ANALYSIS OF PLATFORM VERTICAL CONTRACTS: PRICE VERSUS THE COMPETITIVE PROCESS IN *AMERICAN EXPRESS*

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INTRODUCTION

The continuing debate surrounding the Supreme Court's 2018 landmark decision in *Ohio v. American Express Co.* (*Amex*)[1] indicates that a great deal of uncertainty remains regarding how the anticompetitive effects of platform vertical contracts should be analyzed. Much of this debate concerns what particular price increase should be used to evaluate the alleged anticompetitive impact of the American Express (Amex) contract provisions that forbid merchants from "steering" their customers to another credit card at the point of sale. The dissent focused on evidence it claims demonstrates that these contractual restraints increase merchant fees, arguing that both antitrust precedent and economic analysis imply that this result is sufficient evidence of anticompetitive effects caused by the antisteering restraints.[2] In contrast, the majority emphasized that merchant fees are only one element of the payment system's total price charged to merchants and cardholders considered together on the two sides of the credit card platform, and that demonstrating anticompetitive effects therefore requires evidence that the antisteering restraints increased this total price of an Amex transaction. "Price increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services," the majority held.[3]

A large number of articles have discussed *Amex*, some agreeing with the majority and some with the dissent regarding how anticompetitive effects should be evaluated. A recent article in this Journal misrepresents the state of the debate by totally dismissing the *Amex* decision, describing it in the article's first sentence as "what may be the worst antitrust decision in many

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[1] 138 S. Ct. 2274 (2018).

[2] *Id.* at 2295 (Breyer, J., dissenting) (relying on Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 610 (1953)).

[3] *Id.* at 2286 (citing Benjamin Klein, Andres V. Lerner, Kevin M. Murphy & Lacey L. Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 571, 575, 594, 626 (2006).

decades."[4] Because my co-authored article[5] is favorably cited by the majority fourteen times in support of its analysis, I have decided to enter this debate.

Perhaps surprisingly, I argue in this article that neither the merchant price nor the total price should be the focus of the anticompetitive effects analysis, and that an increase in either price should not be considered sufficient direct evidence of anticompetitive effects of the Amex vertical restraints at issue. Instead, I argue that one should specify the anticompetitive theory of how the vertical restraint is alleged to distort the competitive process in the sense of significantly decreasing the ability of rival platforms to effectively compete. Once that anticompetitive theory is specified, the requisite evidence of anticompetitive effects of the vertical contracts is then implied. This framework for assessing evidence of anticompetitive effects is shown to be fundamentally consistent with current U.S. antitrust law of vertical contracts, the underlying principles of which are applied in this article to vertical contracts instituted by platforms.

Establishing the anticompetitive effects of a vertical contract requires that the firm (or platform) instituting the contract possess sufficient market power. This safe-harbor market-power requirement is important because it permits a firm that clearly lacks significant market power—but sells a differentiated product and thus faces a negatively sloped demand—to use a vertical contract to earn increased rents on its firm-specific assets as an essential part of the normal competitive process. Vertical contracts are commonly used for this purpose, with the often-resulting increase in the firm's price or profits not serving as an appropriate measure of anticompetitive effects in the sense of creating or maintaining market power. In these circumstances, the alternative of focusing solely on the effect of a vertical restraint as increasing price would involve what I refer to as "microregulation" of the competitive market process. This would render suspect all vertical contracts where market results deviate from the perfectly competitive benchmark of price equal to marginal cost, which is not the established or appropriate role of antitrust analysis of vertical contracts.

Neither the majority nor the dissent in *Amex* conducted a market-power analysis and reached a conclusion regarding whether Amex possessed market power in the credit card platform relevant market. The majority avoided what it considers to be this required first step of the indirect antitrust standard it claims to employ. Instead, it argued that there is an absence of evidence of anticompetitive effects of the Amex antisteering restraints in terms of a higher total price (or a reduction in quantity or quality) of Amex transactions in

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[4] Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, 84 ANTITRUST L.J. 883, 883 (2022).

[5] Klein et al., *supra* note 3.

the relevant credit card platform market. The majority therefore implicitly adopted the direct-evidence antitrust standard used by the dissent, where "proof of actual adverse effects on competition is, *a fortiori*, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved."[6] The essential question underlying the disagreement between the majority and dissent therefore is: What should direct evidence of anticompetitive effects of vertical restraints from which market power may be inferred consist of?

The antisteering vertical restraints at issue in *Amex* restricted the ability of merchants to "steer" customers who present the Amex card to a rival credit card.[7] Part I presents the basic economics and institutional background of credit card platforms. Part II then discusses the ostensible disagreement between the *Amex* majority and dissent regarding whether an indirect- or direct-evidence antitrust standard should be used to evaluate the presence of anticompetitive effects of the Amex antisteering restrictions. Part III describes the economic and legal basis for a market-power safe-harbor requirement, and Part IV describes what should constitute the direct evidence of anticompetitive effects from which the anticompetitive exercise of market power can be inferred. It argues that such evidence should demonstrate use of the vertical restraint to distort the competitive process in the sense of causing a significant decrease in the ability of rivals to compete effectively. Part V summarizes the claimed evidence of anticompetitive effects in the *Amex* record presented by the dissent and the majority. Part V shows that in both cases, the evidence referred to does not meet the necessary condition of demonstrating such a distortion in the competitive process.

I. THE PLATFORM ECONOMICS OF CREDIT CARD SYSTEMS

The *Amex* majority and dissent both recognized that Amex operates a credit card transaction platform that connects two distinct sets of buyers in two related markets. To be successful, Amex must make its credit cards desirable both to consumers on the cardholder-usage side of the payment-system market and to merchants on the card-acceptance side of the payment-system market. Amex is competing with other credit card companies in both respects—for acceptance by merchants and for usage by cardholders.

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[6] *Amex*, 138 S. Ct. at 2297 (Breyer, J., dissenting) (citing FTC v. Ind. Fed'n of Dentists (*IFD*), 476 U.S. 447, 460 (1986)).

[7] Visa and MasterCard, in addition to Amex, were simultaneously sued for similar antisteering provisions in their merchant contracts. In 2011, Visa and MasterCard settled the complaint and were not parties to the case when it reached the Supreme Court. *See* Final Judgment as to Defendants Mastercard Int'l Inc. and Visa Inc., United States v. Am. Express Co., No. 10-cv-04496 (E.D.N.Y. July 20, 2011), ECF No. 143. As part of the settlement, Visa and MasterCard agreed to drop the antisteering rules at issue for ten years starting in 2011. *Id*. at 5–7, 15.

The price charged by Amex to merchants is the amount Amex subtracts from transactions made by its cardholders before payment is made to the merchant. This "merchant discount" on Amex transactions averaged 2.6% at the time the complaint was filed, or approximately 0.4% greater than the average merchant discount on Visa and MasterCard transactions.[8] On the other side of the platform, the price charged by Amex to cardholders may include annual and other fees and, more important economically, significant card features and benefits provided to cardholders free of charge. Those features and cardholder benefits include, for example, cash discounts and other rewards, including access to unique events and retail services such as transaction-reversal privileges. Because of these benefits, the "price," or net cost to the cardholder of using the Amex card, is often negative.[9]

The key economic characteristic of all platforms is that pricing takes account of differential elasticities of demand by the transactors on the two sides of the platform. Competitive platform suppliers determine profit-maximizing *relative* prices on the two sides of the platform by balancing transactor demand on the two sides. In the case of payment card systems, this balancing generally leads to merchant and cardholder prices that involve merchants bearing a larger fraction (often greater than 100%) of total system costs compared to cardholders.[10]

That result—a negative cardholder price and a positive merchant price—does not imply that the payment card supplier has market power over merchants. Rather, it follows directly from the fact that demand sensitivity is generally much greater on the cardholder side of the market than on the merchant side of the market. It is relatively easy for consumers to shift to a different credit card for a given transaction, and payment card systems actively compete for cardholder applications and transactions with offers of rewards. Many merchants, on the other hand, find it profitable to accept cards from all major payment card systems so as not to lose profitable incremental sales from consumers who only have, or prefer to use, one particular payment card. This implies that cardholder demand for payment card usage is generally more elastic than merchant demand for payment card acceptance.[11]

Payment-system competitive pricing therefore results in relative underpricing in the cardholder market, often with an effectively negative

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[8] Klein et al., *supra* note 3, at 572, 602 fig.3.

[9] In addition to merchant transaction fees and cardholder annual fees, credit card companies may earn revenues on interest charged to consumers on credit extended for delayed payment. Amex, in contrast to Visa and MasterCard, initially did not offer this service and required full payment of monthly balances by cardholders. *See Amex*, 138 S. Ct. at 2282; United States v. Am. Express Co., 88 F. Supp. 3d 143, 153–54 (E.D.N.Y. 2015).

[10] *See, e.g.*, Klein et al., *supra* note 3, at 585.

[11] *Id.*

cardholder price in the form of rewards and other cardholder benefits, and a positive merchant price in the form of payment-system-set merchant fees.[12] Those factors, rather than market power, explain relative prices on the two sides of the credit card platform.[13] This economic analysis is fully accepted in *Amex*, with the Court noting that "the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing."[14]

In addition to differential elasticities of demand on the two sides of the platform, a platform-supplier's balancing of relative prices takes account of the possibility of differential indirect network effects between the two sides of the platform. Positive indirect network effects mean that an increase in the number of transactions on one side of the platform increases the value to, and hence demand by, transactors on the other side of the platform. Therefore, rather than setting prices on the two sides of the platform based solely on the price elasticity of demand on the two sides, the platform supplier will find it profitable in setting relative prices to take account of how differential network effects between the sides of the platform affect relative elasticities of demand on the two sides of the platform. Specifically, lowering prices on one side of the platform may not only increase demand on that side but, through positive indirect network effects, also increase demand on the other side of the platform. If these positive indirect network effects are greater than any positive network effects in the opposite direction, the platform supplier will set lower relative prices on the initial side of the platform. In general, the platform supplier sets relative prices based on relative elasticities of demand on the two sides of the platform after taking account of network effects.[15]

The classic case of a newspaper illustrates how the presence of positive network effects influences profit-maximizing relative prices. A newspaper publisher sets prices for readers of the newspaper and for advertising placed in the newspaper on the two sides of what may usefully be considered a newspaper platform. Because of the positive network effects of increased readership on increasing the demand for advertising, a profit-maximizing newspaper publisher will set lower prices of its newspaper to readers and

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[12] *Id.* at 587.

[13] *Id.* at 595.

[14] *Amex*, 138 S. Ct. at 2286 (citing Klein et al., *supra* note 3, at 574, 595, 598, 626).

[15] This important economic insight was originally made by Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003) [hereinafter Rochet & Tirole, *Platform Economics*]. It was developed further in Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets*: *A Progress Report*, 37 RAND J. ECON. 645 (2006), and in a number of other early articles and books, including DAVID S. EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING (2d ed. 2005).

higher prices for the advertising placed in the newspaper than if the publisher did not account for network effects.[16]

In contrast to a newspaper, where significant indirect network effects largely go in only one direction (from an increase in the number of readers to an increase in advertising demand), a credit card platform must take account of network effects in both directions. Increased merchant acceptance increases cardholder demand to carry and use the card, and increased cardholder usage increases merchant demand for acceptance of the card. Although the economics of credit card pricing is therefore more complex than the simple newspaper-pricing case, the fundamental economic forces are the same. Relative prices are set on the two sides of the platform so that in the final equilibrium, marginal revenue equals marginal cost minus marginal network effects.

In following this profit-maximizing calculation that takes account of the two-way positive indirect network effects between the cardholder and merchant sides of its platform, Amex has historically set somewhat different relative prices than Visa and MasterCard. Specifically, Amex has charged substantially higher merchant fees, and consequently has had significantly lower merchant acceptance than Visa or MasterCard.[17] However, Amex historically has provided somewhat greater cardholder benefits, including substantially higher average spending limits and greater services and rewards to a smaller number of higher-income cardholders that preferred to use the Amex card despite the card's more limited merchant acceptance. In sum, these two economic forces historically resulted in a relatively smaller Amex share of credit card transactions than Visa or MasterCard.[18] Although Amex, everything else equal, would prefer greater merchant acceptance, which via positive indirect network effects would increase cardholder demand to use the Amex card, Amex historically chose to supply a differentiated product with higher rewards, higher merchant fees and narrower merchant acceptance.

This Amex business strategy was in clear contrast to the initial Visa and MasterCard business decisions to encourage wide (essentially universal)

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[16] The economics of newspapers, and ad-supported media businesses more generally, was used as an example of the influence of network effects on pricing in the initial formal economic statement of platform pricing in Rochet and Tirole, *Platform Economics*, *supra* note 15, at 990, 1010–15.

[17] In 2013, Visa, MasterCard, and Discover were accepted at nearly three million more retail locations than Amex. *Amex*, 138 S. Ct. at 2282. In 2021, Amex merchant acceptance was almost identical to merchant acceptance of its three major rivals. This change in Amex's merchant acceptance is examined *infra* Part III.C.

[18] *See, e.g.*, Klein et. al., *supra* note 3, at 599–600, 600 fig.2 (finding that between 1995 and 2000, the Amex market share of U.S. credit card transactions was relatively stable at approximately 18%, which was lower than Mastercard at approximately 27% and Visa at approximately 48%).

merchant acceptance as a way to increase cardholder demand. In fact, Visa's early advertising campaign used the slogan "It's Everywhere You Want to Be."[19] The greater importance of broad merchant acceptance to Visa and MasterCard compared to Amex shifted competitive relative pricing by Visa and MasterCard in favor of merchants. This explains why Visa and MasterCard merchant discounts have always been lower than Amex merchant discounts.[20]

Because the cardholder benefits provided by Amex created cardholder loyalty to the Amex card for a significant number of higher-income consumers, many merchants selling products aimed at such consumers found it profitable to accept Amex despite the associated higher merchant fees. Essentially all Amex cardholders are able to deal with merchants who do not accept Amex because "the vast majority of Amex cardholders have a Visa or MasterCard."[21] However, dropping Amex may be unprofitable for some merchants if a non-trivial number of the merchant's consumers who prefer to use Amex now decide to shop at an Amex-accepting merchant elsewhere. In such a case, the merchant's incremental profit margin on lost sales may be greater than its merchant fee savings from dropping Amex card acceptance.

To illustrate, assume that a merchant's gross margin on retail sales, defined as sales less cost of goods sold as a percent of sales, is approximately 30%.[22] Incremental sales from acceptance of the Amex card therefore need not be very large to make it worthwhile for many merchants to decide to accept the Amex card despite the higher level of merchant fees. For example, assume for illustration that the transaction fee savings for a merchant that drops Amex and completes the sale with Visa or MasterCard would be .5% (50 basis points). In that circumstance, the merchant need only experience a decrease of greater than 1.7% in its prior Amex sales as a consequence of dropping Amex

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[19] EVANS & SCHMALENSEE, *supra* note 15, at 192.

[20] Because Amex made the business decision to supply a differentiated product aimed primarily at higher-income consumers by setting higher merchant fees and hence more limited merchant acceptance, it also did not offer cardholders delayed-payment credit services. In contrast, Visa and MasterCard interest revenue on credit supplied to cardholders accounted for half of their total revenue. *See Amex*, 138 S. Ct. at 2282. When Amex supplied a product closer to Visa and MasterCard with a broader customer base and greater merchant acceptance (discussed *infra* Part III.C), Amex began to offer such delayed-payment credit terms.

[21] *Amex*, 138 S. Ct. at 2282.

[22] The average retail gross margin for all U.S. retail businesses so defined was 31% in 2021. *Estimated Annual Gross Margin as a Percentage of Sales of U.S. Retail Firms by Kind of Business: 1993-2021*, UNITED STATES CENSUS BUREAU, www2.census.gov/programs-surveys/arts/tables/2021/gmper.xlsx. In fact, the incremental profits from additional sales of the products Amex-loyal customers are more likely to purchase, such as hotel accommodations or jewelry, is often substantially higher than the average retailer incremental profit margin across all products. A positive gross retail margin does not mean that retailers are earning excess profits. It is a consequence of the fact that retailers generally face somewhat negatively sloped demands, with the gross margin of price over incremental costs covering, for example, overhead costs such as rent, executive salaries, and marketing.

