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Ohio v. Amex: Not So Bad After All?

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THE SUPREME COURT'S DECISION in *Amex* has been roundly criticized in progressive quarters as dealing a major blow to antitrust enforcement.[1] It does raise uncertainty over numerous issues, which this article addresses, including (1) market definition in two-sided markets, (2) the application of the direct effects test to vertical restraints, (3) the necessity of showing reduced output to establish anticompetitive effects, and (4) the vitality of the three-step burden shifting framework under the rule of reason and of the prohibition against considering "out-of-market" benefits. But in this article, I suggest that the Court's ruling, while misguided, is actually quite limited in scope.

Presenting the Question

For advocates of strong antitrust enforcement, it was easy to criticize the new administration when the Justice Department chose not to seek Supreme Court review of the Second Circuit's *Amex* decision, which overturned the district court's judgment striking down American Express's restraints that prevent merchants from steering customers to credit cards with lower merchant fees. In fact, the United States opposed the cert petition filed by Ohio and other states that were co-plaintiffs.[2] The Solicitor General did argue forcefully that the Second Circuit was wrong, but maintained that certiorari was not warranted because "no other court of appeals has specifically considered the application of the Sherman Act to two-sided platforms," and "the scope of the court of appeals' decision is unclear."[3] The Solicitor General suggested that "[f]urther percolation in the lower courts" would be particularly useful because of the idiosyncratic horizontal aspect of the challenged vertical restraint, and the fact that there was no meaningful precedent addressing this type of restraint.[4]

As the case was presented to the Supreme Court, the question was simple and narrow: "[D]id the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit card platform suffice to prove anticompetitive effects [under the rule of reason] and thereby shift to Amex the burden of establishing procompetitive benefits from the provisions?"[5] The Second Circuit had said no. The benefits to Amex cardholders from the restraints (essentially, increased rewards) had to be taken into account at the first step of the rule of reason analysis, with the plaintiff bearing the burden of showing "net harm" considering both sides of Amex's credit card platform because the relevant market had to include services offered to both merchants and cardholders.

Advocates for certiorari presumably assumed that the risks of seeking cert were low. Due to the absence of a circuit split, the Court was unlikely to take the case just to affirm. And any Supreme Court Justice with a modicum of antitrust expertise would recognize the error of the Second Circuit's combining complementary products in the same relevant market, especially with Professor Hovenkamp explaining the mistake in his treatise and in a professors' amicus brief.[6] Moreover, antitrust plaintiffs were on a roll in the Supreme Court, having won the previous five cases.[7]

But the advocates underestimated the power of conservative ideology over vertical restraints, and overestimated the ability of the government to persuade conservative Justices that the Amex restraint was different in kind from intrabrand vertical restraints that are treated leniently.[8] In fact, the majority was so hostile to the government's interbrand theory of harm that it blatantly ignored and contradicted the factual findings of the trial court.[9] Relying on a raft of academic articles written largely by conservative economists and its own version of the facts, the Court concluded that the government had failed to make out a prima facie case of anticompetitive harm under the rule of reason. In so doing, the Court seemingly adopted new hurdles for antitrust plaintiffs for a vaguely defined category of two-sided markets, and arguably beyond. As a result, rather than percolation, we have unfiltered confusion.

How much damage does *Amex* do? One is tempted to dismiss the Court's mangling of market-definition principles and the burden-shifting framework under the rule of reason as amounting to an "enquiry meet for the case,"[10] which will have little lasting impact. Indeed, if taken at face value, the Court's bottom-line conclusion that "Amex's business model has spurred robust interbrand competition and has increased

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the quantity and quality of credit card transactions,"[11] militates against attributing much significance to the Court's subsidiary legal analysis.

