

# AMAZON AND PLATFORM ANTITRUST

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*With its decision in Ohio v. American Express, the U.S. Supreme Court for the first time embraced the recently developed, yet increasingly prolific, concept of the two-sided platform. Through advances in technology, platforms, which serve as intermediaries allowing two groups to transact, are increasingly ubiquitous, and many of the biggest tech companies operate in this fashion. Amazon Marketplace, for example, provides a platform for third-party vendors to sell directly to consumers through Amazon’s web and mobile interfaces.*

*At the same time that platforms and their scholarship have evolved, a burgeoning antitrust movement has also developed which focuses on the impact of the dominance of these tech companies and the fear that current antitrust laws are ill-equipped to prevent any potential anticompetitive behavior. Many of those who feel this way worried that American Express, which decided whether a plaintiff alleging anticompetitive behavior by a two-sided platform would have to show harm to both sides of the market to make a prima facie case, would give companies like Amazon even more power. This Note argues that while the case could be interpreted in such a way, because Amazon and similarly situated platforms possess a great degree of control over their users—in some cases competing with them directly—it would be unwise to do so.*

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## INTRODUCTION

Many modern internet-based companies relied upon by consumers and businesses alike operate, at least in some capacity, as two-sided platforms.<sup>1</sup> The concept originates from relatively new economic developments<sup>2</sup> but was adopted by the U.S. Supreme Court in 2018. Although there is no unanimously agreed upon definition of what makes these firms two-sided,<sup>3</sup> for the sake of simplicity, this Note designates a two-sided platform as one that facilitates interactions between two groups that derive value or revenue from one another.<sup>4</sup> For instance, both American Express and Amazon's third-party marketplace ("Amazon Marketplace") are two-sided platforms because they connect merchants to consumers,<sup>5</sup> and Google is a two-sided platform because it connects users to advertisers.<sup>6</sup> Catering to multiple sides makes two-sided platforms different from one-sided platforms in that any change in price the platform makes to either side will affect sales on both sides.<sup>7</sup> Thus, the two-sided firm must delicately balance the needs of both sides.<sup>8</sup>

Antitrust law, aimed at promoting fair competition for the purpose of consumer benefit,<sup>9</sup> typically requires any litigant challenging a firm's alleged anticompetitive practices to show proof of harm to the relevant market in which the firm operates.<sup>10</sup> Thus, it becomes important to define said market.<sup>11</sup> Prior to *Ohio v. American Express*<sup>12</sup> ("AmEx"), two-sided platforms had been analyzed in the same manner as one-sided platforms: without mention of sides.<sup>13</sup> However, in *AmEx*, for the first time, the Court relied on relatively new, yet highly topical, economics research to hold that

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1. See, e.g., Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 784 (2017) (discussing Amazon). See generally Florence Thépot, *Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets*, 36 WORLD COMPETITION 195 (2013) (discussing primarily Google and Facebook).

2. See generally Andrea Amelio et al., *Exclusionary Practices and Two-Sided Platforms*, in OECD, RETHINKING ANTITRUST TOOLS FOR MULTI-SIDED PLATFORMS 131 (2018).

3. See Benjamin E. Hermalin & Michael L. Katz, *What's So Special About Two-Sided Markets?*, in TOWARDS A JUST SOCIETY: JOSEPH STIGLITZ AND 21ST CENTURY ECONOMICS 111, 112 (Martin Guzman ed., 2018).

4. See David S. Evans, *Essential Principles for the Design of Antitrust Analysis for Multisided Platforms* 5 (Oct. 6, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3261812> [<https://perma.cc/G6TW-3TD2>].

5. See *id.* at 3 n.2.

6. See Thépot, *supra* note 1, at 196.

7. David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 680–81.

8. *Id.*

9. See 1 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 100 (4th ed. 2016).

10. 7 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1500 (3d ed. 2006).

11. *Id.*

12. 138 S. Ct. 2274 (2018).

13. See Erik Hovenkamp, *Platform Antitrust*, J. CORP. L. (forthcoming 2019) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3219396](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219396) [<https://perma.cc/WW4P-ST48>].

because the relevant market was for credit card *transactions* themselves, as opposed to the market for merchant credit card fees or consumer card benefits, the merchant-plaintiff must consider the effects to both sides of the two-sided platform when alleging that a restraint is anticompetitive.<sup>14</sup>

This decision arrives at a time when some of these platforms—Facebook, Google, Amazon, and others—continue to grow at rapid paces while expanding into new industries and collecting massive amounts of user data.<sup>15</sup> Using this data, these firms are able to exercise their market power to create restraints of trade, like acquiring entrants before they become competitive threats or selectively excluding participants from search engine results.<sup>16</sup> One example this Note will discuss at length is Amazon Marketplace’s practice of using its third-party sellers’ sales data to decide whether to enter their markets and subsequently compete with them.<sup>17</sup> As a result of exercises of power like these, scholars,<sup>18</sup> American politicians on both sides of the aisle,<sup>19</sup> and foreign governments<sup>20</sup> have become focused on the potential short- and long-term consequences of structural dominance by companies like Amazon. These scholars see antitrust as a potential check on these companies but argue that it is currently ill-equipped.<sup>21</sup> Most notably, in her highly publicized article, *Amazon’s Antitrust Paradox*, Lina Khan brought to attention how antitrust law is not prepared to limit Amazon’s predatory pricing and data exploitation.<sup>22</sup> This article sparked a greater conversation

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14. *AmEx*, 138 S. Ct. at 2286.

15. See generally Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019); Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401 (2014); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018); Maurice E. Stucke, *Should We Be Concerned About Data-Opolies?*, 2 GEO. L. TECH. REV. 275 (2018).

16. Stucke, *supra* note 15, at 306.

17. See *infra* Part II.B.3.

18. See, e.g., David Streitfeld, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html> [<https://perma.cc/RD5E-FTPQ>]. These concerns are being taken seriously by regulators. See Cecilia Kang, *F.T.C. Hearings Add to Efforts That Threaten Tech Industry*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/technology/ftc-hearings-technology.html> [<https://perma.cc/UJK4-UR4B>] (crediting Khan with some of the impetus for the reemergence of antitrust). Still, there has been backlash from those who feel this movement is based in populist fear and that antitrust is an improper remedy for corporate power and issues of income inequality. See generally Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714 (2018).

19. See generally Daniel A. Crane, *Antitrust’s Unconventional Politics*, 104 VA. L. REV. ONLINE 118 (2018). Quickly, this has become a mainstream political issue, fostering unlikely bipartisan alliances. See Nellie Bowles, *Fighting Big Tech Makes for Some Uncomfortable Bedfellows*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/technology/big-tech-strange-bedfellows.html> [<https://perma.cc/2PP5-6EVW>].

20. See, e.g., Adam Satariano & Jack Nicas, *E.U. Fines Google \$5.1 Billion in Android Antitrust Case*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html> [<https://perma.cc/P7QR-9XDF>].

21. See, e.g., Lina Khan, *The Ideological Roots of America’s Market Power Problem*, 127 YALE L.J.F. 960 (2018). See generally TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

22. See Khan, *supra* note 1, at 716–17.

about what the role of antitrust is and what it should be.<sup>23</sup> *AmEx* was widely discussed in popular media as a battleground of sorts for this conversation. Media and consumer advocates worried that a decision in American Express's favor would act as a shield to tech platforms,<sup>24</sup> while tech companies feared the broad implications of an outcome in the plaintiff's favor.<sup>25</sup> While the Court did rule in American Express's favor, the holding appears narrower than either side feared.<sup>26</sup> However, in the Court's framing of the decision around indirect network effects,<sup>27</sup> there still exists some ambiguity about how it will apply to some tech companies like Amazon.

This Note argues that the fairest and most accurate way to interpret *AmEx*'s new market definition guidelines is to exclude Amazon Marketplace and similarly situated platforms because these platforms have competitive constraints that distinguish them from credit card platforms. While the political discourse around big tech's power has led to a variety of policy proposals,<sup>28</sup> this Note will focus only on the role of tech platforms in the context of antitrust litigation. In Part I, this Note provides background on two-sided platforms, profiles their rise in economics literature, and distinguishes different types and their effects. Part II discusses antitrust review of anticompetitive behavior, with special focus given to some of Amazon's practices. Part II then focuses on the role of market definition in antitrust review and discusses the scholarship and case law around two-sided "transaction" platforms leading up to *AmEx*. Part III discusses three potential interpretations addressing whether *AmEx* should apply to platforms like Amazon Marketplace. Lastly, Part IV argues for a new classification of two-

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23. See *id.* See generally Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583 (2019).

24. See, e.g., Lina M. Khan, Opinion, *The Supreme Court Case That Could Give Tech Giants More Power*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/02/opinion/the-supreme-court-case-that-could-give-tech-giants-more-power.html> [https://perma.cc/8K38-PRD7]; see also Washington Bytes, *Will the Supreme Court's Amex Decision Shield Dominant Tech Platforms from Antitrust Scrutiny?*, FORBES (July 18, 2018, 6:45 AM), <https://www.forbes.com/sites/washingtonbytes/2018/07/18/antitrust-enforcement-of-dominant-tech-platforms-in-the-post-american-express-world/> [https://perma.cc/8GEA-Z3XC]; Greg Stohr & David McLaughlin, *American Express Case Could Shield Tech Giants from Antitrust Scrutiny*, BLOOMBERG (June 25, 2018, 4:09 PM), <https://www.bloomberg.com/news/articles/2018-06-25/u-s-supreme-court-backs-american-express-on-credit-card-suit-jiuiffg9> [https://perma.cc/55ZE-PQNE].

25. See *Why Tech Companies Are Worried About the Ohio v. Amex Case*, KNOWLEDGE@WHARTON (Mar. 8, 2018), <http://knowledge.wharton.upenn.edu/article/impacts-ohio-vs-amex/> [https://perma.cc/2MH6-M87K].

26. See, e.g., Mark MacCarthy, Opinion, *Ohio v. American Express Is Sensible Antitrust Policy*, CIO (Aug. 7, 2018, 4:30 AM), <https://www.cio.com/article/3295539/regulation/ohio-v-american-express-is-sensible-antitrust-policy.html> [https://perma.cc/7F4N-U7VU].

27. See *AmEx*, 138 S. Ct. 2274, 2286 (2018).

28. See, e.g., Joshua Brustein, *Tech's Biggest Antitrust Problem May Be a Congressman from Rhode Island*, BLOOMBERG (June 14, 2019, 4:00 AM), <https://www.bloomberg.com/news/articles/2019-06-14/tech-s-biggest-antitrust-problem-may-be-a-congressman-from-rhode-island> [https://perma.cc/T8ZV-EW7E]; Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> [https://perma.cc/84EF-PJ6V].

sided transaction platforms, which should be exempt from *AmEx*'s definition of two-sidedness.

## I. TWO-SIDED TRANSACTION PLATFORMS

Although *AmEx* is the first federal case to refer specifically to two-sided platforms,<sup>29</sup> in embrace of recent learning in economics, these types of firms have arguably been the subjects of antitrust review for decades.<sup>30</sup> Until *AmEx*, these platforms had been dealt with on an ad hoc basis, undistinguished from other types of firms.<sup>31</sup> Meanwhile, economic analysis of two-sided platforms exploded, with hundreds of papers written since the early 2000s.<sup>32</sup> These firms are difficult to analyze through an antitrust lens because they are not only structured differently from others, but also impacted differently—on one or both sides—depending on the restraint in question.<sup>33</sup> Part I.A discusses the evolving definitions of two-sided platforms, as well as their distinguishing features relative to traditional, single-sided firms. Part I.B identifies three different types of platforms that have emerged from scholarly literature, and Part I.C discusses how Amazon and similarly situated tech platforms may be categorized.

### A. Defining and Distinguishing Two-Sided Platforms

In trying to parse out what makes a two-sided platform different from any other type of firm, Benjamin Hermalin and Michael Katz aptly point out the complications that have emerged, writing, “[a]n unusual feature of two-sided markets is that there is no consensus regarding what they are.”<sup>34</sup> While credit card networks are perhaps a paradigmatic example of a two-sided market, as they act as intermediaries to enable a transaction between cardholders and merchants, the line blurs when considering advertising-supported media, health insurance plans, manufacturers, and other intermediaries between groups.<sup>35</sup> Adding to the confusion and employing skepticism about whether two-sided platforms amount to anything significant at all, Justice Breyer, writing for the dissent in *AmEx*, argued that, as the Court defined the term,

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29. *AmEx*, 138 S. Ct. at 2298 (Breyer, J., dissenting) (“I can find no case from this Court using those words.”); Evans, *supra* note 4, at 2.

30. See, e.g., *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 610 (1953) (noting that “every newspaper is a dual trader in . . . news and advertising content”).

31. Hovenkamp, *supra* note 13 (manuscript at 5) (noting that “while a few opinions had recognized the relevant commercial environment as involving distinct but highly-interrelated strands of transactions, this typically amounted to little more than a passing observation.”).

32. See David Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, in 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 404, 404–05 (Roger D. Blair & D. Daniel Sokol eds., 2014).

33. See *infra* Part II.B.

34. Hermalin & Katz, *supra* note 3, at 111–12.

35. *Id.*

nearly *any* business can be analyzed through a two-sided lens.<sup>36</sup> This section will discuss the defining features of two-sided transaction platforms.<sup>37</sup>

### 1. Definitions

Contributing to the difficulty in determining the implications and precedential value of *AmEx* is the “disturbing lack of consensus” on the definition of two-sided platforms.<sup>38</sup> Economists Jean-Charles Rochet and Jean Tirole, responsible for much of the foundational scholarship on two-sided platforms, have defined them in terms of their ability to resolve externalities that prevent cross-platform users from contracting efficiently.<sup>39</sup> According to this definition, a market is two-sided if the volume of transactions varies with a change of price to one side and holds the total price charged constant.<sup>40</sup> Similarly, David S. Evans argues that two-sided platforms solve a transaction cost problem by serving as an intermediary between the two sides<sup>41</sup> and giving users access to a much wider variety of opportunities for exchange.<sup>42</sup> Subsequent economic scholarship has defined two-sided platforms in terms of three key features: (1) distinct services to two distinct sides, (2) cross-platform network effects, and (3) market power resulting in setting the prices on both sides.<sup>43</sup> However, because this definition is purely academic and never intended to inform antitrust review, some note that it is too arbitrary and manipulable to suffice in court.<sup>44</sup>

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36. *AmEx*, 138 S. Ct. 2274, 2300 (2018) (Breyer, J., dissenting) (“As the economists who coined the term explain, if a ‘two-sided market’ meant simply that a firm connects two different groups of customers via a platform, then ‘pretty much any market would be two-sided, since buyers and sellers need to be brought together for markets to exist and gains from trade to be realized.’” (quoting Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 646 (2006))).

