QUALITATIVE MARKET DEFINITION

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Modern antitrust law has come under intense criticism in recent years, with a bipartisan chorus of complaints about the power of technology and internet platforms such as Google, Amazon, Facebook, and Apple. A fundamental issue in these debates is how to define the "market" for the purposes of antitrust law. In the Supreme Court's first antitrust case on platforms (2018's Ohio v. American Express*), the definition of the relevant market was the central issue. The Justices' 5-4 split on the issue was particularly stark, with the dissent describing the majority's approach as not only "wrong" but "economic nonsense." Partially in response to the controversy in* American Express*, recent judicial, legislative, and regulatory proposals have even suggested doing away with market definition in some antitrust cases.*

The root problem, this Article shows, is that modern market definition has been treated in antitrust as a matter of quantitative economics, with markets defined by economic formulas lacking a connection to widely held social understandings of competition. Antitrust law needs to augment these quantitative approaches by explicitly acknowledging qualitative aspects of markets, including the normative visions of competition they represent. Such an approach is hardly radical. Such qualitative factors have been part of market definition since its origin, and federal antitrust regulators have recently solicited public comment on whether to include qualitative factors in market definition. This Article argues that market definition is necessarily normative and describes an approach for including qualitative criteria in market definition so that market definition accurately reflects the types of competition antitrust law seeks to protect.

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INTRODUCTION

Few aspects of antitrust are more central, and more controversial, than the role of market definition. Market definition plays a role in almost every antitrust case.[1] Market definition featured prominently in 2018's *Ohio v. American Express*,[2] the first case in which the Supreme Court addressed the question of how U.S. antitrust law should regulate "platforms."[3] But correctly defining relevant markets is the subject of

[1] Jonathan B. Baker, Market Definition: An Analytical Overview, 74 Antitrust L.J. 129, 129 (2007) ("Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue.").

[2] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–87 (2018).

[3] In the economics literature, a "platform" or "two-sided" market is one in which "1) two sets of agents interact through an intermediary or platform, and 2) the decisions of each set of agents affects the outcomes of the other set of agents, typically through an externality." Marc Rysman, The Economics of Two-Sided Markets, 23 J. Econ. Persps. 125, 125 (2009).

much controversy.[4] The case that introduced modern market definition to antitrust, *United States v. E.I. du Pont de Nemours & Co.* (*Cellophane*),[5] is widely known in antitrust circles for giving birth to its own brand of error: the "*Cellophane* fallacy."[6] *American Express* itself resulted in a 5-4 split on the market definition, with the dissent describing the majority's approach as not only "wrong" but "economic nonsense."[7] Even proponents of market definition are dubious about its accuracy,[8] and at least one prominent antitrust scholar, Louis Kaplow, believes that the problems inherent in market definition are so central as to warrant its abandonment in antitrust.[9]

The current debate over market definition is universal, with scholars like Kaplow being joined by jurists, legislators, and regulators arguing not only over how to conduct market definition but whether it needs to be conducted at all. In *American Express*, Justice Breyer wrote a strong

Facebook offers a typical example. Facebook produces two products (social media services and advertising services) that are consumed by two distinct groups (social media "friends" and advertisers) and the value of at least one product (the advertising) increases with consumption of the other product (social media) by a different group ("friends"). See Thomas B. Nachbar, Platform Effects, 62 Jurimetrics 1, 8 (2021). These indirect network effects and the externalities they generate separate platforms from other businesses, which also bring together distinct groups of users. Mark Armstrong, Competition in Two-Sided Markets, 37 RAND J. Econ. 668, 673 (2006); David S. Evans, The Antitrust Economics of Multi-Sided Platform Markets, 20 Yale J. on Reg. 325, 332–33 (2003); Geoffrey G. Parker & Marshall W. Van Alstyne, Two-Sided Network Effects: A Theory of Information Product Design, 51 Mgmt. Sci. 1494, 1496, 1502 (2005). Platforms have been canonically described by Jean-Charles Rochet and Jean Tirole. See Jean-Charles Rochet & Jean Tirole, Platform Competition in Two-Sided Markets, 1 J. Eur. Econ. Ass'n 990, 990 (2003). The terms "platform," "two-sided," and "multi-sided" are used interchangeably in the literature. See, e.g., Evans, supra, at 325; David S. Evans & Richard Schmalensee, The Industrial Organization of Markets with Two-Sided Platforms, 3 Competition Pol'y Int'l 150, 151 (2007); Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 299 (2014); Rochet & Tirole, supra, at 990. Following conventional usage, I will also use the terms interchangeably.

[4] For a comprehensive treatment of the problem, see William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937 (1981).

[5] 351 U.S. 377 (1956).

[6] E.g., Baker, supra note 1, at 164; Thomas G. Krattenmaker & Steven C. Salop, Appendix A—Analyzing Anticompetitive Exclusion, 56 Antitrust L.J. 71, 80 n.32 (1987) ("This error, now termed the *Cellophane fallacy* . . . ."); Gene C. Schaerr, The *Cellophane* Fallacy and the Justice Department's Guidelines for Horizontal Mergers, 94 Yale L.J. 670, 677 (1985); see Donald F. Turner, Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281, 309 (1956); Landes & Posner, supra note 4, at 960–61 (describing the error in the *Cellophane* case).

[7] 138 S. Ct. at 2295, 2297 (Breyer, J., dissenting).

[8] See Landes & Posner, supra note 4, at 960–61.

[9] Louis Kaplow, Why (Ever) Define Markets?, 124 Harv. L. Rev. 437, 440 (2010).

dissent, arguing not only that the majority wrongly defined the relevant market[10] but also that market definition was unnecessary because the district court had found evidence of anticompetitive effects, which obviated the need to define the market in the first place.[11] Legislation proposed in the last Congress by Senator Amy Klobuchar would have removed market definition as a requirement in many antitrust cases[12] and would prohibit antitrust courts from requiring market definition in most cases if direct evidence of "actual or likely harm to competition" is present.[13] The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), as part of their revision of the Horizontal Merger Guidelines, have recently solicited public comment on whether it is "necessary to precisely define [a relevant] market in every case,"[14] how to change market definition to include qualitative criteria, or whether to eliminate it if likely anticompetitive effects can be shown.[15] The FTC doubled down on the expendability of market definition in its recent policy statement on the application of Section 5 of the Federal Trade Commission Act to competition cases.[16] Such proposals (like Justice Breyer's) could shift the emphasis in antitrust away from market definition, and the DOJ/FTC proposed changes to the merger guidelines suggest changing how market definition should be conducted—changes with the potential to revolutionize how antitrust cases are litigated. These conversations have placed the meaning and necessity of market definition at the forefront of antitrust law.

This Article reframes the ongoing debate over market definition by taking a step back to consider the problem of market definition more generally. The platform markets at issue in *American Express* (and subject to recent proposals) present particular challenges to market definition, but in confronting those challenges, the case provides valuable insight into

[10] 138 S. Ct. at 2297 (Breyer, J., dissenting).
[11] Id. at 2296.
[12] See Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 13(a) (2021).
[13] Id. § 13(b).
[14] U.S. Dep't of Just. & U.S. Fed. Trade Comm'n, Request for Information on Merger Enforcement 5 (Jan. 18, 2022) [hereinafter DOJ/FTC Request for Information], https://www.regulations.gov/document/FTC-2022-0003-0001 [https://perma.cc/3TSX-GM3D].
[15] Id.
[16] U.S. Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 10, 15 (Nov. 10, 2022) [hereinafter FTC Policy Statement], https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf [https://perma.cc/8YP4-EU8Q].

how evidence of anticompetitive effects should (and should not) inform antitrust analysis more generally. There are few clear answers, although what is clear is that Justice Breyer's (and Senator Klobuchar's) claim that market definition is unnecessary is not only wrong but illogical.

Reliance on anticompetitive effects is frequently unreliable, and Justice Breyer's invocation of anticompetitive effects in lieu of market definition demonstrates a deeper misunderstanding about the relationship between observed effects and anticompetitive harm. For instance, the evidence of anticompetitive effects that Justice Breyer would have relied on in *American Express*—higher prices—are singularly ill-suited to identifying the market power that is the target of the antitrust laws. Indeed, seriously considering Justice Breyer's reliance on price emphasizes other problems with the economic definition of market power—captured by the Lerner Index[17]—that has been accepted by antitrust theorists for decades.[18]

By reconsidering market definition and the anticompetitive effects that Justice Breyer would have relied on in its stead, we can gain new insight into the way market definition and conceptions of market power have been used and misused in American antitrust law over the last half century. Attacked by Donald Turner as economically inaccurate since its inception,[19] the *Cellophane* approach to market definition has nevertheless survived. What those like Kaplow have made clear, though, is that the established practice of defining relevant markets is problematic at best. But the problems with current understandings of market definition and market power go far beyond criticisms identified by Kaplow and others. Theories of market definition and market power go to the very core of what is "anticompetitive," a concept dependent on normative understandings of antitrust law. Indeed, it was just such a criticism over the Court's understanding of antitrust law, not its understanding of economics, that led Turner to criticize the Court's market definition in the *Cellophane* case in the first place.[20] When the normative basis of Turner's criticism is understood, it becomes an argument for, not against, antitrust market definition.

[17] See infra text accompanying notes 26–27.

[18] See, e.g., IIB Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, Antitrust Law ¶ 503b (5th ed. 2021) (explaining the Lerner Index); Baker, supra note 1, at 142 n.49; Kaplow, supra note 9, at 445 ("This concept of market power is usually expressed using the Lerner Index."); Landes & Posner, supra note 4, at 938–39.

[19] See Turner, supra note 6, at 309–10.

[20] Id.

This Article proceeds in four Parts. Part I describes the general debate over market definition, whose merits are usually debated with regard to a specific use of market definition: the inference of market power from market shares, a singular emphasis that ignores other ways in which market definition can be useful in antitrust. Part II considers the problem of market definition in *American Express* and highlights problems with how the district court and Justice Breyer used pricing information as the basis for finding anticompetitive effects, a problem that goes beyond *American Express*. Part III expands on Part II's consideration of *American Express*, explaining how the problem of focusing on price information in *American Express* is not limited to platform markets but applies generally to analysis of observed market effects in antitrust. Although price increases might reflect anticompetitive market power, they are equally indicative of competition through product differentiation. For the purposes of antitrust, the price effects are secondary to effects on output. That recognition puts in question antitrust scholars' long-standing reliance on comparisons between price and marginal cost, as expressed in the Lerner Index, to define market power in antitrust cases. In the end, the Lerner Index does not just represent an incomplete understanding of market power; it embodies a normative understanding of competition that does not track the content of the antitrust laws. As explained in Part IV, antitrust actually protects a conception of competition that is far more complex, and quite distinct, from that embodied by the Lerner Index. So understood, market definition is a necessary element to describing the competition that antitrust seeks to protect. For the purposes of applying the antitrust law, relevant markets must be defined not only through economic tools like the Lerner Index; it is also necessary to use other legal and socially relevant features of markets, and Part IV considers what those factors might be. The Article ends with a brief Conclusion.

I. THE MANY FACES OF MARKET DEFINITION IN ANTITRUST

It is clear that market definition is central to antitrust law. What is not clear is why.

A market (or "relevant market") is a collection of products that is delineated in antitrust cases as part of an inquiry into the competitive significance of a particular practice or transaction.[21] For instance, in a

[21] Here I am paraphrasing Jonathan Baker. See Baker, supra note 1, at 130 ("In antitrust analysis, a market is a collection of products and geographic locations, delineated as part of

merger between two baby food makers, the relevant market will be the market for baby food.[22] In most antitrust cases, markets are not defined as an end in themselves but rather as a step toward determining presence of market power,[23] which is the ability to profitably raise prices above competitive levels.[24]

Microeconomic theory tells us that the price charged under perfect competition is marginal cost—the cost incurred by producing the last unit of a particular product produced.[25] Market power is generally taken to be the ability to price above one's marginal cost.[26] That ability is captured by the Lerner Index, which describes market power as a ratio between

an inquiry aimed at making inferences about market power and anticompetitive effect."); see also Herbert Hovenkamp, Response: Markets in IP and Antitrust, 100 Geo. L.J. 2133, 2133 (2012) ("The purpose of market definition in antitrust law is to identify a grouping of sales such that a single firm who controlled them could maintain prices for a significant time at above the competitive level.").

[22] FTC v. H.J. Heinz Co., 246 F.3d 708, 711 (D.C. Cir. 2001).

[23] See Daniel A. Crane, Market Power Without Market Definition, 90 Notre Dame L. Rev. 31, 32 (2014).

[24] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.38 (1985) ("Market power is the ability to raise prices above those that would be charged in a competitive market."); Landes & Posner, supra note 4, at 937 ("The term 'market power' refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded."); see also Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 20 (1984) ("Market power is the ability to raise price significantly without losing so many sales that the increase is unprofitable."); Kaplow, supra note 9, at 444–45 (collecting sources).

[25] See Areeda et al., supra note 18, ¶ 503a, at 122. Marginal cost does not equal the total cost of the last unit, since every item produced involves both a fixed cost (such as the cost of building a factory or conducting research and development that makes production possible) and a variable cost (the direct cost incurred making a particular unit). Marginal cost only includes the variable cost, ignoring the fixed costs incurred. W. Kip Viscusi, Joseph E. Harrington, Jr. & David E.M. Sappington, Economics of Regulation and Antitrust 80 (4th ed. 2005). Marginal cost is thought to reflect the production decision faced at the time the last unit is produced. Because fixed costs are sunk, firms facing perfect competition will continue producing so long as they can cover the variable cost of the next unit, which is the marginal cost. See Areeda et al., supra note 18, ¶ 503a, at 124. Perfect competition, and thus marginal cost pricing, is also considered to be Pareto optimal in that it maximizes the social welfare from the allocation of goods and services. Viscusi et al., supra, at 79–80.