(i.e., a loss of at least 1 in 60 Amex sales) for the change to be unprofitable. This illustrates that a merchant's loss of an extremely small number of sales to Amex-loyal consumers would be sufficient to make continued merchant acceptance of Amex worthwhile despite its higher merchant fees.[23]

The fundamental economics underlying credit card platforms involves the platforms' creation of cardholder loyalty through the provision of valuable cardholder features and benefits. Once cardholder loyalty is established, merchants that wish to sell to these particular Amex-loyal customers will likely find it profitable to accept the associated card. The credit card platform can then be thought of as using the cardholder loyalty it has created to act as an indirect bargaining agent for its cardholders to, in effect, negotiate effective price discounts for its cardholders. The share of the increased merchant fee that is passed on to cardholders in the form of increased rewards amounts to an effective price discount on the transaction for those cardholders; any remaining profit earned by the credit card platform is a return on its investment in creating the cardholder loyalty that permits the platform to negotiate with merchants for the effective price discount.

Do these fundamental economic considerations change if merchants can steer cardholders that present the Amex card to another form of payment that is less costly for the merchant? The foregoing calculation assumes that Amex-card-accepting merchants are contractually prevented from placing a surcharge on Amex transactions, be it to cover the additional merchant costs associated with Amex transactions or to induce consumers to substitute another form of payment less costly to the merchant. While a surcharge would likely cause some consumers that present the Amex card to substitute an alternative credit card at the point of sale, it also may cause a number of the Amex-loyal consumers who have decided to shop at the merchant because of merchant's acceptance of the Amex card to switch merchants. As described above, the merchant would need to lose a trivial fraction (less than two percent) of Amex card sales for the merchant's decision to impose a surcharge on Amex card transactions to be non-economic. How many of the merchant's Amex card sales are truly incremental in this sense determines the merchant's original decision to accept the Amex card despite higher merchant fees.[24]

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[23] The total transaction fees savings earned by the merchant from dropping acceptance of Amex under these assumptions of .5% on each of an assumed 59 of 60 Amex sales is equal in total to 29.5% of an individual product's price (i.e., a savings of .5% of the product's price multiplied by 59 units). It would not be profitable for the merchant to drop Amex acceptance in this circumstance because the merchant loses 30% incremental profit from the loss of the single (60th) sale to a previous Amex card consumer who prefers Amex and will now shift purchases to another merchant that accepts Amex.

[24] Although the Amex merchant antisteering contract restraints include a prohibition on surcharges, the no-surcharge restraint was not included in the plaintiffs' complaint in *Amex*. *See generally* Complaint, United States v. Am. Express Co., No. 10-cv-04496 (E.D.N.Y. Oct. 4,

II. DIRECT VERSUS INDIRECT ANTITRUST STANDARD OF ANTICOMPETITIVE ANALYSIS

The disagreement between the *Amex* majority and dissent, as well as the continuing debate in the literature, concerns the question of whether the plaintiffs carried their burden under step one of the rule of reason to demonstrate anticompetitive effects. The majority held that the plaintiffs had not made the initial anticompetitive effects showing; the dissent disagreed.[25]

Part of this disagreement between the *Amex* majority and dissent appears to hinge on the question of what antitrust standard should be used to demonstrate anticompetitive effects of vertical restraints under the rule of reason. The majority argued for an indirect-evidence standard, which it described as involving, first, defining the relevant product market and demonstrating the defendant's market power in that market, and second, providing "some evidence that the challenged restraint harms competition,"[26] which is defined in terms of an "effect that harms consumers in the relevant market."[27]

On the other hand, the dissent relied on a direct-evidence antitrust standard, where all that is necessary to establish anticompetitive effects is "'proof of actual detrimental effects [on competition]'"[28] without the necessity of meeting an initial market-power requirement. "'[S]ince the purpose in a Sherman Act § 1 case of the inquiries into market power is simply to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction in output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental

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2010), ECF No. 1. This may be because ten U.S. States ban such surcharges and also because the post-Visa and MasterCard consent decree evidence indicates that, even when permitted, surcharges are unlikely to be used by the overwhelming majority of merchants. *See* Joanna Stavins, *Consumer Preferences for Payment Methods: Role of Discounts and Surcharges*, 94 J. BANKING & FIN. 35, 36 (2018); *infra* note 137 and accompanying text (discussing this evidence and similar evidence that suggests relatively few merchants offer price discounts for lower-cost mediums of exchange such as cash or debit).

[25] *Amex*, 138 S. Ct. at 2287 (holding that the plaintiffs did not satisfy the threshold showing under the rule of reason test); *id.* at 2302 (Breyer, J., dissenting) (arguing the opposite). The district court decision earlier held that anticompetitive effects were demonstrated, but the Second Circuit reversed. United States v. Am. Express Co., 88 F. Supp. 3d 143, 151–52, 195–224 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179, 184 (2d Cir. 2016).

[26] *Amex*, 138 S. Ct. at 2284 (citing 1 JULIAN VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 12.02[2] (2d ed. 2017)); Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 (2d Cir. 1998); Spanish Broad. Sys., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1073 (11th Cir. 2004)).

[27] *Id*. (citing KALINOWSKI ET AL., *supra* note 26, § 12.02[1]; PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 15.02[B] (4th ed. 2017); Cap. Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)).

[28] *Id*. at 2291 (Breyer, J., dissenting) (quoting FTC v. Ind. Fed'n of Dentists (*IFD*), 476 U.S. 447, 460 (1986)).

effects.'"[29] As a result, "proof of actual adverse effects on competition is, *a fortiori*, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved."[30]

Under the direct-evidence standard adopted by the dissent, anticompetitive effects therefore can be established without first defining a relevant market and determining that the firm possesses market power in that market. The dissent argues that this often makes more sense because it avoids the often "complex business" of "properly defining a market."[31] Moreover, a direct-evidence approach has the further advantage of avoiding the difficult question of whether a particular firm's market share of an assumed well-defined relevant market implies sufficient market power to produce anticompetitive effects. The dissent reasoned that these questions regarding relevant market definition and the minimum market share necessary to establish sufficient market power can be avoided if there is direct evidence of anticompetitive effects caused by the alleged restraints. Proof of anticompetitive effects means that we can infer the presence of sufficient market power to produce the particular anticompetitive effects at issue.

FTC v. Indiana Federation of Dentists (IFD), cited by both the majority and dissent,[32] illustrates these direct-evidence principles. The case dealt with the effort by a group of Indiana dentists to deny insurance-company demands that dentists provide patient x-rays before approving insurance reimbursement coverage.[33] The Federal Trade Commission had successfully forced the much-larger state-wide Indiana Dental Association to drop its rule that prohibited dentists from supplying x-rays to insurance companies.[34] The Indiana Federation of Dentists (IFD) was a smaller association of dentists—consisting of fewer than 100 dentists in the Anderson, Lafayette, and Fort Wayne, Indiana areas—that instituted the same rule for its members as the one that the FTC had previously found to be anticompetitive.[35]

IFD argued on appeal that the FTC had not demonstrated anticompetitive effects because it had not proven a relevant market or, therefore, that IFD possessed market power.[36] The Supreme Court rejected this argument because

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[29] *Id.* (quoting *IFD*, 476 U.S. at 460–61 (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511 (3d ed. 1986))).

[30] *Id.* at 2297 (citing *IFD*, 476 U.S. at 460).

[31] *Id.* at 2295.

[32] *Id.* at 2284 (majority opinion) (citing *IFD*, 476 U.S. at 460); *id.* at 2297 (Breyer, J., dissenting) (citing *IFD*, 476 U.S. at 460).

[33] *IFD*, 476 U.S. at 448–49.

[34] *Id.* at 450–51.

[35] *Id*. at 451.

[36] *Id*. at 460. The defendant also claimed that the FTC failed to find evidence that the rules resulted in any increase in the price of dental services. *Id.* at 461.

there was evidence that insurers were, in fact, unable to obtain x-rays that they attempted to review in two particular localities in the IFD area. The Court considered this an anticompetitive reduction in output, "obviat[ing] the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"[37]

The *Amex* majority initially rejected the dissent's analysis that a relevant market need not be defined to establish anticompetitive effects of the antisteering restraints under a direct-evidence standard by arguing that such a direct-evidence standard is only applicable to horizontal-restraint cases, not the vertical restraints at issue.[38] The majority reasoned that because "horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded [in *IFD* and *Catalano*] that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive."[39] In contrast, the majority maintained, "vertical restraints are different."[40] "Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market."[41] According to the majority, analysis of vertical restraints therefore requires a definition of the relevant market in which the defendant firm operates and a determination that the firm possesses market power in that market. "'Without a definition of the market there is no way to measure the defendant's *ability* to lessen or destroy competition.'"[42]

The majority is correct; vertical restraints are fundamentally different from horizontal restraints. But the majority is wrong in claiming that this difference implies that one cannot use a direct-evidence standard to determine the presence of anticompetitive effects of a vertical restraint from which market power may be inferred. The difference lies not in the standard for proving effects (direct or indirect), but in the kind of direct evidence of anticompetitive effects from

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[37] *Id.* at 460–61 (quoting AREEDA, *supra* note 29, ¶ 1511). The Court also rejected the defendant's argument that the FTC failed to find any evidence that the price of dental services increased, stating that "'proof of actual detrimental effects'" was "likely enough" to demonstrate anticompetitive effects absent actual proof of higher prices. *Id.* at 461–62 (quoting AREEDA, *supra* note 29, ¶ 1511).

[38] Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2285 n.7 (2018) (citing *IFD*, 476 U.S. at 460–61; Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648–49 (1980)).

[39] *Id.* (citing *IFD*, 476 U.S. at 460–61; *Catalano*, 446 U.S. 648–49).

[40] *Id.* (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 348 (1982); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888 (2007)).

[41] *Id*. (citing *Leegin*, 551 U.S. at 898).

[42] *Id.* at 2285 (cleaned up) (emphasis added) (quoting Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965)). The majority also cites Frank Easterbrook for the proposition that "'possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power.'" *Id.* at 2285 n.7 (quoting Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 160 (1984)).

which market power may be inferred. Specifically, one cannot use a post-vertical-restraint increase in price as direct evidence of anticompetitive effects from which market power may be inferred. As described in the following Part, in contrast to horizontal restraints, an increase in price is a common effect in many cases of non-anticompetitive vertical restraints used by firms without market power.[43]

In arguing that a direct-evidence-of-anticompetitive-effects standard only applies to horizontal restraints, the majority may have confused the direct-effects standard with the "quick look" truncated rule of reason analysis. A "quick look" standard only applies to horizontal contracts where the anticompetitive effects of the restraint are so obvious in terms of the likely increase in price or decrease in output that a full rule of reason analysis is unnecessary.[44] In contrast, the truncated direct-evidence standard used in *Indiana Federation* may in principle be applied to vertical restraints.[45] The question is, rather than a price increase, what does direct evidence of anticompetitive effects of a vertical restraint consist of from which the legally required market power may be inferred?

In attempting to apply the indirect antitrust standard to *Amex*, the majority defined the relevant market as the credit card payment-system market.[46] But it failed to determine whether Amex possesses market power in that market, which it claimed was the necessary first step in conducting the indirect analysis. The majority therefore actually used a direct-evidence standard similar to the dissent in its evaluation of the vertical antisteering restraints at issue in *Amex*. For both the majority and dissent, the claimed direct evidence of anticompetitive effects of the antisteering restraints must imply sufficient market power to produce the alleged anticompetitive effects. The only difference between the dissent and majority is whether such direct evidence of anticompetitive effects should consist of an increase in merchant prices or an increase in the total transaction price associated with Amex transactions.

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[43] In contrast to a price increase caused by a vertical restraint, if there is an expected increase in price as a result of a horizontal merger, this implies that the two firms possess market power in an appropriately defined relevant market.

[44] The Supreme Court applied such a "quick look" standard, for example, in *NCAA v. Board of Regents*, concluding that "it would be inappropriate to apply a per se rule to this case . . . [because it] involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." 468 U.S. 85, 100–01 (1984).

[45] 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 68–70 (9th ed. 2022) (examining "[t]runcation through [d]irect [e]vidence of [a]ctual [a]nticompetitive [e]ffects"). This provides a reasonable interpretation of Easterbrook's statement, *supra* note 42 at 160, shortly after stating that "possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power," that "an inquiry into market power does *not* [necessarily] entail the definition of a 'market,' a subject that has bedeviled the law of mergers."

[46] *Amex*, 138 S. Ct. at 2282, 2285–86.

Parts IV and V will address what direct evidence of anticompetitive effects should generally consist of and how this corresponds with the alternative types of price-increase evidence claimed by the dissent and majority to show anticompetitive effects. But first, Part III examines the legal requirement of sufficient market power to establish anticompetitive effects of a vertical restraint.

III. MARKET-POWER REQUIREMENT FOR ANTICOMPETIVE EFFECTS OF VERTICAL CONTRACTS

In conducting anticompetitive analysis of vertical contracts, it is necessary to distinguish between two distinct evidentiary requirements: (1) that the firm using the vertical contract has a minimum amount of market power, and hence the ability to use the vertical restraint it adopts to significantly reduce competition and (2) that the firm uses the vertical restraint to, in fact, significantly reduce market competition. For example, analysis of a tying contract may require determining if the firm has sufficient market power in the tying-product market and if the contract sufficiently forecloses rivals in the tied-product market.[47] In this Part, the initial safe-harbor market-power condition is examined, and in Part IV, the conditions for establishing the presence of sufficient anticompetitive effects are examined.

A. THE LEGAL BASIS OF A SAFE-HARBOR MARKET-POWER REQUIREMENT

Whether the firm instituting a vertical restraint exceeds a minimum, or safe-harbor, market-power condition may be determined by defining the relevant market in which the firm competes and measuring its share of that market. This is identical to the initial element of indirect antitrust analysis. However, rather than determining if significant market power is present, the safe-harbor analysis merely involves determining if the firm possesses the potential ability to impose anticompetitive effects on rivals through its use of a vertical restraint. For example, the *Amex* majority referred in this context to *Leegin.*[48] Clearly, a small manufacturer of leather products the size of Leegin can be assumed not to exceed the minimum-market-share safe-harbor condition. The *Amex* majority concluded, referring to *Leegin*, that therefore "[v]ertical restraints often pose no risk to competition unless the entity imposing them

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[47] For example, the Supreme Court has held that "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." Ill. Tool Works Inc. v. Indep. Ink, 547 U.S. 28, 46 (2006). It has also held that "we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby." Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[48] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

has market power, which cannot be evaluated unless the Court first defines the relevant market."[49]

The dissent claimed that the majority's conclusion (that market power in a relevant market must first be established in order to find anticompetitive effects of a vertical contract) does not accurately summarize the law of vertical restraints because the contract restraint at issue in *Leegin* was an intrabrand contract, while the antisteering provisions in *Amex* were interbrand contract restraints.[50] However, much of the rule of reason analysis of interbrand vertical contracts also requires the plaintiff to prove that the defendant firm possesses a minimum level of market power in an appropriately defined relevant market. For example, anticompetitive analyses of interbrand tying and exclusive dealing contracts often include this requirement. With regard to tying contracts, a plaintiff must demonstrate the defendant's market power in the claimed tying-good market,[51] with the Supreme Court specifically finding in *Jefferson Parish* that a 30% market share in the tying good was insufficient to support a finding of the required presence of tying-good market power.[52]

Similarly, in the case of interbrand exclusive dealing contract restraints a minimum level of defendant market power is generally required for a finding of anticompetitive effects. "Proof of market power, then, for many courts is a critical first step, or 'screen,' or 'filter,' which is often dispositive of the case."[53] As the landmark *Microsoft* decision held, when "an exclusive deal is challenged, it is clear that in all cases the plaintiff must . . . define the market" and demonstrate that the defendant has market power.[54] Establishing market power is commonly recognized as "the first task in any vertical exclusive dealing case . . . [, and it is] essential to determine whether harm to the competitive process is possible."[55]

Hence, it was not necessary for the *Amex* majority to rely on the intrabrand *Leegin* decision for an unambiguous statement of the legal requirement that market power must initially be established to show anticompetitive effects under the first step of the rule of reason analysis of a vertical restraint. The

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[49] *Amex*, 138 S. Ct. at 2285 n.7 (citing *Leegin*, 551 U.S. at 898). The majority also refers at this point in the opinion to Judge Easterbrook's similar statement of this market-power requirement. *Id.* (citing Easterbrook, *supra* note 42, at 160).

