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Platforms, *American Express*, and the Problem of Complexity in Antitrust

Chris Sagers
Cleveland-Marshall College of Law, Cleveland State University, c.sagers@csuohio.edu

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I. INTRODUCTION

Everything about *Ohio v. American Express*[1] was wrong and the adoption of "two-sided platform" reasoning into American antitrust law might be one of its worst, most regrettable wrong turns in decades. That is not because the original theoretical model of two-sided interaction has anything wrong with it at all. It is rather that nothing

* James A. Thomas Distinguished Professor of Law, Cleveland State University, *c.sagers@csuohio.edu.* In the course of preparing this Article, I noted that to an unusual degree the leading research published in this area has been either funded by credit card companies or written by authors who have worked for them. *Cf.* Brief for *Amici Curiae* Ahold U.S.A., Inc. et al., In Support of Petitioners at 13–21, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454). Therefore, it seemed worth stating that I have never received any funding, from anyone, for this or any other research.

That said, I signed briefs of amici curiae supporting plaintiffs in the case, on behalf of antitrust professors. Brief of 28 Professors of Antitrust Law as *Amici Curiae* Supporting Petitioners, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454); Brief of *Amici Curiae* 23 Antitrust Law Professors and Scholars in Support of Petition for Rehearing En Banc, United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016) (No. 15-1672).

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

could be gained by incorporating it that could be worth the result in the *American Express* case itself, or the difficulty that has likely been invited into antitrust litigation. The consequences are hard to predict, but they may be severely limiting to our already moribund antitrust enforcement. I will offer two major responses in this Article. Part II states a simple theoretical argument to demonstrate an important mistake in *American Express*. It was crucial for the *American Express* majority to characterize its decision as simply a problem in product market definition, but for the strictly strategic purpose of requiring plaintiffs to prove that where markets are two-sided, the challenged conduct reduces the quantity of the *jointly demanded product*. However, quite contrary to the majority's self-assured confidence, the anti-steering rule at issue indeed could cause serious harm without reducing the quantity of the jointly demanded card-swipe transactions. The harm is dynamic and depends on the fact that, contrary to platform theory's presumption, elasticities are neither fixed nor exogenous. Part III then explains how a deeper epistemological problem inherent in cases like *American Express*, and in conservative antitrust law more generally, poses very serious risks for the policy.

This reflects an old problem in antitrust. Ronald Coase once famously mocked the "preoccupation" of mid-century economists "with the monopoly problem."[2] When such "an economist finds something . . . that he does not understand," said Coase, "he looks for a monopoly explanation."[3] Like some others of his little witticisms, that line has been quoted dozens of times, usually to show how laughable the economic mainstream of his day was, and really the antitrust enterprise itself. Because Coase further believed that "in this field we are very ignorant," he thought that "the number of ununderstandable practices tends to be rather large, and reliance on the monopoly explanation, frequent."[4] It was all quite absurd, you see.

If anything was absurd about it, though, it was just that the monopoly preoccupation generated policy that seemed to Coase contrary to prudent common sense. When Coase said that thing in 1972, the Warren Court had effectively outlawed non-conglomerate acquisitions of any size and literally all limits on intra-brand resale competition.[5] The Court had very recently held components of seemingly desirable

2. R.H. Coase, *Industrial Organization: A Proposal for Research*, 3 Policy Issues and Research Opportunities in Industrial Organization 59, 66–67 (Victor R. Fuchs, ed., 1972), *reprinted in* The Firm, the Market, and the Law 57–74 (1988).
3. *Id.*
4. *Id.*
5. Lawrence A. Sullivan et al., The Law of Antitrust: An Integrated Handbook 319–27, 472–73 (3d ed. 2016).

joint ventures per se illegal,[6] and the enforcement agencies were in the midst of several huge, long-running monopolization challenges. But even following those strictures, a popular clamor, led in part by Ralph Nader, was gaining ground, stressing that American antitrust had been much too *soft* on monopoly, and Congress was considering blue-ribbon-panel recommendations for the nation's first general, no-fault deconcentration law.[7] From Coase's point of view, the antitrust law of his day risked serious harm to the American economy to protect against the merest possibility of confiscated surplus or deadweight loss. The monopoly preoccupation seemed like it was wagging the whole dog of competition policy, so much and so knee-jerkingly so that it seemed driven more by the economists' ideology than by the search for empirical truth.

Well, if that sort of thing was absurd in Coase's day, then it is absurd today as well. It was accordingly frustrating to read yet another opinion like *American Express.* That was only partly because listening to Clarence Thomas talk about American Express was like listening to Donald Trump talk about Vladimir Putin.[8] What was not merely tedious was that something seems pretty far out of whack in American payment systems, and yet the Court allowed the merest possibility of accidental impediment to private enterprise to wag the entire dog of competition policy. On the one hand, credit cards are in hugely common use even though they are more costly to society than other payment systems, and there is no strong evidence that (absent cardholder premiums) they especially benefit either merchants or cardholders.[9] Something has apparently gone wrong in these markets that shouldn't happen if they were working well. On the other hand, the challenged conduct seemed like a grossly, facially anticompetitive restraint imposed by the number two firm in a three-firm oligopoly, preserving a practice the three of them had long followed until the other two gave it up in the course of the same litigation. The restraint seemed ugly even within the terms of the "two-sided" or "platform market" theory the Court would adopt for it. It went to inter-system competition of the kind that William Baxter condemned in his famous original formula-

6. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967).

7. All this history is nicely explained in William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989). *See also* Herbert Hovenkamp, *Introduction to The Neal Report and the Crisis in Antitrust & a Reprint of the Neal Report*, 5 COMPETITION POL'Y INT'L 217 (2009) (examining the history in more detail).

8. *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2282 (2018) (explaining that by offering its "superior rewards," American Express has "stimulated competitive innovations," "increas[ed] . . . volume," "improv[ed] . . . quality," and even served as a boon to the poor).

9. *See infra* section III.A.

tion of the problem.[10] It also involved massively mature platforms, in which the incremental network value of additional participants closely approximates zero. Yet American academia and a majority of the Supreme Court bent over backwards to give that conduct the benefit of the doubt. The Court invoked the prohibitive machinery not only of the rule of reason but of a new, bespoke variation on it that may be quite a bit more demanding. It did that on no more than an a priori demonstration that any stricter rule might jeopardize some possible benefit, the size of which we can only guess.

It is not just the *American Express* case that is put in issue by this sort of thing, or its particular economic theory. A deeper and generalizing purpose lurks within any such case, and in all conservative antitrust law. Much more than mere mockery, Coase and those quoting him have meant to imply a claim of fundamental epistemology and policy. The claim is that law and social science should work in the same way, so that where social science would be cautious the law must be too. That claim defines the conservative ideology that has dominated American antitrust law for fifty years.