[26] See Landes & Posner, supra note 4, at 939 ("A simple economic meaning of the term 'market power' is the ability to set price above marginal cost. Under perfect competition, price equals marginal cost, so if a firm's price is above its marginal cost, the implication is that the firm does not face perfect competition, *i.e.*, that it has at least some market power.").

price and marginal cost; the higher price is above marginal cost, the higher the Lerner Index will be.[27]

In a typical case, market power is not actually calculated by measuring the Lerner Index.[28] Areeda and Hovenkamp postulate that this is because marginal cost is difficult to determine in an antitrust case[29]: given the practical difficulties of measuring cost, courts typically estimate market power by measuring how *concentrated* the relevant market is.[30] As the theory goes, the more concentrated the market, the more market power is likely to be present, since price increases by a dominant firm (or cartel) will not be adequately offset by competition from other firms in the market.[31] In this way, market *share*, which can only be measured after defining a relevant market, becomes in antitrust a proxy for market *power*,[32] and so the importance of market definition to antitrust is largely derivative of the importance of market share in estimating market power.[33]

Market *power* is hugely important to antitrust. Preventing the acquisition of market power is taken to be the principal goal of antitrust, and market power is either an element in, or extremely relevant to, most antitrust cases.[34]

[27] See Abba P. Lerner, The Concept of Monopoly and the Measurement of Monopoly Power, 1 Rev. Econ. Stud. 157, 169 (1934). The Lerner Index can be expressed mathematically as

$$\frac{P - MC}{P}$$

such that a product whose marginal cost is 1 and whose price is 1.25 will have a Lerner Index of

$$\frac{1.25 - 1}{1.25}$$

or 0.2. In perfect competition, when price equals marginal cost, the Lerner Index of a product is 0. For the Lerner Index's application in antitrust, see Areeda et al., supra note 18, ¶ 503b; Landes & Posner, supra note 4, at 940–41.

[28] Areeda et al., supra note 18, ¶ 504, at 126.

[29] Id.

[30] Id. ¶ 531, at 262; Landes & Posner, supra note 4, at 938.

[31] See Areeda et al., supra note 18, ¶ 507, at 137; Kaplow, supra note 9, at 452 (describing both the lower elasticity of supply of smaller rivals and the reduced proportionate impact on the dominant firm's output from any particular price increase); Landes & Posner, supra note 4, at 945–46.

[32] See, e.g., FTC v. H.J. Heinz Co., 246 F.3d 708, 716–17 (D.C. Cir. 2001) (evaluating market shares as an estimate of market power).

[33] See Areeda et al., supra note 18, ¶ 532a.

[34] Crane, supra note 23, at 31, 35–36. As a practical matter, there are three principal avenues to antitrust liability: agreements in restraint of trade (Sherman Act § 1), monopolization

Given how important a role market power, and hence market definition, plays in antitrust cases, it is remarkable how much doubt there is over current approaches to establishing either. It is virtually a commonplace assumption that inferring market power from market shares makes little economic sense,[35] and courts are wary of inferring market power from high market share alone.[36] But some criticisms go beyond that. Perhaps the leading critic of current approaches to market definition is Louis Kaplow, who contends that market definition is (at best) circular and should be eliminated.[37] Others, like Judge Easterbrook, point out problems with market definition, concluding, accordingly, that "it should

(Sherman Act § 2), and merger (Clayton Act § 7). Of those three, market power is an explicit element in one of them (monopolization) and market concentration, which is also dependent on market definition, is the *sine qua non* of horizontal merger review. See generally Landes & Posner, supra note 4, at 937–38 (describing the role of market power under all three theories). As Dan Crane points out, market power is also practically an element in most § 1 cases, since the rule of reason points to market power as a central part of the inquiry. Crane, supra note 23, at 36. Although market power, and hence market definition, is critical to these distinct theories, the Court has extended the market definition inquiry from one theory to another, largely without considering the implications of how market power might operate differently under different theories of liability. See Sean P. Sullivan, Modular Market Definition, 55 U.C. Davis L. Rev. 1091, 1104–05 (2021) (describing the Court's extension of the market definition inquiry from merger to monopolization cases); see also John B. Kirkwood, Market Power and Antitrust Enforcement, 98 B.U. L. Rev. 1169, 1209 (2018) ("The market definition/market share paradigm persists despite its drawbacks in large part because of precedent.").

The analysis in this Article focuses on the roles of both market power and anticompetitive effects. In per se cases under § 1, there is no separate requirement of anticompetitive effects, but that is commonly understood to be because such restraints are presumed to be inherently anticompetitive, see NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1985), which complicates the role of either market power or anticompetitive effects in per se cases. I have consequently left per se cases outside the scope of my inquiry.

[35] Kaplow, supra note 9, at 440; id. at 446 ("Given this understanding of market power, the role of the market definition / market share paradigm is, on its face, obscure. Market shares, whether in a properly defined relevant market or in any other, do not appear in the definition of market power."); Landes & Posner, supra note 4, at 941–43, 947.

[36] See Gregory J. Werden, Why (Ever) Define Markets? An Answer to Professor Kaplow, 78 Antitrust L.J. 729, 731 (2013) (collecting cases); see also Landes & Posner, supra note 4, at 947 (explaining why market power cannot be inferred from high market share alone); id. at 950 (describing cautions in inferring market power from market share data).

[37] Kaplow, supra note 9, at 465–67 (arguing that the best estimation of market definition requires an estimation of market power, but the market definition inquiry is in service of market power, which makes market definition pointless); id. at 473–74 (describing a better approach to market definition that explicitly considers the legal question of relevant market power, which provides the correct relevant market, but does so through its "circular construction").

be avoided whenever possible."[38] Others defend market definition. Gregory Werden argues that Kaplow's criticisms of market definition are artificial.[39] And even critics are willing to make conclusions about cases on the basis of market share in some cases. Judge Easterbrook, for instance, is doubtful about the inferences that can be drawn from high market shares but cites *low* market share as a basis for finding an antitrust claim implausible.[40] What unifies positions on both sides, though, is a shared understanding that market definition is most frequently used as an input to determining market power based on market share.[41]

Thus, one of the major hurdles to understanding market definition in antitrust is the fact that "market definition" is frequently shorthand for a larger inquiry in which market definition is in service of determining market share in order to evaluate market power, which, following Kaplow, I will call the "market definition / market share paradigm."[42] The identification of market definition writ large with its specific use in the market definition / market share paradigm is understandable given that market definition is most frequently used for that purpose, particularly in merger cases.[43] In this way, the very ubiquity of market definition is a threat to understanding market definition,[44] since its use for one purpose

[38] Easterbrook, supra note 24, at 22.

[39] See Werden, supra note 36, at 738.

[40] Easterbrook, supra note 24, at 23 (citing *Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977), and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 694 F.2d 1132 (9th Cir. 1982), *on remand from* 433 U.S. 36 (1977), for the proposition that a firm with 1% and 5% market share, respectively, cannot have meaningful market power). Perhaps that is the right answer when it comes to market share and market power. Market share might be a valid proxy for market power when used as a screen for facially problematic cases but should not be used to conclusively establish liability.

[41] See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 n.15 (1992) ("Because market power is often inferred from market share, market definition generally determines the result of the case."); Easterbrook, supra note 24, at 22; Kaplow, supra note 9, at 446, 454; Werden, supra note 36, at 730.

[42] See Kaplow, supra note 9, at 446. On the confusion caused by the conflation of market share with market power, see Louis Kaplow, On the Relevance of Market Power, 130 Harv. L. Rev. 1303, 1396–403 (2017); see also Areeda et al., supra note 18, ¶ 532a (observing the potential problems of using market share to determine market power); Kirkwood, supra note 34, at 1176–77 (acknowledging complications raised by determining a measure of market power based, in part, on market share).

[43] See, e.g., FTC v. Staples, 970 F. Supp. 1066, 1081 (D.D.C. 1997).

[44] See David Glasner & Sean P. Sullivan, The Logic of Market Definition, 83 Antitrust L.J. 293, 297 (2020) ("We do not challenge the consensus that market definition serves broad purposes, but we suspect that this breadth of use may actually be a source of some confusion.").

(within the market definition / market share paradigm to evaluate market power) might be completely different and rest on completely different theoretical grounds than its use for another purpose.

And there are potential uses of market definition beyond the market definition / market share paradigm. As Werden explains in response to Kaplow, market definition might serve purposes that are not touched by Kaplow's criticism.[45] Werden describes market definition as serving a narrative function in antitrust cases quite apart from inferring market power by market share;[46] market definition "identifies the competitive process alleged to be harmed."[47]

A more nuanced understanding of market definition—one that takes it outside of its traditional use in the market definition / market share paradigm—provides new justification for market definition, justification that is informed less by economic concepts and more by the content of the antitrust law. David Glasner and Sean Sullivan, for instance, argue that market definition cannot be performed in a vacuum (there being no such thing as an abstract "market"[48]) but rather can only be performed relative to a specific theory of competitive injury, since it is the competitive injury that informs how one should look at the market for the purposes of antitrust.[49] One might object that, absent the market-share-as-market-power error, all market definition does is identify the capacity of a firm to work anticompetitive harm, and therefore it is theory-independent, but "harm" is a concept relative to substantive antitrust law. It is illegal to engage in anticompetitive conduct in order to both maintain current market power and to acquire new market power, but the market definition in the two cases would be different, as exemplified by the oft-discussed *Cellophane* fallacy.

[45] Werden, supra note 36, at 746 ("Professor Kaplow argues from the erroneous premise that the relevant market is merely a basis for assigning market shares."); see also Glasner & Sullivan, supra note 44, at 294 (describing Kaplow's method as criticizing the use of market shares to infer market power).

[46] Werden, supra note 36, at 740–42.

[47] Id. at 741; see also Baker, supra note 1, at 130 n.6 ("The identification of market participants—a task that generally requires market definition—may be important to the analysis of the competitive effects of firm conduct even when market shares are not important."); Sullivan, supra note 34, at 1118–19 (describing a "magnification purpose" of market definition in which it zooms in on a particular restraint or effect).

[48] Glasner & Sullivan, supra note 44, at 330.

[49] Id. at 325; see also Sullivan, supra note 34, at 1127–28 ("[M]arket definition . . . marks out a context in which the various issues relating to a [unilateral effects] concern may be explored and addressed.").

In *Cellophane*,[50] du Pont had been charged with monopolizing the market for "cellophane and cellulosic caps and bands."[51] du Pont produced about 75% of the cellophane during the relevant period,[52] but the Court identified the relevant market as the broader market for flexible packaging materials (such as "greaseproof paper, glassine, waxed paper, foil and Pliofilm"[53]), of which du Pont only had 17.9%[54] because consumers would substitute to other flexible packaging materials if du Pont raised the price of cellophane.[55] Legions of commentators, following Donald Turner, have pointed out that the Court's market definition would fail to detect whether du Pont *already* possessed market power (the ability to price above its cost), and therefore that the market definition was flawed in that case,[56] an error that has come to be known as the "*Cellophane* fallacy."[57]

But whether the market definition in *Cellophane* was flawed depends on whether the harm being addressed was the protection of du Pont's *current* market power or the potential for du Pont to acquire *additional* market power.[58] If the former, then the *Cellophane* market definition was overbroad since it would miss the market power du Pont was currently exercising; if the latter, it was not, since additional power would necessarily be felt in products beyond cellophane itself.[59] The government

[50] United States v. E.I. du Pont de Nemours & Co. (*Cellophane*), 351 U.S. 377 (1956).

[51] Id. at 378. The claims regarding cellophane caps and bands fell out of the case on appeal, leaving only the question of whether du Pont had monopolized the market for "cellophane." Id. at 379.

[52] Id.

[53] Id. at 400.

[54] Id. at 399–400.

[55] Id. at 394–95.

[56] See Turner, supra note 6, at 309–11. On the broad disapproval of *Cellophane*, see Landes & Posner, supra note 4, at 960–61; Glasner & Sullivan, supra note 44, at 320–21.

[57] See, e.g., Areeda et al., supra note 18, ¶ 516h.

[58] The same disagreement as in *Cellophane* is apparent in disagreements over whether the correct baseline for measuring likely price increases in merger cases should be the current price (which would include existing market power, as in *Cellophane*) or the competitive price. Compare Werden, supra note 36, at 737–39 (assessing price effects of mergers by comparing pre-merger and post-merger prices without reference to an abstract competitive price), with Schaerr, supra note 6, at 670 (arguing that "the competitive price is the appropriate baseline from which to define the relevant market"). If merger law is designed to prevent the entrenchment of existing monopolies, then the competitive price is the right measure; if it is only intended to prevent the acquisition of additional market power, then the current price is the correct measure. See Glasner & Sullivan, supra note 44, at 322 n.125.

[59] See Glasner & Sullivan, supra note 44, at 320–22; Sullivan, supra note 32, at 1138–40.

had charged du Pont with illegally acquiring a monopoly in cellophane,[60] and so the Court arguably made the wrong choice in *Cellophane* as a matter of the government's theory of the case.

But the district court in *Cellophane* rejected the government's theory and found that du Pont's conduct with regard to its monopoly over cellophane was not anticompetitive for the purposes of Section 2 of the Sherman Act.[61] That finding means that, as a matter of antitrust law unrelated to the existence of market power, the relevant market was in fact the market for flexible packaging materials, since that was the market subject to the putatively illegal conduct. The cellophane market was not the relevant market, not because du Pont did not already have market power in cellophane but because any market power du Pont already had in cellophane could not be the basis of an antitrust violation, at least according to the district court's finding. The *Cellophane* fallacy is fair criticism of the case's economic theory, but given the district court finding, the Supreme Court's market definition in *Cellophane* was correct as a matter of antitrust law.[62] If the antitrust law were different—if it had prohibited du Pont's acquisition of a monopoly in cellophane—the market definition in *Cellophane* would have been wrong.[63] Indeed, it was disagreement over the legal rule for anticompetitive conduct—not abstract economic theory—that led Turner to pen the criticism that has come to be known as the *Cellophane* fallacy. Turner framed the

[60] *Cellophane*, 351 U.S. at 378–79.

[61] United States v. E.I. du Pont de Nemours & Co., 118 F. Supp. 41, 233 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

[62] At least as to the acquisition of market power. If the theory were that du Pont had engaged in anticompetitive conduct in order to maintain its monopoly in cellophane, then cellophane itself might be the relevant market. See Sullivan, supra note 34, at 1139–40. That distinction emphasizes just how contingent the market definition inquiry needs to be; the same antitrust defendant facing different theories under § 2 alone might be subject to different market definitions based on the specific theory at issue. See infra Section IV.A.

The government did not allege that du Pont had leveraged its market power in cellophane to either acquire or attempt to acquire market power in the flexible packing material market more broadly. See *Cellophane*, 351 U.S. at 381. If it had, then cellophane might have been the proper relevant market for assessing du Pont's market power as part of the leveraging claim, but the broader market would have still been the correct one for the purposes of assessing du Pont's likelihood of success in monopolizing that market.

[63] Chief Justice Warren's dissent recounts a long history of du Pont's attempts to monopolize the cellophane market, essentially an attack on the district court's factfinding on cellophane itself. See id. at 418–20 (Warren, C.J., dissenting). Like Turner, see, e.g., infra notes 64, 212, Chief Justice Warren's argument appears to have been on the legal standard the district court applied.

