that American Express’s platform operated in at least “two separate, yet deeply interrelated, markets”: first, “a market for card issuance, in which

34 88 F. Supp. 3d. at 143.
35 Id. at 169. The antisteering rules should actually be understood as price restraints analogous to RPM in the first instance, with the added element that they were also interbrand restraints.
36 Id. (internal citations and quotations omitted).
37 Id. (internal citations and quotations omitted). It is important that this requires “evidence,” not simply “assertion” or “identification.” However, the quantum of evidence was not specified.
38 Id. (internal citations and quotations omitted). Note that, unlike many other formulations of the rule of reason, the District Court did not explain that, at this stage of the rule of reason, plaintiffs may also show that, on balance, the harms resulting from the restraints outweigh the procompetitive effects put forward by the defendant. See Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). Because the Court concluded that Amex failed to provide evidence of procompetitive effects, this omission was not outcome determinative.
39 Visa, 344 F.3d at 234.
Amex and Discover compete with thousands of Visa- and Mastercard-issuing banks” to supply services to cardholders, and, second, “a network services market, in which Visa, Mastercard, Amex, and Discover compete to sell acceptance services” to merchants. Despite the separate nature of these two markets, the court cautioned that its analysis would “account for the two-sided features of the credit card industry in its market definition inquiry, as well as elsewhere in its antitrust analysis.”

Examining these markets, the court concluded that American Express held market power in the market for network services provided to merchants, in which it enjoyed a share of 26.4% (measured by dollar value of transactions using credit cards). It chronicled at some length evidence of concentration, high barriers to entry, and inelastic demand for use of American Express cards. The court separately noted that the evident tendency of the antisteering rules—to depress price competition and to limit competitive pressure on American Express at the point of sale—was sufficiently clear to discharge the plaintiffs’ burden.

The court’s analysis of the plaintiffs’ direct-effects case was set out in similarly exhaustive detail. At its core was the tendency of the antisteering rule to suppress its network competitors’ incentive to offer lower prices at the approximately 3.4 million merchants where American Express is currently accepted, vitiating an important source of downward pressure on Defendants’ merchant pricing, and resulting in higher profit-maximizing prices across the network services market.

As the court noted, between 2005 and 2010, American Express had implemented a series of merchant fee hikes without losing a single large merchant. The District Court also specifically pointed that these merchant fee increases were not accompanied by equivalent increases in cardholder

40 Id. at 151.
41 Id. at 174.
42 Id. at 188.
43 Id. In the earlier Visa case, the Second Circuit had found that Mastercard enjoyed market power with a market share of 26%. See id. at 240.
44 Id. at 188-95.
45 See id. at 212. The court’s assessment of the restraints’ anticompetitive tendency was entwined with its assessment of direct evidence of competitive harm. See id. at 208.
46 Id. at 209.
47 Id. at 195.
The court highlighted the lack of merchant attrition in response to these price hikes as evidence of American Express’s market power.\footnote{48} The harm from American Express’s own antisteering rules reached more broadly still: it included encouraged higher merchant fees for other cards. After all, Discover’s failed effort to compete on price had demonstrated that an antisteering regime blocked the path to a “lowest-cost provider strategy.”\footnote{49} For much of the relevant period, Visa and Mastercard also had their own anti-steering rules. And even after eliminating those antisteering rules, Visa and Mastercard had been able to raise their merchant fees with “virtual impunity” under the umbrella of American Express’s rules, suggesting an “absence of inter-network competition on the basis of price attributable to rules prohibiting merchant steering.”\footnote{50} Thus, with no prospect of winning share through price competition, there was no reason to lower fees.\footnote{51}

The court did not ignore the fact that there were consumers on the other side of the platform. It held that the antisteering rules harmed customers on the other side of the platform because inflated merchant fees were passed on as higher retail prices to all customers—American Express cardholders and non-cardholders alike\footnote{52}—and most of these customers do not receive sufficient cardholder benefits to offset the harms.\footnote{53}

At step two, the burden shifted to American Express to prove that the restraints had procompetitive benefits. American Express claimed two types of pro-competitive justifications for its antisteering rules: but neither was accepted. First, American Express argued that the rules were “critical” to preserve “welcome acceptance” and to maintain its unique business model, which in turn drove competition in the network services market.\footnote{54} American Express claimed that if merchants were permitted to “discriminate” at the

\footnotesize{\begin{itemize}
\item Id. at 196.
\item Id.
\item Id. at 151. See also id. at 210 (“The three major networks similarly felt no pressure to lower their own prices or otherwise respond to Discover’s efforts in the late 1990s to build its share in the network services market by offering merchants prices well below those charged by its competitors. . . . [T]he failure of Discover’s low-cost provider strategy in the 1990s provides direct evidence of how antisteering rules like Defendants’ NDPs impede modes of competition that likely would benefit consumers on both sides of the [credit card] platform.”).
\item Id. at 202; see also id. at 216 (“Visa and Mastercard, for instance, were able to increase their average all-in merchant rates through a variety of means by more than 20% from 1997 to 2009, without fear of other networks undercutting their prices in order to gain share.”).
\item Id. at 150.
\item Id. at 208.
\item Id. at 215 (“Plaintiffs have provided sufficient circumstantial evidence and expert testimony for the court to conclude that Amex’s Value Recapture price increases were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and resulted in a higher net price.”).
\item Id. at 225.
\end{itemize}}
point of sale by encouraging its cardholders to use another form of payment, its cardholders would be less likely to use their cards, not only at the steering merchant, but also at other merchants.\textsuperscript{56} The District Court determined that this argument was not cognizable as a matter of law because it is “axiomatic that the federal antitrust laws were enacted for the protection of competition, not competitors.”\textsuperscript{57}

The District Court also dismissed American Express's argument that its antisteering rules prevented merchants from free-riding on its cardholder investments and rewards, explaining that “[a]n economically rational consumer will not accept a merchant's invitation to use another card product unless he believes that what the merchant is offering is of greater value than the rewards or other benefits he receives for using his Amex card.”\textsuperscript{58}

In addition, with respect to American Express’s claimed investments in data analytics services provided to merchants, the court noted that concerns about free riding were reduced given that American Express also sold those services separately from network services.\textsuperscript{59} Finally, the Court rejected American Express’s argument that the restraints were necessary to prevent merchants from free-riding on American Express’s investments to enhance its own brand.\textsuperscript{60} Indeed, American Express’s own survey data showed that its “credentialing” effect—the idea that acceptance of American Express cards confers some prestige on a merchant—actually trailed that of its competitors and, in any event, was not the result of specific investment by American Express and so was not likely to be impacted by free-riding.\textsuperscript{61}

The failure to show plausible procompetitive benefits was fatal. It followed that American Express’s antisteering rules unlawfully restrained competition in the network services market, and so violated Section 1.

\textbf{C. Court of Appeals}

The District Court’s analysis did not survive review by the U.S. Court of Appeals for the Second Circuit, which took a profoundly different view of the record, the law, and antitrust economics.

The Second Circuit began by discussing the importance of price structure—that is, the balance of pricing between cardholders and

\textsuperscript{56} \textit{Id.} at 225.
\textsuperscript{57} \textit{Id.} at 227.
\textsuperscript{58} \textit{Id.} at 236.
\textsuperscript{59} \textit{Id.} at 236.
\textsuperscript{60} \textit{Id.} at 238.
\textsuperscript{61} \textit{Id.} at 238.
merchants—for credit card networks, and by expressing some concern that merchant steering could undermine networks’ ability to set an optimal price structure. For the appellate court, the antisteering rules were part of American Express’s own competitive response to Visa and Mastercard.

Turning to market definition, the Second Circuit took a sharp turn away from the District Court’s analysis. Distinguishing its own separate-markets approach in the earlier Visa case, the court held that a single relevant market ought to include both the cardholder- and merchant-services sides of the platform. The court proceeded to outline the types of evidence that would have been sufficient to satisfy the initial burden under the rule of reason in this two-sided market: first, evidence of reduced output (i.e., cardholders engaging in fewer credit card transactions than they otherwise would); second, evidence of reduced quality (i.e., card services worse than they would otherwise have been); or, third, evidence of supracompetitive pricing (i.e., American Express’s net, or overall, pricing above competitive levels).

Applying this standard, the court concluded—in a strikingly brief analysis that purported to disturb none of the District Court’s careful factual findings—that there was no evidence of diminished quality, and without a reliable measure of Amex’s net price, plaintiffs could not show that that price was supracompetitive. And regarding output, the court noted that transaction volume had increased across the credit card industry throughout the relevant time, which it viewed as evidence that American Express’s rules were procompetitive. (The Court made no effort to adjust for the growth of

62 United States v. Am. Express Co., 838 F.3d 179, 186 (2d Cir. 2016). This same reasoning would suggest that it is necessary for Amex to prohibit discounts for cash or debit, which it does not do. In that sense, the Amex argument proves too much.
63 Id. at 190. To the extent that the Second Circuit was suggesting that rules could be justified as a response to unlawful restrictions adopted by Visa and Mastercard, that proposition appears unsound: antitrust law does not permit anticompetitive conduct to be justified as a response to anticompetitive conduct by others. See, e.g., Fashion Originators’ Guild of America v. FTC, 312 U.S. 457 (1941); United States v. Apple Inc., 791 F.3d 290 (2d Cir. 2015).
64 838 F.3d at 198 (“Unlike the contested conduct in this case the contested conduct in Visa occurred not among different sides of the same network platform, but rather between the platforms themselves.”).
65 Id.
66 Id. at 205-206.
67 Id. at 206. Of course, while the District Court did not explicitly calculate a net-price, its opinion includes extensive discussion of Amex’s pricing history and concluded that “by disrupting the price-setting mechanism ordinarily present in competitive markets, the NDPs reduce American Express’s incentive—as well as those of Visa, Mastercard, and Discover—to offer merchants lower merchant fees and, as a result, they impede a significant avenue of horizontal interbrand competition in the network services market.” 88 F. Supp. 3d at 207-08.
68 “Increased investment in cardholder rewards has accompanied a dramatic increase in transaction volume across the entire credit-card industry . . . This evidence of increased output is not only indicative of a thriving market for credit-card services but is also consistent with evidence that Amex’s
the economy in general, or card-favoring commerce (including e-commerce!) in particular, over that time.) As a result, the plaintiffs had failed to meet their “initial burden . . . to show that the [antisteering rules] made all Amex consumers on both sides of the platform—i.e., both merchants and cardholders—worse off overall.”

Concluding that the plaintiffs had accordingly failed to establish a *prima facie* case, the appellate court remanded with instructions to enter judgment in favor of American Express.

**D. Supreme Court**

DOJ elected not to appeal the Second Circuit’s decision, but eleven state attorneys general pressed on, appealing the direct-evidence case only.\(^\text{70}\) *Ohio v. American Express* was argued in February 2018, and the opinion came down in June.\(^\text{71}\) Justice Thomas wrote for the Court on behalf of five Justices, joined by Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch; Justice Breyer dissented for himself and for Justices Ginsburg, Sotomayor, and Kagan.

In a relatively brief opinion, the majority endorsed the Second Circuit’s holding and much of its essential reasoning. The Court’s critical holdings can be summarized briefly.

First, the Court indicated that a formal market definition was a necessary element of the antitrust analysis in cases involving vertical theories of harm, noting—apparently without irony—that “[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”\(^\text{72}\)

Second, the Court followed the Second Circuit in holding that the appropriate market definition in *Amex* encompassed both consumer- and merchant-facing sides of the card platform.\(^\text{73}\) The Court appeared to believe that this was required in order to capture the reality that activities on the two

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\(^{69}\) *Id.* at 205.


\(^{72}\) Id. at 2286.
sides were related (“[d]ue to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand”), and to reflect that a price increase on one side alone did not necessary mean or imply an increase in overall price (“[p]rice 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”).

But the Court cabined its approach: only some two-side markets would be treated for market definition purposes in this way. In particular, the “two sides, one market” approach was appropriate only for “transaction platforms”: that is, platform businesses that “facilitate a single, simultaneous transaction between participants.” “The key feature” of such businesses, the Court explained, was that “they cannot make a sale to one side of the platform without simultaneously making a sale to the other.” A single market definition was appropriate, in the Court’s telling, for a trio of reasons: because activity on the two sides was always joint, simultaneous, and in fixed proportions; because the two sides were connected by “more pronounced” network effects and interrelation of demand and pricing; and because “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.” The Court’s earlier holding in Times-Picayune v. United States, that the advertiser and reader sides of a newspaper platform should be analyzed separately, was distinguished on the ground that it did not involve one of these transaction platforms and its network feedback effects were one-directional.

Third, and most telling, the Court held that the plaintiffs had failed to show prima facie evidence of harm in this unified market. To do so, the Court explained, plaintiffs would have had to show that the antisteering rules: (a) increased the overall price of credit-card transactions above a competitive level, (b) reduced output (i.e., the number of credit-card transactions), or (c) otherwise stifled competition in the credit card market.