Market Definition in Markets Involving Two-Sided Platforms

The apparent crux of the Court's 5-4 decision written by Justice Thomas is that because of the indirect network effects of two-sided platforms "courts must include both sides of the platform—merchants and cardholders—when defining the credit card market."[12] The Court explained:

> Indirect network effects exist where the value of a two-sided platform to one group of participants depends on how many members of a different group participate. . . . 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.[13]

Because of these indirect network effects, the Court reasoned, "two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand."[14]

There was no disagreement between the majority and the dissent over the economics of two-sided platforms, just the legal implications of the interdependence between the two sides. For the majority, it was not sufficient, as the district court did, to define a separate relevant market for services provided to merchants while taking into account the feedback effects on the market for services to cardholders. Rather, a court must define a *single* relevant market, in this case, for credit card transactions.[15]

But the Court's discussion of this point is exceedingly murky. The Court said that "it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor."[16] The Court went on to focus on "two-sided *transaction* platforms," concluding that "'[i]n two-sided transaction markets, only one market should be defined.'"[17] Does the single-market requirement apply only to two-sided transaction platforms, or to any two-sided platform where the network effects are not minor? And does it apply to all two-sided transaction platforms, including those for which indirect network effects are minor?[18]

As Justice Breyer observed in his dissent, "the phrase 'two-sided transaction platform' is not one of antitrust art."[19] Rather, the term is borrowed from an article written principally by the Italian economist Lapo Filistrucchi,[20] which the majority cited nine times. Justice Breyer noted that "the majority defines the phrase as covering a business that 'offers different products or services to two different groups who both depend on the platform to intermediate between them,' where the business 'cannot make a sale to one side of the platform without simultaneously making a sale to the other' side of the platform."[21]

The logic of singling out such "transaction" platforms is not apparent. The Court said that two-sided transaction platforms "exhibit more pronounced indirect effects" than other two-sided platforms like newspapers, but failed to explain why that is always or even usually the case.[22] Some two-sided transaction platforms may involve relatively modest network effects[23] while some non-transaction two-sided platforms may have pronounced indirect network effects.[24]

Significantly, Filistrucchi points out that transactions between the two sides of a platform can enable "the side that pays more to pass through the difference in its cost of interacting to the side that pays less. If a complete pass-through were possible, the price structure chosen by the platform would not matter," and the platform would not be two-sided in any relevant economic sense.[25] This means that the credit card market may effectively be one sided absent the Amex anti-steering rules because merchants could then pass on Amex merchant fees fully to consumers who use Amex cards. In other words, the more lenient treatment that the majority applied to the Amex two-sided transaction platform depends on the existence of the anti-steering rules whose lawfulness the analysis is designed to evaluate.

Another justification given by the Court for singling out two-sided transaction platforms is that "competition cannot be accurately assessed by looking at only one side of the platform in isolation."[26] Citing Filistrucchi, the Court explained: "Only other two-sided platforms can compete with a two-sided platform for transactions," whereas "[n]ontransaction platforms [like newspapers] often do compete with companies that do not operate on both sides of their platform."[27] But if only other two-sided platforms are in the relevant market, how would one account for non-platform sources of competition for platform transactions, say cash or bitcoin in the case of payment-card platforms, or taxicab companies in the case of ride-sharing platforms like Uber?[28] In fact, one of the reasons the district court had offered for rejecting a single "transactions" market is that it would "obfuscate or confuse market realities," rather than "'recognize competition where, in fact, competition exists.'"[29]

If any two-sided platform with non-minor indirect network effects qualifies for favorable "single market" treatment, then a large part of the economy might qualify, and figuring out exactly which part would be an administrative nightmare for courts. Even if only "two-sided transaction platforms" qualify, that category could still be expansive and is hardly self-defining. Justice Breyer suggested that, in addition to credit cards, the majority's definition would seemingly include farmers' markets, travel agents, and internet retailers that allow other goods-producers to sell over their networks.[30] Under the definition proposed by Filistrucchi, multi-sided platforms that charge or could charge (or pay) usage fees would qualify as two-sided transaction platforms.[31] But advertiser-supported platforms like newspapers that do not or could not easily charge usage fees would not qualify. So, Amazon Marketplace, eBay, and Apple's App Store apparently would qualify, but Walmart.com, Google search, and Facebook would not. It is also possible that lower courts will

read *Amex* narrowly to apply only to two-sided platforms that can be characterized as selling "transactions," or perhaps only financial transactions, rather than products themselves.[32]

