Antitrust Has Forgotten Its Coase

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There is a raging debate within antitrust to determine how to best assess the conduct of digital platforms and tailor the enforcement of antitrust laws to the modern economy. The distinguishing features of digital platforms can make their analysis quite different from conventional, single-sided markets. The Supreme Court's ruling in Ohio v. American Express ("Amex") *was the first decision to explicitly incorporate features of multisided platforms into antitrust analyses. However, the decision has divided academics and practitioners as to whether the Court properly incorporated platform features into antitrust's rule of reason framework, which seeks to divide the burden of production between plaintiffs and defendants. Adding fuel to the fire are the lower courts' interpretation of* Amex, *including in* U.S. v. Sabre, *where the district court ruled that only "transactional" platforms compete with other transactional platforms, which effectively short-circuited the competitive analysis. This Article argues that antitrust has forgotten the lessons from Ronald Coase's work on the nature of the firm. Specifically, categorizing business organizations as "platforms" is insufficient to properly inform the actual competitive effects analysis. Firms organize in various ways to ultimately turn inputs into outputs. Precisely how this process is achieved is relevant to understand a firm's conduct and incentives, but firm organization alone should not lead to competitive effects conclusions. In light of Coase, this Article reexamines the Court's* Amex *decision to put suitable bounds on its precedential value. Additionally, this Article examines several key antitrust cases before and after* Amex *to assess their fidelity to a Coasian interpretation of platforms.*

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INTRODUCTION

Perhaps no case has split the antitrust community as much as *Ohio v. American Express* ("*Amex*") with vocal critics on one side[1] and defenders of the decision on the other side.[2] Indicative of its polarizing effect, some advocacy groups have even demanded a legislative repeal of the decision.[3] While the case involves a credit card that was first introduced in 1958,[4] the decision invokes the larger issue of how to adjudicate antitrust claims involving multisided platforms, whether for credit cards, search engines, social media, or online marketplaces. At the heart of the disagreement is how to fit the characteristics of platforms, namely, network effects and the interrelationship between different groups on a platform, into antitrust law's rule of reason framework, which governs the evidentiary burdens of the litigants.[5]

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[1] *See, e.g.*, Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 COLUM. BUS. L. REV. 35 (2019); Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law:* American Express *and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061 (2020); Lina Khan, *The Supreme Court Just Quietly Gutted Antitrust Law*, VOX (July 3, 2018), https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony/; Tim Wu, *The Supreme Court Devastates Antitrust Law*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html/.

[2] *See, e.g.*, DAVID S. EVANS & RICHARD SCHMALENSEE, ANTITRUST ANALYSIS OF PLATFORM MARKETS: WHY THE SUPREME COURT GOT IT RIGHT IN *AMERICAN EXPRESS* (2019); Geoffrey A. Manne, *In Defense of the Supreme Court's 'Single Market' Definition in* Ohio v American Express, 7 J. ANTITRUST ENF'T 104 (2019). For a commentary on the various sides of the debate, see 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).

[3] *See, e.g.*, Randy M. Stutz, *We've Seen Enough: It Is Time to Abandon* Amex *and Start Over on Two-Sided Markets*, AM. ANTITRUST INST., Apr. 21, 2020, https://www.antitrustinstitute.org/work-product/aai-says-its-time-to-cancel-amex-sabre-farelogix-opinion-makes-a-mockery-of-market-definition/.

[4] *Our History*, AMERICAN EXPRESS, https://about.americanexpress.com/our-history/.

[5] The rule of reason framework is a three-step process that courts use to shift the burden of production between plaintiffs and defendants. Step One determines whether there is anticompetitive harm from a practice, and the prima facie burden is on the plaintiff. In Step Two, the burden of production shifts to the defendant, who offers evidence of procompetitive efficiencies. Finally, in Step Three, if the defendant identified such efficiencies, the burden of production shifts back to the plaintiff to argue that the benefits from Step Two could be achieved through less restrictive means. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) ("To determine whether a restraint violates the rule of reason, the parties agree that a

Specifically, in *Amex*, the Court assessed whether Amex's contractual requirement that prohibited merchants from "steering" cardholders at the point of sale to another credit card that offered merchants a lower merchant fee (that is, the percentage of the transaction that goes to the credit card company) caused harm to consumers.[6] In its decision, the Court found that, since Amex is a multisided platform, the welfare of both the merchants and cardholders must be considered before anticompetitive harm can be established.[7]

Some have read *Amex* as creating an extraordinary onus on plaintiffs to successfully meet its prima facie burden to demonstrate anticompetitive harm.[8] Specifically, the complaint is that plaintiffs must weigh the net impact of a particular conduct or policy on all platform groups rather than finding harm to just one group. Others have defended the decision as properly incorporating the market reality that some policies, such as Amex's antisteering provision, are balancing the incentives to two or more groups; thus, the analysis is incomplete without considering the welfare of all relevant parties.[9]

After *Amex*, another high-profile case, *U.S. v. Sabre Corp.*,[10] added fuel to the fire. The district court ruled against the U.S. Department of Justice (DOJ)

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three-step, burden-shifting framework applies."). *See also* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 103–04 (2018).

[6] Ohio v. American Express Co., 138 S. Ct. 2274 (2018).

[7] *Id*. at 2287 ("Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone.").

[8] *See, e.g.*, Hovenkamp, *supra* note 1, at 60 ("What the Supreme Court 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."); Gregory J. Werden, *Views on Antitrust Issues Relating to the Digital Marketplace*, Submitted to the Subcommittee on Antitrust, Commercial, and Administrative Law, Apr. 10, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642738 at 3 ("The courts allocate and calibrate burdens to determine which uncertainties are held against which litigants, and in my view, burdens now placed on antitrust plaintiffs can be excessive. I believe the burden was excessive in a case I worked on at the Department of Justice, *Ohio v. American Express Co*.").

[9] *See, e.g.*, Evans & Schmalensee, *supra* note 2, at 27 ("When a challenged practice clearly has effects on both sides of a two-sided transactions platform, as in this case, to exclude either side of the platform in the first step of the analysis is to bias the result.").

[10] 452 F. Supp. 3d 97, 105 (D. Del. 2020).

and found that the merger between Sabre and Farelogix did not violate the Clayton Act, § 7, which prohibits mergers that may substantially lessen competition.[11] In part, the district court judge reasoned that, based on the *Amex* precedent, "transaction platforms" can only compete with other transaction platforms.[12] Notably, however, the judge asserted that, even without this interpretation of *Amex*, the DOJ failed to meet its burden to properly define the relevant market and demonstrate anticompetitive harm.[13]

The *Sabre* decision has received an immense amount of criticism with the blame laid firmly at the feet of the Supreme Court justices who were part of the majority in the *Amex* decision.[14] Some have even suggested that *Amex* is the straw that broke the camel's back and that modern antitrust, and the allegedly onerous consumer welfare standard, is simply broken.[15] Noticeably, antitrust is at a crossroads where there is significant external pressure to "fix" antitrust law because courts simply cannot be trusted to get the complexities of platform markets right—with *Amex* as Exhibit A.[16]

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[11] Specifically, the Clayton Act prohibits mergers whose effect "may be substantially to lessen competition." 15 U.S.C. 18 (2018).

[12] *Sabre Corp*., 452 F. Supp. 3d at 136.

[13] *Id*. ("Even if that were not the law, DOJ's market analysis fails because it does not relate to the relevant product market or the relevant geographic market.").

[14] *See, e.g.*, Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 63 (2021) ("The *American Express* decision has already led to one incoherent decision in a merger case: *Sabre/Farelogix*.); Stutz, *supra* note 3, at 1 ("[W]hile Sabre-Farelogix was wrongly decided, the decision is a symptom. *Amex's sui generis* antitrust rules for an amorphous category of two-sided markets is the root pathology.").

[15] *See, e.g.*, Maurice E. Stucke, Invited Submission to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law, Mar. 13, 2020, https://judiciary.house.gov/uploadedfiles/submission_from_maurice_stucke.pdf at 2-3 ("Recent U.S. Supreme Court decisions, including *Ohio v. American Express Co.*, and the recent lower courts' decisions to allow the AT&T/Time Warner merger and T-Mobile/Sprint merger illustrate how antitrust, under the prevailing consumer welfare standard, has been weakened and distorted beyond all recognition.").

[16] Indicative of this pressure are the numerous Congressional hearings on the state of antitrust and legislative proposals. *See, e.g.*, *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms Hearing Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights*, 116th Cong. (2020), https://www.judiciary.senate.gov/meetings/competition-in-digital-technology-markets-examining-self-preferencing-by-digital-platforms/; American Innovation and Choice Online

In the context of this debate about how to incorporate multisided platforms into a rule of reason analysis, this Article argues that antitrust has forgotten its Coase. While Ronald Coase is best known for effectively starting the field of law and economics with his seminal work that criticized the Pigouvian approach to solving the problem of externalities,[17] he published a much earlier work on the nature of firms.[18] The relevance to platforms is that there is a potential trap of considering business organizations as a binary choice: either a firm is a platform or it is not. While this paradigm can be quite useful, and even necessary, in terms of pedagogy and understanding foundational concepts, we need another Coasian revolution—this time, in terms of how we think about platforms in the context of antitrust law.

Specifically, prior to Coase's work on firms, economists tended to treat firms as static "black boxes."[19] The idea is that various inputs go into a stylized production function, which generates output. This paradigm is still used in economic textbooks and scholarship and is beneficial when analyzing economic concepts such as diminishing returns and economies of scale. Yet, this model of the firm is limiting when assessing dynamic considerations that are more of interest in antitrust cases. Specifically, Coase was frustrated with how little the black box model explained the actual "nature" of firms—that is, questions as to why firms expand or contract; why firms choose to vertically integrate or outsource to the market; or why firms engage in certain types of conduct. Like in his more well-known work on establishing property rights, the key component to understand firm behavior is transaction costs.[20] Incorporating transaction costs into the analysis of firm organization is an

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Act, S. 2992, 117th Congr. (2021), https://www.congress.gov/117/bills/s2992/BILLS-117s2992is.pdf.

[17] Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[18] Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[19] R. H. COASE, THE FIRM THE MARKET AND THE LAW 5 (1988) ("The firm in modern economic theory is an organization which transforms inputs into outputs. Why firms exist, what determines the number of firms, what determines what firms do (the inputs a firm buys and the output it sells) are not question of interest to most economists. The firm in economic theory, as Hana said recently, is a 'shadowy figure.'").

[20] *See* Coase, *supra* note 18, at 390 ("The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism.").

acknowledgment that there are costs to generate a market exchange, including contracting, monitoring, and assuring performance.[21]

In the end, a Coasian approach is a recognition that different firms can have different solutions to organizing production in order to meet some consumer demand.[22] For example, both taxi cab companies and ride sharing platforms, such as, Uber and Lyft, are firms organized to ultimately transport people from one location to another via an automobile. *How* a taxi cab company and Uber actually achieve this objective is quite different—involving different incentives and relationships with both passengers and drivers. Further, compare Google Search with Neeva, which is a search engine startup founded by former Google executives.[23] Google Search monetizes through matching advertisers and users while Neeva is ad-free and relies on a freemium business model.[24] Holding aside issues of current market shares, do Google Search and Neeva compete? The answer depends on what exactly they are competing over. They are not competing for advertisers. Yet, are they competing for users looking for content online? The answer is almost certainly yes. The bottom-line is that assessing competitive interactions is a very detail-specific inquiry that can be informed by how firms are internally organized, but organization is a means to an end. Given all this, what does a Coasian approach to firms have to do with *Amex*, platforms, and digital markets?

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[21] *See, e.g.*, Douglas W. Allen, *What are Transaction Costs?*, 14 RES. L. & ECON. 1 (1991).

[22] *See* Coase, *supra* note 19 ("The people one deals with, the type of contract entered into, the kind of product or service supplied, will all be affected [by transaction costs]."). While there has been an entire body of literature that has blossomed after Coase's work, that is, the "new institutional economics," our focus remains on Coase's original article due to its simplicity and broad applicability. *See, e.g.*, Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Benjamin Klein & Kevin M. Murphy, *Vertical Integration as a Self-Enforcing Contractual Arrangement*, 87 AM. ECON. REV. 415 (1997); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112 (1971); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1985); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[23] *See* Neeva.com/about.

[24] *See* Neeva.com/faq. In Neeva's case, "freemium" does not mean the free-tier is monetized through ads. Rather, the free-tier has a more limited set of search features.

First, this Article argues that, while the term "platform" is useful and often necessary to describe a business organization, it should be considered a short-hand and not a binary classification.[25] Rather, the proper focus must be on the nature, direction, and significance of the various network effects when assessing competitive effects.[26] What should be avoided is a starting point of declaring a business as either a single-sided market or a platform—with subcategories such as transactional and non-transactional platforms. Such an approach gets the order of the analysis wrong. One cannot declare a business a platform without extensively analyzing the specific nature of the network effects and the relevance of those effects to assess the conduct at issue.