Cellophane fallacy as problematic not for being bad economics but for representing the wrong legal rule.[64]

As the dispute over the correct relevant market in *Cellophane* demonstrates, the first step to understanding market definition is to recognize that its purpose is specific to the antitrust law being applied. The market definition in *Cellophane* was correct, but only because du Pont's conduct with regard to its previously acquired market power was not anticompetitive as a matter of substantive antitrust law. Because different aspects of antitrust get at different harms to the competitive process, market definition might vary between them. We should not expect there to be only one form of market definition because there is no one form of antitrust liability. For instance, uses of market definition in one context, such as merger analysis, might be different—and supported by different justifications—than market definition in other contexts, such as the evaluation of monopolization claims under Section 2. One obvious difference relates to anticompetitive conduct itself, which is a distinct element under Section 2 but not under merger law. Unfortunately, because market definition is performed in almost every type of antitrust case along roughly similar lines,[65] market definition precedents can be used widely and interchangeably, creating the potential for a generic rather than particularized understanding of market definition.[66] But the recognition that market definition is dependent on antitrust theories of liability should exacerbate rather than resolve disputes over market definition. That there are different theories of harm underlying antitrust requires more, not less, attention to market definition.

[64] Turner's criticism on the market definition in *Cellophane* was based on his belief that the antitrust laws meant that consumers had a right to competition not just in the market for "flexible packaging materials" but also in cellophane itself, an endorsement of Judge Hand's approach in *United States v. Aluminum Co. of America* (*Alcoa*), 148 F.2d 416, 424–25 (2d Cir. 1945), and Turner saw the Court's market definition as potentially signifying rejection of Judge Hand's approach in *Alcoa*. See Turner, supra note 6, at 309–11. That argument is in tension with the district court finding that du Pont did not engage in anticompetitive conduct in its acquisition of its cellophane monopoly and is really an argument that the district court should have applied Hand's *Alcoa* standard. See id. at 309 (referencing *Alcoa* with approval).

[65] *Cellophane*, 351 U.S. at 395; see Landes & Posner, supra note 4, at 944–45; Glasner & Sullivan, supra note 44, at 303 ("[S]tandards for defining relevant markets have always included various approximations to the economic idea of substitutability.").

[66] Glasner & Sullivan, supra note 44, at 297.

II. PRICE, ANTICOMPETITIVE EFFECTS, AND MARKET DEFINITION

The antitrust regulation of platforms provides an excellent example of just such a widening dispute over market definition. That is so in part because of some unusual economic characteristics of platforms, including the role of both price and cost.

Platforms are defined by their ability to bring together two distinct groups who purchase different, complementary services from the platform. The two groups on the two sides of the platform generally benefit from indirect network effects in that the more users there are on one side of the platform, the more valuable the platform is to users on the other side.[67] Amazon is a typical example. Amazon is a marketplace that sells online marketing and distribution services to product sellers while selling online shopping services to consumers. The Amazon platform is more valuable to sellers if more consumers shop on Amazon, and vice versa; consumers go to Amazon because they know they will find many sellers there.

Platforms present some special problems related to price, which make it particularly difficult to draw conclusions about how platforms are operating in the market by observing their price. Platform markets generally involve price discrimination and wealth transfer between the two sides of the platform,[68] to the point that many platforms charge a zero[69] or even a negative[70] price (that is, effectively paying consumers to

[67] Rysman, supra note 3, at 125 ("Broadly speaking, a two-sided market is one in which 1) two sets of agents interact through an intermediary or platform, and 2) the decisions of each set of agents affects the outcomes of the other set of agents, typically through an externality."); see also Armstrong, supra note 3, at 669 ("To be able to compete effectively on one side of the market, a platform needs to perform well on the other side (and vice versa)."); Evans, supra note 3, at 332–33 (discussing how indirect network effects make the platform more valuable to users by coupling different groups of users); Parker & Van Alstyne, supra note 3, at 1496 (citing additional studies of indirect network effects in two-sided markets and suggesting that indirect network effects create "efficiently handled" externalities).

[68] While shifting wealth between customers in this way would normally be considered price discrimination, see Evans, supra note 3, at 336; Rochet & Tirole, supra note 3, at 1013, because they produce a combined product, it is not even clear how to allocate the costs of the platform between the two sides, Evans, supra note 3, at 328, making it difficult to conclude whether there is true price discrimination. Either way, the discretion platforms have to price on the two different sides of the platform in a way detached from its cost separates them from most businesses, and I will follow convention and refer to platform pricing strategies that optimize output detached from cost on each side as "price discrimination."

[69] Evans, supra note 3, at 351; Jean-Charles Rochet & Jean Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 659 (2006).

[70] Evans, supra note 3, at 345; Parker & Van Alstyne, supra note 3, at 1494.

take a service) on one side of the platform. Amazon, for instance, charges consumers an annual fee for Amazon Prime that combines expedited shipping and other services (like Amazon Prime Video) unrelated to buying products on Amazon, but sellers on Amazon pay a combination of selling, referral, fulfillment, and "other costs" fees,[71] a combination that makes it hard to decide what "price" Amazon is charging a particular buyer and seller for a particular transaction. By the same token, there is frequently no easy way to allocate marginal cost between the two sides of a particular platform.[72] After all, what is Amazon's cost to serve up the results of my search for microfiber sheets? And what is the cost of providing my search to potential sellers? If market power is the ability to charge a price above one's cost,[73] then the difficulties in determining both the relative price of the products on the two sides of the platform and in allocating cost between them present particular challenges to calculating market power, and with it, defining the relevant market.

A. Price and Anticompetitive Effects in American Express

The complexity of allocating price to one side or the other of the platform—and the effect of that complexity on market definition—was actually one of the key issues in the recent *Ohio v. American Express* case. But the debate in *American Express* goes beyond *how* to define the relevant market to whether the relevant market has to be defined *at all*, with Justice Breyer arguing in dissent that evidence of actual anticompetitive effects obviates the need to define a relevant market.[74] After all, if there is direct evidence of anticompetitive effects, then why would one need a less direct method (such as defining the relevant market and measuring market power in that market) for finding anticompetitive effects?[75] That assertion has found currency in recent scholarship[76] and in

[71] See Pricing, Amazon, https://sell.amazon.com/pricing [https://perma.cc/UCK6-SUKU] (last visited Jan. 19, 2023).

[72] Evans, supra note 3, at 359–60.

[73] See supra text accompanying notes 25–27.

[74] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–87, 2296–97 (2018) (Breyer, J., dissenting).

[75] Id.; see also Herbert Hovenkamp, Antitrust and Platform Monopoly, 130 Yale L.J. 1952, 1958–59 (2021) (noting that direct methods are increasingly favored for demonstrating market power).

[76] See, e.g., Michael Katz & Jonathan Sallet, Multisided Platforms and Antitrust Enforcement, 127 Yale L.J. 2142, 2152 (2018); John B. Kirkwood, Antitrust and Two-Sided Platforms: The Failure of *American Express*, 41 Cardozo L. Rev. 1805, 1826–27 (2020).

legislative[77] and regulatory[78] proposals, so the debate in *American Express* deserves attention. As shown below, Justice Breyer's claim that market definition was unnecessary in *American Express* was mistaken, and exploration of the faults in his approach is informative for market definition beyond the platform markets at issue in the case.

1. American Express *and Market Definition*

Ohio v. American Express[79] dealt with the use by American Express ("Amex") of "anti-steering" provisions, which prevented merchants who accept Amex cards from encouraging customers to use other payment cards.[80] Amex has traditionally offered its cardholders a higher level of rewards for using their cards than do Visa and MasterCard, the other two leading charge cards.[81] To pay for these rewards, Amex charged merchants higher transaction fees than Visa or MasterCard.[82] Consequently, merchants had a natural incentive to suggest to consumers that they use a Visa or MasterCard instead of an American Express card, since the merchant could then avoid Amex's higher transaction fees.[83] The anti-steering provisions prohibited merchants from doing so.[84]

Charge cards like the ones at issue in *American Express* are prototypical platform goods.[85] The cards bring together two distinct groups (merchants and buyers, or "cardholders") who purchase different services from the card issuer (merchants buy payment clearance services; cardholders buy purchasing services and, depending on the card, credit), and both sides benefit from indirect network effects (cards are more valuable to merchants if more cardholders carry them; cards are more valuable to cardholders if more merchants accept them).[86]

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[77] Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 13 (2021).
[78] DOJ/FTC Request for Information, supra note 14, at 3, 5; FTC Policy Statement, supra note 16, at 10, 15.
[79] 138 S. Ct. 2274 (2018).
[80] Id. at 2283.
[81] Id. at 2282.
[82] Id.
[83] Id. at 2282–83.
[84] Id. at 2283.
[85] See Evans & Schmalensee, supra note 3, at 156.
[86] United States v. Am. Express Co., 88 F. Supp. 3d 143, 154–56 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

The district court found anticompetitive effects from the restraint in the market for merchant card services.[87] The U.S. Court of Appeals for the Second Circuit reversed on the basis that the district court's market definition was faulty for excluding cardholders (on the other side of the Amex platform),[88] and the Supreme Court affirmed, holding that, in cases in which a platform provides a "single, simultaneous transaction,"[89] the antitrust market definition must include not only the merchants on one side of the transaction but the cardmembers on the other side, since the total price of the transaction is actually paid by the two parties in combination rather than just by the merchants. The district court had defined the wrong market by focusing on the price paid by merchants and ignoring the cardholder half of the transaction.[90] Justice Breyer dissented, taking issue with the majority's approach to market definition, arguing that because cardholder services and merchant services are not substitutes, they should not be included in the same relevant market.[91]

Although *American Express* was a case about market definition, the market definition question in *American Express* was not in service of the market definition / market share paradigm decried by Louis Kaplow and so many others. Instead, the market definition question in *American Express* went to identifying what the total product (and hence the total price being charged) was. That aspect of *American Express* seems to have resulted in substantial confusion over the role of market definition in that case. The Areeda and Hovenkamp treatise, for instance, seems to take the majority's market definition to be in service of measuring market shares.[92] But if the point was not the traditional one of identifying the range of alternatives that merchants could turn to in calculating Amex's market share but rather to identify the other half of the product, then Justice Breyer's insistence that market definition can only consider substitutes seems misplaced.

[87] Id. at 207–08, 224.
[88] United States v. Am. Express Co., 838 F.3d 179, 206–07 (2d Cir. 2016).
[89] *American Express*, 138 S. Ct. at 2286.
[90] Id. at 2286–87.
[91] Id. at 2296–97 (Breyer, J., dissenting).
[92] Areeda et al., supra note 18, ¶ 520e, at 233 ("[M]easuring market power by reference to share of a defined market [in *American Express*] seems distinctly inferior.").

2. Anticompetitive Effects as a Substitute for Market Definition in American Express

Justice Breyer went further, arguing not only that the majority's market definition was wrong but also that market definition was unnecessary. As Justice Breyer saw it, because the district court had found actual anticompetitive effects (a finding the Second Circuit did not strike as "clearly erroneous"), there was no need to define the relevant market in the first place and therefore no need to engage in the majority's theoretical inquiry into the operation of multi-sided markets.[93] But the district court findings on this score were confused—a confusion that continued at the Supreme Court.[94]

The district court found that the plaintiffs had established anticompetitive effects, both by direct evidence of actual anticompetitive effects and indirectly, by demonstrating Amex had enough market power to cause anticompetitive effects.[95] The district court relied on Amex's repeated increases in merchant fees as establishing that the anti-steering provisions caused anticompetitive effects (by preventing merchants from switching their transactions to other, cheaper cards)[96] and as establishing Amex's market power.[97]

[93] *American Express*, 138 S. Ct. at 2296–97 (Breyer, J., dissenting) ("[A] discussion of market definition was legally unnecessary . . . . That is because the District Court found strong *direct* evidence of anticompetitive effects flowing from the challenged restraint. . . . Doubts about the District Court's market-definition analysis are beside the point in the face of the District Court's findings of actual anticompetitive harm."); see also Areeda et al., supra note 18, ¶ 520e, at 231–32 (arguing that the *American Express* majority's market definition requirement "seems regressive, given the significant progress that economists have made . . . in assessing power by more direct methods that do not require a market definition").

[94] For a detailed account of the district court's reasoning, see Thomas B. Nachbar, Anticompetitive Effects and Market Definition in Platform (and Non-Platform) Markets, 14–15 (Aug. 11, 2021) (unpublished manuscript), https://papers.ssrn.com/abstract=3903643 [https://perma.cc/47SN-YBMS].

[95] United States v. Am. Express Co., 88 F. Supp. 3d 143, 187 (E.D.N.Y. 2015).

[96] Id. at 195–217 (discussing Amex's successful "Value Recapture initiatives" and the role of the anti-steering provisions in enabling them).

[97] See id. at 169 n.9 ("[W]hen a plaintiff has discharged his initial burden in a Section 1 case by proving that the challenged restraint caused actual detrimental effects on competition, the plaintiff implicitly has also proven that the defendant possessed sufficient antitrust market power to cause such competitive harms."); id. at 188 (citing "many of the same types of evidence introduced into the factual record in this case" plus market share, concentration, barriers to entry, cardholder insistence on using Amex cards, and Amex's pricing practices, which also formed the basis for the court's finding of anticompetitive effects); id. at 195 ("Certain of Amex's pricing practices provide direct evidence of the company's market power in the network services market . . . .").

Thus, the district court's findings on Amex's price increases served double duty: both to directly show anticompetitive harm and to indirectly show harm through market power.

On appeal, the Second Circuit clarified that the indirect method does require its own showing of market power and that market power cannot be inferred from the effects the district court observed.[98] Rather, indirect evidence of anticompetitive effects requires "market power, *plus* some other ground for believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market."[99] Thus, the Second Circuit ostensibly rejected the district court's use of high prices (direct evidence of harm) to find the potential for harm (indirect).[100] It did not matter to the Second Circuit whether the district court relied on the direct or indirect method for finding anticompetitive effect. Both were invalid.

But it did matter to Justices Thomas and Breyer. Justice Breyer relied on the district court's finding of anticompetitive effects as the basis for finding that Amex had market power,[101] while Justice Thomas's majority opinion rejected the district court's finding that the effects observed—Amex's price increases—were in fact anticompetitive.[102] Thus, a fundamental distinction between the majority and dissent was whether the district court findings of anticompetitive effects could either obviate the need to inquire into market power or, alternatively, conclusively demonstrate the presence of market power.

The key to understanding Justice Breyer's argument is that the anticompetitive effects supporting the market power determination were

[98] United States v. Am. Express Co., 838 F.3d 179, 194–95 (2d Cir. 2016) (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993)). The district court did not find that output was reduced. Output as measured by credit card transactions went up over the period the restraint was in place. *American Express*, 138 S. Ct. at 2288–89.

[99] *American Express*, 838 F.3d at 195 (emphasis added) (quoting Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 (2d Cir. 1998)).

[100] The Second Circuit also found Amex to have no market power over merchants, in part because approximately one-third of merchants do not accept Amex, suggesting that merchants (on the whole) see other networks as substitutes. Id. at 203.