Implications of the Court's Market Definition

The government took the position that market definition was essentially irrelevant under *Indiana Dentists* because the government could (and did) prove anticompetitive harm directly.[33] The Court disagreed. The Court recognized that *Indiana Dentists* does permit a plaintiff to show anticompetitive harm directly, with proof of "'actual detrimental effects,'" but the Court held that proving the relevant market could not be avoided, stating that "[t]o assess" the government's direct evidence of anticompetitive harm "we must first define the relevant market."[34] And because the relevant market was the "two-sided credit card market as a whole," merely demonstrating that the restraints resulted in higher merchant fees—on which the Court said the "plaintiffs stake their entire case"—was insufficient to carry their burden of proving anticompetitive effects.[35]

The majority's reasoning appears to require that, in two-sided markets where the single-market requirement applies, a plaintiff seeking to establish anticompetitive harm directly in a challenge to a vertical restraint under the rule of reason must show, in effect, that anticompetitive harm on one side of the market is not offset by procompetitive benefits on the other side of the market. This may be no small task, given the difficulties of obtaining the requisite evidence (there is a reason that a defendant normally has the burden of showing procompetitive benefits), and establishing, measuring, and comparing the relevant effects. *Amex* itself illustrates the degree of difficulty.

This requirement, however, does not apply to horizontal restraints. That is clear because the Court distinguished *Indiana Dentists* on the basis that it involved a horizontal restraint.[36] And, plainly, per se or "quick look" claims would not be subject to the requirement because such claims do not require market definition for independent reasons.[37] Moreover, a horizontal agreement to restrict competition in part of a market cannot be saved by benefits to another part.[38] And this would be true under the rule of reason as well as a per se rule. Consider, for example, a plaintiff seeking to establish that an agreement among credit card networks to exchange information about merchant fees or related deals with merchants violates the rule of reason because it tends to raise merchants' costs. Such a case presumably would not require definition of a "transactions" market or permit gains to cardholders to offset harm to merchants. For similar reasons, it is unlikely that the single-market requirement would apply to Section 2 monopolization claims.[39]

Whither the Direct Effects Test in Vertical Cases?

The Court's footnote distinguishing *Indiana Dentists* as a horizontal case raises the question whether *Amex* should be read to abrogate the direct effects test for all vertical restraints, even those that do not arise in qualifying two-sided platform markets. Indeed, Justice Breyer wrote that the majority's footnote "seems categorically to exempt vertical restraints from the ordinary 'rule of reason' analysis that has applied to them since the Sherman Act's enactment in 1890."[40] However, a narrow reading of the footnote is more plausible.

What the Court said in the footnote is that "vertical restraints are different" because they "often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market."[41] However, the Court did not require proof of the relevant market in order to evaluate whether Amex possessed market power but rather to evaluate the purported anticompetitive effects of its conduct. The Court accepted *Indiana Dentists* at least insofar as the Court did not require independent proof of market power (i.e., a market power screen), although Amex had urged that it hold otherwise.[42] Indeed, Amex's brief focused heavily on the Second Circuit's unchallenged holding that the government had failed to establish Amex's market power,[43] but the Court made nothing of the point and largely ignored the parties' conflicting claims about the independent evidence of market power (such as the significance of Amex's market share).

Thus, insofar as *Amex* applies to vertical restraints outside the context of qualifying two-sided markets, any limitation on *Indiana Dentists* should be read at most to suggest that a plaintiff in a vertical case should show the "rough contours" of the market so that the direct effects can be assessed.[44] It does not require independent proof of market power or a detailed market definition that, for example, would satisfy the Horizontal Merger Guidelines SSNIP test.

Are Higher Prices Prima Facie Anticompetitive in the Absence of Reduced Output?

