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REDEFINING DIGITAL MARKET DEFINITION

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Digital markets pose problems for the traditional antitrust toolkit. They are often quite complex. Various marketplace actors often occupy unorthodox roles. Prices—a focal point for neoclassical economic analysis—are often opaque, and may simply be lacking altogether.

And yet, digital markets are markets, even if the relevant products are sometimes "free."[2] These markets are often prone to the entrenchment and exercise of concentrated power. Pearl-clutching fundamentalists may denounce any criticism of Silicon Valley tech giants as "blasphemy,"[3] but serious observers agree that the status quo leaves much to be desired.

Formal market definition serves as a perfect case study for analysis and reform. It has come to play an outsized role in many types of antitrust matters, ranging from restraints of trade to monopolization and mergers.

Guided by commonsense, administrable frameworks, antitrust institutions may yet be able to carry out their congressional mandate to oversee competition in digital markets. The following discussion uses formal market definition, which plays an outsized role in many antitrust matters, as a case study for analysis and reform.

Will market definition be an aid or a hindrance to antitrust analysis of conduct in digital markets? It is currently a morass of bizarre, often-incoherent theories and methodologies. But a better way exists. Let's take a look first at the sad state of current affairs.

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[1] The author currently serves as associate professor at the University of Miami School of Law; a member of the American Antitrust Institute advisory board; and as an affiliated fellow with the Thurman Arnold Project at Yale.

[2] Multiple prominent antitrust commentators have badly misunderstood the fundamentals of zero-price digital markets. Shortly before his death in 2012, Bork published a scaremongering op-ed in response to news that regulators had dared to open an investigation of Google. "Antitrust is on the rampage again. . . . There is no coherent case for monopolization, because a search engine, like Google, is free to consumers . . . ." Robert H. Bork, *Antitrust and Google*, CHI. TRIB., Apr. 6, 2012. Bork was serving as an advisor to Google at the time. *Id.*

[3] Stigler Center, Judge Richard A. Posner in Conversation with Professor Luigi Zingales, YOUTUBE (Mar. 30, 2017), https://youtu.be/JRCm_gJ2EOk [https://perma.cc/5K5G-RN2R] (remarks of Judge Posner at 5:26). This is, of course, not the only instance of far-right commentators using religious terminology to describe their belief system. Robert Bork described his law-school experience in such terms: "A lot of us who took the antitrust course or the economics course underwent what can only be called a religious conversion . . . . We became janissaries as a result of this experience." Panel Discussion, *The Fire of Truth: A Remembrance of Law and Economics at Chicago*, 26 J.L. & ECON. 163, 183 (1983).

The Quagmire

Market definition is an inherently artificial process. The real-world economy is not demarcated by precise metes and bounds. Attempting to force some sector of the economy into a legal fiction (the "relevant market") was always going to be a messy, contested process.

Compounding the problem, many antitrust institutions in the United States have embraced a particularly technical and onerous means of defining markets. The "hypothetical monopolist test" is a metaphysical exercise that requires "proof" of convoluted counterfactuals like what the "market" price would be in an alternate reality in which the defendant's challenged conduct never occurred and the candidate grouping of transactions is completely controlled by a fictional firm. In other words, it requires judges to decide what a firm that does not exist would have done in a world that does not exist. *Res ipsa loquitur*.

From Bad to Worse: ***AmEx***

The U.S. Supreme Court's *Ohio v. American Express* ("*AmEx*") decision badly worsened an already-considerable mess. Among a host of other fundamental flaws, Justice Thomas's majority opinion appears to endorse a number of novel positions relating to market definition. It seems to announce—in a footnote—that all plaintiffs challenging vertical restraints must engage in formal market definition.[4] Moreover, in cases involving so-called "two-sided transaction platforms", Thomas suggests that plaintiffs and judges must define the relevant market so as to include all of the platform's trading partners. This second requirement also affects (or infects) the element of harm. As Thomas would have it, in vertical-restraint cases involving two-sided transaction platforms, plaintiffs must also go on to prove (and judges must also go on to analyze) *net* harm. Thus, a claim can succeed only if the established harms to a group of trading partners were not offset by possible benefits to any other group of trading partners.

AmEx leaves the definition of "two-sided transaction platform" rather unsettled. Newspapers apparently do not qualify. Credit-card networks apparently do. Beyond that, Thomas's opinion is murky. A vague and contingent notion of "simultaneity" makes an appearance. Indirect network effects are seemingly important, at least when they are positive and multidirectional. The long-standing bedrock principle that relevant markets comprise substitutable products is simply ignored.

Unsurprisingly, the reach and meaning of *AmEx* are now being hotly contested. Commentators have applied the "platform" label to a wide range of wildly different business models. Facebook,[5] Google,[6]

[4] This was at least arguably mere *dicta*—it was a breathtakingly broad proclamation (buried in a footnote) within an opinion that is, by its own terms, very narrow in scope. As discussed further *infra*, Thomas took great pains to distinguish the market(s) at issue in *AmEx* from even other supposed "two-sided platform" markets, let alone more traditional markets.