[101] *American Express*, 138 S. Ct. at 2297 (Breyer, J., dissenting) ("[P]roof of actual adverse effects on competition *is*, *a fortiori*, proof of market power.")

[102] Id. at 2288–89 (majority opinion) ("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's *price increases*.[103] Framed within the normal rule of reason inquiry, Justice Breyer's inference necessarily runs through three steps: 1) price increases are indicative of anticompetitive effects; 2) anticompetitive effects can establish market power; and 3) having already established market power, it is not necessary to define the relevant market, since the purpose of defining the relevant market is to use it as input to determining market power. Thus, another difficulty in evaluating the market definition question in *American Express*—and I would argue the most significant question in the case—is whether observed higher prices establish anticompetitive effects so conclusively as to obviate the need to define the relevant market. If so, then the disagreement between Justices Thomas and Breyer on the specific question of how to define platform markets is something of a sideshow. If price increases are enough, the complex question of market definition in platform (or other) markets purportedly tackled by *American Express* could become legally irrelevant in antitrust cases if the plaintiff can show the restraint resulted in higher prices. As shown below, that would work a fundamental change to American antitrust law.

B. The Role of Price in American Express

As shown below in Part III, reliance on price increases to find anticompetitive effects is fraught with the potential for error; but if using price increases as indications of anticompetitive effects is problematic in some cases, it is downright confounding in cases involving platform markets.[104] Platforms are defined by their amenability to price discrimination,[105] which necessarily includes charging above-cost prices

[103] See United States v. Am. Express Co., 88 F. Supp. 3d 143, 188 (E.D.N.Y. 2015); id. at 196 ("[T]he company's ability to profitably impose such price increases across a broad swath of its merchant base with little or no meaningful buyer attrition is compelling proof of such power."); see also *American Express*, 138 S. Ct. at 2285 n.7 ("The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees."); Areeda et al., supra note 18, ¶ 520e, at 234 (noting that the *American Express* dissent "observed some 20 instances in which the defendant increased its merchant acceptance fees").

[104] See Evans, supra note 3, at 359–60 (discussing the lack of a connection between marginal cost and price for platforms, making price on either side of the platform a poor indication of market power); Geoffrey A. Manne, In Defence of the Supreme Court's 'Single Market' Definition in *Ohio v American Express*, 7 J. Antitrust Enf't 104, 108 (2019).

[105] See Evans, supra note 3, at 336, 338; Rochet & Tirole, supra note 3, at 991, 1013. On the antitrust significance of platforms' amenability to price discrimination, see Nachbar, supra note 3, at 46.

to one side of the platform.[106] Given the role of price structures in platform markets, product differentiation among platforms (in this case between Amex and other charge cards[107]) is likely to result in what would, in more conventional markets, look like irregular price variations. Using those price variations to conclusively establish anticompetitive effects, and therefore market power, would confuse potentially procompetitive platform product differentiation with market power on one side of the platform.[108]

Given the nature of platforms, premising a finding of market power on the presence of high prices on one side of a platform will cause courts to systematically mistake economically efficient (and potentially procompetitive) platform pricing[109] for anticompetitive effects. That appears to be exactly what the district court itself did in *American Express*. A similar error, which would carry the problem beyond platform markets to antitrust generally, was at the heart of the proposed Competition and Antitrust Law Enforcement Reform Act,[110] which

[106] Katz and Sallet argue against netting out the effects on the two sides of the platform because *anticompetitive* harms to one group should not, as a matter of antitrust law rather than economic theory, be "netted" with benefits to another. Katz & Sallet, supra note 76, at 2160–66. But, like the district court, that analysis when applied to platforms assumes that the observed higher prices on one side are anticompetitive higher prices. If they are not the result of anticompetitive effects, then netting across markets does not seem problematic as a matter of either welfare maximization or antitrust law. See Evans & Schmalensee, supra note 3, at 176.

[107] Amex argued that their higher pricing was used to support efforts to differentiate their card from Visa and MasterCard, and the district court cited no evidence to the contrary. See *American Express*, 88 F. Supp. 3d at 226.

[108] Unfortunately, Justice Thomas did not address whether anticompetitive effects could be used to establish market power, perhaps because the plaintiffs abandoned the indirect approach to showing anticompetitive effects on appeal. *American Express*, 138 S. Ct. at 2285 n.6. That omission creates uncertainty as to how to interpret the gap between Justice Thomas and Justice Breyer on the role of anticompetitive effects in *American Express*. See, e.g., Areeda et al., supra note 18, ¶ 520e, at 231–32 ("Justice Breyer seemed mystified, suggesting in his dissent that the majority believed that there was some category of anticompetitive effects that could be established without market power."). That statement by a leading commentator seems to assume that the majority rejected the indirect method, but Justice Thomas seems to have emphasized the district court's use of anticompetitive effects in the direct method. See *American Express*, 138 S. Ct. at 2285 n.7. What is clear from *American Express* is that the market power question was seriously muddled in both the district court opinion and Justice Breyer's dissent by the fact that Amex's restraints resulted (as was their purpose) in higher merchant prices.

[109] See Nachbar, supra note 3, at 16.

[110] Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).

sought to enshrine the district court's error (endorsed by Justice Breyer[111]) in the antitrust laws.

III. INFERRING MARKET POWER FROM OBSERVABLE EFFECTS: THE PROBLEM OF PRICE VS. OUTPUT

Although particularly problematic for platform markets, in which price discrimination is the norm, relying on price information as evidence of market power is a problem outside of platform markets as well. High prices are not particularly indicative of anticompetitive effects since any number of (potentially procompetitive) reasons, such as improvements in product quality, might lead to higher prices. If one were going to infer that particular observed effects are anticompetitive, changes in output are a much more reliable indicator, since market power is the ability to increase prices by reducing output (as opposed to doing something else, like increasing product quality[112]). More importantly for present purposes, though, relying on observed effects does not obviate the need to define the relevant market. In most cases, observed effects must be felt outside the defendant's own product to be considered the product of anticompetitive, rather than procompetitive, forces.[113] Considering the potential for relying on observed effects to conclusively establish either anticompetitive effects or antitrust-relevant market power only highlights the problems with quantitative approaches to the market power inquiry, including problems with the Lerner Index itself.

[111] Id. § 13(b) ("If direct evidence in the record is sufficient to prove actual or likely harm to competition . . . neither a court nor the Federal Trade Commission shall require definition of a relevant market in order to evaluate the evidence, to find liability, or to find that a claim has been stated under the antitrust laws."); see also DOJ/FTC Request for Information, supra note 14, at 3, 5 (considering the appropriate use of direct evidence and whether a market needs to be defined in antitrust cases).

[112] See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1412 (7th Cir. 1995) ("Generally you must pay more for higher quality.").

[113] In cases involving horizontal mergers, the defendant's "own product" is necessarily the product prior to the transaction. The unilateral effects produced by a horizontal merger would be felt in the two different defendants' products and are therefore rightly the object of antitrust scrutiny. See U.S. Dep't of Just. & U.S. Fed. Trade Comm'n, Horizontal Merger Guidelines § 6 (2010) [hereinafter Horizontal Merger Guidelines], https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/W7HK-6B4J].

A. Market Power Without Market Definition?: Inferring Anticompetitive Effects from Price and Output Data

High prices are particularly salient in antitrust cases, but making the connection between high prices and anticompetitive effects (or market power) requires more. As it happens, Justice Breyer's views in *Ohio v. American Express* about the role of price increases might actually reflect a different understanding of the role of price increases in antitrust cases and not a different theory of how to infer market power from high prices.

1. The Relevance of Price in Antitrust Cases

Under Justice Breyer's view, higher prices were enough to demonstrate anticompetitive effects in *American Express*.[114] In making this claim, he cited *FTC v. Indiana Federation of Dentists*,[115] which held that a full market power inquiry was not necessary in the face of clear evidence of anticompetitive effects.[116]

But while *Indiana Federation of Dentists* does say that the existence of *anticompetitive effects* is enough to establish market power, it does not say that *higher prices* are. Rather, what *Indiana Federation of Dentists* says is that "proof of actual detrimental effects, such as *a reduction of output*, can obviate the need for an inquiry into market power."[117] *Indiana Federation of Dentists* cited reductions in output, not higher prices, as conclusive indicia of anticompetitive effects.[118]

[114] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2291, 2294 (2018) (Breyer, J., dissenting); Kirkwood, supra note 76, at 1826–27 (highlighting price effects as evidence of market power).

[115] See *American Express*, 138 S. Ct. at 2297 (Breyer, J., dissenting) ("One critical point that the majority's argument ignores is that 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." (citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986))); see also Katz & Sallet, supra note 76, at 2152 (similarly citing *Indiana Federation of Dentists* for the same proposition).

[116] 476 U.S. at 460–61.

[117] Id. (emphasis added) (internal quotation marks omitted) (quoting 7 Phillip E. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1511, at 429 (1986)).

[118] Id. at 460–61. Indeed, the Second Circuit rule applied by the district court in *American Express* also cites reduction in output, not increased prices, as indicative of market power. See United States v. Am. Express Co., 88 F. Supp. 3d 143, 169 (E.D.N.Y. 2015) ("If plaintiff can demonstrate an actual adverse effect on competition, such as reduced output . . . there is no need to show market power in addition." (quoting Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 509 (2d Cir. 2004))).

Although *Indiana Federation of Dentists*'s reference to the anticompetitive effect "*such as* a reduction of output"[119] might seem equivocal, the rule itself is definitive: market power cannot be inferred from high prices alone, absent some showing related to output.[120] As Judge Posner has explained, comparatively high prices are readily explainable by too many procompetitive justifications to raise an inference of monopoly power standing alone.[121] Using high prices as a fortiori proof of market power (as Justice Breyer would) confuses observation with causation and is likely to lead to false positives. It is one thing to assume that market power can lead to anticompetitive effects, including higher prices, but in the case of higher prices, the converse does not hold.

Instead, in order for observable effects to lead to an inference of anticompetitive market power, there has to be a restriction on output.[122] The restriction on output is what connects high prices with the canonical antitrust definition of market power, which is "the ability to raise price profitably by restricting output."[123] But in *American Express*, output expanded during the relevant period.[124] Measuring output alone, however, does not necessarily solve all problems. It is possible, as Justice Breyer pointed out, that output could still expand while being restricted by the defendant.[125] The Second Circuit in *American Express* rightly

[119] 476 U.S. at 460 (emphasis added) (quoting Areeda, supra note 117, ¶ 1511, at 429).

[120] See *Geneva Pharms.*, 386 F.3d at 500; Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411–12 (7th Cir. 1995); Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997).

[121] *Blue Cross*, 65 F.3d at 1411–12.

[122] See id.; *Forsyth*, 114 F.3d at 1476. In *Blue Cross*, the high prices were accompanied by a high rate of return, and, as Judge Posner explained, "there is not even a good economic theory that associates monopoly power with a high rate of return." *Blue Cross*, 65 F.3d at 1412.

[123] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288 (2018) (quoting Phillip E. Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law § 5.01, at 5-5 (4th ed. 2017)).

[124] Id. ("The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%."); Kevin Caves & Hal Singer, When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard, 26 Geo. Mason L. Rev. 395, 397 n.7 (2018).

[125] As Justice Breyer rightly pointed out, there is a problem of establishing a baseline output. Output increases over time do not conclusively establish that there is no anticompetitive effect compared to what output increases over time would have been absent the restraint. See *American Express*, 138 S. Ct. at 2302 (Breyer, J., dissenting). Of course, the comparison-of-hypotheticals problem is not unique to measuring output over time; it is equally true if the effect is a price increase.

distinguished between both raw "price and output data" and "evidence that tends to prove that output was *restricted*."[126] That information is likely to be more sophisticated than raw price or output data[127] because it is the restriction, not the higher prices or a raw change in output, that causes the effect to be anticompetitive. Placing the emphasis on the restriction and not just the observed effects requires some theory about how output was restricted, not just the observation that prices went up or output went down. Drawing inferences from raw data is harder than proponents of the direct evidence approach frequently acknowledge, but even relying on raw output data is more defensible than relying solely on price increases to establish anticompetitive effects.[128]

This is not the first time the Court has considered whether price increases are inherently anticompetitive. In 2007's *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court reversed the long-standing per se prohibition against minimum resale price maintenance.[129] Minimum resale price maintenance occurs when a manufacturer of a particular product (in this case, a manufacturer of a single brand of belts) requires a retailer to sell that brand at a minimum retail price.[130] The likely result is higher prices than in the absence of the price maintenance, since the price maintenance only prevents price decreases, not price increases. The Court refused to apply the per se rule because it could not presume that higher prices for that single brand of belt were anticompetitive.[131] In many ways, *Leegin* was just the natural extension of the Court's earlier jurisprudence regarding vertical non-price restraints, which the Court had subjected to rule of reason analysis almost thirty years earlier.[132] Price and non-price restraints are economically interchangeable,[133] a point that the Court emphasized in *Leegin* itself.[134]

[126] United States v. Am. Express Co., 838 F.3d 179, 195 (2d Cir. 2016) (emphasis added) (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993)). Output as measured by credit card transactions went up over the period that the restraint was in place. *American Express*, 138 S. Ct. at 2288.

[127] See infra text accompanying notes 142–45.

[128] For one, Justice Breyer's baselining problem exists equally with price as it does with output. Thus, establishing the right baseline is just as much a problem with using price as it is with using output.

[129] 551 U.S. 877, 907 (2007).

[130] Id. at 882–83, 887.

[131] Id. at 894–97.

[132] Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

[133] See George J. Stigler, Price and Non-Price Competition, 76 J. Pol. Econ. 149, 149 (1968).

[134] *Leegin*, 551 U.S. at 896–97.

Given the Court's evolving treatment of vertical restraints at the time, the holding in *Leegin* would seem unexceptional, except that it was decided 5-4 over a strongly worded dissent by Justice Breyer, who, in addition to emphasizing the importance of stare decisis, pointed to the necessarily higher prices caused by minimum resale price maintenance as the kind of anticompetitive effects that would argue heavily in favor of condemnation.[135]

Consequently, the disagreement in *American Express* represents a more fundamental disagreement than one limited to platforms or market power in rule of reason cases. Rather, it seems to go to the Court's willingness to find anticompetitive effects on the basis of the defendant's own higher prices and to infer market power from the existence of those effects without the need for further market definition. As mentioned above, such an approach would represent a substantial change to antitrust law. It would, at the very least, suggest overruling *Leegin* and potentially even reworking rule of reason cases toward a much greater emphasis on price evidence, opening the door to likely liability in any rule of reason case (regardless of whether the restraint was a price or a non-price one) in which the price climbed, because those higher prices would signify the defendant's market power.[136] It is possible that Justice Breyer was arguing for such a fundamental shift to antitrust law, but such a shift would have to be expressly justified; it should not be indirectly adopted by relying on purported anticompetitive effects instead of doing the hard work of defining relevant markets.