Further, there are "platform-like" elements in businesses that are not frequently considered platforms, such as supermarkets.[27] Ultimately, the degree to which a firm is a platform or not is dependent on the nature, direction, and significance of the network effects. Also, a "definitional approach" to platforms tends to ignore the real work of relating the conduct at issue to the firm's incentives, which might or might not depend on its role as a platform in coordinating and matching two or more groups to create output. This implication is that the label "platform" should not bring with it a set of legal presumptions—either in a pro- or anticompetitive way. Rather, we should view firms along a continuum as it relates to platform economics. When we apply one set of tools for platforms and another set of tools for conventional firms in a mechanical manner, we can end up with muddied economic analysis. Specifically, aspects of the *Amex* decision overstate the difference between "platforms" and "non-platforms," which can lead to

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[25] *Cf*. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 8 (1979) (in describing whether licensing music with a "blanket license" over the entire portfolio of music is illegal price fixing under the antitrust laws, the Court explained "easy labels do not always supply ready answers.").

[26] Before the emergence of economic research on platforms in the early 2000s, economists focused primarily on network effects, which laid the groundwork for the platform work that followed. *See, e.g.*, Ronald Artle & Christian Averous, *The Telephone System as a Public Good: Static and Dynamic Aspects*, 4 BELL J. ECON. & MGMT. SCI. 84 (1973); Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 BELL J. ECON. & MGMT. SCI. 16 (1974); Michael L. Katz & Carl Shapiro, *Network Effects, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985); S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 205 (1995).

[27] *See infra* Section I.B for further discussion of supermarkets, network effects, and platforms.

subsequent errors such as parts of the *Sabre* decision. To avoid such confusion, this Article offers guidance on how to procedurally assess markets that involve significant network effects. Put simply, a Coasian approach to platforms recognizes that platforms are a form of firm organization that is a means to an end.

Second, this Article reexamines the Court's ruling in *Amex* to determine how much the Court's decision aligns with a Coasian approach and to identify the parts that do not. Since *Amex* is the first Supreme Court decision to explicitly incorporate the modern economic research on platforms, the precedent can be interpreted in several ways. One interpretation that is consistent with a Coasian approach is to read the decision narrowly while also leaving intact the more general point that competitive effects analyses may require a consideration of the welfare of more than one group. The necessary, but not sufficient, conditions are (1) when there is at least one significant, positive, cross-group network effect between two groups on a platform[28] and (2) where the conduct at issue materially impacts the cross-group network effect(s).

Third, this Article examines a prequel and sequel to *Amex*—plus a coming attraction—in order to assess the degree to which they are consistent with a Coasian approach. The prequel is *Times-Picayune Pub. Co. v. U.S.*, which involved an allegation that the leading New Orleans newspaper illegally tied the purchase of advertising between its morning and evening editions.[29] Newspapers are "non-transactional" platforms insofar as they coordinate the engagement of readers and advertisers rather than facilitate a market exchange *per se*. The sequel is *U.S. v. Sabre Corp*., which required the court to assess whether a "transactional" platform, that is, Sabre, can compete with a non-platform business, that is, Farelogix, which Sabre was acquiring.[30] Finally, the coming-attraction is *Epic Games v. Apple*. The case involves the claim that Apple is abusing its monopoly position in its App Store platform, which brings together users and app developers, through a litany of misbehaviors.[31]

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[28] Cross-group network effects occur when the presence of one group materially impacts the willingness of another group to participate in the network. *See infra* Section I.A.

[29] 345 U.S. 594, 598 (1953).

[30] 452 F. Supp. 3d 97, 105 (D. Del. 2020).

[31] Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR, 2021 WL 4128925 (N.D. Cal. Sep. 10, 2021).

While the district court ruled largely in favor of Apple, the case has already been appealed to the Ninth Circuit.[32]

Overall, an examination of these key cases indicates that courts are missing coherence in their approach to network effects and platforms. There are aspects of *Amex* that conform too strongly to a categorical approach to platforms. Further, while *Times-Picayune* is consistent with a Coasian approach, in *Sabre*, there are legitimate concerns that the court took the worst-parts of *Amex* and relied on a strict bifurcation of antitrust into platform and non-platform analyses. In order to be an economically reasoned precedent, *Amex* must be read more narrowly. In *Epic Games*, some claims may require an explicit assessment of the network effects while others do not. In sum, adopting a Coasian view of platforms can harmonize *Amex* with the economic literature on platforms as well as offering a coherent guide to courts on the critical issue of assessing competitive effects in the presence of significant cross-group network effects.

I. WHAT EXACTLY ARE "PLATFORMS"?

Labels are critical in all areas of the law,[33] and antitrust is no exception—particularly when assessing various types of business conduct. For instance, labels such as exclusive deals, resale price maintenance (RPM), vertical mergers, and horizontal mergers guide courts to the relevant case law and economic learning.[34] Yet, labels can also be vague and incomplete, such as the use of term "barriers to entry" to describe factors that hinder the ability of entrants to compete in a relevant market.[35] Nonetheless, there is an

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[32] Notice of Appeal, Epic Games, Inc. v. Apple Inc., Case No. 4:20-CV-05640-YGR-TSH (N.D. Cal., Sep. 12. 2021).

[33] *See, e.g.*, Roscoe Pound, *Classification of Law*, 37 HARV. L. REV. 933, 939 (1924) ("Classification is an important thing. It is important to make it the best of which we are capable. But it is not a solving device whereby we may obviate the difficulties inherent in ascertaining and applying the law.").

[34] *See generally*, ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY (4th ed. 2022).

[35] *See, e.g.*, W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., ECONOMICS OF REGULATION AND ANTITRUST 168 (4th ed. 2005) ("There is perhaps no subject that has created more controversy among industrial organization economists than that of barriers to entry. At one extreme, some economists argue that the only real barriers are government related . . . At

understandable desire to use labels in antitrust law to provide order to what seems, at times, to be market chaos.

This Part first walks through the concepts of network effects and platforms. The goal is to identify characteristics that make a business more platform-like. Second, this Part offers a Coasian view of network effects and platforms. What emerges is that labels have a place in the analysis but can end up doing more harm than good if labels for firm organization are used to make competitive effects conclusions and legal presumptions that are not tethered to specific market evidence and experiences.[36] Rather, a Coasian approach to platforms aims to pierce the veil of labels and focus more on the core incentives that firms face given their particular business organization including the fact patterns themselves, the particular externalities involved, and the incentives to internalize them.

A. Network Effects & the Concepts Behind Platforms

Integral to understanding the nature of platforms is understanding the presence of various types of network effects. Typically, when economists assess the purchase decision of a consumer, such as, whether to buy a custom-made desk from a heritage furniture maker, the assessment weighs the consumer's private benefit of the desk with the private cost. While the existence of the desk may provide aesthetic value to other members of society, economists can typically ignore those effects. Generally, the focus is solely on the decision-maker who internalizes (nearly) all the benefits and costs of the decision.

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the other end of the spectrum, some economists argue that almost any large expenditure necessary to start up a business is a barrier to entry."); Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L.J. 1 (2006), https://blj.ucdavis.edu/archives/vol-7-no-1/Entry-Barriers-and-Contemporary-Antitrust-Litigation.html ("[T]he Supreme Court has really never provided a comprehensive analysis of barriers to entry and their role in interpreting the Sherman, Clayton and Federal Trade Commission Acts. Rather, the Court has periodically referenced entry barriers in antitrust cases, resulting in a somewhat cryptic and uncertain message to lower courts, litigants and students of antitrust law.").

[36] *See, e.g.*, Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 680 (1989) ("[T]he standards for adequate factual classification include not only administrability but accuracy.").

In contrast, consider the decision of a family member to join a social media network. The decision has a direct impact on the welfare of other family members and friends who are now able to communicate with that person. Specifically, Katz and Shapiro explain that "[t]here are many products for which the utility that a user derives from consumption of the good increases with the number of other agents consuming the good."[37] Commonly cited examples of products with these "within-group" or "direct" network effects include email, telephones, and fax machines.[38] The central idea is that, as more people join the network, the value to existing users increases. This social benefit creates a positive feedback loop where having more users makes the network more valuable and desirable to each additional user. It is no coincidence that the examples listed above all involve a means of communication. Technologies used to facilitate communication naturally tend to have network effects due to the benefits arising from the ability and option to connect with more people as the network grows.[39] Such effects are akin to "demand-side economies of scale," that is, the benefits of consumption increase as the network expands.[40]

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[37] Katz & Shapiro, *supra* note 26, at 424. While this Article's primary focus is on positive network effects, in the sense that a user's utility increases with more users on the same network or standard, network effects can also be negative. *See*, *e.g.*, Oz Shy, *A Short Survey of Network Economics*, 38 REV. INDUS. ORG. 119-20 (2011) ("Negative network effects are generated by congestion or interference, and also are the result of snobbism or vanity, in that a consumer loses the sense of belonging to an elite group when a product is adopted more widely."). An example of a "congestion" effect is when on a "network" of highways, additional drivers slow down the pace of traffic, which reduces the value of the network to other drivers.

[38] Some of the earliest economic literature on network effects began with models assessing potential equilibria in the telephone system. *See* Artle & Averous, *supra* note 26; Rohlfs, *supra* note 26.

[39] *See* Shy, *supra* note 37, at 121 ("Consumers' sensitivity to the size of telecommunication networks can be explained as follows: The number of potential direct connections (or links) among n subscribers is given by $L(n) = n(n-1)/2$. If, for example, the number of subscribers increases from 10 to 11, the number of possible connections increases by $L(11) - L(10) = 55 - 45 = 10$. Hence, the addition of the 11th subscriber makes 10 additional connections possible[.]").

[40] *See* Hal Varian, *Use and Abuse of Network Effects*, *in* TOWARDS A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS 229, 230 (Martin Guzman ed., 2018).

Network effects are a subcategory of externalities.[41] For instance, joining a social network creates both a private gain to the user and a social benefit to others already on the network and even those who are considering becoming a user.[42] This latter effect, that is, providing a social benefit to others, is what creates a positive externality. The existence of this positive externality actually led early commentators to remark that networks could be inefficiently too small since users do not fully internalize the benefits of their participation.[43] Network operators can serve in the role of internalizing the externality to the extent it can monetize based off of the size of the network. In essence, this is akin to the Coase Theorem, where the network operator is assigned the property right and, thus, solves the externality problem.[44] This view of networks is not limited to online platforms and telephones. For instance, we can consider tort liability as a mechanism that internalizes negative externalities.[45]

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[41] *See* Shy, *supra* note 37, at 119 ("Network effects are a special type of externality in which consumers' utility and/or firms' profits are directly affected by the number of consumers and/or producers using the same (or a compatible) technology.").

[42] The value that consumers receive from using a networked product can be divided into what Liebowitz & Margolis call (a) the "autarky value," which is the value of the product even if no one else uses the same product, and (b) the "synchronization value," which is the additional value from being able to interact with others on the network. *See* S. J. Liebowitz & Stephen E. Margolis, *Network Externalities (Effects)*, https://personal.utdallas.edu/~liebowit/palgrave/network.html. This can be an important distinction because even a relatively "small" network can thrive if the autarky value is sufficiently high. Further, the synchronization value could be high even with a smaller network.

[43] S.J. Liebowitz & Stephen E. Margolis, *Network Externalities (Effects)*, https://personal.utdallas.edu/~liebowit/palgrave/network.html ("If network effects are not internalized, the equilibrium network size may be smaller than is efficient. For example, if the network of telephone users were not owned, it would likely be smaller than optimal since no agent would capture the benefits that an additional member of the network would impose on other members.").

[44] Coase, *supra* note 17. Coase also points out the importance of transaction costs and how the presence of significant transaction costs can impact how property rights should be assigned in order to maximize social welfare, or efficiency.

[45] *See, e.g.*, Israel Gilead, *Tort Law and Internalization: The Gap Between Private Loss and Social Cost*, 17 INT'L REV. L & ECON. 589, 589 (1997) ("A central theme in the economic analysis of tort law is that the imposition of tort liability on those engaged in loss-inflicting activities (injurers) operates as a mechanism for internalizing harmful externalities.").

The discussion up to this point has focused on direct network effects, whether positive or negative. A related, but distinct, concept is a "cross-group" network effect, which involves an interrelationship across different groups of people. Consider an advertising platform such as a broadcast television station or yellow pages. If the participation of one group (such as viewers of a broadcast) impacts the incentive of another group to participate (such as advertisers), then there are cross-group network effects.[46] While cross-group effects may be positive, negative, or insignificant, the most relevant case is when cross-group effects are positive—otherwise, without some degree of attraction between groups, there is nothing for a platform to facilitate. Further, cross-group effects can be positive in one or both directions between two groups. A unidirectional cross-group effect typically describes advertising platforms, such as ad-supported radio and television stations, newspapers, and arguably online search engines.[47] Bidirectional cross-group effects typically describe situations where the two groups are buyers and sellers. For example, as more consumers purchase Android smartphones, this creates a greater incentive and corresponding benefit for app developers to write software for the Android operating system (OS) and vice versa. Similarly, as more passengers use a ride sharing app such as Lyft, drivers experience greater incentives to join the Lyft network and vice versa.

Synonymous with a cross-group network effect is the idea of an "indirect" network effect. Returning to the Lyft example, as more passengers join Lyft, this induces more drivers to join Lyft (i.e., a positive cross-group network effect), which, in turn, provides more value to existing passengers on

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[46] *See, e.g.*, PAUL BELLEFLAMME & MARTIN PEITZ, THE ECONOMICS OF PLATFORMS 17 (2021) ("A cross-group network effect is a network effect that an additional user in some group exerts on users belonging to another group.").

