THE AMERICAN EXPRESS CASE: BACK TO THE FUTURE

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The Supreme Court's 2018 decision in the American Express case is the first U.S. antitrust case that explicitly addressed the unique issues raised by so-called platform or multi-sided markets, which are prominent in the digital economy.[1] *The Court resolved the case with a 5-4 decision, with the five "conservative" Justices on one side, in an opinion written by Justice Thomas, and the four "liberal" Justices on the other side, in a lengthy dissent written by Justice Breyer.*[2] *It has been the subject of substantial commentary.*[3]

This paper is not intended to be another analysis of the strengths and weaknesses of the arguments of the parties or the ultimate decision in the case, and it pays scant attention to the dissent. Instead, the purpose of this paper is to examine what the American Express case might tell us about the attitudes of the Court's five-Justice majority towards antitrust law. Part I provides a high-level overview of the legal context in which the case arose. Part II summarizes the basic facts of the case and some of the key factual findings of the district court. Part III analyzes the majority opinion and, most important, the majority's reasoning and approach to the case. The Conclusion summarizes what the decision tells us

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1. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). *See* Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 1 COLUM. BUS. L. REV. 35, 35 (2019).

2. *See Am. Express*, 138 S. Ct. 2274. The case was decided before Justice Kavanaugh joined the Court. Justice Kennedy was with the majority. Nothing in Justice Kavanaugh's lower court antitrust decisions suggests that he would have disagreed with the majority in the *American Express* case. *See* Stephen Calkins, *How Might A Justice Kavanaugh Impact Antitrust Jurisprudence?*, PROMARKET (July 20, 2018), https://promarket.org/might-justice-kavanaugh-impact-antitrust-jurisprudence/?mc_cid=a6c3283e82&mc_eid=e5293d4df4 [https://perma.cc/DYT8-HG72].

3. *See, e.g.*, Hovenkamp, *supra* note 1; Dennis W. Carlton, *The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error of Amex*, 1 COLUM. BUS. L. REV. 93 (2019); David S. Evans, *Basic Principles for the Design of Antitrust Analysis for Multisided Platforms*, J. ANTITRUST ENFORCEMENT (2019).

about how the majority decided the case and might decide antitrust cases in the future.

I. ANTITRUST AS A COMMON LAW-LIKE DISCIPLINE

The basic antitrust statutes are old, short, and ambiguous.[4] Their meaning has been fleshed out and evolved by a common law-like process for more than 100 years.[5] This process has not just answered questions unresolved by the language of the statutes. It has also enabled antitrust doctrine to change in response to new commercial developments and market circumstances, new learning by economists and lawyers, and the experience of courts and businesses.[6]

The antitrust laws are laws of general application that apply to commercial conduct affecting interstate conduct in almost all industries. These laws have enjoyed widespread and long-lasting legitimacy and political support for a number of reasons. First, they are laws of general application, and have not been perceived as laws that in purpose or effect promote certain interest groups at the expense of others. Additionally, they have adapted to the new challenges posed by ever-changing commercial practices and market circumstances.[7] In a different era, the Supreme Court

4. The Sherman Act was enacted in 1890. In pertinent part, Section 1 provides that every agreement "in restraint of trade" is illegal, and Section 2 provides that it is illegal to "monopolize or attempt to monopolize . . . any part of trade or commerce." 15 U.S.C. §§ 1–2 (2004). The Clayton Act was enacted in 1914. The key substantive provision, Section 7, provides that acquisitions of business assets or stock are illegal if "the effect . . . may be substantially to lessen competition." 15 U.S.C. § 18 (2004).

5. *See* William F. Baxter, *Separation of Powers, Prosecutorial Discretion and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982); *see also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (noting that Congress "expected courts to give shape to the [Sherman Act]'s broad mandate by drawing on common-law tradition").

6. FTC, *Competition Guidance: Guide to Antitrust Laws*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/W7AS-GELU] (last visited Oct. 1, 2019).

7. *See generally,* Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L. J. 147, 151 (2012).

characterized the antitrust laws as the "Magna Carta of free enterprise."[8]

Beginning in the 1950s, a number of scholars – now loosely called "Chicago School" – were dismayed by the then-current state of antitrust law.[9] To oversimplify, these scholars thought that antitrust enforcement had intruded too much on the working of the market and had done so without clear standards or rigorous economic or analytical principles.[10] Their sentiment was captured by Justice Stewart's statement in 1966 that "the sole consistency . . . is that in litigation under § 7 [of the Clayton Act], the Government always wins."[11]

The Chicago School scholars did not just express dismay. They conducted serious economic and conceptual analysis. Their work was in large part empirical, for they endeavored to show how careful attention to facts could illuminate errors in earlier judicial decisions and guide courts in future cases.[12] They used a "bottom-up," "case-by-case" analysis of "specific practices."[13] They sought to dig beneath the words of antitrust to understand the underlying substance – how different kinds of conduct actually affect markets under varying circumstances.[14] And they sought to inform antitrust doctrine by a decision theoretic approach that takes into account the following: the likelihood and costs of erroneous decisions; mistaken condemnation of benign or desirable conduct (false positives), such as the infamous decision in *Von's Grocery* that found that a merger between two firms that together accounted for 7.5 percent of the sales in the relevant market was illegal;[15] and the failure to condemn conduct that is likely to harm competition (false negatives), such as some above-cost price reductions.[16] The costs of false positives include the lost benefits of the prohibited conduct

8. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

9. *See generally* William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency,* 75 VA. L. REV., 1221 (1989) (providing background information about the Chicago School scholars).

10. *Id.*

11. United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

12. *See e.g.*, Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEG. STUDIES 257 (1974).

13. Kobayashi & Muris, *supra* note 7, at 151 (citing Page, *supra* note 9, at 1228, 1231-1233).

14. *See generally* Kobayashi & Muris, *supra* note 7.

15. *See* Von's Grocery, 384 U.S. 270 at 272, 278.

16. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (acknowledging that the rule which permits above-cost prices would permit some harmful conduct: "As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.").

and similar conduct that is deterred in the future as a result of the false positive. The costs of false negatives include the costs of the anticompetitive conduct and the resulting market power permitted in the case at hand or not deterred in the future because of the decision in that case. These scholars brought to the courts and the broader antitrust community new economic learning and a conceptual and normative framework for analyzing antitrust issues.

The Chicago School critics won the day beginning with the Supreme Court's *GTE Sylvania* decision in 1977,[17] and their views were synthesized in numerous scholarly works. Two of them in particular have become classics: Robert H. Bork's *Antitrust Paradox* (1978) and Frank Easterbrook's 1984 article about error costs in antitrust law.[18] They made two fundamental, related contributions. First, they established the *normative principle* that antitrust law should be exclusively focused on economic welfare.[19] An antitrust law, with vague statutes and largely judge-made law, focused on multiple, sometimes conflicting objectives would inevitably lead to arbitrary and inconsistent decisions that would undermine economic welfare and perhaps the law's legitimacy and broad political support.[20] Second, the works eschewed formalistic analysis that would, for example, determine whether to condemn conduct solely on the basis of the number of rivals in a market or whether the agreement could be characterized as exclusive dealing.[21] These scholars demonstrated that careful *factual and economic* analysis is essential for sound antitrust decisions and the development of sound antitrust doctrine.

As a consequence of their factual and economic analysis, the Chicago School scholars embraced a number of empirical economic propositions that reflected the state of economic learning as they then understood it. Three of the propositions are especially important in general and to the decision in the *American Express* case. They are (1) vertical transactions are for all practical purposes never anticompetitive,[22] (2) vertical transactions can be presumed to generate efficiencies by eliminating channel conflict,[23] and (3)

17. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

18. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). Bork was then a professor at Yale Law School and Easterbrook at Chicago Law School. Both were subsequently appointed to the federal appellate bench, Bork on the U. S. Court of Appeals for the District of Columbia Circuit and Easterbrook on the Seventh Circuit.

19. *See generally id.*; *see also* Page, *supra* note 9, at 1302 (commenting on Bork's view on "normative analysis")

20. *See generally* BORK, *supra* note 18; Easterbrook, *supra* note 18.

21. *Id.*; *see* e.g., Easterbrook, *supra* note 18, at 7-9, 23.

22. *See, e.g.*, BORK, supra note 18, at 298-309, 372-75, 406.

23. *See, e.g.*, *id.*, at 226, 375-81 (noting that "vertical mergers are means of creating efficiency, not of injuring competition").

false positives are more worrisome than false negatives.[24] The last was based principally on the supposition that false negatives would be more costly than false positives.[25] Easterbrook argued in particular that entry and other market forces would restore or replace the competition harmed by mistakenly permitted anticompetitive conduct (a false negative) more quickly than a final judicial decision mistakenly prohibiting desirable conduct (a false positive) could be overturned.[26]

Empirical and economic learning and experience over the past forty years demonstrate that each of these propositions needs at the very least to be substantially qualified. We now know that all kinds of vertical agreements can be anticompetitive and that vertical agreements do not always generate efficiencies.[27] And experience demonstrates that false negatives are more costly and more common than previously thought and that false positives are less common and perhaps less costly than previously thought.[28]

A healthy common law-like process would take the new learning into account, as it did in the 1970s and 1980s with respect to the then-new learning of the Chicago School, while adhering to the enduring normative focus of the antitrust laws on economic welfare. A healthy common law-like process would use that learning to inform antitrust doctrine, especially with respect to issues raised in cases like the *American Express* case that have not been addressed in earlier cases and in which legal precedent and principles of stare decisis do not inhibit the development of economically sound antitrust doctrine. But the majority in the *American Express* case failed to do that, and it failed to do so in ways that are worrisome.

24. *See* Easterbrook, *supra* note 18, at 15-16.

25. *Id.* at 15.

26. *Id.* at 15, 24.

27. *See, e.g.*, United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc); *see generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L. J. 209 (1986).

28. *See Does America Have a Monopoly Problem? Examining Concentration and Competition in the U.S. Economy: Hearing Before Subcomm. on Antitrust, Competition Policy, & Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. 8-9 (2019) (prepared statement of A. Douglas Melamed, Professor of the Practice of Law, Stanford Law School) (outlining inferences that could be drawn from studies suggesting under-enforcement of antitrust laws, enduring market power of large technology platforms, failure of firms to realize expected merger efficiencies, etc.), https://www.judiciary.senate.gov/imo/media/doc/Melamed%20Testimony.pdf [https://perma.cc/4867-M335].

II. THE AMERICAN EXPRESS CASE

The case concerned the general purpose credit card business. General purpose credit cards enable cardholders to purchase goods and services without paying the merchant directly by cash or check.[29] Instead, the cardholder authorizes the merchant to collect payment from the credit card system and promises to reimburse the credit card system the full price of the purchased good or service.[30] A wide range of merchants accept general purpose credit cards.[31] By contrast proprietary credit cards, like those for particular brands of gasoline, are accepted at only a relatively small number of merchants, most of which are affiliated with the credit card issuer.[32]

General purpose credit card systems collect money from both cardholders and merchants.[33] The former pay both annual fees and interest on outstanding debts to the system, while the latter pay a merchant fee to the credit card system.[34] The merchant fee is usually a percentage of the price for the goods or services sold by that merchant and charged to the credit card.[35] For example, if a cardholder makes a $100 purchase with her credit card, the credit card system might charge the merchant a fee of 4%, in which case it would pay the merchant $96, bill the cardholder $100, and keep the $4 difference.

Credit card systems are thus engaged in a platform or multi-sided market in which they connect cardholders on one side with merchants on the other side.[36] Both sides are essential to the success of the platform, which is characterized by network effects in the sense that the value of the system to cardholders, and thus the number of cardholders, depends in large part on the number and type of merchants that accept credit cards issued by the system.[37] Furthermore, the value of the system to merchants, and thus the number of merchants, depends in large part on the number

29. *See* Am. Express, 138 S. Ct. at 2280 (explaining that when a credit card is used the credit card "network extends [the cardholder] credit, which allows them to make purchases without cash and to defer payment until later.").