[135] Id. at 912, 918 (Breyer, J., dissenting).

[136] It might work an even greater change to § 2 liability, in which market power is an element and not just one aspect of assessing the anticompetitive effects of a restraint, as it is in § 1 rule of reason cases.

What matters for present purposes is that inferring anticompetitive conduct on the basis of elevated prices alone would make little sense in the face of evidence of similar but uncoordinated price moves by others or virtually any evidence of product differentiation,[137] both of which were present in *American Express*.[138] Failure to see the necessary connection between market definition and anticompetitive effects led Justice Breyer to wrongly criticize the *American Express* majority for ignoring the district court's factual findings,[139] but in rejecting the district court's market definition, both the Second Circuit and the Supreme Court majority implicitly refused to infer anticompetitive effects from Amex's price increases.[140] High prices are an effect, but it takes more to characterize that effect as pro- or anticompetitive.[141]

2. The Pivot to Output

The best way to ask whether Amex's pricing was procompetitive is to ask whether consumers wanted more of it—that is, to measure output

[137] See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411–12 (7th Cir. 1995) ("[W]hen dealing with a heterogeneous product or service . . . a reasonable finder of fact cannot infer monopoly power just from higher prices . . . .").

[138] See Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288 (2018) (noting that other networks had been increasing their prices for merchant services over the same time); United States v. Am. Express Co., 88 F. Supp. 3d 143, 226 (E.D.N.Y. 2015) (describing Amex's undisputed product differentiation arguments).

[139] Justice Breyer pointed out that neither the court of appeals nor the majority had held the district court's findings clearly erroneous and, without such a finding, the Court had essentially ignored the anticompetitive effects of Amex's restraints. *American Express*, 138 S. Ct. at 2294, 2304 (Breyer, J., dissenting); id. at 2304; see also Herbert Hovenkamp, Platforms and the Rule of Reason: The *American Express* Case, 2019 Colum. Bus. L. Rev. 35, 69 (noting that even though the *American Express* majority "did not disagree with or repudiate the district court's detailed fact findings, it made almost no use of them"); Douglas Melamed, The American Express Case: Back to the Future, 18 Colo. Tech. L.J. 1, 19 (2020) (arguing that the majority ignored district court factual findings that were "more than sufficient to establish a prima facie case of harm to competition").

[140] The Second Circuit had rejected the district court's use of Amex's pricing policies, standing alone, as sufficient to show anticompetitive effects. United States v. Am. Express Co., 838 F.3d 179, 195 (2d Cir. 2016) (rejecting an inference of anticompetitive effects from price or output data alone); id. at 202 (rejecting merchant price increases as evidence of anticompetitive effects because they fail to account for total prices). Because the market power determination was predicated entirely on those anticompetitive effects, the Second Circuit's and Supreme Court's determinations that the district court's approach to market power was flawed are tantamount to findings that the district court committed clear error in making its finding of anticompetitive effects. Although they did not use the words "clearly erroneous" with regard to anticompetitive effects, both the Second Circuit and the Supreme Court rejected

rather than price. Measuring output is also critical to determining whether Amex's price increases were enabled by market power, since market power is defined by the ability to raise prices *by restricting output*.[142] If a firm raises prices and increases output, that would be a sign that the increase was itself feeding competition (as by funding production of a differentiated or higher-quality product) and would defeat virtually any argument that the increase was the product of market power.

The emphasis on output restriction is not an economic abstraction or definitional nicety—it is necessary in order to classify whatever effect is

those findings, see id. at 204; *American Express*, 138 S. Ct. at 2288–89, because the district court had failed to define (and therefore find effects throughout) the correct relevant market.

Dennis Carlton argues that the majority decision failed to recognize a different anticompetitive effect: the foreclosure of Discover as a competitor. Dennis W. Carlton, The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error of *Amex*, 2019 Colum. Bus. L. Rev. 93, 104; see also *American Express*, 138 S. Ct. at 2296 (Breyer, J., dissenting) (arguing that Discover's inability to enter the credit card market as a result of the challenged conduct constituted direct evidence of anticompetitive effects). That criticism carries more weight since foreclosure cannot similarly be mistaken for market-driven price increases. On the other hand, because the form of competition Discover offered was merchant-facing price competition, Amex's ability to protect its higher merchant fees needs to be taken into account before one can conclude that Discover's inability to get merchants on board was the result of anticompetitive forces, as opposed to being the product of competition. It is also the case that Discover's foreclosure was not particularly strong evidence of either anticompetitive effects on merchants or cardholders or Amex's market power given the competition Amex faced from not only Visa and MasterCard, but from Discover as well. See id. at 2289 (majority opinion) ("By charging lower merchant fees, Visa, MasterCard, and Discover have achieved broader merchant acceptance—approximately 3 million more locations than Amex."). Nevertheless, it clearly would have been better if both the Second Circuit and Supreme Court had addressed the findings of Discover's foreclosed entry.

[141] It is too soon to tell whether similar errors underlie other approaches to eliminating market definition in favor of evidence of likely anticompetitive effects. The DOJ and FTC Request for Information on Merger Enforcement suggests both using "qualitative evidence" to define relevant markets and the possibility of eliminating formal market definition in cases where "likely effects" can be shown. DOJ/FTC Request for Information, supra note 14, at 3, 5. The effects highlighted by the Request are "evidence of head-to-head competition," but the qualitative evidence is limited to evidence about substitution, id. at 3, which mirrors the conventional approach—albeit augmented with qualitative evidence, as I suggest here. Because merger review will take place before any likely effects are realized, antitrust enforcers will be stuck with predicting "likely" effects, rather than relying on observed effects. As a result, they will not be susceptible to acting on observed price effects. It does mean, however, that despite their putative reliance on the purported certainty of "effects" over theory, the enforcers' market definition task will remain as hypothetical as it is today.

[142] *American Express*, 138 S. Ct. at 2288 (quoting Areeda & Hovenkamp, supra note 123, § 5.01, at 5-5); see Landes & Posner, supra note 4, at 941–42; Hovenkamp, supra note 21, at 2143 ("Antitrust condemns practices that tend to increase prices by reducing market output . . . .").

being observed as "anticompetitive." A restriction on output is a necessary part of any story that attributes higher prices to harms to competition since, in the absence of a restriction on output, higher prices would attract competition from other sellers seeking to sell at those inflated prices.[143] Given the difficulties with relying on raw output data,[144] it is the explanation—not the change in output—that matters, but that explanation must be related to output, not just price. Even if focusing solely on output might have its own problems, there is no good argument for relying on price data alone to conclusively find that the increases were anticompetitive, much less the next step in the analysis: that those anticompetitive effects are evidence of market power.[145] Measuring effects in terms of output rather than price, though, does not obviate the need for market definition.[146]

B. Competition in Single Product "Markets"

Even if one were to rely on output reductions as evidence of anticompetitive effects, market definition is necessary in order to determine if output is reduced for the product as a whole, rather than just for the defendant's product. A reduction in an individual firm's output does not necessarily produce a harm to the market[147] or any particular

[143] Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411–13 (7th Cir. 1995); Areeda et al., supra note 18, ¶ 501, at 116 (describing the ability of firms to impose barriers to entry as essential to the exercise of anticompetitive market power).

[144] See supra text accompanying notes 125–28.

[145] Even putting aside whether one *could* determine market power from anticompetitive effects, it is not clear what purpose such a finding would serve. If there are actual anticompetitive effects, it seems unnecessary to separately prove market power. That much is clear from the Second Circuit's preferential ordering of the direct and indirect methods for showing anticompetitive effects. United States v. Am. Express Co., 838 F.3d 179, 194 (2d Cir. 2016). Eliminating the connection to market power does simplify the inquiry, but it does not obviate the need to define a relevant market because the market definition is not only necessary for determining whether there is market power, but also whether observed effects are "anticompetitive." See infra Section III.B.

[146] There are some cases in which it might not be necessary to define the relevant market to infer market power, such as in the case of *conduct* that can only be explained in light of market power. Thus, large reverse payments from branded pharmaceuticals to generics might be, as Hovenkamp says, "all the 'market' evidence we need that the two products compete." Hovenkamp, supra note 21, at 2153. In such cases, though, it is the unusual nature of the conduct itself, not observed effects in the market (such as price or output data), that would give rise to the inference of market power without a market definition.

[147] See Easterbrook, supra note 24, at 21 ("If judges tolerate inefficient practices, the wrongly-tolerated practices will disappear under the onslaught of competition.").

market participant, much less an effect one could reasonably label "anticompetitive."

The presence of anticompetitive effects is a conclusion that requires two subsidiary findings: that there are effects and that they either harm competition or are produced by a harm to competition. But one can neither measure a harm to competition nor describe how restricted competition produces harms without defining the area of effective competition, which is the relevant market. Saying that a finding of anticompetitive effects obviates the need to define the relevant market is like saying that a finding of drunk driving obviates the need to determine whether the defendant was driving. One cannot make the conclusion without the subsidiary finding.

This is true both as a matter of markets and as a matter of defining competition. In order to characterize an observed effect, it is necessary to identify the market in which the effect occurs, whether product or geographic.[148] The same is true as a matter of identifying whether the conduct affects something we would call "competition." If Amex raises its merchant rates, even if transaction volumes go down, that does not show any effect on *competition* unless Amex itself comprises the entire market. Observing a change and concluding that the market is harmed—as opposed to Amex's business being harmed—cannot be done without accounting for other sellers, which is to say Amex's competitors.[149] It is the effect as observed through Amex's competitors, not the effect on Amex itself, that tells us whether "competition" is being harmed, and those competitors cannot be identified without defining the relevant market.

Concerns over the connection between individual products and competitive markets likely underlie Justice Thomas's approach to inferring anticompetitive effects in *American Express*. Although he did not evaluate the use of anticompetitive effects to find market power, Justice Thomas did address the plaintiffs' argument that they had shown

[148] See Fishman v. Est. of Wirtz, 807 F.2d 520, 568–69 (7th Cir. 1986) (Easterbrook, J., dissenting in part) ("The market definition in this case shows why you can't pick a market without knowing the purpose of the choice. The court has defined a market of professional basketball in Chicago. This is a plausible market, if the question is whether anything injured consumers. . . . If, instead, we seek to learn whether CPSC harmed competition for a sports franchise, we must define a market that looks at the demand and supply possibilities facing [franchisees]."); Glasner & Sullivan, supra note 44, at 316.

[149] See generally Baker, supra note 1, at 130 n.6 (arguing that market definition is necessary to measure the competitive effects of conduct).

anticompetitive effects directly.[150] In doing so, he distinguished both *Indiana Federation of Dentists* and another case cited by the plaintiffs, *Catalano, Inc. v. Target Sales, Inc.*,[151] on the ground that those cases involved horizontal rather than vertical restraints.[152] That raises the question of why one would have a different rule regarding market definition in horizontal cases than in vertical ones, since the nature of market definition as identifying substitutes is arguably identical between them. Justice Thomas's justification was that a restraint involving a single firm can be anticompetitive only if it is predicated on market power.[153] That statement is incorrect as a matter of economics. The ability of both horizontal and vertical restraints to push prices above cost is equally dependent on market power; a vertical restraint imposed by a near-monopolist is far more likely to affect market prices than a horizontal restraint among minuscule firms.[154] Rather, Justice Thomas's point is a statement about the kind of conduct that qualifies as "anticompetitive."

What is different between horizontal and vertical cases is not the amount of market power necessary to produce an effect on markets but the *source* of that market power. In horizontal cases, the source of the market power is usually an agreement among competitors, which is conduct that the antitrust laws themselves define as anticompetitive.[155] In the case of a vertical arrangement, the source of the market power is usually something else, so the court needs to determine whether to label that source of market power as pro- or anticompetitive. That labeling involves a value judgment that is different in vertical cases than in horizontal cases, and it is the need to make that value judgment—not the quantum of market power in the abstract—that separates vertical cases from horizontal ones for the purposes of inferring whether an observed effect is anticompetitive.

The content of that value judgement is inherent in market definition itself. One major reason why antitrust treats vertical restraints differently than horizontal ones is because vertical restraints contribute to product

[150] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 n.7 (2018).

[151] 446 U.S. 643 (1980) (per curiam).

[152] *American Express*, 138 S. Ct. at 2285 n.7.

[153] Id. ("[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power." (quoting Frank H. Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L.J. 135, 160 (1984))).

[154] Thomas B. Nachbar, The Antitrust Constitution, 99 Iowa L. Rev. 57, 77 (2013).

[155] See United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–83 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 247 (1899).

differentiation.[156] Product differentiation makes products imperfect substitutes for each other and therefore,[157] virtually by definition, provides opportunities for above-marginal-cost pricing.[158] Product differentiation is therefore a likely source of market power, at least as defined by the Lerner Index. Antitrust recognizes that the market power generated by product differentiation is not anticompetitive—it is a consequence of successful competition. That is why the market power generated by product differentiation (both through brand recognition and legally supported differentiation, such as through trademark) is not itself generally the target of antitrust.[159] Product differentiation leads to above-cost prices, but because those above-cost prices are not anticompetitive, they are not antitrust's concern.[160] In such cases, it is the effect on the overall market, not the price for the specific, differentiated product, that is relevant.[161] The (irrelevant) product-differentiated product can readily be identified by brand, but identifying the (relevant) more general market is not so easy: it requires some kind of market definition.

[156] Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–55 (1977).

[157] Christopher S. Yoo, Copyright and Product Differentiation, 79 N.Y.U. L. Rev. 212, 220 (2004) ("Product differentiation occurs when competing goods act as imperfect rather than perfect substitutes for one another. An oft-cited example is breakfast cereals, which vary widely in flavor, sweetness, and crunchiness.").

[158] See Hovenkamp, supra note 21, at 2147 ("[P]roduct differentiation serves to make firms less-than-perfect competitors; that is, individually they have downward sloping demand curves."); Kaplow, supra note 9, at 500 n.123 (discussing "monopolistic competition"); Kirkwood, supra note 34, at 1214–15; see also Edward Hastings Chamberlin, The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value 67 (8th ed. 1962) ("As long as . . . substitutes are to any degree imperfect, [a seller] still has a monopoly of his own product and control over its price within the limits imposed upon any monopolist — those of the demand.").

[159] Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 595 (7th Cir. 2008) (refusing to infer market power from brand-specific product differentiation in the face of competition for the underlying product (gasoline)).

[160] Hovenkamp, supra note 21, at 2147 ("One thing that product differentiation does not do, however, is lead to monopoly prices, at least not without some additional assumptions. This explains antitrust policy's quite appropriate reluctance to infer single-brand or narrow markets from the simple fact of differentiation.").