37. Note that while much scholarship discusses *multisided* as opposed to *two-sided* platforms, and many platforms may have more than two sides, the distinction does little to change the analysis. See Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 645 n.1 (2006) (“The insights obtained for two-sided platforms apply more generally to multi-sided ones.”); cf. David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 328 (2003) (“Platform businesses compete in ‘multi-sided markets.’”).

38. Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2148 (2018).

39. Rochet & Tirole, *supra* note 37, at 657; see also *AmEx*, 138 S. Ct. at 2300 (Breyer, J., dissenting) (“The defining feature of a ‘two-sided market,’ according to these economists, is that ‘the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount.’” (quoting Rochet & Tirole, *supra* note 37, at 664–65)).

40. Rochet & Tirole, *supra* note 37, at 648.

41. Evans, *supra* note 37, at 379. Transaction costs may include search costs, bargaining and decision costs, and policing and enforcement costs. See Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979).

42. Bertin Martens, *An Economic Policy Perspective on Online Platforms* 6 (Joint Research Ctr. of the European Comm’n, Working Paper No. 2016/05, 2016).

43. E. Glen Weyl, *A Price Theory of Multi-Sided Platforms*, 100 AM. ECON. REV. 1642, 1643 (2010).

44. Katz & Sallet, *supra* note 38, at 2149 (arguing that any firm sets its prices for inputs and outputs by treating the prices it pays for inputs as prices). But see Marc Rysman, *The*

Despite its unsettled definition, many argue that the defining characteristic of two-sided platforms is the presence of indirect cross-platform network effects (“indirect network effects”)<sup>45</sup>—i.e., the value of the platform for a customer on one side of the market increases as more customers on the other side of the market participate.<sup>46</sup> For example, as more consumers have American Express cards, the cards become more valuable to merchants, who will then accept the cards and vice versa.<sup>47</sup> Store owners do not want to invest in technology and contracts for credit cards that consumers do not use, while cardholders do not want credit cards that stores will refuse to accept.<sup>48</sup> The platform must then not only balance prices on each side (“price distribution”) in order to maintain customers on both sides but must also address the universal concern of price (“price level”).<sup>49</sup> If it fails to do so, the interdependence of demand creates the risk of cascading decreased participation on both sides.<sup>50</sup> But some competition law experts warn against using the existence of a cross-platform network externality to distinguish two-sided from one-sided platforms because it may not matter for a given concern being investigated.<sup>51</sup> The most recent contribution to the two-sided platform definition has been from Andrei Hagiu and Julian Wright, who differentiate platforms that foster a direct interaction between sides from resellers that do not and argue that a firm may switch between the two categories when advantageous.<sup>52</sup>

Despite this continued debate, in *AmEx*, the Court simply defined two-sided platforms as “firm[s that] offer[] different products or services to two different groups who both depend on the platform to intermediate between them.”<sup>53</sup> The Court then noted that two-sided platforms “often” exhibit indirect network effects.<sup>54</sup> That is, each side’s demand for the platform’s service depends not only on the price it is charged by the platform but also

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*Economics of Two-Sided Markets*, 23 J. ECON. PERSP. 125, 127 (2009) (arguing that a broad definition is not inherently problematic, but the more important inquiry is “how important two-sided issues are in determining outcomes of interest”).

45. The cross-platform indirect network effects discussed in this Note differ from intra-platform network effects, which arise when the value of a good or service to a user rises as the number of other users of that good or service rises. See Hermalin & Katz, *supra* note 3, at 112–13. For example, an increase in Facebook users is of value to a given Facebook user because more potential friends (direct) and developers will have more incentive to improve Facebook services (indirect). See *id.*

46. Evans, *supra* note 37, at 332.

47. *Id.*

48. See Patrick R. Ward, Comment, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. CHI. L. REV. 2059, 2075 n.97 (2017).

49. Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS’N 990, 990 (2003).

50. Katz & Sallet, *supra* note 38, at 2151.

51. Organisation for Economic Co-operation and Development [OECD], *Market Definition*, at 49, OECD Doc. DAF/COMP(2012)19 (Oct. 11, 2012), <http://www.oecd.org/daf/competition/Marketdefinition2012.pdf> [<https://perma.cc/2PLX-RPE3>].

52. See generally Andrei Hagiu & Julian Wright, *Marketplace or Reseller?*, 61 MGMT. SCI. 184 (2015).

53. *AmEx*, 138 S. Ct. 2274, 2280 (2018).

54. *Id.*

on the number of users participating on the other side.<sup>55</sup> Further adding to the confusion, different types of two-sided platforms inherently function differently, which may impact how to analyze their performance.<sup>56</sup>

## 2. Distinct Features of Two-Sided Platforms

Two-sided platforms have distinctive economic features that make their antitrust analysis more complicated than for their single-sided counterparts. Many of these features stem from the platforms' indirect network effects and relate to pricing.<sup>57</sup>

### *a. Indirect Network Effects, Critical Mass, and Externalities*

The indirect network effects that two-sided platforms experience are twofold: usage externalities and membership externalities.<sup>58</sup> A usage externality refers to the need for two sides of the platform to act together through the platform to create value.<sup>59</sup> For example, Uber drivers and riders can only enter into a value-increasing exchange if they can get together.<sup>60</sup> Both drivers and riders benefit when they use the app to “match” with each other.<sup>61</sup> Further, Uber increases the value of these usage externalities by increasing the quality of the matches, for example by using location-tracking to pair drivers and riders who are close to one another.<sup>62</sup>

There is a membership externality, on the other hand, where the value to each side increases as more members participate on either side.<sup>63</sup> Using the Uber example, drivers benefit from more riders being on the app, and vice versa. This results in a positive feedback loop, where more users on one side attract more users on the other, which fuels growth.<sup>64</sup>

The platform plays a crucial role in creating these indirect network effects. For this reason, research shows that aspiring platforms must achieve enough users on each side to secure what is known as a critical mass to propel indirect network effects.<sup>65</sup> That is, without a critical mass of users—or a sufficient amount of users to establish minimal demand—on each side, platforms will offer little value to users on either side, and this prevents more users from participating in the platform.<sup>66</sup> This is often referred to as a “chicken and egg” problem, as bringing more users on board on one side of the market

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55. See, e.g., Julian Wright, *One-Sided Logic in Two-Sided Markets*, 3 REV. NETWORK ECON. 44, 47 (2004).

56. See *infra* Part I.B.

57. Rysman, *supra* note 44, at 137.

58. Evans & Schmalensee, *supra* note 32, at 410–11.

59. *Id.*

60. See *id.* (using instead an example of a restaurant reservation platform).

61. See *id.*

62. See *id.*

63. *Id.*

64. *Id.*

65. *Id.* at 431–33.

66. *Id.*

requires more users on the other side.<sup>67</sup> Platforms may achieve critical mass in a number of ways, including through pricing, product design, and marketing.<sup>68</sup> However, without a critical mass, a platform is not viable; without a critical mass of Uber drivers, prospective passengers will not gain utility from the app, and vice versa.<sup>69</sup>

This specific concern for two-sided platforms creates an environment where a market's efficiency, at least in digital markets, is maximized with only a few firms, each seeking control of the market.<sup>70</sup> As a product or service becomes more popular, it trends toward dominance because its network effects give each consuming user increased utility, which in turn attracts more users.<sup>71</sup> The firm's dominance then creates barriers to entry wherein competition tends to come from outside of the market because of the firm's power.<sup>72</sup> In online markets, some claim that entry barriers are low because competition is "one click away."<sup>73</sup> However, others suggest that the more data an online market gathers about its users, the more the company can harness its network effects to tailor its product to its users with a scope that newcomers may not have access to.<sup>74</sup> For example, because of the amount of personalized user data Google gathers through its various features including Gmail, YouTube, and Google Maps, it may be able to identify whether a user that searches for "apple" desires results pertaining to the fruit or the company.<sup>75</sup> Additionally, data accumulation creates an information asymmetry where platforms have access to significant data unavailable to both sides of its market and a capacity to leverage that data to disadvantage platform participants.<sup>76</sup> Indeed, the market conditions under which platforms operate can create efficiencies for users, but these efficiencies only arise when the platform is able to get both sides on board.

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67. See, e.g., Benjamin Edelman, *Does Google Leverage Market Power Through Tying and Bundling?*, 11 J. COMPETITION L. & ECON. 1, 9–10 (2015).

68. See Evans, *supra* note 37, at 350.

69. *Id.*

70. See Khan, *supra* note 1, at 785 (noting that indirect network effects and control over data in online two-sided markets promote this "winner-take-all" type of environment).

71. See *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001); see also Khan, *supra* note 1, at 785 ("[E]arly advantages become self-reinforcing. The result is that technology platform markets will yield to dominance by a small number of firms.").

72. MAURICE E. STUCKE & ALLEN P. GRUNES, *BIG DATA AND COMPETITION POLICY* 163 (Sibyl Marshall ed., 2016).

73. See, e.g., Eric Schmidt, *Why Google Works*, HUFFINGTON POST (Mar. 22, 2015), [http://www.huffingtonpost.com/eric-schmidt/why-google-works\\_b\\_6502132.html](http://www.huffingtonpost.com/eric-schmidt/why-google-works_b_6502132.html) [<https://perma.cc/9GKQ-SXW4>].

74. STUCKE & GRUNES, *supra* note 72, at 186; see also Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1085 (2017) (arguing that two-sided platforms that collect personal consumer data may raise antitrust concerns including "the possibility of anticompetitive price discrimination and exacerbated lock-in effects by personalizing the platform experience").

75. STUCKE & GRUNES, *supra* note 72, at 188.

76. See Bamberger & Lobel, *supra* note 74, at 1086 (citing Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1624 (2017)).

*b. Price-Distribution Focus*

Because of the balance of users on each side, pricing in two-sided platforms is more complex than in ordinary businesses.<sup>77</sup> While a one-sided firm must focus on the price it charges to its customers, or the price level, a two-sided platform must attend primarily to the way it *distributes* its prices between its two sides.<sup>78</sup> Thus, even holding the price level constant, an adjustment to the price distribution, also known as price structure, can affect the participation levels of each side.<sup>79</sup> The price distribution may even reach its equilibrium when one side is not charged at all. This occurs, for example, on ad-supported platforms, like Google, where the site is free for searchers but has costs for advertisers.<sup>80</sup> Similarly, many credit cards are free for consumer-users, but all credit card companies charge merchants a fee for each transaction.<sup>81</sup>

*c. User Dynamics: Multi- and Single-Homing*

The ways two-sided platforms compete with each other also differ greatly from one-sided platforms. A crucial distinction is whether users on one or both sides engage in a process called multi-homing.<sup>82</sup> A user multi-homes if she uses several competing platforms in an industry and single-homes if she only uses one.<sup>83</sup> For example, both rideshare drivers and passengers may alternate between Uber and Lyft, and thus, these users multi-home. On the other hand, smartphone users only use one operating system and do not alternate between iOS and Android, while app developers may make apps for both platforms.<sup>84</sup> Therefore, users single-home and developers multi-home. Multi-homing tends to arise within a given side of a platform if users view the alternative platforms as reasonably substitutable and if there are not significant fixed costs required to use such platforms.<sup>85</sup> Firms may encourage or require users on one side to single-home through exclusivity contracts.<sup>86</sup> All else being equal, if there is more multi-homing on both sides, then competing platforms will compete more aggressively, lowering prices.<sup>87</sup> Research shows that when there is single-homing on one side and multi-homing on the other, platforms have incentives to compete aggressively for

77. See, e.g., Evans, *supra* note 37, at 349.

78. See Rochet & Tirole, *supra* note 49, at 990 (“Under multisidedness, platforms must choose a price structure and not only a price level.”).

79. *Id.* at 997.

80. See Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 543–44 (2016).

81. Evans, *supra* note 37, at 335–36.

82. See, e.g., Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. ECON. 668, 669 (2006).

83. David S. Evans, *Economics of Vertical Restraints for Multi-Sided Platforms* 6 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 626, 2013).

84. Katz & Sallet, *supra* note 38, at 2155–60.

85. Hovenkamp, *supra* note 13 (manuscript at 17).

86. Evans, *supra* note 37, at 356.

87. See Rochet & Tirole, *supra* note 49, at 1004.

the single-homing customer.<sup>88</sup> Therefore, it is confusing to speak of the competitiveness of the market for two-sided platforms because there are two potential markets with different competitive conditions.<sup>89</sup>

*B. Types of Two-Sided Platforms: The Transaction Distinction*

Although there may not be consensus on what defines a two-sided platform or when it matters that a platform is two-sided, it is evident that there are different types of multisided platforms, differentiated by, among other things, the inherent value of their product to their users. This is important because firms structured differently may compete with different parties, and this requires different economic and antitrust analyses. This section gives an overview of the different types of firms and distinguishes them from one another.

1. Transaction and Exchange Platforms

The most studied type of platform is what this Note will refer to as the transaction platform, also known as the “market-maker.”<sup>90</sup> This is not only where American Express and Amazon Marketplace fit in but also includes rideshare apps, online markets and their offline analogues, and dating websites.<sup>91</sup> A transaction platform may either provide a marketplace for buyers and sellers to complete their transaction—which reduces the transaction costs associated with buyers and sellers finding one another—or, in the case of the credit card market, facilitate the means of the transaction between buyers and sellers who have already found one another.<sup>92</sup> These markets are characterized by the observability of the transaction between the users of their corresponding sides (e.g., buyers and sellers).<sup>93</sup> That is, both merchants and cardholders are aware that they are transacting.<sup>94</sup> Competing transaction platforms are typically considered substitutes by both buyers and sellers.<sup>95</sup> For example, a buyer can buy and a seller can sell on eBay instead of Amazon Marketplace. Further, and importantly, the platform itself derives its value *only* from connecting its two sides; the platform itself has no inherent value.<sup>96</sup> Thus, for a transaction platform to be valuable, it must rely heavily on indirect network effects.

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88. Armstrong, *supra* note 82, at 680.

89. *See id.*

90. *See* Evans, *supra* note 37, at 334; *see also* Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 298 (2014).

91. Evans, *supra* note 37, at 334.

92. *See id.* at 335. For this reason, some have distinguished transaction platforms and exchange platforms. *See* David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL'Y INT'L 151, 153–56 (2007).

93. Filistrucchi et al., *supra* note 90, at 302.

94. *Id.*

95. *Id.* at 303. For example, American Express may differentiate its product as a more upscale alternative to other brands of credit cards.