The Court accepted that higher prices may be sufficient to demonstrate an anticompetitive effect, at least if the prices are shown to be above a competitive level. "To demonstrate anticompetitive effects on the two-sided credit card market as a whole," the Court held, "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."[45] The government failed to show supracompetitive prices because, according to the Court, it erroneously focused on merchant fees alone, and "Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price."[46]

Yet the Court noted that the government "did offer evidence" that Amex's increase in merchant fees "was not entirely spent on cardholder rewards," and that "plaintiffs believe that this evidence shows that the price of Amex's transactions increased."[47] According to the Court, however, "Even assuming the plaintiffs are correct, this evidence does not prove that Amex's antisteering provisions gave it the power to

charge anticompetitive prices," arguably because there was no showing of reduced output.[48] On the contrary, the Court emphasized that the volume of credit card transactions in the industry had grown dramatically. And, "'Where output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand.'"[49]

Does this imply that the Court adopted a requirement that a plaintiff seeking to make out a prima facie case of anticompetitive harm based on higher prices must *also* show a reduction in output? Such a requirement would dramatically change the rule of reason, especially if applied generally. But it would be an overreading of the case to infer such a requirement, given the Court's formulation of the alternative ways that anticompetitive harm may be shown[50] and the widely recognized proposition that "a reduction in output is not the *only* measure of anticompetitive effect."[51] Moreover, the Court did not accept that the government had shown higher transaction prices, it merely assumed as much.[52]

Accordingly, the Court seems to be suggesting that an increase in industry output is sufficient to negate a weak inference that higher prices are anticompetitive.[53] Of course, such a holding is itself deeply troubling to the extent that it ignores causation. As Justice Breyer pointed out, "The fact that credit card use in general has grown over the last decade, as the majority says, says nothing about whether such use would have grown more or less without the nondiscrimination provisions."[54] Indeed, Chief Justice Roberts recognized the causation issue at oral argument.[55] But the Court appears to be placing the burden on the plaintiffs to show that a demonstrable increase in output is not due to the restraints at issue.[56]

Procompetitive Benefits: Out of Market and Otherwise

Had the Court ruled in favor of the government on the market definition issue, it would have faced the question of whether offsetting benefits to cardholders could be considered at all, in light of the general rule that anticompetitive harm in one market may not be offset by benefits that accrue in other markets.[57] The Solicitor General would have allowed consideration of benefits to cardholders under his proposal that "a court should consider out-of-market effects at the second step of its rule-of-reason analysis if, but only if, the defendant shows that the challenged restraint is reasonably necessary to achieve legitimate procompetitive benefits in a closely related and interdependent market."[58] Justice Breyer, too, would have allowed Amex to show procompetitive benefits "in respect to its shopper-related services," notwithstanding that a "defendant can rarely, if ever, show that a procompetitive benefit in the market for one product offsets an anticompetitive harm in the market for another."[59] However, by defining the market as including both sides of a two-sided platform, *Amex* does not technically reach, and therefore does not alter the out-of-market benefits rule, although it opens the door to its evasion.

Does *Amex* require that a plaintiff must negate *any* procompetitive justification at the first step of the rule-of-reason analysis, essentially eliminating the three-step burden-shifting framework in qualifying two-sided platform cases? The Court did credit Amex's "welcome acceptance" justification at the first step.[60] However, while the Court explicitly placed the burden on plaintiffs to prove net harm to both sides of the Amex platform at step one, it did not expressly put the burden on plaintiffs to disprove Amex's procompetitive justifications. On the contrary, the Court recited the familiar rule that "[i]f the plaintiff carries its [initial] burden [to show anticompetitive effects], then the burden shifts to the defendant to show a procompetitive rationale for the restraint."[61] And the Court considered Amex's justifications only in response to the government's argument that Amex's restraints are structurally anticompetitive because they stifle interbrand price competition over merchant fees.

But here we get to the heart of the matter. The Court said that "there is nothing inherently anticompetitive about Amex's antisteering provisions" in light of Amex's "welcome acceptance" justification, but "most importantly [because the] antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance."[62]

In other words, the Court rejected the government's basic theory of the case, i.e., with Amex's anti-steering provisions in place, other credit card networks had little economic incentive to compete on merchant fees because lowering fees would not garner additional volume from merchants (as shown by the failure of Discover's low-fee business model). The Court apparently thought otherwise, despite the district court's unchallenged findings to the contrary, and concluded that Amex's restraints did not inherently impair interbrand competition as to merchant fees. In short, the main flaw in the government's case may not have been a failure to account for cardholder benefits or the increased volume of credit card transactions (or to satisfactorily rebut Amex's business justification based on welcome acceptance), but rather its failure to convince the Court that this was one of the rare vertical restraints that tends to impair interbrand competition.

