

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 *United States 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*”),¹ with vocal critics on one side² and defenders of the decision on the other side.³ Indicative of its polarizing effect, some advocacy groups have even demanded a legislative repeal of the decision.⁴ While the case involves a credit card that was first introduced in 1958,⁵ 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 differ-

¹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

² See, e.g., Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 46, 88–89, 90 (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, 2061 (2020); Lina Khan, *The Supreme Court Just Quietly Gutted Antitrust Law*, VOX (July 3, 2018, 9:40 AM), <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony/> [<https://perma.cc/8U7G-DYMY>]; 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/> [<https://perma.cc/3CRF-7E5C>].

³ 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 Defence 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).

⁴ 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/> [<https://perma.cc/TJE6-PN5V>].

⁵ *Our Company*, AM. EXPRESS, <https://about.americanexpress.com/our-company/who-we-are/who-we-are/default.aspx/> [<https://perma.cc/H4N6-6VFC>].

ent groups on a platform, into antitrust law's rule of reason framework, which governs the evidentiary burdens of the litigants.⁶

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.⁷ In its decision, the Court found that, since Amex is a multi-sided platform, the welfare of both the merchants and cardholders must be considered before anticompetitive harm can be established.⁸

Some have read *Amex* as creating an extraordinary onus on plaintiffs to successfully meet its prima facie burden to demonstrate anticompetitive harm.⁹ 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.¹⁰

After *Amex*, another high-profile case, *United States v. Sabre Corp.*,¹¹ added fuel to the fire. The district court ruled against the United States Department of Justice (DOJ) and found that the merger between Sabre and Farelogix did

⁶ 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, to offer 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 Am. Express Co.*, 138 S. Ct. at 2284 ("To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies."); *see also* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 103–04 (2018).

⁷ *Am. Express Co.*, 138 S. Ct. at 2280.

⁸ *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.").

⁹ *See, e.g.*, Hovenkamp, *supra* note 2, 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) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642738 [<https://perma.cc/R8HD-NGGD>] ("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.* . . .").

¹⁰ *See, e.g.*, EVANS & SCHMALENSSEE, *supra* note 3, 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.").

¹¹ *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020).

not violate the Clayton Act, Section 7, which prohibits mergers that may substantially lessen competition.¹² In part, the district court judge reasoned that, based on the *Amex* precedent, “transaction platforms” can only compete with other transaction platforms.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷

In the context of this debate about how to incorporate multisided platforms into a rule of reason analysis, this Article will argue 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,¹⁸ he published a much earlier work on the nature of firms.¹⁹ The relevance to platforms is that there is a potential trap of considering business organizations as a binary choice: either a

¹² *Id.* at 136. Specifically, the Clayton Act prohibits mergers whose effect “may be substantially to lessen competition.” 15 U.S.C. § 18 (2018).

¹³ *Sabre Corp.*, 452 F. Supp. 3d at 136.

¹⁴ *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.”).

¹⁵ 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 4, 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.”).

¹⁶ See, e.g., MAURICE E. STUCKE, INVITED SUBMISSION TO THE U.S. HOUSE JUDICIARY SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW, 2–3 (2020), https://judiciary.house.gov/uploadedfiles/submission_from_maurice_stucke.pdf [<https://perma.cc/FP8J-EJ83>] (“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.”).

¹⁷ 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 Subcommittee 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> [<https://perma.cc/G5UY-Q7FK>]; American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021).

¹⁸ See R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 3 (1960).

¹⁹ See R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

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.”²⁰ The idea is that various inputs go into a stylized production function that 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 standard assumptions of a “firm” explained the actual “nature” of firms²¹ (e.g., 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.²² Incorporating transaction costs into the analysis of firm organization is an acknowledgment that there are costs to generate a market exchange, including contracting, monitoring, and assuring performance.²³

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.²⁴ For example, both taxicab companies and ride sharing plat-

²⁰ 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 questions of interest to most economists. The firm in economic theory, as Hahn said recently, is a ‘shadowy figure.’”) (quoting Frank Hahn, *General Equilibrium Theory*, in *THE CRISIS IN ECONOMIC THEORY* 131) (Daniel Bell & Irving Kristol eds., 1981)).

²¹ See Coase, *supra* note 19, at 386 (“Economic theory has suffered in the past from a failure to state clearly its assumptions. Economists in building up a theory have often omitted to examine the foundations on which it was erected. . . . [I]t is all the more necessary not only that a clear definition of the word ‘firm’ should be given but that its difference from a firm in the ‘real world,’ if it exists, should be made clear. Mrs. Robinson has said that ‘the two questions to be asked of a set of assumptions in economics are: Are they tractable? and: Do they correspond with the real world?’”).

²² *Id.* 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.”).

²³ See generally Douglas W. Allen, *What Are Transaction Costs?*, 14 *RSCH. L. & ECON.* 1 (1991).

²⁴ See COASE, *supra* note 20, at 7 (“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 et al., *Vertical Integration, Appropriate Rents, and the Competitive Contracting Process*, 21 *J.L. & ECON.* 297, 323 (1978); Benjamin Klein & Kevin M. Murphy, *Vertical Integration as a Self-Enforcing Contractual Arrangement*, 87 *AM. ECON. REV.* 415, 415 (1997); Oliver E. Williamson, *The Ver-*

forms, such as Uber and Lyft, are firms organized to ultimately transport people from one location to another via an automobile. *How* a taxicab 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.²⁵ Google Search monetizes through matching advertisers and users while Neeva is ad-free and relies on a freemium business model.²⁶ 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?