96. *See* Rochet & Tirole, *supra* note 49, at 990 (“Cardholders value credit or debit cards only to the extent that these are accepted by the merchants they patronize.”).

## 2. Ad-Supported Platforms

This Note refers to the other major type of two-sided platform as an ad-supported platform. Also described as “audience-makers”<sup>97</sup> or, perhaps more confusingly, “media platforms,”<sup>98</sup> ad-supported platforms operate through a business model that seeks to match advertisers with consumers. They typically include television, radio, and internet content providers. Unlike transaction platforms, ad-supported platforms contain inherent value for consumers,<sup>99</sup> while consumers are generally indifferent to advertisers.<sup>100</sup> For this reason, there is a clear indirect network effect between advertisers and viewers (or readers or users) because advertisers value ad-supported platforms with more viewers.<sup>101</sup> However, unlike transaction platforms, based on the premise that viewers may be indifferent to advertising, the indirect network effect between viewers and advertisers is less clear.<sup>102</sup>

Even though there is an interaction between the advertiser and the consumer through the platform, it is generally not observable to the platform.<sup>103</sup> That is, *if* there is a transaction (sale) between the advertiser and the consumer, it is delayed—and does not occur on the platform itself—but rather through the means specified in the advertisement.<sup>104</sup> Unlike transaction platforms, ad-supported platforms do not set the terms of the transaction between the two sides.<sup>105</sup> Furthermore, the platforms with which the advertisers compete will be very different from those with which the consumers compete.<sup>106</sup> That is, users will appraise substitutability by the type of content on the platform, while advertisers will focus on factors like the market catered to and how the ads are delivered.<sup>107</sup> For example, while Netflix and Hulu may be competitors for users, advertisers may decide between placing ads in a wider variety of media, e.g., newspapers, video ads, banner ads, and more.<sup>108</sup>

## 3. Software Platforms

An additional distinct type of two-sided platform is the software platform, which provides services that link app developers and app users.<sup>109</sup> Operating

97. Evans, *supra* note 37, at 335.

98. Katz & Sallet, *supra* note 38, at 2156.

99. *See also* Hovenkamp, *supra* note 13 (manuscript at 16) (noting that because of the inherent value of the products, advertising may be used as an alternative or supplement to price). *See generally* Evans, *supra* note 37.

100. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 613 (1953).

101. *See* Filistrucchi et al., *supra* note 90, at 323–24.

102. *Id.*

103. *Id.* at 298.

104. *Id.* at 298 n.11.

105. *See id.* (“[A]t best only a delayed transaction is present . . . and this transaction is not identifiable.”).

106. *Id.* at 298.

107. *Id.*

108. *See* Evans & Noel, *supra* note 7, at 697–98 (discussing the varied competitive environments among one- and two-sided platforms).

109. *Id.* at 678–79.

systems like iOS, OSX, Android, and Windows, as well as video game consoles like Xbox and PlayStation, function by permitting users to run the developers' applications only if the users have the same software platform on which the developers relied to create their application.<sup>110</sup> In the case of operating systems, platform owners derive the bulk of their revenue from users buying the device on which the platform exists, and developers may obtain access to platform services for free.<sup>111</sup> Because of this imbalance, no single market-share metric accurately summarizes the position of, for example, competing video game platforms, and, to understand the market dynamics, it is important to consider both the competitors' shares of video console sales and their shares of game sales.<sup>112</sup>

### C. Complex, Vertically Integrated Platforms: Amazon

The largest tech companies, including Amazon, Google, Facebook, and Apple, in their widespread growth and diversification, contain elements of all of the aforementioned types of platforms.<sup>113</sup> Amazon is "best understood as a retail, shipping, and logistics platform that operates as the infrastructure for twenty-first century retail."<sup>114</sup> Amazon acts as a transaction platform through Amazon Marketplace by facilitating transactions between third-party sellers and users.<sup>115</sup> Amazon also functions as an ad-supported platform by hosting ads throughout its website for both products sold on Amazon and external products and services.<sup>116</sup> Third, Amazon has software platform features as well, including its Kindle device and app, which is a platform where Amazon connects e-book readers with publishers and writers.<sup>117</sup> Amazon also dominates in infrastructure and logistics, operating by far the largest cloud-computing platform,<sup>118</sup> as well as Fulfillment By Amazon (FBA)—a logistics and delivery service for independent sellers.<sup>119</sup>

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110. See, e.g., ABA SECTION OF ANTITRUST LAW, MARKET DEFINITION IN ANTITRUST: THEORY AND CASE STUDIES 448 (2012). Note that exceptions exist in the form of open-source operating systems and software.

111. Evans & Noel, *supra* note 7, at 679.

112. ABA SECTION OF ANTITRUST LAW, *supra* note 110, at 448.

113. See, e.g., David S. Evans, *Antitrust Issues Raised by the Emerging Internet Economy*, 102 NW. U. L. REV. 285, 295 (2008) (identifying Google as an "interconnected web ecosystem"). While this Note focuses on Amazon, much of the legal and empirical scholarship on Google is useful by analogy.

114. Rahman, *supra* note 15, at 1675.

115. Khan, *supra* note 1, at 710.

116. *Video Ads*, AMAZON ADVERT., [https://advertising.amazon.com/products/video-ads/?ref=a20m\\_us\\_gw\\_valm](https://advertising.amazon.com/products/video-ads/?ref=a20m_us_gw_valm) [<https://perma.cc/UJ7K-9GAN>] (last visited Aug. 22, 2019).

117. See *infra* Part II.B.1. For further discussion of antitrust analysis of Amazon's e-book practices, see generally John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI L. REV. 1 (2014).

118. Ron Miller, *AWS Continues to Rule the Cloud Infrastructure Market*, TECHCRUNCH (Oct. 30, 2017), <https://techcrunch.com/2017/10/30/aws-continues-to-rule-the-cloud-infrastructure-market/> [<https://perma.cc/6EEH-V8CX>].

119. *Fulfillment by Amazon*, AMAZON SERVICES, <https://services.amazon.com/fulfillment-by-amazon/benefits.htm> [<https://perma.cc/K3LS-V48E>] (last visited Aug. 22, 2019).

These services, when used in tandem, create efficiencies through vertical integration that greatly benefit consumers.<sup>120</sup>

Amazon's third-party marketplace, the largest e-retailer with 31.3 percent of e-commerce market share,<sup>121</sup> is to some degree a typical transaction platform, in that it links buyers and sellers of both new and used products through its website and mobile app.<sup>122</sup> Notably, one of the competitors that sellers compete with is Amazon itself. Amazon contracts with manufacturers separately to sell products directly to consumers with free two-day shipping through a service called Amazon Prime.<sup>123</sup> However, this service is not offered by default to other Amazon Marketplace sellers.<sup>124</sup> Amazon Prime membership requires a consumer to pay an annual fee for free shipping as well as other perks.<sup>125</sup> A subset of Amazon Prime items are manufactured by Amazon, most identifiably under the AmazonBasics product line.<sup>126</sup> So when a shopper seeks to buy, for example, a stapler, she may buy an AmazonBasics-brand stapler from Amazon, or alternatively an outside-brand stapler through a third-party seller on Amazon.<sup>127</sup>

For products that are available from a variety of sellers, including Amazon itself, the list of all sellers is made available; however, 82 percent of sales are made without consideration, through Amazon's "buy-box."<sup>128</sup> The buy-box is simply Amazon's add-to-cart button, which algorithmically chooses the default seller for a customer, updating in real time.<sup>129</sup> Price is the most important feature used by the buy-box algorithm to select the default seller, but it is not determinative, as customer feedback and ratings of the seller are also used.<sup>130</sup> As of 2017, the buy-box algorithm is used even for products that Amazon sells directly.<sup>131</sup> Thus, Amazon Marketplace may be thought of as a transaction platform that also competes with its seller side.

120. 3B AREEDA & HOVENKAMP, *supra* note 9, ¶ 755 ("Vertical integration occurs when a firm provides for itself some input that it might otherwise purchase on the market. As a result, the input is said to be produced within the firm rather than purchased from another firm.")

121. Juozas "Joe" Kaziukėnas, *Amazon Marketplace Is the Largest Online Retailer*, MARKETPLACE PULSE (Dec. 3, 2018), <https://www.marketplacepulse.com/articles/amazon-marketplace-is-the-largest-online-retailer> [<https://perma.cc/NF2W-RG6F>].

122. OLIVIA LAVECCHIA & STACY MITCHELL, INST. FOR LOCAL SELF-RELIANCE, *AMAZON'S STRANGLEHOLD: HOW THE COMPANY'S TIGHTENING GRIP IS STIFLING COMPETITION, ERODING JOBS, AND THREATENING COMMUNITIES* 20 (2016).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Some commentators have suggested that with the exception of AmazonBasics, Amazon often fails to distinguish many of its private label brands. *See, e.g.,* Ian Morris, *AmazonBasics: Peeling Back Amazon's Private Labels*, TWICE (Mar. 14, 2019), <https://www.twice.com/retailing/amazonbasics-private-label-house-brands-2019> [<https://perma.cc/22PT-67HP>].

127. *Cf.* LAVECCHIA & MITCHELL, *supra* note 122, at 24.

128. *Id.* at 20.

129. *Id.*

130. Le Chen et al., *An Empirical Analysis of Algorithmic Pricing on Amazon Marketplace*, 25TH INT'L WORLD WIDE WEB CONF. 1341 (April 2016), <http://gdac.uqam.ca/WWW2016-Proceedings/proceedings/p1339.pdf> [<https://perma.cc/JS6U-9B77>].

131. *See* Jim Milliot, *Publishers Are Urged to Monitor Amazon Buy Buttons*, PUBLISHERS WKLY. (Mar. 23, 2018), <https://www.publishersweekly.com/pw/by-topic/industry-news/>

For the bulk of Amazon's services, both customers and vendors multi-home.<sup>132</sup> For example, third-party sellers may sell their products through other platforms, and users, also, may buy the products through other platforms. However, users may come close to single-homing through use of Amazon Prime for their online retail needs to justify the upfront fixed cost that they paid to enroll in the service.<sup>133</sup> Indeed, data suggests that less than 1 percent of Amazon Prime members are likely to consider competitor retail sites in the same shopping session.<sup>134</sup> This percentage may reflect high switching costs—those “borne by customers who have already purchased a product and who would then incur some cost in switching to another product.”<sup>135</sup> Switching-cost analysis may also be extended from price alone to account for the difficulty of breaking a habit like shopping primarily on Amazon Prime.<sup>136</sup> Near single-homing by users makes Amazon evermore valuable for vendors, as vendors may not consider competing platforms equally substitutable. Thus, these indirect network effects create conditions akin to single-homing on the seller side, and some vendors have expressed that they have no choice but to sell on Amazon despite being unable to compete.<sup>137</sup>

Lastly, through its vertical integration, Amazon is able to collect a variety of consumer data in real time about “which products are sold to whom, at what price, and which packaging or incentives work.”<sup>138</sup> Said data, in addition to helping Amazon understand its consumers, may also provide intelligence about potential competitive threats, which Amazon may use to

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bookselling/article/76406-publishers-are-urged-to-monitor-amazon-buy-buttons.html [https://perma.cc/SL57-QSE3].

132. See, e.g., D. Daniel Sokol & Jingyuan Ma, *Understanding Online Markets and Antitrust Analysis*, 15 NW. J. TECH. & INTELL. PROP. 43, 50 (2017).

133. Khan, *supra* note 1, at 752. A former Amazon employee confirmed that Amazon Prime's fixed enrollment cost, which competitors like Target and Walmart lack, was designed to get users to single-home. See Brad Stone, *What's in Amazon's Box?: Instant Gratification*, BLOOMBERG BUSINESSWEEK (Nov. 24, 2010, 5:00 PM), <https://www.bloomberg.com/news/articles/2010-11-24/whats-in-amazons-box-instant-gratification> [https://perma.cc/YJA8-FYC2].

134. Khan, *supra* note 1, at 752.

135. *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 818 (6th Cir. 1997).

136. Cf. Mark R. Patterson, *Google and Search-Engine Market Power*, HARV. J.L. & TECH OCCASIONAL PAPER SERIES, July 2013, at 4 (arguing that quality, as opposed to market power, is a preferable metric in certain circumstances because “[a]lthough some of Google's practices seem designed to increase switching costs, such costs probably do remain low”). *Contra* Sokol & Ma, *supra* note 132, at 50 (arguing that platforms have low switching-costs, enabling multi-homing). See generally Adam Candeub, *Behavioral Economics, Internet Search, and Antitrust*, 9 I/S: J.L. & POL'Y FOR INFO. SOC'Y 407 (2014) (arguing that in online markets, users develop powerful behavioral tendencies from the desire to reduce cognitive costs, which in turn create high switching costs).

137. See, e.g., Jennifer Rankin, *Third-Party Sellers and Amazon—A Double-Edged Sword in E-Commerce*, GUARDIAN (June 23, 2015, 9:31 AM), <https://www.theguardian.com/technology/2015/jun/23/amazon-marketplace-third-party-seller-faustian-pact> [https://perma.cc/W56J-GZGM].

138. STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE, MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE 52 (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf> [https://perma.cc/TA3B-2N8X].

determine “what firms [it] should block, which [it] should buy, and how [it] should grow strategically.”<sup>139</sup>

## II. ANTITRUST REVIEW OF TWO-SIDED PLATFORMS

Like single-sided firms, the anticompetitive practices of two-sided platforms are subject to review by courts and regulators, who seek to promote fair competition for consumers’ benefit.<sup>140</sup> In *AmEx*, the practice in question was a contractual restriction by American Express that prohibited merchants from steering customers away from American Express to a card with lower merchant fees at the point of sale.<sup>141</sup> Specifically, merchants who accepted American Express cards were prohibited from asking consumers to pay with a different (Visa, Mastercard, or Discover) card.<sup>142</sup> This section will give background on potentially anticompetitive restraints and how they are litigated and investigated through antitrust law, and it will pay special attention to platforms that may now be identified as two-sided in the aftermath of *AmEx*. Part II.A of this section provides an introduction to antitrust review and the tests courts and regulators use to assess the specific practices in dispute. Next, Part II.B discusses a common factor in the aforementioned tests used for two-sided platforms and the test used in *AmEx*: both define the relevant market that an antitrust defendant’s allegedly anticompetitive conduct impacts (“market definition”). Specifically, this section discusses how and for what purpose courts determine market definition, as well as scholarship debating how to properly define relevant markets of two-sided platforms prior to *AmEx*. Finally, Part II.C discusses specific business practices and restraints of trade for which market definition could be crucial to the outcome of platform litigation, as it was in *AmEx*, with examples discussing Amazon’s practices in particular.

