Competing Approaches to Antitrust: An Application in the Payment Card Industry

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Introduction

The contrasting approaches to antitrust enforcement across the Atlantic are stark. The European Union uses an abuse-of-dominance standard, which is less tolerant towards exclusionary conduct than the consumer-welfare standard used by US courts.[1] The EU system is decentralized and independent, designed that way to get buy-in from member countries. The Directorate-General for Competition ("DG Comp") makes an initial decision on whether conduct violates its standard, and the burden of proof is on defendants to appeal that decision.[2] In contrast, US plaintiffs, whether private or governmental, bear the burden of showing antitrust injury in Sherman Act section 2 cases, as well as substantial burdens when a rule-of-reason framework is applied to Sherman Act section 1 cases.[3] Against this backdrop, this Article explores how these differences in antitrust standards lead to different outcomes in the payment card industry. Under an honor-all-cards ("HAC") regime, a merchant wishing to access any Visa or Mastercard credit card must accept all Visa or Mastercard cards in that category.[4]

The theory of harm in these cases is that the issuing banks no longer must compete on price to obtain market share, leading to higher merchant fees. HAC theoretically dampens the merchant's elasticity of demand with respect to an increase in interchange fees, by removing substitution possibilities to lower-cost credit cards. The European Union settled with

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1 *See* THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 131 (2019).

2 *Id.* at 133.

3 *See infra* Part I.B.1.

4 *See infra* Part III.

MasterCard in 2007–08, and with Visa in 2014.[5] Although the HAC rules were cited as supporting a larger horizontal conspiracy across acquiring banks in the European Commission ("EC") decision, the HAC rules remain, but interchange fees are regulated.[6] Thus, merchants have achieved relief from high fees despite the lack of empirical proof that HAC policy inflates merchant fees. In contrast, litigation in the United States is ongoing, with plaintiffs bearing the burden of establishing a causal connection between the restraint and merchant fees.[7] Merchant fees in the European Union are approximately eighty-five percent lower than the prevailing rates in the United States.[8]

Because merchants pass through a percentage of those fees to retail customers, higher merchant fees depress output in the goods market, which is economically inefficient. The lax enforcement policy in the United States thus promotes a regressive outcome—namely, to induce a merchant to raise prices on less wealthy consumers (cash payers), so that issuing banks can give small rewards to its wealthier consumers.

The Article is organized as follows: Part I explains the starkly different and increasingly divergent approaches to antitrust enforcement in the United States and the European Union. The differences that have evolved over time in the extent of their independence and centralization apparently drive the divergences in these two competition law enforcement regimes, resulting in differences in the degree of each system's susceptibility to business and political influence. Part II shows how these differences in standards appear to have resulted in significant differences in enforcement. In the European Union, the overall trends in competition law enforcement have been stable. In the United States, however, enforcement has declined in important respects. Part III explores how the differences in antitrust standards lead to different outcomes in the payment card industry. Part IV asks whether the United States is any better off under its more permissive antitrust standard. Rather than abandon the consumer-welfare standard, this Article offers more modest reforms.

5 *See* Stephen Critchley, *Credit Card MIFs Explained*, LEXOLOGY (Nov. 3, 2014), https://perma.cc/R4TY-M2DC.

6 *See* EUROCOMMERCE, INTERCHANGE FEE REGULATION 4 (2016), https://perma.cc/Z2RB-9QR4; European Commission Press Release IP/07/1959, Antitrust: Commission Prohibits MasterCard's Intra-EEA Multilateral Interchange Fees (Dec. 19, 2007), https://perma.cc/NJQ5-REZ7.

7 *See, e.g.*, United States v. Am. Express Co. (*American Express*), 838 F.3d 179, 194 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

8 *See infra* Part III.B.

I. Institutional Differences in Antitrust Standards Across the Atlantic

Over time, the United States and European Union have adopted starkly different and increasingly divergent approaches to antitrust enforcement. The European Union favors an abuse-of-dominance standard, while US courts apply the consumer-welfare standard. In principle, both standards are geared toward maximizing the economic benefits that a free-market system confers on society as a whole. But as currently implemented, the consumer-welfare standard effectively presumes that nearly all exclusionary conduct is procompetitive absent overwhelming evidence to the contrary and tolerates a substantially wider range of exclusionary conduct than does the European abuse-of dominance standard. The US consumer-welfare standard has also evolved to be significantly more tolerant of potentially anticompetitive mergers and acquisitions, and even of potentially collusive conduct among ostensibly competing firms. The differences that have evolved over time in the extent of their independence and centralization apparently drive the divergences in these two competition law enforcement regimes, resulting in differences in the degree of each system's susceptibility to business and political influence.

A. *The European Union's Abuse-of-Dominance Standard*

Despite many similarities between the EU and US antitrust regimes, with the former having evolved from the latter in important respects, there are important differences as well. The European Union is relatively decentralized. Within the European Union, member states have national competition authorities ("NCAs"), and only cases exceeding certain thresholds related to the volume of commerce at stake are subject to review by the EC.[9] The EU structure is also relatively independent, taking decades for EU member states to agree to cede their ability to shape competition policy to a pan–European body.[10] A key factor in member states' acquiescence involved developing a structure designed to ensure that the overarching regulator would be independent and not subject to

[9] *See* Practical Law Competition, *Co-Operation Between the European Commission and National Competition Authorities*, THOMSON REUTERS 2–18 (2020), https://perma.cc/EW2K-HFL2 (noting the scenarios where the European Competition Network ("ECN") advises on what parties should investigate and hold decision-making power).

[10] *See* PHILIPPON, *supra* note 1, at 132.

any individual member state's control.[11] Because they are sovereign nations, EU member states exercise broader authority in many policy arenas than do US states, relative to their respective federal authorities.[12] Perhaps somewhat paradoxically, this tends to place greater emphasis on the relatively narrow set of issues in which decision-making authority rises to the EU level, including competition policy governing economic sectors so pervasive that they are guaranteed to exceed the relevant thresholds.

1. Burden of Proof on Defendants

In the European Union, the enforcement of competition law is a joint effort between the NCAs, the European Commissioner for Competition, and the DG Comp.[13] The DG Comp's transparency and accountability has evolved in important ways in recent decades. In the mid-2000s, the European Commission on Merger Regulation ("ECMR") adopted important amendments that advanced these goals for the DG Comp.[14] Around the same time, EU policymaking began to more prominently feature economics with the creation of the Chief Competition Economist position, along with guidelines clarifying the role of unilateral effects in economic analysis.[15] Contrasted with the US system, where antitrust cases are first tried in court, the DG Comp makes the initial decision on whether a given form of conduct violates its standard, placing the burden of proof on defendants to appeal that decision.[16]

2. Independence & Smaller Returns to Lobbying

The EU's current competition law regime is the outcome of decades' worth of bargaining among member states to arrive at a workable supranational institution. Theoretically, a fully independent regulatory body would act as a benevolent social planner, structuring policy in such a way as to maximize the aggregate economic benefits however measured.[17] In practice, no regulator or competition authority can ever be

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11 *Id.*

12 *Id.* at 134.

13 *Id.* at 133.

14 *See id.*

15 *See id.*

16 PHILIPPON, *supra* note 1, at 133.

17 *See, e.g.*, N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 144–45 (1998).

fully immune from business and political influence, or "regulatory capture."[18] However, the degree of independence can increase when political representatives from one member state are obliged to negotiate a new, supranational regime with representatives from other member states. Under this scenario, each member state's political apparatus must weigh the expected benefits of regulatory capture for their own nation against the expected costs of regulatory capture by other member states, whose representatives are captured by a different set of parties representing a different set of local interests.[19] This creates economic and political incentives for all sovereign nations involved in the negotiation to insist on more safeguards than they would otherwise, to guarantee the independence and objectivity of the supranational competition authority that will ultimately govern them. As a result, EU member states ultimately agreed to vest the DG Comp with substantially more authority and independence for competition law enforcement than individual member states had previously granted to their own regulators at the national level.[20] Evidence suggests that the DG Comp is, in fact, more independent than the national authorities that preceded it.[21] The evidence also suggests that, as a result, the returns to and expenditures on political lobbying have become substantially greater in the United States relative to the European Union.[22]

B. *The Consumer-Welfare Standard in the United States*

In the United States, there are two primary federal competition authorities: the Federal Trade Commission ("FTC") and Department of Justice ("DOJ").[23] Additionally, private litigants may pursue antitrust claims.[24] Private antitrust litigation plays an important role in the United States, because it is the only mechanism allowing for market participants

18 *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971); *see also* Christopher Carrigan & Cary Coglianese, *Capturing Regulatory Reality: Stigler's* The Theory of Economic Regulation 1–9 (July 4, 2016) (unpublished manuscript) (University of Pennsylvania Carey Law School Legal Scholarship Repository), https://perma.cc/UGV9-DDAH.