30. *See id.*

31. *See, e.g.,* Bob Musinski, *How Are Store Cards Different From General Credit Cards?*, U.S. NEWS (Jan. 31, 2019, 9:47 AM), https://creditcards.usnews.com/articles/how-are-store-credit-cards-different-from-general-credit-cards [https://perma.cc/7N2P-9H4P].

32. *Id.*

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

34. *Id.*

35. *Id.* at 572.

36. *Am. Express*, 138 S. Ct. at 2280.

37. *See id.* at 2280-81.

and type of customers that carry and use the cards issued by the system.[38]

Credit card systems compete with one another, and with other forms of payment, for both merchants and cardholders. They compete for merchants principally by enlisting a large and attractive base of cardholders and by the quality of their credit card services and their merchant fees.[39] They compete for cardholders by enlisting a large and attractive set of participating merchants and by the quality of their card services, their annual fees and interest charges, and their cardholder rewards.[40] Cardholder rewards include such benefits as airline miles or points that the cardholders can redeem for goods or services at specified merchants and that are paid to cardholders when they charge purchases to the credit card.[41]

American Express competes most directly with Visa, MasterCard, and Discover.[42] Visa and MasterCard are networks of participating banks that issue different credit cards with the Visa or MasterCard logo.[43] Purchases made with those cards are processed through the Visa and MasterCard systems, which specify the merchant fees and other rules applicable to participating merchants.[44] In 2013, Visa accounted for 45% of general purpose credit card purchases in the United States; American Express accounted for 26%, MasterCard for 23%, and Discover for only 5%.[45]

American Express is targeted at a demographic that is smaller and more upscale than the Visa and MasterCard cardholders.[46] American Express cardholders generally have higher incomes and spend more than Visa and MasterCard cardholders.[47] They tend to use credit cards as payment vehicles, rather than as means of making purchases on credit to be repaid over a period of time.[48] Visa and MasterCard thus receive a much higher portion of their revenues in the form of interest payments on outstanding balances than does American Express.[49] Conversely, American Express

38. *Id.*
39. *Id.* at 2282.
40. *Id.*
41. *Id.* at 2280.
42. *Id.* at 2282.
43. Klein, *supra* note 33, at 572.
44. *Id.*
45. *Am. Express*, 138 S. Ct. at 2282.
46. *Id.*
47. *See id.*
48. *See* Matthew Frankel, *Here's Why American Express Can Charge More than Visa or MasterCard*, THE MOTLEY FOOL (Oct. 2, 2018, 3:03 PM), https://www.fool.com/investing/general/2014/06/16/heres-why-american-express-can-charge-more-than-vi.aspx [https://perma.cc/Q3AB-2YK2].
49. *Am. Express*, 138 S. Ct. at 2282.

charges higher merchant fees than its competitors and offers more generous cardholder benefits and rewards than its competitors.[50]

Many more merchants accept Visa and MasterCard than American Express.[51] Many merchants are not especially interested in the more upscale American Express cardholders and are unwilling or unable to pay the higher merchant fees charged by American Express.[52] Other merchants accept the American Express card, even with its higher merchant fees, because accepting the card signals to customers that the merchants caters to the upscale demographic of American Express cardholders and because those cardholders often prefer to use the American Express card because of its greater cardholder benefits and rewards.

Even merchants that accept the American Express card, however, would prefer that the cardholders use some other means of payment that has no or a lower merchant fee.[53] If the customer makes a $100 purchase, the merchant would prefer to keep $100 or to pay a merchant fee of 2% and be paid $98 than to pay American Express a 4% fee and be paid only $96. Some merchants might therefore want to encourage customers at the point of sale not to use their American Express card.

Not surprisingly, American Express would prefer that its cardholders use its cards so that it can collect more in merchant fees. Thus, to prevent merchants from steering customers to other forms of payment, American Express includes in its contracts with merchants that accept its cards so-called "no-steering rules" (NSRs) that prohibit the merchants from steering customers to other forms of payment by, among other things, disparaging American Express, expressing a preference for other general purpose credit cards or promoting such cards more than it promotes American Express cards, and offering discounts or other monetary incentives to those that pay with other cards.[54] The NSRs also prohibit merchants from charging different prices depending on which card the customer uses and from passing on to users of other cards all or a portion of the lower merchant fees charged to the merchants when those cards are used.[55]

50. *Id.*
51. *Id.*
52. Adam Liptak, *Supreme Court Sides with American Express on Merchant Fees*, N.Y. TIMES (June, 25 2018), https://www.nytimes.com/2018/06/25/us/politics/supreme-court-american-express-fees.html [https://perma.cc/4MFM-W8R4].
53. *Id.*
54. United States v. Am. Express Co., 88 F. Supp.3d 143, 149-50 (E.D.N.Y 2015) (the District Court refers to NSRs as "NDPs" throughout the opinion because American Express included anti-steering rules under the label, Non-Discrimination Provisions (NDPs) in its contracts with merchants).
55. *Id.* at 165.

The United States and 17 states filed an antitrust action in 2010 challenging the lawfulness of the NSRs.[56] Plaintiffs argued that the NSRs were exclusionary, in that they harmed American Express's competitors, and that they reduced competition between credit card systems, and therefore violated Section 1 of the Sherman Act, 15 U.S.C. §1.[57] American Express argued that the NSRs were necessary to protect its goodwill, to prevent free riding on its investment in cardholder services, and to fund its cardholder benefits and rewards.[58]

After a seven-week bench trial, the district court held that the NSRs were unlawful.[59] The court found, among other things, that the NSRs (i) reduced incentives for American Express and its competitors to compete on price because the cost savings from lower merchant fees could not be passed on to customers and would thus not induce increased customer usage of the cards; (ii) excluded Discover and other rivals that sought to compete on the basis of price, rather than cardholder benefits, for the same reason; (iii) resulted in higher merchant fees for both American Express and its credit card rivals; (iv) did not lead to offsetting improvement in benefits or services for American Express cardholders; and, (v) thus resulted in a higher "net price" for cardholder services.[60]