[5] Press Release, U.S. Dep't of Justice, "Justice Department Reviewing the Practices of Market-Leading Online Platforms: Review Focuses on Practices That Create or Maintain Structural Impediments to Greater Competition and User Benefits" (July 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

[6] *Id.*

Amazon,[7] Uber,[8] and more have all been labeled as "platforms." Defendants ranging from the NCAA, to Goldman Sachs, to a dental-insurance provider have argued that they operate "platforms" to try to take advantage of *AmEx*.[9] In at least one case involving digital markets, they have met with success.

The recent district court decision in *United States v. Sabre Corp.* offers a stark example of the damage caused by the ongoing market-definition fiasco. *Sabre* involved a government challenge to a proposed merger between two firms, Sabre and Farelogix, that provide digital distribution services to airlines. The district court found that, as a factual matter, the two firms competed against each other for airlines' business.[10] But the court also found that Sabre operated a "two-sided transaction platform," while Farelogix did not. That finding triggered Justice Thomas's claim in *AmEx* that "[o]nly other two-sided platforms can compete with a two-sided platform."[11] Thus, the district court reversed course and held that, as a matter of law, Sabre and Farelogix did *not* compete.[12] This conclusion was "fatal" to the Government's case.[13]

Despite its obvious flaws, *Sabre* is not an aberration or outlier. It is just one example (albeit a particularly striking one) of where all of this—a blinkered focus on formalized market-definition, compounded by an increasingly bizarre and tortured set of methodologies—inevitably leads. It is the triumph of artificiality over reality, of confusion over clarity, and of illogic over common sense.

Draining the Swamp

Reading a decision like *Sabre* (or *AmEx*, for that matter) compels any serious analyst to conclude that the current path will take antitrust to a ruinous end—if it has not done so already. Perhaps market definition offers some value in some cases. But elevating it to an outcome-determinative legal requirement, insisting upon it even in cases where it is patently unnecessary, and distorting it beyond all recognition with flimsy theorizing about "two-sidedness" and "transaction-versus-non-transaction platforms"—that way madness lies.

How might *Sabre* have played out if the Government had not been forced to overlay an artificial market definition onto real-world competition? If its attorneys and economic experts could have focused solely on the straightforward and abundant evidence of harm, instead of slogging around in the metaphysical quagmire of "proving" what hypothetical firms might do in a fantasy world? If the

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[7] *See* Note, Derrian Smith, *Taming Sherman's Wilderness*, 94 IND. L.J. 1223, 1232 n.70 (2019) ("Amazon provides a platform that connects buyers and sellers of goods . . . .").

[8] Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 16 (2017) ("Uber is not the first two-sided market in the history of the taxi industry—taxi companies in many jurisdictions historically have operated as two-sided platforms, dispatching taxis by radio in response to calls from customers.").

[9] Victoria Graham, *Goldman, NCAA Test Limits of AmEx Two-Sided Antitrust Defense*, BLOOMBERG LAW, Feb. 26, 2020, https://news.bloomberglaw.com/mergers-and-antitrust/goldman-ncaa-test-limits-of-amex-two-sided-antitrust-defense.

[10] United States v. Sabre Corp., No. 19-1548-LPS, at ¶ 118 (D. Del. Apr. 20, 2020).

[11] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287 (2018).

[12] *Sabre Corp.*, *supra* note 10, at 68.

[13] *Id.*

district court had been free to decide the case on the merits, instead of being derailed by *AmEx*'s strange dictates? We will never know, of course, but the outcome could hardly have been worse.[14]

The current approach to market definition—culminating in *AmEx* and exemplified in *Sabre*—puts the cart before the horse, then destroys the cart. Its flaws are clear. Fortunately, the appropriate prescriptions are equally clear.

Judges and plaintiffs should never be required to overlay an artificial market definition onto the facts at hand. Market definition is, at most, only a modestly helpful tool for guiding analysis—it should never *per se* be outcome-determinative. As to *AmEx* specifically, the majority opinion's assertion that a "two-sided transaction platform market" must include all trading partners should be construed extremely narrowly. The aphorism that "[o]nly other two-sided platforms can compete with a two-sided platform" should be called out for what it is: nonsense. Even if *AmEx* is not formally overruled, it should be quietly relegated to the dustbin of history—as seems to have happened with Justice Thomas's previous attempt at antitrust decision-making.

Does Any of This Matter?

Discussions of technical antitrust topics like market definition run the risk of appearing too arcane to matter. Yet the task of reform in this area is crucial, and not only because of the immediate stakes for participants in the affected markets. Antitrust has important expressive value as well. As Robert Bork put it: "[Antitrust] is also an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency."[15] Vibrant and thoughtful antitrust enforcement sends a message: we the people design markets to serve our ends, not the other way around. If, however, antitrust becomes a hollow façade—and the current trajectory seems to bend in that direction—it will also send a message. That message will not be particularly hopeful. It will not inspire or uplift. It will be profoundly anti-democratic. It will be all too familiar to those who struggle for justice and equality under law. Let us hope we are not too late.

[14] At least within the confines of the U.S. litigation under discussion. The merging parties ultimately abandoned the deal after the UK's Competition and Markets Authority moved to block it—yet another example of non-U.S. jurisdictions taking the global lead on enforcement matters.

[15] Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 364 (1965).