The Court concluded that the plaintiffs had not met this mark. The price evidence was held insufficient for lack of evidence that credit card transactions were more expensive, overall, than they would be in a
competitive market.\textsuperscript{81} Evidence that American Express had increased its merchant fees was inadequate because the increased prices had a claimed procompetitive explanation: “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.”\textsuperscript{82} The Court specifically pointed out that Visa and Mastercard’s merchant fees had continued to increase, including at merchant locations where American Express was not accepted.\textsuperscript{83} Thus, “the cause of increased merchant fees is not Amex’s antisteering provisions, but rather increased competition for cardholders.”\textsuperscript{84}

In the majority's view, satisfactory output evidence was not forthcoming either, as the overall volume of credit-card transactions had grown by 30 percent from 2008 to 2013.\textsuperscript{85} The Court noted that “between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%.”\textsuperscript{86}

The Court was untroubled by the tendency of antisteering rules to suppress fee competition.\textsuperscript{87} The Court indicated that merchant fees had in fact decreased by over half since the 1950s.\textsuperscript{88} (The Court’s citation to the District Court here pointedly omitted evidence from the same page that, “[w]hen Plaintiffs’ economics expert controlled for the changing composition of Amex’s merchant base, he found that the network’s average effective merchant fee had, in fact, increased slightly over time.”\textsuperscript{89})

Finally, the Court noted in closing, there was “nothing inherently anticompetitive about Amex’s antisteering provisions.”\textsuperscript{90} On this point, the Court revived American Express’s efficiency argument—rejected by the District Court as ungrounded in fact—that the antisteering provisions prevented merchants from undermining cardholders’ expectation of

\textsuperscript{81} Id. at 2288.

\textsuperscript{82} Id.

\textsuperscript{83} Id. The Court did not discuss why Visa and Mastercard would have any incentive to depart from uniform pricing to offer lower merchant fees at non-American Express locations or whether that type of price differential would have been practical to implement. The issue of parallel conduct among the three networks is discussed in Section III.

\textsuperscript{84} Id. at 2288.

\textsuperscript{85} Id.

\textsuperscript{86} Id. at 2289 (citing David S. Evans & Richard L. Schmalansee, Paying with Plastic: The Digital Revolution in Buying and Borrowing 88–89 (2d ed. 2005)).

\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} 88 F. Supp. at 203.

\textsuperscript{90} 138 S. Ct. at 2289.
“welcome acceptance.”

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In dissent, Justice Breyer’s analysis diverged from that of the majority at virtually every step. He began by restating what had hitherto been antitrust orthodoxy: a relevant market is not required in cases featuring direct evidence of anticompetitive effects, because “proof of actual adverse effects on competition is, a fortiori, proof of market power.” And here, he noted, the plaintiffs demonstrated that Amex was able to raise merchant prices repeatedly without any significant loss of business. Formal market definition using indirect evidence was an unnecessary analytical exercise in the face of such direct evidence.

There was even less reason to define such a market in defiance of accepted antitrust principles, which compelled a substitutability-based approach to market definition. True, Justice Breyer acknowledged, such platforms offer different products or services to different groups of customers whom the “platform” connects in simultaneous transactions. But each of those features also describes plenty of other products and services that have long been analyzed under traditional market-definition principles. None provided a reason to fracture antitrust’s basic market-definition methodology.

Finally, the dissent protested, the evidence of harm assembled here was more than sufficient. The District Court had expressly concluded that all consumers, not just Amex cardholders, paid higher retail prices as a result of the challenged practices; that the restraints excluded competition and permitted repeated increases in merchant fees; and that consumers were denied opportunities to accept incentives that merchants might otherwise have offered to use less-expensive cards. “I should think that, considering step 1 [of the rule of reason] alone,” concluded Justice Breyer, “there is little more that need be said.”

On July 20, 2021, the other shoe fell, with the expiration of DOJ’s ten-
year consent decree with Visa and Mastercard.99

II. DIAGNOSIS AND PRESCRIPTION: AMEX’S ERRORS, AND A BETTER APPROACH

In this Part, we crystallize Amex’s substantial analytical errors and show that a better approach was available. Our diagnosis, in brief, is that the Court allowed a legitimate concern for accuracy in effects analysis to distort its approach. Specifically, we infer that the Court feared that antitrust analysis could too quickly condemn platform conduct that was beneficial overall but harmful to consumers on a single side of the platform, and that the Court then wrongly believed that it was necessary to distort other basic principles of antitrust analysis—including those relating to market definition and burdens of proof—in order to protect against this risk.

But the Court was mistaken: a better road was available. Rather than trying to wrangle other elements of antitrust analysis, the Court could and should have simply held that, in a well-defined but limited subset of platform cases, multi-market balancing of effects may be appropriate.100 Doing so would have candidly acknowledged the relevant normative and legal considerations, and preserved the clarity and integrity of other areas of law that now stand needlessly compromised. It also could have outlined how such balancing should proceed.

A. Diagnosis: Three Errors

1. An Unforced Error: Requiring Circumstantial Evidence of Market Definition in a Direct-Evidence Case

We begin with what may the most bizarre of the Amex Court’s errors: its odd insistence on a formal market definition. It has long been hornbook law that a formal definition of a relevant market is not a necessary component of modern antitrust analysis, and much modern antitrust scholarship encourages courts and agencies to move beyond the strictures of market definition where it is possible to do so.101

99 Visa-MasterCard Settlement.
100 The Court also pointedly avoided the issue of multi-market balancing in Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. _ (2021), where it raised but declined to address the argument that "a court should not ‘trade off’ sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one” and that “review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury.” Alston, 594 U.S. at _ (slip op. at 15).
Indeed, as the District Court correctly pointed out, courts have long understood there to be two avenues for a plaintiff to satisfy its burden to demonstrate anticompetitive effects under the first step of the rule of reason in both vertical and horizontal cases. Plaintiffs may either (a) provide direct evidence of anticompetitive effects, or (b) provide circumstantial (or indirect) evidence consisting of (i) demonstrated market power, and (ii) additional indicia that the conduct is likely to harm competition.\(^{102}\)

Of course, market definition can play an important role in an indirect-evidence case: one way to demonstrate market power is to show that the defendant has a substantial share in a relevant market.\(^{103}\) But market definition is an analytical step designed to screen for the ability to inflict harm—that is, market power—and it is widely recognized that direct evidence of actual anticompetitive effects makes it unnecessary to prove such power indirectly by defining a relevant market and showing a high share in

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\(^{102}\) The District Court in Amex followed the long-standing approach of many other courts. See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 51 (2001) (“[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level. . . . Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear.”) (citations omitted); Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000) (“The Supreme Court has made it clear that there are two ways of proving market power. One is through direct evidence of anticompetitive effects. . . . The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant’s share exceeds whatever threshold is important for the practice in the case.”) (citations omitted); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (“If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power.”); Con'l Airlines, Inc. v. United Air Lines, Inc., 120 F. Supp. 2d 556, 567 (E.D. Va. 2000) (“[D]efinition of a relevant market may be unnecessary under the Rule of Reason where the anticompetitive effects of an allegedly illegal agreement are manifest and any justifications for the agreement are implausible.”) (internal quotation marks and citation omitted); In re Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d 274, 300 (D.R.I. 2019) (“Case law suggests that when direct evidence is dispositive, indirect evidence is unnecessary. . . . Where direct evidence of market power is available . . . a plaintiff need not attempt to define the relevant market. This is because inquiries into market definition and market power are but a surrogate for detrimental effects on competition.”) (internal quotation marks and citations omitted); see also Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999) (“[A]lthough the plaintiffs failed to define the relevant market with precision and therefore failed to establish the defendants’ monopoly power through circumstantial evidence, there does exist a genuine issue of material fact as to whether the plaintiffs’ evidence shows direct evidence of a monopoly, that is, actual control over prices or actual exclusion of competitors.”); but see Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 737 (7th Cir. 2004) (noting that “[i]t may be that, in a proper case alleging vertical restraints, a direct anticompetitive effects analysis could be used to show market power,” but suggesting that the “rough contours” of a definition should always be required). The agencies have also endorsed this view. See U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (Aug. 2010).

that market. Accordingly, courts have long-held that direct evidence of anticompetitive effects in the form of, e.g., supracompetitive prices, infracompetitive quality, or output restrictions, necessarily implies the existence of sufficient market power to cause such effects.

Before Amex, the Supreme Court itself had expressly recognized this principle. In Indiana Federation of Dentists, a challenge to a decision by a dentists’ professional organization to restrict insurers’ access to dental x-rays, the Court held that “the finding of actual, sustained adverse effects on competition” obviated the need for formal market definition. But in Amex, Indiana Federation of Dentists was shrugged off, with the suggestion that effects evidence made market definition unnecessary in horizontal cases only and that in vertical cases a formal market definition is always required. “Vertical restraints,” the majority explained in what was destined to be a notorious footnote, “often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market.”

For this proposition, the Court cited its earlier decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc., as well as Judge Easterbrook’s article Vertical Arrangements and the Rule of Reason.

But these sources simply noted the importance of evaluating market power: they did not endorse a requirement of formal market definition. In fact, Judge Easterbrook’s article specifically stated that “[a]n inquiry into market power does not entail the definition of a ‘market,’ a subject that has bedeviled the law of mergers. Market definition is just a tool in the investigation of market power.” Indeed, direct evidence is normally considered more reliable than circumstantial evidence based on market shares.

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105 Justice Breyer’s dissent correctly stated this principle. 138 S. Ct. at 2997 (2018) (Breyer, J., dissenting) (“The District Court’s findings of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances.”)
107 138 S. Ct. at 2285 n.7
108 Id.
111 Id. at 160 (emphasis added).
112 See, e.g., Horizontal Merger Guidelines § 4 (“Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.”); see also, e.g., Tim Wu, The Supreme Court Devastates Antitrust Law, N.Y. TIMES (June 26, 2018) (“[T]he court put theory ahead of practice in an absurd way: Even though, in practice, American
Nor did the argument make economic sense in principle. The Court’s central claim was that a critical difference exists between horizontal and vertical cases, in that vertical restraints do not present any risk to competition unless the entity imposing them has market power. But this is no difference at all. Horizontal restraints also do not present any risk to competition unless the participants collectively enjoy market power. Moreover, direct evidence of market power was commonly used by courts of appeal in vertical cases.\textsuperscript{113}

What was the point of this odd step? We can only speculate, of course: perhaps the introduction of this rogue market definition requirement represented an effort to increase the \textit{de facto} burden of proof facing the plaintiffs. This could reflect some underlying skepticism about the theory of harm in this case or the dangers of interbrand vertical restraints more generally.\textsuperscript{114} Alternatively, perhaps the point was simply to give the Court an occasion to raise the subject of what the market definition should be: itself an opportunity to bring into the market of primary harm what would otherwise be out-of-market benefits, by defining a broader market than the one on which the District Court had relied.

Whatever the cause, this single, conclusory and unsupported sentence in a footnote is hardly enough reasoning for this strange departure. The Supreme Court has never required a heightened burden of proof of harm, even for intrabrand vertical restraints.\textsuperscript{115} And this case involved an interbrand restraint that directly reduced interbrand competition, which is broadly understood to raise competitive concerns. The whole point of the rule of reason is that it provides an occasion for a careful and neutral examination of evidence and theory specific to a challenged restraint.\textsuperscript{116}

Ultimately, the market-definition requirement was an unforced error. If the purpose was to reflect concerns about likelihood of harm in interbrand vertical restraints cases, the introduction of additional rogue market-definition requirements is not a particularly appealing way to achieve that goals. Antitrust cases litigated under the rule of reason are already famously

\textsuperscript{113} See supra note 102.
\textsuperscript{114} Cf. Republic Tobacco Co., 381 F.3d at 737 (“As horizontal agreements are generally more suspect than vertical agreements, we must be cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases.”).
\textsuperscript{116} Khan, 522 U.S. at 10.
challenging for plaintiffs.\(^\text{117}\) If the Court was determined to make them harder still, it could have done so directly by expressly imposing an elevated threshold of proof, such as “clear and convincing evidence”\(^\text{118}\) or “clear showing.”\(^\text{119}\) And if the Court believed that a market definition was necessary in order to achieve the Court’s desired result on effects analysis, that too is mistaken, as we discuss below.

2. Market Definition: Breaking the Substitutability Principle

Having determined that a formal market definition was necessary, the Court next turned to what that definition ought to be. The traditional touchstone for this exercise is the principle of demand-side substitutability. The Supreme Court long ago instructed that “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”\(^\text{120}\) In other words, a market contains the relevant product or service, plus whatever other products and services are reasonably substitutable for it.\(^\text{121}\) Failure to define a market by reference to this principle is normally fatal to an antitrust claim.\(^\text{122}\)

The logic underlying this approach is simple. Market definition is an effort to identify market power by identifying the set of competitive

\(^{117}\) See, e.g., Michael A. Carrier, The Rule of Reason: An Empirical Update for the 21st Century, 16 GEO. MASON L. REV. 827, 828 (2009) (“Courts dispose of 97% of [rule of reason] cases at the first stage, on the grounds that there is no anticompetitive effect. They balance in only 2% of cases.”).