Defendants appealed, and the Second Circuit reversed.[61] Fourteen of the plaintiff states filed a petition for certiorari in the Supreme Court.[62] The United States did not join in that effort and, to the contrary, expressed to the Court that the case was not a suitable vehicle for certiorari review because the issues were new, there was no conflict in the Circuits, and the courts did not have experience with the issues raised in the case.[63] The Supreme Court granted certiorari and, after briefing and argument, affirmed the Second Circuit decision by a 5-4 vote.[64]

56. *Id.* at 149.
57. *Id.*
58. *Id.* at 225, 235-37.
59. *Id.* at 150-51.
60. *Id.* at 196, 207-09, 213-15.
61. United States v. Am. Express Co., 838 F.3d 179, 183 (2d Cir. 2016) (holding government failed to demonstrate American Express possessed sufficient market power to affect competition adversely), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).
62. Ohio v. Am. Express Co., 138 S. Ct. 355 (2017) (granting certiorari).
63. *See* Brief for the United States in Opposition, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454) [hereinafter *Brief for US in Opposition*]. (The case had been initiated and pursued through the appeal to the Second Circuit by the Obama Administration. The Trump Administration was in power by the time of the Supreme Court proceedings. The United States subsequently filed a merits brief in support of petitioners. Brief for the United States as Respondent Supporting Petitioners, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (No. 16-1454)).
64. *Am. Express,* 138 S. Ct. at 2283.

III. THE SUPREME COURT DECISION – DEFAULTING TO AN EARLIER TIME

The analysis below is not intended as a critique of the outcome of the case. There is some merit to the arguments made by American Express. While, as should become clear below, some parts of the NSRs seem hard to defend, others are probably lawful.

Instead, the analysis below is intended to illuminate how the five-Justice majority decided the case and what its approach to deciding the case might tell us about how those Justices will be likely to address other antitrust issues in the future. A useful starting point might be to note that the Court granted certiorari even though the United States, the initial lead plaintiff below, did not join the petition for certiorari and in the face of strong, conventional arguments outlining why the case was not worthy of certiorari review.[65] The grant of certiorari under those circumstances, followed by the decision to affirm, invites conjecture that perhaps at least four Justices saw the case as a useful vehicle in furtherance of a substantive agenda.

In any event, regardless of why the Court granted certiorari, the majority decision was flawed. The majority made three fundamental errors, which all fail to account for new economic learning and experience over approximately the past forty years that call into question some sweeping assertions of Chicago School scholars in 1970s and 1980s.

A. *Requiring Proof of a Relevant Market*

The NSRs were embodied in agreements between American Express and its merchant customers, and they restricted the activities of the merchants. The agreements were thus, in antitrust parlance, vertical restraints. Plaintiffs sought to prove that the NSRs injured competition by introducing direct evidence of their effects on the market.[66] Some of the district court's findings based on that evidence are summarized above.

The Supreme Court held that the Plaintiff's evidence was not sufficient and that, as a matter of law, the plaintiff in a case alleging that a vertical restraint is unlawful must define and prove a relevant market.[67] On its face, this is an odd holding. Markets are defined in antitrust to permit market power to be inferred from certain market characteristics, such as the size of the market, the defendant's market share, the height of entry barriers, and the like. Proof of market power, in turn, can help a court determine whether

65. *Brief for US in Opposition*, *supra* note 63.
66. *Am. Express*, 138 S. Ct. at 2284-85.
67. *Id.* at 2285.

a restraint harms competition. Defining a relevant market, therefore, can provide a kind of *circumstantial evidence* that can aid the court in resolving the material factual issue about harm to competition. The Court, in effect, converted a tool intended to aid proof of anticompetitive effects into an additional *element* in the antitrust case itself.

The Court's holding was odd for another reason. A long line of Supreme Court decisions held that market definition is not necessary if there is direct evidence of harm to competition.[68] The Court distinguished those cases on the ground that they involved horizontal agreements – that is, agreements among competitors – rather than vertical agreements, and that vertical agreements "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."[69] This distinction is absurd. In the first place, the Court itself has recognized in many cases the indisputable point that horizontal agreements, too, often pose no risk to competition.[70] Second, as Justice Breyer explained in his dissent, direct proof of injury to competition also proves market power because, "[w]ithout such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved."[71]

In support of its new holding, the Court cited language from Frank Easterbrook's 1984 article noted above, and less explicit language from an earlier Supreme Court decision concerning vertical resale restrictions. [72] But the quoted language said only that market power needs to be proven in a case involving a vertical restraint, not that a relevant market needs to be defined and proven or that market power cannot be proven by direct evidence.[73]

It is hard to make sense of the Court's holding as a matter of logic and economics. To see this, imagine that some states at various times had rules that prohibited American Express from applying NSRs to in-state merchants; that the evidence convincingly showed that, when those laws were in effect, there were more credit card transactions at either higher value to merchants and/or lower costs to cardholders (taking into account

68. *Id.* at 2285 n.7.
69. *Id.*
70. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. System, Inc., 441 U.S. 1 (1979); *cf.*, United States v. Addyston Pipe and Steel Co., 85 F. 271 (6th Cir. 1898) (opinion by then-judge, later Chief Justice, Taft).
71. *Am. Express,* 138 S. Ct. at 2297 (Breyer, J., dissenting).
72. *Id.* at 2285 n.7 (quoting Easterbrook, *Vertical Arrangements and the Rule of Reason,* 53 ANTITRUST L. J. 135, 160 (1984)).
73. *Am. Express,* 138 S. Ct. at 2285 n.7. (quoting Easterbrook, *Vertical Arrangements*, supra note 66, "[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power.").

fees, prices, cardholder rewards, and other quality-related features), in those states (1) than at other times and (2) relative to other states; and that there was no discernable explanation for the differences other than the enforceability of the NSRs. If those were the facts, there would be no need to require proof of a market in order to conclude that the NSRs were anticompetitive.