19 *See* Germán Gutiérrez & Thomas Philippon, *How EU Markets Became More Competitive Than US Markets: A Study of Institutional Drift* 5–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24700, 2019).

20 *Id.* at 6.

21 PHILIPPON, *supra* note 1, at 145.

22 *Infra* Part I.B.2.

23 *See The Enforcers*, FED. TRADE COMM'N, https://perma.cc/W9RG-DSGU.

24 *See* R. Preston McAfee, Hugo M. Mialon & Sue H. Mialon, *Private Antitrust Litigation: Procompetitive or Anticompetitive?*, U.S. DEP'T OF JUST. (Dec. 1, 2005), https://perma.cc/XHH4-A2X5.

harmed by antitrust violations to seek damages.[25] US plaintiffs, whether private or governmental, bear the burden of showing antitrust injury in section 2 Sherman Act cases.[26] Even in section 1 cases, where liability is generally more clear cut, plaintiffs bear the burden of showing damages, often playing a critical role in both ensuring that injured parties are reasonably compensated for the economic losses sustained by the conduct at issue and disincentivizing the defendants from engaging in similar conduct in the future.[27] The burden on plaintiffs is further augmented when section 1 cases are subjected to a rule-of-reason standard.[28]

1. Burden of Proof on Plaintiffs

Contrasted with EU plaintiffs, US plaintiffs—whether private or governmental—bear the burden of showing antitrust injury and damages, even when the alleged conduct involves per se violations of the antitrust laws.[29] *In re High-Tech Employee Antitrust Litigation* (*High-Tech Employee*)[30] is illuminating. In that matter, the DOJ performed the foundational investigations documenting that top executives at many of the most prominent companies in Silicon Valley had entered into so-called "No Poach" agreements, in which they explicitly agreed not to compete for the services of a range of technical and creative employees.[31] Although the DOJ concluded that the "No Poach" agreements were clearly per se violations of US antitrust law, and negotiated settlements to which the defendants agreed to halt these practices,[32] the settlements did not include any provisions to compensate the Defendants' employees, whose compensation was allegedly depressed by the conduct at issue.[33] It was left

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25 *See id.*

26 Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 846 (2000).

27 *See* United States v. Am. Express Co. (*American Express*), 838 F.3d 179, 193–94 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

28 *See infra* Part I.B.1.

29 *See* Anne E. Hartnett, *Keep Calm and Causation On: Reframing Causation Analysis in Private Section 1 Antitrust Actions at Summary Judgment*, 102 IOWA L. REV. 2291, 2306 (2017).

30 985 F. Supp. 2d 1167 (N.D. Cal. 2013).

31 *See* Competitive Impact Statement at 2–3, United States v. Adobe Sys., Inc., No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010).

32 *See* Press Release, Dep't of Just., Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://perma.cc/L36J-WHZH.

33 *See* United States v. Adobe Sys., Inc., No. 1:10-cv-01629, 2011 WL 10883994, at *2–5 (D.D.C. Mar. 18, 2011).

to private plaintiffs to prove in court that a well-defined class of creative and technical employees had suffered substantial and widespread economic injury as a result of the "No Poach" agreements, and that this class was sufficiently cohesive to permit treatment under the US class action litigation regime instead of impractically requiring that each individual employee bring suit on her own.[34] The private litigants ultimately prevailed in certifying the class, securing settlements of $415 million on class members' behalf before the case proceeded to the merits phase.[35] Nevertheless, the costs and risks facing plaintiffs in this case, as in most large antitrust cases, were daunting.

High-Tech Employee involved alleged per se violations of section 1 of the Sherman Act.[36] The burden of proof on plaintiffs can be substantially higher in rule-of-reason cases under section 1, with a correspondingly lower success rate.[37] Well aware of this, US defendants have consistently argued that the rule-of-reason standard should be applied to a range of ongoing "No Poach" cases, which have challenged agreements not to compete for labor among a range of branded franchisees, including McDonald's, Carl's Jr., Auntie Anne's, Arby's, Cinnabon, and others.[38] Significantly, the DOJ itself has intervened to advocate broader application of the rule-of-reason framework to these cases, potentially resulting in additional substantial hurdles for plaintiffs to clear.[39]

When one moves beyond per se violations of the antitrust laws—alleged violations of section 2 of the Sherman Act or mergers allegedly violating the Clayton Act—the burden on plaintiffs is correspondingly

34 *See* Kevin Caves & Hal Singer, *Analyzing* High-Tech Employee*: The Dos and Don'ts of Proving (and Disproving) Classwide Antitrust Impact in Wage Suppression Cases*, ANTITRUST SOURCE, Feb. 2015, at 1, 7–8.

35 Dan Levine, *U.S. Judge Approves $415 Mln Settlement in Tech Worker Lawsuit*, REUTERS (Sept. 3, 2015, 1:35 AM), https://perma.cc/ZKA5-P3RM.

36 At the time of the class's certification, there was a chance that the plaintiffs would avoid having to prove injury and damage under a "rule-of-reason" standard at the merits phase, which would have shifted the burden in the defendants' favor. *See In re* High-Tech Employee Antitrust Litig. (*High-Tech Employee*), 985 F. Supp. 2d 1167, 1179 (N.D. Cal. 2013). The decision of whether to apply a "rule-of-reason" standard had been deferred to the merits phase, which was never reached in this case.

37 *See* United States v. Am. Express Co. (*American Express*), 838 F.3d 179, 193–94 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018); Michael A. Carrier, *The Four-Step Rule of Reason*, ANTITRUST, Spring 2019, at 50, 50.

38 *See* Bryan Koenig, *Can No-Poach Class Actions Beat the Rule of Reason?*, LAW360 (Jan. 30, 2019, 9:15 PM), https://perma.cc/JEF4-N4LJ.

39 Boris Bershteyn, Karen Hoffman Lent, Tara L. Reinhart & Zachary C. Siegler, *No-Poach Update: DOJ Seeks to Rein In Franchise Suits*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Feb. 11, 2019), https://perma.cc/R833-6MP3.

greater.[40] The lack of any abuse-of-dominance standard in the United States means that a monopoly can generally exploit its market power to the fullest, so long as the exploitation is not assisted via a demonstrably anticompetitive restraint. Monopoly leveraging theories—involving the exploitation of monopoly power in one market to extend dominance into some related market—have generally fallen out of favor, particularly as some courts have embraced the economically dubious "one monopoly profit" theory.[41] In cases involving refusals to deal or exclusive-dealing arrangements, surrogate tests may sometimes be used, often simplifying plaintiffs' burden by focusing the economic analysis on relatively straightforward criteria, such as whether the share of customers or inputs foreclosed was economically significant.[42] Otherwise, plaintiffs alleging that monopoly power has been abused to workers' or consumers' detriment generally bear the burden of providing rigorous economic evidence demonstrating that the defendants' allegedly anticompetitive conduct generated substantial anticompetitive effects.[43] For example, plaintiffs may be required to demonstrate inflated prices, suppressed output, suppressed compensation, or suppressed hiring. Even if they succeed in demonstrating these anticompetitive effects directly, plaintiffs may—somewhat counterintuitively—also be required to provide indirect proof of market power by demonstrating that the anticompetitive effects at issue were sustained within a well-defined, relevant antitrust market, and that the defendant possessed a dominant share of the relevant market.[44]

2. Susceptibility to Lobbying

Over time, the evidence suggests that US competition authorities have exhibited less independence from regulatory capture compared to

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40 *See id.* at 2 ("The DOJ emphasized that no-poach agreements between franchisees and a franchisor within the same franchise system should be evaluated under the rule of reason."); *see also* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV 81, 101–02 (2018) ("The requirements for a rule of reason case—market power and anticompetitive effects—can be very difficult to prove.").