\(^{118}\) See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (requiring that antitrust plaintiff in vertical price-fixing case “present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective”) (internal quotations omitted); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (requiring plaintiff to "show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents"). In both cases the court required that the plaintiff show evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Matsushita, 475 U.S. at 588 (citing Monsanto, 465 U.S. at 764).


\(^{122}\) See, e.g., US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d at 64 (“Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products, the relevant market is legally insufficient and a motion to dismiss may be granted.”) (cleaned up); Shah v. VHS San Antonio Partners, LLC, 985 F.3d 450, 455 (5th Cir. 2021) (“Shah's proposed relevant market does not encompass all interchangeable substitute products because it does not include the two non-BHS facilities that the BHS parties contend serve as viable alternatives to BHS facilities.”).
constraints that would make it unprofitable for a firm or group of firms to impose supracompetitive prices or other terms of dealing. Courts and agencies test whether an actual or hypothetical monopolist supplier of a particular set of products or services would be able profitably to implement a significant price increase above competitive levels. This exercise should be conducted with an eye to the specific competitive concerns at issue in each individual case. Thus, different theories of harm might imply different market definitions, even in the same antitrust case, but demand-side substitutability remains central.

Even the handful of “special” market definition tools derive from demand-side substitutability. “Cluster” markets, for example, are aggregations of multiple traditionally-defined markets, treated together for analytical convenience (e.g., various different outpatient services supplied by the same hospitals under the same competitive conditions). “Bundle” markets exist when consumers demand a set of products or services used together rather than the individual components of such sets, and where substitution is focused among such sets (e.g., sets of silverware, or automobiles). Likewise, courts sometimes define “price discrimination” markets that distinguish among customers by reference to differences in their ability or incentive to turn to substitute products or services. Finally, “supply-side substitution” may inform market definition, by including in a relevant market suppliers that do not currently produce reasonable substitutes, but could do so rapidly and at low cost. None of these variants diminishes the primacy of demand-side substitutability.

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124 See Horizontal Merger Guidelines ¶ 4.1.
125 Steven C. Salop, The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millenium, 68 Antitrust L.J. 187 (2000). See also Gregory J. Werden, Four Suggestions on Market Delineation, 37 Antitrust Bull. 107, 108–12 (1992) (“Assuring that markets are suitable for the purposes to which they are put requires that a preliminary step be taken before market delineation. This step is the identification of who might exercise market power, against whom it might be exercised, and how it might be exercised.”). See, e.g., Olin Corp. v. FTC, 986 F.2d 295, 1299, 1301 (9th Cir. 1993); Staley v. Gilead Sciences, Inc., 446 F. Supp. 3d 578, 616 (N.D. Cal. 2020) (“[I]t is not unreasonable for Plaintiffs to have identified two different product markets because they have claimed harm to competition in two different ways.”).
128 See, e.g., FTC v. Sysco Corp., 113 F. Supp. 3d 1, 39 (D.D.C. 2015) (“The concern underlying price discrimination markets is that certain types of captured or dedicated customers could be targeted for monopolist pricing even if a price increase for all customers would not be profitable.”).
130 Likewise, in other cases involving complementary products and competitive harm—including tying
As the District Court correctly noted, courts have applied the substitutability principle to credit card market definition before. In the early 2000s, the DOJ successfully challenged Visa and MasterCard’s exclusivity rules, which prohibited their member banks from issuing American Express cards or Discover cards. The District Court for the Southern District of New York held that these rules violated the Sherman Act. Affirming that holding, the Second Circuit carefully considered the relevant product market and upheld the District Court’s conclusion that there are “two interrelated, but separate, product markets”: (1) “the general purpose card market, consisting of the market for charge cards and credit cards,” and (2) “the network services market for general purpose cards.”

The Amex majority started from the vague proposition that market definition is intended to reflect “the area of effective competition,” that is, the “arena within which significant substitution in consumption or production occurs,” taking account of “commercial realities.” The Court then defined a single “two-sided” market encompassing both services to cardholders and services to merchants, even though services to cardholders are not substitutable for services to merchants. The Court reasoned that indirect network effects required assessment of both sides of the platform in order to “accurately assess competition.” Due to these network effects, the majority cautioned, a price increase on one side did not necessarily imply an overall increase in the cost of the platform’s services without testing for an offsetting beneficial effect on the other side of the platform.

131 Visa, 344 F.3d at 234.
132 Id.
133 Id. at 238-39. As the District Court explained, “general purpose card network services . . . constitute a product market because merchant consumers exhibit little price sensitivity and the networks provide core services that cannot reasonably be replaced by other sources.” Id. In the market for network services, “the four networks themselves are the sellers, and the issuers of cards and merchants are the buyers,” and the four networks compete with one another to establish brand loyalty in favor of the Visa, MasterCard, Amex, or Discover card.” Visa, 344 F.3d at 237. At that time (1999), Visa members accounted for approximately 47% of the dollar volume of credit and charge card transactions, MasterCard members accounted for approximately 26%, American Express accounted for 20%, and Discover for 6%. Id. at 240. Visa and MasterCard both charged an all-in fee (comprised of the issuing bank’s interchange fee and the acquirer’s fee) of approximately 2%. Discover’s merchant fees were usually 1.5%. Amex’s were 2.73%. Id. at 236.
135 Id. at 2287.
136 Id. As discussed later, the Court also erred by saying that “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.”
137 Id. at 2286.
Of course, indirect network effects are important to the functioning of a platform like Amex, or any other two-sided platform. Likewise, an antitrust assessment should accurately reflect the nature and scope of any such effects. But none of these propositions justified combining both sides of the platform into a single antitrust market. Market definition is not designed to replace competitive effects analysis. Instead, it is one of the tools used to frame that analysis.

Consider the observation that prices and demand on the two sides of the platform were interrelated. True enough. If a platform serves customers of two types who each use the platform to transact with customers of the other type, then an increase in prices to one type could reduce demand for the platform's services from both types of customers through a negative feedback loop, limiting the profitability of such an increase. For similar reasons, a challenged practice may be associated with a price increase on one side of a platform simply because the practice causes competitive harm to those customers, or prices may rise because the practice stimulates demand on one side of the platform, resulting in higher overall demand through a positive feedback loop. Or the price increase may be due to a combination of these factors.

Thus, the Court was correct to point out that a price increase to customers on one side of a platform does not necessarily imply overall competitive harm. But nothing about that fact compels a novel approach to market definition. That a nominal price increase could have either a benign or a sinister explanation is not unique to multi-sided platforms; it is a common phenomenon. A price increase in any market could flow from anticompetitive mischief or an increase in demand. More generally, the relevant market definition need not include all business activity that could affect price (or output, quality, innovation, etc.). For example, a change in the price of a product or service could result from a change in the supply or price of a complementary good, but antitrust analysis has never for that reason included complements in the relevant market.

Worse still, the Court’s approach compromises the analytical function of

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138 Id. at 2285.
139 See Jonathan B. Baker, Market Definition: An Analytical Overview, 74 Antitrust L. J. 129, 134 n.30 (2007) (“[T]he significance for competitive effects of demand complementarities should not be accounted for in the market definition step of the analytical process . . . . Rather, the significance of demand complementarities should be accounted for in the later analysis of competitive effects.”). See also Steven Salop, The First Principles Approach to Antitrust, Kodak, And Antitrust at the Millennium, 68 Antitrust L. J. 187 (2000).
the market definition exercise.\textsuperscript{140} As Jon Sallet and Michael Katz have pointed out, a separate-markets approach allows more precise measurement of competitive conditions, which may differ significantly from one side of a platform to another.\textsuperscript{141} For example, an ad-supported newspaper may be the only newspaper in town, but might compete on the advertising side with other forms of advertising (i.e., market power on the user side, competition on the ad side), as explained in \textit{Lorain Journal}.\textsuperscript{142} Aggregation of distinct groups of consumers into a single market impairs rather than facilitates granular assessment of competitive realities and thus undermines the utility of market definition.\textsuperscript{143}

3. An Illogical Limiting Principle: Transaction Platforms

In what seems to be an effort to cabin the broader reach of its reasoning and to distinguish its own earlier cases,\textsuperscript{144} the Court attempted to limit its holding by confining its novel approach to a special subset of platforms: “transaction platforms”. American Express was a member of this special category, explained the Court, because merchants and cardholders use the platform’s payment services \textit{jointly, simultaneously, and in fixed proportions}.\textsuperscript{145} Such transaction platforms “exhibit more pronounced indirect network effects and interconnected pricing and demand” than other platforms and, according to the Court, supply only one product that is jointly consumed by both types of consumers.\textsuperscript{146}

However, the concept of ‘transaction platforms” as a limiting principle leaves much to be desired from an economic perspective. All platforms exhibit indirect network effects of some kind.\textsuperscript{147} Everyday non-transaction

\textsuperscript{140} 138 S. Ct. at 2285 n.7.
\textsuperscript{141} Michael Katz & Jonathan Sallet, \textit{Multisided Markets and Antitrust Enforcement}, 127 YALE L.J. 2142, 2158 (2018) (“As demonstrated for both advertising-supported media platforms and transaction platforms, the single-market approach fails to accurately account for product substitution and competitive conditions in multisided platform industries.”).
\textsuperscript{142} 342 U.S. 143 (1951).
\textsuperscript{143} See, e.g., \textit{FTC v. Indiana Fed. of Dentists}, 476 U.S. 447, 460 (1986) (purpose of market definition is to “determine whether an arrangement has the potential for genuine adverse effects on competition”); Daniel Francis & Jay Ezrielev, \textit{Disaggregating Market Definition: AmEx and a Plural View of Market Definition}, 98 Neb. L. J. 460, 479 (2019) (“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.”).
\textsuperscript{144} Such cases include \textit{Lorain Journal} as well as \textit{Times–Picayune Publishing Co.}, 345 U.S. 594.
\textsuperscript{145} 138 S. Ct. at 2286.
\textsuperscript{146} Id.
\textsuperscript{147} See, e.g., Gunnar Niels, \textit{Transaction Versus Non-Transaction Platforms: A False Dichotomy In Two-Sided Market Definition}, 15 J. COMPETITION L. & ECON. 327 (2019) (“There exists a spectrum of interactions between the two sides [of a platform], with transactions simply being at one end of the spectrum, and ‘mere’ interactions of various sorts on the other. What matters for market definition is
platforms with significant indirect network effects are legion: in the digital economy, these include content streaming and sharing platforms of all kinds; in the brick-and-mortar economy, one need look no further than economists’ standard example of heterosexual singles bars. In all those cases, indirect network effects may play a very important—even indispensable—role in appraising competitive effects. The Court offered no explanation why “transaction platforms” should be treated as a special category from this perspective. (And, of course, the “share of transactions” would be identical regardless of whether a one-side or two-sided definition were used.)

What is more, even credit card platforms are not pristine transaction platforms as defined by the Court. American Express and other credit cards provide competitively relevant network membership services that are not consumed jointly, including revolving credit, entertainment benefits, and information services to cardholders, and analytic services to merchants. Thus, it seems that American Express’s own services were not consumed by cardholders and merchants in a purely joint and simultaneous fashion. The unhappy task of distinguishing a two-sided “transaction platform” from other platforms seems destined to be a wellspring of confusion—and litigation.

The Court was equally misguided in commenting that “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.” This idea is demonstrably wrong. For example, a two-sided booking platform like Hotels.com, which would appear to satisfy the Court’s definition of a transaction platform, may compete with individual hotel websites, which are not platforms at all.

The error of this latter proposition soon became painfully obvious. In April 2020, Judge Stark of the District of Delaware rejected DOJ’s challenge to the acquisition of Farelogix by Sabre. Historically, airlines had relied on booking services provided by Sabre and two other global distribution systems (“GDS”) to sell tickets to travel agents. Farelogix offered an alternative booking services solution, that allowed airlines to bypass the GDSs and

the nature of the externalities between the two sides and how the platform operator takes these externalities into account when setting prices.

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148 Id.
150 138 S. Ct. at 2287.
152 Id. at 110.
connect directly to travel agencies.¹⁵³ Farelogix’s entry provided travel agencies with additional leverage to negotiate lower GDS booking fees and reduced their reliance on the GDSs for booking services.¹⁵⁴ Farelogix’s disruptive technology standard, New Distribution Capability (“NDC”), powers Open Connect and allows airlines to make a broader, more personalized range of offers to travelers booking through travel agencies.¹⁵⁵ Sabre had vigorously opposed Farelogix’s technology in the market and in industry groups before changing tactics and agreeing to purchase Farelogix.¹⁵⁶ DOJ sued to block the acquisition.