But, in turn, *American Express* entails a strong empirical assumption for which there is no systematic confirmation of any kind. It presumes that in the presence of ignorance it is better not to act than to act. Putting it a different way, it presumes that choosing not to act in the administration of public policy is the same thing as choosing not to decide in science. But that does not follow at all. In science, to reject a hypothesis typically has no real consequences. It is a protocol of intellectual hygiene that is usually just the equivalent of keeping an open mind and thinking some more. Choosing not to enforce the law is not like that at all. It is deliberate and practically significant, because it might permit conditions to fester that threaten worse loss than mistaken government action. It is emphatically not just some neutral stance of healthy caution; it is ideological, no less than the monopoly preoccupation of yore. That is so because whether reticence is always or even usually better than action is empirical, and it seems fraught, complex, and unknown.

This Article will ask as an initial question whether the stance taken in *American Express* was a worthwhile prophylaxis, comparing the cost of its rule to the likelihood that some good was done by giving credit cards this much leeway. I think the answer is no. It was a counterproductive mistake. On the one hand, the history of the industry is not easy to explain; it seems complicated and it could be explained in different ways. But it is still not so hard to answer the question. The likelihood that enforcement would inadvertently cause

10. William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & ECON. 541, 586–87 (1983).

harm to the industry seems very small and the cost of failing to enforce the law seems large. As a great appellate advocate wrote in briefing before the *American Express* Court: "whether theoretically accurate or not," special rules for purportedly special cases "introduce occasions for lower courts to miss the forest for a tree they have misunderstood and that was never necessary to plant."[11]

The problem in letting theory like this invade antitrust law is not just that it gets one case or one narrow context wrong. It may very well be that liberals like me have overreacted to *American Express*, and that it will seem limited in hindsight. Many critics of my persuasion took *Credit Suisse*[12] as a very dangerous, foreboding case, but then it was basically never applied outside its narrow context of exchange-listed securities.[13] *Illinois Brick*[14] in its day was taken by the plaintiff bar as the end of their enterprise until they discovered that state law would permit indirect purchaser actions, and that in many cases they could find direct purchasers who would bring federal claims. I hope that *American Express* will be like that. I hope it will be like another antitrust decision by Justice Thomas, the weirdly illogical *Texaco v. Dagher*,[15] which seemed to turn on a misunderstanding of the ancillary restraints rule. *Dagher* seemed scary at the time,[16] but it was quickly rendered essentially irrelevant by *American Needle*.[17] If it has any significance at all going forward, it will be limited pretty closely to its facts.

I'm not as confident that that will be the case with *American Express*, because times have changed a fair bit. This is in a large part because of judicial appointments, and above all the appointment of Justice Kavanaugh. In practice, in these modern times the personnel of the Court has seemed quite a lot more important than the strength of ideas.[18] So, at a bare minimum, I expect we've wound up with an

11. Brief of 28 Professors of Antitrust Law as *Amici Curiae* Supporting Petitioners, *supra* note * (drafted and filed on behalf of amici by Eric Citron of Goldstein & Russell, PC).
12. Credit Suisse Sec. LLC v. Billing, 551 U.S. 264 (2007).
13. For example, *Credit Suisse* was used to repeal antitrust implicitly in the narrow context of *Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC*, 588 F.3d 128 (2d Cir. 2009), but in other cases, even in seemingly analogous contexts of regulated commodities or financial transactions, *Credit Suisse* has been distinguished. *See* A.B.A. SEC. OF ANTITRUST LAW, HANDBOOK ON THE SCOPE OF ANTITRUST (Christopher L. Sagers ed., 2014).
14. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).
15. Texaco Inc. v. Dagher, 547 U.S. 1 (2006).
16. *See* Chris Sagers, American Needle, Dagher, *and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?*, THE ANTITRUST SOURCE, 2009, at 1 https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug09_FullSource.pdf [https://perma.unl.edu/XAX3-8FJC].
17. Am. Needle, Inc. v. Nat'l. Football League, 560 U.S. 183 (2010).
18. *See* Chris Sagers, *#LOLNothingMatters*, 63 ANTITRUST BULL. 7, 20–24 (2018); Chris Sagers, *Antitrust, Political Economy, and the Nomination of Brett Kava-*

effectively impregnable antitrust immunity for a three-firm oligopoly. It seems pretty likely, however, that it will extend further. I fear that quite unlike *Dagher*'s career, *American Express* will be for platform theory what *Sylvania* was for free riding. "Free riding" was another theoretical advancement so self-evident that it could not be doubted, and it wound up rendering an entire class of potentially harmful conduct effectively per se legal. That remains the case even though, nowadays, even the chief apologists for that conduct acknowledge that explaining it by free-riding was probably quite wrong.[19]

II. THE GREAT GENERALIZATION

Something old and important is lost sight of in a case like *American Express*, and in theoretical efforts like the one on which it is based. A rarely discussed idea built into American antitrust is that, as far as the law is concerned, markets are all pretty much the same.

While opinions have varied over time about what should be illegal and what should not, they mostly have not varied about how broadly the law should apply. "Language more comprehensive" than that in the antitrust statutes, the Supreme Court has said, "is difficult to conceive,"[20] and accordingly the Court is convinced of Congress's desire "to strike as broadly as it could."[21] Thus, claims for exemption are at least nominally frowned upon.[22] More importantly, courts have been

naugh, HARV. L. & POL'Y REV.: NOTICE & COMMENT (Sept. 19, 2018), http://harvardlpr.com/2018/09/19/antitrust-political-economy-and-the-nomination-of-brett-kavanaugh/ [https://perma.unl.edu/2VFH-RYXN].

19. *See* Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, 76 ANTITRUST L.J. 431 (2009). *See generally* Warren S. Grimes, *A Dynamic Analysis of Resale Price Maintenance: Inefficient Brand Promotion, Higher Margins, Distorted Choices, and Retarded Retailer Innovation*, 55 ANTITRUST BULL. 101 (2010) (collecting criticism of the free-riding explanation).
20. United States v. Se. Underwriters Ass'n, 322 U.S. 533, 553 (1944).
21. Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975).
22. The Supreme Court did so in some of its earliest antitrust cases, as when it applied the law against the railroads, despite them having been otherwise regulated shortly before 1890. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 314–27 (1897). Since then the courts have observed a strong presumption against judge-made limits, *see, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 350 n.28 (1963); Associated Press v. United States, 326 U.S. 1, 20 (1945), and they purport to construe statutory exemptions narrowly. *See, e.g.*, Union Lab. Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956); Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 671–72 (7th Cir. 1992). Each of the many blue-ribbon antitrust study commissions established by Congresses and Presidents of both parties have urged repeal of existing exemptions and warned against new ones. *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 338, 340–41 (2007); Phil C. Neal et al., *Report of the Task Force on Productivity and Competition*, 2 ANTITRUST L. & ECON. REV. 11 (1968); REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY (1969), *reprinted in* 1 J. REPRINTS ANTITRUST L. & ECON. 827 (1969); ATTORNEY GEN.'S

mostly hostile to claims that when antitrust rules apply, they should work in different ways to account for the special problems of particular markets. As a still broadly basic American rule it is no defense to attack competition itself.[23] "Whatever may be [the] peculiar problems and characteristics" of any given market, the Sherman Act "establishes one uniform rule applicable to all industries alike."[24]