[47] The attractiveness of advertising for all these examples depends on the specific consumer and context. For newspapers, classified ads represent something quite different than large, display ads in the sports section of a newspaper. Further, for online search engines, some evidence indicates that consumers derive some utility from ads. *See* Navdeep S. Sahni & Charles Zhang, *Searching Advertising and Information Discovery: Are Consumers Averse to Sponsored Messages?* 4 (Stan. Univ. Graduate Sch. of Bus., Rsch. Paper No. 3441786, 2021), https://ssrn.com/abstract=3441786 (using a large-scale field experiment on a search engine to determine the impact of more prominent advertisements on user engagement, the authors found no evidence that more prominent advertisement placement reduces usage, and found, on average, the number of searches increased 2.47% for the treatment group).

the Lyft network (i.e., a positive indirect network effect). The effect is "indirect" because the participation of more people within group A helps others in group A not "directly" but "indirectly" through the stimulation of greater participation of group B, which members of group A value.[48]

Generally, the concepts of a cross-group and indirect network effect are so similar and intertwined that these terms are used interchangeably.[49] In some situations, however, the distinction might be useful. For instance, consider an ad network where the majority of users are indifferent to the presence of ads or only have a very minor positive valuation. If so, there is a unidirectional cross-group effect as more users induce more advertisers to join the network, yet there may be insignificant indirect network effects—as another user joining does not provide an indirect benefit to other users in terms of stimulating the participation of more advertisers.[50] That being said, whether the presence of advertisers creates an indirect network effect or stimulates a cross-group effect going from advertisers to users is ultimately an empirical question.[51]

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[48] Belleflamme & Peitz, *supra* note 46, at 19 ("[P]ositive *indirect network effects*" occur "not directly through some within-group network effects but indirectly through the combination of two positive cross-group network effects.").

[49] *See, e.g.*, Nicholas L. Johnson, *What are Network Effects?*, APPLICO, https://www.applicoinc.com/blog/network-effects/ ("This type of network effect is called an indirect network effect, also known as cross-side effects. With indirect network effects, the value of the service increases for one user group when a new user of a different user group joins the network.").

[50] Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 INT'L J. INDUS. ORG. 162, 164 (2015) ("[A] newspaper is properly thought of as a MSP [multisided platform]. However, if readers do not care about the number of adverts in a newspaper when deciding whether to subscribe, which seems plausible, then even though advertisers value an increased number of readers, there will be no indirect network effect because the cross-group network effect will only apply in one direction.").

[51] An example of the latter is yellow pages, where users specifically reference yellow pages to view advertising from local businesses. Again, it is useful to consider network effects as externalities. For instance, as more advertisements populate the newspaper (or web page), the value to existing ads tends to fall because of crowding out of limited consumer attention. The publisher regulates this externality by limiting the number and placement of ads. It also may be the case that ads are disliked by readers, so there is a negative indirect effect from ads to readers, which is another reason for the publisher to regulate ad placement. The negative indirect effect has likely declined with technological advances to "target" advertising to the reader's particular preferences.

Again, the concept of a cross-group effect can be considered in terms of externalities. The presence of a user in group A creates a positive externality on participants in group B, which increases the value of the network or platform to group B. In turn, greater participation (or frequency and intensity of use) of group B can create a positive, negative, or inconsequential cross-group effect on group A. These various externalities can misalign private and social welfare unless they are internalized, which a platform can do. For instance, a credit card network can subsidize cardholder spending with various rewards based on card usage.

Given the presence of network effects, some of the early economic literature explored whether first-mover advantages create lock-in and a path dependency[52] where markets can tip and create "winner takes all" (or "winner takes most") outcomes.[53] The idea is that, even if a better, superior product or standard were to emerge, customers may stick with the inferior product because its network is larger and the market has already tipped in its favor.[54] This effect is compounded in the presence of switching costs; but even with nominal switching costs, there could still be a path dependency if a coordination problem inhibits migration. Moreover, difficulties in overcoming incumbency are further exacerbated to the extent that economies of scale exist on the production side as well. Recently, similar arguments have been made

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[52] *See* Liebowitz & Margolis, *supra* note 26, at 205 (describing path dependency as a situation wherein "a minor or fleeting advantage or a seemingly inconsequential lead for some technology, product, or standard can have important and irreversible influences on the ultimate market allocation of resources, even in a world characterized by voluntary decisions and individually maximizing behavior."). *See also* Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332, 332 (1985).

[53] For some of the pioneering work on potential market inefficiencies from network effects, *see, e.g.*, Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70 (1985); W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON. J. 116, 127 (1989) ("But in the increasing returns case laissez-faire gives no guarantee that the 'superior' technology (in the long-run sense) will be the one that survives.").

[54] *See, e.g.*, Stan J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 30 J.L. & ECON. 1, 1 (1990) ("The economic literature on standards has focused recently on the possibility of market failure with respect to the choice of a standard. In its strongest form, the argument is essentially this: an established standard can persist over a challenger, even where all users prefer a world dominated by the challenger, if users are unable to coordinate their choices.").

in debates whether digital platforms should be regulated as common carriers.[55]

Despite the importance of network effects, which fostered these early concerns regarding path dependency and lock-in, subsequent research has identified the importance of understanding the precise nature of the network effect—in terms of its strength, scope, and relevance to the success of a product.[56] For instance, users could adopt a product for reasons other than a desire for a relatively large network. Consider an ad-supported online newspaper. What is the primary aspect of the newspaper that is responsible for users visiting the site? Perhaps users value reading other user comments to the various stories posted, which is a direct network effect. Yet, these comments likely represent only a small fraction of the total value that most users derive from visiting a news site. On the other hand, the presence of other users will be significantly more important to visitors of local business review sites, such as TripAdvisor. While these sites have useful basic information about local businesses, such as hours of operation and location provided by their staff, the breadth and depth of other user reviews likely represent the overwhelming value of these sites. Thus, the relative importance of the size and quality of the network will depend on the particular business. Even in businesses where network effects are important, there remains the question of when, and the degree to which, the network hits diminishing returns.

Even for social media sites, the importance of network effects can differ. Catherine Tucker's research reveals that network effects on social media can be quite "local," in that what primarily affects a platform's utility to users is not a large network per se but rather the participation of specific sets of users,

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[55] *See, e.g.*, Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021).

[56] One example that illustrates this point is OpenTable. Evans and Schmalensee detail how OpenTable originally adopted a business model of bringing on as many restaurants in as many cities as possible into their network. After experiencing lackluster success, OpenTable changed its strategy and restricted its network to focus on higher end restaurants in four cities: Chicago, New York, San Francisco, and Washington, DC. While OpenTable has since expanded beyond these cities, the network effects only began to take off after shrinking the network and changing its composition rather than expanding it. *See* DAVID S. EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS 10-11 (2016).

such as friends, relatives, co-workers, and classmates.[57] Importantly, however, even though network effects may be more local for some users, there can be, in effect, cross-group effects *within* the larger group that still create value from a larger network.[58] That being said, fundamentally, products can be still be useful as long as there are two people who want to communicate with each other.[59] For instance, even for products with strong direct network effects, such as fax machines, it can be a viable method of communication at various network sizes.[60] Thus, coordinating migration to a new or alternative network

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[57] *See* Catherine Tucker, *Online Advertising and Antitrust: Network Effects, Switching Costs, and Data as an Essential Facility*, CPI ANTITRUST CHRON., Apr. 2019, at 2-3 ("In the few forums where there are same-sided network effects, such as social media websites, my research suggests that these type of network effects are quite local. This means that they depend only on the user's smaller friend-group and do not depend on the user base of the entire platform."); Catherine Tucker, *Network Stability, Network Externalities, and Technology Adoption*, *in* 37 ENTREPRENEURSHIP, INNOVATION, AND PLATFORMS: ADVANCES IN STRATEGIC MANAGEMENT (2017). Although, it is important to acknowledge that increases in the sheer number of users—analogous to the income effect in economics—also bring more users into each subgroup.

[58] The idea is a form of six degrees of Kevin Bacon, that is, we are all interconnected by a few degrees. While a user may only text with a small number of people, those people in turn may text with others, and so on. If someone a user does not text with drops off the network, that can still adversely affect the user by making it more likely that someone the user does text with also drops off. Of course, there are diminishing returns from this effect from the user's perspective, but not necessarily from the network's perspective. Thus, this is akin to cross-group effects within the larger group, which blurs the distinction between direct and indirect effects, which conforms with the thesis about being wary of labels.

[59] This point is acknowledged by the STIGLER COMM. ON DIG. PLATFORMS, STIGLER CTR., CHICAGO BOOTH SCH. OF BUS., FINAL REPORT 38 n.51 (2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf ("To send a message to someone, a user only needs that single person to be on a particular messaging app, rather than everyone they would want to send a message to. This explains why many messaging apps can live alongside one another—WhatsApp, Snapchat, SMS, and Facebook Messenger all have significant customer bases.").

[60] Fax machines have a long history, but it was the introduction of Xerox's Magnafax Telecopier in 1966 that truly jumpstarted the technology. *See* JONATHAN COOPERSMITH, FAXED: THE RISE AND FALL OF THE FAX MACHINE (2016). Its use first grew in scale and viability in newsrooms and the military, rather than as a mass market product. *See, e.g.*, Keith Randall, *The Rise and Fall of the Fax Machine*, TEX. A&M TODAY (Aug. 6, 2015), https://today.tamu.edu/2015/08/06/the-rise-and-fall-of-the-fax-machine. Even today, the fax machine is still frequently used in real estate firms, pharmacies, and the medical industry. *See id.*; Lloyd Minor, *Why Your Doctor's Office Still Depends on a Fax Machine*, WALL ST. J. (Sept. 19,

is not necessarily a significant hindrance if the primary value from joining a network is derived from a relatively small group of people. This point is not universal, however: the success of certain types of networks could be dependent on having a large group of people rather than just a subset. Potential examples, for some users at least, are microblogging sites, such as Twitter, where the characteristics of the network correspond to a type of public forum.[61]

In sum, the presence of network effects can be a key consideration in analyzing certain types of products and markets. Detailing the type of network effect and its strength and significance are critical. Network effects are not the only characteristic of products, however. Therefore, a broad pronouncement that the presence of network effects leads to tipping and lock-in is a dated view of platforms and only applies to certain types of markets and systems. Nonetheless, network effects provide the scaffolding to platform businesses and drive much of the incentives that these businesses could face relative to a conventional market. The following Section argues that Coase's work on the nature of the firm can provide a foundation to consider the various network effects and harmonize our understanding of platforms relative to conventional firms.

B. Coasian Approach to Platforms

In 1927, Coase changed how economists thought about firms by examining why firms exist at all.[62] The following passage offers a summary of Coase's insights:

> At the margin, the costs of organising within the firm will be equal either to the costs of organising in another firm or to the costs involved in leaving the transaction to be "organised" by the price mechanism. Business men will be constantly experimenting, controlling more or

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2019), https://blogs.wsj.com/experts/2019/09/19/why-your-doctors-office-still-depends-on-a-fax-machine.

[61] *See*, *e.g.*, Elizabeth Harper, *Twitter 101: Understanding the Basics*, TECHLICIOUS (May 17, 2013), https://www.techlicious.com/guide/twitter-101-understanding-the-basics/ ("Think of Twitter as a big, open room.").

[62] Coase, *supra* note 18.

> less… This gives the position of equilibrium for static analysis. But it is clear that the dynamic factors are also of considerable importance, and an investigation of the effect changes have on the cost of organising within the firm and on marketing costs generally will enable one to explain why firms get larger and smaller. We thus have a theory of moving equilibrium.[63]

At the heart of Coase's idea is that there are costs and benefits to using the market, that is, the "price mechanism," to organize production as opposed to an entrepreneur integrating production within a firm. Further, Coase explains that "[w]ithin a firm . . . [there] are alternative methods of co-ordinating production."[64] Coase even anticipated organizations where the transaction costs to using the market are so low that "production could be carried on without any organisation at all."[65] Within that discussion, Coase uses an example that at least hints at a platform-like setup: "In a department store, the allocation of the different sections to the various locations in the building may be done by the controlling authority or it may be the result of competitive price bidding for space."[66] The punchline is that vertical integration, that is, the degree to which a firm supersedes the price mechanism of the market, "varies greatly from industry to industry and from firm to firm."[67]

Coase's insight that a firm's scope is endogenous and based on transaction costs to use the market can be adapted to our understanding of platforms. Ultimately, a Coasian approach to business organization is a recognition that different firms can have different solutions to organizing production in order to meet some consumer demand. Thus, business organizations, including platforms, are a means to an end. Adopting a Coasian approach to understand business organizations has been used in other

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[63] *Id*. at 404-05.
[64] *Id*. at 388.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 389.

contexts such as examining music licensing organizations as well as franchise agreements.[68]

What is the implication for markets that involve significant network effects where firms, or platforms, attempt to internalize the externalities in various ways? First, there is an ultimate output sold to some group of consumers. That output could be produced within a firm through vertical integration (e.g., Apple's iPhone where Apple makes the hardware and some of the software), or that output could be organized through inputs purchased at wholesale prices (e.g., supermarkets and other retailers). Additionally, that output could be organized through matching existing sellers with buyers (e.g., OpenTable, Etsy), or could involve a firm coordinating the use of various inputs (e.g., Uber Eats where restaurants make the food while Uber coordinates with independent drivers to deliver the food). Ultimately, the entrepreneur organizes the various groups or inputs directly or indirectly. For example, a business directly organizes inputs when it employs the labor and owns the cars used for taxi services. Ride sharing platforms, such as Uber, indirectly organize inputs since the driver retains significantly more independence relative to a taxicab employee. Thus, the key for competitive effects analysis is to identify the actual output being produced, the consumers being served by that output, and whether there are substitutes, not in terms of organization type, but in terms of the output from the perspective of consumers.