41 *See, e.g.*, Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 403–10 (2009); *see also* Schor v. Abbott Lab'y, 457 F.3d 608, 611–12 (7th Cir. 2006); *In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1326–27 (Fed. Cir. 2000).

42 *See, e.g.*, KEVIN CAVES & HAL SINGER, COMPETITION POL'Y INT'L, ON THE UTILITY OF SURROGATES FOR RULE OF REASON CASES 6 (2015), https://perma.cc/YR4C-DBZR.

43 *See* Hovenkamp, *supra* note 40, at 89–90.

44 *See* Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95–99 (2d Cir. 1998).

their EU counterparts.[45] By definition, an independent regulatory authority is less vulnerable to lobbying and political influence than a less independent authority because the expected returns of such efforts will tend to be relatively low.[46] Put differently, the more independent the regulator is, the more difficult it is to sway a given policy decision away from what an objective economic analysis would otherwise yield. Thus, the expenditure of resources to influence the policymaking process is, on average, not expected to cause the ultimate policy outcome to deviate by that much relative to what would have been obtained without such expenditures. Conversely, the less independent the regulator is, the higher the likelihood is that a lobbying campaign will cause policymakers to deviate from the economic optimum, which increases the expected economic returns to lobbying.[47]

Economists have shown that corporations in the United States invest significantly more in lobbying and campaign contributions than their European counterparts.[48] In both jurisdictions, larger firms tend to invest more in lobbying than do smaller firms.[49] However, lobbying expenditures by large corporations in the United States are significantly greater compared to expenditures by large corporations in the European Union.[50] The same pattern holds for smaller- or medium-sized firms.[51] Significantly, these disproportionately large investments in the US political process appear to be predicated on rational expectations.[52] Empirical evidence indicates that lobbying efforts are substantially more likely to pay off for companies that invest heavily in such efforts in the United States than in the European Union.[53] A study spanning over 150 lobbyists and nearly fifty issues concluded that eighty-nine percent of corporate lobbying efforts were successful in the United States, as compared to a sixty-one percent success rate in Europe.[54] Economists have also found that a doubling of lobbying expenditures in the United States

45 *See* PHILIPPON, *supra* note 1, at 172–73.

46 *See* Gutiérrez & Philippon, *supra* note 19, at 5–23.

47 *See id.*

48 *See* PHILIPPON, *supra* note 1, at 166–70.

49 *See id.* at 169.

50 *See id.* at 169–70.

51 *See id.* at 169; *see also* Konstantinos Dellis & David Sondermann, *Lobbying in Europe: New-Firm Level Evidence* 11–20 (Eur. Cent. Bank, Working Paper Series, Paper No. 2071, 2017), https://perma.cc/9Y35-EM4D; Gutiérrez & Philippon, *supra* note 19, at 34.

52 *See* PHILIPPON, *supra* note 1, at 170–74.

53 *Id.* at 173.

54 *Id.*

to the FTC and DOJ reduces the number of cases by approximately nine percent.[55] This statistic may even underestimate the true returns of lobbying in the United States because a case does not have to be dropped altogether for its outcome to be heavily tilted—or watered down—in favor of the lobbying entity.[56] In any case, lobbying efforts targeting the DOJ and FTC nearly tripled between 1998 and 2008, suggesting that the expected returns to lobbying investments were also rising.[57] This evidence is consistent with the notion that US antitrust authorities are less independent and thus more vulnerable to lobbying and political influence than their European counterparts.

II. Different Standards Lead to Differences in Enforcement and to Potential Differences in Economic Outcomes

The differences in standards documented in prior sections appear to have resulted in significant differences in enforcement. In the European Union, the overall trends in competition law enforcement have been stable.[58] In the United States, however, enforcement has declined in important respects.[59] The differences in standards and enforcement postures could also be contributing to differences in the larger economy, specifically in metrics like the labor share of national income, firms' markups of prices over costs, and industry concentration.

A. *Differences in Enforcement*

Evidence suggests that US antitrust authorities' enforcement has been persistently trending downward for some time. An important turning point was *United States v. Microsoft Corp.*,[60] in which the DC Circuit on appeal effectively quashed the DOJ's proposed structural remedy for finding an abuse of market power to consumers' and platform

55 *Id.*

56 Some mergers were allowed to go through with a few toothless behavioral remedies. For example, the Comcast–NBCU merger was approved despite the merger's combining a dominant cable distributor with must-have input (local NBC affiliates). The behavioral remedies designed to protect rival programmers were feckless and, in any event, were sunset after seven years. *See, e.g.*, Letter from John Bergmayer, Senior Couns., Public Knowledge to Hon. Makan Belrahim, Assistant Att'y Gen., Antitrust Div., Dep't of Just. (Dec. 22, 2017), https://perma.cc/ZG39-AY6W.

57 PHILIPPON, *supra* note 1, at 173.

58 *Id.* at 146.

59 *See id.*

60 253 F.3d 34 (D. C. Cir. 2001) (per curiam).

competition's detriment—breaking up the tech behemoth to divorce the Windows operating system from other Microsoft lines of business.[61] The DOJ and Microsoft subsequently entered into a settlement that left Microsoft intact.[62] In the wake of *Microsoft*, US antitrust authorities' section 2 enforcement has become a rarity. Specifically, the US authorities have brought only ten such cases since 1990 and just one since 2000.[63] In the United States, plaintiffs have lost ninety-seven percent of all rule-of-reason cases brought under section 2, largely due to plaintiffs' failure to demonstrate price or output effects.[64]

With respect to merger enforcement in the United States, the pace of merger activity has proceeded rapidly in recent decades, and it is recognized as an important factor explaining increased concentration in the US economy overall.[65] Professor John Kwoka has conducted a meta-analysis covering more than 3,000 mergers and documented a systematic reduction in merger enforcement by the FTC between 1996 and 2011.[66] The data show a clear shift in enforcement exclusively towards mergers resulting in the highest levels of industry concentration and away from mergers that would result in moderately- to highly-concentrated industries.[67] Additional evidence of increasingly permissive US merger review standards includes studies documenting US antitrust authorities' tendency to approve mergers resulting in higher prices without generating sufficient cost-side efficiencies to blunt, let alone reverse, the upward pricing pressure that the acquisitions generated.[68] For example, in

61 *See, e.g.*, Richard J. Gilbert & Michael L. Katz, *An Economist's Guide to* U.S. v. Microsoft, 15 J. ECON. PERSP. 25, 40–42 (2001); *see also* James V. Grimaldi, *Microsoft Breakup Order Reversed*, WASH. POST, July 1, 2001, at A3A.

62 Press Release, Dep't of Just., Department of Justice and Microsoft Corporation Reach Effective Settlement on Antitrust Lawsuit (Nov. 2, 2001), https://perma.cc/S97H-T4HR.

63 PHILIPPON, *supra* note 1, at 146.

64 *See* Carrier, *supra* note 37, at 51 ("I updated my 1999 study in 2009, finding that the burden-shifting trend that resulted in the quick disposal of cases continued and, in fact, accelerated. Between 1999 and 2009, courts dismissed 97 percent of cases at the first stage, reaching the balancing stage in only 2 percent of cases.").

65 *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 9 (2015); Bruce A. Blonigen & Justin R. Pierce, *Mergers May Be Profitable, But Are They Good for the Economy?*, HARV. BUS. REV. (Nov. 15, 2016), https://perma.cc/U4ZH-E553.

66 *See* KWOKA, *supra* note 65, at 24–26, 143–45.

67 *Id.* at 33; *see also* John Kwoka, Mergers, Merger Control, and Remedies: A Response to the FTC Critique 13 (Mar. 31, 2017) (unpublished manuscript), https://perma.cc/L4YB-JW5N.