Judge Stark refused to enjoin the deal, holding that DOJ had failed to establish a prima facie case because it had failed to properly identify a relevant market.¹⁵⁷ It was clear that the combination of Farelogix-plus-airlines would allow airlines to disintermediate Sabre. Yet, citing Amex, the court held that, as a matter of law, Sabre (a two-sided transaction platform) could only compete with other two-sided platforms.¹⁵⁸ Farelogix only provides services to airlines and was, therefore, not a two-sided platform.¹⁶⁰ So, despite evidence that Sabre actually viewed Farelogix as a competitive threat through its relationship with airlines, the court determined that the two firms were not competitors.¹⁶¹ At trial, the DOJ attempted to limit Amex to the credit card industry, but Judge Stark did not believe that the Amex opinion provided any rationale for such a limitation and maintained that he was bound by the precedent.¹⁶²

As Sabre demonstrates, Amex has opened a door to the broader erosion of the substitutability principle. That door may prove hard to shut: the path is now marked for lower courts to depart from substitutability for whichever reasons might seem persuasive to them, as the Sabre court did. Today, many

¹⁵³ Id. at 113.
¹⁵⁴ Id. at 114.
¹⁵⁵ Id. at 112.
¹⁵⁶ Id. at 105.
¹⁵⁷ Id. at 136.
¹⁵⁸ The court was following the precedent established by the Second Circuit in US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43., 452 F. Supp. 3d at 136.
¹⁵⁹ Id.
¹⁶⁰ Id. at 118 ("[A] preponderance of the evidence shows that Sabre and Farelogix do view each other as competitors, although only in a limited fashion. Sabre considers Farelogix a competitor in developing NDC technology for direct connects.").
¹⁶¹ Id. at 137. The DOJ is partly to blame for this outcome because it framed the merger as horizontal, rather than vertical or horizontal-plus-vertical. It was the relationship between Farelogix and the airlines that exerted competitive pressure on Sabre. Farelogix allowed the airlines to disintermediate Sabre and serve travel agencies directly. Analyzing this disintermediation as a vertical issue would have been much more sensible and may have avoided the issue of whether one-sided products can compete with two-sided platforms.
businesses and litigation defendants—in industries from ridesharing\textsuperscript{163} to collegiate athletics\textsuperscript{164}—are arguing that they should benefit from the “Amex exception.”\textsuperscript{165} Some of those claims have and will be accepted, and what was previously an antitrust axiom—that markets are defined based on meaningful substitutes—will steadily erode.\textsuperscript{166}

This is a problematic outcome. Legal certainty and analytical coherence will suffer; private and governmental plaintiffs will face more risk and will be deterred from filing private challenges or enforcement action; courts will face growing confusion; and businesses will find it harder to measure the legality of their planned conduct. And, as Herbert Hovenkamp points out, it invites parties to “waste many hours of litigation resources” disputing whether the Amex exception to normal market definition principles applies to their case.\textsuperscript{167} In short, as long as the ill-defined “Amex exception” exists, rigor and predictability will suffer.

B. Prescription: Balancing in Platform Cases

These errors of Amex were needless. The Court alternatively could have allowed a proof of market power from direct evidence, retained the substitutability-based approach to market definition, and could have avoided the flight into dubious economic distinctions. In doing so, it still could have avoided the risk that antitrust analysis might have wrongly ignored the close economic relationship between the different sides of the American Express platform. However, to achieve all these things, the Court would have needed to craft a limited exception to the general rule against multi-market balancing, and to demand a balancing of benefits and harms among the various participants.

By insisting on a single market definition encompassing both sides, the Court was able to avoid making (or at least admitting) this exception, and—

\textsuperscript{164} Alston, 594 U. S. ___.
\textsuperscript{166} One of us has argued elsewhere that the substitutability principle could be reconciled with Amex only by splitting the market definition tool itself. See Daniel Francis & Jay Ezrielev, Disaggregating Market Definition: AmEx and a Plural View of Market Definition, 98 Neb. L. J. 460, 479 (2019).
\textsuperscript{167} Herbert Hovenkamp, Platforms and the Rule of Reason: The American Express Case, 2019 COLUMBIA BUS. L. REV. 35, 58 (2019). Chris Sagers predicted this at the time of Amex itself. Chris Sagers, Ohio v. American Express: Clarence Thomas Sets Sail on a Sea of Doubt, and, Mirabile Dictu, It’s Still a Bad Idea, PROMARKET (June 27, 2018) (“[W]e can expect every antitrust defendant and their sister to start claiming that their business is two-sided, and lower courts will find reason within the theory to give their claims the time of day.”).
into the bargain—to place a burden on the plaintiff, rather than the defendant, to figure out whether the acknowledged harms were in fact offset by claimed benefits.  

Had the Court chosen the more direct road, it would have focused instead on crafting a limited exception to the general rule against multi-market balancing. Such an exception would have to be narrowly tailored and consistent with existing law, including the law of burdens of proof. But, as we shall demonstrate, such an exception could have been created.

1. The Traditional Rule Against Multi-Market Balancing

The starting point is the basic rule that benefits in one market cannot normally be invoked to justify harms in another market. This rule certainly applies in merger cases, and—while the Supreme Court has never quite said so clearly—lower courts have generally assumed the rule also applies in conduct cases. Justice Breyer acknowledged in dissent that “[a] Sherman Act § 1 defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another.” The District Court also nodded to the same difficulty.

This basic rule raises some challenges. On the one hand, it directs a court

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168 Herbert Hovenkamp, Platforms and the Rule of Reason: The American Express Case, 2019 COLUMBIA BUS. L. REV. 35, 60 (2019) (“What the . . . majority was apparently trying to do is force the plaintiff to consider burdens and benefits on both sides of the platform as part of its prima facie case.”).

169 See Philadelphia Nat’l Bank, 374 U.S. at 371 (“[A] merger the effect of which ‘may be substantially to lessen competition’ is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.”).

170 Justice Breyer’s dissent quoted from United States v. Topco Assocs., Inc., 405 U.S. 596 (1972), but it is not clear whether the Court is talking about true multi-market balancing or (on a more natural reading) something like the distinction between intrabrand and interbrand competition. Nevertheless, Topco’s antipathy to broad balancing is clear. See Topco, 405 U.S. at 611–12 (“If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.”).

172 See infra Part II-B-2.

173 See 138 S. Ct. at 2302–03 (Breyer, J., dissenting) (“American Express might face an uphill battle. A Sherman Act § 1 defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another.”).
to ignore effects on some consumers, which can lead the court to condemn conduct that is beneficial to consumers overall.\(^{174}\) Thus, it is in some tension with the central purpose of rule of reason analysis, which is to determine the overall competitive effects of challenged conduct.\(^{175}\) The rule also invites the criticism of formalism, to the extent that it treats effects in a relevant market dissimilarly from effects outside that market. Because market definition is not necessary in every case, and because it rests on legal formalisms rather than economic realities, one might fairly be uneasy that the distinction is doing so much heavy lifting.\(^{176}\) On the other hand, the rule prevents antitrust cases from becoming unwieldy, if not limitless, as it would if every possible impact on every possible consumer group had to be measured or predicted before adjudication could take place.

The question of whether and how to compare harms to some participants against benefits to others is not unique to platform cases: it is ubiquitous in antitrust litigation. Consider retail price maintenance agreements (“RPM”), which can be justified when they make it possible to provide better services to consumers.\(^{177}\) Suppose that only some of the consumers value the additional services, while all customers pay the resulting higher nominal price. RPM would thus benefit the consumers who value the services, but would harm those who do not.\(^{178}\)

This raises a problem in what we might call the political morality of antitrust: if there are only a few customers who do, or do not, not value the services, should the RPM be considered beneficial overall?\(^{179}\)

\(^{174}\) See, e.g., *Eastman Kodak*, 504 U.S. at 479 (“We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact.”).

\(^{175}\) See, e.g., *1-800 Contacts*, Inc. v. FTC, No. 18-3848, 2021 WL 2385274, at *7 (2d Cir. June 11, 2021) (testing for “net procompetitive effect” under rule of reason); In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011 (7th Cir. 2012) (focusing on “net effect on economic welfare”); *Smith v. Pro Football*, Inc., 593 F.2d 1173, 1186 (D.C. Cir. 1978) (rule of reason analysis involves identifying anticompetitive and procompetitive effects and “net[ting] them out”).

\(^{176}\) See supra Section II.1. See also *Michael Katz & Jonathan Sallet, Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2154 (2018) (“[O]ne should be very wary of putting too much weight on market definition itself as a driver of the key conclusions.”).

\(^{177}\) See *Leegin*, 551 U.S. at 890-91 (noting that RPM agreements may stimulate interbrand competition).


\(^{179}\) It was assumed by some commentators that the “overall” effect can be gauged by the effect on market output. If output increased, it was assumed that consumers are benefited overall, and harmed overall if market output falls. However, economists have known for decades that this assumption is incorrect if the value of services is not identical across all consumers. Under those circumstances, it is clear that basing the comparison on the effects on total output is a defective approach. The benefits of the services to consumers “at the margin” may lead to an increase in output. But the harms to the
crucially—should that conclusion change if we conclude that the two groups of customers are in a single market or represent two distinct markets? Should the abstractions of market definition really be dispositive of this matter of antitrust’s moral foundation?

Reasonable minds can and do differ about the right answer to these questions. Some argue that antitrust should not turn a blind eye to harm from anticompetitive conduct simply because some other group benefits.180 Price discrimination markets also underscore the antitrust policy of protecting injured consumer subgroups even if other consumers are unharmed or benefited by the challenged conduct.181 Others argue that one group of consumers should not be denied the fruits of net-beneficial conduct simply because some other group of consumers prefer the status quo.182 In practice, courts—including the Supreme Court—often accept for at least some purposes the possibility of multi-market balancing.183 The Horizontal Merger Guidelines also provide support for reasonably circumscribed departures from the rule against multi-market balancing in the agencies’ exercise of prosecutorial discretion.184

2. Some First Principles for Platform Balancing

In the context of platforms, we believe that balancing harms and benefits on one side with harms and benefits on another side may be appropriate in certain, carefully prescribed and limited, circumstances. We accept the force of the Court’s observation that effects on multiple sides of a platform business are often closely interconnected as a causal matter, and that antitrust analysis ought not neglect this reality. But the question of whether and when to compare effects should turn on economic substance, not on the formalism of market definition.

For similar reasons, simply classifying a business as a platform should not set off a free-for-all of opportunism and guesswork. As Katz and Sallet...
ably show, virtually any business can be shoehorned into some definition of a “platform.”[^3] Instead, analysis should be structured and guided by the principles described below.

By way of preface, we acknowledge that the economic literature on two-sided markets has not reached consensus on the definition of a “platform.”[^4] Rather than replacing one formalistic rule with another, we propose using a broad definition of “platform” and relying on the substantive principles below to focus and structure the balancing inquiry. For these purposes, we accept the Supreme Court’s working definition of a platform as a business that “offers different products or services to two different groups who both depend on the platform to intermediate between them,”[^5] with the caveat that there is no reason to limit to only two sides.

For such a platform, we propose that cross-platform harms and benefits experienced by consumers in a market on one side of a platform may be balanced against harms suffered by consumers on another side of the platform, subject to the following principles.[^6] First, “other side” effects should be counted only if they are sufficiently causally connected to the challenged restraint. Second, a defendant must do more than just name a plausible justification: it must be required to prove actual offsetting beneficial effects of sufficient magnitude to overcome the harms. And, third, when a court departs from the standard single-market rule to assess the benefits enjoyed on another side of the platform, it must also consider any other reasonably ascertainable effects of the challenged conduct, good and bad, on any side of the platform. On this approach, antitrust markets on each side of the platform would be defined according to traditional substitutability-based principles and could involve special analytical tools (like price-discrimination markets) in appropriate cases.

[^3]: Katz & Sallet, supra note 143, 2149-51 (“Almost any firm selling an input to a manufacturer would prefer that the manufacturer have more customers, as then the manufacturer will demand more of the input.”).

[^4]: See, e.g., Jean-Charles Rochet & Jean Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. ECON. 645-67 (2006). Rochet and Tirole defined a market as two-sided “if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other in an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board.” Evans and Schmalensee, by contrast, defined a two-sided market to be one that “has (a) two or more groups of customers; (b) who need each other in some way; (c) but who cannot capture the value from their mutual attraction on their own; and (d) rely on the catalyst to facilitate value creating interactions between them.” David S. Evans and Richard Schmalensee, Markets with Two-Sided Platforms, in 1 ISSUES IN COMPETITION L. AND POL’Y 667 (2008).

[^5]: 138 S. Ct. at 2280.

[^6]: The limitation to “other sides” of a single platform business helps, among other things, to avoid the analysis becoming unwieldy or unmanageable, or to avoid a court having to entertain arguments about so-called “butterfly effects.” It does, however, include all effects in markets where the platform is active, including effects on those not literally purchasing from the platform.
First, the requirement of causal connection between harms and benefits is a crucial limiting factor. Courts should not entertain arguments about benefits that would be provided absent the restraint, or through significantly less restrictive means. In drawing a line, courts should heed guidance in the agencies’ 2010 Horizontal Merger Guidelines, which acknowledges that, as a matter of prosecutorial discretion, the agencies will consider out-of-market benefits in a merger review only if those benefits would be substantial and also would be lost if the harmful effect were prohibited:

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 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.

Limiting balancing to causal connection—considering only benefits that a defendant proves would not be achieved if the restraint were prohibited—makes both economic and legal sense. If a claimed benefit could be achieved without a restraint that causes consumer harm, then there is no need to tolerate the consumer harm to achieve the consumer benefit. This approach also serves the ultimate goal of the rule of reason—to assess the overall effect of a challenged restraint—and fits existing guidance and enforcement practices in merger enforcement.