[50] *Id.* at 2303 (Breyer, J., dissenting).

[51] *See supra* note 47 and accompanying text.

[52] *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26–29 (1984). A recent summary of U.S. antitrust law states that, with regard to tying contracts, "[s]ince *Jefferson Parish*, no court has inferred the requisite market power from a market share below 30 percent." ABA SECTION OF ANTITRUST LAW, *supra* note 45, at 190.

[53] SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994).

[54] United States v. Microsoft Corp., 253 F.3d 34, 69 (D.C. Cir. 2001) (en banc).

[55] Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 365 (2002).

majority obviously could have chosen numerous examples of interbrand tying or exclusive dealing contracts in support of a market-power requirement for finding anticompetitive effects.

The majority may have chosen the intrabrand contract in *Leegin* because the focus of anticompetitive effects analysis in interbrand vertical contract cases commonly involves analysis of whether there is evidence of anticompetitive effects in the market where the restraints operate. For example, after establishing a defendant's market power, the next step of anticompetitive analysis of an exclusive dealing distribution contract often is to determine if the contract disturbs the competitive process by significantly disadvantaging the ability of rivals to obtain effective distribution.

Therefore, if the *Amex* majority had referred more generally to the antitrust law of interbrand vertical contracts as legal support for a market-power requirement, the cases also may have appeared to support the dissent's conclusion that direct evidence of anticompetitive effects of the antisteering restraints in *Amex* should focus on effects on the merchant side of the platform where the restraints operate. This incorrect implication would have undercut the majority's fundamental conclusion that, separate from an initial market-definition/market-power requirement, one must determine the presence or absence of anticompetitive effects of the Amex antisteering contract restraints in the overall credit card platform relevant market.

It is reasonable from an economic standpoint for the law of vertical restraints to have developed so that a minimum level of market power, measured by a minimum market share in an appropriately defined relevant market, is required to satisfy the first step of rule of reason analysis. Detailed analysis of economic costs and benefits associated with all vertical contracts, including in cases where the defendant clearly lacks market power, would be counter to the primary purpose of the antitrust laws to control the creation and exercise of market power. Antitrust law does not require a weighing of all potential costs and benefits associated with every vertical restraint. Such microregulation of competition in the attempt to obtain the supposedly "most efficient" price and other contract terms, even in circumstances where the firm does not possess market power, is not the goal of antitrust law.

B. A Market-Power Safe Harbor Encourages Efficient Operation of the Competitive Process

The economic motivation for vertical restraints is often based on the fundamental fact that the firm adopting the contractual restraint faces a negatively sloped demand curve, a condition facing most firms in the economy. This implies that such firms set profit-maximizing prices above marginal costs and therefore may have an incentive to adopt a vertical contract to produce incremental sales. Vertical restraints are commonly used in this

context as a way for the firm to induce cooperating inputs (e.g., its downstream distributors) to supply non-explicitly contracted-for elements of performance such as increased retailer point-of-sale promotional efforts.

This incentive for firms facing negatively sloped demand curves to adopt vertical restraints exists even when the firms have relatively small market shares. Many such firms may also have relatively low marginal costs compared to average costs. Consequently, although the firm may not be earning overall profits, there may be significant profitability associated with incremental sales. In this circumstance, there may be a fundamental incompatibility between the incentives of the manufacturer and its retailers regarding the point-of-sale promotional efforts necessary to produce such profitable incremental sales because the manufacturer is likely to earn substantially more on an additional sale produced by the retailer's promotional efforts than the retailer earns. Therefore, even when there is an absence of standard consumer inter-retailer free riding, manufacturers often want their retailers to provide more point-of-sale promotion for their products than the retailers themselves would independently decide to provide.[56]

This incentive incompatibility is a widespread phenomenon that explains numerous types of intrabrand and interbrand vertical restraints.[57] For example, it explains why automobile manufacturers, including relatively small manufacturers, generally sell through exclusive retail dealerships. Automobiles are products that often have significant manufacturer profits associated with incremental sales because automobiles have relatively high fixed costs of production in comparison to marginal costs of production. When a customer arrives at a dealership and states that they are also considering an alternative brand, the manufacturer wants the salesperson to spend time and effort explaining the specific advantages of its product, thereby increasing the demand for its product relative to the alternative. Without the "undivided retailer loyalty" created by the exclusive, the salesperson will not be motivated to devote the increased selling efforts to the manufacturer's product.

A car dealership selling products from multiple manufacturers, for example, may earn more by not devoting extra efforts in promoting the particular

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[56] The Court clearly recognized this broader use of vertical contracts in the absence of free riding in *Leegin*. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 891–92 (2007).

[57] *See, e.g.*, Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, 76 ANTITRUST L.J. 431 (2009). The three general economic characteristics associated with this incentive incompatibility are: (1) that the desired retailer services are manufacturer specific, (2) that the retailer services are aimed at "marginal consumers" who would not otherwise purchase the manufacturer's products at current prices, and (3) that the supply of these retailer services are unlikely to have significant inter-retailer demand effects and hence retailer competition will not lead to the level of such retailer services that is profit maximizing for the manufacturer. *Id.* at 443–44.

manufacturer's products. The salesperson could say to the potential buyer that both products are high quality and merely sell the brand that will take less effort and consequently involve the expenditure of less time and other retailing costs. Or a dealer selling multiple automobile brands may actually have an incentive to devote increased promotional efforts to selling a rival automobile product if the rival has a higher retail margin, even to the point of disparaging or "negatively promoting" the manufacturer's product. These problems from the manufacturer's point of view are mitigated, if not entirely eliminated, with an exclusive dealing contract.[58]

It is probably unrealistic to expect generalist (non-economist) judges to understand and evaluate the economic motivations for the numerous vertical contracts used pervasively throughout the economy. The economic analysis may sometimes be theoretically complex and in most cases will be highly fact intensive. Moreover, it would be extremely difficult if the judge or administrator were then also required to conduct a detailed weighing of benefits and costs associated with each vertical restraint, presumably with regard to overall effects on consumer welfare. Because courts are often ill prepared to undertake such analysis, it may make sense to include an initial minimum market-power requirement as an element of the rule of reason analysis, making liability less likely when the firm instituting the restraint has a relatively small share of the market.

Contrary to what has sometimes been claimed, it does not make sense to define the degree of market power in such circumstances by the degree of the firm's inelasticity of demand or the gap between a firm's price and its marginal cost.[59] Such a definition would mistakenly define the degree of market power in terms of the deviation of price from the equilibrium price that would exist

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[58] There are, in general, two major economic mechanisms for how a retailer exclusive dealing contract restraint works in these circumstances: (1) to create a retailer-profit-premium stream so that manufacturer termination of the retailer for failure to perform as desired implies a sufficient expected sanction to induce retailer conduct, or (2) to create the direct incentive to induce desired retailer conduct. *See* Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265, 268–69 (1988); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473, 478 (2007). Automobile manufacturers also may combine exclusive dealing contract arrangements with some form of exclusive territorial arrangement as part of dealer compensation to incentivize dedicated promotional efforts.

[59] For example, William Landes and Richard Posner state that "market definition is important in determining whether a firm has market power (and how much it has) only because of the difficulty of measuring elasticities of demand and supply reliably. If we knew the elasticity of demand facing firm *i*, we could measure its market power directly, using [the Lerner Index], without troubling ourselves about what its market share was." William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 962 (1981). This "direct" economics measure of market power is based on A.P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157 (1934).

in the perfectly competitive theoretical model. Because the most common economic explanations for many vertical restraints used by relatively small firms without significant market power fundamentally rely on the presence of a negatively sloped individual-firm demand curve, price greater than marginal cost cannot be the appropriate benchmark for market power.

This implies that market power also should not generally be defined in these circumstances by the presence of firm profits. Doing so would incorrectly imply, for example, that Porsche, with a one-half of one percent worldwide automobile market share in 2020, possesses antitrust market power because it earns a significant operating margin on its sales.[60] Porsche is merely earning economic (but not monopoly) rents on its valuable established brand name and reputation.[61]

A market-power requirement for the presence of anticompetitive effects of a vertical restraint, defined in terms of a minimum market share, is consistent with Frank Easterbrook's insight that in cases where the litigation process is likely to lead to both significant false positive and false negative errors in imposing liability, we should be more careful to avoid false positives because, compared to false negatives, false positives are less likely to be corrected over time by the competitive process.[62] Easterbrook would undoubtedly recognize that the economic understanding of the role of vertical restraints has improved substantially and that this improved understanding has been integrated into the law over the 40 years since he wrote his article.[63] Presumably, this would imply some adjustment in his proscription, at least with respect to vertical restraints, that "optimal" results should be biased toward non-liability conclusions.[64]

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[60] Volkswagen-owned Porsche sold 265,000 cars in 2020. VOLKSWAGEN AKTIENGESELLSCHAFT, THE FUTURE ON HAND: ANNUAL REPORT 2020, at 25, 37 (2021), annualreport2020.volkswagenag.com/servicepages/downloads/files/download.php?file=entire-vw-ar20.pdf. Total worldwide passenger car sales in 2020 were 54,742,117. *Global Sales Statistics 2019 – 2023*, INTERNATIONAL ORGANIZATION OF MOTOR VEHICLE MANUFACTURERS (2024), www.oica.net/category/sales-statistics. Porsche earned a 15.4% operating profit margin on its 2020 sales, which is more than triple the 4.3% profit margin earned by Volkswagen in 2020 on its 8,965,000 total passenger car sales. VOLKSWAGEN AKTIENGESELLSCHAFT, *supra*, at 25–26, 37.

[61] Daniel Crane perceptively criticizes the contention that a gap between firm price and marginal cost (or the presence of "supracompetitive profits") provide evidence of market power. *See* Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 45–46, 48–69 (2014).

[62] *See* Frank M. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15–16, 29 (1984).

[63] The start of these legal advances regarding vertical-contract restraints can be dated to *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–59 (1977). The legal acceptance of a small firm's competitive use of resale-price-maintenance contracts, however, was not fully recognized until 30 years later in *Leegin*. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882, 907 (2007).

[64] *See generally, e.g.*, Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015); Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 712 (2011).

However, it is reasonable to rely on a minimum-market-share safe-harbor screen with regard to antitrust analysis of vertical contracts for an entirely separate reason than the avoidance of false positives relative to false negatives. Namely, a market-power requirement is a way to encourage the competitive market process. Permitting firms that clearly do not possess significant market power to use vertical restraints allows them to earn increased rents on their product and marketing improvements. This creates an increased incentive for such firms to innovate, thereby encouraging the dynamic efficiencies essential to the competitive process.

The established antitrust law of vertical restraints eschews court microregulation of this competitive process, which would require measuring all deviations between price and marginal cost and the likely associated changes in consumer and producer surplus in evaluating every challenged vertical restraint. If the absence of market power is clear, it should reasonably be assumed that there is an absence of anticompetitive effects in the firm's use of the vertical contract. While *Leegin*, for example, merely moved vertical resale-price-maintenance contracts from the per se rule to a rule of reason standard, it is obvious that all vertical contracts, whether intrabrand or interbrand, instituted by a firm the size of Leegin would be highly unlikely to be challenged now under U.S. antitrust law.[65] While we may be tempted to intervene in all cases to move the market equilibrium to what may appear to be a socially better result (in the sense of increasing consumer welfare by moving prices closer to marginal cost), we should resist that temptation. We should adhere instead to the fundamental presumption of current U.S. antitrust law regarding vertical contracts: letting the dynamic competitive market process operate, and thereby letting firms without market power earn rents on their specific assets, is likely to maximize consumer welfare over the long term.

C. AMEX MARKET POWER

Although the *Amex* majority claimed to adopt an indirect standard of antitrust analysis where the first step for demonstrating anticompetitive

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[65] A market-power requirement for a challenge to vertical contract restraints is consistent with two of the four potential anticompetitive scenarios associated with resale price maintenance described in *Leegin*. *See* 551 U.S. at 892–94. One anticompetitive scenario involves a dominant retailer that demands resale price maintenance to prevent competition from less established rival retailers. *Id.* at 893. The other anticompetitive scenario involves a dominant manufacturer that institutes resale price maintenance to compensate retailers in accepting exclusive dealing restrictions so that the manufacturer can maintain market power. *Id.* at 894. The other two potential anticompetitive motivations listed by the Court involve vertical resale-price-maintenance contracts used as part of horizontal agreements, namely, (1) a horizontal agreement among retailers who jointly act contrary to their individual interests to coerce the manufacturer to adopt resale price maintenance and (2) a horizontal agreement among a group of manufacturers who agree to use resale price maintenance to facilitate an interbrand manufacturer cartel. *Id.* at 892–93.

effects would involve an examination of Amex market power, the majority did not reach a conclusion regarding the presence of Amex market power. While there is disagreement between the majority and dissent with regard to where the potential anticompetitive effects of the Amex antisteering restraints should be measured, there is no disagreement regarding the relevant market definition in terms of how to measure the Amex market share, namely, in the credit card payment-platform market. Because Amex is a single-transaction platform that intermediates credit card transactions, its credit card transactions market share is the same whether measured on the cardholder side or the merchant side of the platform. Measured by transaction volume, Amex accounted for 26.4% of credit card transaction volume in the United States at the time the litigation was filed in 2013.[66] Neither the majority nor dissent labeled this market share as indicative of either the presence or absence of market power.

Historically, Amex's market share of credit card transactions was generally much lower than its share at the time suit was filed. For example, during the 1995–2000 period, Amex's market share averaged approximately 18%.[67] Consistent with the basic economic framework of credit card platform competition presented in Part I, Amex has always supplied a somewhat differentiated product preferred by a significant number of higher-income consumers. Because Amex created a valuable differentiated product that a significant number of individuals preferred to use, Amex could then charge merchants a higher fee for access to its loyal cardholders and for the associated incremental sales that the merchants could expect to receive by accepting the card. That Amex-set merchant fees were higher than other credit card platform merchant fees therefore should not be considered, by itself, an indication of market power. In fact, in the 1970s, when the Amex share of U.S. credit card transactions was significantly lower than at the time of the litigation, Amex merchant fees were substantially higher, both absolutely and relative to Visa's merchant fees.[68] The *Amex* majority thus drew the correct conclusion, "[t]hat Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends."[69]

The substantial growth in the Amex market share, which accelerated significantly after 2005 and led to the 26.4% Amex share in 2013, was due to the significant change that occurred in the nature of Visa and MasterCard

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[66] Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2282 (2018). If the transaction-platform relevant market were defined more broadly to include other mediums of exchange, for example, debit cards, the measured Amex market share would obviously be substantially reduced.

[67] Klein et al., *supra* note 3, at 600 fig.2.

[68] *Id.* at 599–602 figs.1–3.

[69] *Amex*, 138 S. Ct. at 2288.

competition during this period.[70] It is important to discuss these events in some detail because the dissent extensively relies on market events during 2005–2010 for its primary evidence of anticompetitive effects of the Amex antisteering restraints. The mistaken inferences of anticompetitive effects from these market events are described in Part V.A.