### A. Antitrust Review Generally

As discussed earlier, prior to *AmEx*, antitrust case law regarding two-sided platforms, transactional or otherwise, developed outside the context of economics literature. Based on the type of behavior litigated or investigated, the analysis varied. This section contains an overview of antitrust causes of action particularly regarding two-sided platforms.

#### 1. Sherman Act § 1 and the Rule of Reason Test as Applied to Horizontal and Vertical Restraints

Anticompetitive practices are typically litigated under one of two statutes, both of which are more judicial than statutory in nature<sup>143</sup>: the Sherman

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139. *Id.* at 50.

140. *See, e.g.*, Evans & Noel, *supra* note 7, at 669.

141. *AmEx*, 138 S. Ct. 2274, 2277 (2018); *see also* Evans, *supra* note 83, at 13–14 (identifying steering as a behavioral restriction imposed by payment card systems).

142. *AmEx*, 138 S. Ct. at 2277.

143. AREEDA & HERBERT, *supra* note 10, ¶ 1502[B].

Antitrust Act<sup>144</sup> and the Clayton Antitrust Act.<sup>145</sup> Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”<sup>146</sup> Section 2 focuses specifically on monopolizing or attempting or conspiring to do so.<sup>147</sup>

Restraints of trade may be unreasonable in one of two ways: (1) unreasonable per se because they “always or almost always tend to restrict competition and decrease output”<sup>148</sup> or (2) under the rule of reason test, which requires a fact-specific assessment of market power and structure to assess a restraint’s actual effect on competition.<sup>149</sup> Restraints litigated through the rule of reason test are typically separated into horizontal and vertical categories.<sup>150</sup> This distinction is important; horizontal restraints—anticompetitive conduct done in coordination with competitors—is provided less leeway and punished more harshly than conduct that occurs *within* a firm at various levels of distribution (vertical).<sup>151</sup> That is, there is a presumption that a firm acting in coordination with others has more power and less of a procompetitive rationale than a firm acting alone.<sup>152</sup> Because agreements among distributors are such an ordinary and necessary part of business,<sup>153</sup> vertical restraints are only found unlawful when they are unreasonable. They are found to be unreasonable when they reduce output which increases prices in relation to costs.<sup>154</sup>

The rule of reason test, which attempts to assess the reasonableness of a particular restraint, is a multipronged, burden-shifting test that seeks to compare the competitive effects of challenged behavior relative to alternatives, such as abandonment or a less restrictive substitute.<sup>155</sup> The plaintiff has the initial burden to prove that the challenged restraint has an anticompetitive effect that harms customers in the relevant market.<sup>156</sup> If the plaintiff meets this burden, the burden then shifts to the defendant to show a procompetitive rationale.<sup>157</sup> If the defendant makes this showing, the burden then shifts back to the plaintiff to show that the procompetitive efficiencies

144. 15 U.S.C. §§ 1–7 (2012).

145. Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2012) and 29 U.S.C. §§ 52–53 (2012)).

146. 15 U.S.C. § 1 (2012).

147. *Id.* § 2.

148. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289–90 (1985)).

149. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

150. *See, e.g.*, 11 AREEDA & HOVENKAMP, *supra* note 10, ¶ 1901.

151. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007); *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 348 n.18 (1982).

152. *See AREEDA & HOVENKAMP, supra* note 10, ¶ 1512.

153. Vertical restraints often have procompetitive justifications, which result in benefits to both sides of a two-sided platform. *See Evans, supra* note 4, at 9.

154. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 159–60 (2018). Thus, vertical restraints have an implicit horizontal impact, either through collusion or exclusion. *Id.*

155. AREEDA & HOVENKAMP, *supra* note 10, ¶ 1500.

156. *Id.* ¶ 1502.

157. *Id.*

could be reasonably achieved through less anticompetitive means.<sup>158</sup> The plaintiff's need to satisfy the initial burden is crucial because 95 percent of rule of reason cases are won or lost at the first step.<sup>159</sup>

Regarding the first prong of the rule of reason test, the plaintiff can show a restraint's anticompetitive effects either directly by evidence of actual detrimental effects on competition, such as reduced output or increased prices in the relevant market,<sup>160</sup> or indirectly by proof of market power plus some evidence that the restraint harms competition.<sup>161</sup> Usually, to prove anticompetitive effects, the plaintiff must define the relevant market.<sup>162</sup> But the method of defining the market, and even the underlying purpose of how to do so, is not settled, especially as applied to two-sided platforms and their many variants.<sup>163</sup>

## 2. Predatory Pricing: The *Brooke Group* Test

Although antitrust law is not usually concerned with setting a limit on price competition, under certain conditions, low prices may have anticompetitive effects.<sup>164</sup> Predatory pricing occurs when a platform attempts to drive rivals out of business by lowering prices or issuing subsidies to one or several of the groups it serves.<sup>165</sup> After driving said rival out of business, the platform can then raise prices or reduce subsidies to recoup its losses.<sup>166</sup>

Predatory pricing claims do not rely upon the Sherman Act § 1 rule of reason but instead on the Robinson-Patman Act<sup>167</sup> or section 2 of the Sherman Act.<sup>168</sup> The elements for a prima facie claim are virtually identical under each act, but the Sherman Act requires a higher standard of proof.<sup>169</sup>

While claims are brought under the aforementioned statutes, courts use the two-part test introduced in *Brooke Group Ltd. v. Brown & Williamson*

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158. *Id.*

159. Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, PERSP. ANTITRUST (ABA/Civil Practice & Procedure Comm., Chi., Ill.), Jan. 22, 2013, at 1.

160. *See, e.g.,* *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 390 (8th Cir. 2007); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001).

161. *See* *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Comm'ns, Inc.*, 376 F.3d 1065, 1073 (11th Cir. 2004); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998).

162. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007); *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 348 n.18 (1982); *see also* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 440 (2010).

163. *See infra* Part II.C.

164. 3A AREEDA & HOVENKAMP, *supra* note 9, ¶ 723a.

165. Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 219–20 (1979).

166. *Id.*

167. 15 U.S.C. § 13(a) (2012).

168. *Id.* § 2.

169. Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2255 n.99 (2000) (distinguishing the Sherman Act's need for dangerous probability of monopolization from the Robinson-Patman Act's reasonable possibility of substantial injury to competition).

*Tobacco Corp.*<sup>170</sup> to decide predatory pricing cases.<sup>171</sup> In this test, plaintiffs must show that the defendant's price was below an appropriate measure of cost and that the defendant had a dangerous probability of recouping its upfront losses through enhanced market power.<sup>172</sup> This test is difficult to satisfy by design, as the Court did not want to condemn procompetitive and consumer-friendly price cuts.<sup>173</sup> Despite predatory pricing's different test, market definition must occur nonetheless because "[s]uccess requires not just below-cost pricing but a product market that will allow the would-be monopolist to raise prices later without the threat of new market entrants."<sup>174</sup>

*B. Market Definition Is Applied in the Rule of Reason and Brooke Group Tests*

Defining the relevant market in which an allegedly monopolizing firm competes is a necessary inquiry under both the rule of reason<sup>175</sup> and *Brooke Group* tests.<sup>176</sup> While the ultimate goal of defining the relevant market is undeniably to determine whether a firm has power in said market,<sup>177</sup> the method used to properly define it has evolved over time, and it was an issue of first impression in *AmEx* with respect to two-sided platforms specifically.<sup>178</sup> And although courts and regulators alike have reasoned that it is not always necessary to define the relevant market, especially when there is direct evidence of power over and harm to said market,<sup>179</sup> Supreme Court jurisprudence has shown market definition to be an important inquiry.

What is clear is that to define a market is to identify producers providing customers of a firm with alternative sources for the firm's product or service.<sup>180</sup> A market is the arena where significant substitution in consumption or production occurs.<sup>181</sup> A properly defined market excludes suppliers whose products are different (not within the product market) or who

170. 509 U.S. 209 (1993).

171. *Id.* at 222–24.

172. *Id.*

173. C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 *YALE L.J.* 2048, 2049 (2018) (“The price-cost and recoupment tests are difficult to satisfy and were imposed to serve the Court’s stated goal to avoid condemning—and thereby chilling—procompetitive price cuts.”).

174. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 458 (6th Cir. 2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986)).

175. *See supra* Part II.A.1.

176. *See supra* Part II.A.2.

177. Kaplow, *supra* note 162, at 440; *see also* *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460 (1986) (identifying more broadly the purposes of market definition and market power as crucial in the determination of whether an arrangement “has the potential for genuine adverse effects on competition”).

178. *See* Evans, *supra* note 4, at 3 (“Many questions concerning the design of antitrust analysis involving platform businesses remain unsettled and there are divergences, as well as common ground, among the approaches different courts have taken.”).

179. *Ind. Fed’n*, 476 U.S. at 460–61; *see also* *Todd v. Exxon Corp.*, 275 F.3d 191, 207 (2d Cir. 2001) (recognizing the use of anticompetitive effects alone to demonstrate market power).

180. 2B *AREEDA & HOVENKAMP*, *supra* note 9, ¶ 530.

181. *Id.*

do not compete in the same geographic market.<sup>182</sup> Depending on the characteristics of the market, a firm's raise in price of its product may make substitutes more attractive to buyers and entry more attractive to sellers.<sup>183</sup> For example, if Uber raises its prices, Lyft may appeal to riders who do not wish to pay the increased price.

The emergence of defining relevant markets in antitrust may be traced to *United States v. E.I. du Pont de Nemours & Co.*,<sup>184</sup> where the Supreme Court opined that “[e]very manufacturer is the sole producer of the particular commodity it makes but its control [over price] depends upon the availability of alternative commodities for buyers.”<sup>185</sup> The *du Pont* Court framed the initial scope of the inquiry for market definition: “products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.”<sup>186</sup> However, the Court failed to find a monopoly by defining the relevant market as all flexible packaging materials instead of cellophane specifically.<sup>187</sup> This is now referred to as the “cellophane fallacy” because while some consumers may have viewed some other products as substitutes for cellophane, it was only because cellophane was too expensive as a result of *du Pont*'s monopolistic pricing.<sup>188</sup> Thus, *du Pont* shows that failing to consider the market conditions may result in an overbroad definition.

In *Brown Shoe Co. v. United States*,<sup>189</sup> a few years after *du Pont*, the Court reinforced its interchangeability approach but did not fall victim to the same fallacy. The Court expanded on *du Pont* by explaining that within a “broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.”<sup>190</sup> Instead of providing a bright-line rule to determine whether one is in a broad market or a submarket, the Court provided a list of factors to consider: (1) industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors.<sup>191</sup>

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182. *Id.* Subsequent discussion will focus on product market, as geographic market is less relevant to e-commerce, and therefore outside the scope of this Note.

183. *Id.*

184. 351 U.S. 377 (1956).

185. *Id.* at 380.

186. *Id.* at 404.

187. *Id.*

188. See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 471 (1992) (“The existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power”) (quoting PHILLIP E. AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* ¶ 340(b) (4th ed. 1988)).

189. 370 U.S. 294 (1962).

190. *Id.* at 325.

191. *Id.*

Later, in both *United States v. Grinnell Corp.*<sup>192</sup> and *Eastman Kodak Co. v. Image Technical Services, Inc.*,<sup>193</sup> the Court began to take a more flexible approach and placed an emphasis on “commercial realities” in pursuit of a practical solution. In *Grinnell*, the Court, distinguishing home alarms that were centrally monitored from those that were not, held that an overbroad definition would not accurately reflect the commercial realities of the market because certain portions of the consumer population would not actually consider products in the alleged market substitutable.<sup>194</sup>

Doubling down on this reasoning almost thirty years later, the *Kodak* Court justified including aftermarket products and services in the relevant market for photocopier replacement parts because photocopier owners may have considered them interchangeable with Kodak’s parts.<sup>195</sup> Thus, the Court’s jurisprudence has allowed for, if not encouraged, practical considerations when defining relevant markets.

### *C. Specific Practices Through Which Two-Sidedness Could Matter to Market Definition Calculation*

While *AmEx* established that two-sidedness is a consequential inquiry, it does not follow that *any* action against a platform would implicate its two-sidedness. This section discusses some of the practices that Amazon Marketplace has engaged in that would in fact implicate Amazon’s two-sidedness.

#### 1. Most-Favored-Nation Provisions for Platforms

One typical vertical restraint is a most-favored-nation provision (an “MFN”), also known as a “price parity provision.”<sup>196</sup> Some distinguish an MFN from a platform MFN.<sup>197</sup> The former pertains to agreements between sellers and buyers about the prices that sellers will charge other buyers, while the latter concerns agreements between sellers and platforms about the prices that sellers will charge buyers who will purchase through other platforms.<sup>198</sup> A platform MFN is imposed by the platform on the merchant and requires that a merchant refrain from offering its products or services at lower prices elsewhere.<sup>199</sup> This guarantees that the platform charges the lowest price available for the merchant’s product.<sup>200</sup> The merchant may agree to the MFN

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192. 384 U.S. 563 (1966).

193. 504 U.S. 451 (1992).

194. *Grinnell*, 384 U.S. at 572–74. *But see generally* FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016) (including medical procedures that customers would not consider substitutable in the assessment of relevant markets).

195. *Kodak*, 504 U.S. at 481–82.

196. *See generally* Ariel Ezrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, 11 EUR. COMPETITION J. 488 (2015).

197. *See* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2181 (2018).

198. *Id.*

199. *Id.* at 2178.

200. *Id.*

because the platform's market power restricts its alternatives or because the weakened competition also benefits the merchant.<sup>201</sup> Evidence suggests that MFNs lead to higher prices for consumers by preventing rival discounting and/or discouraging entry.<sup>202</sup> Further, a 2016 literature review detailed the potential of MFNs to soften competition between retailers on the margin charged to suppliers, restrict entry at the retailer level, and fully eliminate price competition at the retail level.<sup>203</sup>

One recent instance of platform MFN litigation was *United States v. Apple Inc.*,<sup>204</sup> frequently referred to as the “e-books case.” Underlying the case, Apple planned to release the iPad and sought to gain control of the e-book market from Amazon, which possessed over 90 percent of the market.<sup>205</sup> To do so, Apple instituted an MFN with five e-book publishers wherein the publishers set price caps for e-books, and, if a certain book was offered more cheaply elsewhere (e.g., on Amazon), the publisher was required to reduce its price on the Apple iBookstore and, ultimately, receive less in commission.<sup>206</sup> Here, the Southern District of New York found in favor of the plaintiffs, holding that the MFN provisions

not only protected Apple by guaranteeing it could match the lowest retail price listed on any competitor's e-bookstore, but also imposed a severe financial penalty upon the [p]ublisher [d]efendants if they did not force Amazon and other retailers similarly to change their business models and cede control over e-book pricing to the [p]ublishers.<sup>207</sup>

Similarly, through a platform MFN, Amazon Marketplace prohibited sellers from offering lower prices on their own sites or any other online marketplaces.<sup>208</sup> Following pressure from policymakers, Amazon eventually removed the provision from its seller terms in the spring of

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201. *Id.*

202. See, e.g., Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nations Provisions*, ANTITRUST, Spring 2013, at 20, 22–25 (surveying the economics literature on the adverse competitive effects of MFNs).