68 *See, e.g.*, Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 J. L. & ECON. 417, 418 (2010); *see also* Graeme Hunter, Gregory K. Leonard & G. Steven Olley, *Merger Retrospective Studies: A Review*, ANTITRUST, Fall 2008, at 34, 34 ("[T]he majority of studies that analyze price effects have found post-merger price increases.").

a study on five major consumer products mergers that US authorities allowed to proceed, Professor Orley Ashenfelter and Deputy Assistant Director of the Federal Trade Commission Daniel Hosken found that prices increased in four cases and did not decrease in any case.[69] Their conclusions were not sensitive to the way in which consumer prices were measured, the control group of products against which the price increases were measured, or to the duration of the timeframe following the consummation of the transaction during which price changes occurred.[70] In another study, economists Bruce Blonigen and Justin Pierce studied the effects of mergers and acquisitions by using detailed plant-level data drawn from a range of US manufacturing industries.[71] The study showed that merger activity is associated with increases in markups of price over cost—higher profit.[72] Their analysis provides scant evidence that merger activity in these industries resulted in increased efficiencies, whether through increased plant-level productivity, shifts in production to more efficient plants, or cost savings from increased administrative efficiency.[73]

In contrast, there has been no corresponding decline in antitrust enforcement in Europe. The DG Comp's abuse-of-dominance enforcement remained stable—or even increased—for decades.[74] With respect to merger enforcement, European authorities investigated an average of 264 antitrust cases and 284 merger cases per year between 2000 and 2004.[75] During this timeframe, the European Union blocked a $42 billion merger between General Electric and Honeywell, despite US antitrust authorities' decision to approve it.[76] More recently, the DG Comp levied a €1.49 billion fine against Google for abuse of dominance in online advertising, again despite US enforcers' decision against pursuing the case years earlier.[77]

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69 Ashenfelter & Hosken, *supra* note 68, at 418.

70 *See id.* at 418–19.

71 Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22750, 2016).

72 *See id.* at 24.

73 *Id.*

74 PHILIPPON, *supra* note 1, at 146; *see also* Martin Carree, Andrea Günster & Maarten Pieter Schinkel, *European Antitrust Policy 1957–2004: An Analysis of Commission Decisions*, 36 REV. INDUS. ORG. 97, 104 (2010).

75 Carree et al., *supra* note 74, at 100.

76 *See id.*; *see also Lessons from the GE-Honeywell Non-Merger*, KNOWLEDGE@WHARTON (July 4, 2001), https://perma.cc/KL9Q-F6TB.

77 European Commission Press Release IP/19/1770, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019), https://perma.cc/6WZA-YU9G.

More broadly, a comprehensive analysis of European antitrust law enforcement since the mid-twentieth century reveals no evidence of a slackening of enforcement like that seen in the United States.[78] The overall trend in EC decisions between 1964 and 2004[79] shows that "from the early 1970s onwards, the number of [violations] found increased relative to exemptions and negative clearances."[80] The study's authors observe that the most recent enforcement period in their data set—1991 to 2004—included enforcement innovations aimed specifically at combatting cartels.[81]

B. *Potential Differences in Market Outcomes*

The differences in standards and enforcement documented above may be contributing to significant differences in broad economic trends in the United States and the European Union. After decades of stability, the share of national income paid to labor has exhibited a significant decline in the United States, declining by approximately five percentage points since the turn of the millennium.[82] The US nonfarm labor share index declined steadily beginning around 2000, and then experienced additional steep declines during the Great Recession of the late 2000s from which it has still not begun to recover.[83] Remarkably, this occurred despite the sustained macroeconomic expansion and record-low unemployment rates that characterized the recovery following the Great Recession.

In contrast, although the global financial crisis also hit European economies hard, labor's share of income in Europe has remained remarkably stable. An apples-to-apples comparison for the years 1995–2015 shows that the Euro Area labor share held steady at approximately sixty-six percent over this interval, while the US labor share fell from approximately sixty-five percent to less than sixty percent.[84]

78 *See* PHILIPPON, *supra* note 1, at 146.

79 *Infra* Part II.B.

80 Carree et al., *supra* note 74, at 106.

81 *Id.*

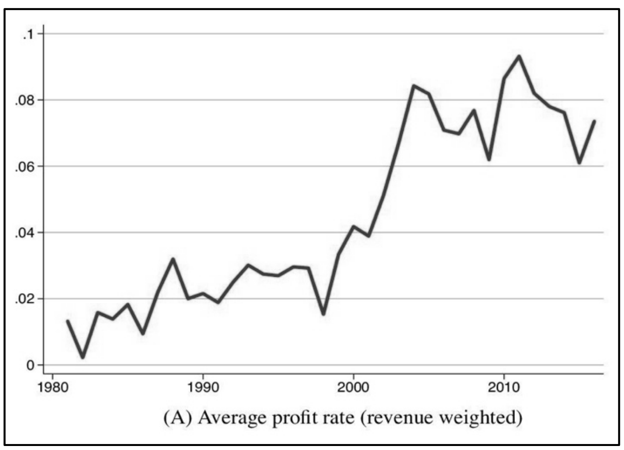
82 *See* Michael W. L. Elsby, Bart Hobijn & Ayşegül Şahin, *The Decline of the U.S. Labor Share*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2013, at 1, 1–2; Loukas Karabarbounis & Brent Neiman, *The Global Decline of the Labor Share*, 129 Q.J. ECON. 61, 72 (2014).

83 U.S. Bureau of Labor Stat., *Nonfarm Business Sector: Labor Shar*e, FED. RSV. BANK OF ST. LOUIS (June 4, 2020), https://perma.cc/HYZ3-GV5Q.

84 Gutiérrez & Philippon, *supra* note 19, at 50 fig.22.

A significant increase in both profit margins and industry concentration has accompanied the sustained decline in the US labor share. Numerous economic studies have documented these trends. In 2016, the US Council of Economic Advisors reviewed "three sets of trends that are broadly suggestive of a decline in competition."[85] These included "increasing industry concentration, increasing [profits] accruing to a few firms, and lower levels of firm entry and labor market mobility."[86] A forthcoming study documents a "large increase in the share of pure profits"[87]—the share of national income neither paid to labor nor accounted for by capital costs—and concludes that "increases in concentration are associated with declines in the labor share."[88] A recently published economic study reviews data showing long-term trends in the evolution of market power in the US economy, documenting substantial increases in both markups of price over cost and firm profitability over time.[89] As shown in Figure 1 below, for example, average profit rates among US firms have risen remarkably steeply since the turn of the millennium, by a factor of three to four:

FIGURE 1: US PROFIT RATE (1980–2015)[90]



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85 COUNCIL OF ECON. ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4 (2016), https://perma.cc/VKU5-6JXQ.

86 *Id.*

87 Simcha Barkai, *Declining Labor and Capital Shares*, J. FIN. (forthcoming 2020) (manuscript at 1).

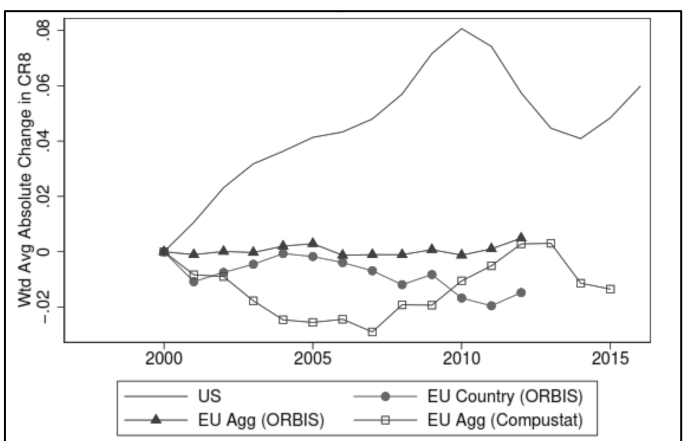
88 *Id.*

89 *See* Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 594 (2020).

90 *Id.* at 595 fig.viii.