First, this Article will argue that, while the term “platform” is useful and often necessary to describe a business organization, it should be considered a shorthand and not a binary classification.²⁷ Rather, the proper focus must be on the nature, direction, and significance of the various network effects when assessing competitive effects.²⁸ 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

tical Integration of Production: Market Failure Considerations, 61 AM. ECON. REV. 112, 112 (1971); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 233–34 (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, 691–92 (1986); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305–08 (1976).

²⁵ See NEEVA, <https://neeva.com/about> [<https://perma.cc/2N5N-TEW5>].

²⁶ See NEEVA, <https://neeva.com/faq> [<https://perma.cc/25QL-T28U>] (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).

²⁷ Cf. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (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”).

²⁸ 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., Roland Artle & Christian Averous, *The Telephone System as a Public Good: Static and Dynamic Aspects*, 4 BELL J. ECON. & MGMT. SCI. 89, 89 (1973); Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 BELL J. ECON. & MGMT. SCI. 16, 16 (1974); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424–25 (1985); S. J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 218 (1995).

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.²⁹ 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 that might or might not depend on its role as a platform in coordinating and matching two or more groups to create output. The 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 muddled economic analysis. Specifically, aspects of the *Amex* decision overstate the difference between “platforms” and “non-platforms” that can lead to subsequent errors, such as parts of the *Sabre* decision.³⁰ To avoid such confusion, this Article will offer 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 will reexamine 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 platform³¹ and (2) where the conduct at issue materially affects the cross-group network effect(s).³²

Third, this Article will examine 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 Publishing Co. v. United States*, which involved an allegation that the leading New Orleans newspaper illegally tied the purchase of advertising between its morning and evening edi-

²⁹ See generally *infra* Section I.B (including further discussion of supermarkets, network effects, and platforms).

³⁰ See *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 136 (D. Del. 2020) (finding that “[a]s a matter of antitrust law . . . a two-sided transaction platform . . . only competes with other two-sided platforms.”).

³¹ Cross-group network effects occur when the presence of one group materially affects the willingness of another group to participate in the network. See *infra* Section I.A.

³² See *infra* Section II.B.

tions.³³ Newspapers are “nontransaction[al] platforms” insofar as they coordinate the engagement of readers and advertisers rather than facilitate a market exchange *per se*.³⁴ The sequel, *United States v. Sabre Corp.*, required the court to assess whether a “transactional” platform, Sabre, can compete with a non-platform business, Farelogix, that Sabre was acquiring.³⁵ Finally, the coming-attraction is *Epic Games v. Apple*.³⁶ 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.³⁷ While the district court ruled largely in favor of Apple, the case has already been appealed to the Ninth Circuit.³⁸

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 offer 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,³⁹ 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.⁴⁰ Yet, labels can also be vague and incomplete, such as the use of the term “barriers to entry” to describe factors that hinder the ability of entrants to

³³ *Times-Picayune Publ'g. Co. v. United States*, 345 U.S. 594, 596–97 (1953).

³⁴ *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 n.9 (2018).

³⁵ *See Sabre Corp.*, 452 F. Supp. 3d at 136.

³⁶ *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021).

³⁷ *Id.* at 921.

³⁸ Notice of Appeal, *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR-TSH (N.D. Cal. Sept. 12, 2021).

³⁹ *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.”).

⁴⁰ *See generally* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY (4th ed. 2022).

compete in a relevant market.⁴¹ Nonetheless, there is an 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 they 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.⁴² 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 the particular externalities.

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.

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

⁴¹ See, e.g., W. KIP VISCUSI ET AL., *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 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, 6 (2006) (“[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.”).

⁴² 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.”).

of other agents consuming the good.”⁴³ Commonly cited examples of products with these “within-group” or “direct” network effects include email, telephones, and fax machines.⁴⁴ 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.⁴⁵ Such effects are akin to “demand-side economies of scale,” that is, the benefits of consumption increase as the network expands.⁴⁶

Network effects are a subcategory of externalities.⁴⁷ 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.⁴⁸ 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

⁴³ Katz & Shapiro, *supra* note 28, 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, 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.

⁴⁴ Some of the earliest economic literature on network effects began with models assessing potential equilibria in the telephone system. *See generally* Artle & Averous, *supra* note 28, at 89–90, 100; Rohlfs, *supra* note 28, at 16–17.

⁴⁵ *See* Shy, *supra* note 43, 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[.]”).

⁴⁶ *See* Hal Varian, *Use and Abuse of Network Effects*, in TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS 227, 229 (Martin Guzman ed., 2018).

⁴⁷ *See* Shy, *supra* note 43, 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.”).

⁴⁸ The value that consumers receive from using a networked product can be divided into what Liebowitz and 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> [<https://perma.cc/Q3TD-85W7>]. 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.

since users do not fully internalize the benefits of their participation.⁴⁹ Network operators can serve in the role of internalizing the externality to the extent the externality can be monetized based off of the size of the network. In essence, this is akin to the Coase Theorem in which the network operator is assigned the property right and, thus, solves the externality problem.⁵⁰ 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.⁵¹

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) affects the incentive of another group to participate (such as advertisers), then there are cross-group network effects.⁵² 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.⁵³ 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

⁴⁹ *Id.* (“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.”).

⁵⁰ See Coase, *supra* note 18, at 15–16. 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. *Id.* at 19.

⁵¹ 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.”).

⁵² 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.”).

⁵³ 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, *Are Consumers Averse to Sponsored Messages? The Role of Search Advertising in Information Discovery* 1, 4 (Stan. Univ. Graduate Sch. of Bus., Rsch. Paper No. 3441786, 2022), <https://ssrn.com/abstract=3441786> [<https://perma.cc/F2WV-MXH5>] (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).

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 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.⁵⁴

Generally, the concepts of a cross-group and indirect network effect are so similar and intertwined that these terms are used interchangeably.⁵⁵ In some situations, however, the distinction might be useful. For instance, consider an ad network where most 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.⁵⁶ 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.⁵⁷

⁵⁴ BELLEFLAMME & PEITZ, *supra* note 52, 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.”).