[161] See id. at 2137 ("Indeed, antitrust law has found that a single firm's brand constitutes a relevant market in only a few situations, such as when the purchaser of a specialized piece of durable equipment is locked in by this purchase and must buy that firm's aftermarket supplies or services as well. As a result, practices such as exclusive dealing in markets for branded products are never antitrust violations unless the branded seller independently has market power based on shares of a more general product market.").

C. Lessons from Observed Effects for the Lerner Index

Recognizing that the principal concern of antitrust is output restrictions and not price increases has implications for antitrust's reliance on the Lerner Index. In the classical case when monopoly power is exercised, price increases and output reductions go hand-in-hand, and so it is not generally necessary to distinguish between the two for the purposes of considering market power. When considered in isolation, though, it is output reduction, not price increases, that matter. The Lerner Index, however, by emphasizing the relationship between price and cost, shifts the analysis away from output reduction and toward price. Consequently, it is time to substantially reduce reliance on the Lerner Index as a description of anticompetitive effects in antitrust. While the Lerner Index does describe one form of market power, like the observation of price increases, it is not at all clear that market power as described by the Lerner Index is anticompetitive for the purposes of antitrust law. The Lerner Index can, in some cases, be a helpful tool, but more often than not it points to poor competition policy.

Although generally treated as an economic phenomenon, when coupled with antitrust, the Lerner Index represents its own theory of competition: that competition is realized when price equals marginal cost. Harold Hotelling's observation that marginal cost pricing also maximizes general welfare[162] gives the argument for marginal cost pricing even more bite, converting it from an economic observation to a potentially attractive social policy. Such a policy tracks closely with Robert Bork's argument that antitrust "should be guided solely by the criterion of consumer welfare,"[163] since the marginal cost prices that will necessarily allocate all surplus in the hands of consumers will also (according to Hotelling) maximize general welfare.

This can be true as an economic definitional matter, but not only is such an outcome practically unattainable,[164] it represents disastrously bad competition policy, as Ronald Coase demonstrated in his response to Hotelling. As Coase pointed out, the relevant question was not limited to optimizing output of the item in question; one also had to allocate the

[162] See Harold Hotelling, The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates, 6 Econometrica 242, 242 (1938).

[163] Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 57 (1978).

[164] Areeda et al., supra note 18, ¶ 402a, at 5 ("While antitrust cannot hope to achieve perfect competition, nor should it.").

costs of production between producing that item or another.[165] In order to remain economically viable, firms must price to cover not only their marginal cost but also their invested fixed costs.[166] The same point can be made by reference to short-term vs. long-term consideration of costs[167] or to static vs. dynamic efficiency.

This argument is most often made and accepted in industries involving intellectual property ("IP"),[168] where the relationship between fixed and marginal cost is particularly stark, but the point applies to all industries with decreasing average cost,[169] which would describe many modern industries (including virtually any modern platform). Indeed, one of the problems with the Lerner Index is that it ignores variations in the ratio of fixed to variable costs. The necessity of recovering fixed costs across any time period varies from industry to industry, while the math represented by the Lerner Index applies identically to all industries. Antitrust generally recognizes the need for firms to recover their fixed costs, which raises the question of why anyone should be—in the context of antitrust—talking about marginal cost in the first place. Yet the concept persists in antitrust and related scholarship.[170]

The before-mentioned practical problems with using marginal cost in litigation[171] prevent courts from relying on the Lerner Index,[172] and so discussion of it could be dismissed as harmless were it not for its pervasive effect on thinking in the scholarship of markets. For example, labeling prices above marginal cost as resulting in "deadweight loss" not only describes a shift from "perfect competition," but it is also offered as

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[165] R.H. Coase, The Marginal Cost Controversy, 13 Economica 169, 173–74 (1946).

[166] Hovenkamp, supra note 21, at 2140. Coase connected long-term cost to dynamic efficiency by recasting it as the need to forecast consumption before making additional investments in capacity. Coase, supra note 165, at 175–76.

[167] Areeda et al., supra note 18, ¶ 504b, at 127–28.

[168] See, e.g., Mark A. Lemley & Mark P. McKenna, Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP, 100 Geo. L.J. 2055, 2095 (2012); Hovenkamp, supra note 21, at 2140. On the problems of applying marginal cost in intellectual property, see John F. Duffy, The Marginal Cost Controversy in Intellectual Property, 71 U. Chi. L. Rev. 37, 38 (2004) (discussing literature "preoccupied with the perceived problem that prices for intellectual property may sometimes exceed marginal cost").

[169] See Coase, supra note 165, at 173.

[170] See, e.g., Areeda et al., supra note 18, ¶ 503a, at 123; Viscusi et al., supra note 25, at 80.

[171] See supra text accompanying notes 28–31.

[172] See Areeda et al., supra note 18, ¶ 504, at 126 ("Notwithstanding its theoretical precision, the technical measure of market power exemplified by the Lerner Index . . . can seldom be used explicitly in antitrust cases."); id. ¶ 515, at 142, 144 (discussing the alternatives that courts use instead of attempting to measure market power).

a justification for policy prescriptions that would reduce such loss.[173] But above-marginal-cost pricing does not represent a loss with no offsetting benefit, as is suggested by describing it as "deadweight." The benefit comes in the form of incentives to invest in the first place, a benefit not accounted for by the Lerner Index. That benefit is potentially irrelevant to economists studying microeconomics, but it is critical to competition policy. Most scholars understand this,[174] and so the harm of relying on the Lerner Index is limited, but not eliminated.

The point, though, is that when translated from describing an economic phenomenon to operating within any regime that purports to regulate "competition," it is the social understanding of competition, not the economic phenomenon, that matters. The Lerner Index's major technical failure is that it points to the wrong cost—marginal cost instead of a more realistic measure of cost, like average total cost—but the Lerner Index represents a deeper problem in antitrust of relying on economic tools made for one purpose (describing economic static efficiency) and using them for another (defining the goals of a legal regime). Although the Lerner Index does not purport to be prescriptive, importing the Lerner Index into antitrust law elevates an economic description to a legal imperative, and at that point the economic description takes on prescriptive and normative meaning. Reliance on the Lerner Index is worse than using no guide because it points in the wrong direction. It is like using a compass to determine latitude and longitude—a compass might accurately and consistently point to magnetic north, but knowing which way is north is not particularly relevant to knowing one's latitude and longitude, and relying on it for the answer will only keep one from turning to more reliable methods. The Lerner Index, with its overemphasis on price, underlies Justice Breyer's decision to find anticompetitive effects on price information alone, which as described above, has major implications for antitrust law.

Because the true target of antitrust is not economic market power but rather the restriction of competition, focus should shift away from

[173] See, e.g., C. Scott Hemphill, Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, 81 N.Y.U. L. Rev. 1553, 1602–03 (2006); Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 Tex. L. Rev. 1031, 1059–60 (2005).

[174] See, e.g., Oliver E. Williamson, Economies as an Antitrust Defense: The Welfare Tradeoffs, 58 Am. Econ. Rev. 18, 21–22, 21 fig.1, 21 n.3 (1968); Hemphill, supra note 173, at 1599 (describing innovation benefits as a means of offsetting the deadweight loss of pricing above marginal cost); Lemley, supra note 173, at 1057 (citing average total cost rather than marginal cost as the object of regulation).

measuring market power as a function of marginal cost and price and toward defining what are and are not legitimate forms of competition. But, unlike market power itself, competition cannot be defined and measured as a scalar. Competition is not a number like the Lerner Index but rather is a socially constructed phenomenon that must be described relative to other social facts. The same is true of the "markets" subject to antitrust market definition. The Lerner Index, which accounts for none of these nuances of antitrust law but instead points to unknowable and largely unhelpful indicia like marginal cost[175] and unreliable indicia like price, represents too great a risk to sound antitrust law.

IV. COMPETITION AS A SOCIAL CONSTRUCT

The recognition that some restraints generate market power but are nevertheless unlikely sources of antitrust liability requires the ability to delineate between legitimate and illegitimate sources of market power. Antitrust has been performing that function through a variety of doctrines since nearly its inception, and similar concerns must be reflected in any approach to market definition.

A. What Color Is Your Market Power?

Antitrust does not view all sources of market power equally. Market power has to be characterized before we can decide whether it should be condemned.

Some antitrust doctrines explicitly privilege accumulations of market power, even some that are not the product of competitive forces. The *Noerr*/*Pennington* doctrine, which removes conspiracies to obtain government action from antitrust scrutiny,[176] immunizes anticompetitive conduct regardless of the amount of market power it generates. In a *Noerr*/*Pennington* case, economic considerations like measuring the ratio between cost and price are simply beside the point, even though the exclusivity generated by government action produces exactly the same kind of deadweight loss as other sources of monopoly.[177] The same is true

[175] See supra notes 27–28 and accompanying text.

[176] See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144–45 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 671 (1965). On *Noerr*/*Pennington* generally, see Thomas B. Nachbar, Antitrust and the Politics of State Action, 60 Wm. & Mary L. Rev. 1395, 1413–14 (2019).

[177] Indeed, government regulation is likely to produce particularly durable market power, since government regulation is frequently accompanied by some limit on entry.

of the state action doctrine, which essentially removes participation in or compliance with comprehensive state regulation from the purview of antitrust.[178] The *Noerr*/*Pennington* and state action doctrines are themselves enough to conclusively demonstrate that antitrust law embodies a political rather than an economic understanding of competition. Any serious reliance on a purely economic conception, such as suggested by the Lerner Index, is likely to divert the conversation from the far more important one of characterizing the type of harm (*wrongfully* anticompetitive, such as in the case of some exclusionary conduct, or *rightly* anticompetitive,[179] such as in the case of obtaining regulation) resulting from the restraint at issue.

Many laws are designed to allow the accumulation of market power, at least if it is defined as the ability to charge above marginal cost. Enabling such market power is the purpose of copyright and patent protection, and similar concerns underlie much of trademark law (including contentious anti-dilution protection).[180] For the reasons stated in Section III.C, emphasis on the "deadweight loss" of above-marginal-cost pricing is emblematic of a framing error in discussing the competitive consequences of these regimes.[181] A price increase above marginal cost enabled by intellectual property protections is not only not anticompetitive, it is essential to the survival of the business. Here, legal and economic understandings of market power necessarily diverge. From an economic standpoint, market power earned through intellectual property might be unproblematic because it reflects a necessary shift from using marginal to average cost owing to the high fixed costs in developing intellectual property.[182] As a matter of economically informed competition policy, it is easy to justify intellectual property regimes by using average total cost rather than marginal cost.[183] But legally, that economic justification is

[178] On the reach of the state action doctrine and the degree of protection it offers to private as opposed to state entities, see Nachbar, supra note 176, at 1414–15.

[179] Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J.L. & Econ. 23, 27 (1983) ("Regulation displaces competition. Displacement is the purpose, indeed the definition, of regulation.").

[180] Following law schools' course listing habits, I will, for simplicity's sake, lump these regimes together under the rubric of "intellectual property," although I recognize that they represent very different economic concerns and interests.

[181] See supra notes 173–74 and accompanying text.

[182] Hovenkamp, supra note 21, at 2147.

[183] See FTC v. Actavis, 570 U.S. 136, 147 (2013); see also Landes & Posner, supra note 4, at 939 (describing the case in which the difference between price and marginal cost is trivial, as is the case with market power from intellectual property, as it "simply reflects certain fixed

irrelevant. While it is true that a firm *might* have incurred high fixed costs in developing intellectual property and thus is not making rents in the sense of profits above (average) costs, the cost of its intellectual property investments is irrelevant as a matter of both intellectual property and antitrust law.[184] It is entirely possible that a firm is raking in extraordinary monopoly profits with a piece of intellectual property it fortuitously developed at very little cost, but that low cost, and the resulting monopoly profits, would not render the firm's exploitation of its intellectual property anticompetitive. Intellectual property, regardless of cost, is a legally justified (and therefore not anticompetitive as a matter of law) accumulation of market power.

From the perspective of economists concerned about the consequences of market power, antitrust might seem like a corrective specifically designed to target such accumulations of market power. Deven Desai and Spencer Waller rightly point out that branding is a potentially enormous source of durable market power for market participants.[185] As they explain, though, the cases, at least those involving vertical restraints, tend to protect rather than limit both the accumulation and exercise of this kind of market power.[186]

Desai and Waller see permissive antitrust (and trademark) law treatment of brand market power as a failure to understand the competitive significance of branding,[187] but I would posit that it instead represents a conscious choice in antitrust[188] to permit accumulations of market power related to what antitrust would define as legitimately competitive activity. In *Sheridan v. Marathon Petroleum Co.*,[189] Judge Posner relied on the brand-specific forces of product differentiation in refusing to find market power in a particular brand unless there is market

costs"); id. at 957 (distinguishing market power resulting from intellectual property from "monopoly profits" due to the higher fixed cost the firm has incurred in developing its intellectual property).

[184] See Kaplow, supra note 9, at 500–01 (distinguishing between whether there is "market power" in a patent and whether the particular exercise of market power is an antitrust violation, which is to say, legally, as opposed to economically, problematic).

[185] Deven R. Desai & Spencer Waller, Brands, Competition, and the Law, 2010 BYU L. Rev. 1425, 1465.

[186] Id. at 1487 (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007)).

[187] Id. at 1430, 1465.

[188] And perhaps in trademark law, especially with the recent extension of protection against dilution. See id. at 1459–60.

[189] 530 F.3d 590 (7th Cir. 2008).

power in the product itself, essentially removing brand-related market power from the ambit of antitrust.[190] *Continental T. V., Inc. v. GTE Sylvania Inc.*[191] and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[192] by requiring full rule of reason analysis for virtually all intra-brand restraints, similarly reflect an appreciation of the competition underlying defendants' efforts to harness the value created by brands. Antitrust courts have not ignored, but rather have consistently embraced, the role of brand-specific accumulations and exploitations of market power.[193]

One of the consequences of cost-price approaches to market power like the Lerner Index is that they have led to false justifications for this preferential treatment of intellectual property and branding in antitrust. It is tempting, and frequently true, to point out that such patent-specific,[194] or copyright-specific,[195] or brand-specific[196] market power is minimal. But the degree of market power, at least as measured between the price and cost of the defendant's product, is beside the point. Microsoft's copyright in Windows is likely the source of considerable market power, but during the *United States v. Microsoft Corp.* case, the D.C. Circuit accommodated those copyrights in its analysis of Microsoft's various restrictions without regard to the amount of market power they created.[197] The court did not consider, because it was irrelevant, either the cost to develop Windows or the price Microsoft was charging.