Conclusion

The majority decision in *Amex* raises uncertainty over numerous issues, but it is actually quite limited in scope. Regardless of which two-sided platforms may qualify for "single market" treatment for purposes of analyzing vertical restraints, *Amex*'s market-definition analysis should have no application to per se or quick-look claims, claims challenging horizontal restraints more generally, or to Section 2 monopolization claims.

As to vertical restraints, *Amex* does not abrogate the direct effects test nor establish a market power screen. To the extent that it may be read to require market definition beyond the two-sided platform context, defining the "rough contours" of

the market should be sufficient in a direct effects case. And to the extent *Amex* applies to the rule of reason generally, it does not make reduced output a necessary factor in demonstrating anticompetitive harm; rather, it suggests that when a prima facie case is based on weak evidence of supracompetitive pricing and there is a demonstrable increase in industry-wide output, a plaintiff may be required to show that the increase in output is not caused by the restraint at issue. Finally, because it ostensibly turned on market definition, *Amex* does not alter the established rules that defendants have the burden of proving procompetitive justifications at step two of the rule of reason and that out-of-market benefits do not count. In short, *Amex* may not be as bad for antitrust enforcement as some contend. ■

[1] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). *See, e.g.*, 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] Brief for the U.S. in Opposition, Amex, 138 S. Ct. 2274 (2018) (No. 16-1454). The brief was submitted by then-acting Solicitor General Jeffrey Wall.

[3] *Id.* at 19.

[4] *Id.* at 20–21 (noting that the anti-steering rules were analogous to vertical most-favored-nations agreements as to which there was little precedent).

[5] Petition for Writ of Certiorari i, *Amex*, 138 S. Ct. 2274 (No. 16-1454).

[6] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 562e, at 102–03 (Supp. 2017); Brief of 25 Professors of Antitrust Law as Amici Curiae Supporting Petitioners, *Amex*, 138 S. Ct. 2274 (No. 16-1454).

[7] *See* Richard M. Brunell, Oneok v. Learjet*: More Than a One Off?* 30 ANTITRUST, Fall 2015, at 67, 67 & n.2.

[8] At oral argument, Justice Gorsuch noted the "long and painful experience with vertical restraints in this Court going back to Dr. Miles that it took decades to correct." Transcript of Oral Argument at 18, *Amex*, 138 S. Ct. 2274 (No. 16-1454); *see id.* at 7 ("[W]e learned through painful experience and many, many years that [vertical restraints are] generally pro-competitive").

[9] In dissent, Justice Breyer chided the majority numerous times for ignoring or contradicting the district court's detailed findings of fact, none of which were challenged by Amex or found to be clearly erroneous by the court of appeals. *See Amex*, 138 S. Ct. at 2303–05 (Breyer, J., dissenting).

[10] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

[11] *Amex*, 138 S. Ct. at 2290.

[12] *Id.* at 2286.

[13] *Id.* at 2280–81.

[14] *Id.* at 2285.

[15] *Id.* at 2287 ("[T]he product that credit card companies sell is transactions."). The Court brushed aside the argument that it is inappropriate to combine products that are not substitutes in the same relevant market by citing the proposition that "courts should 'combin[e]' different products or services into 'a single market' when 'that combination reflects commercial realities.'" *Id.* at 2285 (quoting United States v. Grinnell Corp., 384 U.S. 563, 572 (1966)). Justice Breyer distinguished *Grinnell* on the basis that it involved "producer substitutes." *Id.* at 2299 (Breyer, J., dissenting) (internal quotation marks omitted); *cf.* Brief for the Am. Antitrust Inst. as Amicus Curiae in Support of Petitioners at 22, *Amex*, 138 S. Ct. 2274 (No. 16-1454) (explaining *Grinnell*'s "cluster market" approach as consistent with defining markets in accordance with demand-substitution factors).