In contrast, Europe has not seen comparable macroeconomic developments. As recently as the 1990s, US profit margins were significantly below those in Europe, but the situation has reversed itself.[91] From 2000 to 2015, profitability in Europe remained steady or declined, while profitability in the United States shot upwards.[92] Similarly, industry concentration rose steadily in US markets over this timeframe while remaining stable in Europe, as measured by the change in the eight-firm concentration ratio—the share of the market accounted for by the eight largest firms.[93] Other data show relatively mild concentration increases in Europe, compared to greater increases in the United States. A 2019 study calculating concentration after taking into account cross-ownership structures across conglomerates found that the eight-firm concentration ratio within two-digit industries in Europe increased by approximately three to four percentage points—from 21.5% to 25.1%—between 2000 and 2015.[94] In North America, concentration started higher and increased by approximately eight percentage points—from 30.3% to 38.4%—over the same time period.[95] Figure 2 compares the weighted-average absolute change in concentration ratios for the top eight firms in an industry between the European Union and United States:

FIGURE 2: CHANGE IN EIGHT-FIRM CONCENTRATION RATIOS (2000–2015)[96]



91 PHILIPPON, *supra* note 1, at 103–04, 104 fig.6.2.

92 Gutiérrez & Philippon, *supra* note 19, at 3 fig.1.

93 *Id.*

94 *See* PHILIPPON, *supra* note 1, at 105–06.

95 *Id.* at 106.

96 Gutiérrez & Philippon, *supra* note 19, at 3 fig.1.

III. Application to the Payment Card Industry

This Part explores how the aforementioned differences in antitrust standards lead to different outcomes in the payment card industry. Visa's and Mastercard's Honor-All-Cards ("HAC") policy has been challenged by both US and EU antitrust enforcers.[97] In Europe, however, the HAC was a small component of a larger investigation aimed at an alleged horizontal conspiracy across acquiring banks.[98] Under an HAC policy, a merchant wishing to access any Visa or Mastercard credit card must accept all Visa or Mastercard cards in that category.[99] The European Union settled with Mastercard in 2007 and with Visa in 2014; the HAC rules remain, but at a regulated rate.[100] Thus, merchants have achieved relief from high interchange fees (merchant fees) despite the lack of empirical proof that HAC policy inflates merchant fees. In contrast, antitrust litigation in the United States is ongoing, with plaintiffs bearing the burden of establishing a causal connection between the restraint and merchant fees.[101] The differences in standards have resulted in widely different outcomes. Because merchants pass through a percentage of those fees to retail customers, higher merchant fees depress output in the goods market, which is economically inefficient. The lax enforcement policy in the United States thus promotes a regressive outcome—inducing a merchant to raise prices on less wealthy consumers so that issuing banks can give small rewards to its wealthier consumers.

A. *The Economic Theory of Harm*

The merchant fee is the cost of accepting card payment from the merchant's perspective, and it is typically denominated in terms of a percentage of the transaction's value.[102] A hypothetical one percent

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97 *See The 40-Year War: Credit Cards and Antitrust Law*, AMERICAN BANKER, https://perma.cc/4EGC-SBVY; *see also* Critchley, *supra* note 5; Ruth Milligan, *European Competition Commission Gets It Right with Payments Legislation?*, MERCHANT ADVISORY GROUP (Sept. 3, 2015), https://perma.cc/ZVU5-DQ6N.

98 *See* EUROCOMMERCE, *supra* note 6, at 4; European Commission Press Release IP/07/1959, *supra* note 6.

99 MERCHANT ADVISORY GROUP, MOVING PAYMENTS TO MOBILE: CUSTOMERS WIN WITH COMPETITION 2, https://perma.cc/NG9T-GJMQ.

100 *See* EUROCOMMERCE, *supra* note 6, at 4.

101 *See, e.g.*, United States v. Am. Express Co. (*American Express*), 838 F.3d 179, 194 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

102 *See* Bert Markgraf, *What Are Merchant Fees?*, HOUSTON CHRON., https://perma.cc/EB9D-FXVK.

merchant fee on $100 of merchandise sold will thus cost the merchant $1. In terms of the mechanics of payment, the merchant fee is retained by the customer's bank (the issuing bank) and charged to the merchant's bank (the acquiring bank), which then takes this cost element into consideration when setting its prices for merchants.[103]

The theory of harm in these cases is that, because of the merchant obligations attached to the HAC policy, the issuing banks must no longer compete on price to obtain market share, leading to higher merchant fees. The HAC policy serves to coordinate the pricing decisions of participating Visa and Mastercard banks. Absent that coordination, the banks would compete for merchants by, among other things, offering cards with lower merchant fees. The reason that merchant fees would be lower absent the HAC policy is that credit cards are largely homogenous products—cashless payment methods—and firms competing in such homogenous industries do so on the basis of price.[104] Although it is true that cards try to distinguish themselves to *cardholders* on the basis of varying reward programs—which are funded by merchant fees in part—the cards compete for *merchants* largely on the merchant fees.[105] The HAC has the effect of dampening the merchant's elasticity of demand with respect to an increase in interchange fees by removing substitution possibilities to lower-cost credit cards.[106] The lack of competition among issuing banks attributable to the HAC policy also harms consumers in the form of higher prices via the pass through of merchant fees to end users.

In December 2007, the EC held that Mastercard's multilateral interchange fees ("MIF") violated Article 81, the EC Treaty rules on

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103 *See* Odysseas Papadimitriou, *How Credit Card Transaction Processing Works: Steps, Fees & Participants*, WALLETHUB (Apr. 2, 2009), https://perma.cc/DF47-T5PW.

104 *See* Tongxiao (Catherine) Zhang, Samer Faraj & Joseph P. Bailey, *Online Retailers' Strategies to Survive in a Homogeneous Product Market: An Exploratory Analysis*, 39 INT'L CONF. ON INFO. SYS. 2003 PROC. 464, 464.

105 *See, e.g.*, AnnaMaria Andriotis & Emily Glazer, *Rewards Credit Cards Gained a Fanatic Following—Now Banks Are Pulling Back*, WALL ST. J. (Jan. 1, 2019), https://perma.cc/2FTU-JJV4; Josh Barro, *Are Other People's Credit-Card Rewards Costing You Money?*, N.Y. MAG. (Oct. 16, 2018), https://perma.cc/A5EB-9G7S.

106 By definition, the elasticity of demand increases with substitution possibilities, including from multihoming. *See, e.g.*, Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EURO. ECON. ASS'N 990, 994 (2003) ("[C]ompetition is more intense when platforms cannot deter multihoming."); *id.* at 1004 ("But as multihoming becomes more widespread . . . the possibility of steering increases the own-brand elasticity."). When competition is more intense, markups decline, reflecting a larger elasticity. Thus, a restraint that eliminates substitution dampens the elasticity of demand.

restrictive business practices.[107] The European Union brought these cases against Visa and Mastercard based on the card issuers' coordinating the terms, via the MIF, of associations of acquiring banks.[108] Although the European investigation focused on Mastercard's horizontal restraint (the MIF), the EC also scrutinized the vertical restraint (the HAC) imposed on merchants, finding that the "'honour-all-products' functionality reinforces the restrictive effects of the MasterCard MIF on price competition between acquiring banks."[109] It also found that the HAC rule "enables MasterCard's member banks to exert *collective market power* through the MIF by allowing issuing banks to introduce new card products in the market while at the same time pre-determining their price through the MIF for merchants who are bound to accept those cards."[110] The EC concluded that the "'honour all products functionality' of MasterCard's [HAC rule] therefore further decreases the countervailing buyer power of merchants in the presence of a MIF."[111] During its investigation of Mastercard, the EC concluded that there was no empirical evidence demonstrating any positive effects on innovation and efficiency that justified Mastercard's MIF.[112] In July 2012, the EC informed Visa that the card issuer's merchant fees could violate EU antitrust laws, citing Article 101 of the Treaty on the Functioning of the European Union.[113]

Formally, one can understand the relationship between the merchant fee (P_M) and the elasticity of demand among merchants (E_M) by using Professors Jean-Charles Rochet and Jean Tirole's two-sided platform framework[114]:

$$[P_M + P_C - C] / [P_M + P_C] = 1 / [E_M + E_C]$$

where P_C is the price to the cardholder, E_s is the elasticity of demand among cardholders, and C is the marginal cost of servicing both sides of

107 European Commission Press Release IP/07/1959, *supra* note 6.

108 *See id.*; *see also* European Commission Memorandum MEM0/07/590, Antitrust: Commission Prohibits MasterCard's Intra-EEA Multilateral Interchange Fees – Frequently Asked Questions (Dec. 19, 2007), https://perma.cc/P2FT-7FTY.