The Court relied on Easterbrook's 1984 article, which was notable principally for its skepticism about cases alleging unlawful exclusionary conduct and for its conclusion that antitrust law should avoid false positives even at the risk of false negatives.[74] The Court distinguished prior Supreme Court precedent by a conclusory assertion that vertical restraints are less problematic than horizontal restraints.[75] It also created a new element that plaintiffs must establish in antitrust cases challenging vertical restraints – definition of a relevant market – without explaining why that element was necessary for the stated purpose of proving market power.[76] It thus increased the likelihood of false negatives in cases in which anticompetitive effects can be proven directly. In its use of old Chicago School scholarship rather than more recent learning, its skepticism about challenges to vertical restraints, and its willingness to create new obstacles for antitrust plaintiffs, this aspect of the decision reflects a throwback to Chicago School thinking of the 1970s.

B. *Requiring a Single Market for Both Sides of the Platform*

Numerous antitrust cases have dealt with multi-sided markets involving the newspaper and other platform businesses.[77] In none of these cases did the court explicitly address the issues uniquely raised by the two-sided nature of the market, although the courts did in various ways recognize the interdependence between the different sides of the platform.[78] All of these cases focused on and

74. *Id.* at 2285 n.7.

75. *Id.*

76. *Id.* at 2284.

77. *See*, *e.g.*, Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953) (newspapers, which are in effect sold to both advertisers and readers); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (same); United States v. Microsoft Corp., 253 F.3d 34 (D.D. Cir. 2001 (en banc) (computer operating systems, which are in effect sold to users or intermediaries on their behalf and to application developers); Brantley v. NBC Universal, Inc., 675 F.3d 1192 (9th Cir. 2012) (broadcast television, which is in effect sold to viewers and advertisers).

78. This was most explicit in the *United States v. Microsoft* case, which although focused on a consumer market for PC desktop operating systems found that the market was protected by what it called "the applications barrier to entry." As the court explained, new operating systems could not effectively enter and compete for consumers unless it were able to offer a large suite of valuable applications, but applications developers would not invest in developing applications for a new operating system until it had a large number of users. *Microsoft Corp.,* 253 F.3d at 55-56.

defined a relevant market based on one side of the platform.[79] In the case of newspapers, for example, the market could be a market for readers or a market for advertisers depending on the conduct at issue.

The Court in *American Express* held that, in what it called "transaction platforms," the relevant market must include both sides of the platform.[80] The Court defined a transaction platform as one that facilitates a simultaneous transaction among parties on both sides.[81] In the case of credit cards, the card system facilitates a simultaneous transaction between the consumer and the merchant.[82] The Court distinguished other types of platforms, like those provided by Google and Facebook, on the ground that they do not facilitate simultaneous transactions between the two sides.[83] Users access those platforms to obtain various online services, such as search, map directions, and social networking. The users are exposed to advertising sold by Google and Facebook while using those services, but they do not necessarily or simultaneously engage in transactions with the advertisers. To the contrary, transactions between advertisers and consumers using the Google and Facebook platforms take place, if at all, later and often outside the platform.

The Court's reasoning on this issue was largely formalistic. The Court reviewed the basic literature about two-sided markets and seemed to understand how they operate. It correctly noted that there are often substantial feedback effects between the two sides of a transaction platform.[84] But the Court did not itself engage in the kind of substantive analysis of the market definition issue that had characterized much of the earlier Chicago School scholarship. The Court made no effort to analyze whether including both sides in a single market would further the purpose for which markets are designed or to investigate the functional implications of a requirement that both sides of a platform be included in a single antitrust market. Instead, the Court seemed to think that there should be a single market simply because there are simultaneous transactions on both sides and a likely connection between them.[85]

79. *Supra* note 70.
80. *Am. Express*, 138 S. Ct. at 2286-87.
81. *Id.* at 2286.
82. *Id.* ("These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network.").
83. *See id.*
84. *Id.* at 2285.
85. Scholars are divided on the market definition issue. *Compare* Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2158 (2018) (proposing separate markets), *with* Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 302 (2014) (proposing a single market for merger analysis).

The Court's holding that both sides must be included in a single market is problematic. At the very least, it raises difficult issues that the Court did not address.

In the *first* place, there is no need to include both sides in a single market in order to take account of the facts and economic forces relevant to the antitrust issues. The distinctive feature of two-sided markets is the connection between the two sides and the feedback effects between them. Thus, for example, if one wanted to know whether a proposed acquisition would enable a credit card system profitably to increase the prices or fees it charges merchants, one would have to take into account the effect of the increase on cardholders. The price increase might itself cause too few merchants to stop accepting the system's cards to make the increase unprofitable. The loss of those few merchants, however, might cause some cardholders to stop using the card, and the loss of both the merchants and the cardholders might be enough to make the price increase unprofitable. That kind of factual question about the connection and feedback between the two sides can be fully analyzed without defining a single market on both sides.

Second, including both sides of a platform in a single market greatly complicates defining and proving the relevant market. Market definition focuses on demand substitution: identifying the alternative sellers that are available to buyers and constrain one another's behavior.[86] Markets are typically defined by identifying the alternatives available to the buyers that might constrain the exercise of market power by the subject firm.[87] For most platforms, however, the competitive constraints are not the same on both sides. Take newspapers, for example. A reader's alternatives to the newspaper might include television news, local shoppers, and so on; but most advertisers will not regard all of those alternatives as suitable substitutes. By the same token, advertisers might consider alternatives, such as billboards, that readers would not regard as substitutes for newspapers. Even when the competitors are the same on both sides, competitive conditions might be very different.[88]

Including both sides in the same market would require determining which combinations of possibly very different competitive alternatives on both sides, including alternatives on one side that are not meaningful alternatives to buyers on the other side, would constitute a market. If, as in a newspaper case, one is concerned about alleged constraints on competition on the reader

86. *See, e.g.*, U.S. DEP'T of JUST. & FTC, HORIZONTAL MERGER GUIDELINES at 8 (2010) [hereinafter *Horizontal Merger Guidelines*].
87. *Id.*
88. *See* Katz & Sallet, *supra* note 85, at 2158.

side, there is no need to determine which of the possible constraints on the advertiser side might be deemed to be "in the market;" it is sufficient to determine whether feedback effects from the advertiser side as a whole would prevent the exercise of market power in the alleged market on the reader side.