[16] *Amex*, 138 S. Ct. at 2286.

[17] *Id.* at 2287 (quoting Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 302 (2014)).

[18] This latter question is raised directly in an appeal pending in the Second Circuit. *See* US Airways, Inc. v. Sabre Holdings Corp., Nos. 17-960, 17-983 (2d Cir. supp. briefs filed July 16, 2018); *infra* note 23.

[19] *Amex*, 138 S. Ct. at 2298 (Breyer, J., dissenting).

[20] *See* Filistrucchi, *supra* note 17.

[21] *Amex*, 138 S. Ct. at 2298 (Breyer, J., dissenting) (quoting majority opinion).

[22] *Id.* at 2286 (majority opinion). The Court did note that in the case of newspapers, the indirect network effects are likely to operate in only one direction (i.e., readers do not value a newspaper if it has more advertisers). *Id.* But even if that is the case, other two-sided non-transaction markets (say, fashion magazines) involve indirect network effects that may operate in both directions.

[23] *See, e.g.*, US Airways, Inc. v. Sabre Holdings Corp., No. 11-CV-2725, 2017 WL 1064709, at *10 (S.D.N.Y. Mar. 21, 2017) (upholding jury finding that the relevant market for a global distribution service was one sided based on plaintiffs' theory that, as a "mature market," the indirect network effects were minor); *supra* note 18.

[24] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 55 (D.C. Cir. 2001) (operating system).

[25] Filistrucchi, *supra* note 17, at 299; *id.* ("[A] complete pass-through can only take place if there is a transaction between customers on both sides of the market, such as a payment card transaction").

[26] *Amex*, 138 S. Ct. at 2287. Of course, the district court repeatedly stressed that it was not just looking at the network services side of the market in isolation, as Justice Breyer noted. *Id.* at 2301 (Breyer, J., dissenting).

[27] *Id.* at 2287 & n.9 (majority opinion) (citing Filistrucchi, *supra* note 17, at 301). Insofar as non-platform forms of competition are necessarily excluded from consideration, single-market treatment presumably would help plaintiffs in some circumstances by narrowing the relevant market.

[28] Filistrucchi himself points out that "[c]andidate substitute products are not only other platforms that offer, to both sides, the possibility to transact, but also non-intermediated transactions, such as a direct rental or a cash payment." Filistrucchi, *supra* note 17, at 303. It appears that Fillistrucchi's point about accurately assessing competition was simply that, in a merger between two-sided transactions platforms, the effect of non-platform competition should be considered on both sides of the market, which Justice Breyer noted "makes sense" in a merger case, "but is also meaningless, because, whether there is one market or two, a reviewing court will consider both sides." *Amex*, 138 S. Ct. at 2301 (Breyer, J., dissenting).

[29] United States v. Am. Express Co., 88 F. Supp. 3d 143, 172 (E.D.N.Y. 2015) (quoting United States v. Cont'l Can Co., 378 U.S. 441, 452 (1964)). The district court explained that "each constituent product market in this industry is distinct, involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers." *Id.* at 173.

[30] *Amex*, 138 S. Ct. at 2299 (Breyer, J., dissenting). Justice Breyer used these examples to criticize the logic of the Court's ruling.

[31] For Filistrucchi, the key is that a "platform is not only able to charge a price for joining the platform, but also one for using it." Filistrucchi, *supra* note 17, at 298. That would include "virtual marketplaces" (like eBay), auction houses, rental agencies, global distribution services, some online advertising intermediation services, as well as (curiously) operating systems and video game consoles. *Id.* at 298 n.12, 302, 307–08.

[32] The Court has a chance to opine on *Amex*'s scope in the pending case involving the application of *Illinois Brick* to customers of Apple's App Store. Apple Inc. v. Pepper, 138 S. Ct. 2647 (2018) (No. 17-204). Although market definition is not at issue, the parties have disputed whether Apple's App Store is properly characterized as a two-sided platform under *Amex*.