A few related ideas built into the law are deeply implicit, rarely mentioned, and relevant. Taken together, they amount to an empirical vision of markets for use in antitrust litigation. First, antitrust law measures outcomes only within partial equilibria and on a relatively static basis. If a practice causes a net loss in its local market, it is (supposed to be) legally irrelevant that it generates benefits in some other market.[25] Likewise, we define markets to include only those competitors presently in them or that easily could be,[26] and claim at least nominally that subsequent entry does not matter unless it will be pretty fast and pretty effective.[27] Innovation and dynamic concerns can be important in particular cases but ordinarily play no direct role.

COMM. TO STUDY THE ANTITRUST LAWS, REPORT 269 (1955). Indeed, the so-called "Shenefield Report" of 1979 contained seven full chapters comprehensively calling for their drastic limitation or repeal. 1 NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAW AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 177–316 (1979).

23. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."); *Phila. Nat'l Bank*, 374 U.S. at 371 (holding that conduct challenged in antitrust "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted [the antitrust laws].").

24. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940).

25. *Phila. Nat'l Bank*, 374 U.S. at 370–71; U.S. DEP'T OF JUSTICE & FAIR TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 30, 30 n.14 (2010) [hereinafter 2010 HMGS]. As with so many other rules, modern practice has started chipping away at the out-of-market efficiencies rule. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 56–57 (2006).

26. 2010 HMGS, *supra* note 25, at 15–16.

27. Thus, the familiar SSNIP test of market definition is generally applied by asking how many consumers would switch from some set of products if the price were raised for 5% for one year. (The *Guidelines* no longer state an explicit time-frame for measuring "non-transitory" increases, but the 1982 *Guidelines* specified one year, and agency practice since seems generally to have followed that rule. *See* John Harkrider, *Operationalizing the Hypothetical Monopolist Test*, U.S. DEP'T OF JUST., 4, 4 n.8 (June 25, 2015), https://www.justice.gov/sites/default/files/atr/legacy/2007/08/30/202598.pdf [https://perma.unl.edu/NA73-TWJ4].) Likewise, once markets are defined, entry is considered relevant only if it will be "timely, likely, and sufficient," and the agencies at least purport to apply that standard aggressively. *See* 2010 HMGs, *supra* note 25, at 27–29.

This is all to say that we usually care what happens in *this* market, and care about it only if it will happen, more or less, *now*. Finally, in antitrust law we do not ask whether the goods in question are important, or how they relate to other goods or services, or to labor or leisure or any such thing. A cartel in paper clips is as illegal as one in heart medicine or staple foods and it triggers the same remedies.

Built into the policy, then, is an even deeper empirical generalization. If antitrust should almost always apply to almost all sectors and apply its handful of essentially simple rules in the same way to all of them, then our policy must contain a commitment that markets are in fact mostly the same. They are in need of pretty much the same degree of simple price competitiveness, and they do not often differ in ways relevant to antitrust law. Moreover, by attending only to the price-competitiveness of more-or-less static partial equilibria, without too much clemency or variation for case-by-case peculiarities, we presume that healthy markets can solve problems on their own, and that they will do the best we can do to account for general equilibrium considerations. Instead of trying to solve the economy's problems directly by private self-regulation or government oversight, we do our best just to preserve the price competition that is its "central nervous system."[28]

Call it populism or knee-jerking ideology or whatever else if that is your inclination, but this particular brand of free-market fundamentalism is not really a substantive or ideological faith, or at least it need not be. It can seem so simplistic, sometimes so zealous and naive, but there is a reason antitrust law has usually made this presumption of broadly similar, self-sufficient markets rather than let defense experts spin out whatever speculations they can dream up. As Taft explained a long time ago, we abjure the sea of doubt for the practical sake of having the policy at all.[29] It is effectively a legal fiction to believe that markets are the same in policy-relevant respects, and that their problems are redressable through partial and comparatively static analysis. Otherwise, the policy wouldn't be worth the cost.[30] There is a

28. *Socony-Vacuum Oil Co.*, 310 U.S. at 224 n.59.

29. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899) (refusing "to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not," because that would be to "set sail on a sea of doubt").

30. *Cf.* United States v. Am. Express Co., 88 F. Supp. 3d 143, 230 (E.D.N.Y. 2015), *rev'd and remanded sub nom.* United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) ("the law does not permit American Express to decide on behalf of the entire market which legitimate forms of inter-brand competition should be available and which should not."); PHILIP I. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 562e, 101 (Supp. 2017) (writing of the *American Express* case that "competition," rather than private restraints, "should choose the optimal mix of revenue between the two sides.").

certain delicious irony in the fact that this market liberalism has come to be opposed much more by defendants and the political right than by the left.

Indeed, there is a nice anecdotal record that markets tend to work out solutions, even when clever theorists explain hypothetically before the fact that they will not. That was true of the initial problem of "destructive" price rivalry. It turned out to be a blackboard problem, even in the presence of high fixed costs, because entrepreneurs and their financiers avoid entry that would be suicide, and, in any event, with a little differentiation prices do not actually go below average cost.[31] Likewise, it seemed to some for some time that there might be "empty cores" in some markets, for technological reasons, that would prevent them from achieving equilibrium. One such sector was thought to be ocean shipping for the simple and seemingly obvious reason that ships are big and each one of them has a large capacity. Capacity could not (or so it seemed) be added or subtracted except in such large increments that equilibrium would almost certainly be some point in between the addition or subtraction of the last ship. However, when the antitrust immunity was finally removed for the shipping rings said to be needed to solve that problem, ship owners managed to solve it quite nicely with leasing and space-sharing agreements.[32] Similarly, when network effects were first elaborated, there followed many suggestions that competition would not be workable in network markets, because competition would be "for the field." But it turns out that in many such products competition can flourish so long as designs can be standardized and shared, at least where the effect follows from some need for technological interoperability.