This point bears emphasis because of the degree to which the cost-price approach to market power has come to dominate antitrust law. Suppose the maker of non-differentiated widgets snags a low-level celebrity endorsement for a modest sum. Next imagine that proto-celebrity hits it big, the result being that demand for that brand of product escalates dramatically, providing the opportunity for above-cost pricing (not just marginal cost, but average total cost, including the cost of securing the endorsement).

[190] Id. at 595.
[191] 433 U.S. 36, 59 (1977).
[192] 551 U.S. 877, 899 (2007).
[193] Over time, for instance, the Supreme Court has become increasingly skeptical about using market power resulting from intellectual property protections as the basis for antitrust liability, insisting instead that market power be established in its own right. See Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006).
[194] See id.
[195] Edmund W. Kitch, Elementary and Persistent Errors in the Economic Analysis of Intellectual Property, 53 Vand. L. Rev. 1727, 1734 (2000).
[196] Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 595 (7th Cir. 2008).
[197] 253 F.3d 34, 63–64 (D.C. Cir. 2001) (en banc) (per curiam).

Next, imagine any number of agreements that might preserve that market power:

- a long-term, exclusive contract with the now-famous endorser
- an exclusive dealing arrangement with retailers that prevents competing makers of widgets from reaching store shelves
- a long-term supply contract for an input to widgets (flidgets) that, because of purchases at volume, will give the firm a substantial cost advantage over other producers of widgets

From even cursory consideration of the alternatives, two things should be clear: First, the relationship between the firm's current price and its current (marginal, average total, or whatever) cost is largely irrelevant for antitrust purposes. In none of these cases would it be plausible that the relevant market would be the market for the firm's own product, even in the absence of something like formal intellectual property protection to provide legal cover for the accumulation of market power. Second, the market definition in each case would be determined not by the cost-price relationship of widgets but by the nature of the restraint. In the first, the relevant market would be for endorsers or endorsements; in the second, it would be in the market for widgets; and in the last, it would be in the market for flidgets. As David Glasner and Sean Sullivan point out, market definition depends on the theory of harm,[198] which is to say that it does *not* depend on the relationship between the price and cost of any particular item involved in the restraint. The reason why antitrust generally ignores brand-specific market power is not because it is minimal; it is because its exercise is generally not something we would label as anticompetitive.

That is not to say that the market power acquired through intellectual property protection is always irrelevant for antitrust purposes. For instance, the use of market power gained from intellectual property protection to acquire or exercise market power beyond the scope of its protection can be an antitrust violation.[199] The question in such cases is whether the market power being acquired or exercised is beyond the scope of the intellectual property protection.[200] In the case of formally defined protection like copyright and patent, the answer to that question might come from the intellectual property regime itself, as it arguably did in the

[198] Glasner & Sullivan, supra note 44, at 325.
[199] *Microsoft*, 253 F.3d at 63.
[200] See id. at 63–64; Int'l Salt Co. v. United States, 332 U.S. 392, 395–96 (1947).

Microsoft case.[201] For restraints that are not the product of positive law like IP rights, though, identification of the legitimate reach of the restraint has to come from antitrust, and so market definition of some kind is necessary in order to prevent every vertical restraint from being identified as generating antitrust-prohibited market power.

Ohio v. American Express only tangentially involved intellectual property, but the kind of brand investments that Amex made and sought to protect with the anti-steering provisions are similarly beyond the ambit of the antitrust laws. If merchants were willing to accept Amex's combination of price and non-price terms because Amex was providing them a better product, then the higher prices and the inability to steer are indicative of competition and cannot be called an anticompetitive effect. On the other hand, if merchants were paying higher prices to Amex because Amex's market dominance was such that merchants did not have a meaningful choice to turn to, those higher prices might have been the product of anticompetitive effects.[202] The anti-steering provisions (and the price effects they enabled) can only be rightly called "anticompetitive" if merchants could not switch to other cards for reasons beyond legitimate competition between the cards. But whether the forms of competition Amex were trying to capitalize on were "legitimate" is not a question that can be answered in a vacuum, such as by looking at price increases over time. Whether or not merchants could switch to other cards was an issue disputed in the case, but it cannot be decided without identifying the range of choices that merchants had and the ways in which the anti-steering provisions affected those options. The district court finding that the anti-steering provisions had anticompetitive effects did not obviate the market definition question—it begged it.[203]

[201] See *Microsoft*, 253 F.3d at 63.

[202] In the case of *American Express*, although entry into the credit card market is difficult, existing firms in the market can (like in many modern technology-driven platform markets) expand rapidly, meaning that market definition should be more in service of identifying the number of alternatives and barriers to entry rather than in service of the traditional market definition / market share paradigm. See Landes & Posner, supra note 4, at 947 (highlighting the relative importance of supply elasticities over market share in calculating market power). For a multi-homing product like credit cards, measuring market share by percentage of transactions makes little sense, since cardholders can easily switch to other cards. The question, then, is whether cardholder preferences translate to merchants, which was the same "feedback" question asked in *American Express*, although in terms of preference rather than pricing.

[203] In another part of the case, the district court did attempt something like a market definition / market share approach, which it transmuted into a discussion of product

Recognizing the depth of antitrust's accommodation of efforts to accumulate and capture brand-related rents has a least two major implications.

First, there is no meaningful way to determine whether a particular practice is truly anticompetitive without acknowledging its full legal and social meaning. Are celebrity endorsements a legitimate source of rents? How about anti-steering provisions? The answers to those questions cannot be determined merely by observing whether a particular product's price went up or down. Whether a firm is able to charge a price above their cost says very little about whether their market power is a matter for antitrust.

Second, the deference that antitrust exhibits for market power specific to one's own product combined with the potential that consumers can discipline anticompetitive practices by switching to substitutes means that any cost-based approach to market power in antitrust should focus not on the cost of the defendant's product but on the cost of its putative substitutes. To bring it back to *American Express*, so long as Visa and MasterCard were viable substitutes and *their* transactions were priced at their cost, then the only overcharge that consumers could have paid to Amex would have been the product of Amex's brand-related investments. Any attempt by Amex to raise their prices above Visa and MasterCard's cost-based pricing (plus the extra value that Amex created through its brand-specific features, which is value Amex is free to capture without running afoul of the antitrust laws) would be met by consumer defection to Visa or MasterCard. This is yet another way the Lerner Index does not fit the competitive concerns of antitrust. It not only looks at the wrong

differentiation without recognizing the significance of that shift for its market power inquiry. The district court found Amex to have 26.4% of the relevant market for transactions, second to Visa (with 45%) in what is admittedly a highly concentrated market with high barriers to entry for new cards, United States v. Am. Express Co., 88 F. Supp. 3d 143, 188 (E.D.N.Y. 2015), but the court found that number was not adequate to establish market power under the traditional market definition / market share approach, id. at 191. Instead, it was only by virtue of "cardholder insistence" that the court found Amex to have market power. See id. The court recognized that cardholder insistence was largely a result of Amex's investments in product differentiation but discounted that argument as being about the durability, not the procompetitive nature, of Amex's market power. See id. at 191, 194–95. Amex was able to limit merchant choice not because other cards could not increase supply quickly enough to satisfy merchant demand switching from Amex, which is the classic market definition / market share understanding, see supra note 31, but because Amex had devised a product that cardholders (on the other side of the transaction) preferred, which is a procompetitive justification.

type of cost (marginal vs. long-run), but it also looks at the wrong entity's cost (the firm vs. its competitors).

Which brings us back to *Cellophane*. Assuming du Pont did not act illegally in order to obtain its market power in cellophane, not only was the market definition in *Cellophane* correct, the *Cellophane* fallacy is itself a fallacy. The *Cellophane* fallacy posits that the market definition in *Cellophane* ignored the degree to which du Pont could already charge above its cost.[204] But if the question is whether consumers have access to substitutes at cost, and antitrust itself absolves du Pont of the responsibility to sell at du Pont's *own* cost, the relevant cost for judging the availability of substitutes should be du Pont's *competitors'* costs. The Court in *Cellophane* measured cross-elasticity of demand at the current price,[205] and so long as the alternatives to cellophane were themselves priced at cost, that price actually reflected the appropriate cost measure. Du Pont's ability to charge above its own cost was irrelevant to determining whether consumers actually had a choice to switch to other packaging in the face of anticompetitive conduct by du Pont to either secure or expand its market power.

B. Tariffs and Other Political Market Definitions

What does all this have to do with market definition? After all, the intellectual property related concerns that I have expressed could just as easily be (and frequently are) dealt with by examining whether the conduct (not the market) extends beyond the scope of intellectual property protection.[206] The problem can frequently be handled within the rubric of conduct as opposed to market definition. But many aspects of conduct could be, and have been, re-cast in terms of market definition.

According to the 2010 Horizontal Merger Guidelines, geographic market definition can be driven by a variety of factors:

> The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions. The

[204] See supra note 6.
[205] Landes & Posner, supra note 4, at 960–61.
[206] See, e.g., *Microsoft*, 253 F.3d at 63–64 (distinguishing Microsoft's different restrictions, some of which were legitimate protections of its intellectual property and some of which were not).

> competitive significance of foreign firms may be assessed at various exchange rates, especially if exchange rates have fluctuated in the recent past.[207]

From the perspective of the cost-price approach, this list of barriers makes sense, since all of them "impede long-distance or international transactions," and therefore provide some margin above cost at which the defendant can price without losing sales—the veritable definition of market power under the cost-price approach. This approach tracks that taken by Judge Hand in *United States v. Aluminum Co. of America* (*Alcoa*).[208] Alcoa argued that the market definition should include foreign-produced aluminum, but Judge Hand refused to include all foreign aluminum because foreign aluminum, which bore "the handicap of the tariff and the cost of transportation," did not effectively constrain Alcoa's pricing.[209]

Per the previous discussion, one could identify a defendant's comparative advantage in terms of location or language or familiarity as forms of non-price competition, and so it is not necessarily clear that higher prices attributable to such advantages are themselves an anticompetitive effect. But even discounting that argument, there is something fundamentally different about the "regulation [and] tariff and non-tariff trade barriers"[210] that the Guidelines lump in with other geographic barriers to competition. Regulation and, especially, tariff and non-tariff trade barriers are *designed* to burden foreign trade. It seems unfair, and even implicates the constitutional right to petition,[211] to use the existence of government-granted trade restrictions against firms that benefit from those government-granted restrictions.

As suggested by the 2010 Merger Guidelines, tariffs directly affect market definition. In *Alcoa* itself, Judge Hand's decision to exclude foreign competitors was in service of estimating Alcoa's market share in applying the market definition / market share paradigm.[212] *Cellophane*,

[207] Horizontal Merger Guidelines, supra note 113, § 4.2, at 13.

[208] 148 F.2d 416 (2d Cir. 1945).

[209] Id. at 426 ("[W]ithin the limits afforded by the tariff and the cost of transportation, 'Alcoa' was free to raise its prices as it chose, since it was free from domestic competition, save as it drew other metals into the market as substitutes.").

[210] Horizontal Merger Guidelines, supra note 113, § 4.2, at 13.

[211] E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.").

[212] See *Alcoa*, 148 F.2d at 425–26.

similarly, presents an example of tariffs implicating market definition. In that case, du Pont's market position in cellophane was itself the product of tariff protections that insulated it from entry by foreign competitors.[213] If that were the only source of du Pont's market power in cellophane, then that would be yet another reason to define the relevant market as "flexible packaging material," since any market power du Pont enjoyed in cellophane would be by (government) design.

Of course, that market power would be no less real, nor would the deadweight loss be any less dead. The reason for defining the market as the broader rather than the narrower one would not be because the economic costs are any different; it would be because of the policy choice represented by the tariff on cellophane, just as the grant of an IP right reflects a policy choice to privilege the market power conferred by the IP right.

It is possible that either Alcoa or du Pont attempted to expand its market power, either in aluminum itself (for instance, by preventing foreign rivals from entering after expiration of the tariffs[214]) or to other products. The market definition would have to reflect that theory of the case. But if the theory is that the tariff resulted in higher aluminum prices, it would not be enough to point out that Alcoa (or du Pont, for cellophane) had market power by virtue of their congressionally granted trade preferences.[215] To the degree those trade preferences are the result of Alcoa's lobbying, they are protected under *Noerr*/*Pennington*, and they therefore should not themselves be sufficient to establish antitrust liability just because their result is a price that is above what Alcoa's price would have been without them.

As consideration of government-granted sources of market power makes clear, it is impossible to meaningfully characterize market power without also characterizing its source. Market power gained through

[213] United States v. E.I. du Pont de Nemours & Co. (*Cellophane*), 118 F. Supp. 41, 167–69, 190, 220–21 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956); see George W. Stocking & Willard F. Mueller, The Cellophane Case and the New Competition, 45 Am. Econ. Rev. 29, 34–35 (1955); Kirkwood, supra note 34, at 1222 ("[du Pont's] principal effort to block foreign rivals involved legal petitioning activity: du Pont convinced the United States Customs Court to reclassify cellophane, resulting in an increased import duty.").

[214] See Donald H. Wallace, Market Control in the Aluminum Industry 29 n.12 (1937) (describing the dramatic reduction in aluminum import tariffs in 1913).

[215] The crux of Turner's argument against *Cellophane* was that the Court in *Cellophane* should have followed the approach in *Alcoa*, which was to focus on any accumulation of market power, with little attention to the source—including cost advantages—of that market power. See Turner, supra note 6, at 309.

government action, for instance, is clearly anticompetitive, but not in a way relevant to antitrust law. Whether market power gained in other ways, such as through product differentiation, is relevant to antitrust law is a question that cannot be answered categorically but has to be considered in context.

That context is not only dependent on market definition: it affects the market definition itself. In *Alcoa*, Judge Hand's decision to exclude foreign aluminum from the relevant market (and thereby increase Alcoa's potential liability for monopolization) was at least in tension with Congress's decision to insulate Alcoa from competition from that very same aluminum. In *Cellophane*, if the district court was correct in finding that du Pont's monopoly in cellophane was legally obtained, then the Supreme Court's market definition was correct even if du Pont had been exercising market power for cellophane. Recognizing the legally contingent nature of market definition opens the door to a broader understanding of how to define relevant markets beyond the economic tools of measurement, like the cost-price approach of the Lerner Index.

C. Qualitative Market Definition

It is necessary in virtually every antitrust case to determine the relevant market, contrary to Justice Breyer's and Senator Klobuchar's belief, even if market power is being established through the existence of anticompetitive effects. Glasner and Sullivan rightly argue that the relevant market cannot be determined in the abstract without first identifying the theory of anticompetitive harm.[216] But the point goes the other way as well: it is impossible to determine if an observed effect is "anticompetitive" without first identifying the relevant market in which those effects are occurring.