[33] *See* Brief for the United States as Respondent Supporting Petitioners at 40–41, *Amex*, 138 S. Ct. 2274 (No. 16-1454) [hereinafter U.S. Merits Brief]; *see also Amex*, 138 S. Ct. at 2296–97 (Breyer, J., dissenting) ("Doubts about the District Court's market-definition analysis are beside the point in the face of the District Court's findings of actual anticompetitive harm."). In *Indiana Dentists*, the Court held that "specific findings . . . concerning the definition of the market" are unnecessary to prove a violation

under the rule of reason. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460 (1986).

[34] *Amex*, 138 S. Ct. at 2284–85 (quoting *Indiana Dentists*, 476 U.S. at 460). The Court's recitation of the direct and indirect methods of proof blurs the distinction between the two methods by stating that the direct method requires that detrimental effects must be shown "in the relevant market," while the indirect method requires "some evidence that the restraint harms competition." *Id.* at 2284. In contrast, *Indiana Dentists* said that no "elaborate" or "detailed market analysis" was required to prove anticompetitive harm directly, and that the purpose of the indirect method was to establish merely the "*potential* for genuine adverse effects on competition." *Indiana Dentists*, 476 U.S. at 460–61 (emphasis added). The Court also recited that a rule of reason violation requires a showing of a "substantial" anticompetitive effect, *Amex*, 138 S. Ct. at 2284, a gloss that does not appear in the Court's prior Sherman Act decisions.

[35] *Id.* at 2287.

[36] *Id.* at 2285 n.7 ("The cases that the plaintiffs cite for [the] proposition [that defining a relevant market is unnecessary] evaluated whether horizontal restraints had an adverse effect on competition."). It is also notable that the Second Circuit in *Amex* expressly distinguished *United States v. Visa*, which defined a relevant market for credit card network services separate from the market for general purpose credit cards on the basis that it involved a horizontal rather than vertical restraint, although the court also noted that the rule at issue in *Visa* had harmful effects in both markets. *See* United States v. Am. Express, Inc., 838 F.3d 179, 197–98 (2d Cir. 2016) (distinguishing United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003)).

[37] *See, e.g.*, *California Dental*, 526 U.S. at 779–80 (even non-naked horizontal restraints may not require "plenary market examination").

[38] Indeed, the Court expressly recognized this principle and distinguished the relevant cases as horizontal. *See Amex*, 138 S. Ct. at 2285 n.7 (distinguishing Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980)); *id.* at 2290 n.10 (distinguishing United States v. Topco Assocs., 405 U.S. 596 (1972)).

[39] Courts commonly allow for direct evidence of anticompetitive harm as an alternative way to prove monopoly power in monopolization cases. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 477 (1992) ("It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so."); Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 307 n.3 (3d Cir. 2007) (market definition not required under direct method).

[40] *Amex*, 138 S. Ct. at 2297 (Breyer, J., dissenting).

[41] *Id.* at 2285 n.7 (majority opinion). The Court relied on *Leegin* for this proposition, but *Leegin* neither required market definition nor independent proof of market power, which was only one of the "factors . . . relevant to the [rule of reason] inquiry" for resale price maintenance agreements. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 897 (2007). *But see* PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 418 (5th Cir. 2010) ("A market-power screen is . . . compatible with *Leegin*").

[42] *See* Brief for Am. Express Co. at 20, *Amex*, 138 S. Ct. 2274 (No. 16-1454) ("[T]his Court should hold that a vertical restraint cannot be condemned as an unlawful restraint under the rule of reason if the defendant lacks market power.").

[43] *See id.* at 2, 24–41.

[44] *See* Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 737 (7th Cir. 2004) (suggesting that, although not applicable to the case at hand, *Indiana Dentists* may apply to vertical restraints if "a plaintiff can show the rough contours of a relevant market"; "[e]conomic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market"); *see generally* Andrew I. Gavil, *A Comment on the Seventh Circuit's* Republic Tobacco *Decision: On the Utility of "Direct Evidence of Anticompetitive Effects*, ANTITRUST, Spring 2005, 59, at 64 (reading *Republic Tobacco* to be saying that it may not be "possible even to assess actual effects without at least approximating a relevant market in which to measure those effects," but criticizing the result).

[45] *Amex*, 138 S. Ct. at 2287 (emphasis added).