109 *Commission Decision of 19/XII/2007 Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement*, at ¶ 509 (Dec. 19, 2007), https://perma.cc/TWH4-JR88.

110 *Id.* (emphasis added).

111 *Id.*

112 European Commission Press Release IP/07/1959, *supra* note 6.

113 European Commission Memorandum MEMO/14/138, Antitrust: Commission Makes Visa Europe's Commitments Binding – Frequently Asked Questions (Feb. 26, 2014), https://perma.cc/P7G6-L388.

114 *See* Rochet & Tirole, *supra* note 106, at 997. This is the same expression as equation two in the paper, with the prices and elasticities broken out.

the market. The total margin on a given transaction is the sum of the two prices less the marginal cost. The only difference from a one-sided platform is that the total margin will vary with the *sum* of the elasticities.[115] In addition, Professors Rochet and Tirole show that absolute markup of price over cost is chosen as follows:

$$[P_M + P_C - C] = P_M / E_M = P_C / E_C$$

Solving the above equations for P_M and P_C yields:

$$P_M = [E_M(C - P_C)]/[E_M - 1] \text{ and } P_C = [E_C(C - P_M)]/[E_C - 1]$$

The final equation above shows how downward pressure on price on one side of the market leads to upward pressure on price on the other side of the market, or what is known more generally as the "seesaw principle" of two-sided markets.[116] The corollary is that upward pressure on price on one side due to artificial restraint that dampens the elasticity of demand among merchants, such as the HAC policy, will tend to lead to downward pressure on price on the other side of the market.

B. *Differences in Outcomes*

In the European Union, regulatory decree eliminated high merchant fees.[117] Before 2009, fees were on the order of eighty to 120 basis points, but were reduced to thirty basis points for both Mastercard in 2009 and Visa in 2014.[118] Overall, merchant fees in the European Union are

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115 *See id.* ("A monopoly platform's total price . . . is given by the standard Lerner formula for elasticity equal to the sum of the two elasticities.").

116 *See* Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 659 (2006) ("The linkage between the two sides comes from the reinterpretation of costs as opportunity costs. The linkage also shows up in the form of a simple 'seesaw principle': a factor that is conducive to a high price on one side, to the extent that it raises the platform's margin on that side, tends also to call for a low price on the other side as attracting members on that other side becomes more profitable.").

117 *See* EUROCOMMERCE, *supra* note 6, at 2.

118 *See* Critchley, *supra* note 5; *see also* European Commission Memorandum MEMO/09/143, Antitrust: Commissioner Kroes Notes MasterCard's Decision to Cut Cross-Border Multilateral Interchange Fees (MIFs) and to Repeal Recent Scheme Fee Increases – Frequently Asked Questions (Apr. 1, 2009), https://perma.cc/275F-B8PF. Something similar occurred in the United States with respect to maximum allowable fees on debit card transactions, albeit via the legislation process. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1075, 124 Stat. 1376, 2068 (codified at 15 U.S.C. § 1693*o*-2). Opponents of the Durbin Amendment claim that debit card providers reduced cardholder benefits in response to the rate regulation. *See, e.g.*, Mark D. Manuszak & Krzysztof Wozniak, *The Impact of Price Controls in Two-Sided Markets: Evidence from US Debit Card Interchange Fee Regulation* 1 (Bd. of Governors of the Fed. Rsrv. Sys. Fin. & Econ. Discussion Series, Working Paper

approximately eighty-five percent lower than the prevailing rates in the United States.[119] Because merchants pass through a percentage of those fees to retail customers, higher merchant fees depress output in the goods market, which is economically inefficient. The lax enforcement policy in the United States thus promotes a regressive outcome—inducing a merchant to raise prices on less wealthy consumers (low-reward cards and cash payers), so issuing banks can give small rewards to its wealthier consumers.

1. EU Litigation

Before the EC's intervention in 2007, Mastercard's merchant fee on consumer credit cards ranged between 0.80% and 1.20%.[120] Due to the intervention, Mastercard was compelled to reduce its weighted-average MIF to 0.3%.[121] Mastercard was not required to make any changes to its HAC rules.[122] However, its acquiring banks were required to inform merchants that they were free to accept the most efficient card for a transaction, including non-Mastercard cards.[123] Acquirers' invoices to merchants also were required to show separately for each card the

No. 2017-074, 2017), https://perma.cc/76BV-G7EL ("[B]anks subject to the cap raised checking account prices by decreasing the availability of free accounts, raising monthly fees, and increasing minimum balance requirements, with different adjustment across account types."); Vladimir Mukharlyamov & Natasha Sarin, The Impact of the Durbin Amendment on Banks, Merchants, and Consumers 4 (Jan. 31, 2019) (unpublished manuscript) (University of Pennsylvania Carey Law School Legal Scholarship Repository), https://perma.cc/UUF2-6A5R (finding that following Durbin, the provision of free checking accounts decreased by forty percentage points). *But see* Benjamin S. Kay, Mark D. Manuszak & Cindy M. Vojtech, *Bank Profitability and Debit Card Interchange Regulation: Bank Responses to the Durbin Amendment* 5 (Bd. of Governors of the Fed. Rsrv. Sys. Fin. & Econ. Discussion Series, Working Paper No. 2014-77, 2014), https://perma.cc/5XAU-KWLL (finding that banks only partially offset their interchange fee losses by lifting deposit fees and did not cut expenses).

119 *See* Markgraf, *supra* note 102; Rochelle Toplensky, V*isa and Mastercard to Cut Foreign Card Fees in EU*, FIN. TIMES (Apr. 29, 2019), https://perma.cc/4846-7FNX.

120 European Commission Press Release IP/07/1959, *supra* note 6.

121 European Commission Memorandum MEMO/09/143, *supra* note 118.

122 *See id.* at 13.

123 *Id.* at 8 ("Whereas [MasterCard] will not make any changes to these rules, it will however require its acquirers to *inform* merchants that they are permitted to accept MasterCard cards and/or Maestro cards and/or competing schemes' cards.").

unblended merchant fee.[124] In May 2012, the General Court rejected Mastercard's appeal of the EC's 2007 decision.[125]

In February 2014, the EC made Visa's commitment to reduce merchant fees binding, capping the MIFs for consumer credit card transactions at a weighted average of 0.3% per transaction.[126] Invoked by HAC policy proponents, the EC rejected the notion that fees charged to cardholders would rise as merchant fees fell, citing the experience in France as a natural experiment.[127] In 2015, the EC codified the lower merchant fee regulations for both Mastercard and Visa.[128]

2. US Litigation

In the United States, a merchant wishing to accept a Visa card must accept any valid Visa card in its category of acceptance.[129] For example, a merchant who accepts any Visa credit card must accept all Visa credit cards, including cards with higher merchant fees such as generous rewards cards.[130] Before January 1, 2004, Visa and Mastercard each maintained a single HAC rule applicable to both credit and debit cards.[131] The Visa rule thus provided that if a merchant accepted *any* Visa-branded credit card *or* Visa-branded debit card, it was required to accept *all* Visa-branded credit

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124 *See id.* Recently, European retailers have asserted that credit card issuers have introduced new fees or raised nonregulated fees in response to the regulations on interchange. *See* Aoife White, *European Retailers Say Card Costs Rose After EU Capped Fees*, BLOOMBERG (May 14, 2020, 8:29 AM), https://perma.cc/5XRE-TFHD.