To understand the competition between Visa and MasterCard, it is important to recognize that they are open-loop credit card systems that use independent issuers of their credit cards—in contrast to the closed-loop payment system of Amex, which issues its own cards. The Visa and MasterCard payment systems fundamentally compete for card issuers, which originally consisted of commercial banks,[71] who along with Visa and MasterCard then compete for cardholders.

Beginning in the early 1990s, MasterCard, in response to its declining market share in competition with Visa, began to offer non-bank corporations, such as AT&T, General Motors, and General Electric, and monoline banks (banks without branch systems) the ability to become card issuers in the MasterCard association.[72] In addition, MasterCard was the first to introduce on a wide-scale basis co-branded card products, which were heavily promoted by their new issuers such as MBNA.[73] This change in MasterCard's policy succeeded, and MasterCard began to gain share from Visa.[74] Ultimately, Visa responded. In August 1993, Visa appointed a new president and CEO, Carl Pascarella, who agreed to accept the position only under the condition that the Visa Board agreed to let Visa "compete[] more aggressively against MasterCard."[75] This started a period of intensive competition between Visa and MasterCard for card issuers.

This increased competition by Visa and MasterCard for issuers resulted in a substantial increase in Visa and MasterCard interchange fees, and hence a resulting increase in merchant fees on Visa and MasterCard transactions.[76] In

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[70] Much useful information regarding early credit card market competition is found in *Visa U.S.A.*, an earlier case that the government successfully brought against the Visa and MasterCard payment-system rules that prevented their bank issuers from also supplying Amex and Discover credit cards. *See* United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322 (2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003); *see also* Klein et al., *supra* note 3, at 603–09 (describing this competition).

[71] *Visa U.S.A.*,163 F. Supp. 2d at 366, n.15.

[72] *Id.* at 365–66.

[73] *See id.* at 365–66.

[74] *Id.* at 366.

[75] *Id.*

[76] *See id.* at 367. Open-loop payment systems such as Visa and MasterCard set interchange fees that are paid by the merchant's bank to the card-issuing bank, which then largely determine merchant fees. Competition among issuers for cardholders through issuer-provided cardholder rewards then determines final relative merchant/cardholder prices. *See* Klein et al., *supra* note 3, at 572, 575–76.

addition, large Visa and MasterCard issuers, such as Capital One, Citibank, and Chase, began to spend large sums on advertising to develop and promote their own credit card brand names and to supply higher-rewards credit cards financed by increased merchant fees in competition with one another and with the higher-rewards Amex card. Each of these large issuers also used their expanded established base of loyal cardholders within the Visa and MasterCard payment systems to individually play off the Visa and MasterCard payments systems for favorable terms in return for their contractual promises to move a minimum share of their transactions to a particular payment system. In addition to setting higher interchange fees, Visa's and MasterCard's competitive offers to large issuers included discounts on the per-transaction payment-system network fees paid by such issuers to the payment system.[77] Visa and MasterCard also made financial offers to large issuers of cash incentives to become part of the issuers' promotional solicitation programs and for the issuers' minimum-transaction-share commitment, which sometimes included the issuer's de facto commitment of payment-system exclusivity.[78]

The resulting competition between the Visa and MasterCard payment systems for the credit card transactions of large issuers led over the 2000–2010 period to substantially higher average merchant fees on Visa and MasterCard transactions, as well as increased cardholder rewards on new "high rewards" Visa and MasterCard credit cards that were more competitive with the Amex card on the cardholder side of the credit card platform.[79] Amex decided in response to this increased competition by Visa and MasterCard to keep its merchant fees essentially constant.[80] As a result, this caused the gap between Amex merchant fees relative to Visa and MasterCard merchant fees to fall significantly.[81] This in turn led to a significant expansion in merchant acceptance of the Amex card and an increase in Amex market share, as Amex in effect decided to fundamentally alter its product positioning.[82]

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[77] *Visa U.S.A. Inc.*, 163 F. Supp. 2d at 382 ("[Visa and MasterCard] pay millions of dollars in incentive payments in the form of discounts from the price for network services to selected issuing banks to compete for their business and the banks play Visa and MasterCard against [each] other.").

[78] *Id.* at 367.

[79] *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 201–02 (E.D.N.Y. 2015)

[80] Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2288 (2018) (explaining that, during the 2005–2010 period emphasized by the dissent, the average Amex merchant fee increase over the entire five-year period was less than one-tenth of one percent, 0.09%) (citing *Am. Express*, 88 F. Supp. 3d at 195–97, 215).

[81] The gap between Amex and Visa merchant fees, which was as high as 1.4 percentage points in 1990, fell to less than .2 percentage points in 2005. *See* Klein et al., *supra* note 3, at 602 fig.3.

[82] Merchant acceptance of the Amex card has continued to grow, so that it is now essentially identical to the universal merchant acceptance of the Visa card. *See General Purpose Cards—U.S. 2021*, NILSON REP. no. 1213, at 7 (Feb. 2022). It is important to note that growth in the Amex market share in the post-2000 period cannot be attributed to the introduction of Amex

In sum, if the *Amex* case had been brought in 2000 or earlier, Amex, with its less than 20% market share, could perhaps have been found to lack sufficient market power to meet the minimum safe-harbor condition for its antisteering contracts to be considered an antitrust violation. However, given the substantial growth of Amex in the post-2000 period, as it changed its product positioning in response to increased competition from Visa and MasterCard, it seems unlikely that a court would base a finding of a lack of anticompetitive effects solely on Amex's less than 30% market share. It is reasonable to assume for purposes of antitrust analysis that Amex now exceeds the minimum safe-harbor market-share condition, and the question then becomes whether one can reasonably infer from direct evidence that the antisteering restraints used by Amex had anticompetitive effects. That is the question to which we now turn.

IV. WHAT DOES DIRECT EVIDENCE OF ANTICOMPETITIVE EFFECTS CONSIST OF?

The major disagreement between the majority and dissent, as well as the continuing debate in the literature, concerns the question of what specific evidence of the effects of the antisteering restraints should be considered direct proof of anticompetitive effects from which the anticompetitive use of Amex market power may be inferred. The majority maintained that evidence of anticompetitive effects of the Amex antisteering restraints must consist of "reduced output, increased prices, or decreased quality in the relevant market."[83] Moreover, because payment card competition as well as individual credit card company market power is measured in the credit card platform relevant market, direct evidence of anticompetitive effects of the antisteering restraints should involve an increase in the total price paid by cardholders and merchants who are jointly using the Amex platform in this market. "Price increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services."[84] In contrast, the dissent claimed that direct evidence of anticompetitive effects of the Amex antisteering restraints should involve price increases solely on the merchant side of the Amex platform because that is where the antisteering contract restraints operate, and hence merchant behavior is "the good or service directly restrained."[85] This

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antisteering restraints because the restraints were always present in Amex's merchant contracts since the 1950s. *See Amex*, 138 S. Ct. at 2283.

[83] *Amex*, 138 S. Ct. at 2284.

[84] *Id.* at 2286 (citing Klein et al., *supra* note 3, at 575, 594, 626).

[85] *See id.* at 2294–95 (Breyer, J., dissenting) (referencing Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 610 (1953)).

disagreement over which price increase should suffice as direct evidence has been echoed in the continuing debate over *Amex* in the antitrust literature.[86]

Evidence of the presence and economic significance of these alternative price increases as measures of anticompetitive effects of the Amex antisteering restraints is discussed in the following Part V. This Part IV describes how, even if there were evidence that the antisteering restraints increased the merchant or total price, neither price increase should be considered sufficient direct evidence of anticompetitive effects because platform market power cannot be inferred from such evidence. In order to properly determine what should be considered direct evidence of anticompetitive effects, it is necessary to first specify the anticompetitive theory by which the restraints are alleged to distort the competitive process by significantly decreasing the ability of rivals to effectively compete.

A. DIRECT EVIDENCE OF ANTICOMPETITIVE EFFECTS DEPENDS ON THE ANTICOMPETITIVE THEORY

Insight into the question of what direct evidence of anticompetitive effects should consist of was provided more than 20 years ago in an important article by Professor Steven Salop, where he introduced a framework labeled "the first principles approach to antitrust analysis."[87] Salop convincingly argued that evidence of anticompetitive effects must be defined in the context of the plaintiff's anticompetitive theory. Only after the plaintiff specifies the claimed anticompetitive theory will we know what should constitute direct evidence of anticompetitive effects. Under this approach, Salop argues, the questions of market definition and whether the firm possesses market power "should not be analyzed in a vacuum . . . divorced from the conduct and allegations about its effects."[88] That is because "[i]t is impossible to evaluate market power accurately without understanding the conduct and effect claims at issue and analyzing market power in the context of those claims."[89]

How Professor Salop's general framework of anticompetitive effects analysis is applied in particular cases will depend upon the vertical restraint at issue and the specific anticompetitive theory of how that contract restraint is alleged to produce anticompetitive effects—in the sense of distorting the

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[86] *See generally, e.g.*, Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018) (arguing for the dissent's merchant-side analysis); DAVID S. EVANS & RICHARD SCHMALENSEE, ANTITRUST ANALYSIS OF PLATFORM MARKETS: WHY THE SUPREME COURT GOT IT RIGHT IN *AMERICAN EXPRESS* (2019) (arguing for the majority's analysis of both sides of the platform).

[87] Steven C. Salop, *The First Principles Approach to Antitrust,* Kodak*, and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187, 188 (2000) (emphasis omitted).

[88] *Id.* at *188*.

[89] *Id.* at 189.

competitive process by significantly impeding effective rival competition. If such direct evidence of anticompetitive effects on the competitive process exists, market power sufficient to produce these anticompetitive effects then can be inferred.

For example, consider an automobile manufacturer's adoption of exclusive retail-dealership contracts, as discussed above.[90] The potential anticompetitive effects of such exclusive contracts concern the increased difficulties rival manufacturers may have in obtaining retail distribution. Anticompetitive effects analysis therefore should occur in the automobile retail distribution market, with proof of anticompetitive effects requiring evidence that the exclusive dealing contracts significantly decrease the ability of rival manufacturers to obtain effective retail distribution. The specific empirical question is whether the contracts significantly increase the rivals' costs of distribution. The ready availability of dealership sites in most geographical markets and the relatively small fraction of sites controlled by any individual automobile manufacturer make it unlikely that a manufacturer could significantly disadvantage actual or potential rivals through the adoption of exclusive dealing retail contracts.

As described above, the likely motivation for the use of an exclusive dealing contract by an individual automobile manufacturer with a relatively small share of any reasonable automobile relevant market is to induce greater dedicated retailer promotional efforts and the resulting increase in sales at higher retail prices.[91] Higher prices in this circumstance, therefore, should not be considered sufficient direct evidence of anticompetitive effects of the exclusive contract from which we can infer the presence and exercise of market power. It is clear in this case that a relatively small automobile manufacturer may use an exclusive contract merely in an attempt to collect increased economic rents on its differentiated products.

If the effects of the exclusive dealing contracts used by a hypothetical, somewhat-larger automobile firm resulted in an increase in the price of its products, that also would not be sufficient direct evidence of anticompetitive effects from which the exercise of market power could be inferred. The primary purpose of the exclusive contract in such a case may still be to efficiently collect rents as part of the normal competitive process. To determine if the vertical restraint actually produced anticompetitive effects, the focus of the analysis must specify the anticompetitive theory and then determine whether there are, in fact, significant detrimental consequential effects on the ability of rivals to effectively compete.

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[90] *See supra* Part III.B.
[91] *See id.*

Some antitrust decisions have handled the question of whether an exclusive contract produces anticompetitive effects by determining if the contract "forecloses" a sufficient share of the market to rivals. A minimum distribution market share covered by an exclusive contract therefore has often been considered a necessary condition for anticompetitive effects,[92] with the concurring opinion in *Jefferson Parish* now regularly cited to set that minimum share at 30%.[93]

While the concurring opinion in *Jefferson Parish* emphasized a minimum foreclosure requirement in determining whether exclusive dealing contracts had the potential to significantly increase or maintain the defendant's market power, subsequent decisions have more generally emphasized "the effect of exclusive dealing in creating, enhancing, or preserving the defendant's market power," and focused more specifically on whether the restraint impairs the "competitors' ability to act as a meaningful constraint."[94] This framework was explicitly adopted in the Third Circuit's *Dentsply* decision, where the court rejected the previous exclusive dealing framework that determined sufficient effective foreclosure in part by focusing on the length of the exclusive contract.[95] However, although the exclusive dealing contract at issue in *Dentsply* was terminable "at will," such that it may appear that rivals could at any time actively compete for distribution by inducing distributors to terminate their Dentsply contract, the court recognized that no distributor would ever find it economic to execute the termination-at-will clause and operate without Dentsply products.[96] The court therefore concluded that the Dentsply exclusive contract did in fact prevent rivals from obtaining effective competitive distribution.

The importance of this restatement of sufficient foreclosure evidence to support a conclusion of anticompetitive effects is perhaps seen most clearly

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[92] *See, e.g.*, Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162–65 (9th Cir. 1997).

[93] The concurring opinion in *Jefferson Parish* handled the contract at issue as an exclusive dealing rather than a tying contract and concluded that "[e]xclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring). Because Jefferson Parish Hospital had only a 30% share of the relevant market, the opinion concluded that the exclusive contract it signed with an anesthesiology firm was unlikely to permit the firm to acquire market power. *Id.* at 45–46; *id.* at 7 (majority opinion). Subsequent exclusive dealing decisions have held that an even higher market share coverage of an exclusive dealing contracts, such as 40%, should be a necessary, but certainly not sufficient, condition for anticompetitive effects. *See, e.g.*, Sterling Merch., Inc. v. Nestle, S.A., 656 F.3d 112, 123–24 (1st Cir. 2011).

[94] Jacobson, *supra* note 55, at 311, 313.

[95] United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191–96, 194 n.2 (3d Cir. 2005). For example, the court in *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 395 (7th Cir. 1984), held that exclusive dealing contracts of one year or less were presumptively legal.

[96] *Dentsply*, 399 F.3d at 193–94.

in *Microsoft*.[97] The D.C. Circuit adopted a minimum foreclosure standard for finding anticompetitive effects of exclusive dealing contracts, stating that "the requirement of a significant degree of foreclosure serves a useful screening function."[98] And the district court had earlier done a simple analysis and found Microsoft's exclusive dealing browser distribution contracts not to violate Section 1 on this basis because the contracts covered less than 40% of total browser distribution.[99]

The district court, however, failed to take account of the fact that Microsoft used exclusive contracts to dominate the two most cost-effective methods of browser distribution at the time. Specifically, Microsoft entered exclusive contracts with (1) computer manufacturers, whereby Internet Explorer was included as the sole browser in the Windows operating system when consumers purchased personal computers; and (2) most internet-access providers, whereby, for example, America Online provided internet access to their customers solely with the provision of Internet Explorer. Because Microsoft limited its exclusives to these two browser distribution channels, Microsoft's exclusive contracts did not foreclose 40% of total browser distribution.[100] Microsoft's exclusive contracts, however, foreclosed substantially more than 40% of the most economically efficient channels of browser distribution. Hence Microsoft's exclusive contracts did significantly disadvantage rival browser suppliers, most specifically Netscape. This detailed analysis of specific market conditions, rather than focusing on merely the share of "the total market" covered by a vertical restriction such as an exclusive dealing contract, is crucial for correct anticompetitive effects analysis.[101]

Applying this insight to Amex suggests that, rather than moving immediately to the question of whether higher merchant fees or an increase in the overall cost of credit card transactions to both merchants and cardholders should be considered the appropriate direct evidence of anticompetitive effects, one should first specify the anticompetitive theory by which the antisteering vertical restraints were alleged to significantly increase or maintain Amex

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[97] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).

[98] *Id.* at 69.

[99] United States v. Microsoft Corp., 87 F. Supp. 2d 30, 52–53 (D.D.C. 2000).