⁵⁵ See, e.g., Nicholas L. Johnson, *What Are Network Effects?*, APPLICO, <https://www.applico.com/blog/network-effects/> [<https://perma.cc/82FL-55T9>] (“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.”).

⁵⁶ 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.”).

⁵⁷ 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 that 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 dependency⁵⁸ where markets can tip and create “winner takes all” (or “winner takes most”) outcomes.⁵⁹ 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.⁶⁰ 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 in debates about whether digital platforms should be regulated as common carriers.⁶¹

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—

⁵⁸ See Liebowitz & Margolis, *supra* note 28, 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).

⁵⁹ 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, 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.”).

⁶⁰ See, e.g., S. J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 33 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.”).

⁶¹ See, e.g., Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 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, 463 (2021).

in terms of its strength, scope, and relevance to the success of a product.⁶² 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. In contrast, 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, such as friends, relatives, co-workers, and classmates.⁶³ 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.⁶⁴ That being said, fundamentally, products can still be useful as

⁶² 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).

⁶³ 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* 151, 160–61 (Jeffery Furman et al. eds., 2017). It is important to acknowledge, however, that increases in the sheer number of users—analogous to the income effect in economics—also bring more users into each subgroup.

⁶⁴ 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 text with only 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

long as there are two people who want to communicate with each other.⁶⁵ 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.⁶⁶ Thus, coordinating migration to a new or alternative network 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 in which the characteristics of the network correspond to a type of public forum.⁶⁷

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 is 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.

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 in turn conforms with the thesis about being wary of labels.

⁶⁵ This point was acknowledged by the Stigler Committee on Digital Platforms. 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> [<https://perma.cc/D8CY-EKYM>] (“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.”).

⁶⁶ Fax machines have a long history, but it was the introduction of Xerox's “Magnafax” Telcopier in 1966 that truly jumpstarted the commercial success of the technology. See JONATHAN COOPERSMITH, FAXED: THE RISE AND FALL OF THE FAX MACHINE 114 (2015). 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> [<https://perma.cc/3PKX-CKHR>]. 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, 2019, 2:45 PM), <https://blogs.wsj.com/experts/2019/09/19/why-your-doctors-office-still-depends-on-a-fax-machine> [<https://perma.cc/SGC2-6FBK>].

⁶⁷ See, e.g., Elizabeth Harper, *Twitter 101: Understanding the Basics*, TECHLICIOUS (May 17, 2013), <https://www.techlicious.com/guide/twitter-101-understanding-the-basics/> [<https://perma.cc/CRP5-VU8C>] (“Think of Twitter as a big, open room. . .”).

B. Coasian Approach to Platforms

In 1927, Coase changed how economists thought about firms by examining why firms exist at all.⁶⁸ 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 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.⁶⁹

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.⁷⁰ Further, Coase explains that "[w]ithin a firm . . . [there] are alternative methods of co-ordinating production."⁷¹ 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."⁷² 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."⁷³ 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."⁷⁴

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 contexts such as examining music licensing organizations, as well as franchise agreements.⁷⁵

⁶⁸ Coase, *supra* note 19, at 386.

⁶⁹ *Id.* at 404–05.

⁷⁰ *Id.* 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.").

⁷¹ *Id.* at 388.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 388–89.

⁷⁵ 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, 925–26 (2015);

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].”⁷⁶ 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).⁷⁷ Fundamentally, network effects capture the idea that the behavior of one person has some impact on the welfare of another person, whether in the same group or a different group, beyond the transaction itself. In turn, this relationship can affect how the platform manages these various groups and ultimately monetizes the business. As Belleflamme and Peitz emphasize, to understand network effects, the starting point is to identify the “originator” and the “receiver.”⁷⁸ If both parties are within the

Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 223–24 (1978).

⁷⁶ Coase, *supra* note 19, at 389.

⁷⁷ 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 market definition.”); David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, in 1 ISSUES IN COMPETITION LAW AND POLICY 667, 689 (2008) (describing that “[i]n 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.”).

⁷⁸ BELLEFLAMME & PEITZ, *supra* note 52, at 11.

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 and Peitz offer the insight that “[w]hen 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.”⁷⁹

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 policies are intended to manage network effects (e.g., Google raising the minimum price to advertise).⁸⁰

The consequence of deconstructing a business into the core elements of (1) identifying the relevant network effects and (2) 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 with traditional “network industries” such as communications, energy, and transport.⁸¹ 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 on 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.⁸² 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.⁸³ To reach this decision, the EU determined “merchant platforms,” such as Amazon, were not Google’s competitors in the comparison shopping service market.⁸⁴ 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 analy-

⁷⁹ *Id.* at 3.

⁸⁰ 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.

⁸¹ See, e.g., Martin Cave, *What Lessons Can Be Drawn for Digital Platforms from the Regulation of Traditional Networks?*, TECHREG CHRON., Dec. 2021, at 1, 2–3.

⁸² Case T-612/17, *Google LLC v. Comm’n*, 2021 ECLI:EU:T:2021:763 (Nov. 10, 2021), CURIA.

⁸³ *Id.* ¶¶ 179, 197, 596–97.

⁸⁴ *Id.* ¶¶ 468–95.

sis focused on the differences in how the businesses are organized.⁸⁵ 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.⁸⁶ One solution to an externality between two parties, such as network effects, is to vertically 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.⁸⁷ The difficulty with these categorical representations is that systems may be open in some respects and closed in others.⁸⁸ Further, there is no clear threshold to determine whether a system is “open” or “closed.”⁸⁹ 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 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 ver-

⁸⁵ See *id.* ¶ 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.”).