Nevertheless, a strong tension has run through the law's history to challenge this simplicity. Since the very beginning—in *Addyston Pipe*, for example, and even earlier—the tension has manifested in theoretical critiques of competition itself.[33] Courts have indulged that instinct from time to time, and especially have done so in this latter season, even though it seems deeply unlikely that Congress intended the law to proceed by graduate social science seminar. Economists in both 1890 and 1914 were largely excluded from the law's formulation. The

31. *See* Hovenkamp, *supra* note 7; Russell Pittman, *Who Are You Calling Irrational? Marginal Costs, Variable Costs, and the Pricing Practices of Firms*, U.S. DEP'T OF JUST: ECON. ANALYSIS GROUP DISCUSSION PAPER (July 2009), https://www.justice.gov/atr/who-are-you-calling-irrational-marginal-costs-variable-costs-and-pricing-practices-firms [https://perma.unl.edu/5WGM-7QLP].

32. Chris Sagers, *The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics*, 39 VAND. J. TRANSNAT'L L. 779 (2006).

33. *See, e.g.*, Hovenkamp, *supra* note 7, at 220 (noting that the theory of "destructive" price rivalry was already recognized in Marshall's *Principles of Economics* in 1890).

dozen or more times since then that Congress has intervened to reverse judicial interpretations it has almost uniformly been to favor a more pro-enforcement law, and sometimes explicitly to reject over-complexity. But put that aside for now. The next immediate question is whether something about credit cards or platforms is a reason that this time is finally different.

III. ANTIRUST WITHOUT PLATFORM THEORY

Whether antitrust law is better off without platform theory seems really like two broad questions. The first is whether there is something especially good to preserve in typical platform markets that couldn't just be handled by the antitrust rules we've got. I'll suggest that the answer is no, using credit cards as the example. Second is whether incorporating theory like this into antitrust invites bigger problems than it is worth. I'll suggest that the answer is yes.

The point will not be to show that the two-sided interaction phenomenon does not exist. It seems trivially obvious that it does on some level and no one seriously doubts it. Both the problem of joint demand and interdependent externalities seem to characterize common examples given for two-sided interaction, like advertiser-supported newspapers, broadcast radio and television, and so on. Indeed those features also seem to characterize multi-party payments systems. The question is just whether something was preserved by the anti-steering rule that was worth making it so hard to challenge.

A. Are Credit Cards Really a Boon to Society and Would Non-Platform Antitrust Wreck It?

The entire two-sided market agitation seems strange and counterintuitive from a traditional antitrust point of view, and maybe too clever for its own good. One of the strangest things about it is captured in this observation from *American Express*: "[T]he fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing."[34] That seems like bizarre, shifty double-speak, for the following reason: *Pricing within a range of demand inelasticity is a textbook definition of market power*.[35] It is nevertheless a basic claim in the literature, and Justice Thomas borrowed it almost verbatim.[36]

34. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–86 (2018).
35. *See, e.g.*, JEFFREY M. PERLOFF ET AL., ESTIMATING MARKET POWER AND STRATEGIES (2007).
36. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2285–86 (citing Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 574 (2006)).

It does appear, however, that pricing differentials like this can sometimes occur, even under vigorous competition. The problem follows from joint demand. From the beginning of platform theory, theorists observed that even under perfect competition, the platform operator may have a rational incentive to raise price on one side and lower it on the other. That incentive follows from a problem of joint demand that must be aggregated across two sets of consumers. Ordinarily it wouldn't matter that consumers value a good differently, because each consumer's desire is independent of all the others. It is not necessary that all of them buy at any given price for the market to reach equilibrium. In the case of a payment system, by contrast, two different consumers (the merchant and the retail consumer) must both be persuaded to consume the card-swipe transaction. Their two demand curves must both be consulted to know what each would pay for the payment method at any particular quantity, and they each must be charged only that much or the transaction won't happen. Their interests in using the method are unlikely to be identical because the benefits they get from it will differ. For this reason, even under perfect competition, the platform operator will apportion its own costs of producing the transaction between the parties according to their elasticity—their willingness to pay at any given output. That likely will be at different prices. Incidentally, platforms therefore might solve a Coasian problem. The parties might have difficulty negotiating the efficient allocation of the costs between them, and each would be tempted to understate its own desire for the transaction.[37]

Nevertheless there is a very nice anti-competitive story of the anti-steering rule that is perfectly consistent with these two-sided effects. It depends on an oversight in the theory, or at least in legal applications of it. Specifically, it takes elasticities as fixed and exogenous.

First, however, it is important to the story to point something else out. Two-sided or no, competitive markets should still favor socially lower-cost technologies over time. That seems not to have happened in American payment systems, or at the least their evolution has not been very responsive to costs in this way.

1. Do Credit Cards Do Anything Special?

Credit cards are comparatively expensive and there is no clear evidence that they do anything especially better than their alternatives, but they have been heavily used. Showing that might seem complex, and indeed the payment systems literature involves some very complex modeling. Fortunately, however, the only really complex question is one that is not relevant here—why payors choose one medium over

37. *See* Baxter, *supra* note 10, at 542–49.

another when they can choose among alternatives.[38] That problem mostly concerns private costs and benefits, which are not my concern. The social costs are studied in a more straightforward, mostly empirical literature.

By a significant margin, credit cards are the costliest payment mechanism available in most countries. The cheapest method for point-of-sale retail transactions—cheaper even than cash, perhaps by a pretty large margin—is the PIN debit card.[39] But, while debit cards have grown considerably in use, they still distantly trail credit cards in the United States in value of payments.[40] And, to be clear, the cost estimates in the literature account only for the direct social costs—only the resources used in processing and securing the payments. They do not account for the allocational effects if any of those charges are supra-competitive, or the systemic risk of excessive consumer debt, or the macro or distributional consequences of high-risk lending to the poor. Unless there is some anticompetitive explanation, a more costly technology should dominate only if its users benefit in some way that outweighs its additional costs.

38. The complex literature that asks it begins with a pair of papers that worked out the "Baumol-Tobin" model of transactions-demand for cash. William J. Baumol, *The Transactions Demand for Cash: An Inventory Theoretic Approach*, 66 Q.J. ECON. 545 (1952); James Tobin, *The Interest-Elasticity of Transactions Demand for Cash*, 38 REV. ECON. & STAT. 241 (1956). There followed some decades of very complex mathematical modelling of the demand for different payment media. *See, e.g.*, Anthony M. Santomero & John J. Seater, *Alternative Monies and the Demand for Media of Exchange*, 28 J. MONEY, CREDIT & BANKING 942 (1996) (surveying literature and adding further modelling). The question has also generated a substantial empirical literature. *See, e.g.*, Kenneth A. Carow & Michael E. Staten, *Plastic Choices: Consumer Usage of Bank Cards versus Proprietary Credit Cards*, 28 J. ECON. & FIN. 216 (2002) (surveying literature).

39. Fumiko Hayashi & William R. Keeton, *Measuring the Costs of Retail Payment Systems*, FED. RES. OF KAN. CITY ECON. REV., Second Quarter 2012 at 37, 57 (2012), https://www.kansascityfed.org/~/media/files/publicat/econrev/econrevarchive/2012/2q12hayashi-keeton.pdf [https://perma.unl.edu/PEF8-KCHQ].