Second, regarding the allocation of burdens of proof within the rule of reason framework, generally plaintiffs should have the burden of showing harms and defendants should have the burden of showing benefits. To satisfy

189 Alston, 594 U.S. at ___ (slip op. at 28) (“[H]owever framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.”) (citing 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1505, p. 428 (4th ed. 2017)).
190 Horizontal Merger Guidelines § 10 n.14 (emphasis added).
191 The Horizontal Merger Guidelines require the existence of "merger-specific efficiencies." See Horizontal Merger Guidelines § 10 ("The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects.").
the burden of showing redeeming beneficial effects, a defendant should not be able to simply invoke the specter of procompetitive benefits without demonstrating that such benefits exist and are of sufficient magnitude to overcome the harms proven by the plaintiff. It must also be reasonably possible for the court to evaluate and weigh the evidence provided by each party.\textsuperscript{193}

The Supreme Court’s approach in \textit{Amex} defied this principle. Because of its contorted market definition, the Court effectively required plaintiffs to not only prove anticompetitive harm but also to disprove any plausible procompetitive benefit in order to make its \textit{prima facie} case.\textsuperscript{194} This is untenable. The defendant has much better access to evidence of benefits; forcing a plaintiff to \textit{disprove} the sufficiency of an invoked justification would undesirably redouble an already forbidding evidentiary burden.\textsuperscript{195} Finally, maintaining this burden on the defendant is consistent with the longstanding approach under the rule of reason when the defendant claims that benefits in the \textit{same market} side offset apparent harms in that market.\textsuperscript{196} Benefits should not be treated more favorably simply because they fall on a different side of the platform.

\textit{Third}, when it comes to analyzing cross-platform effects, we count both benefits and harms on all sides of the platform. Suppose that the plaintiff alleges harms from the restraint suffered by consumers in a market on one side of the platform and the defendant asks a court to consider a benefit enjoyed by a particular customer group on the other side of the platform. In this case, the court should also consider effects on other consumer groups on that side of the platform, and any others, reasonably connected to the challenged conduct. Burdens of proof regarding these effects should follow the ordinary rules: benefits are for the defendant to prove and harms are for the plaintiff.

This symmetry rule will not affect the outcome in every case. In some

\textsuperscript{193} See Andrew I. Gavil & Steven C. Salop, \textit{Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct}, 168 U. PENN. L. REV. 2107 (2020). Courts do not always demonstrate great concern for the magnitude of the benefit offered by the defendant at step two. See, e.g., Capital Imaging v. Mohawk Valley Med. Assoc, 996 F.2d 537, 543 (2d Cir. 1993) (stating that the defendant, once the burden shifts to them, must "offer evidence of the pro-competitive 'redeeming virtues' of their combination," and that "[a]ssuming defendant comes forward with such proof," the plaintiff once again assumes the burden of production").

\textsuperscript{194} 138 S.Ct. at 2288.

\textsuperscript{195} See Herbert Hovenkamp, \textit{Platforms and the Rule of Reason: The American Express Case}, 2019 COLUMBIA BUS. L. REV. 35, 57 (2019) (noting that a defendant “is in a far better position” to provide such evidence). See also Elkins v. United States, 364 U.S. 206, 218 (1960) ("[A]s a practical matter, it is never easy to prove a negative.").

cases involving harms on one side and benefits on another, the effects on the other side(s) may be uncomplicatedly positive.\textsuperscript{197} But in many real-world cases, the overall impact may be more ambiguous. A restraint may simultaneously harm some participants, and benefit others, on each side of the platform. As discussed in Part III, this seems to have been exactly the impact in \textit{Amex} itself: some consumers (namely, some American Express cardholders) were benefited, but other cardholders were also harmed.\textsuperscript{198}

3. A Final Puzzle

Subject to these conditions—causal contingency, correct allocation of the burdens of proof, and the symmetry principle to avoid cherry-picking—relaxing the general rule against out-of-market comparison and balancing can be a principled and helpful approach in an appropriate set of platform cases.\textsuperscript{199} Recognizing this exception to the general rule against multi-market balancing would also allow the restoration of the core substitutability principle in market definition.

This still leaves the fundamental question of how to weigh these effects. Courts and agencies have several options, whether in platform cases or in other cases involving harms to some consumers and benefits to others:

(1) a pure Pareto-based “\textit{no consumer harmed}” standard that would never permit harm to any individual consumer;
(2) a “\textit{no group harmed}” standard that would not permit net-harm to well defined groups of consumers;
(3) a “\textit{no side harmed}” approach that would condemn a practice or transaction whenever it was net-harmful on any one side of a platform, even if there were greater benefits on another side;
(4) an “\textit{overall effects}” approach that would allow harm to some consumers to be justified by redeeming benefits to others if sufficient in magnitude;
(5) a “\textit{disproportionate benefits}” (i.e., “\textit{harm-weighted}”) standard that gives greater weight to the interests of consumers who are harmed overall and thus requires a more compelling showing of offsetting benefits;\textsuperscript{200} and

\textsuperscript{197} For example, suppose that small marketplace platform requires vendors to use its lower cost logistics system while charging a supracompetitive fee, which is found to lead to lower merchandise prices, and these lower prices are matched by the larger platforms.
\textsuperscript{198} 138 S. Ct. at 2288.
\textsuperscript{199} Analyzing whether this balancing rule should be applied outside of the platform context is beyond the scope of this article.
\textsuperscript{200} A protected group might be based on grounds such as income level or other vulnerability. \textit{Cf.}
(6) a “disproportionate harms” (i.e., “benefit-weighted”) standard that gives greater weight to the interests of consumers who are benefited overall, and thus requires a more compelling showing of offsetting harms.

There is, of course, more to say about these options than there is space to say it: and we acknowledge a critical need for further work on the normative and technical aspects of antitrust balancing.\textsuperscript{201} Option 1 would effectively prohibit virtually any conduct within the scope of the rule, reflecting the well-known impracticality of the Pareto criterion in the real world.\textsuperscript{202} Option 2 arguably shares much DNA with antitrust’s traditional price-discrimination market approach, and it is likely to condemn most restraints in platform environments.\textsuperscript{203} Option 3 resembles a traditional, separate-markets approach that entirely rejects cross-platform balancing.\textsuperscript{204} Option 4 offers the promise of keeping platform antitrust focused on overall effects in affected markets, albeit at the cost of tolerating harm to individual consumer groups.

Options 5 and 6 place “thumbs on the scale” in favor of consumers harmed or benefited respectively. Option 5 weights more highly those consumers who do better in the but-for world absent the restraint, effectively prioritizing their protection from economic harm over access to economic benefits by others. Option 6 reflects an analogous anti-intervention view, consistent with some conservative approaches to antitrust analysis.\textsuperscript{205}

Even these six options likely do not exhaust the possibilities. As a general matter, we doubt there will be a consensus about the “correct” balancing standard. But the need to choose one is inescapable, and that choice should be made openly. Hiding the ball, as the Amex Court did, does not help matters.

III. APPLYING THE FRAMEWORK: AMEX AS IT SHOULD HAVE BEEN

In Part II, we examined the Amex Court’s central errors of principle and set out a framework for the appraisal of rule-of-reason cases in platform

Jonathan B. Baker & Steven C. Salop, Antitrust, Competition Policy, and Inequality, 104 Geo. L.J. 1, 24-26 (2015). This might be justified, for example, by reference to the diminishing marginal utility of wealth. See Baker & Salop 5.

\textsuperscript{201} For useful contributions so far, see, e.g., Rebecca Haw Allensworth, The Commensurability Myth in Antitrust, 69 Vand. L. Rev. 1 (2016).

\textsuperscript{202} HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 2.3c (6th ed. 2020).

\textsuperscript{203} See Horizontal Merger Guidelines § 3.

\textsuperscript{204} Katz & Sallet, supra note 143, at 2158.

markets. In this Part, we apply that framework to the record in Amex itself. We demonstrate that the evidence in Amex supported liability on any reasonable view and that the Court systematically overlooked or marginalized important facts—including ample theoretical and evidentiary support for overall harm within a balancing framework—in the course of directing dismissal.

Our analysis is structured to conform with familiar rule of reason burden shifting. First, we consider the theoretical and evidentiary basis of harm to competition in Amex. Rather than belabor the interpretation of the District Court, which is summarized in Part I, our analysis focuses on some neglected aspects of the conduct. In particular, we highlight the importance of the parallel conduct of Visa and Mastercard and its impact on industry dynamics, as well as the role of the challenged restraints in fueling a dysfunctional and harmful Prisoner’s Dilemma dynamic among cardholders. We also show that Amex reveals an often-neglected truth of broader import: output is not always a reliable measure of competitive effects.

Next, we consider American Express’s evidence of procompetitive justification, applying our proposed “platform exception” to the general rule against multi-market balancing. Our analysis draws out another aspect of Amex that has been overlooked: cardholder rewards—which the Court treated as straightforward evidence of benefit—may not have been cognizable benefits but rather evidence of further competitive harm.

Finally, we consider how the ledger of effects might have been compared and balanced. And we show that on almost any plausible view—including most of the metrics discussed in Part II—the record compelled a finding for the plaintiffs.

A. Harm to Competition

In the first stage of rule-of-reason analysis, a plaintiff must provide direct or indirect prima facie evidence of a substantial anticompetitive effect. In practice, the vast majority of antitrust suits fail at this stage. As a result, the case law is particularly well developed on the methods a plaintiff may use to show harm to competition: courts are willing (at least in principle) to infer

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206 See Alston, 594 U.S. at _ (slip op. at 24-25).
harm from a wide variety of evidence, including adverse impacts on price, output, quality, innovation, and other indicia of competition.\textsuperscript{208}

In \textit{United States v. Visa USA, Inc.}, for example, the Second Circuit affirmed the District Court’s conclusion that defendants’ exclusionary rules resulted in anticompetitive effects, including reduced card and network services output and stunted price competition.\textsuperscript{209} Plaintiffs pointed to evidence that competitors of Visa and Mastercard were prevented from dealing with issuers, as well as to qualitative evidence that price competition and innovation in services and features would have been greater without the restraints.\textsuperscript{210}

The \textit{Amex} record contained plentiful evidence of effects of just this kind. In particular, the plaintiffs had shown that:

\begin{itemize}
  \item American Express had “repeatedly and profitably raised its [merchant fees] to millions of merchants across the United States . . . without losing a single large merchant and losing relatively few small merchants as a result”\textsuperscript{211}
  \item the antisteering rules had created or contributed to a pricing umbrella, allowing Visa and MasterCard to raise their own fees with “virtual impunity”\textsuperscript{212}
\end{itemize}

\textsuperscript{208} This is consistent with the kind of evidence that has successfully discharged the plaintiff’s burden in rule-of-reason cases in other industries. In \textit{NCAA v. Board of Regents}, for example, the Supreme Court held that a plaintiff had satisfied its initial burden by showing both limitations of output, in the form of a ceiling on the number of televised sports games, and price increases arising from a loss of price competition among member schools. \textit{Board of Regents}, 468 U.S. at 113. Likewise, in \textit{Realcomp II, Ltd. v. FTC}, 635 F.3d 815 (6th Cir. 2011), the Sixth Circuit affirmed a finding that a restraint had suppressed competition for certain real estate services, based on a record that included evidence that the restraint was correlated with a statistically significant decrease in a low-cost form of competition. \textit{See Realcomp II}, 635 F.3d 833-34. In \textit{Graphics Products Distributors v. Itek Corp.}, 717 F.2d 1560 (11th Cir. 1983), the Eleventh Circuit found that the challenged restraints had eliminated competition and that they threatened “substantially adverse effects on price competition and consumer welfare,” based on testimony that the excluded competition would have been qualitatively significant and evidence of a substantial price increase as a result of the restrictions. \textit{Itek}, 717 F.2d at 1575. In \textit{L.A. Memorial Coliseum v. Nat'l Football League}, 726 F.2d 1381 (9th Cir. 1984), the Ninth Circuit held that competitive harms were “plain” when the challenged restrictions insulated [NFL] teams from competition and “allow[ed] them to set monopoly prices to the detriment of the consuming public.” \textit{L.A. Memorial Coliseum}, 726 F.2d at 1395. In \textit{Roseborough Monument Co. v. Memorial Park Cemetery}, 666 F.2d 1130 (8th Cir. 1981), the Eighth Circuit held that anticompetitive effects were “obvious” from a horizontal arrangement among cemeteries that reserved foundation preparation services at each cemetery to the cemetery itself, excluding other cemeteries and independent operators from competing for the work, even when they could perform “the same . . . service at a lower price.” 666 F.2d at 1139-40.

\textsuperscript{209} \textit{Visa}, 344 F.3d 229 at 240.

\textsuperscript{210} Id., 344 F.3d at 240–41.

\textsuperscript{211} Id. at 195.