Coase also explains that, while a "firm is the supersession of the price mechanism . . . it is important to discover the exact nature of this relationship [between the firm and the price mechanism]."[69] In the context of businesses with platform elements, the blueprint for assessing conduct is to first identify the relevant network effects, in terms of kind, direction, and magnitude (often, this is more a threshold question on relevance).[70] Fundamentally, network

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[68] *See, e.g.*, Bruce H. Kobayashi, *Opening Pandora's Black Box: A Coasian 1937 View of Performance Rights Organizations In 2014*, 22 GEO. MASON L. REV. 925 (2015); Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223 (1978).

[69] Coase, *supra* note 18, at 389.

[70] Some have already called for this type of approach, which is to consider the relevance of the network effects first and foremost. *See, e.g.*, Patrick R. Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. CHI. L. REV. 2059, 2061 (2017) (describing a multi-stage inquiry to ultimately determine whether "multisidedness should be excluded from

effects capture the idea that the behavior of one person has some impact on the welfare of other person, whether in the same group or a different group, beyond the transaction itself. In turn, this relationship can impact how the platform manages these various groups and ultimately monetizes the business. As Belleflamme & Peitz emphasize, to understand network effects, the starting point is to identify the "originator" and the "receiver."[71] If both parties are within the same group, this is a within-group or direct network effect. If the parties are in different identifiable groups, then it is a cross-group or indirect network effect.

Further, the identification of network effects should not imply that they are exogenously given to a business. Belleflamme & Peitz offer the insight that: "When we say that a platform *enjoys* network effects or scale economies, this is often misleading, as it often takes ingenuity and effort to make network effects (and scale economies) happen."[72]

Second, there is a need to determine how the platform is managing the relevant network effects. Specifically, what precisely is the platform facilitating? What governance policies are designed to balance the potentially competing incentives of the various sides? Importantly, not all platform polices are intended to manage network effects, e.g., Google raising the minimum price to advertise.[73]

The consequence of deconstructing a business into the core elements of (a) identifying the relevant network effects and (b) determining the governance policies intended to manage those network effects is that it avoids a "one size fits all" approach to analyzing platform conduct. Not all platforms are akin to public utilities based on monumental economies of scale associated

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market definition"). *See* Davis S. Evans & Richard Schmalensee, *Markets with Two–Sided Platforms*, 1 ISSUES IN COMPETITION L. & POL'Y 667, 689 (2008) ("In some cases, the fact that a business can be thought of as two-sided may be irrelevant,'' including because ''nothing in the analysis of the practices [at issue] really hinges on the linkages between the demands of participating groups."). *Id*. ("In other cases, the fact that a business is two-sided will prove important both by identifying the real dimensions of competition and focusing on sources of constraints.").

[71] Belleflamme & Peitz, *supra* note 46, at 11.

[72] *Id*. at 3.

[73] Assuming the cross-group network effect only materially runs from users to advertisers, the fact that advertisers may pay more to appear in the search results has no impact on the sole cross-group network effect because higher advertising costs do not yield more Google users.

with traditional "network industries" such as communications, energy, and transport.[74] Thus, not all network effects are to the degree that there is market tipping with winner-takes-all outcomes. Adopting a Coasian approach to platforms can prevent regulatory recommendations for antitrust reform based on such broad, static notions. Further, it can prevent antitrust analyses based not the competitive impact of particular conduct but on the nature of the business itself.

A potential example of this error is the recent European Union (EU) case against Google. In 2021, the EU concluded that Google abused its dominant position in the market for specialized product search services by displaying a preference for its own comparison shopping service in general search results over third-party content.[75] To reach this decision, the EU determined "merchant platforms," such as Amazon, were not Google's competitors in the comparison shopping service market.[76] In its analysis of the market, the EU argued that merchant platforms and comparison shopping services, like Google's shopping service, serve different functions for internet users; however, the analysis did not rely on market-based evidence of internet user behavior. Rather, the analysis focused on the differences in how the businesses are organized.[77] The fact that merchant platforms are also places where goods can be purchased does not preclude them from competing with Google for shopping queries including product research and price comparisons.

Additionally, a Coasian view does not consider vertical integration as something fundamentally different from platforms.[78] One solution to an externality between two parties, such as network effects, is to vertically

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[74] *See, e.g.*, Martin Cave, *What Lessons Can Be Drawn for Digital Platforms from the Regulation of Traditional Networks?*, TECREG CHRON., Dec. 2021, at 3.

[75] Case T-612/17, Google LLC v. Comm'n, 2021 ECLI:EU:T:2021:763, ¶¶ 179, 197, 596-97 (Nov. 10, 2021).

[76] *Id*. at ¶¶ 468-95.

[77] *See id*. at ¶ 483 ("[F]or internet users, merchant platforms appear primarily to be places where goods can be purchased and which provide all the traditional sales functions, including in some cases operating as a sales counter for non-professionals, while the primary function of comparison shopping services is to provide information.").

[78] *See, e.g.*, Dennis W. Carlton & Ralph A. Winter, *Vertical Most-Favored-Nation Restraints and Credit Card No-Surcharge Rules*, 61 J.L. & ECON. 215, 215 (2018) (finding many of the effects attributed to platforms are similar to what can occur via vertical integration or control).

integrate—as the act of integration necessarily aligns incentives. Integration can also inform our view of "open" versus "closed" ecosystems or platforms. As another example of defaulting to labels and presumptions, there is a tendency to suggest some degree of wrongdoing from "closed" systems compared to more open ones, which some consider to be more pro-consumer.[79] The difficulty with these categorical representations is that systems may be open in some respects and closed in others. Further, there is no clear threshold to determine whether a system is "open" or "closed."[80] Rather, these systems all exist on a continuum with multiple dimensions that are open or closed.

A more sensible approach is to consider systems more in terms of specific vertical controls and to assess the merits of each control individually. Thus, if we compare Apple's iPhone to a phone with Google's Android, there is a recognition that Apple and Google can face very different incentives in managing their respective businesses even though they both ultimately are part of a supply chain to deliver smartphones to consumers. Specifically, they differ in the degree of vertical integration; the strength of their vertical controls, that is, the open v. closed balance; and the management of their network effects, which is endogenously created (e.g., Google has a strong incentive to promote internet search on its Android OS as Google built its business based largely on search advertisements, while Apple chooses to monetize largely through its premium brand and high phone prices). Thus, part of the Coasian approach to business organizations is a recognition that

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[79] *See, e.g.*, Apple v. Pepper, No. 17-204, slip. op. at 6 (U.S. Sep. 24, 2018) ("Apple's intentionally closed system prevents competition in the aftermarket for iPhone apps. iPhone owners who want to unlock the range of functions on their iPhone have no choice but to shop for apps in the App Store, which enables the App Store to collect a higher price per app than if Apple were forced to entice app seekers in a competitive market."). *See also* Matt McMurrer, *Exclusive Gadget: Apple & AT&T Antitrust Litigation and the iPhone Aftermarkets*, 36 J. CORP. L. 495, 496 (2011) ("[T]he iPhone was one of the least-open smartphones on the market. Apple made the iPhone available for only one provider, AT&T, and prevented software downloads except from the App Store."). Of course, Google has been characterized as an "open" ecosystem; yet, this does not seem to insulate Google from antitrust litigation.

[80] *See* Hanno F. Kaiser, *Are "Closed Systems" an Antitrust Problem?*, 7 COMP. POL'Y INT'L 91, 94 (2011) ("Open versus closed is therefore not a binary distinction but a matter of degree. All real-world systems are open in part and closed in others.").

alternative methods of coordinating production does not imply they do not ultimately compete for the same consumer.

As a point of illustration, consider ride sharing apps like Uber and Lyft. Do they compete with taxicabs? It certainly depends on several factors including the preferences of consumers, the purpose of the desired trip, and even the local area. Yet, the answer to this question is not based on the fact that taxicabs are more vertically integrated than Uber. Nor is the answer based on how Uber monetizes relative to taxi companies. Nevertheless, how Uber achieves the ultimate transaction of transporting passengers is quite different and relevant to understanding Uber's incentives relative to a taxicab company. Specifically, Uber matches passengers and drivers via a mobile phone app, which, at its core, is software that lowers transaction and search costs for both drivers and passengers. A taxi also achieves matching, but typically through passengers waving their arms on the street and drivers circling around high traffic areas.[81] Uber's innovation radically reduced transaction costs. Suppose a taxi company responds—not by fully adopting Uber's model—but using an app to allow customers to access their network of drivers. This moves the taxi model much closer to the Uber business model. Does this make a taxi a "platform"? The answer ultimately does not matter. What matters is the nature of the conduct that is at issue in an antitrust case.

Consider the role of Amazon in its Amazon Marketplace, which is considered a platform that matches Amazon's network of users with third-party sellers. Is this really "different" than Amazon itself or the online version of Walmart? The end objective is the same for Amazon, Amazon Marketplace, and Walmart: deliver a product from seller A to buyer B. Indeed, Amazon has changed the relative mix of its single-sided business with its multi-sided business. Yet, even this distinction is somewhat artificial. Amazon is not "proprietary Amazon" and "Amazon Marketplace" but one Amazon that is vertically integrated, to a degree, into sales and discovery but also provides access to third-party sellers for a transaction fee.[82] As Shapiro explains, "the

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[81] *See* Rosa M. Abrantes-Metz & Albert D. Metz, *Regulating Multisided Platforms? The Case Against Treating Platforms as Utilities*, CPI ANTITRUST CHRON., Aug. 2020, at 6.

[82] In this respect, Amazon Marketplace is much like eBay, which also brings together third-party sellers and buyers; however, again, organizational form can paint a misleading picture of the nature of the competition. While Amazon Marketplace and eBay are similarly organized, Amazon has integrated its Marketplace with its other distinctive features including

boundary between the 'platform' and services running on that platform can be fuzzy and can change over time."[83]

Thus, rather than getting bogged down with strict definitional exercises to determine whether a business is a platform, in some instances, there are advantages to focusing more on the transaction cost economics pioneered by Coase. Again, platform considerations can matter—particularly in identifying various network effects that are critical to understanding consumer responses to changes in price, quality, or innovation.[84] The problem is when the analysis simply invokes "network effects" or "platforms" with the implicit suggestion that the analysis is therefore complete with either an anticompetitive or procompetitive conclusion. Additionally, not all conduct invokes platform considerations even if there is a consensus that a business is a platform. The point is that platform economics can be a complement to vertical control and integration analysis. Yet, platform consideration should not indiscriminately be made the primary focus of the analysis.

Ultimately, the Coasian approach offers several insights based on the overarching theme that detailed inquiries of specific institutions and organizations must be part of all proper economic analyses—not just general theories and concepts.[85] First, the approach considers the choice of business organization as endogenous, including the degree of the firm's integration. Second, the approach considers business organization to be critical to understanding a particular firm's incentives but not necessarily to understanding the nature of competition between firms who may use very different organizational approaches to reach the same set of consumers. Third, the presence of network effects and, ultimately, a platform categorization do not always suggest these considerations matter to the degree that a competitive effects analysis requires a full, integrated assessment of all the

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product curation, fast shipping, and user reviews. Consequently, Amazon Marketplace and eBay are highly differentiated products.

[83] Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSP. 69, 84 (2019).

[84] *See, e.g.*, David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, in 1 ISSUES IN COMPETITION L. & POL'Y 667, 675 (2008) (explaining that two-sided platform pricing depends "in a complex way on the price sensitivity of demand on both sides, the nature and intensity of the indirect network effects between the two sides, and the marginal costs that result from changing output of each side.").

[85] *See generally* Ronald Coase, *The New Institutional Economics*, 88 AM. ECON. REV. 72 (1998).

distinct groups that are part of the platform. Rather, the key is to identify the network effects both in kind and significance and to determine whether the conduct at issue intends to manage those network effects. If both conditions apply, then the economic insights from the body of work on platform research becomes relevant. Yet, even with this recognition, it does not mean that all analyses follow a structured template. Notably, imposing rigid legal presumptions can be problematic. As Rysman explains: "The interesting question is often not whether a market can be defined as two-sided—virtually all markets might be two-sided to some extent—but how important two-sided issues are in determining outcomes of interest."[86]

II. REEXAMINING THE *OHIO V. AMERICAN EXPRESS* DECISION

This Part reexamines the *Amex* ruling in light of a Coasian approach to platforms. The goal is to assess how broadly officials should interpret the decision as it relates to conduct involving other platform-like businesses and digital markets. To provide some background, Section II.A details the core issues and rulings of the Court and how the Court's decision impacted the rule of reason assessment of platform-related conduct. Next, Section II.B offers an interpretation of *Amex* that addresses some of the criticism that the decision has received.