Defenders of the card companies point to one unpublished paper, funded by Visa, that found credit cards to be no more socially costly than other payment systems. Daniel D. Garcia-Swartz et al., *The Economics of a Cashless Society: An Analysis of the Costs and Benefits of Payment Instruments*, AEI-BROOKINGS JOINT CTR. ON REG. STUD., (Sept. 2004), https://www.researchgate.net/publication/265496400_The_Economics_of_a_Cashless_Society_An_Analysis_of_the_Costs_and_Benefits_of_Payment_Instruments/download [https://perma.unl.edu/MR7U-JAKM]. That paper is at odds with most other estimates and depends for its results on certain significant judgments. It excludes fixed costs entirely in counting "social cost." Measuring incremental cost is a proper measure of short-run individual choice, and so it makes sense as an explanation why a consumer would choose a particular payment method among those on their person and accepted by a given merchant. But it is not a complete measure of social cost.

40. U.S. FED. RES. SYS., THE FEDERAL RESERVE PAYMENTS STUDY 2016 2–4 (2016) [hereinafter FED. PAYMENT STUDY 2016].

But indeed, the only additional benefits of credit cards seem like relatively minor services. For consumers they combine a small payment-systems convenience with a credit facility of a few thousand dollars at very high interest. For all the expanse of the literature, there is fairly little systematic effort to show that credit cards do any particular good in the world to justify their cost. To be clear, plenty of people, who oftentimes have worked for or been subsidized by the card companies, have been willing to say things like that they are "great innovations," on par with "the microchip, the personal computer, and the cellular telephone," so significant that they "have transformed how people live."[41] But there is less in the way of meaningful analysis of those claims, and in particular almost no plausible effort to show that credit cards specifically do anything better than their alternatives. In a sixty-page law review article heavily relied on in *American Express*, that touched on seemingly every argument ever raised in the debate, the only effort to show that credit cards "create social benefit" is an unelaborated claim in a footnote that they provide "relatively cheap . . . credit."[42] That would seem uncommonly weak even were it supported by more than citation to one article written by a credit-card executive.[43]

Most payors don't much use that line of credit as such, and few probably should. That is, they don't use cards to earn float, and those who finance purchases that they would not otherwise have made probably shouldn't. As to the former, the float most consumers can make on credit cards has long been minuscule.[44] The evidence is that small

41. Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 515 (2005); Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not So Crazy*, 73 U. CHI. L. REV. 63, 63 (2006).

42. Klein et al., *supra* note 36, at 621 n.113.

43. *See id.* (citing Brown & Plache, *supra* note 41, at 71–74). At the time the cited article was written, author Brown was a senior counsel for antitrust at Visa, Inc.

44. Claims are occasionally made to the contrary, *see, e.g.*, Muris, *supra* note 41, at 526, n.30, but for most consumers it is really implausible. Imagine that a consumer averages $1000 in consumer purchases per month. By using a credit card the consumer can keep $1000 in cash invested for about one month, which is roughly the interest-free grace period for most credit card payments. The money to pay off card debt must be quite liquid, because it must be accessible every month, so it likely must be kept in a savings account or some similarly liquid form. At present, the average interest rate for no-minimum-balance savings accounts in the United States is less than one-tenth of one percent. The float on $1000, even if the interest compounds daily, would therefore be on the order of about eight or nine cents per month.

Savings interest rates are presently rising, after many years at very low levels. Also, money market accounts and other options might be relatively liquid alternatives for some consumers to get somewhat higher rates. But even if overall average rates reach levels they have not seen in a long time—say, 2.5%—the monthly float on $1000, compounded daily, would be about two dollars.

amounts of it do not influence consumer behavior,[45] and if anything it may just encourage inefficient payments methods and technologies that would be avoided if negotiation were less costly.[46] Whatever its value, moreover, in this case it is a strictly private good. Credit card float is just a transfer from payees to payors.

As to the other possible special value of credit cards, that consumers use them to finance purchases by carrying balances beyond the interest-free grace period,[47] they do in fact do it, of course. Visa and Mastercard earn the majority of their revenue from it. Whether that is a meaningful social good is a matter of strong opinions, but for what it is worth, the evidence is fairly clear that credit card borrowers are uncommonly vulnerable. Interestingly, both card ownership and use are correlated with education, income, age, and other indicators of stability, but use of cards for *borrowing* is predominantly by the young and the poor.[48] No consumers probably should revolve credit card balances, in other words, and when they do, it is typically because they are desperate or making bad decisions.

In any event, for merchants, the chief benefit in the absence of consumer rewards—I will have more to say about rewards in a second, because I think they are a mechanism of anticompetitive harm—is quick and ensured payment. But as to that, credit cards are of less value than cash. In the end, the only uncontroversial social good in payment cards is just a minor convenience. They obviate the need to carry cash for all one's purchases.[49] And so, the business of processing payments is very valuable to credit card companies, but not because

In any event, these amounts are so small that several years' worth of them could be outweighed by the fees, penalty, and interest for even one late payment.

45. *See, e.g.*, Kirstin E. Wells, *Are Checks Overused?*, FED. RES. BANK OF MINN. Q. REV., Fall 1996, at 2, 4 (finding that check usage grew substantially during a period in which falling interest rates and faster check processing caused the amount of available float to fall drastically). Business payors and payees undoubtedly do consider float in arranging payments of any meaningful size, but for that reason they individually negotiate those arrangements, and they do not by and large make them by credit card. *Cf. id.*

46. An extremely interesting paper by two federal reserve bank economists set out a careful Coasian analysis showing that the hunt for float has probably driven inefficient investments. Frictionless Coasian bargaining would likely have resulted in change to some different and more socially desirable technology years ago. McAndrews & Roberds, *infra* note 48, at 23.

47. No doubt there is some non-zero value in the ability to make purchases during the grace period, but it would already be captured by float. As just explained, the significance of float seems negligible. *See supra* note 44.

48. *See* Kenneth A. Carow & Michael E. Staten, *Plastic Choices: Consumer Usage of Bank Cards Versus Proprietary Credit Cards*, 26 J. ECON. & FIN. 216, 219–20 (2002) (summarizing empirical literature).

49. Under existing commercial law rules, credit cards provide fraud protection to payors, and that may partly explain their much greater use in e-commerce, though that would explain their prominence only relatively recently.

they provide a service of unique value either to consumers or merchants that only they can provide. Quite the contrary, their service seems both mundane and quite a bit more costly than its several alternatives.