[100] Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. 119, 127 & n.23 (2003). The other main methods of browser distribution at the time not covered by Microsoft exclusive contracts included users obtaining their browsers by downloading directly from a browser supplier, receiving a browser at work or school, or acquiring a browser from a software or hardware vendor other than Microsoft. *See Microsoft*, 87 F. Supp. 2d at 53.

[101] Because the government did not appeal the finding of no liability on its Section 1 exclusive dealing claim, the D.C. Circuit could not reverse that ruling, instead finding that Microsoft's exclusive dealing contracts violated Section 2 based on the fact that Microsoft's exclusive contracts did not involve "competition on the merits." *Microsoft*, 253 F.3d at 62, 65, 71.

market power. Before turning to that question, the limitations on using price as direct evidence of competitive harm caused by a vertical restraint are first considered.

B. A PRICE INCREASE IS NOT SUFFICIENT DIRECT EVIDENCE OF ANTICOMPETITIVE EFFECTS OF A VERTICAL CONTRACT

Professor Salop's "first principles" antitrust framework focuses on specifying the particular alleged anticompetitive conduct at issue and the associated anticompetitive mechanism by which that conduct is alleged to produce anticompetitive effects.[102] Rather than defining a relevant market and determining as the first step of the anticompetitive analysis if the firm exceeds a market-power threshold, Salop maintains that the analysis should first focus on specifying anticompetitive effects and then determine whether direct evidence of such alleged anticompetitive effects is present. If it is, then sufficient market power necessary to produce such alleged anticompetitive effects can reasonably be assumed to exist. This anticompetitive-effects framework is thus similar to the direct-evidence antitrust framework adopted by both the dissent (expressly) and the majority (de facto) in *Amex*.

Unfortunately, Salop also states in his *First Principles* article that "market power should be measured as the power profitably to raise or maintain price above the competitive benchmark price, which is the price that would prevail in the absence of the alleged anticompetitive restraint."[103] A clear problem with such a "but-for" price-increase measure of anticompetitive effects and hence market power is that a price increase is sufficient direct evidence of anticompetitive effects in the context of a horizontal, but not a vertical, agreement.[104] Evidence of a price increase caused by a horizontal restraint is analogous to the unilateral effects (or "upward pricing pressure") analysis associated with horizontal merger analysis. If the horizontal restraint or merger leads to an increase in price above the pre-merger or pre-restraint level, this is sufficient direct evidence of anticompetitive effects and implies that the merging parties have an economically significant share of a relevant market such that the two firms jointly possess sufficient market power to produce the increase in price.

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[102] Salop, *supra* note 87, at 188.

[103] *Id.*

[104] The majority and dissent both referred to the direct-evidence standard with regard to the horizontal agreement in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). *See* Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. at 2274, 2285 n.7 (2018); *id.* at 2291 (Breyer, J., dissenting). The other direct-evidence case referred to by the majority on this point is *Catalano*, which involved a horizontal agreement among competing beer wholesalers not to provide favorable retail credit terms to retailers. *See Amex*, 138 S. Ct. at 2285 n.7 (majority opinion) (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980)).

On the other hand, direct evidence of a price increase associated with a vertical contract should not be considered sufficient direct evidence of anticompetitive effects from which market power may be inferred. As described above, there are many cases of vertical restraints, such as automobile manufacturers' exclusive dealing contracts with dealers, where the result of the vertical contract likely involves an increase in retail price without such a price increase being considered sufficient evidence to meet the first anticompetitive-effects step of a rule of reason analysis.[105] If we use a direct-evidence-of-anticompetitive-effects antitrust standard for a vertical contract, it is necessary under the Salop *First Principles* approach adopted in this article to first specify the claimed anticompetitive mechanism, such as significantly increasing rival automobile manufacturers' costs of obtaining effective retail distribution. The next step of analysis then involves a determination of whether there is evidence of significant anticompetitive effects on the competitive process as specifically alleged by the plaintiff. If so, the presence and exercise of market power then can be inferred.[106]

The antitrust law of vertical contracts also does not define anticompetitive effects in terms of calculations of consumer welfare changes to determine whether, for example, automobile consumers are better or worse off as a result of the increased retailer promotional services induced by automobile manufacturers' exclusive dealing contracts. Some consumers may be better off because they obtain more point-of-sale information and make a better-informed product selection, but some consumers are likely worse off if they knew they wished to purchase a particular product and would have done so at a lower price absent the exclusive dealing contract restraint. The exclusive dealing caselaw discussed above is clear that the absence of evidence that the contract has caused anticompetitive effects by significantly disadvantaging rivals implies the absence of antitrust liability without the need to calculate consumer harm in terms of "net" consumer welfare effects. That some consumers benefit and others bear costs from the presence of the vertical contract exclusive dealing restraint is merely the result of the competitive process.

Salop's failure to recognize that direct evidence of a price increase as a result of a vertical contract should not be considered sufficient evidence of

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[105] *See supra* Part III.B.

[106] The majority in *Amex* recognized that a price increase, by itself, is not sufficient evidence of anticompetitive effects of a vertical restraint, citing horizontal restraint cases to illustrate a direct-effects standard. *Amex*, 138 S. Ct. at 2285 n.7. The majority correctly emphasized in the same footnote that, independent of evidence of a price increase, "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power," referring to the price increases caused by the resale-price-maintenance contract in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007). *Id.*

anticompetitive effects is illustrated by his extensive discussion in the article of the *Kodak* decision.[107] Salop argues that the Supreme Court moved closer in *Kodak* to establishing anticompetitive effects through direct evidence of such effects from which market power is inferred rather than first defining the market and determining that Kodak possessed sufficient market power.

The alleged anticompetitive conduct in *Kodak* involved a vertical tying contract, where Kodak conditioned the supply of replacement parts for its high-speed photocopiers and micrographic equipment on customers' purchase of Kodak aftermarket service for their equipment.[108] Kodak instituted this policy only after independent service organizations (ISOs) entered the business of servicing Kodak machines and separately purchased replacement parts directly from Kodak. Kodak's refusal to supply replacement parts to ISOs caused consumers of Kodak equipment to pay higher prices for the service of their Kodak equipment and drove the ISOs out of the business of servicing Kodak equipment.[109] Salop maintains that the Court found sufficient evidence of anticompetitive effects in (1) the service-price increases paid by consumers who had already purchased Kodak equipment and were "locked-in," and (2) the exit of the ISOs.[110]

Salop states that his primary concern "is not whether *Kodak* was rightly decided."[111] Instead, Salop emphasizes what he considers "[t]he aspect of the Kodak opinion that gives the greatest cause for optimism," namely, the Court's "approach to the analysis of market power (and its building block, market definition)."[112] Rather than starting with a relevant market definition and determining whether Kodak passed an initial screen of possessing sufficient market power in that market, Salop claims that the Court actually looked at the evidence of anticompetitive effects and worked backward. Specifically, the evidence of higher service prices to "locked-in" consumers and the fact that ISO rivals were driven out provided the Court with direct evidence of "injury to competitors," "power to exclude competitors," and "raising rivals' costs," as well as injury to consumers ("power over price").[113] Although the Court did then define a market of "locked-in" consumers for purposes of meeting the initial condition of showing market power in the tying good, Salop argues

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[107] Salop, *supra* note 87, at 189–94 (discussing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992)).

[108] *Kodak*, 504 U.S. at 456–58.

[109] *Id.*

[110] Salop, *supra* note 87, at 191–92.

[111] *Id.* at 188.

[112] *Id.* at 189.

[113] *Id.* at 192.

that was not an ex ante threshold screen but an ex post condition implied by the direct evidence.[114]

It is important to recognize that such vertical tying contracts are commonly used by firms without market power as a way to efficiently meter differences in buyer demand and implicitly price the total product package differently between customers by individual-customer intensity of use. If customers who use the metered tied-product aftermarket (service) more intensively generally place a higher total value on the package, the meter permits the firm to collect increased profits more efficiently on sales to such customers (or equivalently provide discounted total prices on sales to customers with less intensive demands). Such differential pricing, however, does not imply the presence of market power in the tying product, namely market power by Kodak over its replacement parts.[115]

What is different in *Kodak* is the unanticipated change in contract terms. However, modifications in contract terms after transactors make specific investments is not a unique phenomenon in the marketplace and may occur in cases where the party imposing the change clearly lacks market power. The associated wealth distribution and other effects associated with such contract changes are generally handled under contract law, not antitrust law. The courts have not adopted Salop's view that higher prices associated with a change in vertical contract terms should, on its face, be considered direct evidence of anticompetitive effects from which sufficient market power and antitrust liability may then be inferred.

C. Determining Direct Evidence: Lessons From *Times-Picayune*

1. *Direct Evidence of Anticompetitive Effects Depends on the Anticompetitive Theory*

The *Amex* dissent relies extensively on *Times-Picayune*[116] as precedent to justify evaluation of anticompetitive effects of the Amex antisteering restraints on the merchant side of the platform. *Times-Picayune* involved the claim that the publisher of the only morning daily newspaper in New Orleans, *The Times-Picayune*, instituted an illegal tying contract. Times-Picayune Publishing also

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[114] "Market definition and market power should be evaluated in the context of the alleged anticompetitive conduct and effect, not as a flawed filter carried out in a vacuum divorced from these factors." *Id.* at 191.

[115] *See generally* Benjamin Klein & John Shepard Wiley Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599 (2003). In a post-*Kodak* decision, the Court explicitly rejected the proposition that sufficient market power is present in an alleged tying good if the tying good is patented, such as the Kodak replacement parts. *See* Ill. Tool Works v. Indep. Ink 547 U.S. 28, 42 (2006).

[116] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953).

supplied an evening daily newspaper, *The States*, which competed against the only rival New Orleans evening paper, *The Item*. The three newspapers were the "sole significant newspaper media for the dissemination of news and advertising to the residents of New Orleans."[117] The Times-Picayune contract at issue required purchasers of some types of advertising to place the same ad in both of its papers. Those advertisers could not buy space in either the morning or evening paper alone; they paid a single price for the placement of "identical copy in both or none."[118]

The importance of *Times-Picayune* for analyzing the issues in *Amex* is that the Court in *Times-Picayune*, without using the term expressly, recognized that the defendant was a supplier of a two-sided platform. The Court described the newspaper publisher as supplying news content to readers on one side of its platform and advertising space to advertisers on the other: "[E]very newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space."[119] Rather than examining the effect of the tie in increasing Times-Picayune's overall newspaper platform market power as measured by the effect of the tie on Times-Picayune's total profits in the sale of newspapers and advertising, the Court determined whether the tie had an anticompetitive effect by examining solely the advertising side of the newspaper market where the vertical restraint at issue operated.[120] It is therefore obvious why the majority attempts to distinguish *Amex* from *Times-Picayune*.

It is important to recognize that, in measuring anticompetitive effects, the Court in *Times-Picayune* first implicitly defined the anticompetitive mechanism by which the tie may have disadvantaged the ability of rival evening newspaper to compete. Namely, the Court asked whether the vertical tying restraint significantly decreased the demand by advertisers to place ads in *The Item*. Only after this potential anticompetitive theory of how the tie may have distorted the competitive process was first specified could the Court

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[117] *Id.* at 598.

[118] *Id.* at 600. The 1950 tying contract at issue covered only one of the three principal types of newspaper advertising, general "national display" ads (such as an advertisement for a film placed by a movie studio). Local retailer display advertisements (such as advertisements placed by a local grocer publicizing daily bargains) were not covered by the tying contract, and the tie with respect to classified ads (such as "want ads" placed by a local employer) was adopted fifteen years earlier, in 1935, two years after Times-Picayune Publishing purchased *The States* evening newspaper. *Id.* at 599–600, 604.

[119] *Id.* at 610.

[120] The *Amex* dissent emphasizes this conclusion of *Times-Picayune*, stating that "the Court held that an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint." Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2295 (2018) (Breyer, J., dissenting) (citing *Times-Picayune*, 345 U.S. at 610).

determine how to measure potential anticompetitive effects. When the Court in *Times-Picayune* focused on this specific potential anticompetitive effect on the advertising side of the newspaper platform market, it found that *The Item's* actual quantity of national display advertising lineage remained essentially constant between 1949 and 1950, and therefore that "[t]he record's factual data, in sum, do not demonstrate that the Publishing Company's advertising contracts unduly handicapped its extant competitor, the Item."[121] The evidence indicated that advertisers who wished to communicate with the readers of *The Item* continued to advertise there. The Court consequently concluded that "[t]he record in this case thus does not disclose evidence from which demonstrably deleterious effects on competition may be inferred."[122] This clear reference to the lack of evidence of a reduction in the competitive process in the sense of disadvantaging rivals is superior to the alternative of considering, for example, whether Times-Picayune's total advertising revenue or profits increased after instituting the tie. Any platform profits increase could have been a consequence, in part, of potential Times-Picayune cost savings associated with efficiencies of not having to reset newspaper ads placed in *The States.*

2. *The Majority's Attempt to Distinguish the Amex Platform from the Times-Picayune Platform*

Rather than focusing on the specific anticompetitive theory of how a vertical restraint may distort the competitive process, the *Amex* majority attempts to justify its conclusion that anticompetitive analysis of the antisteering restraints must occur on both sides of the Amex platform by distinguishing the newspaper platform in *Times-Picayune* from the credit card platform in *Amex* in two ways.

The majority's first distinction between the Amex and Times-Picayune platforms is that indirect network effects operate in both directions in the Amex credit card platform, from increased merchant acceptance to greater cardholder demand and from greater cardholder demand to greater merchant acceptance.[123] In contrast, in the Times-Picayune newspaper platform "the indirect network effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. Because of these weak indirect network effects, the market for newspaper

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[121] *Times-Picayune*, 345 U.S. at 619. In contrast, after Times-Picayune instituted its tying contract, *The Item's* share of afternoon national display advertising lineage declined from 49% in 1949 to 45% in 1950, a decrease the Court did not consider significant. *Id.* at 617–19. This suggests that the tie increased *The States*' lineage without significantly affecting *The Item's* lineage.

[122] *Id.* at 621.

[123] *Amex*, 138 S. Ct. at 2285–86.

advertising behaves much like a one-sided market and should be analyzed as such."[124]

There are, in fact, some network effects in the opposite direction, from increased advertising (especially classified ads) to greater reader newspaper demand. However, independent of that consideration, the platform economics framework presented in Part I indicates that the magnitude and direction of network effects influence the effective demand elasticity on the two sides of the platform and consequently the profit-maximizing level of relative prices on the two sides of the platform. The sole significance of the presence, magnitude, and direction of indirect network effects, whether the platform involves one-way or two-way network effects, is the implied change in relative demand elasticities and therefore the effect on relative prices on the two sides of the platform that the platform owner would deem appropriate for maximizing profits.

Thus, while the direction and strength of the network effects may affect the analysis of elasticities and prices, they are not controlling. Even if network effects were primarily only one way, this would not imply that newspaper advertising should be economically analyzed "like a one-sided market."[125] Where and how anticompetitive effects should be evaluated will always depend on the particular anticompetitive theory of how the defendant's conduct is alleged to distort the competitive process by significantly disadvantaging rival platform competition. And that is what was explicitly done by the Court in *Times-Picayune*.

More importantly, the majority distinguishes the Times-Picayune newspaper platform from the Amex credit card platform in a second way, namely that the newspaper platform involves separate (but economically related) transactions on the two sides of the platform, with readers and with advertisers. In contrast, the product supplied by a credit card platform involves a transaction that necessarily always occurs on both sides of the platform:

> [Credit card] platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. . . . Transaction platforms are thus better understood as "supplying only one product"—transactions. . . . [which] "are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment."[126]

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[124] *Id.* at 2286.
[125] *Id.*
[126] *Id.* (quoting Klein et al., *supra* note 3, at 580).