A. Case Background

The key issue in *Ohio v. American Express* was Amex's use of an "antisteering" provision in its contracts with merchants.[87] Specifically, in order to join the Amex credit card network, merchants must agree to not disadvantage Amex at the point of sale by offering Amex cardholders a discount to incentivize them use a different credit card.[88] For example, if a local florist offers a one percent discount if a customer uses a Discover card instead

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[86] Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. ECON. PERSP. 125, 127 (2009).

[87] 138 S. Ct. 2274 (2018).

[88] *Id*. at 2280 ("If a merchant wants to accept Amex credit cards—and attract Amex cardholders to its business—Amex requires the merchant to agree to an antisteering contractual provision. The antisteering provision prohibits merchants from discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee.").

of Amex, then this would violate the antisteering provision.[89] The florist has an incentive to offer this discount because cards such as Discover can have lower "merchant fees," which represent the percentage of the transaction that goes to the credit card issuer.[90]

With a narrow 5-4 majority, the Supreme Court affirmed the appellate court's decision and ruled that Amex's antisteering provision did not violate the Sherman Act, Section 1, which governs "contracts, combinations, and conspiracies" in restraint of trade.[91] The Court concluded that the plaintiffs—the Department of Justice (DOJ) and several States—failed to demonstrate that the provision caused anticompetitive harm.[92] Notably, this does not imply the Court found the provision to be procompetitive.

Specifically, the Court found that Amex is a "transactional platform" where Amex balances the incentives of both merchants and cardholders.[93] In order to incentivize cardholders to join the network and spend money with the in-network merchants, Amex offers cardholder benefits including the abilities to receive credit, delay payments, and collect membership rewards such as airline miles and discounts on gasoline and groceries.[94] These benefits spur cardholders' demand to use the card, which, in turn, incentivizes merchants to be part of the Amex network. This incentivization generates the first cross-group network effect. Merchants also benefit from faster

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[89] Amex does not prevent merchants from steering cardholders to other payment methods including cash, checks, or debit cards. *See id*. at 2283.

[90] *Id*. at 2280 ("When a cardholder buys something from a merchant who accepts Amex credit cards, Amex processes the transaction through its network, promptly pays the merchant, and subtracts a fee.").

[91] 15 U.S.C. § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

[92] Ohio v. Am. Express, 138 S. Ct. 2274, 2287 (2018) ("The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market.").

[93] *Id*. at 2280 ("[C]redit-card networks are a special type of two-sided platform known as a 'transaction' platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other.").

[94] *Id*. at 2280 ("For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. Cardholders also can receive rewards based on the amount of money they spend, such as airline miles, points for travel, or cash back.").

transactions and the patronage of wealthier clientele.[95] The merchants' desire to gain these benefits and join the Amex network creates a second cross-group network effect as more merchants attract more cardholders. Thus, there are significant, positive cross-group network effects in both directions.

The ultimate "output" that Amex facilitates is a market transaction, which is primarily how Amex monetizes its network and funds the rewards program to cardholders.[96] Thus, both merchants and cardholders share a common output level since both are needed to in order to generate a transaction.[97] This situation is different from ad-supported businesses like Google Search where the number of searches does not correspond on a one-to-one basis to the number of ad clicks; although, they are likely highly correlated.

Within this context, the Court's task was to determine whether the plaintiffs met their burden of production within antitrust's rule of reason framework.[98] Within this framework, in the first step, the plaintiff has the prima facie burden to demonstrate anticompetitive harm.[99] For *Amex*, the

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[95] *Id*. at 2280 ("For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment. This saves merchants the trouble and risk of extending credit to customers, and it increases the number and value of sales that they can make."). *Id*. at 2282 ("Due to its superior rewards, Amex tends to attract cardholders who are wealthier and spend more money.").

[96] *Id*. at 2282 ("While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending.").

[97] *Id*. at 2286 ("[W]henever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder.").

[98] *See generally* JONATHAN B. BAKER, THE ANTITRUST PARADIGM 68 (2019) ("Antitrust decision rules have continued to evolve and today typically adopt a burden-shifting approach that structures the rule of reason and harmonizes it with per se analysis.").

[99] *Id*. ("[A] plaintiff meets a burden of production—it sets forth its prima facie case—by presenting evidence of anticompetitive harm."). Anticompetitive harm impairs the competitive process, which focuses on consumers and not competitors. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)) ("The antitrust laws, however, were enacted for 'the protection of competition not competitors.'"). *Cf*. United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) ("[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive

question was whether it was sufficient to show harm to just the merchants or whether, due to the significant, bidirectional cross-group network effects, the plaintiffs must have also considered the welfare impact on cardholders.

Writing for the majority, Justice Clarence Thomas concluded that "'[i]n two-sided transaction markets, only one market should be defined.'"[100] Consequently, the Court analyzed "the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects."[101] With this conclusion, the Court rejected a bifurcation the Amex platform into two separate "relevant markets" for merchants and cardholders.[102] In other words, the plaintiffs had to demonstrate more than merely showing the antisteering provision harmed merchants. Rather, they had to consider the welfare of all the participants on the platform—both merchants and cardholders.[103]

As for the antisteering provision, the Court found that focusing solely on the inability of merchants to steer Amex cardholders with discounting "misses the mark" because of the narrow focus on merchants.[104] Rather, the plaintiffs needed to demonstrate some harm to competition incorporating both cardholders and merchants.[105] The Court did mention how the plaintiffs

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effect.' That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.").

[100] 138 S. Ct. at 2287 (citing Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice* 302 (Tilburg L. Sch. Rsch. Paper No. 09/2013 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240850).

[101] *Id*.

[102] A "relevant market" is a specific legal and economic construct designed to delineate the competitive boundaries, so courts can reasonably assess the competitive effects of a disputed practice. *See* United States v. E. I. Dupont de Nemours & Co., 351 U.S. 377, 395 (1956); Brown Shoe v. United States, 370 U.S. 294 (1962).

[103] Another way to regard this idea is that the welfare of merchants is a function of the size and quality of the cardholder base, which, in turn, is a function of the utility that these cardholders derive from participating in the network. Thus, the assertion that the welfare of cardholders must be strictly partitioned from the welfare of merchants in determining antitrust harm does not conform with the incentives and design of the Amex platform.

[104] 138 S.Ct. at 2287.

[105] *Id*. ("To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.").

attempted to show how Amex raised merchants fees without a one-for-one pass through to consumers.[106] The Court dismissed this evidence maintaining that prices alone do not show harm, and there should also be evidence of a reduction in output.[107] On this point, Court did not need to appeal to output changes.[108] Merchants fee increases can occur for reasons unrelated to market power, such as, increased operational costs, regulatory changes, and changes in the composition of Amex's cardholder network. Stated somewhat differently, plaintiffs failed to establish a causal claim that the antisteering provision is what allowed Amex to raise its fees to merchants. Further, the fact that Amex raised fees over a certain period, while the antisteering provision has been in place since the 1950s—with some changes in the 1980s and 1990s,[109] does not tell the full story, which includes times when Amex might have lowered the fees.[110]

In arriving at the above economic and legal conclusion, the Court summarized its analysis by explaining that "[e]valuating both sides of a two-sided transaction platform is … necessary to accurately assess competition." Yet, rather than confining its ruling to the facts specific to *Amex*, the Court asserted in the very next sentence: "Only other two-sided platforms can compete with a two-sided platform for transactions."[111] While the next Section offers a detailed commentary on this assertion, the simple fact is that this statement is economically wrong and illustrates the pitfall of elevating business form over competitive substance.

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[106] *Id*. at 2288 ("The plaintiffs did offer evidence that Amex increased the percentage of the purchase price that it charges merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on cardholder rewards. … The plaintiffs believe that this evidence shows that the price of Amex's transactions increased.").

[107] *Id*.

[108] While some of the output evidence the Court cited was not demonstratively causal or compared to some proper counterfactual, the output evidence was ultimately irrelevant to the legal finding that the plaintiffs did not carry their burden.

[109] *See* U.S. v. Am. Express Co., 838 F.3d 179, 191 (2d Cir. 2016) ("These restraints, known as non-discriminatory provisions ('NDPs'), had existed in Amex's card-acceptance agreements in some form or another since the 1950s, but Amex tightened them considerably in the late 1980s and early 1990s to ensure that merchants could not state a preference for any payment-card network other than Amex.").

[110] The Court briefly alludes to the type of inquiry. 138 S. Ct. at 2289 ("[I]n the late 1980s and early 1990s, competition forced Amex to offer lower merchant fees.").

[111] 138 S. Ct. at 2287.

In summary, while the Court discussed evidence of output increases and an efficiency rationale for the antisteering provision based on combating free-riding,[112] the relevant legal justification for the Court's decision was that the plaintiff failed to establish anticompetitive harm from the antisteering provision.[113] The decision has, as mentioned, sparked controversy and criticism. The following Section seeks to reexamine *Amex* under a Coasian lens to put suitable bounds on the precedential value.

B. Interpreting Amex *with a Coasian Approach to Platforms*

One key component of a Coasian approach to platforms, or more specifically, businesses with material network effects, is to directly consider the relationship between the governance policy at issue and the relevant network effects. This Section argues that the Court's ruling in *Amex* is consistent with a Coasian approach in some aspects but not in others.

Let us begin by considering the commercial relationship between Amex and its in-network merchants. At the most basic level, Amex could be viewed an input that these merchants use to facilitate the transactions required to sell their output. The antisteering provision is part of that commercial relationship. Amex also has a direct relationship with some of the merchants' consumers, that is, Amex cardholders. In other words, Amex is vertically integrated between both merchant acquisition and card issuance. This direct relationship includes paying rewards to cardholders, collecting monthly payments, and arbitrating disputes. Amex promotes its payment method to its cardholders to drive greater spending at in-network merchants. Amex also curates its cardholder network so that they represent a desirable class of customers. In a sense, Amex is helping to "push" cardholders to the point of sale. Similarly, Amex incentivizes cardholders to spend more with the merchants through rewards and the ability to defer payment.

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[112] Free riding occurs when a person or group uses a good or service without paying for its provision, which is not to be confused with zero-priced services. *See infra* Section II.B for a more detailed discussion of the free rider argument in *Amex*.

[113] 138 S. Ct. at 2290 ("In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects.").

Thus, we have two important aspects of the Amex business. First, Amex has a direct relationship with both merchants and cardholders. Second, as detailed in the prior Section, there are significant, bidirectional cross-group network effects between these two groups.[114] The next relevant issue is the role, if any, the antisteering provision plays in managing these relationships and the cross-group network effects.

At the point of sale, antisteering negatively impacts a merchant and cardholder since the policy eliminates the ability to offer and receive, respectively, a potential discount. If this were the end of the story, then there would be no impact on the network effects. However, does the policy materially affect other merchants and cardholders who are not part of the immediate transaction? To address that question, imagine a counterfactual world without the policy. From the merchant's perspective, once a consumer has reached the point of sale, all else equal, the merchant will prefer the form of payment that is most beneficial to the merchant. Focusing on credit cards, this means merchants prefer the card that has the lowest merchant fee. Imagine an Amex cardholder who attempts to pay for a bouquet of flowers with his Amex card. The merchant has a strong incentive to steer him to a card like Discover, assuming it has a lower merchant fee. As a result, Amex and other higher fee cards would almost never be used. In turn, this would incentivize credit card networks to lower their merchant fees to the marginal cost of provision. Given this, what is wrong with this outcome?

While this counterfactual outcome sounds like good old-fashioned price competition, steering can severely impact the welfare of the participants in the network. In the prior counterfactual, we began our story at the point of sale, but the actual story starts before then. Merchants are also competing with other merchants for the attention of consumers. One dimension through which merchants compete is on the accepted forms of payment. We live in a world where cash, check, debit card, credit cards, and even cryptocurrencies are all potential substitutes as the mechanism to facilitate an exchange.[115] Each

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[114] 138 S. Ct. at 2281 ("A credit card, for example, is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it.").

[115] For instance, there are clear indications that payment methods, such as cryptocurrencies, do compete over branding, and it is relevant to consumers. *See, e.g.*, Rob Davies, *Cryptocurrency Ads Reach Record Levels on London Transport*, THE GUARDIAN, Jan. 14, 2022, https://www.theguardian.com/technology/2022/jan/14/cryptocurrency-ads-london-

has its advantages and disadvantages to the merchants and consumers. Merchants partner with various payment suppliers, including credit card companies, to enhance their competitive positions in this stage of competition.

From the perspective of consumers, the primary dimension in which credit cards compete are the terms for delayed payment, annual fees, merchant acceptance, and rewards.[116] Additionally, credit cards invest in developing a broad network of merchants, promoting those merchants, and enhancing the brand itself.[117] The competition to be the payment of choice for consumers is critical to assess the behavior of Amex and other credit card companies. In turn, this informs the competition between merchants to accept a diverse set of payment methods. Given that credit card networks have significant, bidirectional network effects, these fuel the incentive to have a broad base of both merchants and cardholders to generate value-creating market exchanges.

Amex fosters and manages these network effects through its governance policies. For instance, high annual fees can limit accessibility for some potential cardholders but likely changes the composition of the cardholder group in a way that conceivably creates a wealthier group who tends to spend more per store visit. Additionally, perhaps Amex cardholders tend to return items less, are more loyal, and are overall less price sensitive. In turn, this can increase the incentive for merchants to join the network. Thus, while high annual fees generate immediate harm to every cardholder, it can impact the network in a manner that is more profitable for both the credit card company and the merchants and, ultimately, the cardholders who join.