⁸⁶ 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).

⁸⁷ See, e.g., Brief for Respondents at 6–7, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204) (“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. See Hanno F. Kaiser, *Are “Closed Systems” an Antitrust Problem?*, 7 COMP. POL’Y INT’L 91, 93 (2011).

⁸⁸ See Kaiser, *supra* note 87, at 94 (“[C]omputer systems or stacks consist of various layers—hardware, operating system, software, and content—each of which can be more or less open. Should a system like Microsoft Windows that is open at the content and software layers but closed at the operating system layer be labeled open or closed?”).

⁸⁹ *Id.* (“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.”).

tical integration; the strength of their vertical controls, that is, the open versus closed balance; and the management of their network effects, which is endogenously created. For example, 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 alternative methods of coordinating production does not imply organizations 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 that, 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.⁹⁰ 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 multisided 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.⁹¹ As Shapiro explains, “the boundary

⁹⁰ See Rosa M. Abrantes-Metz & Albert D. Metz, *Regulating Multisided Platforms? The Case Against Treating Platforms as Utilities*, CPI ANTITRUST CHRON., Aug. 2020, at 1, 6.

⁹¹ 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 product curation, fast shipping, and user reviews. Consequently, Amazon Marketplace and eBay are highly differentiated products.

between the ‘platform’ and services running on that platform can be fuzzy and can change over time.”⁹²

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.⁹³ 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 pro-competitive 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.⁹⁴ 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 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—

⁹² Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69, 84 (2019).

⁹³ See, e.g., Evans & Schmalensee, *supra* note 77, at 675 (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”).

⁹⁴ See generally Ronald Coase, *The New Institutional Economics*, 88 AM. ECON. REV. 72 (1998).

virtually all markets might be two-sided to some extent—but how important two-sided issues are in determining outcomes of interest.”⁹⁵

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 affected 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.⁹⁶ 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.⁹⁷ For example, if a local florist offers a 1 percent discount if a customer uses a Discover card instead of Amex, then this would violate the antisteering provision.⁹⁸ 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.⁹⁹

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, that governs “contracts, combinations, and conspiracies” in restraint of trade.¹⁰⁰ The Court concluded that the plaintiffs—the DOJ and several states—failed to demonstrate that the provision caused anticompeti-

⁹⁵ Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. ECON. PERSPS. 125, 127 (2009).

⁹⁶ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018).

⁹⁷ *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.”).

⁹⁸ Amex does not prevent merchants from steering cardholders to other payment methods, including cash, checks, or debit cards. *See id.* at 2283.

⁹⁹ *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.”).

¹⁰⁰ 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.”).

tive harm.¹⁰¹ 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.¹⁰² In order to incentivize cardholders to join the network and spend money with the in-network merchants, Amex offers cardholder benefits including the ability to receive credit, delay payments, and collect membership rewards, such as airline miles and discounts on gasoline and groceries.¹⁰³ These benefits spur cardholders’ demand to use the card that, 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 transactions and the patronage of wealthier clientele.¹⁰⁴ 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.¹⁰⁵ Thus, both merchants and cardholders share a common output level since both are needed in order to generate a transaction.¹⁰⁶ This situation is different from ad-supported businesses like Google Search in which 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 frame-

¹⁰¹ *Am. Express Co.*, 138 S. Ct. at 2287 (“The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market.”).

¹⁰² *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.”) (internal citations omitted).

¹⁰³ *Id.* (“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.”).

¹⁰⁴ *Id.* (“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.”).

¹⁰⁵ *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.”).

¹⁰⁶ *Id.* at 2286 (“[W]henver 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.”).

work.¹⁰⁷ Within this framework, in the first step, the plaintiff has the prima facie burden to demonstrate anticompetitive harm.¹⁰⁸ For *Amex*, the 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 were also required to consider 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.”¹⁰⁹ 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.”¹¹⁰ With this conclusion, the Court rejected a bifurcation of the Amex platform into two separate “relevant markets” for merchants and cardholders.¹¹¹ 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.¹¹²

As for the antisteering provision, the Court found that focusing solely on the inability of merchants to steer Amex cardholders with discounts “misses the mark” because of the narrow focus on merchants.¹¹³ Rather, the plaintiffs needed to demonstrate some harm to competition incorporating both cardholders and merchants.¹¹⁴ The Court did mention how the plaintiffs attempted to show

¹⁰⁷ See generally JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 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.”).

¹⁰⁸ *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) (“The antitrust laws, however, were enacted for ‘the protection of competition not competitors.’”) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). 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 effect.’ That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.”).

¹⁰⁹ *Am. Express Co.*, 138 S. Ct. at 2287 (citation omitted).

¹¹⁰ *Id.*

¹¹¹ 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. *Brown Shoe Co.*, 370 U.S. at 324; see also *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

¹¹² 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.

¹¹³ *Am. Express Co.*, 138 S. Ct. at 2287.

¹¹⁴ *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

how Amex raised merchants fees without a one-for-one pass through to consumers.¹¹⁵ The Court dismissed this evidence maintaining that prices alone do not show harm, and there should also be evidence of a reduction in output.¹¹⁶ On this point, the Court did not need to appeal to output changes.¹¹⁷ 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, the 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 1990s¹¹⁸—does not tell the full story, which includes times when Amex might have lowered the fees.¹¹⁹

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.”¹²⁰ Yet, rather than confining its ruling to the facts specific to *Amex*, the Court asserted in the very next sentence, “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.”¹²¹ 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.

In summary, while the Court discussed evidence of output increases and an efficiency rationale for the antisteering provision based on combating free rid-

credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.”)

¹¹⁵ *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.”) (internal citation omitted).

¹¹⁶ *Id.*

¹¹⁷ 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. *Id.* at 2288–89.