\textsuperscript{212} Id. at 202; see also id. at 216 ("Visa and MasterCard, for instance, were able to increase their average
in addition to effects on merchants, these merchant fee increases “were not paired with offsetting adjustments on the cardholder side of the platform,” and as such were “properly viewed as changes to the net price charged across Amex’s integrated platform”; and

all consumers—including American Express cardholders and other cardholders, and non-cardholders, who purchased from merchants who accepted credit cards—paid higher merchandise prices as a result of the rules, regardless of whether they were receiving card benefits.

Under the approach we outlined in Part II, it would have been enough for the plaintiffs to have identified harm in a single market, such as the market for credit card services to merchants that is one side of the platform. (On appropriate facts, this market could have been narrower than “all merchants”: for example, a price-discrimination market containing a subset of inelastic merchants.) In this analysis, the merchants are the direct participants on their side of the platform, and are considered consumers in the relevant sense: the effects on their welfare includes the effects passed on consumers who do not pay with credit cards. In later stages of the analysis, of course, the defendant would need to establish that there were sufficient net) benefits to consumers on the other side of the platform (i.e., cardholders) to outweigh these harms, considered collectively.

Strikingly, however, the evidence in the record supported overall harm, not just harm to merchants. Merchants, most cardholders, and non-cardholding consumers were all harmed by the restraints, at least before considering any separate benefits like a “credentialing” effect. As Justice Breyer’s dissent correctly noted, the district court’s factual findings on these net effects—particularly the finding that harms to merchants were not in fact offset by effects on cardholders—were “unchallenged.”

This direct evidence of anticompetitive effects was buttressed by the nature of the restraint. An antisteering rule amounts to a “retail price MFN” agreement. Economic theory teaches that such agreements can have the effect of softening interbrand price competition at the point of sale and of encouraging competitors to increase or maintain their own fees, rather than

all-in merchant rates through a variety of means by more than 20% from 1997 to 2009, without fear of other networks undercutting their prices in order to gain share.”).

213 Id. at 196.

214 Id. at 150; see also id. at 208.

215 See 88 F.Supp.3d at 216-17 (discussing “the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base in the form of higher retail prices”).

216 138 S. Ct. at 2301–02 (Breyer, J., dissenting).

217 This interbrand restraint was similar to the restraint that was condemned in the Apple e-books case. See United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013).
reduce them.\textsuperscript{218} Indeed, a central effect of the American Express rule here was to ensure that a reduction in Visa’s or Mastercard’s fees would not result in merchant steering away from American Express to Visa or Mastercard, thereby eroding the incentive for those other cards to compete aggressively with American Express on price.\textsuperscript{219} In addition, American Express furnished no reason to expect competitive benefits often claimed for MFNs, such as transaction cost savings from negotiating price discounts.\textsuperscript{220}

1. The Hidden Parallelism of Antisteering

None of the various courts in the *Amex* litigation, and none of the plaintiffs, focused on a striking and important dimension of the economics of antisteering: the interactions between the effects of American Express’s antisteering rules and effects of the parallel antisteering rules of Visa and MasterCard. The Court ignored the fact that during most of the period under analysis all three networks had antisteering rules. In addition, the Court did not appear to consider the key point that American Express’s rule contributed to Visa’s and Mastercard’s ability to increase their own fees during this period and prevented competitive strategies based on low merchant fees.\textsuperscript{221}

Although American Express was the lone defendant at trial, and despite careful emphasis in the complaint that each rule *alone* was anticompetitive,\textsuperscript{222} it is clear that both theory and evidence suggest the effects of the antisteering restrictions implemented earlier by American Express, Visa, and Mastercard were mutually reinforcing. That is, each company had a better ability and incentive to set supracompetitive fees because the other two major credit cards imposed antisteering rules during the period of analysis of the alleged anticompetitive effects.


\textsuperscript{219} The District Court made this finding. However, the Supreme Court, without overruling the District Court’s finding and without any support for its assertion, insisted that Visa and MasterCard retained incentives to compete on price in the face of the restraints. 138 S. Ct. at 2290 (stating that “antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance”).

\textsuperscript{220} 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1807 (4th ed. 2018). An analogous intrabrand MFN would involve a contractual promise by Amex to charge the same merchant fee to all retailers.

\textsuperscript{221} 88 F. Supp. 3d. at 201-02; see also Discover Brief *Amicus Curiae*, *n*.7.

\textsuperscript{222} Amended Complaint for Equitable Relief at ¶ 23, United States v. Am. Express Co., No. CV-10-4496 (NGG)(RER) (E.D.N.Y. Dec. 21, 2010) (“Each Defendant’s set of vertically imposed restrictions independently restrains competition among networks. Each Defendant’s Merchant Restraints violate Section 1 of the Sherman Act apart from the existence of the other two Defendants’ Merchant Restrictions.”).
The economic analysis is straightforward. Visa’s antisteering rule eliminated the incentive of MasterCard and American Express to cut their merchant fees, but did not eliminate Visa’s incentive to do so. However, the American Express antisteering rule perfected the anticompetitive effect by eliminating Visa’s incentive to cut its fees. At the same time, each of the rules increases the incentive of the network imposing it to raise its fees, because it gives the network confidence that the merchant will be unable to steer consumers to the other networks. Yet, while the Court said “the cause of increased merchant fees is not Amex’s antisteering provisions, but rather increased competition for cardholders,”\(^{223}\) the Court ignored the obvious role of antisteering rules in driving fees up and keeping them high. In this regard, the Court ignored evidence suggesting that the antisteering rules were the cause of the failure of Discover’s competitive strategy of offering lower merchant fees.\(^{224}\)

As in many cases involving vertical restraints in an oligopolistic market, is the compounding effects of parallel restraints is intuitively plausible and a ground for increased competitive concern. Indeed, the *Leegin* Court acknowledged that even intrabrand vertical restraints “should be subject to more careful scrutiny . . . if many competing manufacturers adopt the practice.”\(^{225}\) Moreover, the credit card market was highly concentrated. Calculating shares based on the dollar value of transactions, American Express’s market share was 26% in this highly concentrated market, where Visa had a 47% share and MasterCard had a 23.3% share.\(^{226}\) Accordingly, the market was prone to oligopoly effects, and American Express’s retail interbrand MFN was well placed to lead or support parallel practices by the other two oligopolists.

In response to American Express’s rules, Visa and Mastercard tightened their own antisteering rules, which allowed all three networks to implement merchant fee increases.\(^{227}\)

The states’ Supreme Court briefing expressly called out the impact of American Express’s rule on its competitors’ prices:

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\(^{223}\) 138 S. Ct. at 2288.

\(^{224}\) Discover Brief *Amicus Curiae* at *8.

\(^{225}\) *Leegin*, 551 U.S. at 898.

\(^{226}\) 88 F.Supp.3d at 188.

\(^{227}\) *Id.* at 202 (“[T]he virtual impunity with which Visa and MasterCard were able to raise their merchant pricing suggests an absence of internetwork competition on the basis of price attributable to rules prohibiting merchant steering, which is a condition Amex has been able to perpetuate even after Visa and MasterCard abandoned their anti-steering rules as a result of this litigation.”); *see also* Discover Brief *Amicus Curiae*, *7.*
By restricting price competition, Amex’s restraints have caused all four networks to increase their merchant prices. . . . They . . . helped Visa and MasterCard increase their merchant fees and reduce the gap between their prices and Amex’s traditional premium price. As for Discover, it initially saw an opportunity to become the low-price option given its competitors’ price increases. But the anti-steering provisions blocked its price-cutting approach. So Discover changed strategies by charging prices closer to its competitors’ higher levels.228

To be clear, we do not suggest that there was an express agreement among the three credit card networks to institute or maintain antisteering rules. If there had been evidence of such naked collusion, *per se* illegality would have been the likely result.229 Nor do we suggest that merely parallel conduct is unlawful: it is not.230 Rather, our point is that the contribution of the American Express rule to price increases adopted by its competitors should have been reflected in the Court’s effects analysis of the American Express rule. After all, it is a truism of rule of reason case law that the effects of restrictive practices must be assessed in light of their distinctive circumstances.231

When a restrictive practice significantly increases the ability and incentive of other competing firms to raise prices or to impose or maintain similar restraints, such competitor responses should be included in the assessment of competitive effects.232

The Court appeared entirely blind to this concern and even misinterpreted fee increases by Visa and Mastercard after as evidence in *American Express’s favor*. The relevant passage is remarkable in its lack of attention to the pernicious tendency of the antisteering rules233:

In addition, the evidence that does exist cuts against the plaintiffs’ view

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228 Brief for Petitioners at 32-33, Ohio v. Am. Express Co, 138 S. Ct. 2274 (No. 16-1454).
229 In fact, when Visa and Mastercard adopted their no-surcharge rules and other rules requiring all issuers to be treated the same, the two networks had a governance scheme that permitted member banks to "have formal decision-making authority in one system while issuing a significant percentage of its credit and charge cards on a rival system." United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 328 (S.D.N.Y 2001) (internal quotations omitted).
231 See Alston, 594 U.S. at _ (slip op. at 16) (describing rule-of-reason analysis as a "fact-specific assessment of market power and market structure aimed at assessing the challenged restraint’s actual effect on competition—especially its capacity to reduce output and increase price") (internal quotation marks and citations omitted).
232 See U.S. Gypsum Co. v. Indiana Gas Co., Inc. 350 F.3d 623, 627 (7th Cir. 2003) ("[A] cartel cuts output, which elevates price throughout the market; customers of fringe firms (sellers that have not joined the cartel) pay this higher price, and thus suffer antitrust injury, just like customers of the cartel members.").
233 Despite the 2010 Visa and Mastercard consent decrees, the Amex antisteering rules prevented them from steering at stores where Amex was accepted. Their normal uniform policies would have made it difficult for them to engage in steering policies only at the stores where Amex was not accepted.
that Amex’s antisteering provisions are the cause of any increases in merchant fees. 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. 234 The passage is remarkable in its lack of attention to the parallelism-promoting tendency of the antisteering rules. And, as we explain in the next section, the Court’s focus on output over price effects further demonstrates its misunderstanding of the compounding anticompetitive effects of American Express’ antisteering rules.

2. The Prisoner’s Dilemma and Its Effect on Output

The economics of antisteering might be seen as raising a puzzle. If consumers were harmed by the antisteering rules, as the District Court concluded and as we have argued, why did the consumers go along? Why didn’t the consumers choose not to pay with cash or checks?

One explanation is that the credit card antisteering rules contributed to a collective action problem among consumers, amounting to a Prisoner’s Dilemma. The causal sequence is as follows: first, by charging a higher merchant fee, a credit card network can provide greater rewards to card users; second, the higher merchant fee combined with the antisteering rule causes merchants to raise merchandise prices across-the-board, rather than surcharging transactions made with the higher fee card; third, as a result, each individual consumer has a greater positive incentive to use credit cards more intensively to benefit from its rewards—increasing the fee burden on merchants still further and driving the cycle again; forth, as more consumers use credit cards, merchandise prices paid by all consumers are increased further.

This is a classic Prisoner’s Dilemma. From the individual consumer’s perspective, the benefit of the rewards offsets the harm from the de minimis marginal increase in merchandise prices caused by that single individual’s decision to use the card, so it is individually rational to use the card. Other consumers do the same, forcing merchandise prices further upward. If merchandise prices are going to be elevated anyway, it is better to enjoy rewards than not to do so! Moreover, the more cards that have rewards attached, the higher will be merchandise prices, which will further sharpen

234 138 S. Ct. at 2288 (emphasis added) (citations omitted).
the incentive effects on consumers.

However, like other Prisoner’s Dilemmas, just because an individually rational consumer would choose to use a card in a world of antisteering, this fact does not mean that cardholding consumers collectively are actually better off than they would be absent the restraint. In fact, they may be collectively worse off.235

Of course, the real world is somewhat more complicated, in a variety of ways. Among other things, the wealthiest consumers who obtain the largest rewards actually may benefit on balance from rewards that exceed the increase in merchandise prices. Other who receive smaller rewards or consumers who do not use credit cards—consumers who will surely tend to be less wealthy—are harmed.236

This adds a further complication overlooked by the Court: those consumers who do not use credit cards at all, and are injured the most, are not considered direct participants in the relevant market (i.e., the market for credit card services to cardholders). However, their harm—which is essentially a passed-on overcharge plus a deadweight loss from the higher prices—is included in and derivative of the harm to merchants, who are participants in the relevant market.

Merchants are also harmed by this Prisoner’s Dilemma dynamic in another way themselves, not just as proxies for the customers who do not pay with credit cards. For even if merchants can fully pass on merchant fees as higher merchandise prices, they will sell less merchandise at those higher prices. Also, to the extent that they cannot not pass on the entirety of the higher fees, they also absorb some of the anticompetitive overcharge.

235 To illustrate with a stylized numerical example, suppose that using cards gives each consumer $1.50 in transactional benefits from a $100 purchase, relative to cash or checks. Suppose further that the credit cards charge merchants $3 and offer user rewards of $1. Assuming that merchants fully pass on the fees as higher merchandise prices, cardholders will pay $3 more in total in increased merchandise prices while reaping rewards of only $1. Assuming for simplicity that the additional costs of operating the rewards program are zero, the card networks face $1 in reward costs with the rest spent on advertising or retained as profits. In this situation, the net consumer welfare impact on the $100 purchase is a harm of $0.50 (i.e., $3 price increase, offset by $1 in rewards and $1.50 in transactional benefit). Yet the Prisoner’s Dilemma dynamics give every consumer the individual incentive to use the cards rather than face the same increased merchandise prices without the shelter of rewards or transactional benefits. At the same time, the consumers would be better off if instead the cards charged merchants $1, and were not permitted to offer rewards, in which case net consumer welfare would be positive $0.50 (i.e., $1.50 minus $1).