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transport-tfl (describing record level of cryptocurrency brands advertising in 2021 on London's tube and train services). This is not to suggest all these forms of payment are sufficiently interchangeable that they would all be in some purported "relevant market" for antitrust purposes.

[116] *See, e.g.*, John S. Kiernan, *Types of Credit Cards*, WALLETHUB, Nov. 12, 2021, https://wallethub.com/edu/cc/types-of-credit-cards/25505/.

[117] *See, e.g.*, American Express, *American Express Commits More Than $100 Million to Inspire Consumers to Support Small Businesses Globally Through its Year-Round Shop Small Campaign*, AMERICAN EXPRESS, June 23, 2021, https://about.americanexpress.com/all-news/news-details/2021/American-Express-Commits-More-Than-100-Million-to-Inspire-Consumers-to-Support-Small-Businesses-Globally-Through-its-Year-Round-Shop-Small-Campaign/default.aspx ("[T]he new campaign builds on its commitment last year to help further encourage U.S. consumers to Shop Small to support local businesses as they continue to recover.").

Antisteering is another example of a governance policy to manage the network; although, in what way? One stated rationale is to solve a free-rider problem.[118] Free riding occurs when a person or group uses a good or service without paying (or underpaying) for its provision. In *Amex*, the free riding argument is that merchants are benefiting from the efforts of Amex to drive sales to merchants through branding, advertising, and offering membership rewards.[119] However, without the ability to internalize the benefits from that investment, Amex lacks the full incentive to drive cardholders to spend money at the in-network merchants. At least conceptually, Amex may place various restrictions on merchants, including the antisteering provision, to protect its investment with cardholders.

Viewed in this light, the antisteering policy allows Amex to maintain its network structure of relatively high merchant fees but also relatively generous cardholder rewards. This allows Amex to differentiate itself from other credit card competitors. In fact, the Court detailed how the Amex model spurred competition on the part of Visa and MasterCard to introduce high-reward, premium cards and charge merchants more in order to compete.[120] Thus, at least in theory, an antisteering provision can promote ex ante competition by solving the free rider problem through a prohibition of ex post discounting. The key point is that the policy does not just affect Amex's incentives to merchants but also the relationship Amex has with cardholders. While the dissent dismissed this idea of branding and free riding as lacking evidence,[121] even if the free riding argument is not the actual motivation behind the antisteering provision, this does not change the fact that steering affects the cross-group effects in a material way.

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[118] Brief for Respondents American Express Company and American Express Travel Related Services Company, Inc. at 10, Ohio v. Am. Express Co., No. 16-1454 (U.S. Jan. 16, 2018) ("[M]erchant steering undermines the investment that Amex makes—through Membership Rewards and other benefits—to encourage its cardholders to use Amex rather than one of the other cards that almost all Amex cardholders also carry. Merchant steering thus 'interferes with a network's ability to balance its two-sided net price.'").

[119] *See* 138 S. Ct. at 2289.

[120] *Id*. at 2282.

[121] *See id.* at 2304 ("As for concerns about free riding on American Express' fixed expenses, including its investments in its brand, the District Court acknowledged that free-riding was in theory possible, but explained that American Express ''ma[de] no effort to identify the fixed expenses to which its experts referred or to explain how they are subject to free riding.'').

Suppose, however, that the free-rider argument is pretextual, and the antisteering policy is intended to exclude competing credit cards, raise prices, and reduce output? Why should the plaintiffs be required to prove this instead of having Amex produce the evidence that the free rider argument is valid as part of an efficiencies defense in Step Two of a rule of reason framework? Holding aside, for the moment, the procedural legal questions, the fundamental point is that we cannot understand Amex's incentives to engage in the conduct by focusing solely on merchants. Amex maximizes profit by concurrently structuring its prices and polices for both merchants and cardholders.[122] Having a precedent where anticompetitive harm can be established by considering only the policy's impact on a merchant at the point of sale—despite the fact that Amex optimizes over *all* merchants and cardholders—is an artificial bifurcation of a central business decision. Further, the plaintiffs need not address the free-rider argument per se. If the policy is truly causing anticompetitive harm, there should be ample evidence that cardholders and merchants, taken as a whole, are harmed beyond the superficial argument that the provision, at the point of sale, may prevent consumers from receiving a discount. Again, stopping the analysis at the point of sale without an assessment of the policy's effect on the viability, structure, and nature of the network is a fundamentally incomplete analysis.

Returning to the procedural legal questions, there are several ways to implement the above considerations. Again, the guiding principle is that the ultimate impact of a governance policy, such as antisteering, that materially impacts a business's networks effects requires an equally weighted assessment of the welfare of all the impacted groups. If that means defining two separate, but interrelated markets, and doing a "joint" competitive effects analysis, then

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[122] *See* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003) ("[t]he quest for 'getting both sides on board' makes no sense in a world in which only the total price for the end user interaction, and not its decomposition, matters."). *See also* Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006). *See also* Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. ECON. 668 (2006). One of the earliest works on the importance of the structure of prices for "gatekeepers," however, is Michael R. Baye & John Morgan, *Information Gatekeepers on the Internet and the Competitiveness of Homogeneous Product Markets*, 91 AM. ECON. REV. 454 (2001).

that is a potential avenue.[123] That being said, this avenue has some potential legal hurdles, which create uncertainty.[124] An alternative avenue is to preserve the traditional "burden shifting" framework examining one group at a time but to elevate Step Two, which is typically considered an efficiencies defense, to be on par with Step One. In other words, put the "efficiency" argument of benefiting cardholders on par with the alleged harm to merchants rather than relegating the benefits to cardholders to a second-class defense that would unlikely get credit or would get credited at a discount.[125] While there are some shortcomings to this particular avenue, including reimagining what "anticompetitive harm" means in Step One, it has the potential virtue of

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[123] *See* Wright & Yun, *supra* note 2, at 734-37 (describing the ability to analyze platform conduct with separate product markets but also with an integrated competitive effects approach). *See also* Thomas Hoppner, *Defining Markets for Multi-Sided Platforms: The Case of Search Engines*, 38 WORLD COMPETITION L. & ECON. REV. 349 (advocating for separate relevant markets for each group on a platform but doing a joint assessment of competitive effects—specifically, "[t]he indirect network effects at play between the different user groups are fundamental to the assessment of market power and the conduct of a platform operator. The ability to exercise market power on one side of a platform typically depends on the structure of the other side.").

[124] *See* Evans & Schmalensee, *supra* note 2, at 26 ("Unfortunately, the conclusions of a *legal* analysis under the three-step structure of rule of reason analysis in U.S. courts can depend critically on this choice of market definition."). One conjecture as to why the Court in *Amex* defined a single, integrated, market is partly due to the precedent set in *Philadelphia National Bank*, which disallows counting efficiencies in one market (that is, "out-of-market" efficiencies) to offset alleged anticompetitive harm in another market. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963). *See generally* Christine S. Wilson, *The Unintended Consequences of Narrower Product Markets and the Overly Leveraged Nature of* Philadelphia National Bank, Remarks as Prepared for Delivery at The Antitrust Enforcement Symposium 2019, June 30, 2019. While there are arguments as to why the *Philadelphia National Bank* standard likely does not apply in *Amex* (which is a Section 1 case rather than a merger), the idea of discounting out-of-market efficiencies nevertheless remains strong in antitrust law. *See* Wright & Yun, *supra* note 2, at 735-36.

[125] *See, e.g.*, *id*. at 27 ("[C]ourts seldom give much weight to pro-competitive benefits in the second stage."). Even the dissent in *Amex* acknowledged the "uphill battle" the defendants face in offering a procompetitive defense when it is in "another" market. *See* 138 S. Ct. at 2302 ("American Express might wish to argue that the nondiscrimination [antisteering] provisions, while anticompetitive in respect to merchant-related services, nonetheless have an adequate offsetting procompetitive benefit in respect to its shopper-related services. … 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.").

placing the burden of showing the impact on cardholders on the defendant, who is likely the lowest-cost provider of the relevant information, in Step Two. Finally, another avenue is to define a single-integrated market, as the Court did in *Amex*, which explicitly highlights the idea that anticompetitive harm involves an assessment of both merchants and cardholders—since they are in the same relevant market.[126]

All that being said, how narrowly should the *Amex* decision be read in terms of its precedential value? A narrow reading is that the case only addresses conduct, such as an antisteering provision, that impacts network effects in the credit card industry.[127] A slightly broader reading is that the case is relevant when conduct impacts the network effects for "transaction platforms."[128] This reading is based on, again, the controversial assertion that: "Only other two-sided platforms can compete with a two-sided platform for transactions."[129] On its face, this statement reads as a general proposition that the Court believes only transactional platforms compete with other transactional platforms. Importantly, this is how the district court interpreted the statement in *U.S. v. Sabre*.[130]

However, while acknowledging that a plain reading of the statement in isolation is problematic and contrary to sound economic analysis, the assertion could be read, with a great deal of liberality, more narrowly if we consider the context. The sentence immediately after the assertion specifically discusses the

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[126] Even if the plaintiff has the legal burden of production to prove a net harm incorporating the welfare of both groups, the actual "burden" is perhaps mitigated by the fact that defendants have enormous incentive to present to the court and plaintiffs a detailed assessment of its position regarding the welfare of all groups.

[127] *See* Hovenkamp, *supra* note 1, at 88 ("[M]aintaining a coherent economic approach to antitrust policy requires that Amex be limited to its facts."). There is evidence that district courts have generally adopted this view. *See, e.g.*, Lindsey Edwards & Jonathan Jacobson, *Missing the Forest for the Trees: The Application of* Amex *in* United States v. Sabre, ANTITRUST SOURCE 1, June 2021 ("To date, in cases involving industries other than the credit card industry, district courts have largely rejected defendants' arguments that they are two-sided platforms and that *Amex* thus requires the court to consider effects on both sides of the market.").

[128] 138 S. Ct. at 2286 ("[T]wo-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants.")

[129] 138 S. Ct. at 2287.

[130] *See infra* Section III.B for a full discussion of the case.

credit card industry,[131] which suggests the statement is cabined by the facts of *Amex*. Without this narrow reading, however, there is a danger of improperly elevating the importance of business organizations above the actual nature of competition. How a business organizes itself is undoubtedly relevant to understand its incentives, but, ultimately, similar business organizations do not necessarily outline the competition between firms—although it might.

Another way to confine the problematic statement is to recognize that it is an obiter dictum. Precisely because all networks in credit cards are two-sided, the statement is incidental, not essential to the decision and therefore establishing no precedent. In essence, the statement is irrelevant beyond the case at hand.

Nonetheless, the majority's assertions regarding transactional platforms caught the attention of the dissent in *Amex*. Specifically, the dissent derided the majority's view that a platform, such as a farmers' market which facilitates "simultaneous transactions," is a meaningful distinction from a conventional market.[132] To further its point, the dissent raised the following questions:

> Should courts abandon their ordinary step 1 inquiry if several competing farmers' markets in a city agree that only certain kinds of farmers can participate, or if a farmers' market charges a higher fee than its competitors do and prohibits participating farmers from raising their prices to cover it? Why?[133]

However, there are several problems with the dissent's hypothetical questions. The first hypothetical invokes collusion between rival farmers' markets—in the form of restricting farmer access. This collusion is likely a per se violation of the Sherman Act, Section 1, and thus falls outside of the rule of reason framework. Consequently, there is no Step One.[134] Even if the collusion

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[131] 138 S. Ct. at 2287 ("A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex.").

[132] 138 S. Ct. at 2299.

[133] 138 S. Ct. at 2299.

[134] Even if there is a Step One, it would largely involve a determination of whether or not there is an agreement. *See generally* Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*,

over restricting farmer access faces consideration under a rule of reason framework—albeit closer to truncated analysis,[135] what would the framework require of the plaintiff to establish anticompetitive harm? In this case, there would be a strong presumption of harm—as competitors getting together to dictate the grounds on which they will compete is almost inevitably going to be harmful to the competitive process. The presence of network effects does not change this fundamental reality. Moreover, collusion to restrict certain types of farmers from participating in the market is a peculiar strategy if there are strong network effects. Perhaps, the dissent is considering a scenario where the rival farmers' markets are colluding with some of the farmers to exclude other farmers who are known to charge lower prices. If so, the ultimate aim is to have higher prices, lower output, and less variety. These are standard measures to assess competition in conventional markets as well; thus, there would be little need to abandon ordinary Step One inquiries.

Ultimately, collusion is not a governance policy to manage a business's network effects. Rather, the conduct fundamentally represents a scheme to undermine the natural process of competition between rivals. Thus, there is little need to consider more than two sides even if the rivals both have network effects. This issue is relevant for a recent allegation that Facebook and Google colluded in allocating online ads.[136] Assuming *arguendo* that these two companies did in fact collude, then, again, demonstrating anticompetitive harm does not necessarily require assessing the welfare of both advertisers and users due to the nature of the allegation. Additionally, the conduct is unlikely to materially affect cross-group network effects for these businesses.