125 *See* European Commission Memorandum MEMO/12/377, Antitrust: Commission Welcomes General Court Judgment in MasterCard Case 1 (May 24, 2012) https://perma.cc/RX9Y-ZE63.

126 European Commission Memorandum MEMO/14/138, *supra* note 113.

127 *Id.* at 6 ("In practice, we see that banks have not raised card holder fees in the past when MIFs were reduced. For example, the decision adopted in 2011 by the French competition authority accepting commitments offered by the domestic card scheme *Groupement Cartes Bancaires* (2011), which substantially reduced interchange fees for domestic debit and credit card transactions does not appear to have resulted in increased card holder fees.").

128 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions, art. 4, 2015 O.J. (L 123) 11, https://perma.cc/AK63-R7A8 ("Payment service providers shall not offer or request a per transaction interchange fee of more than 0,3 % of the value of the transaction for any credit card transaction. For domestic credit card transactions Member States may define a lower per transaction interchange fee cap.").

129 VISA, VISA CORE RULES AND VISA PRODUCT AND SERVICE RULES 98 (2020), https://perma.cc/94X5-L735.

130 *See id.*

131 *See* Jean Charles Rochet & Jean Tirole, *Tying in Two-Sided Markets and the Honor All Cards Rule*, 26 INT'L. J. INDUS. ORG. 1333, 1333–34 (2008).

cards *and* Visa-branded debit cards from *all* Visa issuers.[132] In the 1990s, "retailers . . . filed class action litigation against Visa and MasterCard challenging their [HAC] rules."[133] A 2003 settlement of this litigation required Visa to untie credit and debit acceptance by creating a separate HAC for credit cards.[134] Visa still offers a default interchange schedule, which could permit its member banks to coordinate on a particular rate.[135]

In 2005, a class of merchants sued Mastercard and Visa, several of their issuing banks, and American Express separately over payment card rules that allegedly inflated merchant fees, including the HAC policy and a "no-surcharge" rule that barred merchants from charging customers a higher price for using a high-fee card.[136] The parties reached settlements in 2012.[137] In 2013, a federal district court approved the Mastercard and Visa settlement, which awarded approximately $7 billion in damages and injunctive relief permitting merchants to impose surcharges on consumers paying with cards from Visa or Mastercard, but would have preserved the HAC policy.[138] In August 2015, a federal district court rejected the American Express settlement because certain lawyers for the plaintiffs and Mastercard had allegedly exchanged confidential information relating to American Express.[139] In June 2016, the US Court of Appeals for the Second Circuit in New York vacated the Visa and Mastercard settlement because of a purported divergence of interests among the merchants in the class.[140] On remand, the parties continued to litigate until September 2018, when the defendants reached an

132 *See id.*

133 Bruce D. Sokler, Robert G. Kidwell & Farrah Short, *What Have Merchants Gained from Payment Card Antitrust Litigation?*, MINTZ (Aug. 3, 2016), https://perma.cc/W4WX-KM4G.

134 *See In re* Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 508 (E.D.N.Y. 2003) ("The Settlement Agreements . . . provide, among other things, for . . . the cessation, as of January 1, 2004, of defendants' 'Honor All Cards' rules, by which the defendants' debit card services to merchants were tied to their credit card services."), *aff'd sub nom.* Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96 (2d Cir. 2005).

135 *See Wal-Mart Stores*, 396 F.3d at 102–03.

136 *See* Deborah E. Arbabi, Daniel A Sasse, Christy Markos & Paul I. Sung, *Pathways to Recovery in the MasterCard/Visa Interchange Fee Litigation*, CROWELL MORING (May 2, 2019), https://perma.cc/CJL9-HE8L.

137 James O'Toole, *Visa, MasterCard Settle Antitrust Case*, CNNMONEY (July 14, 2012, 5:43 PM), https://perma.cc/42M8-2CLU.

138 *See* Kat Greene, *Visa, Walmart End Fight Over $7.25B Card-Swipe Settlement*, LAW360 (Nov. 2, 2017, 9:41 PM), https://perma.cc/QPF3-XTXW.

139 Jim Daly, *Judge Tosses AmEx's Settlement with Merchants; Is the Visa-MasterCard Settlement Next?*, DIGITAL TRANSACTIONS (Aug. 5, 2015), https://perma.cc/YQ7R-HMWM.

140 *See* Greene, *supra* note 138.

approximately $6 billion settlement.[141] In January 2019, the US District Court for the Eastern District of New York granted preliminary approval of the settlement.[142]

During the first half of 2019, several opt-out merchants who elected to not be part of the class settlement, including Walmart and Target, sued Visa.[143] Mastercard reported that merchants representing slightly more than one quarter of the interchange volume generated by the damages class had opted out, reducing the settlement fund to $5 billion.[144] Mastercard and Visa reported settlement discussions with these injunctive-relief merchants in November 2019.[145] As of March 2020, however, no injunctive relief had been achieved.[146] The settlement fund will remain inaccessible to plaintiffs until the appeals process concludes and the funds are administered, perhaps not until 2023.[147]

One challenge in demonstrating price effects for private plaintiffs in a US antitrust court is that the HAC policy has been in existence since the beginning of the Visa network. Put differently, there has been little to no change in the treatment variable, which thwarts the use of traditional economic tools such as regression analysis.[148] Even though the merchant fees in Europe are lower than those in the United States, the HAC policy exists in Europe, albeit at a regulated rate.[149] It is possible to construe those lower rates as an approximation of competitive merchant fees absent the

141 Kimberly Chin, *Mastercard, Visa Agree to Settle Merchant Antitrust Suit*, WALL ST. J. (Sept. 18, 2018, 8:23 AM), https://perma.cc/G9KU-LV2Z.

142 Order Preliminarily Approving Superseding Settlement Agreement at 1–2, *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litig., No. 05-1720 (E.D.N.Y. Jan. 24, 2019), https://perma.cc/LJ4F-Y7HY.

143 *See* Jim Daly, *Fairness Hearing Coming Up in the Massive Credit Card Interchange Court Case*, DIGITAL TRANSACTIONS (Nov. 5, 2019), https://perma.cc/E538-3TNE.

144 *See id.*

145 *See id.*

146 Daniel A. Sasse, Deborah E. Arbabi, Charlene Sun & Christy Markos, *Turning Fees into Funds: Maximizing Recovery in the MC/Visa Interchange Fee Litigation*, CROWELL MORING (Mar. 9, 2020), https://perma.cc/95Q5-PZN5 ("Meanwhile, an injunctive relief class continues to litigate in the hopes of achieving rules relief, an objective that retail industry groups, such as the National Retail Federation, have been closely monitoring.").

147 *See id.*

148 Without any variation in an explanatory variable, it is impossible to derive the relationship between said variable and the dependent variable. *See, e.g.*, Michael J. Rosenfeld, *A New Document on What Changes and What Remains the Same in Regressions, When You Change the Inputs*, STAN. UNIV. (Feb. 19, 2010), https://perma.cc/7XC3-DDFS.

149 *See* European Commission Memorandum MEMO/09/143, *supra* note 118.

challenged restraints,[150] but it is not clear whether a court would accept such evidence as proof of antitrust injury and causation. The second major obstacle is the Supreme Court's recent decision in *Ohio v. American Express Co.* (*Amex*),[151] which placed new evidentiary burdens on plaintiffs in certain cases, including demonstrating output effects and considering antitrust "offsets."

C. *Additional Evidentiary Burdens from* Ohio v. American Express Co.

The Supreme Court's recent decision in *Amex* presents a formidable obstacle for plaintiffs seeking recovery in section 2 cases (single-firm monopolist) involving "two-sided transaction platforms."[152] Determining the qualifications for a two-sided transaction platform, the Court imposed two requirements: (1) the sale of the platform's service requires "simultaneous" exchange between two third parties to the platform; and (2) the platform must offer "indirect network effects" that are relatively strong.[153] To understand the nature of the new evidentiary burdens, a brief history of the case is in order. In 2010, the DOJ filed an antitrust suit against Visa, MasterCard, and American Express challenging the payment card companies' anti-steering rules, which prohibited merchants from steering customers toward cheaper payment methods by providing information about a card's costs, for example.[154] Visa and Mastercard immediately settled with the DOJ, but American Express elected to litigate and lost initially.[155] In February 2015, the US District Court for the Eastern District of New York found that American Express's anti-steering restrictions on merchants—which restrict merchants from steering their customers to lower-priced or lower-merchant-fee credit cards by offering consumers a portion of the savings—were anticompetitive and thus an illegal restraint on trade.[156] The court also found that the additional fees American Express charged merchants caused consumer prices to rise on

150 *See id.* at 5. The rates selected in the EC were based on incremental costs, which reflect the competitive rate.