¹¹⁸ See *United States 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.”).

¹¹⁹ The Court briefly alludes to this type of inquiry. *Am. Express Co.*, 138 S. Ct. at 2289 (“[I]n the late 1980s and early 1990s, competition forced Amex to offer lower merchant fees . . .”).

¹²⁰ *Id.* at 2287.

¹²¹ *Id.*

ing,¹²² the relevant legal justification for the Court's decision was that the plaintiff failed to establish anticompetitive harm from the antisteering provision.¹²³ 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 as 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.¹²⁴ Amex promotes its payment method to its cardholders to drive greater spending at in-network merchants.¹²⁵ 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.

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 net-

¹²² 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*.

¹²³ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018) ("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.").

¹²⁴ See generally Jason Steele, *Everything You Need to Know About Credit Card Issuers*, EXPERIAN (Mar. 27, 2018), <https://www.experian.com/blogs/ask-experian/everything-you-need-to-know-about-credit-card-issuers/> [<https://perma.cc/XSA7-T5PU>] ("A credit card issuer is responsible for the relationship between a cardholder and their accounts. This includes reviewing applications, mailing and activating credit cards, issuing statements, and processing payments. A card issuer can also offer rewards and benefits, as well as report your payment history and other information to the credit bureaus.").

¹²⁵ See, e.g., AM. EXPRESS, *Benefits*, <https://www.americanexpress.com/en-us/benefits/> [<https://perma.cc/TJP7-DE26>] ("Make the most of every moment. Explore all the benefits and savings you can get with an American Express membership.").

work effects between these two groups.¹²⁶ 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 affects 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 affect 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.¹²⁷ Each 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.¹²⁸

¹²⁶ *Am. Express Co.*, 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.”).

¹²⁷ 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*, *GUARDIAN* (Jan. 14, 2022, 8:00 AM), <https://www.theguardian.com/technology/2022/jan/14/cryptocurrency-ads-london-transport-tfl> [<https://perma.cc/L29T-DWWK>] (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.

¹²⁸ *See, e.g.*, *American Express and Delta Renew Industry-Leading Partnership, Lay Foundation to Continue Innovating Customer Benefits*, *DELTA NEWS HUB* (Apr. 2, 2019, 8:45 AM), <https://news.delta.com/american-express-and-delta-renew-industry-leading-partnership-lay-foundation-continue-innovating> [<https://perma.cc/Y6GT-2AFN>] (“American Express and Delta Air Lines have signed an 11-year renewal extending their exclusive Delta SkyMiles Credit Cards from American Express portfolio through the end of 2029.”).

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.¹²⁹ Additionally, credit cards invest in developing a broad network of merchants, promoting those merchants, and enhancing the brand itself.¹³⁰ 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 affect the network in a manner that is more profitable for both the credit card company and the merchants and, ultimately, the cardholders who join.

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.¹³¹ Free riding occurs when a person or group uses a good or service without paying (or underpaying) for its provision.¹³² 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 re-

¹²⁹ See, e.g., John S. Kiernan, *Types of Credit Cards*, WALLETHUB (July 18, 2022), <https://wallethub.com/edu/cc/types-of-credit-cards/25505/> [<https://perma.cc/RCA2-EA8N>].

¹³⁰ See, e.g., *American Express Commits More than \$100 Million to Inspire Consumers to Support Small Businesses Globally Through Its Year-Round Shop Small® Campaign*, AM. 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> [<https://perma.cc/W9E2-9B9F>] (“[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.”).

¹³¹ Brief for Respondent, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (No. 16-1454), 2018 U.S. S. Ct. Briefs LEXIS 139, at *21 (“[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.’”).

¹³² See, e.g., Philippe Fontaine, *Free Riding*, 36 J. HIST. OF ECON. THOUGHT 359, 359 (2014) (describing free riding as the “idea of enjoying the benefits of collective action without incurring the corresponding costs”).

wards.¹³³ 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.¹³⁴ 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,¹³⁵ 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.

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 policies for both merchants and cardholders.¹³⁶ Having a precedent where anticompetitive harm can be established by considering only the policy's impact on a merchant at the point of sale—even though Amex optimizes over

¹³³ See *Am. Express Co.*, 138 S. Ct. at 2289–90.

¹³⁴ *Id.* at 2282.

¹³⁵ *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.’”).

¹³⁶ See Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS’N 990, 1018 (2003) (“The 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.”); Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 664–65 (2006); see also Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. ECON. 668, 668–69 (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, 454, 470 (2001).

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 affects a business’s networks effects requires an equally weighted assessment of the welfare of all the affected groups. If that means defining two separate, but interrelated markets, and doing a “joint” competitive effects analysis, then that is a potential avenue.¹³⁷ That being said, this avenue has some potential legal hurdles that create uncertainty.¹³⁸ An alternative avenue is to preserve the traditional “burden shifting” framework by examining one group at a time. Yet, a court could 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 the same playing field 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.¹³⁹

¹³⁷ See Wright & Yun, *supra* note 3, 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* 349, 353 (2015) (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.”).

¹³⁸ See EVANS & SCHMALENSEE, *supra* note 3, 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) in order to offset alleged anticompetitive harm in another market. See *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 370 (1963). See generally Christine S. Wilson, Comm’r, U.S. Federal Trade Comm’n, *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). See Wright & Yun, *supra* note 3, at 735–36 (noting 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).