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168 U. PA. L. REV. 2107, 2117 (2017) ("A more precise statement of the 'per se rule,' for example, is 'per se unreasonableness'—an application of the rule of reason that involves an irrebuttable presumption that the conduct is highly likely to unreasonably restrain competition."); GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST 277 (2020) (calling the per se rule "a special case of the rule of reason.").

[135] *See* Cal. Dental Ass'n. v. FTC, 526 U.S. 756, 779 (1999) (ruling that courts should apply a "sliding scale" in conducting rule of reason analyses).

[136] *See, e.g.*, John D. McKinnon & Ryan Tracy, *Ten States Sue Google, Alleging Deal with Facebook to Rig Online Ad Market*, WALL ST. J., Dec. 16, 2020, https://www.wsj.com/articles/states-sue-google-over-digital-ad-practices-11608146817/ (detailing a complaint by ten states that Google and Facebook colluded in the advertising sector). *See also* Complaint, In Re: Google Digital Advertising Antitrust Litigation, Case 1:21-md-03010-PKC, Jan. 14, 2022.

The dissent's second hypothetical involves a farmers' market unilaterally raising the participation fee to farmers and then prohibiting those farmers from raising prices to consumers. Effectively, the farmers' market has imposed a price ceiling, which would have several negative effects. The primary effect is to create a shortage—the severity of which will depend on the supply elasticity of farmers. The second effect is that the price ceiling will raise the shadow price[137] to consumers through lower quality products and service, a requirement to buy a minimum number of units, etc. In turn, this will negatively impact the participation of consumers. Presumptively, the farmers' market implemented this price control due to an exercise of antitrust market power. While a full analysis could go in several directions, the relevant area of commerce (that is, the relevant market) to consider the competitive effects reasonably includes the impact on both the farmers and consumers. Thus, while the majority improperly asserted that only transactional platforms can compete with other transactional platforms, the dissent also improperly views an organization that manages significant network effects as the same as a conventional firm—in terms of determining the bounds of the relevant inquiry to determine anticompetitive harm.

In summary, the Court left some degree of confusion with its ruling in *Amex*. On one hand, the Court found that theories of anticompetitive harm involving conduct that directly and materially impacts cross-group network effects require an assessment of those network effects within a relevant market that includes all the sides impacted. On the other hand, the Court overstepped the generality of the analysis when it claimed only transaction platforms compete with other transaction platforms. A Coasian approach to platforms would reject such a generalization, which elevates form over substance and fails to recognize that there are various organizational forms that can accomplish the same thing. Thus, *Amex's* precedential value should be narrowly limited to the principle that conduct which materially affects network effects must assess the welfare of all groups impacted before a conclusion of anticompetitive harm can be determined. This is aspect of the decision is consistent with a Coasian approach.

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[137] The shadow price is the true opportunity cost of an activity. *See*, *e.g.*, David A. Starrett, *Shadow Pricing in Economics*, 3 ECOSYSTEMS 16, 16 (2000).

III. A PREQUEL AND SEQUEL TO *OHIO V. AMERICAN EXPRESS*, PLUS A COMING ATTRACTION

This Part examines several key cases often invoked in the *Amex* controversy. The goal is to determine the degree to which these cases are consistent with a narrow reading of *Amex* and, further, the degree to which they are consistent with a Coasian approach to analyzing platforms and network effects. The first case is *Times-Picayune v. U.S.*, which predated *Amex* by about sixty-five years.[138] The dissent in *Amex* specifically invoked the case as having already decided the issue of how to consider platforms.[139] The second case is *U.S. v. Sabre*,[140] which is a case decided after *Amex* that critics consider a good example for the folly of the *Amex* precedent and the dangers it presents to sound antitrust analysis. Undoubtedly, the district court judge in *Sabre* read *Amex* broadly, which led to potentially problematic assessments of competition involving platforms. The third case is *Epic Games v. Apple*,[141] where several allegations involve network effects while others do not.

A. Times-Picayune Publishing Co. v. United States (1953)

In the 1950s, the Times-Picayune Publishing Co. (TPP) was the leading newspaper publisher in New Orleans with a morning and evening edition titled the "Times-Picayune" and the "States," respectively.[142] The only other significant competitor, the "Item," was an evening newspaper. All three of these local newspapers monetized largely through display and classified advertisements.[143]

In 1950, TPP instituted a "unit plan" where all advertisers were required to purchase a bundled package to advertise in both the morning (Times-Picayune) and evening (States) editions. The DOJ alleged competitive

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[138] 345 U.S. 594 (1953).

[139] 138 S. Ct. at 2295 ("In Times–Picayune Publishing Co. v. United States… the Court held that an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint.").

[140] 452 F. Supp. 3d 97, 105 (D. Del. 2020).

[141] No. 4:20-cv-05640-YGR, 2021 WL 4128925 (N.D. Cal. Sep. 10, 2021).

[142] *Times-Picayune Pub. Co.*, 345 U.S. 594, 598 (1953).

[143] *Id*. at 604 ("Advertising is the economic mainstay of the newspaper industry" where "more than two-thirds of a newspaper's total revenues flow from the sale of advertising space.").

harm due to illegal tying, which is a Section 1 violation, and monopolization, which is a Section 2 violation.[144] Specifically, the theory was that TPP leveraged its monopoly position in morning newspapers with a forced tie to monopolize the more competitive evening newspaper market. At the time, tying was effectively a per se violation of the Sherman Act, Section 1, if the tying product "enjoys a monopolistic position" and the tying arrangement impacts "a substantial volume of commerce" in the tied product.[145]

Relevantly, in its discussion of whether the TPP enjoyed a "dominant" position, the Court observed: "[E]very newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space."[146] Further, "[t]his case concerns solely one of those markets . . . . For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan."[147] The dissent in *Amex* pointed to this language in *Times-Picayune* as already having decided the issue of how to analyze two-sided platforms.[148] The majority in *Amex* also acknowledged a potential tension with *Times-Picayune* but found newspapers to be quite different than credit cards, and the network effects were potentially minor in the former.[149]

Thus, in assessing the tying allegation, the Court focused solely on advertisers. To that end, the Court rejected the allegation based on two main findings. The first is that the TPP did not enjoy a dominant position in local newspaper advertising.[150] The second was that there was insufficient evidence that the morning and evening editions were two separate products from the

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[144] *Id*. at 600.

[145] *See id*. at 609 ("[A] tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met."). Currently, tying has moved closer to a rule of reason analysis; although, there is still some degree of uncertainty as to where precisely the conduct sits in the spectrum between per se and a full rule of reason analysis. *See, e.g.*, David S. Evans, *Untying the Knot: The Case for Overruling Jefferson Parish*, July 2006, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=934806 at 6.

[146] *Id*. at 610.

[147] *Id*. at 610.

[148] Ohio v. Am. Express, 138 S. Ct. 2274, 2295 (2018).

[149] *Id*. at 2286 ("[T]he market for newspaper advertising behaves much like a one-sided market and should be analyzed as such.").

[150] 345 U.S. at 611.

perspective of advertisers.[151] This finding effectively ended the tying inquiry because there cannot be tying if there is one product.

The second antitrust claim was that the "unit rule" was an "unreasonable restraint of trade" and Sherman Act, Section 1 violation.[152] This claim has parallels to Amex's antisteering provision given that the Court observed "[a]lthough these unit contracts do not in express terms preclude buyers from purchasing additional space in competing newspapers, the Act deals with competitive realities, not words."[153] In addressing this claim of unduly restraining competition, the Court examined the impact of the unit rule on classified and national display advertising. After doing a detailed data analysis, the Court determined "[t]he record's factual data, in sum, do not demonstrate that the Publishing Company's advertising contracts unduly handicapped its extant competitor, the Item."[154] In effect, what the Court found was that TPP beat the Item on the merits and not due to the unit rule.

At a superficial level, the Court's ruling in *Times-Picayune* seems at odds with its ruling in *Amex*—particularly, the former's conclusion that newspapers, which are platforms, operate in a "separate though interdependent market . . . [thus, the] case concerns solely one of those markets."[155] Yet a detailed reading arguably shows a consistency in their approaches.

First, TPP and Amex manage different network effects. Amex has positive, bidirectional cross-group network effects between cardholders and merchants while TPP largely has one, significant cross-group effect going from readers to advertisers but not vice versa. Thus, conduct which impacts advertisers will presumptively have little effect on readers. Specifically, given that the unit rule prescribes how advertisers purchase advertising space, there is little to suggest the conduct impacts TPP's sole network effect.

The only caveat to the above point is classified ads, which do have bidirectional network effects. Similar to yellow pages, classified ads represent a mechanism to match buyers and sellers. Thus, how did the Court address

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[151] *Id*. at 613 ("[N]othing in the record suggest that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential.").

[152] *Id*. at 614.

[153] *Id*. at 614-15.

[154] *Id*. at 619. In fact, the Court stated simply: "the Item flourishes." *Id*. at 620.

[155] *Id*. at 610.

classified ads? First, the Court highlighted that TPP's competitor, the Item, also used a unit rule when it had a morning edition;[156] thus, "unit plan [was] pitted on even terms against unit plan."[157] Second, the Court found little evidence that the unit rule had "demonstrably deleterious effects on competition."[158] Similarly, "the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm."[159] These findings harken the lack of evidence the *Amex* Court found on harm to competition from the antisteering policy. In sum, while the Court in *Times-Picayune* did explicitly limit its focus to the advertiser-side of the newspaper business, this made sense even for classified ads because the Court did not find anticompetitive harm in the first place—even limiting the inquiry to advertisers.[160] As a consequence, there was no need to even consider how to incorporate the welfare of readers into the analysis of classified ads.

Overall, the Court properly focused on the advertising side of market to assess the Sherman Act, Section 1 and 2 claims.[161] Specifically, in *Times-Picayune*, the Court mainly considered tying under a per se analysis, and, to the extent it analyzed the case under the rule of reason, the Court found little evidence of harm. Ultimately, the idea of an inconsistency between *Times-Picayune* and *Amex* is not well supported.[162]

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[156] *Id*. at 615.

[157] *Id*. at 619.

[158] *Id*. at 621.

[159] *Id*. at 622.

[160] *See also* David S. Evans, *What Times-Picayune Tells Us About the Antitrust Analysis of Attention Platforms*, CPI ANTITRUST CHRON., Apr. 2019, at 10 ("The Court's rule-of-reason analysis at least touches on whether the Company [TPP] had harmed newspaper competition through the unit rule and operating the evening newspaper at loss. The Court didn't need to go further because if newspaper advertiser competition was not harmed, it follows immediately that competition in the dissemination of news wasn't harmed. If the unit rule and low advertising rates had diminished the Item, it is hard to see why the Court would have stopped at the boundaries of an advertising market and not crossed over into newspapers and their readers; or why it should have taken such a restrictive view.").

[161] *Id*. at 610 ("[D]ominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan.").

[162] *See also* Evans & Schmalensee, *supra* note 2, at 79 ("The Court's decisions in *American Express* and *Times-Picayune* share common ground. Both recognized the two-sided nature of the businesses under consideration and the interdependence of the two groups of customers. Each adhered to the two-sided business realities for the claims and facts before the Court.").

B. U.S. v. Sabre Corp. (2020)

In November 2018, Sabre Corporation announced an agreement to acquire Farelogix.[163] Sabre is a market leader in the provision of airline reservation services while Farelogix provides innovative software to airlines to facilitate bookings. In August 2019, the DOJ filed a complaint alleging the combination violated the Clayton Act, Section 7.[164] In finding for the parties, district court asserted, citing *Amex*, that only "transaction platforms" can only compete with other transaction platforms.[165] While the judge explained that his decision did not rest on *Amex* but on the DOJ's failure to meet is burden of proof,[166] it is inescapable that the problematic *Amex* statement has caused confusion.

To provide some background, airlines can sell tickets in several ways. The "direct channel" represents sales that occur directly between airlines and travelers, such as on an airline's website (colloquially called "airline.com"). The "indirect channel" represents sales sold through travel agencies including online travel agencies (OTAs), such as Expedia and Priceline, and travel management companies (TMCs), who manage travel for corporations.[167] Travel agencies use proprietary systems to book flights and bundle other services such as record keeping and invoicing. To that end, within the indirect channel, 95 percent of sales use a global distribution system (GDS).[168]

The court characterized a GDS as "a transaction platform" that connects airlines with travel agencies, including both OTAs and TMCs, providing sophisticated search services to travel agencies to facilitate a match with an

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[163] U.S. v. Sabre Corp., 452 F. Supp. 3d 97, 105 (D. Del. 2020).

[164] *Id.* at 103.

[165] *Id*. at 136.

[166] *Id*. ("Even if that were not the law, DOJ's market analysis fails because it does not relate to the relevant product market or the relevant geographic market."). Subsequently, in May 2020, the parties abandoned the deal after the UK's Competition and Markets Authority's decision to challenge the deal. *See* Press Release, Sabre Corporation Issues Statement on Its Merger Agreement with Farelogix (May 1, 2020), https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix/.

[167] The indirect channel represents 40 percent of all ticket sales. 452 F. Supp. 3d at 106.