Hence, the majority concludes that "competition cannot be accurately assessed by looking at only one side of the platform in isolation."[127] This is a potentially more important distinction because it has led to the narrow interpretation of the *Amex* decision as applicable only to single-transaction platforms.[128]

It is true that one generally cannot understand overall market forces impacting a single transaction platform by examining one side of the platform "in isolation." Changes in market conditions on one side of a single transaction platform have effects on the other side of the platform. However, the same can be said about a non-single-transaction platform. Changes in market conditions on one side of a separate-transaction platform also have effects on the other side of the platform. For example, the recent decrease in the demand for local newspaper readership (caused by the growth of new online substitutes) has led to a dramatic decrease in the demand by advertisers to place local newspaper advertisements. And, through a feedback-loop effect, this may have reduced newspaper content and thereby readership further, causing even more reduced demand for advertising in local newspapers. The ultimate result has been a significant decrease in the profitability and hence the number of local newspapers. Whether the platform is a single-transaction platform, such as a credit card platform, or a separate transaction platform, such as a newspaper, it is always necessary to consider potential effects on both sides of the platform in undertaking economic analysis of effects in the relevant platform market. As *Times-Picayune* illustrates, however, this does not mean that one must necessarily conduct anticompetitive analysis of a vertical restraint on both sides of a platform.

What can be said about a single-transaction platform, such as a credit card platform, is that the dimensions of price and output may be largely the same on both sides of the platform, so that it may be possible to measure the "total" or "net" platform price paid by cardholders and merchants considered together.[129] With a separate-transactions platform, on the other hand, such a "total" or "net price" cannot be defined. In *Amex*, the majority emphasized that because "the plaintiffs failed to offer any reliable measure of Amex's [total] transaction price or profit margins,"[130] it was impossible to conclude "that the price of credit-card transactions was higher than the price one

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[127] *Id.* at 2287.

[128] *See, e.g.*, Salop et al., *supra* note 4, at 892–93, 902 (asserting that the Court held that "'transaction platforms' should be treated as a special category for purposes of effects assessment").

[129] I say "largely" because some dimensions of output on the cardholder side of a credit card platform may include, for example, the potential for delayed-payment/credit-extension terms, as well as general transaction benefits (e.g., improved product return credits and special-events attendance rewards) that may not be easily translated into a cardholder discount on the effective transaction price.

[130] *Amex*, 138 S. Ct. at 2288 (referring to the district court's findings, United States v. Am. Express Co., 88 F. Supp. 3d 143, 198, 215 (E.D.N.Y. 2015)).

would expect to find in a competitive market."[131] But, as illustrated in *Times-Picayune*, focusing on the increase in total price is not how direct evidence of anticompetitive effects of a platform vertical restraint necessarily should be measured. The appropriate analysis of anticompetitive effects in both single-transaction and non-single-transaction platforms is an empirical question that must be answered in all cases by analyzing the economics of the platform and how the particular vertical restraint in each case is alleged to distort the competitive process by significantly decreasing the ability of platform rivals to effectively compete.

V. THE CLAIMED DIRECT EVIDENCE OF ANTICOMPETITIVE EFFECTS OF THE ANTISTEERING RESTRAINTS

A. THE DISSENT'S USE OF HIGHER AMEX MERCHANT FEES AS EVIDENCE OF ANTICOMPETITIVE EFFECTS

The *Amex* dissent accepts the district court finding that the Amex antisteering restraints had significant anticompetitive effects on the merchant side of the credit card platform because the restraints "limited or prevented price competition among credit-card firms for the business of merchants."[132] Credit card payment systems do engage in a form of price competition for the business of merchants by setting merchant fees to induce merchant acceptance. Amex has historically set the highest merchant fees and, as a consequence, obtained a significantly lower level of merchant acceptance compared to Visa and MasterCard.[133]

The antisteering restraints were alleged to prevent price competition among rival credit card platforms of a particular form, specifically, the ability of credit card platforms to offer merchants lower fees or other compensation contingent on the merchant taking actions at the point of sale to shift transactions to the payment system's credit cards. According to the dissent, restrictions on the ability of merchants to enter such contractual arrangements result "in higher profit-maximizing prices across the network services market,"[134] and as a consequence, "[c]onsumers throughout the economy paid higher retail prices."[135] The dissent concludes that these effects of the antisteering restraints

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[131] *Id.* The majority's inclusion of the lack of evidence of increased profits, not solely a lack of evidence of an increased total price, may suggest that the majority's claimed anticompetitive benchmark for concluding that platform restraints are anticompetitive may not be limited solely to single-transaction platforms, the only case where a total price can be defined and measured.

[132] *Id.* at 2294 (Breyer, J., dissenting) (citing *Am. Express*, 88 F. Supp. 3d at 209).

[133] *See supra* notes 17–18 and accompanying text.

[134] *Amex*, 138 S. Ct. at 2294 (Breyer, J., dissenting) (quoting *Am. Express*, 88 F. Supp. 3d at 209).

[135] *Id*. (citing *Am. Express*, 88 F. Supp. 3d at 216, 220).

in increasing merchant fees and retail prices are sufficient to satisfy the first step of rule of reason analysis with regard to anticompetitive effects.[136]

What is the evidence of the effects of the antisteering restraints in increasing merchant fees? In contrast to *Times-Picayune*, where there were clear ex ante versus ex post periods with regard to the introduction of the Times-Picayune tying contract, there is no ex post period with regard to the absence of Amex antisteering restraints. However, there is one related ex post test that provides some information on the willingness of merchants to use surcharges to shift transactions between forms of payment at the point of sale. The 2012 Visa/MasterCard antitrust settlement meant that beginning in January 2013, merchants could surcharge Visa and MasterCard credit transactions. But the initial evidence indicates that post-settlement merchant surcharging was extremely limited. The most extensive empirical study of the incidence of surcharges finds that in 2015, less than one percent (0.8%) of in-person credit transactions were surcharged.[137]

The extremely limited use of merchant surcharging to steer consumer transactions may increase over time and may have been higher if Amex also had been a party to the settlement agreement. But the absence of significant surcharging is not surprising given negative attitudes consumers have toward merchants that surcharge credit cards and the associated merchant fears of potential loss of profitable incremental sales.[138] As described in Part I, a merchant need not lose very many sales for such steering to be uneconomic.[139]

Given the lack of evidence of significant merchant steering through surcharging, an obvious question is why a payment system would adopt antisteering restraints at all. One explanation may be that even limited steering can have a significant negative effect on a payment system's reputation for costlessly completing transactions at merchants that accept the system's card.

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[136] *Id.* at 2296 (citing *Am. Express*, 88 F. Supp. 3d at 207–24).

[137] Stavins, *supra* note 24, at 47. The incidence of discounts on debit and cash transactions, which were not subject to the antisteering restraints, was about double, or 2.0% and 1.6%. *Id.*

[138] Consumer surveys indicate that many consumers have a negative view of merchants who place a surcharge on credit card transactions. *See, e.g.*, *Nearly Three-Quarters of Cardholders Negatively View Retailers and Restaurants That Add a Credit Card Surcharge*, PYMNTS (May 19, 2023), www.pymnts.com/consumer-insights/2023/up-to-72-percent-cardholders-negatively-view-retailers-restaurants-using-surcharges.

[139] *See supra* note 23 and accompanying text. Salop et al. explain the absence of significant merchant surcharging of Visa and MasterCard transactions after the settlement decrees on the basis that merchants could not surcharge if they also accepted Amex and that merchants with multiple outlets had difficulties in establishing differential pricing policies across their outlets based on whether a particular outlet accepted Amex. *See* Salop et al., *supra* note 4, at 920 n.238. No evidence is provided for this claimed explanation. Because there were close to three million retail outlets (about a third of all outlets) at the time that accepted Visa and MasterCard but not Amex, *see supra* note 17, we would expect substantially more surcharging if those explanations were the only reasons for the observed lack of surcharging.

As described by the *Amex* majority, a merchant that places a surcharge on Amex transactions or otherwise attempts to steer Amex cardholders to substitute an alternative card may "undermine[] the cardholder's expectation of 'welcome acceptance'—the promise of a frictionless transaction."[140] Individual merchant surcharging or other merchant steering behavior creates a system-wide negative externality because it makes cardholders that experience it less likely to use the Amex card at other Amex-accepting merchants.[141] Antisteering restraints therefore may be used by payment systems despite limited actual steering to prevent relatively few merchants from imposing costs on the entire credit card system. And absent the antisteering restraints, Amex might be expected to reduce the potential system-wide negative externality costs associated with limited merchant steering by reducing merchant fees somewhat.

What is the evidentiary basis in the *Amex* record for the conclusion of the district court and dissent that the presence of antisteering restraints actually increased merchant fees? Salop et al. claim that "[t]he *Amex* record contained plentiful evidence of anticompetitive effects."[142] They refer, first of all, to the fact that "American Express had 'repeatedly and profitably raised its [merchant fees] to millions of merchants across the United States . . . without losing a single large merchant and losing relatively few small merchants as a result.'"[143] The dissent explains that this lack of merchant response to higher merchant fees was due to the fact that the antisteering restraints prevented merchants from being able "to respond to such price increases by encouraging shoppers to pay with other cards."[144]

This claimed evidence refers to the 2005–2010 period when "American Express raised its merchant prices 20 times in five years without losing any appreciable market share."[145] However, during this 2005–2010 period, Amex kept its merchant fees essentially constant; the total Amex average merchant-fee increase over the entire five-year period was less than one-tenth of one percent, 0.09%.[146] Meanwhile during this period, Visa and MasterCard substantially increased their merchant fees as a result of increased competition between Visa and MasterCard for issuers and cardholders. Amex merchant fees therefore fell significantly relative to Visa and MasterCard merchant

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[140] *Amex*, 138 S. Ct. at 2289 (citing *Am. Express*, 88 F. Supp. 3d at 156).

[141] *Id.*

[142] Salop et al., *supra* note 4, at 916.

[143] *Id*. (quoting *Am. Express*, 88 F. Supp. 3d at 195).

[144] *Amex*, 138 S. Ct. at 2294 (Breyer, J., dissenting) (citing *Am. Express*, 88 F. Supp. 3d at 215).

[145] *Id*. at 2296 (citing *Am. Express*, 88 F. Supp. 3d at 195–98, 208–12).

[146] *Id*. at 2288 (majority opinion) (citing *Am. Express*, 88 F. Supp. 3d at 195–97, 215). The 20 fee increases were not across all products but were a "series of targeted price increases in certain industry segments." *Am. Express*, 88 F. Supp. 3d at 195.

fees.[147] Merchants therefore did not have a significant economic incentive to drop Amex or to steer transactions to another credit card in response to the trivial increase in Amex fees. In fact, during this period, merchant acceptance of the Amex card increased along with the Amex market share.[148]

The district court and dissent attempt to support the contrary view that the Amex antisteering restraints are what prevented merchants from responding to the trivial Amex merchant fee increases during the 2005–2010 period by referring to "the testimony of numerous merchants that [absent the antisteering restraints] they would have steered shoppers away from American Express cards in response to merchant price increases (thereby checking the ability of American Express to raise prices)."[149] This merchant testimony does not take account of the fact that relative Amex merchant fees fell significantly during this period, so that merchants actually had a substantially decreased incentive during this period to steer transactions away from the Amex card.

The second example Salop et al. cite of "plentiful evidence of anticompetitive effects of the antisteering restraints" in the *Amex* record is that during this 2005–2010 period, "the antisteering rules had created or contributed to a pricing umbrella, allowing Visa and MasterCard to raise their own fees with 'virtual impunity.'"[150] This is a surprising example of claimed evidence of anticompetitive effects of the antisteering restraints because it refers to the crucial underlying facts ignored in the first example of evidence of anticompetitive effects, namely the significant increase in Visa and MasterCard merchant fees during 2005–2010 and hence the fact that Amex merchant fees substantially decreased during 2005–2010 relative to rival Visa and MasterCard fees.[151]

As previously described, Visa and MasterCard both recognized during this period that it was necessary to actively compete with one another for issuers and cardholders. This competition resulted in higher Visa and MasterCard merchant fees.[152] Labeling the fact that Amex had always supplied a differentiated credit card product on which it set higher merchant fees and

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[147] *See id.* at 201–02; *supra* note 80.

[148] Merchant acceptance of Amex relative to Visa increased from 64% in 2005 to 66% in 2010, and Amex's market share increased from 20.3% in 2003 to 25.4% in 2010, or by more than 25%. *See General Purpose Cards – U.S. 2005*, NILSON REP. (HSN Consultants Inc., Carpinteria, Cal.), Feb. 2006, at 1, 10–11; *Mastercard & Visa – U.S. 2010*, NILSON REP. (HSN Consultants Inc., Carpinteria, Cal.), Feb. 2011, at 1, 10; *U.S. General Purpose Cards 2003*, NILSON REP. (HSN Consultants Inc., Oxnard, Cal.), Feb. 2004, at 1, 9; *General Purpose Cards – U.S. 2010*, NILSON REP. (HSN Consultants Inc., Carpinteria, Cal.), Feb. 2011, at 1, 8.

[149] *Amex*, 138 S. Ct. at 2296 (Breyer, J., dissenting) (citing *Am. Express*, 88 F. Supp. 3d at 221–22).

[150] Salop et al., *supra* note 4, at 916 (quoting *Am. Express*, 88 F. Supp. 3d at 202, 216).

[151] *Amex*, 138 S. Ct. at 201–02; *supra* note 80.

[152] *See supra* Part I.C.

offered greater rewards (while experiencing lower merchant acceptance) than Visa and MasterCard as providing a "pricing umbrella" merely describes the prior market situation that led Visa and MasterCard to compete more actively. It does not provide, by itself, any evidence whatsoever of anticompetitive effects of the antisteering restraints.

The third example Salop et al. cite of "plentiful evidence of anticompetitive effects" is that Amex "merchant fee increases [once again during 2005–2010] 'were not paired with offsetting adjustments on the cardholder side of the platform,' and as such were 'properly viewed as changes to the net price charged across Amex's integrated platform.'"[153] The relevance of this as evidence of anticompetitive effects of the antisteering restraints is discussed in the following Part, V.B., in the context of whether an increase in the total price of an Amex transaction is an appropriate measure of anticompetitive effects of the antisteering restraints.

The final example Salop et al. cite of "plentiful evidence of anticompetitive effects" does not deal with evidence of how the antisteering restraints increase merchant fees. Instead, assuming that the antisteering restraints do increase merchant fees, Salop et al. reason that the result is that "all consumers—including American Express cardholders and other cardholders, and non-cardholders who purchased from merchants who accepted credit cards—paid higher merchandise prices as a result of the rules, regardless of whether they were receiving card benefits."[154]

It is important to recognize, however, that a merchant's decision to accept Amex with its higher merchant fees does not necessarily increase merchant retail prices because acceptance also is likely to create incremental demand for the merchant. Otherwise, there would be no economic reason for the merchant to accept the Amex card.[155] The final impact on retail price is much more complex and depends, among other things, on the effect of acceptance on the merchant's elasticity of demand.[156] However, I assume for expositional convenience in analyzing the Salop et al. reasoning that higher merchant fees are passed on, at least partially, in higher retail prices. It is obvious that some inter-consumer distribution effects are likely to exist with regard to credit card use. If all consumers at a retailer pay the same price, those consumers who receive credit card rewards on the transaction pay a lower effective price.[157]

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[153] Salop et al., *supra* note 4, at 916 (quoting *Am. Express*, 88 F. Supp. 3d at 196).

[154] *Id.* (citing *Am. Express*, 88 F. Supp. 3d at 150, 208).

[155] As described in Part I, it is useful to think of Amex as acting as the Amex cardholder's bargaining agent that is negotiating an effective price discount (net of rewards) for its cardholders.

[156] Klein et al., *supra* note 3, at 614–22.