203. Amelia Fletcher & Morten Hviid, *Broad Retail Price MFN Clauses: Are They RPM “at Its Worst”?*, 81 ANTITRUST L.J. 65, 69, 73–79 (2016) (using the term “broad retail price” MFNs to discuss what Jonathan B. Baker and Fiona Scott Morton call “platform” MFNs); see also Baker & Morton, *supra* note 197, at 2181.

204. 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

205. Jonathan B. Baker, *Cartel Ringmaster or Competition Creator?: The Ebooks Case Against Apple (2013)*, in THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 471, 471 (John E. Kwoka, Jr. & Lawrence J. White eds., 7th ed. 2018).

206. *Apple Inc.*, 952 F. Supp. 2d at 648–50.

207. *Id.* at 648.

208. Benjamin Edelman & Julian Wright, *Price Restrictions in Multi-Sided Platforms: Practices and Responses*, 10 COMPETITION POL'Y INT'L 86, 90–91 (2014). Though the authors deem this restraint a price coherence practice, not an MFN, the restraint in question is what Baker and Morton identify as a platform MFN. *Id.* at 92–93; see also Baker & Morton, *supra* note 198.

2019,<sup>209</sup> several years after doing so in the European Union.<sup>210</sup> By maintaining the provision, sellers likely suffered substantial lost profits, but more crucially, its removal indicates that Amazon's seller-restrictive practices are not necessary ingredients to the company's success.<sup>211</sup>

## 2. Predatory Pricing

Two-sided platforms may use predatory pricing as a means of getting both sides on board in pursuit of critical mass<sup>212</sup> or by charging unprofitably low prices to prevent potential competitors from reaching critical mass.<sup>213</sup>

Lina Khan attributes much of Amazon's success to its willingness to forego profits to establish dominance—i.e., predatory pricing.<sup>214</sup> She argues that Amazon did this in a variety of ways, including through Amazon Prime membership, which has been calculated to cost them 1–2 billion dollars every year to sustain.<sup>215</sup> Similarly, Amazon has foregone profits by pricing products below cost, in what could either be considered loss leading or predatory pricing.<sup>216</sup> Consider the conduct leading up to the e-books case.<sup>217</sup> Amazon priced bestseller e-books below wholesale costs in an attempt to capture the market.<sup>218</sup> Indeed, Amazon found this strategy successful, as Amazon sold around 90 percent of all e-books through 2009.<sup>219</sup> Amazon was able to recoup its losses through other avenues and major publishers feared Amazon's price point would permanently drive down the price consumers would pay for e-books.<sup>220</sup> As a result, five publishing companies acted together with assistance from Apple to withhold new e-books from

209. Ahiza Garcia, *Amazon Will No Longer Dictate How Sellers Price Their Products*, CNN BUS. (Mar. 11, 2019, 9:11 PM), <https://www.cnn.com/2019/03/11/tech/amazon-price-stipulations/index.html> [<https://perma.cc/5J5U-6JU6>].

210. Press Release, Office of Fair Trading, OFT Welcomes Amazon's Decision to End Price Parity Policy (Aug. 29, 2013), <https://webarchive.nationalarchives.gov.uk/20140402160400/http://oft.gov.uk/news-and-updates/press/2013/60-13> [<https://perma.cc/T27S-BKXR>].

211. That is, restrictive practices may not be elements of Amazon's "flywheel," the self-reinforcing loop of efficiencies powering its business. See BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 241–42 (2013).

212. See *supra* Part I.A.

213. Evans & Schmalensee, *supra* note 32, at 436–37.

214. Khan, *supra* note 1, at 747–55; see also STONE, *supra* note 211, at 278 ("As suppliers had learned over the past decade, no matter the category, Amazon wielded its market power neither lightly nor gracefully, employing every bit of leverage to improve its own margins and pass along savings to its customers.")

215. Khan, *supra* note 1, at 751 (citing Deepa Seetharaman & Nathan Layne, *Free Delivery Creates Holiday Boon for U.S. Consumers at High Cost*, REUTERS (Jan. 2, 2015, 12:22 PM), <https://www.reuters.com/article/us-retail-shipping-holidays-analysis/free-delivery-creates-holiday-boon-for-u-s-consumers-at-high-cost-idUSKBN0KB0P720150102> [<https://perma.cc/55NZ-YFZM>]).

216. *Id.* at 756.

217. See *supra* Part II.B.1.

218. See generally Kirkwood, *supra* note 117.

219. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 649 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

220. Kirkwood, *supra* note 117, at 9.

Amazon.<sup>221</sup> Amazon quickly relented and accepted their pricing terms.<sup>222</sup> The U.S. Department of Justice (DOJ) felt that this was a routine case of price-fixing by the publishers,<sup>223</sup> but in many ways the e-books case has come to represent the notion that potentially illegal means are the only ones that can slow Amazon down.<sup>224</sup>

Although the e-books case is most notorious, it is just one of many examples of below-cost pricing that Amazon uses to drive out competitors. In some cases, Amazon has sought to acquire competing digital retailers, and, when said retailers were not interested, Amazon dropped its prices until the companies were pressured to agree.<sup>225</sup> For example, Zappos, a smaller company with a much larger share of the shoe market than Amazon, sold itself to Amazon after Amazon lowered its shoe prices.<sup>226</sup> In fact, the larger retailer lost “money on each sale” to force the smaller company’s surrender.<sup>227</sup>

While a predatory pricing challenge to Amazon has long been considered untenable because courts consider the practice to be irrational,<sup>228</sup> new research on Amazon’s business model suggests that it may not be so irrational after all. Without access to Amazon’s internal business records, it is impossible to establish that the company is selling products at a loss. But Amazon is recouping costs of operating at a loss not by raising consumer prices as would be expected but by shifting those costs onto its marketplace sellers.<sup>229</sup> “Amazon can sell the same products, for the same price, but push more and more vendors to become third-party sellers on the Marketplace—offloading the costs of fulfillment and allowing Amazon to charge those same entities higher fees.”<sup>230</sup> Indeed, recent reporting shows that Amazon plans to do just this,<sup>231</sup> while simultaneously raising prices on its fulfillment services that have become nearly essential for sellers.<sup>232</sup> This theory of predatory pricing is consistent with studies showing that the likelihood of

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221. *Id.* at 12–13.

222. *Id.*

223. Plaintiffs’ Pretrial Memorandum of Law at 4, *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826 (DLC)), ECF No. 232.

224. *See, e.g.*, Steven Pearlstein, *Pick Your Monopoly: Apple or Amazon*, WASH. POST (Mar. 10, 2012), [https://www.washingtonpost.com/pick-your-monopoly-apple-or-amazon/2012/03/05/gIQA0kBB4R\\_story.html](https://www.washingtonpost.com/pick-your-monopoly-apple-or-amazon/2012/03/05/gIQA0kBB4R_story.html) [<https://perma.cc/8DMW-HBNF>].

225. STONE, *supra* note 211, at 250–56, 286–90.

226. *Id.* at 253; *see also id.* at 250–56.

227. *Id.* at 253; *see also id.* at 250–56.

228. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (“[P]redatory pricing schemes are rarely tried, and even more rarely successful.” (citing ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 149–55 (1978))).

229. Shaoul Sussman, *Superpredators*, WASH. MONTHLY (July/Aug. 2019), <https://washingtonmonthly.com/magazine/july-august-2019/superpredators/> [<https://perma.cc/3CZX-WPW7>].

230. *Id.*

231. Spencer Soper, *Amazon Is Poised to Unleash a Long-Feared Purge of Small Suppliers*, BLOOMBERG (May 28, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-05-28/amazon-is-poised-to-unleash-long-feared-purge-of-small-suppliers> [<https://perma.cc/V998-75NJ>].

232. *See* Sussman, *supra* note 229.

Amazon's entry into a seller's market is positively correlated with the popularity and customer ratings of the seller's products.<sup>233</sup> By shifting more costly transactions to third-party sellers and appropriating less costly transactions from sellers for its own benefit, this suggests a viable means of recoupment under *Brooke Group*.<sup>234</sup> While this theory is admittedly inchoate, it may survive a motion to dismiss in an antitrust case and allow for discovery.

### 3. Exclusionary Conduct Resulting from Dual Distribution

In a dual distribution arrangement, a manufacturer simultaneously sells goods or services to independent dealers and to those who might otherwise be customers of those dealers.<sup>235</sup> For these latter sales, the manufacturer is acting as its own dealer, perhaps through an owned division or subsidiary.<sup>236</sup> The manufacturer may thus compete with the independent dealers handling its product and might restrict that competition by imposing restraints on the independent dealers.<sup>237</sup> While dual distribution is not inherently anticompetitive and is often practical to expand a firm's geographic reach, antitrust concerns arise when the dual distribution results in the manufacturer being in competition with its customer or when customers on different competitive levels compete with each other.<sup>238</sup>

This hybrid relationship has confused some courts, which have been uncertain whether to characterize it as vertical—because it is imposed by the manufacturer upon its dealers—or as horizontal—because it is imposed by the manufacturer-as-dealer upon rival dealers.<sup>239</sup> For example, where Coca-Cola used bottling companies in some geographic areas and did the bottling itself in others, the system was found to be vertical because Coca-Cola established the system itself, observed the same restraints as other bottlers, and there was no control by or conspiracy with the other licensees.<sup>240</sup> However, other courts have concluded that dual distribution restraints are horizontal because the manufacturer and distributor operate on the same level.<sup>241</sup> Whether the restraint is deemed horizontal or vertical is important because it will determine whether the rule of reason is used or whether the restraint will be anticompetitive per se.<sup>242</sup>

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233. See *infra* Part II.B.3. Additionally, there is empirical support for the intuitive notion that “Amazon’s proclivity is to directly sell high-volume products and leave the low-volume items to independent sellers.” Baojun Jiang et al., *Firm Strategies in the “Mid Tail” of Platform-Based Retailing*, 30 *MARKETING SCI.* 757, 758 (2011).

234. See *supra* Part II.A.2.

235. 8 AREEDA & HOVENKAMP, *supra* note 10, ¶ 1605.

236. *Id.*

237. *Id.*

238. *Id.* ¶ 1602.

239. *Id.* ¶ 1605.

240. See generally *Coca-Cola Co.*, 91 F.T.C. 517 (1978), *superseded by statute*, Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, 94 Stat. 939 (1980), as recognized in *Coca-Cola Co. v. FTC*, 642 F.2d 1387 (D.C. Cir. 1981).

241. See, e.g., *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 103–04 (3d Cir. 1975).

242. AREEDA & HOVENKAMP, *supra* note 10, ¶ 1500.

The dual distribution model, while not perfectly designed for or typically associated with two-sided platforms, may be a helpful lens through which to view some of Amazon's practices, specifically in its competition with its own third-party sellers.<sup>243</sup> To be clear, Amazon's structure differs from the typical dual distribution arrangement, where a manufacturer sells to an independent distributor *and* the distributor's potential customers (thus competing with its customer), as Amazon is better characterized as a seller of goods that sells directly to end users but also allows others to sell to end users on its platform.

The dual distribution model has been used in similarly unconventional arrangements. In *Dimidowich v. Bell & Howell*,<sup>244</sup> the Ninth Circuit ruled that a manufacturer of microfilm products lawfully maintained a service organization to repair and replace its equipment except in one market where it authorized a single dealer-representative to make repairs.<sup>245</sup> This hybrid of dual distributorship and a horizontal relationship could be analyzed as a dual distributorship because of its potential procompetitive effects.<sup>246</sup> Thus, under a slightly different arrangement, Amazon still competes with its potential customers in their capacity as sellers, and the dual distribution model contains flexibility to account for this practice.<sup>247</sup>

And indeed, the European Commission<sup>248</sup> and the DOJ<sup>249</sup> are investigating Amazon for competing with its sellers. On its face, this behavior is not a problem, and could even be procompetitive, but Amazon uses its marketplace platform and thus the data of its sellers "as a vast laboratory to spot new products to sell, test sales of potential new goods, and exert more control over

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243. Patrick Hubert et al., *Is Amazon the Next Big Case?—GAFA Under Antitrust Scrutiny*, ORRICK: ANTITRUST WATCH (Oct. 17, 2018), <https://blogs.orrick.com/antitrust/2018/10/17/is-amazon-the-next-big-case-gafa-under-antitrust-scrutiny/> [https://perma.cc/5CWS-RGL9]; Caroline Spiezio, *EU's Amazon Probe Raises Questions About Data Practices as Basis for Antitrust Enforcement*, LAW.COM (Sept. 24, 2018, 12:42 PM), <https://www.law.com/corpocounsel/2018/09/24/eus-move-to-probe-amazon-raises-new-questions-about-data-practices-as-basis-for-antitrust-enforcement/> [https://perma.cc/7ASA-NZM9].

244. 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987).

245. *Id.* at 1481.

246. *Id.*

247. As the characterization of Amazon's inequitable competition with its sellers as a dual distribution arrangement has not been a widely adopted view, it may be more useful to think about it as a problematic outcome of vertical integration or controlling more than one phase of a supply chain. *See, e.g.*, Rahman, *supra* note 15, at 1675 (calling for "prophylactic limits on vertical integration by . . . Amazon [to] limit the spillover of dominance in retail logistics to adjacent lines of business" (citing Khan, *supra* note 1, at 793–94)). *See generally* Khan, *supra* note 15 (making the case for the separation of Amazon as a vendor and Amazon Marketplace to prevent vertical integration from helping Amazon further entrench its dominance, thwart competition, and stifle innovation).

248. Press Release, European Comm'n, Antitrust: Commission Opens Investigation into Possible Anti-Competitive Conduct of Amazon (July 16, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4291) [https://perma.cc/G5B4-DV76].