[168] *Id*.

airline.[169] After a ticket purchase is made, the GDS receives a portion of the purchase price, called a "booking fee," from the airline and, in turn, gives a portion of the booking fee to the travel agency that made the booking.[170] The leading GDSs are Sabre, Amadeus, and Travelport, with Sabre enjoying a 50 percent share.[171]

In contrast, Farelogix developed a New Distribution Capability (NDC) application programming interface (API), which "enables airlines to communicate offers and orders between the airline's PSS [internal reservation system] and third parties."[172] In other words, NDC API directly connects an airline's internal system with third parties such as travel agencies, which allows for sophisticated searches and customization. Thus, the potential competitive overlap between Sabre and Farelogix was that "[b]y enabling airlines to totally or partially disintermediate the GDS, NDC poses a threat to Sabre's traditional business model."[173]

FLX OC is Farelogix's NDC, which it sells to airlines and monetizes on a per ticket basis. Airlines can use FLX OC as an input to both their direct and indirect channel sales. For the direct channel, FLX OC is like a pipe between its internal system and its outward-facing airline.com website. For the indirect channel, FLX OC allows airlines to connect with various travel agencies, thus "bypassing" GDS platforms, such as Sabre. Citing the parties' economic expert, Kevin Murphy, the court explained that "'Farelogix is not a platform. It doesn't bring the set of customers to any airline or other travel supplier.'"[174] Finally, FLX OC could also more efficiently connect an airline's internal system with a GDS—a practice labeled "GDS passthrough."[175]

Taking a step back, while there are numerous complexities in this market, the competition can be characterized in the following way. Airlines want to sell tickets. If they could sell every ticket directly to travelers, then they would—as this eliminates all intermediaries. However, there are positive information costs, which require market mechanisms to facilitate matching.

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[169] *Id*. at 108.
[170] *Id*.
[171] *Id*. at 110.
[172] *Id*. at 111.
[173] *Id*.
[174] *Id*. at 114.
[175] *Id*.

Thus, airlines have found it optimal to use intermediaries such as travel agencies to help sell tickets.[176] To that end, one path airlines use is to implement software like Farelogix's FLX OC to share their internal inventory with travel agencies. Another path is to share their internal inventory with GDSs like Sabre, who, in turn, match airline seats with various travel agencies. In the end, when a ticket is sold, it can happen in variety of ways including going through two intermediaries—GDSs and travel agencies—before reaching the final consumer.

On the question of a Section 7 violation, the judge ultimately ruled for the parties. In doing so, he began his legal reasoning with the following conclusion:

> As a matter of antitrust law, Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre's platform. Even if that were not the law, DOJ's market analysis fails because it does not relate to the relevant product market or the relevant geographic market. . . . [E]ven if the Court were to assume . . . that the record . . . supports a prima facie case . . . the Court further concludes that Defendants have rebutted the government's prima facie case.[177]

While the above summary illustrates the court's dual reasoning in deciding for the defendants, the assertion that "[a]s a matter of antitrust law" that transaction platforms only compete with other transaction platforms is the elephant in the room. Thus, critics have argued that the *Sabre* decision illustrates the problems with *Amex*.[178]

The reality is that the assertion undermines the other rationale the judge used. First, the judge concluded unequivocally that the DOJ did not meet the first hurdle of properly identifying a relevant market—holding aside the issue of *Amex*.[179] Specifically, the DOJ attempted to argue that online travel

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[176] In this sense, travel agencies could, themselves, be platforms that match airlines with travelers.

[177] 452 F. Supp. 3d at 136.

[178] *See, e.g.*, Stutz, *supra* note 3, at 3 ("*Sabre* still demonstrates why *Amex* was flawed at inception and remains incoherent and unworkable in application.").

[179] *Id*. at 139-43.

agencies (OTAs) do not compete with direct channel sales to travelers, such as via Delta.com.[180] This point did not persuade the judge, given the testimony of both economic experts.[181] Second, even if the DOJ succeeded in establishing its prima facie case, the evidence, according to the judge, was insufficient to ultimately conclude the acquisition would substantially lessen competition.[182] For instance, the judge found "[t]he record does not establish that building an adequate 'NDC booking services solution' is particularly difficult."[183]

Thus, on multiple levels, the district court found no basis for a Section 7 violation. The analysis the judge actually used, whether ultimately right or wrong, was independent of *Amex*. Only when discussing the legal standard did the judge make the claim that "[a]s a matter of antitrust law, Sabre, a two-sided transaction platform, only competes with other two-sided platforms."[184] Highlighting this tension, later, the judge explained that he "is persuaded that at various points Sabre has viewed FLX OC as a competitive threat. Among other things, Sabre believed that FLX OC was 'a real alternative to the GDS[.]'"[185] Further, the judge found airline.com to be a relevant competitor to OTAs,[186] yet an airline's website is not a multisided platform[187] while OTAs, such as Expedia, could be considered a platform. Thus, the court twisted itself in a pretzel in an attempt to fold in the perceived *Amex* precedent rather than relying solely on the facts specific to *Sabre*.

A guiding principle of Coase's assessment of the nature of firms is that businesses organize themselves in a myriad of ways based on the transaction costs of using the market for inputs. This diversity of organizational approaches, however, does not mean the output produced by these firms do not compete for the final consumer. The ultimate arbiter of competition is the degree to which consumers view two products as substitutes and not the organizational form of the firms producing the products. *How* that output is

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[180] *Id*. at 141.
[181] *Id*.
[182] *Id*. at 143-48.
[183] *Id*. at 145.
[184] *Id*. at 136.
[185] *Id*. at 146.
[186] *Id*. at 141.
[187] *See* Kostis Hatzitaskos, Brad Howells, & Aviv Nevo, *A Tale of Two Sides: Sabre/Farelogix in the United States and the UK*, 12 J. COMP. L. & PRAC. 698, 703 (2021).

created and *how* the business is organized are not the ultimate goals of competitive effects analysis.

In the case of *Sabre*, an *Amex*-type assessment of multiple sides of a platform is unnecessary because the conduct at issue, the acquisition of Farelogix, does not require an assessment of the network effects that Sabre manages with its GDS product.[188] Sabre is ultimately competing to funnel airline purchases through its GDS product. The fact that there are network effects between airlines and travel agencies within GDS does not change the fact that GDS could compete with Farelogix or airline.com to be the mechanism to funnel those purchases. Thus, the recognition that Sabre and Farelogix have very different business models, should not, in of itself, determine whether they are substitutes from the perspective of travel agencies and the final consumer. Focusing on Sabre's GDS as a multisided platform and Farelogix FLX OC as a conventional input elevates form over substance.

At the end of the day, the Sabre-Farelogix deal is not about network effects that drive Sabre's incentives to balance the interests of airlines and travel agencies. Rather, Sabre is a software company that travel agencies use for inputs to deliver travel-related services to their final consumer. In this context, the court's interpretation of *Amex* was overly broad. While the court was right to point out that *Amex* is not necessarily limited to Section 1 violations and can apply to Section 7 as well,[189] the limitation is on the actual nature of the conduct (that is, an acquisition) and whether the conduct materially impacts the network effects. This is not to say this industry could never involve an *Amex*-like consideration of multiple groups to assess competitive harm. For instance, if Sabre instituted various governance policies to manage its network, then such a case could, but not with certainty, invoke the *Amex* precedent.[190]

C. Epic Games v. Apple (2021)

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[188] *See generally* Evans & Schmalensee, *supra* note 70, at 689.

[189] 452 F. Supp. 3d at 137-38.

[190] *See, e.g.*, US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43 (2d Cir. 2019) (vacating the district court's ruling holding that the question of whether a market is a platform is to be determined by the court—not the jury).

Epic Games, the creator of the popular game Fortnite, alleged in a private antitrust suit that Apple's App Store policies violated the Sherman Act, Sections 1 and 2, which allowed Apple to gain monopoly power and raise prices to supra-competitive levels.[191] The litany of disputed practices included Apple's requirement that developers exclusively distribute their iPhone apps through the App Store; charging a supra-competitive 30 percent commission on all App Store transactions; mandating the use of Apple Pay; and using an antisteering provision that prevented developers from communicating to iPhone users alternative outlets to download content.[192] While the district court ruled in favor of Apple (except for a finding that the antisteering provision violated California state antitrust laws),[193] Epic has appealed the decision to the Ninth Circuit.[194] Given this appeal and other antitrust litigation challenging App Store policies,[195] the antitrust claims brought by Epic are still live legal issues, which could ultimately reach the highest court.

Undoubtedly, the structure of the App Store is critical to understanding Apple's incentives. Similar to *Amex*, the App Store could be considered a transactional platform that brings together app developers and iPhone users, where Apple takes a 30 percent commission. The key question is whether the alleged anticompetitive behaviors materially impact the bidirectional network effects between developers and users.

In terms of defining the relevant market, the court ultimately defined the market as "digital mobile gaming transactions."[196] Citing *Amex*, the court

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[191] Epic Games, Inc. v. Apple Inc., Case No. 4:20-cv-05640-YGR, 2021 WL 4128925 (N.D. Cal. Sep. 10, 2021).

[192] Complaint for Injunctive Relief, Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR (N.D. Cal. Aug. 13, 2020) [hereinafter Epic Complaint]. Notably, after Epic's initial complaint was filed, Apple settled with a class of developers and announced that the antisteering provision will no longer be enforced. *See* Press Release, Apple, US Developers Agree to App Store Updates that Will Support Businesses and Maintain a Great Experience for Users (Aug. 26, 2021), https://www.apple.com/newsroom/2021/08/apple-us-developers-agree-to-app-store-updates/.

[193] *Epic Games, Inc.*, 2021 WL 4128925 at *16.

[194] Notice of Appeal, Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640-YGR-TSH (N.D. Cal., Sep. 12. 2021).

[195] *See* Second Amended Consolidated Class Action Complaint, In re Apple iPhone Antitrust Litigation, No. 11-cv-06714, (N.D. Cal. Sep. 5, 2013).

[196] *Epic Games, Inc.*, 2021 WL 4128925 at *1.

considered the App Store to be a "transaction platform."[197] Despite this setup, when assessing the App Store's exclusivity policy, the court did not consider both sides in order to establish anticompetitive harm for the policy of App Store exclusivity. Rather, the judge determined that the plaintiffs met their burden of showing anticompetitive harm due to the fact that the exclusivity policy, well, excludes competing app stores.[198] However, the judge accepted Apple's efficiency defense in Step Two based on security and privacy rationales.[199] Finally, in Step Three, the judge determined that Epic failed in its burden to show Apple could achieve those efficiencies through less restrictive means.[200] Thus, the judge ultimately used a traditional one-sided analysis where harm to developers was sufficient to conclude harm, but the benefits to users were sufficient to overcome that finding of harm. More importantly, the judge did not require the defense to wage an "uphill battle" to have its efficiency defense considered. The court's approach to what is reasonably considered a two-sided issue can work as long as the welfare of both sides are considered with equal weight. Arguably, this could be a more practical implementation of *Amex* given the criticism that Step One asks plaintiffs to do "too much," which has some merit—especially since the defense is likely in the best position to provide the relevant information.

What to make of this ruling? The district court arguably deviated from the perspective of strict adherence to *Amex*. Although, the judge was perhaps more willing to accept Apple's defense on equal footing with the alleged harm due to the *Amex* precedent and the impact on the network effects. Relatedly, perhaps the judge ratcheted up the burden on the plaintiffs in step three due to *Amex*. Thus, whether or not the ruling follows *Amex* or not, from an economic perspective, is irrelevant. On the issue of exclusivity, the judge

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[197] *Id*. at *83.

[198] *Id*. at *101 ("Having carefully considering the evidence, the Court finds that Apple's app distribution restrictions do have some anticompetitive effects. . . . Its restrictions harm competition by precluding developers, especially larger ones, from opening competing game stores on iOS and compete for other developers and users on price.").

[199] *Id*. at *102 ("Here, the Court finds Apple's security justification to be a valid and nonpretextual business reason for restricting app distribution.").

[200] *Id*. at *105 ("In short, Epic Games has not met its burden to show that its proposed alternatives are 'virtually as effective' as the current distribution model and can be implemented 'without significantly increased cost.'").

appropriately assessed the policy's impact on both developers and users giving seemingly equal weight to both groups.

However, other allegations may not necessarily require this type of blueprint. For instance, mandating the use of Apple Pay does not necessarily involve significant network effects. Rather, the mandate is more of a straightforward vertical control. While the restriction conceivable lowers the profit of app developers, who would like to use their own payment system, on its own, the restriction is not an antitrust violation. Otherwise, all contract terms that are unfavorable to app developers would be an antitrust claim. Instead, the restriction could be intended to prevent free riding, to provide a signal of quality to users, and to save on transaction costs. In sum, the point is that network effects and platform considerations are a tool to a larger vertical control analysis that may or may not be suitable to a particular claim. Thus, caution should be warranted in making them the primary point of the analysis in all circumstances.

CONCLUSION

After *Amex* and subsequent cases, antitrust is seemingly at a crossroads with regard to the assessment of multisided platforms, generally, and digital markets, specifically. Platforms are a convenient categorization for broad generalizations and insights but can lead to problems when addressing a specific antitrust claim. Firms organize in various ways to produce some output. Precisely how this process is achieved is relevant to understand a firm's conduct and incentives, but firm organization alone should not lead to competitive effects conclusions. Considering how the conduct impacts, if at all, the relevant network effects is more important. This determination will ultimately guide courts as to whether an explicit multisided competitive effects analysis is required or not.