¹³⁹ See, e.g., EVANS & SCHMALENSEE, *supra* note 3, 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

While there are some shortcomings to this particular avenue, including reimagining what “anticompetitive harm” means in Step One, it has the potential virtue of 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*, that explicitly highlights the idea that anticompetitive harm involves an assessment of both merchants and cardholders—since they are in the same relevant market.¹⁴⁰

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 affects network effects in the credit card industry.¹⁴¹ A slightly broader reading is that the case is relevant when conduct affects the network effects for “transaction platforms.”¹⁴² This reading is based on, again, the controversial assertion that “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.”¹⁴³ On its face, this statement reads as a general proposition that the Court believes only transactional platforms compete with other transactional platforms.¹⁴⁴ Importantly, this is how the district court interpreted the statement in *United States v. Sabre*.¹⁴⁵

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

in “another” market. *See Am. Express Co.*, 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.”).

¹⁴⁰ *See Am. Express Co.*, 138 S. Ct. at 2284. Notably, 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.

¹⁴¹ *See Hovenkamp*, *supra* note 2, 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 M. Edwards & Jonathan M. Jacobson, *Missing the Forest for the Trees: The Application of Amex in United States v. Sabre*, ANTITRUST SOURCE 1 (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.”).

¹⁴² *Am. Express Co.*, 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.”).

¹⁴³ *Id.* at 2287.

¹⁴⁴ *Id.*

¹⁴⁵ *See infra* Section III.B for a full discussion of the case.

credit card industry,¹⁴⁶ 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*.¹⁴⁷ Specifically, the dissent derided the majority's view that a platform, such as a farmers' market that facilitates "simultaneous transactions," is a meaningful distinction from a conventional market.¹⁴⁸ 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?¹⁴⁹

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.¹⁵⁰ Even if the collusion over restricting farmer access faces consideration under a rule of reason framework, albeit closer to truncated analysis,¹⁵¹ 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

¹⁴⁶ *Am. Express Co.*, 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.").

¹⁴⁷ *Id.* at 2299.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 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*, 168 UNIV. PA. L. REV. 2107, 2117 (2020) ("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* xvi-xvii (2020) (calling the per se rule "a special case of the 'rule of reason.'").

¹⁵¹ See *Cal. Dental Ass'n. v. FTC*, 526 U.S. 756, 779–80 (1999) (ruling that courts should apply a "sliding scale" in conducting rule of reason analyses).

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.¹⁵² 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.

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.¹⁵³ Effectively, the farmers' market has imposed a price ceiling that 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 price¹⁵⁴ to consumers through lower quality products and service, a requirement to buy a minimum number of units, etc. In turn, this will negatively affect 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 sig-

¹⁵² 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, 6:25 PM), <https://www.wsj.com/articles/states-sue-google-over-digital-ad-practices-11608146817> [<https://perma.cc/3Q7Z-GYKU>] (detailing a complaint by ten states that Google and Facebook colluded in the advertising sector); see also Second Amended Complaint at iv, *In re Google Digit. Advert. Antitrust Litig.*, 2022 WL 622031 (S.D.N.Y. 2022) (No 1:21-md-03010-PKC).

¹⁵³ *Am. Express Co.*, 138 S. Ct. at 2299.

¹⁵⁴ 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).

nificant 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 the one hand, the Court found that theories of anticompetitive harm involving conduct that directly and materially affects 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 that 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 that materially affects network effects must assess the welfare of all groups impacted before a conclusion of anticompetitive harm can be determined. This aspect of the decision is consistent with a Coasian approach.

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. United States*, which predated *Amex* by about sixty-five years.¹⁵⁵ The dissent in *Amex* specifically invoked the case as having already decided the issue of how to consider platforms.¹⁵⁶ The second case is *United States v. Sabre*, 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.¹⁵⁷ Undoubtedly, the district court judge in *Sabre* read *Amex* broadly, which led to potentially problematic assessments of competition involving platforms.¹⁵⁸ The third case is *Epic Games v. Apple*¹⁵⁹ in which several allegations involve network effects while others do not.

¹⁵⁵ *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 594 (1953).

¹⁵⁶ *Am. Express Co.*, 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.”).

¹⁵⁷ *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 103 (D. Del. 2020); see Randy Stutz, *AAI Says It's Time to Cancel Amex: Sabre-Farelogix Opinion Makes a Mockery of Market Definition*, 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/> [https://perma.cc/UT2W-CT8Y].

¹⁵⁸ *Sabre Corp.*, 452 F. Supp. 3d at 136.

¹⁵⁹ *Epic Games, Inc. v. Apple, Inc.*, 559 F. Supp. 3d 898, 994 (2021).

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.¹⁶⁰ The only other significant competitor, the “Item,” was an evening newspaper.¹⁶¹ All three of these local newspapers monetized largely through display and classified advertisements.¹⁶²

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.¹⁶³ The DOJ alleged competitive harm due to illegal tying, which is a Section 1 violation, and monopolization, which is a Section 2 violation.¹⁶⁴ 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.¹⁶⁵ 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 affects “a substantial volume of commerce” in the tied product.¹⁶⁶

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.”¹⁶⁷ Further, “[t]his case concerns solely one of these 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.”¹⁶⁸ The dissent in *Amex* pointed to this language in *Times-Picayune* as already having decided the issue of how to analyze two-sided platforms.¹⁶⁹ The majority in *Amex* also acknowledged a potential tension with *Times-Picayune*

¹⁶⁰ *Times-Picayune Publ’g. Co.*, 345 U.S. at 598.

¹⁶¹ *Id.*

¹⁶² *Id.* at 604 (“Advertising is the economic mainstay of the newspaper business” where “more than two-thirds of a newspaper’s total revenues flow from the sale of advertising space.”).

¹⁶³ *Id.* at 600.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 601.

¹⁶⁶ *Id.* at 608–09 (“[A] tying arrangement is banned by § 1 of the Sherman Act whenever both conditions are met.”); see, e.g., David S. Evans, *Untying the Knot: The Case for Overruling Jefferson Parish*, U.S. DEP’T OF JUST. (July 2006), <https://www.justice.gov/atr/untying-knot-case-overruling-jefferson-parish> [<https://perma.cc/H9J3-XE25>] (arguing 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).