What cases like the product differentiation and tariff examples make clear is that market definition has to be informed not only by quantitative criteria like the relationship between cost and price but also by qualitative criteria that necessarily include not only the size of observed effects but also their nature. Some causes of seemingly anticompetitive effects like above-cost pricing or even high market share are privileged, and that

[216] Glasner & Sullivan, supra note 44, at 325; see also Werden, supra note 36, at 732 (describing market definition as necessary to identify the "competitive process" being harmed).

permissibility has to be included in market definition lest antitrust penalize firms for exercising market power they have lawfully acquired.

Including such qualitative criteria in market definition necessarily requires the party offering the definition to justify it, and in that justification one can avoid the problems that those like Louis Kaplow rightly identify in current approaches to market definition. The problem with current market definition is that it is driven entirely by the potential to charge above-cost prices, but the narrow understanding of market power as merely the ability to charge above cost prices makes market definition necessarily circular.[217] Including criteria other than the ability to charge above-cost prices in market definition offers the opportunity to avoid that circularity.

The simplicity of the quantitative approach is attractive. Indeed, the attractive simplicity of quantitative approaches is likely largely responsible for the fact that courts continue to use the market definition / market share paradigm; it is easily quantified even though it is an analytically weak proxy for market power.[218] The simplistic market definition inherent in the market definition / market share paradigm, in which market definition is informed (via the Lerner Index) solely by the ability to price above cost, has become a crutch. It allows courts to avoid difficult questions about how markets operate by relying on quantitative criteria like market power or, worse yet, market share, which is the only thing courts actually measure under the market definition / market share paradigm.

Other areas of law include qualitative criteria to evaluate degrees of market control akin to antitrust market definition. As Mark Lemley and Mark McKenna point out, the scope of intellectual property protection itself reflects a form of market definition.[219] Copyright law effectively defines relevant markets narrowly by assessing competitive effects not between all works but only between a narrower category of similar works, a category defined by the scope of copyright protection itself.[220] As Lemley and McKenna argue, copyright protection implies "fairly narrow markets,"[221] but what matters is not that the markets are narrow but rather that they are defined qualitatively by the substance of copyright

[217] See supra note 37.
[218] See supra notes 35–36 and accompanying text.
[219] See Lemley & McKenna, supra note 168, at 2076.
[220] See id. at 2073.
[221] Id.

protection. The fair use defense in copyright, too, reflects an implicit market definition that, like antitrust, draws on the substitutability of works, but the degree of relevant substitutability is determined not only by consumer demand but by a qualitative understanding of copyright law's scope of protection.[222]

As the analysis above about government-sanctioned barriers to entry demonstrates, the market definition inquiry cannot be meaningfully separated from the consideration of barriers to entry, an area in which qualitative criteria are more widely considered than in market definition or market power. Unlike debates over market definition, which have focused on the potential for market power alone, antitrust scholars openly debate varying approaches to identifying barriers to entry because of the implications for the operation of markets. The Areeda and Hovenkamp treatise adopts Joe Bain's definition of barriers to entry as "any factor that permits firms already in the market to earn returns above the competitive level while deterring outsiders from entering."[223] That approach focuses entirely on the ability to charge prices above those in perfect competition and replicates the Lerner Index's absolutist approach to any ability to engage in above-cost pricing.[224] George Stigler, on the other hand, defined barriers to entry not with respect to the ability to charge above-cost prices but rather with respect to whether a factor of production can be had by new entrants on the same terms as incumbents.[225] The point is not to identify which definition is correct but rather to identify that they reflect different competitive concerns: the Bainian is concerned only with the ability to charge above-cost prices; the Stiglerian seeks to compare incumbent and entrant entry in service of identifying whether new entry can be had on equal terms.

The existence of the debate between Bainian and Stiglerian approaches to barriers to entry has at least two implications for market definition.

First, because a relevant antitrust market is largely dependent on barriers to entry (a market that can be readily entered is unlikely to be

[222] Id. at 2074; see also id. at 2065–66 (describing permissible and impermissible sources of "competitive disadvantage" defined by the permissible scope of trade dress protection); id. at 2103 (discussing a similar approach to market definition for patents based on the scope of patent protection).

[223] Areeda et al., supra note 18, ¶ 420a, at 77.

[224] See generally Evans, supra note 3, at 362 n.140 ("Not surprisingly, Areeda, Hovenkamp, and Solow identify almost any advantage of incumbency as a barrier to entry.").

[225] George J. Stigler, The Organization of Industry 67 (1968); see Evans, supra note 3, at 362 (comparing the Bainian and Stiglerian approaches to barriers to entry).

subject to anticompetitive forces, since competition cannot be effectively limited in such markets[226]), the ideological and policy differences reflected in different approaches to barriers to entry are necessarily mirrored in market definition. If one can have ideological or policy commitments that lead to different approaches to identifying barriers to entry, those ideological or policy commitments necessarily inform one's approach to market definition. That there can be multiple policy-informed approaches to barriers to entry demonstrates that there can and must be multiple policy-informed approaches to market definition.

Second, the distinctions between the Bainian and Stiglerian approaches to barriers to entry only scratch the surface of the possible criteria for evaluating barriers to entry. As I have suggested above, barriers (such as patents or tariffs) put in place through regulatory action have different implications than those that arise from other sources, such as by the anticompetitive acts of an antitrust defendant. That is not to say that such barriers are categorically irrelevant, just that they should not be treated identically—they require more flexibility than is offered by the narrow cost-price approach that currently dominates market definition.

In that increased flexibility lies both promise and peril.

Qualitative market definition offers the promise of freeing antitrust courts from the constraints of the current cost-price approach to market definition. Adherence to the cost-price approach has led courts to three different approaches, none of which are defensible: Judge Hand's rigid refusal to consider the competitive and regulatory context and focus only on the ability to price above cost;[227] Judge Posner's approach in cases like *Marathon*, which purports to follow the market definition / market share paradigm but defines the market by factors other than cost (such as refusing to set the relevant market as the defendants' own brand) without identifying the value judgment inherent in doing so;[228] and Justice Thomas's and Justice Breyer's mutual approach in *American Express* to employ the rubric of "market definition" for purposes different from the market definition / market share paradigm but without acknowledging (or

[226] Areeda et al., supra note 18, ¶ 420a, at 77.

[227] See supra note 208 and accompanying text.

[228] Judge Posner took as a given that brand-specific market power is not a concern for antitrust, see Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 595 (7th Cir. 2008), while Desai and Waller, for instance, hold a contrary view. See Desai & Waller, supra note 185, at 1474 (criticizing *Marathon*).

perhaps even recognizing) they are doing so.[229] Explicit acknowledgement of the premises and value judgments underlying a particular market definition would go a long way toward rationalizing market definition and antitrust law more generally.

The peril lies in the potential for any number of policy justifications to inform market definition, even those having little to do with competition. One advantage of the cost-price approach to market definition is that it limits the relevant criteria for identifying competitive harm. I have outlined why the cost-price approach is overly narrow, but the cost-price approach does exclude any number of even less appropriate criteria for a competition regime. Once the inquiry is opened to qualitative criteria, there needs to be some limit on which qualitative criteria should be included.

In other areas of law, the qualitative criteria informing market definition come from the regime itself. In IP, for instance, the qualitative criteria are specific to the particular IP regime, such as the idea-expression dichotomy in copyright law or the scope of patentability in patent law.[230]

In antitrust, those limits can only come from the concept of "competition," which is a term whose meaning is too open to provide any inherent limiting principles.[231] If not wedded to the economic ideal of static perfect competition, which is at the heart of the Lerner Index and the cost-price approach, it is not clear what grounding principle can constrain various approaches to competition. Recent arguments by would-be antitrust reformers would remake antitrust to protect interests as diverse and divergent as those of workers,[232] anyone who either creates

[229] See supra note 108 and accompanying text.

[230] See supra text accompanying notes 219–20.

[231] Indeed, § 5 of the FTC Act, which outlaws "unfair methods of competition," is simultaneously the basis of not only its authority to enforce antitrust law but also the conceptually distinct consumer fraud law. See Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719–21 (1914) (codified as amended at 15 U.S.C. § 45(a)(1)–(2)).

[232] How that happens is not exactly clear. Some believe that workers can benefit from decreasing the power of firms generally, which would potentially benefit both the consumers who buy their products and the workers who produce them. See Sheelah Kolhatkar, Lina Khan's Battle to Rein in Big Tech, New Yorker (Nov. 29, 2021), https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech [https://perma.cc/3TVL-ZPS4] ("[FTC Chair Lina Khan] will use the full power of the F.T.C. to promote competition, which I think is good for our economy, good for workers, and good for consumers and businesses." (quoting Rep. David Cicilline)). Other proposals would relax antitrust restrictions on workers not currently covered by the labor exemption in order to increase their relative bargaining power against firms, see Marina Lao, Workers in the "Gig" Economy: The Case for Extending

or uses data,[233] and "democratic ideals,"[234] a term whose meaning varies widely.[235] FTC Chair Lina Khan has argued for a "holistic" approach to antitrust, which is practically the definitional opposite to taking a focused one.[236] If not the perfect competition of the Lerner Index, or even its imperfect proxy of market share, we need some other grounding principle to evaluate which qualitative criteria should and should not be used to define relevant markets.

For the last forty-five years, that limiting principle has been the consumer welfare standard, which asks whether consumers are benefitted or harmed by a particular practice.[237] It is not necessary to engage in a full-throated defense of the consumer welfare standard to recognize that it is at the very least a superior approach to identifying harm, and thus to informing market definition, than the cost-price approach embodied in the Lerner Index. All one has to do is engage in a simple thought experiment: If a firm were considering a new practice that would either decrease its cost or increase the value of its product, such that it could charge some margin above its cost without losing sales to competitors, should it be

the Antitrust Labor Exemption, 51 U.C. Davis L. Rev. 1543 (2018), a proposal in tension with the idea of enhancing competition generally.

[233] E.g., Nathan Newman, Search, Antitrust, and the Economics of the Control of User Data, 31 Yale J. on Reg. 401 (2014); Frank Pasquale, Privacy, Antitrust, and Power, 20 Geo. Mason L. Rev. 1009 (2013).

[234] Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets 392 (2020) ("[T]he Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.").

[235] Compare id. at 17 (positing that the market power of online platforms can lead to dissemination of untrustworthy news, harming democracy), with Republican Staff of H. Comm. on the Judiciary, 116th Cong., Reining in Big Tech's Censorship of Conservatives 1, 3 (2020) (viewing Big Tech companies' "censorship" of conservatives and infringement on free speech as a threat to democracy).

[236] Memorandum from Chair Lina M. Khan to Comm'n Staff and Comm'rs 1 (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf [https://perma.cc/9XS8-49M3].

[237] See NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021) ("Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare."); Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56 (1977); see also Thomas B. Nachbar, Heroes and Villains of Antitrust, Antitrust Source, June 2019, at 1, 5–7 (reviewing Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018) (tracing the application and meaning of the consumer welfare standard in antitrust)), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2018-2019/atsource-june2019/jun19_full_source.pdf [https://perma.cc/EEW8-CAA3].

condemned as an antitrust violation because it allows the firm to engage in above-cost pricing?[238] In such a case, the firm would be better off, but so would consumers; the change in the firm's profitability would be irrelevant to any inquiry into either the state or product of competition in that market. Indeed, one could argue that, with their emphasis on output,[239] courts are already using the consumer welfare standard to inform market definition and market power inquiries. My proposal is simply to make explicit what courts have been doing implicitly all along.

CONCLUSION

In the article in which Donald Turner established the *Cellophane* fallacy, he explicitly acknowledged the distance between economic and legal understandings of market power.[240] Although his criticism of the Court's market definition in *Cellophane* is frequently described as identifying an error in economic reasoning, Turner offered it as a criticism of the legal standard embodied in the Court's market definition.[241] From its beginning, criticisms of antitrust market definition have been inherently connected to the content of the antitrust laws, apart from economic reasoning.

Although it is common sport to decry courts' inability to conduct rational market definition, from *Cellophane* itself to Louis Kaplow's criticism of the market definition / market share paradigm, the value of market definition goes beyond its use to determine, as an economic matter, whether defendants possess market power in some abstract sense. Instead, market definition is better thought of as a framing device for identifying what is, and is not, anticompetitive conduct. Subject to ready delegation to economic witnesses through its mathematical quality, market definition has become subsumed by the market definition / market share paradigm and, in the course of doing so, has become a crutch.

[238] It is easy to imagine any number of restraints, such as a warranty (which is a practice that forecloses competition from competing service providers, see Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 490–91 (1992)), that provides a reliable stream of service work, allowing the manufacturer to provide service at a lower cost than rivals could.

[239] See supra text accompanying notes 117–28.

[240] Turner, supra note 6, at 281 ("Writing in 1937 on 'Monopoly in Law and Economics,' a leading economist noted a substantial difference between the two disciplines. He concluded that economics identified monopoly with undue market power, regardless of how it was obtained or used. Law, on the other hand, seemed more centrally concerned with abusive acquisition or coercive use of power—with bad conduct—than with the power itself.").

[241] Id. at 308–11.

Critics are right to point out the failings of the market definition / market share paradigm, but that does not mean that market definition itself is unnecessary.

Instead, market definition is an essential part of identifying what is and is not anticompetitive about a particular transaction or course of conduct. It is an inherently qualitative (and potentially a normative) inquiry, separating the legal objects of market power (such as intellectual property or other brand investments) from the illegal ones (such as using market dominance to restrict consumer choice). In *Cellophane*, the district court's determination that du Pont had not engaged in anticompetitive conduct in building its cellophane business meant that the Court's market definition in that case was actually correct as a matter of antitrust law, even though the Court's economic suppositions about market power might have been flawed.

Market definition requires consideration of concepts as abstract and politically divisive as what constitutes legitimate forms of competition.[242] Those concepts are contingent on political and social commitments, and market definition needs to reflect those commitments. Proposals like the Competition and Antitrust Law Enforcement Reform Act and the FTC Policy Statement on Section 5 are precisely backward; they would redefine norms of antitrust by preventing inquiry into markets when they instead should be calling for a more informed approach to defining markets. The DOJ/FTC Request for Information on the Horizontal Merger Guidelines similarly suggests market definition can be obviated in some merger cases but does so while simultaneously suggesting the possibility of including qualitative criteria in market definition.[243] All of the attention that market definition is receiving from scholars, judges, and policy-makers should be seen for what it is: part of a larger reconsideration of the purpose and scope of U.S. antitrust law. That is a worthy conversation, but it should not be had by pretending that market effects can be identified without defining the markets that antitrust is designed to protect.

[242] See Sullivan, supra note 34, at 1147 ("[M]arket definition should be expected and allowed to continue to evolve with changes to the substantive law.").

[243] DOJ/FTC Request for Information, supra note 14, at 5.