Understanding the role of the Prisoner’s Dilemma also helps to spotlight another important error made by the Supreme Court, which future courts should be careful to avoid. The District Court had found that increased prices—specifically higher merchant fees and higher merchandise prices—was evidence of anticompetitive harm. The Supreme Court rejected this evidence as insufficient and focused instead on output, concluding that a fall in the volume of credit card transactions would be more probative of harm.

But the Court misunderstood the most plausible story of harm. The Prisoner’s Dilemma creates incentives that tend to increase the number and dollar value of credit card transactions—output above the efficient competitive level, at the expense of other forms of payment. First, the higher prices increase the dollar value of transactions, which was the measure used by the Court. Thus, looking only at the dollar value of credit card transactions in isolation, calling it “output,” and denying competitive concerns because that measure is increasing, amounts to another error. A version of this point can just about be discerned in the states’ briefing, though it appeared completely lost on the Court.

B. Cognizable Procompetitive Justifications: Distinguishing Efficiency Benefits from Fruits of Buyer Collusion

In Part II, we emphasized the importance of the traditional rule that, if a plaintiff satisfies the burden of showing anticompetitive harm, the burden shifts to the defendant to prove redeeming procompetitive justifications. In this Section, we explain that the Amex Court may have misinterpreted some harms as procompetitive benefits. This same issue also can arise in other platform antitrust cases.

This possible error lies in the Amex Court’s assumption that the provision of any cardholder reward was, by definition, a procompetitive benefit. However, having failed to spot the trap, the Court risked falling victim to it.

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237 This basic dynamic is familiar from other situations in which the costs of a practice are externalized to others: overproduction of pollution is a classic example. See, e.g., Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the “Race-To-The-Bottom” Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1212 (1992).

238 This is in addition to the Court’s other separate (and familiar) error of assuming that, if output is rising or price is falling, competitive concerns are improbable. The fallacy here lies in the use of the wrong counterfactual: if output would have been rising faster, or by a greater amount, but-for the challenged conduct, then in the relevant sense there is an output reduction, even if output is increasing in an absolute sense. Newman, supra note 176.

239 Brief for Petitioners at 47, Ohio v. Am. Express Co, 138 S. Ct. 2274 (No. 16-1454).

240 Alston, 594 U.S. at _ (slip op. at 26).

241 See, e.g., 138 S. Ct. at 2289–90 (treating investment in rewards as unambiguously procompetitive).
For, in truth, at least some of the cardholder benefits might be more accurately thought of as rents extracted through buyer coordination and externalized onto other consumers.

To illustrate, suppose that a group of wealthy consumers banded together and offered merchants the following terms: “Because we collectively represent a significant chunk of your most valuable consumer traffic, we jointly threaten not to shop at your stores unless you accept our use of payment cards that pay us large ‘transaction fees,’ which you can fund by a general increase in your merchandise prices you charge to other consumers.”

In this somewhat extreme hypothetical, the wealthy consumer group is functioning as a buyer group, but without any of the procompetitive benefits that may result from and can sometimes justify coordinated or joint purchasing. The group has engaged in no procompetitive economic integration and has not created any economies of scale in purchasing. In economic terms (and setting aside for the moment the question of how antitrust law ought to treat such an arrangement) this hypothetical group is a type of buyer cartel. In effect, the merchants’ costs (and the prices paid by other consumers) have been driven up by the imposition of a cartel overcharge. As a result of the cartel’s operation, the wealthy participants obtain higher surplus, while merchants and other consumers pay the resulting costs. Under most plausible conditions, the welfare of the merchants and all the other consumers will have declined as a result. And if the buyer cartel is not spontaneously formed but is instead organized by an agent that extracts some of the fees, then the proportion of the cartel rent that reaches the wealthy consumers in the group will decline, reducing overall consumer harm even further.

This hypothetical illustrates how cardholder “rewards” extracted from merchants by jointly-acting consumers and funded by a general increase in merchandise pricing, those rewards may, at least to some extent, represent anticompetitive rents from collective action rather than the fruits of procompetitive efficiencies. Indeed, in the hypothetical, there are no procompetitive efficiencies at all: the practice does not reduce transaction costs, and no joint-purchasing efficiency benefits are generated. The “rewards” for the participants are the fruits of pure buyer collusion.

242 Cf. 138 S. Ct. at 2288 (“[American Express] delivers wealthier cardholders who spend more money”).
243 See, e.g., Peter C. Carstensen, Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy, 1 WM. & MARY BUS. L. REV. 1 (Feb. 2010).
The hypothetical thus suggests the possibility that at least some of the cardholder rewards in Amex may have been rents from buyer coordination facilitated by American Express, rather than the result of efficiencies in purchasing or paying, or other evidence of the creation of value. The record in Amex showed that American Express cardholders were among the merchants’ most valuable consumers, which increased the risk to a merchant of these consumers turning elsewhere if the merchant chose not to accept American Express.\textsuperscript{244} Economically, each merchant could be understood as facing a potential boycott by a group of its highest-value customers.

The Court’s procompetitive explanation was that “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.”\textsuperscript{245} But, in light of the hypothetical, a better characterization for at least some of the increment may be that the “value of its services” reflects the higher merchant fees—above the competitive level—extracted from merchants. On one view “welcome acceptance” could be considered a euphemism for the success of this rent-extraction mechanism in excluding competition.\textsuperscript{246}

We are not, of course, suggesting that credit card networks are reducible to naked buyer cartels. Credit cards make paying for goods and services much easier, provide important payment services to merchants, and offer valuable revolving credit to cardholders. Nor are we suggesting that all cardholder benefits are invariably or even predominantly improper. Our point instead is that cardholder rewards should not be assumed to be, dollar for dollar, evidence of a procompetitive benefit: they may represent both procompetitive benefits and mere extracted rents. A full and fair assessment of the effects in Amex would have taken this dynamic seriously, aimed to measure its significance, and reflected it in measuring the nature and magnitude of any procompetitive benefits. Future courts (and plaintiffs) should avoid repeating this error.\textsuperscript{247}

\begin{footnotesize}

\begin{enumerate}
\item[244] 138 S. Ct. at 2281.
\item[245] \textit{Id.}
\item[246] Herbert Hovenkamp makes a similar point. Herbert Hovenkamp, \textit{Platforms and the Rule of Reason: The American Express Case}, 2019 \textit{Columbia Bus. L. Rev.} 35, 66–67 (2019) (‘Welcome acceptance’ in this case apparently meant that the buyer should be prevented from being offered or even told about the availability of a cheaper alternative.’).
\item[247] Similar dynamics could present themselves outside the credit-card context, including in the context of so-called MFN-plus agreements, in which a purchaser secures a “discount” against the terms offered by a counterparty to others, funded by a general increase in the prices charged by the counterparty. \textit{See}, e.g., Complaint, United States v. Blue Cross Blue Shield of Michigan, No. 2:10-cv-15155-DPH-MKM (E.D. Mich. Oct. 18, 2010); \textit{cf.} Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984).
\end{enumerate}
\end{footnotesize}
C. Effects Balancing and Less Restrictive Alternatives

In Part II, we proposed a carefully limited framework for multi-market balancing in the context of platform cases, allowing benefits and harms to be balanced across the sides of a platform. Such balancing, we argued, should be subject to three conditions: (1) any claimed benefits must be sufficiently causally connected to the challenged restraint; (2) such benefits are for the defendant to prove, not for the plaintiff to disprove; and (3) in an analysis of cross-platform effects, other effects (good and bad) in markets on other sides also may be introduced.248 We also identified a variety of metrics for weighing harms and benefits, and underscored the necessity of a choice among them for antitrust policy.

Given the weakness of American Express’s evidence of cardholder benefits, we doubt that overall weighing would have been needed. But, in the interests of clarifying a framework for future cases, we outline that analysis here.

1. Allocating Burdens Correctly

Effects balancing is often described as the third step of the rule of reason, but we think it is best integrated into the second stage of rule-of-reason analysis.249 To discharge its burden at this stage, the defendant should be required to show not only that the procompetitive justification is applicable and non-pretextual, but also that it is sufficient in magnitude to offset the competitive harms.250 This approach avoids the illogic that can result if a defendant must only identify a directional benefit to its own business before a plaintiff is required to quantify that benefit and set it off against overall harms.251

The quantum of evidence that should be required for a defendant to

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248 See supra Part II.C.
250 See, e.g., United States v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993) ("[T]he district court was obliged to more fully investigate the procompetitive and noneconomic justifications proffered by MIT than it did when it performed the truncated rule of reason analysis."). Of course, in practice many courts have required much less of defendants. See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (explaining that "the monopolist may proffer a 'procompetitive justification' for its conduct. . . If the monopolist asserts a procompetitive justification — a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal — then the burden shifts back to the plaintiff to rebut that claim") (emphasis added).
251 Cf. Gavil & Salop, supra note 194; see also Daniel Francis, Making Sense of Monopolization, 84 ANTITRUST L.J. (forthcoming 2022).
This issue touches an important controversy in the law of evidence regarding the structure of a showing required to rebut a presumption. See generally Ernest F. Roberts, An Introduction to the Study of Presumptions, 4 VILL. L. REV. 1, 15–21 (1958) (comparing Thayerian view, pursuant to which a presumption has no further operation after the introduction of evidence tending to rebut it, with its leading alternative—today sometimes known as the Morgan-McCormick view—which imposes a burden of persuasion on the rebutting party). See also Steven C. Salop, An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in in Formulating Antitrust Legal Standards 33-34 (Nov. 6, 2017) (unpublished manuscript) (on file with author at https://scholarship.law.georgetown.edu/facpub/2007/).


255 Id. (“The burden of producing evidence to rebut this presumption then shifts to the defendant.”) (emphasis added).


257 One of us has made a similar point in the context of Section 2. See Francis, supra note 255; see...
conduct outweigh the harms, then the burden shifts back to the plaintiff to rebut the defendant’s conclusion or prove that a significantly (not marginally) less restrictive alternative is available.\textsuperscript{258}

2. Conducting the Balancing

In \textit{Amex} itself, there was ample evidence that its antisteering rules, along with Visa and MasterCard’s parallel restraints, drove up merchant fees, inflated merchandise prices for cardholding and non-cardholding consumers, and fueled a destructive Prisoner’s Dilemma that harmed most merchants and their customers. At the same time, the evidence of substantial, genuinely procompetitive benefits sufficient to exceed the harms was weak, particularly since American Express and the other card networks extracted some of the higher merchant fees.\textsuperscript{259} Thus, in order to carry its burden, American Express would have needed to show substantial procompetitive benefits aside from the rewards.

The District Court concluded that most of American Express’s proposed procompetitive benefits were either theoretically flawed or not backed up by evidence. However, to illustrate the proposed analysis, we consider one of the arguments that has the virtue of being legally cognizable: the claim that American Express had made investments in its brand that exerted a “halo” or “credentialing” effect on merchants that accepted the card and drove consumer traffic to them.\textsuperscript{260} While the District Court found that there was no evidence for this effect, the argument at least described a theoretically consistent free-riding argument.

Suppose that American Express had produced evidence that merchants derived a benefit of increased customer traffic and purchases by merely advertising acceptance of the card, and that this served as a signal of prestige. Suppose that it also produced evidence that these benefits were caused by American Express’s investments in advertising, quality of service, and in screening for reputable merchants. Assume further that there were reasonable grounds to believe that merchants would have the incentive to free-ride on Amex’s efforts by redirecting the customers who were influenced by this

\textsuperscript{258} This formulation is consistent with the Court’s most recent rule-of-reason decision in \textit{NCAA v. Alston}. See \textit{Alston}, 594 U.S. ___ (slip op. at 24-25).

\textsuperscript{259} If some of the rewards are treated as mere fruits of buyer collusion, the differential between harms and cognizable benefits would be even larger.

\textsuperscript{260} See supra.
signal to use another, lower cost payment method. Finally, assume that Amex could show that the antisteering rules eliminated this opportunity for merchant free-riding and thereby encouraged further investments by Amex in this credentialing effect.

If this could all be shown by American Express, the balancing step would require showing that the “net” anticompetitive effects proven by the plaintiff as a result of the higher fees were fully offset by the incremental beneficial effects on investment under the antisteering rules, compared to the investment that would take place without such rules. While the language of magnitudes and offsets suggests the tidiness of a simple equation, this balancing would be far from simple. It also would depend on the balancing standard chosen by the court.

The Court treated the relevant harms, for the purposes of balancing, as including only the increased fees paid by merchants. But this misses at least two sets of harms which ought to have been included, consistent with the symmetry principle described in Part II: (1) deadweight losses that result from unsatisfied customer demand in response to higher merchandise prices; and (2) the incremental effects of American Express’s antisteering rules on the merchant fees charged by other card networks.