The Court acknowledged that not all two-sided platforms involve a single market, but it is not clear what limit the Court intended.[89] Some language in the opinion suggests that whether a single market needs to be defined turns on yet another case-specific factual issue: whether the feedback effects between the two sides are not "minor."[90] Other language in the opinion suggests that the Court held only that both sides of a two-sided transaction platform need to be included in a single market.[91] If the Court meant only that, the case would say little about market definition for platforms in general and would be likely both to complicate litigation, by inducing legal disputes as to whether the platform at issue is a "two-sided transaction platform," and to introduce needless complication and inefficiency into commercial activity, by creating incentives for parties to contrive their commercial activities in order to fall into what they regard as a more desirable legal category.[92]

The Court said, presumably referring to "two-sided transaction platforms," that "only other two-sided platforms can compete with a two-sided platform for transactions."[93] Although its reasoning is not clear, it might have thought that, if platforms compete only against other platforms, competition must be the same on both sides. But unless the term "transactions" is intended to refer to transactions on two-sided transaction platforms, in which case the Court's statement would be tautological, the statement is wrong, even with respect to credit card platforms. Credit card platforms compete against cash and travelers' checks as means of funding purchase transactions for goods and services. Whether all of the alternatives should be included in the same antitrust market is an empirical question that cannot be answered by characterizing some of the alternatives as "transaction platforms."[94]

89. *Am. Express*, 138 S. Ct. at 2286.

90. *See, e.g., id.* at 2286 ("To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor.").

91. *See, e.g., id*. at 2287 ("For all these reasons, '[i]n two-sided transaction markets, only one market should be defined.'") (internal citation omitted).

92. *See* Joshua D. Wright & John M. Yun, *Ohio v. American Express: Implications for Non-Transaction Multisided Platforms*, GEORGE MASON U. at 6-8 (June, 2019), https://ssrn.com/abstract=3308516 [https://perma.cc/LP99-NPW9] (explaining that transaction platforms should not be treated differently from multisided platforms).

93. *Am. Express,* 138 S. Ct. at 2287.

94. *See* David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 ISSUES COMPETITION L. & POL'Y 667, 689 (2008).

Moreover, it simply cannot be said as a conceptual or legal matter that the competitors are the same on both sides of a "two-sided transaction platform." For example, Uber would seem to fit the Court's definition of a "transaction platform" because Uber is in the business of matching drivers and users. The alternatives on the two sides are, however, not the same. Users' alternatives—Lyft, taxis, public transportation, bikes, scooters, walking—are more diverse than drivers' alternatives: other ride-hailing platforms, such as Lyft, or maybe food-delivery services. Nor is it the case that feedback effects between the two sides of a transaction platform are always relevant to the antitrust issue.[95] Even for American Express, it is not clear that the competitive constraints are the same on both sides. The Court noted that almost all cardholders carry both Visa or MasterCard and thus do not need American Express but that many merchants are reluctant to give up American Express because of its unique signaling value for the narrow, upscale demographic at which it is aimed.[96]

The Court might have intended by its focus on transaction platforms to embrace the principle that both sides must be included in the relevant market if the competitors in the market are the same on both sides. Implementing that principle would require, even for a two-sided transaction platform, an antitrust decision maker to determine the universe of competitive constraints separately for each side of the platform—in effect, to define a market separately for each side—and then, if the firms in the market are identical on both sides, to analyze a different market that encompasses both sides. There is no need for such contortions in order to answer the substantive issues of market power or competitive effects.

Third, including both sides in the same market makes market definition less useful. As noted above, markets are defined as a kind of circumstantial shortcut to aid resolution of other factual issues. One common use is to define a market, estimate the market shares of the competitors in the market, and draw tentative inferences about market power from the market shares and other market characteristics.[97] Thus, for example, a firm with an enduring share in excess of 70 percent in a market protected by high entry barriers would be presumed to have a monopoly in that market. It is not clear, however, what, if any, useful inferences can be drawn if the defendant's market share is 70 percent on one side and 55 percent

95. *See id.* at 688-89.
96. *Am. Express*, 138 S. Ct. at 2282.
97. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 366 (1963); *Horizontal Merger Guidelines*, *supra* note 86, at 15-19.

on the other, or if entry barriers are high on one side but not the other.

Fourth, including both sides in a single market complicates assessing injury to competition. In earlier platform cases, courts have found antitrust violations on the basis of injury to competition on only one side of the platform.[98] But, if both sides of the platform are included in a single market, even if there are no cognizable countervailing benefits on the other side of the platform, courts and litigants would have to decide whether the harm on one side is enough to constitute harm to competition in the market as a whole.[99] The result will be not only needless complexity in antitrust cases but also a likely bias toward false negatives.

The problem goes beyond complexity. Antitrust law generally does not balance harms and benefits in different markets because, among other things, the competitors, trading partners, market structures, and nature of competition are often very different and there is often not a common metric.[100] The Court in the *American Express* case clearly thought that benefits from the NSRs on the cardholder side should be balanced against harms to merchants on the other side in order to assess the lawfulness of the NSRs, and, although it did not address the issue, it might have thought that defining a single market on both sides was necessary for that purpose. But even if the complex weighing of harms and benefits on different sides of a platform were appropriate, it was not necessary to define a single market in order to do so. For one thing, if there are substantial feedback effects between the two sides of the platform, a benefit on one side, and thus in one market, is likely also to benefit the other market by inducing more trading partners to participate in the directly benefitted market. Additionally, even if the benefits do not have that feedback effect, they can be taken into account if the benefits in one market are inextricably linked to the harm in the other.[101] In both cases, the plaintiff would be required to prove harm in at least one of the markets, and the defendant would then have the burden of proving an offsetting benefit in either the injured market, the other market, or both.

98. *See, e.g., Lorain Journal,* 342 U.S. at 143; *Microsoft Corp*., 253 F.3d at 65.

99. *See generally* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S 477 (1977) (holding no proof of anticompetitive effect where operators of bowling centers brought action against manufacturer of bowling equipment alleging that manufacturer's acquisition of bowling centers violated antitrust laws).