To be clear, my point is not to argue for antitrust liability or any other government intervention because I think there is a superior payments technology. Antitrust is committed with every fiber of its being to let markets sort those problems out, and to keep markets healthy so that they can do it well. The point is to ask how credit cards enjoyed so much success and whether anticompetitive conduct had something to do with it. The story probably involves some historical, accidental path-dependence. There are some real peculiarities in the history of the U.S. payments industry, like the long and essentially unique American reliance on paper checks,[50] and the peculiar fact that many of our payment methods involve four parties instead of three.[51] However, those specific American details seem very unlikely to explain the prominence of credit cards here. Instead, a costlier product persisted precisely because those actors whose cost considerations would drive efficiency have been de-sensitized to the costs. That then leads back to the initial question, which was whether anti-steering and the rise of the credit cards have been somehow anticompetitive.

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50. Check writing in the United States is a very odd and still not well explained peculiarity. Until about 2007, Americans used paper checks for a very large majority of non-cash retail payments, much more than in comparable countries, and while payment cards are now more often used by number of transactions, checks still massively outweigh them by value. FED. PAYMENT STUDY 2016, *supra* note 40, at 2–3. That is so even though checks in the U.S. system are probably more expensive than most other methods, both socially and privately. Since an influential early paper examining this fact, David B. Humphrey & Alan N. Berger, *Market Failure and Resource Use: Economic Incentives to Use Different Payment Instruments*, *in* THE U.S. PAYMENT SYSTEM: EFFICIENCY, RISK, AND THE ROLE OF THE FEDERAL RESERVE—PROCEEDINGS OF A SYMPOSIUM ON THE U.S. PAYMENT SYSTEM SPONSORED BY THE FEDERAL RESERVE BANK OF RICHMOND (David B. Humphrey ed., 1990), a series of papers have attempted to explain it. *See, e.g.*, James McAndrews & William Roberds, *The Economics of Check Float*, FED. RES. BANK OF ATL. ECON. REV., Fourth Quarter, 2000, at 17; Wells, *supra* note 45.

The problem is usually blamed on the decentralized nature of the U.S. banking system—the result of laws that prohibited branching or expansion until fairly recently—and the difficulty of negotiating efficient systems among the very large number of individual American banks. McAndrews & Roberds, *supra* note 48, at 23. That problem was severe from very early in the history of U.S. banking, and lasted much longer than in similar nations. *See* R. Alton Gilbert, *The Advent of the Federal Reserve and the Efficiency of the Payments System: The Collection of Checks, 1915–1930*, 37 EXPLORATIONS IN ECON. HIST. 121 (2000).

51. That is, checks and all other bank-issued payment systems began as four-party systems just because there were so many banks in the United States, and that fact follows because until the mid-20th century U.S. law sharply limited branching and interstate banking.

2. *How a Platform Player Causes Harm on One Side*

Again, the thing that seems fishy about the two-sided market defense is its suggestion that abusing the parties' elasticities does not reflect market power. What's fishy about it is not the basic demonstration of joint demand. It is that the theory takes the parties' elasticities as fixed and exogenous. To think it through, consider the following imaginary example. As initially stated, it will seem rigged—one detail makes it seem anticompetitive and unredeemed. But when we relax its extreme feature we can ask whether it is really all that different from the real world of credit cards.

Imagine that in a hypothetical town, a promoter organizes a club among the townspeople to facilitate their retail purchases. Let's call it the "Star" club, because the members agree to shop only at "Star" establishments. Merchants must pay the promoter for the right to display the Star emblem on their premises, and the payment takes the form of a small commission on every sale to a Star club member. To get the townspeople to join his program, the promoter shares with them part of the commission he collects from merchants. Merchants remain free to charge whatever prices they like for their goods, except that they may not charge Star members more than other customers. The promoter might convince merchants to sign up by promising to deliver only the most desirable customers—as for example by finding those who are comparatively wealthy, inelastic, and likely to spend. On that level the arrangement might seem like just a marketing service, and in fact American Express defended its business in just that way. But it would also work as a coercive boycott to pressure merchants into joining and giving up some of their surplus. The promoter would then split the spoils with the consumer members. Just as the two-sided markets literature predicts, he will maximize his own profit by balancing payments between the two sides according to their elasticities. That seems anticompetitive, it involves only one side of the platform, and it is hard to see anything especially good that would be lost by making it illegal. Of course, what seems bad in that scenario is something that is not present in current credit card markets, and this is the way in which the hypothetical is rigged: it involves exclusivity. In the actual world, credit card holders are free to shop anywhere. However, that may not actually be such a meaningful distinction, because the anti-steering rules might have a similar effect. As with the Star club, merchants will find it unprofitable to reject a given credit card once enough customers are devoted to it. But once customer loyalty to a given card has been secured with premiums, or some other desirable features, merchants could only persuade customers to drop it by making them bear more of the cost of it. So, in the case of the Star club, the promoter can make the merchants less price elastic to his marketing service by convincing more high-value customers to shop only in Star establishments. Likewise, a card company makes merchants less elastic to its transaction processing by securing more high-value customers devoted to its card, as to whom the anti-steering rule prevents any means of persuasion.

It might seem like a problem that this scenario is similar to some other common relationships that we consider perfectly tolerable. For example, it seems roughly analogous to shoppers' clubs, like Costco, in which the retailer compiles a dedicated base of consumers and uses it to negotiate lower wholesale prices. For that matter, it seems analogous to any retail operation that builds big retail market share, through low price or service or whatever, and then uses the resulting leverage to get lower wholesale prices. However, the distinction is the anti-steering rule. Both the Star club and a card company get an increase in negotiating power within a bilateral relationship not by competing better at the retail level, or by giving buyers there a better deal or a better product. They keep the ordinary operation of markets from imposing costs on buyers that buyers otherwise would bear. The rule does that solely by way of contractual restraint imposed with market power.

Critically, the card company very plausibly might pull this little maneuver, and cause injury only on one side, without changing the quantity of card swipes.

Thus, it seems significant that when price competition has been attempted to secure more merchant adoptions—as Discover did—it's been of no effect and has been abandoned. It could also explain why merchant fees vary so much without any evident impact on market share. The Visa and Mastercard systems extract about 2% of the purchase price of all transactions, while Discover takes only 1.5% and yet has a very small market share, and American Express takes upwards of 3% and maintains a big market share.

One last interesting question is why, even if this anticompetitive story is correct, the card companies would use it to favor credit cards. Why would the card companies prefer credit cards specifically, when they could push more efficient systems, like PIN debit cards? The answer seems likely some combination of path-dependence and the opportunity to sell high-interest credit. Interest and service charges are important to all the major cards, and again are the majority of the revenues of Mastercard and Visa. That could explain why debit cards that offer any cardholder rewards remain rare.

B. Will the Cat Really Stay in the Credit Card Bag?

A more general problem is whether the innovation introduced in *American Express* has meaningful boundaries. Even if the outcome was bad in the specific circumstances, maybe it will be limited to them.