249. Press Release, U.S. Dep't of Justice, Justice Department Reviewing the Practices of Market-Leading Online Platforms (July 23, 2019), <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms> [https://perma.cc/9LA8-FV34].

pricing.”<sup>250</sup> Data indicates that Amazon is more likely to begin selling items on its retail platform when said items have become popular in its marketplace.<sup>251</sup> Amazon sells these items at a lower price or draws attention from the third-party vendor’s lower price and highlights its own.<sup>252</sup> This practice minimizes the transaction costs associated with testing the products itself and saves Amazon money.<sup>253</sup>

In the above instances, Amazon cut out third-party sellers by purchasing from the manufacturer directly, but Amazon also has responded to popular third-party products by producing and manufacturing cheaper alternatives itself.<sup>254</sup> Thus, Amazon uses its power, data, and vertical integration to take advantage of the fact that some of its customers are also its competitors; Amazon sells products only once their success has been tested.<sup>255</sup> But even after that, Amazon competes advantageously with its third-party sellers and steers consumers toward its own products.<sup>256</sup> These tactics have results: evidence suggests that this practice discourages third-party sellers from pursuing growth on Amazon and stifles innovation.<sup>257</sup> However, due to the vast number of users on Amazon and its underlying market power, third-party sellers may feel pressure to remain on Amazon Marketplace in spite of any anticompetitive tactics.<sup>258</sup> The competitive constraints that Amazon is able to place on both large companies and individual users put it in a unique category of platform, where it can exercise power over users big and small.

#### *D. Defining Platforms’ Relevant Markets Before AmEx: Differing Views*

Even though two-sided platforms have been subject to antitrust review in the past,<sup>259</sup> their market definition remained unsettled prior to *AmEx*—and to some extent may still be. Debate prior to the decision centered around whether a two-sided platform market definition should encompass one side, both sides, or somewhere in between. Additionally, litigation prior to *AmEx*

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250. Greg Bensinger, *Competing with Amazon on Amazon*, WALL ST. J. (June 27, 2012), <https://www.wsj.com/articles/SB10001424052702304441404577482902055882264> [<https://perma.cc/CJY5-VK9J>].

251. *Upstream Commerce Retail Intelligence Research Finds Amazon Muscles In On Its Own Vendors’ Best Sellers*, BUS. WIRE (Oct. 28, 2014, 9:50 AM), <https://www.businesswire.com/news/home/20141028005999/en/Upstream-Commerce-Retail-Intelligence-Research-Finds-Amazon> [<https://perma.cc/QV23-RYU8>]. See generally Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT. J. 2618 (2018).

252. LAVECCHIA & MITCHELL, *supra* note 122, at 20.

253. See Khan, *supra* note 1, at 754.

254. *Id.* at 782.

255. *Id.* at 783.

256. *Amazon: By Prioritizing Its Own Fashion Label Brands in Product Placement on Its Increasingly Dominant Platform, Amazon Risks Antitrust Enforcement by a Trump Administration*, CAPITOL F. (Dec. 13, 2016), <https://thecapitolforum.com/wp-content/uploads/2016/07/Amazon-2016.12.13.pdf> [<https://perma.cc/K76Z-4EB8>].

257. See generally Zhu & Liu, *supra* note 251.

258. See, e.g., LAVECCHIA & MITCHELL, *supra* note 122, at 19 (quoting multiple third-party sellers).

259. See *supra* note 30 and accompanying text.

defined platforms' relevant markets through ad hoc reasoning.<sup>260</sup> This section discusses proposed theories prior to *AmEx*.

### 1. One-Market View

Some believe that because two-sided markets' competitive effects cannot be inferred from one side of the market alone, an analysis of market-wide output effects is required.<sup>261</sup> That is, even if one side of the market experiences some burden from a particular restraint, it tends to be offset by a significant benefit on the other side.<sup>262</sup> According to the proponents of this view, the reallocation of costs and benefits across the two sides of a two-sided market can be output increasing, output reducing, or output neutral; however, one cannot distinguish between these scenarios simply by looking at the effects on one side.<sup>263</sup> Thus, presuming that harm to one side harms consumer welfare would lead to errors in antitrust analysis.<sup>264</sup> The relevant market is then considered the platform itself, and competition with other platforms then prevents the platform from harming the market as a whole.<sup>265</sup>

In *Eastman Kodak Co. v. Image Technical Services, Inc.*, the Court considered this view with respect to restraints on aftermarket parts and servicing for Kodak copiers but ultimately shied away from it.<sup>266</sup> The Court recognized that if there was sufficient economic interrelatedness between pricing and demand in the market and aftermarket segments of copier servicing, then it would be appropriate to characterize the market as a single, unified market for purposes of market definition.<sup>267</sup> Indeed, the Court expressly acknowledged that “[i]t may be that [Kodak’s] parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anti-competitive effects of Kodak’s behavior are outweighed by its competitive effects.”<sup>268</sup> But the Court held that it could not draw those conclusions as a matter of law on summary judgment.<sup>269</sup> In so acknowledging, it foreshadowed how the Court would rule in *AmEx*.

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260. Hovenkamp, *supra* note 13 (manuscript at 5) (characterizing past attention to two-sidedness as “little more than a passing observation”).

261. *See* Evans, *supra* note 4, at 20.

262. *Id.*

263. *Id.*

264. *Id.*

265. Brief of Dr. David S. Evans & Prof. Richard Schmalensee as Amici Curiae in Support of Appellants-Cross Appellees at 18–19, *US Airways, Inc. v. Sabre Holdings Corp.*, No. 17-960 (2d Cir. July 26, 2017), ECF No. 87.

266. 504 U.S. 451, 463 (1992).

267. *See id.*

268. *Id.* at 486.

269. *Id.*

## 2. Two-Market View

Others have urged different market definitions for each side of the platform. This has traditionally been the approach to antitrust review of ad-supported platforms like newspapers.<sup>270</sup> This approach acknowledges that the markets are not similarly situated enough to be analyzed together because the sides are not closely linked due to the lack of sufficiently close substitutes.<sup>271</sup> However, treating transaction platforms this way has been a considerably less popular view. The purported justification for doing so is because the interests of the two sides and the competitive conditions on each side are not necessarily aligned.<sup>272</sup> Separating the sides of the market does not ignore two-sidedness because some advocate balancing the effects among sides of the market.<sup>273</sup> Thus, the inquiry within a two-market framework differs depending on whether a separate- or net-effects analysis is used.<sup>274</sup> A two-market net-effects analysis is very similar to a one-market view because both weigh the impact on a restraint on both sides of the market.

The two-market separate-effects view, advocated by Michael Katz and Jonathan Sallet, still accounts for cross-market network effects by recognizing that the interests of users on different sides are not fully aligned with each other.<sup>275</sup> Using the example of credit card transactions, Katz and Sallet reason that because merchants desire low fees and consumers desire high rewards, neither party is actually interested in the net effect of the restraint.<sup>276</sup>

Analyzing two geographic markets affected by a potential bank merger, the Court in *United States v. Philadelphia National Bank*<sup>277</sup> reasoned that a procompetitive justification in one-market may not offset another even though there would be an effect on both cluster markets.<sup>278</sup> While not explicitly taking a two-market view, or even analyzing two sides of a platform, this case provides precedent for the two-market view's separate-effects analysis as discussed by Katz and Sallet. However, even more recently, the Second Circuit upheld a Southern District of New York decision which defined Visa and MasterCard's relevant markets as two-sided: a

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270. Katz & Sallet, *supra* note 38, at 2154; *see also* *United States v. Tribune Publ'g Co.*, No. 2:16-cv-01822, 2016 WL 2989488, at \*3–4 (C.D. Cal. Mar. 18, 2016) (order granting temporary restraining order); Complaint at 5–6, *United States v. Tribune Publ'g Co.*, No. 2:16-cv-01822 (C.D. Cal. Mar. 17, 2016), ECF No. 1.

271. Katz & Sallet, *supra* note 38, at 2154; *see also* *United States v. Tribune Publ'g Co.*, No. 2:16-cv-01822, 2016 WL 2989488, at \*3–4 (C.D. Cal. Mar. 18, 2016) (order granting temporary restraining order); Complaint, *supra* note 270, at 5–6.

272. Katz & Sallet, *supra* note 38, at 2158.

273. *See id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. 374 U.S. 321 (1963).

278. *Id.* at 358.

market for credit cards and a market for card network services (e.g., authorization, clearance, and settlement of transactions).<sup>279</sup>

### 3. Different Markets for Different Types of Platforms

Many antitrust scholars have advocated for a position somewhere in between a one-market and two-market view. An intuitive variant would treat media and other nontransaction two-sided platforms as having two markets and payment and other transaction platforms as having one market.<sup>280</sup> The reasoning for this distinction is that, for a credit card market for example, a transaction between the buyer and seller either takes place using American Express on both sides or it does not take place through American Express at all.<sup>281</sup>

In the case of a newspaper, an advertiser may substitute a TV advertisement for a newspaper advertisement while a reader may not substitute TV for a newspaper, and the transaction thus need only impact one side of the market.<sup>282</sup> So, it is then the observability of the transaction between the two sides that first designates a transaction platform and then determines the market definition.<sup>283</sup> This also reflects the notion that relevant markets are usually defined as comprising substitutable products.<sup>284</sup>

One of the few two-sided transaction market cases that took a one-market view prior to *AmEx* was *National Bancard Corp. v. VISA U.S.A., Inc.*,<sup>285</sup> where NaBanco filed suit against Visa and alleged that Visa violated section 1 of the Sherman Act by fixing interchange fees.<sup>286</sup> The Eleventh Circuit affirmed the Southern District of Florida's holding that the procompetitive effects created by the interchange fee exceeded any anticompetitive effects.<sup>287</sup> In doing so, the court affirmed the lower court's definition of the relevant market as the market for all payment systems.<sup>288</sup> The court recognized what would now be deemed a transaction platform as a "joint enterprise"—a recognition that reflected the need to get both cardholders and merchants onboard.<sup>289</sup>

#### *E. Putting Theory to Practice: AmEx Introduced Two-Sided Transaction Platform Language and Reasoning to American Antitrust Jurisprudence*

At the end of the 2017–2018 Term, the Supreme Court relied heavily on the work of David S. Evans and Lapo Filistrucchi to rule not only on the

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279. See Filistrucchi et al., *supra* note 90, at 310 (citing *United States v. VISA U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003)).

280. *Id.* at 310–11.

281. *Cf. id.*

282. *Id.* at 301–02.

283. *Id.*

284. *See id.* at 302–03.

285. 779 F.2d 592 (11th Cir. 1986).

286. *Id.* at 596.

287. *Id.* at 605.

288. *Id.* at 604.

289. *Id.* at 601; *see also* Ward, *supra* note 48, at 2081–83.

legality of American Express's steering provisions but, more importantly, on the requirements of market definition for two-sided platforms.<sup>290</sup> In a majority opinion by Justice Thomas, the Court defined two-sided platforms as those “offer[ing] different products or services to two different groups who both depend on the platform to intermedicate between them.”<sup>291</sup> Further, the Court found that American Express is a transaction platform, of which the distinguishing feature is that “they cannot make a sale to one side of the platform without simultaneously making a sale to the other.”<sup>292</sup> The Court reasoned that “[t]wo-sided platforms differ from traditional markets” in that they “often exhibit . . . ‘indirect network effects,’” defined by the Court as where “the value of the . . . platform to one group of participants depends on how many members of a different group participate.”<sup>293</sup>

Defining the relevant market as “the ‘arena within which significant substitution in consumption or production occurs,’”<sup>294</sup> the Court reasoned that the relevant market would include both consumers and merchants because price increases by two-sided platforms by themselves do not suggest anticompetitive effects without evidence that they increased the overall cost of the platform's services.<sup>295</sup> The Court then distinguished credit card platforms from newspaper advertisement markets and said that courts should only consider both sides of the former because “the impacts of indirect network effects and relative pricing in [the newspaper] market are minor.”<sup>296</sup> Further, two-sided platforms “facilitate a single, simultaneous transaction between participants”<sup>297</sup> and a credit card platform “can sell its services only if a merchant and cardholder both simultaneously choose to use the network.”<sup>298</sup>

And thus, the Court concluded, if the platform is two-sided, the first step of the rule of reason test must net the competitive effects on both sides of the platform by considering both sides of the market.<sup>299</sup>

### III. WHAT *AMEX* MEANS FOR AMAZON

While the Court unambiguously held that credit card platforms will be subject to antitrust review with the market for transactions itself being the relevant market, several questions going forward are left unanswered. Complex tech platforms like Amazon, Google, and Facebook, for example,

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290. *See generally AmEx*, 138 S. Ct. 2274 (2018).

291. *Id.* at 2280.

292. *Id.*

293. *Id.* (emphasis added) (quoting David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, in 1 *ISSUES IN COMPETITION LAW AND POLICY* 667, 667 (2008)).

294. *Id.* at 2285 (quoting 2B AREEDA & HOVENKAMP, *supra* note 9, § 502).

295. *Id.* at 2285–86.

296. *Id.* at 2286.

297. *Id.*

298. *Id.*; *see also* Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 *ANTITRUST L.J.* 571, 583 (2006) (“[C]ardholders and merchants jointly consume a single product, payment card transactions.”).

299. *AmEx*, 138 S. Ct. at 2286.

may make an *AmEx* argument if challenged for anticompetitive conduct, and courts and regulators must have a workable standard for deciding whether *AmEx*'s need for harm to both sides<sup>300</sup> will apply to a given firm. This question is threefold: (1) what criteria are sufficient to designate a platform as two-sided, (2) how do plaintiffs prove these criteria, and (3) which criteria must be proven for *AmEx* to apply. Embedded within these related questions lies one that is broader and more fundamental: what constitutes a transaction platform? This section first identifies the variables needed for *AmEx* to apply and then discusses where Amazon may fit.

#### A. Eliciting Two-Sidedness Under *AmEx*

While the Court's definition of a two-sided transaction platform, to some degree, resembles that of scholarship, the definition going forward will be highly variable as there is no consensus.<sup>301</sup> The Court's definition of a two-sided transaction platform as one "offer[ing] different products or services to two different groups who both depend on the platform to intermediate between them" by making a simultaneous transaction<sup>302</sup> almost certainly captures some types of platforms, for example rideshare apps and auction platforms, but leaves open questions about some of the more complex, vertically integrated tech companies like Amazon.

In the Court's determination that the plaintiff must allege harm to both sides of the market for credit card services, it appears that the Court's principal consideration was the presence of *strong* indirect network effects.<sup>303</sup> Although Justice Thomas does not say so expressly, his conclusion is based on research that explains that costs to one side are not reflective of market power or anticompetitive pricing, but of demand elasticity—i.e., indirect network effects.<sup>304</sup> Thus, he argued, taking into consideration only the merchant in a rule of reason analysis would fail to account for American Express's interdependent consumer side because the credit card market's indirect network effects are *so* strong as to risk setting off a feedback loop of declining demand upon raising prices to one side.<sup>305</sup>

Conversely, the Court differentiated the credit card market from the newspaper market through these indirect network effects and warned that courts should not consider both sides of a two-sided platform like the newspaper market "when the impacts of indirect network effects and relative pricing in that market are minor."<sup>306</sup> That is, because "newspaper readers are largely indifferent to the amount of advertising that a newspaper contains," the network effects do not operate in this direction and the newspaper market is comparable to a one-sided market.<sup>307</sup>

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300. *See supra* Part II.D.