On a full accounting, it is likely that American Express would have failed to carry its burden under most of the alternative standards set out in Part II. It obviously would fail under the “no consumer harmed” standard and the no-group harmed standard, because of the fairly clear harms to the individuals who do not pay with credit cards, those who do not pay with American Express credit cards, or those who do not qualify for rewards. It would fail under the “no side harmed” standard because the increase in the merchant fees lead to higher merchandise prices that directly harm purchasers and the merchants. It also would surely fail under the “harm-weighted” standard, given the weakness of benefit evidence.

It is theoretically possible that American Express could have prevailed under an “overall effects” standard, or a “benefit-weighted” standard that favored defendants. But that seems highly unlikely given the record. For

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261 See 138 S. Ct. at 2287-88.
262 Cardholders whose rewards do not outweigh higher merchandise prices bear some of these deadweight losses.
264 As Hovenkamp notes, the Court did not disturb the district court’s findings of fact: “[r]ather, it simply ignored them.” Herbert Hovenkamp, Platforms and the Rule of Reason: The American Express Case, 2019 COLUMBIA BUS. L. REV. 35, 89 (2019)
one thing, as we note above, the “welcome-acceptance” justification—consumers’ ability to use a higher-priced option without experiencing the “friction” of price competition—may not be cognizable. For another, the District Court rejected the proffered evidence of such benefits at trial (notwithstanding the Court’s failure to defer to those factual findings). For a third, the consumer benefits seem to have been robustly discounted: DOJ’s economic expert and district court concluded that American Express passed on only a portion of the higher merchant fees as rewards. And, finally, even if American Express had made its own cardholders whole with rewards, and even if Visa and MasterCard issuers did the same, there would still be larger harms on the merchant side (including those harms to the purchasers that did not use credit cards) from the transfer of the fee and partial extraction by the card networks. Significant pro-defendant weighting or other efficiencies (such as a huge credentialing effect of a kind nowhere in the record) would likely be needed to offset this effect. For obvious reasons, the rules would be even less likely to survive the application of a “harm-weighted” standard.

As a result, under the kind of balancing framework that we commend to future courts, the rules would not plausibly have passed muster.

IV. MOVING ON FROM AMEX

In Parts II and III, we described and applied our proposed framework for the antitrust analysis of platform cases, taking Amex as our foil but aiming for a sounder approach that can guide adjudication in later cases. No doubt the framework will strike many as less than revolutionary: we hope so, as a key benefit of our approach is that it preserves as much of the fabric of existing law as possible. The basic burden-shifting approach under the rule of reason is readily adaptable to platforms with the principled relaxation of the rule against multi-market balancing we propose.

The problem, of course, is what can be done about Amex itself. We suggest three different options, offered to the three different entities who have the power to act: the Supreme Court, lower courts, and Congress.

265 88 F. Supp. 3d at 199.
266 In the extreme, suppose that all the networks raised their merchant fees by the same amount, all purchases were made with credit cards, and all the merchants fully passed-on the higher fees as higher merchandise prices. In this case, there would be net harm as a result of the reduced purchases at the higher prices. However, if all consumers reckoned the higher rewards into their purchase decisions, then there would be no net harms or benefits. The higher merchants’ fees would be completely neutralized. Of course, these extreme conditions are purely theoretical and would not be expected in practice.
A. A Direct Fix for the Supreme Court: Overrule AmEx

The ideal path would be for the Supreme Court to overrule AmEx directly and to expressly embrace the analytical framework we propose for all cases, including future transaction platform cases.

At a minimum, this would involve correcting its approach to market definition—i.e., restoring the sovereignty of the substitutability principle—and repudiating the idea that a plaintiff must disprove the possibility of offsetting benefits in a transaction platform case. The Court should also eliminate the unnecessary requirement of proving market power by formally defining a market and gauging market share in vertical restraint cases when there is direct evidence of market power or anticompetitive effects.

In place of the approach taken by the Amex majority, the Court could adopt instead the framework we describe in Part II. This approach preserves the possibility of cross-platform balancing in appropriate platform cases while still permitting direct evidence of market power and following the substitutability principle when defining markets. To do so, the Court would implement a narrow platform exception allowing multi-market balancing across multiple sides of a platform under three limiting conditions described above: (1) causal contingency as the test for counting beneficial effects on other sides of the platform; (2) correct allocation of the burdens of proof (harms for plaintiffs; benefits for defendants); and (3) the principle that harms and benefits on all sides of the platform must be included to protect against cherry-picking that may give a court a misleading picture of the balance of a measure’s effects.

The hope of such a clean fix is possible, though it may take some time. The Court has often made substantial course corrections in its 130-year exposition of the Sherman Act. Perhaps the most famous was the overarching Section 1 rule of reason standard itself, created when Standard Oil overruled Trans-Missouri Freight.267 Other dramatic reversals have included the multiple revisions of the law of non-price intrabrand vertical restraints,268 the law of minimum resale price maintenance,269 the law of maximum resale

267 Standard Oil Co. v. U.S., 221 U.S. 1 (1911) (tacitly overruling U.S. v. Joint-Traffic Ass’n, 171 U.S. 505 (1898) and United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897)).
269 Leegin, 551 U.S. 877 (overruling Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) and holding minimum resale price maintenance to be subject to rule-of-reason analysis)
price maintenance, the market-power presumption in patent cases, and the predatory pricing standard. More generally, in both antitrust and non-antitrust cases, the Court has shown a pragmatic willingness to correct errors when they are important enough, when they are sufficiently clear, and when the threat of harm is obvious.

Those factors are amply satisfied here. Amex has already led directly to a dead wrong decision in Sabre/Farelogix that would have led to immediate consumer harm had not the UK antitrust authority intervened. The courts have been drowned in arguments—from the arguable to the meritless—by defendants hoping to avail themselves of the “Amex exceptions” to various established points of antitrust orthodoxy from market definition to proof burdens. A chorus of critical commentary should help the Court see that this decision is not worth defending.

In the years since Amex was decided, a panoply of antitrust litigation has been initiated against the dominant tech platforms. These cases deserve pragmatic, careful analysis: to the extent that Amex impedes such analysis, it is unjustified and should be overruled.

B. A Cry for Congressional Help: Statutory Intervention

The second hope for a direct fix lies with the legislature. While Congress has historically been reluctant to micromanage antitrust doctrine (a policy that we think generally wise), legislative willingness to revisit and modify the antitrust laws seems to be at a generational peak. In that light, fixing Amex

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273 When deciding whether to relax the general principle of stare decisis, the Court considers several factors, with the goal of "gaug[ing] the respective costs of reaffirming and overruling a prior case." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992). These factors include: (1) whether the rule has proven to be intolerable simply in defying practical workability, (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. Id.

274 See 452 F. Supp. 3d at 136.

275 See supra notes 162–64.

276 See supra note 3.

should be near the top of Congress’s antitrust agenda. Of course, we do not suggest that Congress should intervene to correct every bad precedent. But in this case, correction could be achieved simply and by reaffirming well-recognized antitrust principles.

The best solution, in our view, turns on the fact—emphasized throughout Part II—that the Court grounded its analysis in market definition. The single overarching “two-sided” transaction platform market definition allowed the Court to avoid the express question of multi-market balancing and to characterize the record as telling an incomplete story of harm to a transacting pair. As a result, correcting the market definition holding would: (1) restore the integrity of the market definition substitution principle; (2) force future courts to explicitly tackle the multi-market balancing question (including in the way we propose!); and (3) ensure that future courts would not be tempted to reconceive the possibility of out-of-market benefits as a deficiency in a plaintiff’s showing of in-market harms.

The cleanest approach, then, would be focused on market definition. To that end, we recommend that the Sherman Act be amended to read, in relevant part:

In a case brought under the antitrust laws, any definition of a relevant antitrust market shall be conducted by reference to the principle of substitutability.

This provision shall not be construed to require the formal definition of a relevant antitrust market definition in cases where such definition would not otherwise be required, including cases where competitive harms is shown by direct evidence.

Importantly, this surgical legislative intervention would protect against the errors of Amex in merger cases as well as conduct cases. Note also that we do not recommend specifying any particular manifestation of the substitutability principle—not even confining it to demand-side substitution—as doing so would go beyond simply fixing Amex and could

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278 We note that recommendations to “fix Amex” have featured prominently in recent proposals. See, e.g., Competition and Antitrust Law Enforcement Act (“CALERA”), S. 225, 117th Cong. (2021); SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION IN COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 399 (Oct. 2020) (proposing “[o]verriding Ohio v. American Express by clarifying that cases involving platforms do not require plaintiffs to establish harm to both sets of customers”).

279 In contrast, the proposed Amex fix in the Competition and Antitrust Law Enforcement Act (“CALERA”), proposed by Senator Klobuchar in February 2021, was limited to conduct cases.
needlessly interfere with the development of market definition doctrine (including in supply-side substitution cases).

C. A Stopgap Measure for Lower Courts: Keeping AmEx Within Bounds

Even if the Court, or Congress, is willing to step up to overrule the unworkable dimensions of Amex, that process may take some time. What should lower courts do in the meantime?

The best path would be for courts to take the Amex opinion at its word and narrowly construe the scope of its analysis. Both the market-definition and effects-analysis holdings can and should be understood as narrow, fact-bound conclusions.

Amex’s holding is confined on its face to pure transaction platforms that meet the following conditions, and only to the extent that they do so: (1) activity on both sides is strictly joint and simultaneous, (2) relevant services are limited to the execution of transactions, and (3) such platforms compete only with other multisided platforms. Those limitations should be taken seriously, as the Court directed, despite our concerns about the economics of the categorization.

Taking these limitations at face value means that the Amex “two-sided” transaction platform market definition requirement will apply only to services jointly and simultaneously consumed in fixed proportions by pre-existing transacting pairs without single-sided competition. “Mixed” platforms—offering transactional services as well as nontransactional services, such as market-making services—should be subject to Amex only with respect to the restraints on the provision of transactional services.

Many platforms provide both transactional and nontransactional services. For example, ecommerce platforms and app stores commonly provide nontransactional services (like search, curation, and information services) to users, and then transactional services (like payment processing) to user-merchant or user-developer pairs after the user has made a choice. Likewise, a ridesharing platform provides nontransactional services (like search) to users and drivers separately, and then transactional services (like ride monitoring and payment processing) jointly and simultaneously to the user-driver pair after they have chosen to trade. Amex ought only apply to such mixed platforms to the extent that they offer transactional services, and to the

280 138 S. Ct., at 2278.
281 See supra Part II.A.3.
extent that the antitrust theory of harm pertains to such services.282

There is some room for optimism. United States v. Charlotte-Mecklenburg Hospital Authority demonstrates a district court’s ability to limit Amex to its facts and properly apply the rule of reason in the face of a defendant’s claims to special treatment by reason of platform status. In June 2016, the DOJ filed a complaint against Carolinas HealthCare System ("CHS") challenging anti-steering provisions in CHS’s contracts with commercial health insurers.283 Following the Second Circuit’s Amex decision in September 2016, CHS argued that its provisions mirrored those at issue in the Amex case and that the Second Circuit's analysis should guide the analysis in this case.284 In a 2017 order, the Western District of North Carolina rejected the argument, emphasizing the need for a traditionally market-specific analysis.285 The District Court explained that it was not bound by the Second Circuit and concluded that the Second Circuit’s reasoning should be limited to credit card markets.286 The parties settled before Amex was decided by the Supreme Court, but the District Court's focus on the particular history and context of the market at issue would be equally appropriate today.287

CONCLUSION

The last three years have taught us that the errors of Amex are every bit as serious and harmful as commentators feared when it first came down.288 Moving on requires a better approach.

In the preceding pages, we have outlined one such approach: a path that restores principle and vigor to platform antitrust while respecting the special nature of certain platform businesses. We have argued that the substitutability

282 Newspapers, as the Court correctly noted, see 138 S. Ct. at 2286, are not transaction platforms at all in the relevant sense. Advertisers and readers consume the services of a newspaper separately and independently. After a reader and an advertiser choose to transact, they do not purchase services from the newspaper at all. Oddly, the Court claimed that newspapers exhibit only one-directional indirect network effects: this is doubtful at best. See, e.g., Benjamin Klein et al., Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 Antitrust L. J. 571, 577–79 (2006) (using newspaper economics to illustrate two-sided dynamics, including bidirectional indirect network effects).
286 Id. at 16.
288 See supra note 5.
approach to market definition should be restored in platform cases, and that traditional allocations of burdens of proof must be preserved. And we have suggested a limited and principled rule for the cross-platform balancing of harms and benefits.

We hope that the Supreme Court will swiftly correct its error at the first opportunity. However, if it fails to do so, neither the lower courts nor Congress are powerless. Lower courts can and should heed the many limiting principles on the face of the Court’s own decision. And Congress could undertake a scalpel-like intervention with confidence: correct the market-definition component, and the rest will likely work itself out.

So there are reasons for optimism after all. Antitrust has recovered from grievous mistakes before; we trust it will do so again.