[157] These and other inter-consumer distribution effects are quantified in Sumit Agarwal, Andrea F. Presbitero, Andre F. Silva & Carlo Wix, *Who Pays for Your Rewards? Redistribution*

Salop et al., however, also describe a different type of inter-consumer distribution effect associated with what they claim is inherently inefficient individual decisions regarding credit card usage.[158] Considering their analysis is important because it provides insight into the fundamental consumer welfare framework that they use in their antitrust analysis of vertical restraints. Salop et al. start with the assumption that all consumers, including existing credit card users, pay somewhat higher retail prices whenever any individual consumer decides to use a credit card.[159] Because each individual consumer's decision to use a credit card in order to receive rewards and other benefits ignores this "externality" of the resulting higher retail prices paid by all other consumers, individual consumer decisions to use a credit card results in what Salop et al. describe as a greater-than-efficient quantity of total credit card transactions.[160]

It is important to emphasize that this claimed inefficiency associated with a greater than globally efficient level of credit card transactions would be present even if the individual credit card payment system lacked market power and payment system rivals were not disadvantaged in any way by the antisteering restraints from being able to compete for merchants and cardholders. The presence of positive rewards creates incentives that result in a greater number of credit card transactions and hence greater total merchant fees and assumed higher prices. Individual consumer decisions with regard to credit card use therefore are claimed to result in a level of credit card transactions greater than the level that would maximize total consumer welfare.

This novel inefficiency is just one example in Salop et al. of their focus on the use of economics in antitrust analysis to microregulate the results of the competitive process with the intent to maximize total consumer welfare. Although consumer welfare is now generally accepted as the ultimate goal of antitrust law,[161] that does not mean that courts dealing with antitrust litigation regarding vertical restraints should act as economic planners and alter the results of the competitive process so as to maximize what they believe would be improvements in total consumer welfare.

Salop et al.'s view that potential inter-consumer distribution effects resulting from competitive market forces should be considered relevant inefficiencies in vertical contract analysis is perhaps best illustrated by their discussion of the

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in the Credit Card Market (Bd. of Governors of the Fed. Rsrv. Sys., Fin. & Econ. Discussion Series No. 2023-007, Dec. 2023, www.federalreserve.gov/econres/feds/files/2023007pap.pdf.

[158] Salop et al., *supra* note 4, at 920–22.

[159] *Id.*

[160] This is a problem that they claim is analogous to the Prisoner's Dilemma. *Id.*

[161] The Supreme Court has often referred to antitrust law as "a consumer welfare prescription." *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85, 107 (1984) (cleaned up) (quoting 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))).

resale price maintenance contract at issue in *Leegin*.[162] Salop et al. describe how there are inter-consumer distribution effects associated with the Leegin contract because the consumers who would have purchased Leegin products at a lower price absent the vertical resale price maintenance contract were worse off as a result of the contract. Therefore, this "raises a fairness question" because consumers not wishing to consume the extra services supplied as a result of the contract are harmed.[163] They then ask, "if there are only a few customers who value the services, should the RPM be considered beneficial overall?"[164]

While Salop et al. initially describe this result as potentially unfair, their underlying analysis is based on the proposition that a total-consumer-welfare standard should be the appropriate framework used to evaluate potential anticompetitive effects of vertical restraints. They ignore the clear absence of market power in *Leegin* and the fact that higher Leegin retail prices caused by the resale price maintenance contract were therefore part of the normal competitive market process. In this context, Salop et al. also criticize the further condition that a vertical restraint should be considered beneficial if the overall effect of the contract is to increase sales. Even when market output increases, they note that total consumer welfare does not necessarily increase because the value of the services supplied are not identical across all consumers. So, they argue, an increase in sales therefore does not coincide with an increase in total consumer welfare: "[T]he harms to the inframarginal consumers may far more than exceed the benefits to the marginal consumers."[165]

This argument is fundamentally inconsistent with the established antitrust analysis of vertical restraints described in this article, where the competitive process should be permitted to operate if the firm instituting the restraint clearly lacks sufficient market power, or if the claimed direct evidence of adverse anticompetitive effects from which sufficient market power is to be inferred does not involve a significant decrease in the ability of rivals to effectively compete. The law of resale price maintenance (and of vertical contracts more generally) has developed in the United States so that a firm as small as Leegin is permitted to use a vertical contract independent of claimed inter-consumer distribution effects and reductions in total consumer welfare. If there are significant detrimental effects on total consumer welfare due to the supposed inefficiencies associated with the competitive market process,

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[162] Salop et al., *supra* note 4, at 906–07 (citing Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877 (2007)).

[163] *Id.* at 907.

[164] *Id.*

[165] *Id*. at 907 n.172. The authors cite with approval the criticism of a quantity-increasing standard of procompetitive effects of vertical contracts in William S. Comanor, *The Two Economics of Vertical Restraints*, 5 REV. INDUS. ORG. 99, 107 (1990).

then in the United States they should be addressed by potential governmental legislation or regulation, not by antitrust intervention.

If the antitrust analysis of the Amex antisteering restraints were concerned about effects of the restraints on total consumer welfare, this would suggest that one should consider consumer welfare effects on both sides of the Amex payment system platform. Salop et al.'s anticompetitive analysis, however, focuses solely on claimed evidence of increases in merchant fees and hence on retail prices as the appropriate measure of anticompetitive effects of the antisteering restraints. This appears to be a major deviation from their approach of seeking out any reduction in total consumer welfare caused by vertical contracts. A total-consumer-welfare calculation should take account of effects on all consumers, including the consumer-welfare benefits obtained by consumers who receive credit card rewards. This would suggest using a measure of anticompetitive effects related to an increase in the total price, as the majority concludes, rather than solely the increase in merchant fees associated with assumed retail price increases.[166]

Salop et al. justify their focus solely on merchant fees increases, rather than overall-consumer-welfare calculations that also include cardholder rewards, by classifying cardholder rewards as occurring outside what they consider to be the appropriately defined merchant-side product market. They then propose a complicated ad hoc series of rules for separately considering potential consumer-welfare benefits of cardholder rewards by categorizing them as potential "efficiencies" associated with the antisteering restraints assumed to be produced in a distinct separate market.[167] Cardholder welfare benefits from rewards are therefore moved to the second step of their antitrust analysis on the basis of these market definition considerations, thereby lowering the plaintiff's initial burden for demonstrating anticompetitive effects defined in their framework in terms of a reduction in consumer welfare in the merchant market.

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[166] Salop et al. favorably note that the district court "did not ignore consumers on the other side of the platform," but they argue that, when welfare effects on all consumers from the antisteering restraints are considered, there is still a likely reduction in total consumer welfare "because inflated merchant fees are passed on as higher retail prices to all customers—Amex cardholders and non-cardholders alike—and most of these customers do not receive sufficient cardholder benefits to offset the harms." Salop et al., *supra* note 4, at 889 (citing United States v. Am. Express Co., 88 F. Supp. 3d 143, 208, 215 (E.D.N.Y. 2015)). There is no empirical evidence provided for these assertions, and as described above, the likely distribution effects are much more complicated. *See supra* notes 155–57 and accompanying text.

[167] Salop et al., *supra* note 4, at 908–11.

B. THE MAJORITY'S USE OF AN ANTICOMPETITIVE INCREASE IN THE TOTAL PRICE OF AMEX TRANSACTIONS AS EVIDENCE OF ANTICOMPETITIVE EFFECTS

The *Amex* majority focuses its criticism on the dissent's narrow merchant-side relevant market definition and its corresponding failure to consider effects on both sides of the overall platform market. According to the majority, analysis of anticompetitive effects of the antisteering restraints should involve evidence of likely increases in the total price (merchant fees minus cardholder rewards) of an Amex transaction rather than solely increases in merchant fees per Amex transaction. The majority's primary conclusion is that the plaintiffs failed to provide any credible evidence that the antisteering restraints increased the total price of Amex transactions as required for demonstrating anticompetitive effects.[168] The fundamental disagreement between the majority and dissent regarding which price increase should be used to measure anticompetitive effects remains the primary issue in the continuing debate regarding *Amex*.

The majority's reasoning follows the general economic framework presented in my earlier co-authored article, where competition between suppliers of credit card payment systems is described in terms of suppliers setting two prices, a cardholder price and a merchant price. These prices are shown to be economically determined by relative demand elasticities inclusive of network effects on the two sides of the platform. "And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing."[169] Therefore even if the plaintiffs had successfully demonstrated evidence of a positive effect of the antisteering restraints on Amex profit-maximizing merchant fees, the majority concludes that such an increase would not be sufficient evidence of anticompetitive effects. The antisteering restraints may have influenced relative prices but not the total price. "Price increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services."[170]

Credit card platform market power is measured in terms of the platform's share of total transactions in the overall platform relevant market.[171] However, this does not imply that a higher level of the overall platform's total price is an indication of greater overall platform market power or that an increase

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[168] *See* Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2288 (2018) ("The plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market.").

[169] *Id.* at 2285–86 (citing Klein et. al., *supra* note 3, at 574, 595, 598, 626).

[170] *Id*. at 2286 (citing Klein et al., *supra* note 3, at 575, 594, 626).

[171] *See supra* Part III.C (discussing Amex market power); *see also supra* note 66 (noting the exclusion of substitutes such as debit cards).

in a platform's total price is a measure of anticompetitive effects. Other than the wheat farmer example used in introductory microeconomic texts to illustrate the perfect-competition economic model, firms in most markets sell differentiated products, face negatively sloped demands and charge prices above marginal cost. As outlined in Part I, a competitive payment system may decide to adopt a business model that attempts to create cardholder loyalty by providing unique, more costly services and increased rewards and charge merchants higher fees for access to its loyal customer base.[172] If the credit card platform's business plan is successful, the total price may increase and the platform may earn profits or rents on its established brand name. There is no reason why the competitive process should always result in zero firm profits (or a zero change in firm profits) as credit card payment system platforms make competitive adjustments to the features of their products and their merchant and cardholder prices.

Amex is providing this sort of differentiated credit card platform product on which it is likely earning rents. Amex, even when its credit card market share was less than 20%, was able to charge higher merchant fees than its rivals and perhaps also set higher total prices, i.e., it may have earned greater profits per transaction than its rivals. The majority recognizes that "Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. . . . Amex has historically charged higher merchant fees than [its] competitors because it delivers wealthier cardholders who spend more money."[173]

Let us now turn to the question of how anticompetitive effects of vertical restraints adopted by a payment system should be measured. The *Amex* majority uses the reasoning in my previous co-authored article to justify increases in the total platform price as the appropriate necessary condition for the presence of anticompetitive effects of platform vertical restraints.[174]

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[172] Salop et al. describe this competitive process "as rent extraction orchestrated by American Express, in a manner analogous to buyer coordination, and externalized onto consumers." Salop et al., *supra* note 4, at 922. But there is no horizontal agreement or coordination among buyers who individually decide to apply for and use the Amex card. That merchants and consumers using other cards may sometimes be disadvantaged by this competitive process does not make it "buyer coordination" that is illegal under the antitrust laws.

[173] *Amex*, 138 S. Ct. at 2288 (citing United States v. Am. Express Co., 88 F. Supp. 3d 143, 200–01 (E.D.N.Y. 2015)). The majority, however, noted that "[w]hether Amex charges more than its competitors was ultimately inconclusive." *Id.* (citing *Am. Express*, 88 F. Supp. 3d at 199, 202, 215). This is fundamentally irrelevant because the level of the total price is not, by itself, a measure of market power or of anticompetitive effects. Amex may be earning profits in competitive equilibrium. Klein et al., *supra* note 3, at 594 n.43, recognizes this differentiated products framework of analysis. The article, however, focuses on the general competitive forces operating in open-loop credit card payment systems.

[174] *Amex*, 138 S. Ct. at 2285–86 ("Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services.") (citing Klein et al., *supra* note 3, at 574–75, 594–95, 598, 626).

However, the only payment-system vertical restraint we examined in detail in the article was the required setting of interchange fees by the open-loop credit card payment systems (that is, by Visa and MasterCard) with its issuers.[175] Because the interchange fee sets the payment that must be made by the merchant's settling bank to the card issuing bank, the interchange fee therefore largely determines merchant fees. And competition among payment-system issuers for cardholders then determines issuer-provided cardholder rewards. Hence, setting the interchange fee ultimately determines relative merchant/cardholder prices, not the total price.[176]

The majority's criticism of the dissent's analysis of the anticompetitive effects of the antisteering restraints in this context is on one level simple and straightforward. It states that in the context of *Amex* the entire exercise is in some sense moot because the district court found that "the plaintiffs failed to offer any reliable measure of Amex's [total] transaction price or profit margins."[177] Therefore, the majority reasons that the plaintiffs could not possibly have shown "that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level."[178]

While the dissent does not believe that an increase in the total Amex price is the appropriate measure of anticompetitive effects of the antisteering restraints, the dissent responds to the majority by referring to the district court's "unchallenged factual finding" that, as Amex increased merchant fees during 2005–2010, "the merchant price increases . . . 'were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and *resulted in a higher net price.*'"[179] The dissent therefore concludes that, even accepting the majority's view that demonstrating anticompetitive effects of a platform vertical restraint should focus on an increase in the total price, this actual increase in the total Amex price during 2005–2010 is direct evidence of anticompetitive effects of the antisteering restraints.[180] Salop et al. concur, describing the increase in the total price of Amex transactions

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[175] *See generally* Klein et al., *supra* note 3.

[176] *Id.* at 575–76. The article also discusses, as it relates to the setting of interchange fees, the "Honor-All-Cards" payment-system contract term. This requires merchants who decide to accept, for example, the Visa card to agree to accept all Visa cards presented. Obviously, letting merchants decide which particular Visa cards to accept and which to reject (e.g., to reject high rewards/high merchant fee cards) would damage the "welcome acceptance" reputation of the Visa credit card. Given the "Honor-All-Cards" rule, each issuer, if it could individually set its own interchange fees, would have an incentive to arbitrarily increase its own interchange fees, and hence the merchant fees associated with its cards, taking advantage other payment-system issuers and imposing a cost on the payment system. *Id.* at 591–93 & n.39.

[177] *Amex*, 138 S. Ct. at 2288 (citing *Am. Express*, 88 F. Supp. 3d at 198, 215).

[178] *Id.* at 2287.

[179] *Id.*, at 2301–02 (Breyer, J., dissenting) (emphasis added by dissent) (quoting *Am. Express*, 88 F. Supp. 3d at 215).

[180] *Id*.

during the 2005–2010 period as their final example of "plentiful evidence of anticompetitive effects" of the antisteering restraints in the *Amex* record.[181]

An obvious initial question about this evidence is how the increase in the Amex total price that occurred during 2005–2010 is related to the presence of the antisteering restraints. The antisteering restraints were always present, both before and after the five-year period isolated by the dissent. Moreover, how do we know that the increase in the Amex total price implies a total price greater than the competitive level? Merchant fees, remember, increased by a trivial 0.09% over the entire five years.[182] All we know is that increased rewards were not *wholly* offsetting, so that the total price increased by an even smaller amount.[183] It is startling how much evidentiary weight the dissent and Salop et al. place on these extremely small changes in merchant fees and the total price during this five-year period as evidence of anticompetitive effects. They are implicitly, but incorrectly, assuming that without the antisteering restraints, the trivial increases in merchant fees and rewards would necessarily have been identical.

Finally, it is important to emphasize that the *Amex* majority explicitly recognizes that an increase in the total price is necessary but not sufficient evidence of anticompetitive effects of the antisteering vertical restraints. The majority states that evidence of anticompetitive effects of a credit card platform's use of antisteering vertical restraints must consist of evidence that the restraints "increased the cost [i.e., the total platform price] of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market."[184] The majority therefore is clear that in order to demonstrate anticompetitive effects of the antisteering vertical restraints, plaintiffs must demonstrate not only that the total price was increased as a result of the antisteering contract restraints but also that the total price was raised "*above [the] competitive level*."[185]

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[181] Salop et al., *supra* note 4, at 916.

[182] *See supra* Part V.A and text accompanying note 146.

[183] *Supra* note 174.