301. *See supra* Part I.A.

302. *AmEx*, 138 S. Ct. at 2280.

303. *See id.* at 2286.

304. *Id.*

305. *See id.* at 2286–87.

306. *Id.* at 2286 (citing Filistrucchi et al., *supra* note 90, at 321–22).

307. *Id.* (citing Filistrucchi et al., *supra* note 90, at 321, 323).

After discussing the need for strong indirect network effects, the Court's justification for defining one market shifted to its identification of American Express as a transaction platform, unlike a newspaper.<sup>308</sup> This is because the platform facilitates a "single, simultaneous transaction" between merchants and credit card users.<sup>309</sup> Further, as opposed to newspapers, a credit card platform like American Express may not sell its services to one side without selling to the other side, and its optimization of sales results from balancing each side in a way that newspapers need not consider.<sup>310</sup>

Taking all of the *AmEx* Court's factors into consideration, the plaintiffs can be understood to have needed to allege harm to both credit card merchants and consumer-users based on: (1) strong bidirectional network effects between sides and the facilitation of (2) a single transaction between participants that is (3) simultaneous.<sup>311</sup> Importantly, the Court did not specify whether all three considerations need apply to deem a firm a two-sided transaction platform and, in the case of network effects, *how strong* they must be. The answers to these questions will dramatically impact the analysis of complex tech platforms under *AmEx*.<sup>312</sup>

### B. Where Does Amazon Fit?

If Amazon is considered a two-sided transaction platform under the Court's reasoning in *AmEx*, it will be difficult for the plaintiff-consumer or third-party seller to prove an antitrust violation. Because Amazon Prime operates through transactions between Amazon and buyers, it is structured as a traditional firm and does not raise questions of sidedness. However, Amazon Marketplace is less clear-cut. In *AmEx*, the Court deemed American Express a two-sided transaction platform because of the existence of a simultaneous transaction.<sup>313</sup> When a consumer buys a product from Amazon—as opposed to Amazon Marketplace—the seller has already sold their goods to Amazon;<sup>314</sup> there is no simultaneous transaction between user and merchant and arguably no direct transaction at all. That is, brands invoice Amazon for the products Amazon orders, irrespective of whether and for what price a user purchases them.<sup>315</sup> Thus, even if the indirect network

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308. *Id.* (citing Filistrucchi et al., *supra* note 90, at 321).

309. *Id.*

310. *See id.*

311. *Id.*

312. Interestingly, while the case was about market definition within the rule of reason test, the Court did not specify whether two-sided considerations would apply to market definition in other contexts. The only meaningful decision in its aftermath so far has interpreted *AmEx* very strictly and limited its reach to not only rule of reason cases but to rule of reason cases based on vertical restraints. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 (CW), 2018 WL 4241981, at \*7 (N.D. Cal. Sept. 3, 2018) (order reaffirming the exclusion of an expert witness).

313. *See supra* Part III.A.

314. *Selling on Amazon: First Party or Third Party?*, CHANNELADVISOR 2, <https://www.channeladvisor.com/resources/library-webinars/selling-on-amazon-first-party-or-third-party/> [<https://perma.cc/A32N-AHTP>] (last visited Aug. 22, 2019).

315. *See id.* at 4.

effects between users and manufacturers are strong, Amazon is best viewed outside the scope of the *AmEx* requirement and any allegations of anticompetitive practices should be analyzed through the lens of either the market for the consumer-user or the market for the brand-seller.

Whether Amazon Marketplace should be treated as a two-sided transaction platform raises a more complicated question. On the surface, it would appear to be one, even paradigmatically so.<sup>316</sup> Intuitively, its indirect network effects are strong. Just as in the credit card market, consumers gain value from more merchants selling on the platform, and merchants gain value from more users shopping on the platform.<sup>317</sup> Further, when a user buys a product from a third-party Amazon seller, the parties undergo a simultaneous transaction where the user directly pays the seller.<sup>318</sup> This is the best argument in favor of defining a single market for Amazon: it fits the Court's quasi-test. Still, there are additional legal and policy justifications worthy of consideration that make the analysis less clear-cut. This section examines arguments for and against this potential classification of Amazon Marketplace.

### 1. Justifications for Applying *AmEx* to Amazon Marketplace

Both legal and practical concerns support treating Amazon Marketplace as a two-sided transaction platform under *AmEx*. First, justifying the Court's holding, David S. Evans points out that when a platform that provides a service that is jointly and unseverably consumed by two different sides, as third-party sellers and users, these businesses never provide a transaction to only one side of the service.<sup>319</sup> Thus, conduct that, when taking both sides into account, does not reduce the quality of the service or raise the total cost of the service should not reduce total market output or buyers' surplus.<sup>320</sup> American Express, for example, did not reduce the amount of credit card transactions nor did it reduce the customer's surplus. In the case of Amazon Marketplace, much of Amazon's behavior ends up benefiting users who engage in more transactions due to lower prices.<sup>321</sup> So, in accepting this rationale for American Express and the credit card market, the same reasoning may apply to Amazon Marketplace.

Also, practically speaking, Evans's argument that actions against third-party sellers have countervailing benefits to users is one that gets to the heart of antitrust law's purpose—consumer welfare.<sup>322</sup> Much of the reason for

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316. See, e.g., Katz & Sallet, *supra* note 38, at 2143 (using Amazon as an example of such a platform that “brings together merchants and consumers”).

317. See generally DAVID S. EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS (2016).

318. See *Selling on Amazon: First Party or Third Party?*, *supra* note 314.

319. See David S. Evans & Richard Schmalensee, *Applying the Rule of Reason to Two-Sided Platform Businesses*, 26 U. MIAMI BUS. L. REV. 1, 11 (2018).

320. *Id.*

321. See Khan, *supra* note 1, at 716.

322. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (1978)). The consumer

Amazon's continued growth is simply that its prioritization of scale and willingness to undergo debt is consumer-friendly.<sup>323</sup> And courts have consistently identified the Sherman Act's purpose not as maximizing competition but as serving consumers.<sup>324</sup> Moreover, it is this focus on growth that has enabled Amazon's innovation and, perhaps, it should be entitled to a procompetitive presumption, as courts and regulators tend not to intervene when consumers benefit.<sup>325</sup> Such a presumption would fit with the idea of dynamic competition—that new industries will destroy old ones through innovation.<sup>326</sup> Although not the primary concern of antitrust law, dynamic considerations have arisen in case law, for example in *Verizon Communications v. Law Offices of Curtis V. Trinko*,<sup>327</sup> where the Court justified the act of charging monopoly prices in and of itself.<sup>328</sup> In dicta, the Court expressed the sentiment that false negatives (false acquittals) for anticompetitive conduct are not troublesome because monopolies by nature are only temporary.<sup>329</sup> Recent history lends support for this view: platforms like MySpace, Nokia, and BlackBerry, once dominant in their respective spheres, have lost their status through innovation by competitors.<sup>330</sup> Market dominance is not guaranteed to be permanent in an environment with fast technological change.<sup>331</sup> Thus, critics of strong antitrust enforcement applied to tech companies warn that such a “precautionary approach,” which considers “the merest possibility of harm to be a sufficient basis to proscribe uncertain conduct,” would be costly “in an era of rapid technological innovation and evolving business models impelled by shifting consumer preferences and technological capabilities.”<sup>332</sup>

Indeed, the Supreme Court has expressed reluctance to condemn restraints of trade involving new products or business practices for fear of chilling

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welfare standard is not without opposition. *See, e.g.*, Roger D. Blair & D. Daniel Sokol, *The Goals of Antitrust: Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2499 (2013) (advocating a shift to a total welfare standard of antitrust enforcement).

323. *See, e.g.*, Melissa Hoffmann, *Amazon Has the Best Consumer Perception of Any Brand*, ADWEEK (July 16, 2014), <http://www.adweek.com/news/advertising-branding/amazon-has-best-consumer-perception-any-brand-158945> [<https://perma.cc/RS6Q-5WC5>].

324. *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107–08 (1984) (“Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.”); *Reiter*, 442 U.S. at 343 (“Congress designed the Sherman Act as a ‘consumer welfare prescription.’” (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (1978))).

325. Rob Frieden, *The Internet of Platforms and Two-Sided Markets: Implications for Competition and Consumers*, 63 VILL. L. REV. 269, 312 (2018).

326. *See generally* Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1 (2012).

327. 540 U.S. 398 (2004).

328. *Id.* at 407.

329. *Id.*

330. *See* Martens, *supra* note 42, at 3.

331. *Id.* (noting that there is no guarantee that this principle will hold true for platforms like Apple, Google, and Facebook).

332. Elyse Dorsey et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. (forthcoming 2019) (manuscript at 25).

innovation and reducing dynamic benefits.<sup>333</sup> Along these lines, there is no doubt that Amazon has been innovative in its ability to dominate in multiple spheres, and perhaps fear of replacement or obsolescence may sustain its innovation. By analogy, there is empirical support for the notion that when app developers fear Google's entry into and potential takeover of their market (via Android), they reduce their innovation—but this innovation shifts to new, unaffected apps.<sup>334</sup> Thus, platform owner entry may provide efficiencies by enabling more variety while eliminating redundant apps.<sup>335</sup> Perhaps third-party sellers on Amazon who fear Amazon's entry into their market may react in a similar way.

On the other hand, the fact that these platforms are building in the long-term may render dynamic considerations less effective than would typically be expected. For instance, evidence suggests that both actual entry and threat of entry by Amazon and Google alone deter innovation in complementary spaces.<sup>336</sup> Further, a recent report of the University of Chicago's Stigler Center suggests that "rapid self-correction in markets dominated by large digital platforms is unlikely, and that harms to economic welfare from the exercise of market power in such markets are substantial."<sup>337</sup> Additionally, "while monopoly profits are a lure to competitors [to enter], incumbents can use those very profits to entrench themselves and protect their position."<sup>338</sup> Still, these limits to dynamic competition are far from certain.

Lastly, from a judicial economy standpoint, it is more practical to have bright-line rules, free of carve-outs. The Supreme Court agrees.<sup>339</sup> A bright-line rule, the Court has explained, beats the "unwarranted and counterproductive exercise [of] litigat[ing] a series of exceptions."<sup>340</sup> The Court has stated that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule."<sup>341</sup> However, Amazon is differently situated from American Express due to its distinguishable practices, and this may be a reason to exclude it from receiving the same protection under *AmEx*.

## 2. Reasons to Exclude Amazon from the *AmEx* Test

While Amazon Marketplace may intuitively appear to fit into the *AmEx* Court's constraints, the strength of Amazon's indirect network effects may

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333. See Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 194 nn.116–21 (2010) (collecting cases).

334. See generally Wen Wen & Feng Zhu, *Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market*, 40 STRATEGIC MGMT. J. 1336 (2019).

335. *Id.* at 1361.

336. See Khan, *supra* note 15, at 1009–12 (discussing anecdotal survey evidence, data reflecting downward trends in startup formation and angel and seed investments, theoretical economics literature, and empirical economics literature).

337. STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE, *supra* note 138, at 60.

338. *Id.*

339. *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990).

340. *Id.*

341. *Id.* at 216.

not be so clear. And arguably, some of Amazon's practices in this space veer from the transaction platform's principal function of intermediating between groups depending on the platform.<sup>342</sup> Importantly, a broad definition of a two-sided transaction platform would not support the underlying premise of the fact-intensive rule of reason test that aims to understand and weigh commercial realities in a given industry.<sup>343</sup>

Recent scholarship suggests that Amazon is more likely to enter into third-party sellers' markets as a competitor when the products have higher sales and better reviews. Subsequently, this discourages third-party sellers from growing their businesses on the platform or continuing to offer the products.<sup>344</sup> While prior research shows that platform owners generally tend to be dissuaded from competing with one or both sides of its market because of survival concerns, Amazon is differently situated because of its market power and its restraints that prevent third-party sellers from developing identities of their own on the platform to which buyers would develop loyalty.<sup>345</sup> Further, Amazon has the resources and proven desire to price out its competition, and this results in considerable power over its consumer side.<sup>346</sup> All of these concerns, along with its access to and use of sellers' and buyers' data,<sup>347</sup> strongly suggest that Amazon Marketplace's indirect network effects are weaker than other transaction platforms due to the platform's interference. That is, because Amazon as a vendor is able to leverage information asymmetry to compete with its sellers, consumers may not value additional third-party sellers—and instead prefer Amazon as a vendor. And sellers may not value additional consumers, as they will fear Amazon intruding into their product spaces.

This inference complements research that frames the most important difference between merchants and two-sided platforms as control by the seller.<sup>348</sup> That is, in a two-sided transaction platform, the third-party seller has full control over selling its product, and this results in a direct interaction between the two sides.<sup>349</sup> Thus, without the platform's interference in buyer-seller interactions, the network effects are more pronounced.

For these reasons, Amazon's interference into third-party sellers' products necessarily weakens network effects between the seller and buyer: if more buyers enter the market, based on a combination of Amazon's price and nonprice restraints to both sides, sellers may only temporarily increase their

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342. See *AmEx*, 138 S. Ct. 2274, 2280 (2018).

343. Cf. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992) (“Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”).

344. See generally Zhu & Liu, *supra* note 251.

345. *Id.*

346. See *supra* Part II.A.2.

347. See *supra* Part II.B.3.

348. See Andrei Hagiu, *Merchant or Two-Sided Platform?*, 6 REV. NETWORK ECON. 115, 115–16 (2007).

349. *Id.* See generally Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 INT'L J. INDUS. ORG. 162 (2015) (identifying the key features of two-sided platforms as enabling direct interactions between sides as well as each side's affiliation with the platform).

value, if at all.<sup>350</sup> Thus, as the Court's decision in *AmEx* defined a two-sided transaction platform at least partially by the strength of its network effects, Amazon would not qualify as a two-sided transaction platform if its indirect network effects are weak.