Both the literature and *American Express* purport to give the theory some limits. For what it is worth, there really seem to be two separate economic criteria that are supposed to distinguish platforms from other things, and it is not clear under *American Express* if they are both required or how they relate. First, it appears that a market should have mutually dependent network externalities. The value of the product to each side must depend on the number of people using it on the other. More important in practice, as the lower courts work out the applicability of *American Express*, will probably be the limitation to "simultaneous transaction" platforms. Despite the word chosen for it, this requirement seems to depend not so much on literal, temporal simultaneity. What is important is that the ratio of transactions between the two sides will always be one to one. Every card swipe entails exactly one consumer service and exactly one merchant service, coordinated by the network. It is simultaneity in this sense that creates the problem of joint demand. It results in the platform owner apportioning costs differently to the two sides, even absent market power. It is the thing that in the Court's mind made card swipes one product rather than two.

How many businesses are going to have those features? On the one hand, some things commonly called "platforms" likely do not. Ad-driven businesses like Facebook and Google presumably are excluded by the *American Express* Court's pointed reaffirmation of its newspaper cases.[52] But on the other hand, it seems uncomfortably like a fair number of them do. Gig economy businesses and party-to-party e-commerce platforms, like Etsy, eBay, or Amazon Marketplace, seem likely candidates. They display simultaneity in literal, temporal terms, and arguably in the sense that each transaction they process requires joint demand.

There will moreover be continual pressure to expand the rule's applicability, and there will be some receptiveness among the lower courts to do it. Sellers of computer operating systems and smart phones will sooner or later argue that every software purchase entails distribution across their platform, in a simultaneous transaction that must be jointly demanded by the app seller and the consumer. They might argue that they should therefore be entitled to impose restraints on the less elastic side that would seem grossly anticompetitive in traditional terms, because it will help them expand the other side to everyone's benefit. If Amazon ever is sued in the U.S. on the monopolization claim that many expect to be coming, it presumably will argue that even its regular business is not really just a retail store. It is rather an online logistics agent and each individual sale is therefore the joint consumption of a distribution service. And after all,

52. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018) (citing Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953)).

if Amazon is a two-sided platform, why isn't a brick-and-mortar retail store? Doesn't a retail store also perform the balance required to intermediate between a manufacturer and a consumer? Just like American Express, a retail store literally cannot earn any return on its business unless it coordinates discrete, individual sale transactions that in some more or less literal sense are each between one manufacturer and one end-use consumer.

If any of that seems far-fetched, consider how easily some courts seem already to have been persuaded by platform imagery. The judge who wrote the Second Circuit opinion in *American Express* was certain that American Express could not have market power—and was willing to reject the fact-finding of a full merits trial—because he personally gets a lot of mail.[53] Indeed, within weeks of the ruling he wrote, other defendants around the country were saying that they, too were platforms. That was so though they seemed like pretty mundane entities, including athletic leagues and health insurers. Elsewhere, serious, sophisticated thinkers are already prone to jumping to the platform conclusion, especially as to things having any connection to electronics or the internet. When the government sued the Apple computer corporation and book publishers for fixing the prices of electronic books, George Priest wrote that the case was probably bad because it would frustrate the parties' attempts to accommodate some platform effects.[54] But why on earth would that be? My demand for a book requires no one else to demand anything, except in the sense that the publisher and I must both value the retailer who delivers it. My use and experience of it are unaffected by the number of others who use it. Apple or Amazon selling books in one-on-one retail transactions is no more the operation of a "platform" than Barnes & Noble selling books in a physical store.

So while I hope that *American Express* has a fate like *Dagher,* I fear that it will not.

Anyway, I will leave the discussion with one more general question, which I've asked a fair bit but to which no one seems to have an

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53. No kidding. Judge Wesley said at oral argument that the companies must compete for cardholders because "I wouldn't get any mail if they didn't." Chris Sagers, *Appeals Court Rulings Thrust Antitrust Policy Into the Spotlight*, N.Y. TIMES (Sept. 30, 2016), https://www.nytimes.com/2016/10/01/business/dealbook/appeals-court-rulings-thrust-antitrust-policy-into-the-spotlight.html [https://perma.unl.edu/M9DN-FS8N]. With due respect, that is exactly like saying that cellophane must compete with other products because DuPont lost sales at prices any higher than three times the closest substitute. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400–01 (1956); Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 308–09 (1956).

54. George L. Priest, *Apple Should Win Its E-Book Appeal*, WALL ST. J. (Dec. 15, 2014), https://www.wsj.com/articles/george-priest-apple-should-win-its-e-book-appeal-1418600640 [https://perma.unl.edu/BJE3-W8M9].

answer. On the *American Express* Court's reasoning, why should platform theory be the only basis on which antitrust should consider effects outside of conventionally conceived product markets? All economic conduct has effects in more than one static partial equilibrium. So why, on the Court's reasoning, shouldn't every antitrust case be an exercise in general equilibrium analysis?

IV. CONCLUSION: HOW ANTITRUST COMPLEXITY DEVOLVES TO CONSERVATIVE SIMPLICITY

Despite the rhetoric in which such things are often couched—the kind of rhetoric in Ronald Coase's words that I quoted at the beginning—I think the Court's motivation in *American Express* was not at all about humility. Rather than the intellectual humility one might infer from the adoption of elaborate science, it was an act of arrogant self-confidence, and furthermore, it was strategic. Specifically, the case redefines the product in a simultaneous transaction platform as the jointly consumed transaction, rather than the individual parts consumed by the two sides. On the Court's view, there logically cannot be injury if there are more total swipes or lower total charges per swipe, no matter what anybody did to anybody. Better yet, the interdependency will seem like it must automatically constrain overall price increases. Even if there might seem to be pricing power on one side, as traditionally understood, the need to satisfy the participants on the other side will discipline the platform's abuse of whatever apparent power it's got. This constraint in the mind of a conservative judge will render any suggestion that card networks could have policy-relevant pricing power laughable. The result is a super-clever, seemingly irrefutable little trope useful for dismissing cases of the kind of which the Court's contemporary conservative bloc is overwhelmingly fond. It is just like the simplifying gesture that antitrust law only cares about output in narrowly defined product markets, or that it only cares about inter-brand competition. It is like the one-monopoly-profit reasoning and the long-purse strategy of price predation. It is like the insistence, with crabby skepticism, on full market definition in nearly all cases.