[46] *Id.* at 2288.

[47] *Id.*

[48] *Id.* The Court explained: "'Market power is the ability to raise price profitably *by restricting output*.'" *Id.* (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 5.01 (4th ed. 2017)).

[49] *Id.* at 2288–89 (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993)).

[50] Indeed, the Court stated, "This Court will 'not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted *or* prices were above a competitive level.'" *Id.* at 2288 (quoting *Brooke Group*, 509 U.S. at 237) (emphasis added). American Express itself acknowledged in the court of appeals that "the Government need not prove an adverse effect on both output and price." Reply Brief of Defendants-Appellants at 28, *Amex*, 838 F.3d 179 (No. 15-1672).

[51] O'Bannon v. NCAA, 802 F.3d 1049, 1070 (9th Cir. 2015) (internal quotation marks and citation omitted). As one commentator points out, an output reduction requirement is "baffling. . . . Although price increases without output reductions cause no deadweight losses and hence no loss of allocative efficiency, they still result in wealth transfers from consumers to producers and hence diminish consumer welfare. Unless one understands the insistence on proof of output reduction as a back-door replacement of a consumer welfare standard with an allocative efficiency standard—a dubious explanation—the output reduction requirement on top of the supracompetitive pricing criterion makes no sense." Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 45–46 (2014).

[52] As the Court noted, the district court found that "plaintiffs failed to offer any reliable measure of Amex's transaction price." *Amex*, 138 S. Ct. at 2288.

[53] The Court also found the pricing evidence inadequate because "plaintiffs did not show that Amex charged more than its competitors." *Id.* at 2289. Presumably, the Court was referring to transaction prices, not merchant fees, as elsewhere the Court repeatedly refers to Amex's "higher merchant fees" and Visa and Mastercard's "lower merchant fees." *See id.* at 2282, 2288, 2289. In any event, demonstrating that a defendant's practice inflated the prices of all firms in the market, rather than just its own, would seem to be synonymous with harm to interbrand competition.

[54] *Amex*, 138 S. Ct. at 2302 (Breyer, J., dissenting).

[55] *See* Transcript of Oral Argument at 41, *Amex*, 138 S. Ct. 2274 (No. 16-1454) ("Output of the product has increased, that has so many factors that go into that besides the nature of the particular product, right? I mean if the economy grows, then the output of your product, credit card transactions, grows, right?").

[56] Of course, as amici economists explained, even if the restraints increased credit card volume, that would not be "procompetitive" but rather the result of the externality created by the restraints that insulates card holders from the true costs of using high-reward, high-fee cards, and shifts those costs to customers paying by other means. *See* Brief for Amici Curiae John M. Connor et al. at 35, *Amex*, 138 S. Ct. 2274 (No. 16-1454).

[57] *See, e.g.*, *Topco*, 405 U.S. at 609–10.

[58] U.S. Merits Brief, *supra* note 33, at 52. Given the restraints' distortion of the competitive process, the Solicitor General allowed for the possibility that enhanced Amex cardholder rewards were not a legitimate procompetitive benefit even if higher merchant fees were completely passed on to Amex cardholders. *Id.* at 41–42.

[59] *Amex*, 138 S. Ct. at 2302 (Breyer, J., dissenting).

[60] *Id.* at 2289 (Breyer, J., dissenting). And it did so without reference to the district court's unchallenged factual findings rejecting Amex's business justifications. *See id.* at 2303 (Breyer, J., dissenting).

[61] *Id.* at 2284 (majority decision).

[62] *Id.* at 2289; *see also id.* at 2289 ("Nor have Amex's antisteering provisions ended competition between credit card networks with respect to merchant fees."). The Court cited evidence such as the fact that "some merchants chose to leave [Amex's] network" when Amex raised its merchant prices and, "when its remaining merchants complained, Amex stopped raising its merchant prices." *Id.* What the district court actually found was that (1) *no* large merchants left, (2) fewer than 0.1% of medium-sized merchants left, and (3) although some smaller merchants left, the price increase was profitable even among that group. *Amex*, 88 F. Supp. 3d at 197.