[184] *Amex*, 138 S. Ct. at 2287 (citing KALINOWSKI ET AL., *supra* note 26, § 12.02[2]; 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)). The majority claims a lack of evidence of anticompetitive effects using its second measure of anticompetitive effects because output (total credit card transaction volume) "grew dramatically from 2008 to 2013, increasing 30%," *id.* at 2288 (citing United States v. Am. Express Co., 838 F.3d 179, 206 (2d Cir. 2016)), and this cannot reasonably be attributed to the continued presence of the antisteering restraints during this period. The majority's third alternative measure of evidence of anticompetitive effects (i.e., that the restraints "stifled competition," *id.* at 2289) is examined below in Part V.C.

[185] *Id.* at 2287 (emphasis added).

The obvious question, which the majority does not answer, is: How is the competitive level of the total price determined from which an actual price greater than that level implies anticompetitive effects? Consider a hypothetical example where Amex has a less than ten-percent market share and uses an antisteering restraint to permit the efficient creation of a payment system product with higher merchant fees and greater rewards. If Amex was successful and earned increased profits, the associated higher total price would not be sufficient evidence of anticompetitive effects of the vertical restraint from which we can infer the exercise of Amex market power. This example illustrates the limitations on using price levels as direct evidence of harm when evaluating vertical restraints.

C. EVIDENCE OF ANTICOMPETITIVE EFFECTS ON THE COMPETITIVE PROCESS: DISCOVER'S ALLEGED INABILITY TO EFFECTIVELY COMPETE

The debate between the majority and dissent on whether anticompetitive effects of the antisteering restraints should focus on the presence of a price increase in the merchant market or a total price increase in the overall platform market obscures the primary question originally isolated more than twenty years ago by Professor Salop,[186] namely, what is the alleged anticompetitive theory by which the vertical restraints are alleged to distort the competitive process? Once this anticompetitive theory is specified, where anticompetitive effects should be examined and what evidence of anticompetitive effects should consist of is then implied. This framework operationalizes the majority's alternative proposed measure of evidence of anticompetitive effects—i.e., that there is direct evidence that the vertical restraint "stifled competition in the credit-card market."[187]

Because the antisteering restraints prevented merchants from negotiating lower merchant fees by steering consumers between different mediums of exchange, it may appear to make sense to focus analysis of the anticompetitive effects of the Amex antisteering restraints in the merchant market because that is where the vertical restraint operates, drawing the analogy to the anticompetitive effects analysis in the advertising market with regard to the newspaper tying contract in *Times-Picayune*. However, "where the restraint operates" does not precisely state the particular anticompetitive theory involved, which must be specified before we know how to measure anticompetitive effects. This is what was done by the Court in *Times-Picayune*, where the specific allegation that the tying contract reduced the rival newspaper's ability to obtain advertising was explicitly tested to determine the presence of such an effect in the advertising market.

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[186] Salop, *supra* note 87.
[187] *Amex*, 138 S. Ct. at 2287.

In this context, the dissent's direct evidence of anticompetitive effects of the antisteering restraints in preventing rival competition that may appear most persuasive is the claimed adverse effects of the restraints on the ability of Discover to effectively compete. The evidence involves Discover's attempt in 1999, apparently unaware of the presence of the antisteering restraints, "to develop a business model that involved charging lower prices to merchants than other [credit card] companies charged. Discover then invited each merchant to save money by shifting volume to Discover, while simultaneously offering merchants additional discounts if they would steer customers to Discover."[188]

Once Discover became aware of the antisteering contract restraints, it recognized it could not implement its business plan since Visa, MasterCard, and Amex all "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network."[189] "Because the provisions eliminated any advantage that lower prices might produce, Discover 'abandoned its low-price business model' and raised its merchant fees to match those of its competitors. This series of events, the [district] court concluded[,] was 'emblematic of the harm done to the competitive process.'"[190] The inability of Discover to compete as it desired and the reversal of its merchant fee decrease once it became aware of the antisteering restraints appears to present clear evidence of the competitive limitations placed on Discover by the restraints. However, there are some elements of the situation that require further examination. First of all, it is surprising that Discover executives were not aware of the long-established presence of antisteering restraints in rivals' merchant contracts before deciding to introduce their business model. This suggests that Discover lacked familiarity with the specific nature of merchant competition regarding credit card product offerings and that further analysis should be conducted to determine if the restriction on Discover's ability to contract with individual merchants as it wished actually had a significant negative effect on the competitive process.

In terms of Discover's ability to compete on the merchant side of the platform, it is important to recognize that Discover had little if any difficulty in obtaining merchant acceptance. Although there are likely platform network effects, with the demand for merchant acceptance of a particular credit card positively related to the number of the card's cardholders, this is not a significant deterrence to rival card entry because acceptance of a new credit card is essentially costless for a merchant. Contrary to the usual economic

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[188] *Amex*, 138 S. Ct. at 2293 (Breyer, J., dissenting) (cleaned up) (quoting *Am. Express*, 88 F. Supp. 3d at 213).

[189] *Id.* at 2293 (quoting *Am. Express*, 88 F. Supp. 3d at 214).

[190] *Id.* at 2293–94 (citation omitted) (quoting *Am. Express*, 88 F. Supp. 3d at 214).

factors influencing a retailer's decision to stock an additional product, credit card acceptance does not require merchant devotion of any of its limited, valuable shelf space to an additional credit card. So long as Discover charged merchant fees that were not higher than Visa or MasterCard fees, it would not cost the merchant anything to accept the Discover card. Therefore, when "Discover 'abandoned its low-price business model' and raised its merchant fees to match those of its competitors,"[191] it is unlikely that Discover lost any significant merchant acceptance. In fact, in 2000, Discover was already accepted at more than four million retail outlets, or at 93% of the number of outlets that accepted the most popular card, Visa.[192] Consumers may not have been fully aware of the broad merchant acceptance of the Discover card, but Discover could have advertised its broad merchant acceptance and paid merchants to display at the check-out register information regarding the merchant's acceptance of the Discover card without violating the antisteering restraints.

Discover was less successful on the other side of its credit card platform in convincing consumers to apply for and use the Discover card. Despite broad merchant acceptance, in 2000 the Discover market share of credit card purchases was 5.4%, after which it largely continuously declined so that in 2021 it stood at 4.0%.[193] The question is how much of Discover's relatively poor performance in obtaining additional cardholders and market share can be attributed to the presence of the antisteering restraints, specifically the inability of Discover to introduce its "low-merchant-fee business model" that is claimed not only to have "limited or prevented price competition among credit-card firms" for merchant acceptance,[194] but also to have reduced Discover's ability to compete for market share by offering merchant-fee discounts and other forms of contingent compensation for merchants to employ steering behavior in favor of increased cardholder use of the Discover card. According to the dissent, the antisteering restraints meant that "competitors like Discover had

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[191] *Id.* at 2293–94 (quoting *Am. Express*, 88 F. Supp. 3d at 214).

[192] *See Year 2000 Results: U.S. General Purpose Cards*, NILSON REP. (HSN Consultants Inc., Oxnard, Cal.), Apr. 2001, at 1, 4–5. Merchant acceptance of the Discover card at this point in time was more than 30% greater than merchant acceptance of the Amex card. *Id.* In 2021, Discover merchant acceptance was 99% of Visa merchant acceptance. *General Purpose Cards—U.S. 2021*, NILSON REP. (HSN Consultants Inc., Carpinteria, Cal.), Feb. 2022, at 7.

[193] *See Year 2000 Results: U.S. General Purpose Cards*, NILSON REP. (HSN Consultants Inc., Oxnard, Cal.), Apr. 2001, at 1, 4–5; *General Purpose Cards—U.S. 2021*, NILSON REP. (HSN Consultants Inc., Carpinteria, Cal.), Feb. 2022, at 7. In contrast to claims frequently made about technology platforms, Discover's relatively poor performance cannot be attributed to the fact that the credit card platform market is inherently likely to converge to a single natural monopoly or duopoly. The cardholder side of the credit card platform market often involves "multi-homing," with consumers commonly using more than one credit card, and there are generally relatively low economic costs for cardholders to decide to shift between credit card platforms.

[194] *Amex*, 138 S. Ct. at 2294, 2304 (Breyer, J., dissenting) (citing *Am. Express*, 88 F. Supp. 3d at 209).

little incentive to lower their merchant prices, because doing so did not lead to any additional market share."[195]

For example, if not for the antisteering restraints, one possible competitive action by Discover could have involved contracting with individual merchants whereby, in return for a reduction in merchant fees (and possibly additional payments to merchants based on the magnitude and growth of the merchant's Discover transactions over time), the merchant would agree to advertise at the point of sale the offer of a retail-price discount on Discover card transactions. This amounts to the merchant, in effect, sharing with consumers some of the savings received from lower Discover merchant fees and any other contingent Discover payments to induce increased use of the Discover card.

However, even absent the antisteering restraints, it is unlikely that many merchants would offer price discounts at the point of sale on Discover transactions under any reasonable Discover merchant compensation schedule. Relatively few consumers have Discover cards, and there is a risk that merchant advertising of such price discounts at the point of sale on Discover transactions would upset a fraction of the much larger number of non-Discover cardholders, who would now consider their credit cards not to be as effective in completing transactions at a non-disadvantaged retail price at the particular merchant. The merchant would need to lose relatively few such customers for a merchant offer of preferential Discover discounts to be non-economic.[196]

More importantly, it is essential to recognize that, without violating the antisteering restraints, Discover could directly compete by offering equivalent price discounts on Discover transactions directly to its cardholders after their purchase through the provision of increased rewards and cash back. Although Discover cardholders would consider a merchant discount on the retail price at the point of sale to be valuable, they would be expected to be largely indifferent to receiving the same discount shortly thereafter directly from Discover as a cash reward on their monthly invoice. These alternatives should be very close substitutes for most consumers. A credit card product is different from most other products sold by a merchant because there is a continuing financial relationship between the credit card product supplier and the consumer cardholder after the merchant transaction occurs.

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[195] *Id.* at 2294 (citing *Am. Express*, 88 F. Supp. 3d at 214).

[196] Individual merchant promotional arrangements are now used by credit card companies through the creation and promotion of retailer or institutional co-branded cards. Although the co-branded entity may receive reduced merchant fees and other credit card company payments in return for the provision of the merchant promotion, these arrangements are not a violation of the antisteering restraints because there is no change in the retail price or other merchant steering to use an alternative credit card at the point of the transaction.

This illustrates that the primary potential advantage to Discover of being able to enter agreements with individual merchants is not likely related to the compensation of merchants for the provision of price discounts to consumers on Discover transactions. Instead, the potential disruption in the competitive process that may be caused by the antisteering restraints involves the prevention of more general merchant promotion to cardholders at the point of sale for using the Discover card. It is important to further recognize, however, that retailer promotion of a credit card product is different from the promotion of other retail products, where, for example, the retailer may promote a product by supplying prime shelf space (in return for supplier-provided slotting fees) or by providing free introductory product samples (once again paid for by the supplier).

The relevant empirical question is how much the antisteering restraints, by preventing Discover from entering such types of point-of-sale individual-merchant promotional contracts, decreased the ability of Discover to effectively promote the Discover card on the cardholder side of the credit card payment system market. Insight into an answer to this question can be obtained by considering Discover's actions after Visa and MasterCard entered their settlement agreements with the Department of Justice in 2012. At this point in time, Discover was not prevented by the antisteering contract restraints from using the contract terms it previously proposed in 1999 with the nearly 3 million individual merchants who did not accept Amex. The fact that Discover, although permitted, did not introduce such contracts with any merchants in 2012 indicates that Discover had learned that the contracts were unlikely to be effective.[197] Although the antisteering restraints originally prevented Discover from using such proposed contract terms, this suggest that the antisteering restraints are unlikely to have been a significant deterrent to Discover's actual ability to effectively compete.

The evaluation of anticompetitive effects of a vertical restraint must consider at this point potential substitutes to the claimed restraint on behavior: in this case, the use of merchants to promote Discover's product. Product promotion is an important part of competition in the credit card industry on the cardholder side of the platform. In this regard, Discover continues to have access to the same primary promotional advertising channels that all credit card companies currently use, and therefore that Discover must engage in to be successful. This involves the provision of information to consumers about the cost and features associated with its credit card through television advertising,

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[197] Because (1) Discover's attempt to offer discounted fees occurred when all competing platforms, including Visa and MasterCard, had antisteering provisions, and (2) Discover never attempted to offer discounted fees after Visa and MasterCard dropped the restraints, there was no evidence before the district court that the Amex antisteering provisions were sufficient by themselves to prevent Discover from pursuing its steering strategy.

direct-to-consumer mailings, and other promotions.[198] The antisteering restraints do not decrease Discover's ability to effectively compete in these and other ways in which other credit card companies and Visa and MasterCard issuers currently compete to obtain cardholders.

Although Discover may be at a disadvantage competing against the three larger established credit card brands, this reputational disadvantage is part of the normal competitive process, and the evidence indicates that it is not due to the presence of any anticompetitive vertical restraints. To be successful, Discover has to make significant costly investments in increasing cardholder services and the performance associated with the Discover card in order to establish increased consumer demand and brand loyalty. This is the essence of the competitive process.

Finally, despite the absence of sufficient evidence to support the district court's and dissent's assertion that Discover was significantly hindered in its ability to compete in the market for credit card services by the absence of steering, an encouraging aspect of the dissent's emphasis on Discover's failure to compete in this way is that it focuses on the type of evidence necessary to identify anticompetitive harm caused by a platform's vertical restraint—evidence of the extent to which the restraint actually significantly reduces the ability of rivals to effectively compete. Although Discover was originally disappointed that it could not compete in the way it proposed, this disappointment, by itself, falls far short of the necessary direct evidence of anticompetitive effects and does not sustain the inference that Amex's antisteering vertical contract restrictions resulted in a significant distortion in the competitive process.

CONCLUSION

The ongoing debate in the antitrust literature with regard to *Amex* has focused on the question of whether it is appropriate to define a single market that includes both sides of the payment system platform or two separate merchant and cardholder markets, and correspondingly whether the anticompetitive effects of the antisteering restraints at issue should be measured by an increase in the overall platform price or by an increase in the merchant price.

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[198] The ability to get consumers to apply for and use the Discover card also depends critically on credibly creating consumer expectations regarding credit card system performance, including informing consumers about card features such as rewards, finance terms, special services, and consumer confidence in the reputation of the card system in maintaining promised terms over time, preventing misuse, providing purchase reversal credits, and otherwise fulfilling consumer expectations.

In contrast to potential price effects, the anticompetitive effects analysis of the Amex antisteering restraints emphasized in this article focuses on whether there is evidence that the restraints distorted the competitive process by significantly disadvantaging rivals from being able to effectively compete. If so, one can infer the anticompetitive use of market power by Amex. This requires, first of all, specification of the alleged anticompetitive theory and then an empirical determination of whether there is evidence of the likely anticompetitive effects implied by that theory. Only after we know how a vertical restraint is alleged to significantly decrease the ability of rivals to effectively compete can we know what to consider as evidence of anticompetitive effects in this sense of a significant distortion in the competitive process. This framework provides a superior basis to evaluate the vertical antisteering restraints adopted by Amex.

By rejecting a price-increase measure of anticompetitive effects, this article does not question the established consumer welfare standard of antitrust analysis. Instead, it shows that application of the consumer welfare standard to vertical restraints is fundamentally different from application of the standard to horizontal restraints. While direct evidence of a price increase caused by a horizontal restraint is evidence that the transacting parties jointly have sufficient market power to produce anticompetitive effects and have done so, the same cannot be concluded from direct evidence of a price increase, whether an overall platform price increase or a merchant price increase, as a result of a firm's use of a vertical restraint. A price increase in the context of a vertical restraint may involve the use of the vertical restraint by a firm that supplies a differentiated product to increase the rents on its firm-specific assets as part of the normal competitive process. And this essential element of the competitive process is likely to lead to the maximization of consumer welfare over the long-term. The alternative of using antitrust to microregulate the competitive process with the intent to decrease or eliminate all gaps between price and marginal cost in order to maximize short-run measures of total consumer welfare without evidence of the anticompetitive use of market power to significantly distort rival competition is not the stated or desired goal of the antitrust law of vertical restraints.