100. *See, e.g.,* Katz & Sallet, *supra* note 85, at 2162-66.

101. *See Horizontal Merger Guidelines*, *supra* note 86, at 30 n.14. If the benefits are not inextricably linked to the harms, the restraint would be deemed to be more restrictive than necessary to achieve the benefits and thus unlawful. *See generally* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016).

In the *American Express* case, however, the Court held that the plaintiffs did not prove even a prima facie case of harm to competition sufficient to shift the burden of justification to the defendant.[102] The Court reasoned that American Express's merchant fees, made possible in part by the NSRs, funded its cardholder rewards which induced the cardholders to make purchases with the American Express card; and thus increased the value of the cardholders to the merchants.[103] In effect, as the dissent explained, the Court held that plaintiffs failed to prove that the harm from the NSRs outweighed their benefits.[104] In other words, defining a single market on both sides means that the plaintiff, which must prove injury to competition in the market as a whole, must prove that harm on one side is not fully offset by benefits on the other side. For example, in the *American Express* case, the harms were higher merchant discount fees and other harms to merchants and the benefits were improved cardholder services or rewards and increased cardholder goodwill. The antitrust plaintiff thus has the burden of proving a negative – no offsetting benefits – and of doing so on a topic with respect to which the defendant will almost always have better access to evidence. Accurate fact-finding is best served when parties are not required to prove negatives and when the party with the best access to evidence has the burden of proof. This burden-shifting feature of the Court's market definition appears to have been outcome-determinative in the *American Express* case.[105]

There are, to be sure, counter-arguments.[106] However, for present purposes, the important point is that the Court's formalistic approach to the market definition issue suggested a disinterest in the kind of fact-based analysis consistent with the Chicago School's earlier critique of antitrust doctrine. The Court's decision is not compelled, or even supported, by precedent, and it appears unsound with respect to either economic analysis or legal process concerns. The Court's holding had one clear implication: it doomed the plaintiffs' case. It is difficult to dispel the suspicion that, on this issue too, the Court was motivated by the outdated Chicago School skepticism about antitrust challenges to vertical restraints and willingness to incur false negatives in order to reduce the risk of false positives.

102. *Am. Express*, 138 S. Ct. at 2290.

103. *Id.* at 2288.

104. *See id*. at 2303-04 (Breyer, J., dissenting).

105. *Id.* at 2285 ("Once [the market is] defined, it becomes clear that the plaintiffs' evidence is insufficient to carry their burden.").

106. *See, e.g.,* Joshua D. Wright & John M. Yun, *Burdens and Balancing in Multisided Markets: The First Principles Approach of* Ohio v. American Express, 54 REV. INDUS. ORG. 717 (2019).

C. *Assessing Harm to Competition*

The most problematic part of the Court's decision was its approach to assessing competitive effects. The Court focused on the *intrabrand* vertical efficiency and gave short shrift to the anticompetitive *interbrand* effects that were the subject of the litigation.[107]

First, the Court ignored most of the fact-findings of the district court. These included findings that the NSRs caused higher American Express merchant fees with no offsetting cardholder benefits – in other words, increased "net prices" for American Express' credit card services, that the NSRs reduced incentives for American Express and its competitors to lower their merchant fees and thus resulted in increased fees for all credit card systems, and that the NSRs harmed rivals like Diners that wanted to differentiate their products from American Express's and to compete on the basis of lower prices.[108] Those findings are more than sufficient to establish a prima facie case of harm to competition.[109]

The Court did not engage with those findings. Instead, it said that proof of injury to competition requires proof of either prices in excess of competitive prices or a reduction in industry-wide output.[110] Although the Court's reasoning was sparse, it seemed to be saying that the facts found by the district court, while suggestive, did not directly prove the ultimate harm to competition issue.

In support of that ruling, the Court cited only its 1993 decision in *Brooke Group v. Brown & Williamson Tobacco Corp*.[111] *Brooke Group* was a quintessential Chicago School decision. More importantly, it was a predatory pricing case that had nothing to do with two-sided markets, and the cited proposition from that case has little application to a case like *American Express*.[112]

To begin, the evidence of repeated increases in the prices charged merchants with no evidence of offsetting cost increases or benefits to consumers should itself suffice to establish at least a presumption of supra-competitive prices. The *American Express* Court required, instead, direct proof of prices in excess of competitive prices.[113] It is practically impossible to identify the

107. *See Am. Express*, 138 S. Ct. at 2289-90.
108. *See Am. Express,* 88 F. Supp. 3d at 213-15 (E.D.N.Y. 2015).
109. *See Am. Express,* 138 S. Ct. at 2301-02 (Breyer, J., dissenting).
110. *Id.* at 2287.
111. *Id.* at 2288 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993)).
112. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 216-17 (1993).
113. *See Am. Express,* 138 S. Ct. at 2297 (Breyer, J. dissenting).

competitive price level in a market that during the entire relevant period has allegedly been subject to competition-reducing restrictions. Because there is no way to observe or measure 'competitive prices' in such a market, requiring such direct proof puts an impossible burden on the plaintiff. And price levels are, in any event, not a good measure of aggregate welfare on both sides of a platform because welfare depends on price structure as well as price level.[114]

The Court's treatment of industry output is also wrong. The Court inferred, from the fact that the volume of credit card transactions had increased over time, that the restraint had not reduced output.[115] That inference is not warranted for two reasons. First, the issue is not whether output increased over time but whether output would have been greater absent the restraint. Many extraneous factors, like a general increase in overall retail sales, could explain an increase in output over time. Second, if, as the district court found, the NSRs result in higher retail prices for goods and services charged to all customers and thus result in cash and debit customers subsidizing credit card services provided by American Express and other credit card systems, they would tend to shift sales from non-credit means of payment to credit cards. In that event, increased credit card output could be a consequence of the anticompetitive nature of the restraints. Moreover, while increased output does entail a welfare increase in single-sided markets, like that at issue in the *Brooke Group* case and others studied in the early Chicago School literature, it does not necessarily imply increased welfare in a two-sided market. Welfare in a two-sided market depends in part on the relative prices on both sides and on the relative price elasticities on the two sides, not just on the output of the platform.[116]