Additionally, while some may consider this inference about the strength of network effects speculative without empirical measure, the fact that Amazon has a material interest in its sellers' transactions and uses this derivative data suggests that it does not merely "intermediate between" parties at all and should be exempt on this ground.<sup>351</sup> That is, while Amazon in operating its marketplace must indeed "bring both sides on board," by competing with its sellers through its vendor platform, it functions unlike the two-sided transaction platforms that the Court defined in *AmEx*. "For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network."<sup>352</sup> Here, while this may be true for any given transaction between user and third-party seller, Amazon may also bypass sellers to facilitate its own transactions with consumers either through wholesaler deals or the development and promotion of its own product lines.<sup>353</sup> Amazon blurs this distinction between its marketplace and its direct-to-consumer sales platform, for instance, by presenting itself as the default seller even when marketplace vendors offer lower prices on the particular product.<sup>354</sup> In doing so, a marketplace transaction is no longer between seller and buyer but between Amazon and buyer, and this renders it far outside the scope of "facilitat[ing] a single, simultaneous transaction between participants."<sup>355</sup> Thus, to treat it as a two-sided transaction platform under *AmEx* by defining only one relevant market would ignore this crucial distinction that it does more than facilitate transactions by engaging in them as well.

### 3. Middle Ground: Calculating Indirect Network Effects in Court<sup>356</sup>

In their 2013 paper *Identifying Two-Sided Markets*, Lapo Filistrucchi, Damien Geradin, and Eric van Damme wrestle with this issue of when to

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350. See, e.g., James Currier, *70% of Value in Tech Is Driven by Network Effects*, NFX (Nov. 28, 2017), <https://www.nfx.com/post/70-percent-value-network-effects> [<https://perma.cc/GQK7-96GX>] (indicating that Amazon benefits from economies of scale, not network effects).

351. *AmEx*, 138 S. Ct. 2274, 2280 (2018).

352. *Id.* at 2286.

353. See *supra* Part II.B.3.

354. Khan, *supra* note 15, at 988.

355. *AmEx*, 138 S. Ct. at 2286.

356. Another alternative proposal worthy of consideration is to treat Amazon Marketplace as a two-sided transaction platform under *AmEx* and thus require proof of harm to both sides of the market but also account for the upstream costs to consumer welfare at the first step of the rule of reason test. See generally Rob Frieden, *Two-Sided Internet Markets and the Need to Assess Both Upstream and Downstream Impacts*, 68 AM. U. L. REV. 713 (2019). This approach would examine consumer harms beyond those of increased price and reduced output as *AmEx* required, including uncompensated data collection, privacy intrusions, reduced or eliminated consumer surpluses, and harm to information, communications, entertainment, and technology ventures. *Id.* However, as this approach, its merit notwithstanding, is difficult to

focus on one or both sides of the market for purposes of market definition of two-sided platforms.<sup>357</sup> Their answer is to first measure the indirect network effects that link the demands of the two sides and then examine whether they apply to one side or both, whether they are both positive, and how significant they are.<sup>358</sup> In a transaction platform, the greater the indirect network effects, the more two-sided the market is.<sup>359</sup> The authors discuss both qualitative methods—i.e., using intuition or interview—and quantitative methods of calculating network effects.<sup>360</sup> In the interview approach, one may assess the two-sided nature of a market by asking actors “whether they value positively or negatively the presence of more customers on the other side.”<sup>361</sup> As applied to Amazon, this would involve asking third-party sellers if they value more buyers on the platform and asking buyers if they value more sellers. Intuitively, sellers will desire more buyers but perhaps only to a certain extent when considering the possibility of Amazon’s entry into the market. The quantitative approach would be the same but would rely on data of the actual behavior of market participants.<sup>362</sup>

This approach appears to be a reasonable middle ground, but it is not without limitations. First, such an inquiry, especially a quantitative approach, would require a lot of time, slowing potential investigation or litigation.<sup>363</sup> Second, evidence suggests that a highly technical inquiry may be ill-suited for “generalist judges.”<sup>364</sup> Lastly, this solution may create a line-drawing problem because “two-sidedness is not a 0-1 notion: rather, there is a continuum of forms of intermediation.”<sup>365</sup> That is, how two-sided must the platform be to receive *AmEx* treatment?

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square with the Supreme Court’s majority opinion, it is beyond the scope of this Note. *See id.* at 747 (affirming that “[t]he Supreme Court has endorsed a market definition that considers instances where Peter gets robbed . . . but Paul gets paid”).

357. Lapo Filistrucchi et al., *Identifying Two-Sided Markets*, 36 WORLD COMPETITION 33, 44–58 (2013).

358. *Id.* at 44.

359. *Id.* at 45; *cf. AmEx*, 138 S. Ct. 2274, 2286 (2018) (“[T]wo-sided transaction platforms exhibit more pronounced indirect network effects . . .”).

360. Filistrucchi et al., *supra* note 357, at 45.

361. *Id.* at 49.

362. *Id.* at 50.

363. *Id.* at 59.

364. *See* Tim Wu, Contemporary Critique, *The American Express Opinion, the Rule of Reason, and Tech Platforms*, 7 J. ANTITRUST ENFORCEMENT 117, 119 (2019) (suggesting that “[b]y mixing in unnecessarily complex economic principles . . . generalist courts . . . might cherry-pick a new economic theory for each case so as to yield the result preferred” which could distance antitrust law from “the competitive realities of the industry in question”). *See generally* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges?: The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011) (showing that decisions involving the evaluation of complex economic evidence are significantly more likely to be appealed, though decisions of judges trained in basic economics are significantly less likely to be appealed).

365. Hagi, *supra* note 348, at 118.

Nevertheless, as a subsequent case has pointed out, “[n]othing in *American Express* supports the notion that a relevant market can be defined to include more than one side without performing any economic analysis.”<sup>366</sup>

#### IV. PROPOSAL: EXCLUDE AMAZON FROM *AMEX*

Even if network effects are not discernably different between Amazon and American Express, there are still reasons to exclude Amazon from *AmEx* treatment. That is, Amazon as an antitrust defendant should not be considered a two-sided transaction platform, and thus any relevant market under a rule of reason analysis should only encompass one side. If an ousted seller were to sue Amazon,<sup>367</sup> the seller at the first step of the rule of reason test need only prove that Amazon harmed sellers, not buyers.

This reasoning is informed by economics literature on the impact of platform owners’ entry into complementors’ spaces and could also apply to transaction platform app stores and web search results. Specifically, research shows that Android app developers reduce innovation and raise prices for affected apps as Google’s entry threat—i.e., the likelihood that Google will develop a competing app for their own operating system—increases.<sup>368</sup> Then once Google enters, the developers reduce innovation and increase prices further.<sup>369</sup> Similarly, when Google exercises its control by prioritizing its own inferior search results over those of its competitors, it results in harms to consumer welfare.<sup>370</sup> Google’s steering of users to its own search content, like Amazon does as well,<sup>371</sup> results in both worse content for users and declining site views for its competitors (who are also its complementors).<sup>372</sup>

Similarly, recent scholarship distinguishes firms that function as marketplaces from resellers and points out that Amazon is more likely to operate in “reseller mode” by squeezing out the third-party seller and acting as a vendor itself when it has privileged information about the preferences of buyers.<sup>373</sup> For example, because consumer preferences and product varieties

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366. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 (CW), 2018 WL 4241981, at \*6 (N.D. Cal. Sept. 3, 2018).

367. More accurately, a seller in the United States would be forced to arbitrate its claim. See *Amazon Services Business Solutions Agreement*, AMAZON SELLER CENT., [https://sellercentral.amazon.com/gp/help/external/G1791?language=en\\_US](https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US) [<https://perma.cc/8NJR-C8ZK>] (last visited Aug. 22, 2019). Relatedly, *buyers* of third-party goods are now nearly certain to be able to sue Amazon for resulting harms. Cf. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (holding that iPhone users who purchase third-party apps in Apple’s App Store nevertheless constitute “direct purchasers” under the Clayton Antitrust Act and judicial precedent and therefore have Article III standing to bring suit against Apple).

368. See generally Wen & Zhu, *supra* note 334.

369. See generally *id.* Note that the authors suggest that innovation efforts are shifted instead of quashed entirely.

370. See generally Hyunjin Kim & Michael Luca, *Product Quality and Entering Through Tying: Experimental Evidence*, MGMT SCI. (forthcoming); Michael Luca et al., *Does Google Content Degrade Google Search?: Experimental Evidence* (Harv. Bus. Sch., Working Paper No. 16-035, 2015).

371. See *supra* Part II.B.4.

372. See generally Kim & Luca, *supra* note 370.

373. See generally Hagi & Wright, *supra* note 52.

in the area of consumer electronics are unstable and hard to predict, Amazon is less likely to sell them as a reseller (via Amazon Prime) and more likely to allow third-party sellers to sell them on Amazon Marketplace.<sup>374</sup> The informational advantages provided by Amazon's data collection situate it differently from American Express. Knowing in real time through marketplace data which products are sold to whom, at what price, which packaging and incentives work for consumers, among other learnings from operating in multiple verticals, creates the incentive and ability to act in accordance with that information.<sup>375</sup> Insulation from scrutiny by way of *AmEx* protection would amplify this advantage.

This proposal also helps maintain the burden-shifting framework of the rule of reason test, which reflects that the plaintiff's burden at the first step is merely to show harm to competition in *any* relevant market.<sup>376</sup> To require a plaintiff-seller to prove anticompetitive harm to both sellers and buyers to make a *prima facie* case against Amazon would simply be too heavy of a burden.<sup>377</sup> Where courts already “dispose of 97 percent of cases at the first [step], on the grounds that there is no anticompetitive effect,”<sup>378</sup> relying on a field so new and unsettled<sup>379</sup> to require a plaintiff to prove harm to two distinct groups at the first step is problematic without a deeper understanding of the indirect network effects that the *AmEx* Court held must be more than minor or weak.<sup>380</sup> To do so going forward would lead to unpredictable results, if not consumer harm, from a pleading standard too difficult for a plaintiff to meet.

Further, as *AmEx* contained “no serious discussion of the rationale for placing more, less, or the same weight on each type of participant for achieving the objectives of antitrust policy,”<sup>381</sup> there is certainly an opportunity to give, for example, third-party sellers on Amazon Marketplace greater weight over the benefiting consumer. As even *AmEx*'s defenders argue, the case only establishes that two-sided features are relevant for

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374. *Cf. id.* at 198.

375. STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE, *supra* note 138, at 49–52.

376. 2B AREEDA & HOVENKAMP, *supra* note 9, ¶ 530; *see also* Larry V. Mucko, Inc. v. Sw. Pa. Bldg. & Constr. Trades Council, 670 F.2d 421, 439 (3d Cir. 1982) (“[A]ntitrust cases have always rejected the premise that a procompetitive effect in one market will excuse an anticompetitive effect in another.”). *But see* Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 120 (2017) (arguing that the “any-market rule” lacks any basis in Sherman Act decisions).

377. *Cf. Wu*, *supra* note 364, at 118 (likening such burden to “a mirror image of the *per se* rules that once prevailed throughout antitrust” and “an example of a retreat from the evidentiary focus supposedly motivating the Court’s shift towards a rule-of-reason analysis”).

378. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009).

379. Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 135 (2017) (“Tech journalists, activists, and scholars in a variety of academic fields argue that platforms are reshaping seemingly every area of human endeavor . . . but disagree on how to assess platforms’ effects.”).

380. *AmEx*, 138 S. Ct. 2274, 2286 (2018).

381. Evans, *supra* note 4, at 29.

assessing whether restraints are anticompetitive, which leaves open the question of how we should analyze these features.<sup>382</sup>

In limiting the thrust of the *AmEx* decision, courts can take steps to better protect plaintiffs, as antitrust defendants are better equipped than plaintiffs to present an effective case with experts.<sup>383</sup> Antitrust jurisprudence is frequently cited for the goal of choosing a market definition that “can be determined only after a factual inquiry into the ‘commercial realities’ faced by consumers.”<sup>384</sup> Where the commercial realities faced by seller-consumers vary so drastically from buyer-consumers due to the platform’s control, separate markets should be defined.

Lastly, policy rationales support this minor imposition on tech’s biggest companies. Size alone, when combined with data accumulation, potential mergers, and more, gives these companies a disproportionate amount of power over consumers, small business owners, their own employees, and governments.<sup>385</sup> Amazon continues to grow in size and scope of business,<sup>386</sup> enter into public-private partnerships,<sup>387</sup> exert lobbying power,<sup>388</sup> amass, use, and sell unprecedented amounts of detailed consumer data.<sup>389</sup> Further, as Amazon uses protected profits to enter into new markets, potential conflicts of interest and competition with complementors occurs more and more frequently.<sup>390</sup> While antitrust investigations and litigation, especially under the consumer welfare standard, will not fully resolve these issues, preventing an *AmEx* loophole of sorts would preserve some degree of accountability.

#### CONCLUSION

While *AmEx* was billed in the headlines as a decision that could leave tech companies with unlimited power, its holding was likely narrow enough to avoid any impact of the sort, and some commentators have already suggested

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382. *Id.* at 30.

383. Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 583 (2012).

384. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)).

385. *See generally* WU, *supra* note 21.

386. *See supra* Part I.C.

387. *See, e.g.*, Martin Kaste, *Orlando Police Testing Amazon’s Real-Time Facial Recognition*, NPR (May 22, 2018, 10:01 AM), <https://www.npr.org/2018/05/22/613115969/orlando-police-testing-amazons-real-time-facial-recognition> [https://perma.cc/53N3-25V6] (discussing the Orlando Police Department’s pilot real-time facial recognition system in collaboration with Amazon).

388. *See* Renae Reints, *Amazon Lobbied More Government Entities Than Any Other Public U.S. Company Last Year*, FORTUNE (Mar. 13, 2019), <https://fortune.com/2019/03/13/amazon-lobbying-washington/> [https://perma.cc/53N3-25V6].

389. As recent Supreme Court decisions have emphasized, “[w]hen confronting new concerns wrought by digital technology, [the Supreme] Court has been careful not to uncritically extend existing precedents.” *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018) (citing *Riley v. California*, 573 U.S. 373, 386 (2014)).

390. *See supra* Part II.B.3.

that it may end up being inconsequential.<sup>391</sup> But, as it is already difficult enough to successfully allege an antitrust injury, especially in a rule of reason case, it would be a mistake to create a loophole based on relatively new economic concepts that are arguably broader in scope than much of the literature would recommend.<sup>392</sup> In the particular application to Amazon Marketplace, it would further an already present informational asymmetry.<sup>393</sup> Presuming that two-sided concepts will remain in antitrust law, their unsettled dimensions and great variation present a compelling reason to uphold the flexible intent of the rule of reason test and proceed with caution.

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391. Wu, *supra* note 364, at 119 (suggesting that *AmEx* may be “a case of limited long-term import”).

392. *Id.* (noting that it likely would exclude “a nightclub [offering] a subsidized ‘ladies’ night’—the textbook example of a two-sided platform”).

393. *See supra* Part II.B.3.