¹⁶⁷ *Times-Picayune Publ’g. Co.*, 345 U.S. at 610.

¹⁶⁸ *Id.*

¹⁶⁹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2295 (2018) (Breyer, J., dissenting).

but found newspapers to be quite different than credit cards, and the network effects were potentially minor in the former.¹⁷⁰

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.¹⁷¹ The second was that there was insufficient evidence that the morning and evening editions were two separate products from the perspective of advertisers.¹⁷² 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 a Sherman Act, Section 1 violation.¹⁷³ This claim has parallels to Amex’s antisteering provision given that the Court observed that “[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.”¹⁷⁴ In addressing this claim of unduly restraining competition, the Court examined the impact of the unit rule on classified and national display advertising.¹⁷⁵ 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.”¹⁷⁶ 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 markets . . . [thus, the] case concerns solely one of these markets.”¹⁷⁷ 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 that affects 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 affects TPP’s sole network effect.

¹⁷⁰ *Id.* at 2286 (“[T]he market for newspaper advertising behaves much like a one-sided market and should be analyzed as such.”).

¹⁷¹ *Times-Picayune Publ’g Co.*, 345 U.S. at 611.

¹⁷² *Id.* at 613 (“[N]othing in the record suggests that advertisers viewed the city’s newspaper readers, morning or evening, as other than fungible customer potential.”).

¹⁷³ *Id.* at 614.

¹⁷⁴ *Id.* at 614–15.

¹⁷⁵ *Id.* at 616–21.

¹⁷⁶ *Id.* at 619. In fact, the Court stated simply, “the Item flourishes.” *Id.* at 620.

¹⁷⁷ *Id.* at 610.

The only caveat to the above point is classified ads that 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 classified ads? First, the Court highlighted that TPP's competitor, the Item, also used a unit rule when it had a morning edition;¹⁷⁸ thus, "unit plan [was] pitted on even terms against unit plan."¹⁷⁹ Second, the Court found little evidence that the unit rule had "demonstrably deleterious effects on competition."¹⁸⁰ Similarly, "the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm."¹⁸¹ 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.¹⁸² 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 the market to assess the Sherman Act, Section 1 and 2 claims.¹⁸³ 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.¹⁸⁴

B. United States v. Sabre Corp. (2020)

In November 2018, Sabre Corporation announced an agreement to acquire Farelogix.¹⁸⁵ Sabre is a market leader in the provision of airline reservation ser-

¹⁷⁸ *Id.* at 616.

¹⁷⁹ *Id.* at 619.

¹⁸⁰ *Id.* at 621.

¹⁸¹ *Id.* at 622.

¹⁸² See 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.")

¹⁸³ *Times-Picayune Publ'g Co.*, 345 U.S. at 610 ("[D]ominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan.")

¹⁸⁴ See EVANS & SCHMALENSSEE, *supra* note 3 ("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.")

¹⁸⁵ *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 105 (D. Del. 2020).

vices while Farelogix provides innovative software to airlines to facilitate bookings.¹⁸⁶ In August 2019, the DOJ filed a complaint alleging the combination violated the Clayton Act, Section 7.¹⁸⁷ In finding for the parties, the district court cited *Amex*, asserting that only “transaction platforms” can compete with other transaction platforms.¹⁸⁸ While the judge explained that his decision did not rest on *Amex* but on the DOJ’s failure to meet its burden of proof,¹⁸⁹ 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”).¹⁹⁰ 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.¹⁹¹ Travel agencies use proprietary systems to book flights and bundle other services, such as record keeping and invoicing.¹⁹² To that end, within the indirect channel, 95 percent of sales use a global distribution system (GDS).¹⁹³

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 airline.¹⁹⁴ 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.¹⁹⁵ The leading GDSs are Sabre, Amadeus, and Travelport, with Sabre enjoying a 50 percent share.¹⁹⁶

In contrast, Farelogix developed a New Distribution Capability (NDC) application programming interface (API) that “enables airlines to communicate offers and orders between the airline’s PSS [internal reservation system] and third parties.”¹⁹⁷ In other words, NDC API directly connects an airline’s inter-

¹⁸⁶ *Id.* at 103, 105.

¹⁸⁷ *Id.* at 103.

¹⁸⁸ *Id.* at 137.

¹⁸⁹ *Id.* at 136 (“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.”); see Press Release, Sabre, 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/> [<https://perma.cc/2CVM-PJ44>] (noting that subsequently, in May 2020, the parties abandoned the deal after the UK’s Competition and Markets Authority’s decision to challenge the deal).

¹⁹⁰ *Sabre Corp.*, 452 F. Supp. 3d at 106.

¹⁹¹ *Id.* (describing the indirect channel represents forty percent of all ticket sales).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 108.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 110.

¹⁹⁷ *Id.* at 111.

nal 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.”¹⁹⁸

FLX OC is Farelogix’s NDC, which it sells to airlines and monetizes on a per ticket basis.¹⁹⁹ 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.²⁰⁰ For the indirect channel, FLX OC allows airlines to connect with various travel agencies, thus “bypassing” GDS platforms, such as Sabre.²⁰¹ 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.’”²⁰² Finally, FLX OC could also more efficiently connect an airline’s internal system with a GDS—a practice labeled “GDS passthrough.”²⁰³

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 that require market mechanisms to facilitate matching. Thus, airlines have found it optimal to use intermediaries, such as travel agencies, to help sell tickets.²⁰⁴ 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 a 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 rec-

¹⁹⁸ *Id.* at 112.

¹⁹⁹ *Id.* at 113.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 114.