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114. *E.g.,* Jean-Charles Rochet and Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 646 (2006). The Court might have had in mind the narrower and economically correct point that, only if American Express had market power would it be able to sustain a business model in which its revenues on both sided exceeded its costs of operating the credit card system. *See generally* Evans, *supra* note 3, at 668-69. But that theoretical observation does not justify the legal rule that the plaintiff needs to prove revenues in excess of costs for the same reasons that antitrust courts rarely undertake that inquiry. That inquiry would not address either of the ultimate antitrust legal issues: whether defendant's conduct was efficiency-based competition on the merits and whether it *increased* defendant's market power. A. Douglas Melamed, *Antitrust Law Is Not That Complicated*, 130 HARV. L. REV. F. 163 (Mar. 10, 2017). And the inquiry would drown in ambiguities: which costs (incremental, average variable, some share of joint cost with other business activities, opportunity, total), over what time period, which revenues (nominal, some share of joint with other products), and so on. Antitrust law instead uses a variety of short-hands to enable it to address the antitrust issues, which are located at the margins of the underlying economic activity.

115. *Am. Express,* 138 S. Ct. at 2289.

116. *See* Michael L. Katz, *Platform Economics and Antitrust Enforcement: A Little Knowledge is a Dangerous Thing*, 28 J. ECON. & MGMT. STRAT. 138 (2019); Jean-Charles

By ignoring the district court's findings and insisting on direct proof of what it thought was the ultimate factual issue regarding injury to competition, the Court seemed to be saying that injury to competition can never be proven by circumstantial evidence. That would be a remarkable ruling. It would mean that, although persons can be convicted of murder on the basis of circumstantial evidence, circumstantial evidence does not suffice to show injury to competition in an antitrust case. When combined with the holding that a market must be defined in all cases about vertical restraints, it would mean that *both circumstantial and direct evidence* are required to prove an antitrust violation in such cases.

Second, the Court credited American Express's argument that the NSRs were necessary to protect its goodwill and to avoid free riding on its investments.[117] That was a standard, 1970s vintage, efficiency justification for vertical restraints. But here, too, the Court did not engage with the facts of the case. It ignored the findings of the district court that the record did not support the efficiency argument.[118] It did not inquire whether the purported efficiencies expanded market output or just shifted share from other credit card systems to American Express.[119] It did not consider whether there were less restrictive alternatives that would have enabled the efficiency benefits with less harm to competition.[120] In effect, the Court simply presumed efficiencies from the nature of the vertical NSR restraints.

Third, the Court ignored an important, inefficient externality caused by the NSRs. The NSRs prohibit merchants from passing on the lower merchant fees charged by other credit card systems – which might be likened to the wholesale price of credit card services – to consumers using those cards. To appreciate this, imagine Gucci telling Saks that it cannot sell any competitor's handbags for a lower price, even if the wholesale price of the competitor's handbag is lower than Gucci's.

The merchant fee is a cost of doing business for the merchant. If it cannot pass that cost on to the cardholder whose use of the American Express card caused the merchant to incur the cost, it will pass it on to all customers by embedding the cost in the price of the merchant's goods and services. It would, in other words, treat

Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EURO. ECON. ASSOC. 990 (2003).

117. *Am. Express.*, 88 F. Supp. 3d at 213-15 (E.D.N.Y. 2015).

118. *Id.* at 227-28, 231, 236-38.

119. *See Am. Express,* 138 S. Ct. at 2274.

120. *Id.* For example, the fear that merchants would free-ride on American Express's investment in its brand by marketing themselves as merchants that accept the American Express card and then steering customers gained by that marketing to other payment vehicles could be addressed by limiting application of the NSRs to those merchants that use acceptance of American Express cards in their promotional materials or signage.

the higher American Express merchant fees as a cost of doing business akin to rent, personnel, and other costs.[121] The effect of the NSRs, therefore, is to require users of credit cards issued by American Express's competitors and those who pay by cash or check to subsidize American Express by paying a portion of the costs it imposes on merchants.

Competition would be enhanced, and welfare would be increased, by avoiding that externality. If merchants were permitted to pass on to customers a portion of the lower cost of various other payment options – just as Saks can charge lower prices for handbags for which it pays less – then customers using payment methods other than American Express cards would benefit by lower prices, merchants would benefit by increased consumer goodwill and net revenues, and American Express's competitors would benefit and have increased incentive to compete on price. American Express would be harmed, but only to the extent that cardholders were unwilling to pay even a portion of the higher fees charged by American Express in order to get the cardholder benefits that the higher fees are supposed to help fund.[122]

The externality problem is related to the parts of the NSRs that prohibit merchants from charging different prices to customers depending on which credit card they use. A conclusion that those parts of the NSRs were unlawful, at least to the extent they prohibit price differences not greater than the merchant fee differences, would not require finding all parts of the NSRs to be unlawful. That conclusion might reflect the kind of careful attention to factual and economic detail that was a hallmark of Chicago School scholarship.

CONCLUSION

The *American Express* case is just one case, and its significance as precedent is not clear. Its ruling that a market must be defined in vertical restraint cases might endure, but markets are defined in most such cases in any event so that precedent might not have a great deal of practical impact. Its ruling about including both sides of a platform in a single market might be a more significant precedent, but that ruling has been criticized and might be construed narrowly, as some of the Court's language suggests, to apply only to "two-sided transaction markets."

The case might be more important for what it says about how the five-Justice majority on the Supreme Court approaches antitrust cases. The majority opinion conflated the enduring normative contributions of the Chicago School with its embrace of empirical

121. *Am. Express,* 88 F. Supp. 3d at 216-18.
122. *See id.* at 220.

propositions from forty years ago that have not stood the test of time; some of which are, in any event, not applicable to two-sided markets. The majority was willing to decide novel issues on the basis of abstract ideas about vertical restraints and free riding that were central to Chicago School analysis forty years ago, but which have since been shown to require more qualification and modification depending on factual context. The majority ignored the fact findings of the district court, and it was plainly willing to increase the risk of false negatives. Its decision was a triumph of ideology over fact-based decision-making.