For this reason, the business end of the now overwhelming presumption against government action is in itself a very interesting phenomenon. It probably wasn't logically necessary that it work out this way, but to implement the presumption in its contemporary form has usually made the law more complex. Some now say that as a result we have a holistic, broad-minded, technocratic policy, able to consider the richness of actual cases.[55] That is probably misleading, however, be-

55. *See, e.g.*, Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008).

cause in practice complexity hasn't made antitrust law more like social science. It has really just traded one kind of simplicity for another. The cost of putting on trials with fuller factual analysis has translated in practice to most conduct no longer facing challenge at all, and to plaintiffs often losing at the earliest stages when it is. As just one of many examples, the decision to analyze resale price maintenance (RPM) under the rule of reason was perhaps the chief triumph of the struggle for this more scientific antitrust. Rule-of-reason treatment was adopted with recognition that RPM could in fact be harmful sometimes, and with promises that it would still be subject to challenge.[56] But the consequence has been that RPM is now only challenged in Maryland and California, the two places where it remains per se illegal under state law. Plaintiff lawyers just don't bring RPM cases anywhere else because of the cost and difficulty of rule of reason challenge is prohibitive. In other words, the decision to make analysis of RPM holistic and inclusive, even though the judges that did it realized that it could still sometimes be dangerous, has just made it effectively per se legal. And so, as the antitrust left looks back fondly on those days of simple rules and cases that could be won, it often seems that complexity itself is the enemy. In other words, when some said "we need more science in antitrust," it sounded to the left like they didn't actually care so much about science. They just wanted plaintiffs more often to lose.

For better or worse, even that is not so obvious, because it turns out that legal complexity is not in itself inherently conservative or liberal. Sometimes complex rules favor plaintiffs and simple ones favor defendants. The bargaining model of harm from vertical integration, for example, is pretty complex, and it probably can't be deployed in litigation except on a big evidentiary record and competing expert opinions. That is a theory from the left, since it was brought to antitrust to help win against defendants, and it too was developed to confront conservative simplicity. All merger challenge got more difficult after *United States v. General Dynamics*.[57] After the Federal Trade Commission lost in *FTC v. Fruehauf* in 1979,[58] doubts grew so great about the viability of vertical merger challenges that the government would not bring another one for nearly forty years. The complexity of bargaining theory, in other words, was devised to confront what in effect had become the very simple rule that "vertical mergers are legal." There are any number of other examples. Theoretical criticisms have been advanced of the "one monopoly profit" theory, with the goal that people could bring tying and bundling cases again. However, the criticism is blisteringly complex, and it is hard to imagine even the

56. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 897–98 (2007).
57. United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).
58. Fruehauf Corp. v. F.T.C., 603 F.2d 345 (2d Cir. 1979).

federal judge—let alone the jury—that will fully master it in litigation.[59] As a matter of fact, the theory of harm in *Microsoft*[60]—hardly a conservative one, as applied in that case—was really a platform theory, of all things, though the courts deployed it without invoking the literature. Likewise, simple rules can be made just as favorable to defendants as to plaintiffs. Conduct can in principle be made per se legal, after all, and rules can also be stated in simple terms that are stacked against enforcement. There is something of a bright-line rule among some lower courts, for example, that exclusive contracts cannot be illegal if their duration is less than one year.[61] Likewise, the cost-based test of price predation is on one level very simple and very bright-line. It can be complex in litigation, because disagreements over accounting conventions creep in that are mind-boggling,[62] but in principle it is quite simple indeed. Either a plaintiff can show price below average variable cost or not, and since that has proven all but impossible, price predation is effectively per se legal.[63] The bottom-est of bottom lines in antitrust law is that most of us love simple rules, and most of us hate them too. You love them when they go your way, and you hate them when they don't. So, even if simplicity is good, it remains to choose which simple rules are best.

That returns me to the fact that *American Express* seems like a complicated case and it turns on a complex theoretical literature. Yet its real appeal to the Court's majority seemed actually to be something very simple. Namely, a case against a platform defendant can always be dismissed if plaintiff fails to prove a loss of output in the jointly demanded product. On that I will close where I began, with Coase.

Superficially, Coase seemed above all to stress that economists should behave as scientists. In another part of the famous essay I quoted at the beginning, he said the problem was that the industrial organization theory of his day effectively pressured economists to behave like "economic statesmen."[64] As he said, "[t]he desire to be of service to one's fellows is, no doubt, a noble motive."[65] The problem was that "it is not possible to influence policy if you do not give an an-

59. Einer Elhauge & Barry Nalebuff, *The Welfare Effects of Metering Ties*, 33 J.L. Econ. & Org. 68 (2017); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397 (2009).
60. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
61. *See* Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163–64 (9th Cir. 1997); Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984).
62. *See, e.g.*, United States v. AMR Corp., 335 F.3d 1109, 1116–21 (10th Cir. 2003).
63. There is some minor dispute over how frequently predation claims are made and how frequently they enjoy any success, but on any measure they are extremely rare and almost always fail. *See* Chris Sagers, *#LOLNothingMatters*, *supra* note 18, at 22, n.84 (2018).
64. Coase, *supra* note 2, at 66.
65. *Id.*

swer."[66] Because it is difficult to give answers in the presence of empirical uncertainty, economists avoided "critical questioning of the data and the worth of the analysis," and "tolerate[d] standards of evidence and analysis which . . . they would otherwise have rejected."[67] That allowed them to "provide answers even when there are not answers."[68]

But consider Coase's own work. There is something in his most famous paper that my fellow left-leaners love to point out, because they think it shows that he was actually *their* hero. *The Problem of Social Cost* did not merely introduce what we now know as Coase's theorem. The latter half of the paper argued at length that property rights *do* matter because there are in fact transaction costs. To many on the left, Coase's admonition that economists and policymakers must consider all the intricate resulting complexity seems like proof that the law-and-economics movement misunderstood him entirely. It seems to have ignored what really was his call for substantial public intervention in markets.

But I suspect that's a pretty inaccurate take, at least as to whatever Coase himself believed. As for his paper's observation that theory abstracts from reality, and that its application therefore requires empirical care, it is a very obvious criticism. It is at least as old as Romantic reaction to the Enlightenment and it was central to the famous struggle between German and classical economics perhaps a hundred years before *The Problem of Social Cost*. But more important than its lack of novelty or substance, it is just so easy to admonish the world to be careful of undue abstraction, while largely impossible to obey. And indeed, Coase himself never obeyed it. I would have no idea what really was in his personal heart or intentions, but he made no contribution to the overwhelming empirical investigation he recommended. It seems unlikely that he really expected anyone would actually undertake it, or that we would then use law to eradicate all the social evils we'd found. Candid recognition of this fact is rare,[69] but it seems pretty clear that the real goal was just to claim that government should not act in the presence of uncertainty. A person who makes that claim, knowing that uncertainty is practically insurmountable, is really just arguing that government should be small and inert. In other words, it is not science to make such a claim, it is ideology. Complexity has just been the tool of a particular kind of very conservative simplicity.

66. *Id.*
67. *Id.*
68. *Id.* at 66–67.
69. *But see* George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMPETITION L. & ECON. 1, 2–6 (2010).