²⁰³ *Id.*

²⁰⁴ *See id.* at 107–08. In this sense, travel agencies could, themselves, be platforms that match airlines with travelers.

ord . . . supports a prima facie case . . . the Court further concludes that Defendants have rebutted the government's prima facie case.²⁰⁵

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.²⁰⁶ Thus, critics have argued that the *Sabre* decision illustrates the problems with *Amex*.²⁰⁷

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*.²⁰⁸ Specifically, the DOJ attempted to argue that OTAs do not compete with direct channel sales to travelers, such as through Delta.com.²⁰⁹ This point did not persuade the judge, given the testimony of both economic experts.²¹⁰ 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.²¹¹ For instance, the judge found "[t]he record does not establish that building an adequate 'NDC booking services solution' is particularly difficult."²¹²

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."²¹³ Highlighting this tension, the judge later 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.'"²¹⁴ Further, the judge found airline.com to be a relevant competitor to OTAs.²¹⁵ Yet, an airline's website is not a multisided platform,²¹⁶ 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*.

²⁰⁵ *Id.* at 136.

²⁰⁶ *Id.*

²⁰⁷ *See, e.g.,* Stutz, *supra* note 4, at 3 ("*Sabre* still demonstrates why *Amex* was flawed at inception and remains incoherent and unworkable in application.>").

²⁰⁸ *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 143 (D. Del. 2020).

²⁰⁹ *Id.* at 141.

²¹⁰ *Id.*

²¹¹ *Id.* at 143.

²¹² *Id.* at 145.

²¹³ *Id.* at 136.

²¹⁴ *Id.* at 146.

²¹⁵ *Id.* at 141.

²¹⁶ *See* Kostis Hatzitaskos et al., *A Tale of Two Sides: Sabre/Farelogix in the United States and the UK*, 12 J. EUR. COMP. L. & PRAC. 698, 703 (2021).

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.²¹⁷ 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 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.²¹⁸ 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 and 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 as an input 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,²¹⁹ the limitation is on the actual nature of the conduct (that is, an acquisition) and whether the conduct materially affects 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.²²⁰

C. Epic Games v. Apple (2021)

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, Sec-

²¹⁷ See Coase, *supra* note 19, at 390–91.

²¹⁸ See generally Evans & Schmalensee, *supra* note 77, at 689.

²¹⁹ *Sabre Corp.*, 452 F. Supp. 3d at 137–38.

²²⁰ See, e.g., *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 69 (2d Cir. 2019) (vacating the district court's ruling, which held that the question of whether a market is a platform is to be determined by the court—not the jury).

tions 1 and 2, which allowed Apple to gain monopoly power and raise prices to supra-competitive levels.²²¹ 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's in-app-payment processor (IAP) and using an antisteering provision that prevented developers from communicating to iPhone users alternative outlets to download content.²²² While the district court largely ruled in favor of Apple,²²³ Epic has appealed the decision to the Ninth Circuit.²²⁴ Given this appeal and other antitrust litigation challenging App Store policies,²²⁵ the antitrust claims brought by Epic are still live legal issues that 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, in which Apple takes a 30 percent commission.²²⁶ The key question is whether the alleged anticompetitive behaviors materially affect 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."²²⁷ Citing *Amex*, the court considered the App Store to be a "transaction platform."²²⁸ 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,

²²¹ *Epic Games, Inc. v. Apple Inc.*, 599 F. Supp. 3d 898, 921, 923, 1033, 1043 (N.D. Cal. 2021).

²²² See Complaint for Injunctive Relief, *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, 2020 WL 12623035 (N.D. Cal.) Notably, after Epic's initial complaint was filed, Apple settled with a class of developers and announced that the antisteering provision would no longer be enforced. See Press Release, Apple, 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/> [<https://perma.cc/MK97-Q6NZ>].

²²³ See *Epic Games, Inc.*, 599 F. Supp. 3d at 921–22. The court did find, however, that the antisteering provision violated California state antitrust laws. *Id.* at 922.

²²⁴ Notice of Appeal, *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR-TSH (N.D. Cal. Sept. 12, 2021).

²²⁵ See Second Amended Consolidated Class Action Complaint & Demand for Jury Trial, *In re Apple iPhone Antitrust Litig.*, No. 11-CV-06714 (N.D. Cal. Sept. 5, 2013).

²²⁶ See Class Action Complaint & Complaint for Violation of the Sherman Act and California Unfair Competition Law at 38–43, *Cameron v. Apple Inc. (In re Apple iPhone Antitrust Litig.)*, No. 19-CV-03074-YGR (N.D. Cal. June 4, 2019); see also Complaint & Jury Trial Demanded at 9, 19, *Saurikit, LLC v. Apple Inc.*, No. 4:20-CV-08733-YGR (N.D. Cal. Dec. 10, 2020).

²²⁷ *Epic Games, Inc.*, 599 F. Supp. 3d at 921.

²²⁸ See *id.* at 1046.

well, excludes competing app stores.²²⁹ However, the judge accepted Apple's efficiency defense in Step Two based on security and privacy rationales.²³⁰ Finally, in Step Three, the judge determined that Epic failed in its burden to show Apple could achieve those efficiencies through less restrictive means.²³¹ 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, from an economic perspective, whether the ruling follows *Amex* is irrelevant. On the issue of exclusivity, the judge 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's IAP does not necessarily involve significant network effects. Rather, the mandate is more of a straightforward vertical control. While the restriction conceivably 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.

²²⁹ *Id.* at 1037 ("Having carefully considering [sic] 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.").

²³⁰ *Id.* at 1038 ("Here, the Court finds Apple's security justification to be a valid and nonpretextual business reason for restricting app distribution.").

²³¹ *Id.* at 1041 ("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.'").

CONCLUSION

After *Amex* and subsequent cases, antitrust is seemingly at a crossroads regarding 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 affects, 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.