151 138 S. Ct. 2274 (2018).

152 *See id.* at 2280.

153 *See id.*

154 *See* Press Release, Dep't of Just., Justice Department Sues American Express, Mastercard and Visa to Eliminate Rules Restricting Price Competition; Reaches Settlement with Visa and Mastercard (Oct. 4, 2010), https://perma.cc/TN7G-L9RF.

155 *Id.*

156 United States v. Am. Express Co., 88 F. Supp. 3d 143, 229–38 (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).

net, even after accounting for potentially higher cardholder rewards.[157] In September 2016, the Second Circuit reversed the district court's decision, asserting that the plaintiffs failed to examine the benefits of the anti-steering restraints to American Express's cardholders on the other side of the "two-sided" platform.[158] On June 25, 2018, the Supreme Court affirmed the Second Circuit's decision, delivering a victory for American Express and potentially altering the playing field for a large swath of future single-firm monopolization cases involving vertical restraints.[159]

1. The New Output Requirement

Amex understandably established a requirement that plaintiffs—at least in vertical cases involving two-sided transactional platforms—must prove an output effect when using direct evidence to establish competitive effects under the rule of reason.[160] There is some ambiguity, however, as the output requirement appears as one of three ways to establish anticompetitive effects: "To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, *or* otherwise stifled competition in the credit-card market."[161] Yet, the plaintiffs presumably lost because the Court decided that proving a price effect without a concomitant output effect did not satisfy the plaintiff's initial burden under the rule of reason; an additional showing of an output effect is necessary.[162] Indeed, during oral argument, Associate Justice Neil Gorsuch insisted that output is paramount in antitrust law and was the only way to get around the district court's finding that fees net of any rewards to cardholders had increased.[163] The

157 *Id.* at 215 ("Even without such data, however, Plaintiffs have provided sufficient circumstantial evidence and expert testimony for the court to conclude that Amex's Value Recapture price increases were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and resulted in a higher net price.").

158 *See* United States v. Am. Express Co. (*American Express*), 838 F.3d 179, 206–07 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

159 *See* Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2290 (2018).

160 *See American Express*, 838 F.3d. at 194–206.

161 *See Amex*, 138 S. Ct. at 2287 (emphasis added).

162 *See id.* at 2302 (Breyer, J., dissenting) ("And because the relevant question is a comparison between reality and a hypothetical state of affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the Sherman Act does not apply at all.").

163 *See* Transcript of Oral Argument at 4–8, Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274 (2018) (No. 16-1454).

Court pointed to the increase in credit card transactions over time as evidence of the lack of an output effect.[164] However, the correct counterfactual would preserve all other forces pushing towards more credit card transactions—income growth, online purchases—and isolate the incremental effect of the restraint. Thus, it is possible that card transactions would have increased even faster but for the presence of the restraint.

2. The New "Offset" Requirement

Amex also understandably established a requirement that plaintiffs—at least in vertical cases involving two-sided transactional platforms—must prove that any increase in fees on one side of the platform attributable to the restraint is not fully offset by a decrease in fees charged to the other side.[165] Effectively, this is a "net harm" requirement. Specifically, the harms to one side of the platform—the merchants—must exceed the benefits to the other side of the platform—the cardholders.[166] In *US Airways, Inc. v. Sabre Holdings Corp.*,[167] a section 2 case challenging Sabre's vertical restraints, the Second Circuit interpreted this requirement to be a net harm test: "Two-sided damages must, in this case, then, *be lower than* one-sided damages would have been."[168] The Second Circuit elaborated on this requirement: "In a market encompassing both sides of the platform, then, if prices charged to travel agents are less—or incentive payments made are greater—than those that would be observed in a competitive market, then that difference *must be accounted for* in determining US Airways's damages, if any."[169] This appears to suggest that any lost benefits to travel agents made possible by Sabre's vertical restraint must be deducted from US Airways's overcharges. This makes little sense from an economic perspective, as the forgone subsidy was an ill-gotten gain to the extent the restraint is deemed anticompetitive. There should be no requirement in the law that parties who benefited from an illegal restraint should later be made whole when said restrained is removed.

164 *Amex*, 138 S. Ct. at 2288 ("The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%.").

165 *See American Express*, 838 F.3d at 200–02.

166 *See* Richard M. Brunell, Ohio v. Amex*: Not So Bad After All?*, ANTITRUST, Fall 2018, at 16, 18.

167 938 F.3d 43 (2d. Cir. 2019).

168 *See id.* at 59 (emphasis added).

169 *Id.* (emphasis added).

In contrast, the district court in *United States v. Sabre*,[170] a case challenging a Sabre–Farelogix merger, interpreted *Amex* to require plaintiffs to demonstrate a harm to *both* sides of the platform:

> Rather, *Amex* provides that if the government seeks to stop a [global distribution system] from buying a "one-sided competitor," it must show that this purchase will harm competition on both sides of the two-sided market – i.e., the market for travel services to airlines and the market for travel services to travel agencies. Here, however, the government only attempted to demonstrate harm to the airlines side of the two-sided market. It has thus failed to meet its burden.[171]

This supposed *Amex* requirement of showing harm to both sides is an impossible burden. Suppose a two-sided platform charges the *A* side and subsidizes the *B* side with a portion of *A*-side revenues. Suppose further that a one-sided rival, before being acquired, constrains the platform's ability to raise *A*-side prices. The platform's acquiring the one-sided rival allows *A*-side prices to rise, which permits for an even greater subsidy on the *B* side. The *B*-side customers are not harmed, thus waving the merger through under the harm-to-both-sides requirement. That two courts could read *Amex* so differently is highly disconcerting.

Note that a defendant accused of engaging in a price-fixing conspiracy cannot claim that it used a portion of the ill-gotten gains from one set of customers to subsidize the price of a different or complementary service to another set of customers as the conduct is considered illegal per se.[172] Moreover, under *United States v. Philadelphia National Bank*,[173] a merger-related gain of one set of customers cannot offset a merger-related harm to another.[174] Assuming offsets are even considered, standard antitrust jurisprudence would treat them just like any other efficiency, and the burden of proof should be on defendants to establish their connection to the restraint and to quantify their magnitude.[175] However, the *Amex* majority determined that offsets should be addressed by plaintiffs in the

170 No. 19-1548, 2020 WL 1855433, at *1 (D. Del. Apr. 7, 2020).

171 *Id.* at *34.

172 *See Price Fixing*, FED. TRADE COMM'N, https://perma.cc/T6KZ-8ASG.

173 374 U.S. 321 (1963).

174 *See id.* at 370–71.

175 *See* Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2303 (2018) (Breyer, J., dissenting) ("But the Court of Appeals would properly consider procompetitive justifications not at step 1, but at steps 2 and 3 of the 'rule of reason' inquiry. American Express would need to show just how this particular anticompetitive merchant-related agreement has procompetitive benefits in the shopper-related market . . . The majority charts a different path. Notwithstanding its purported acceptance of the three-step, burden-shifting framework I have described . . . the majority addresses American Express' procompetitive justifications now, at step 1 of the analysis.").

initial step of the rule-of-reason analysis.[176] Thus, in light of *Amex*, antitrust law now treats offsets differently in vertical cases than in horizontal cases. Because there is no mechanism by which the beneficiaries of a hypothetical vertical restraint may compensate the injured consumers, one can legitimately question an antitrust regime that tolerates a set of persistent economic losers.

D. *Higher Merchant Fees Lead to Regressive Results*

US plaintiffs' inability to achieve any relief from high merchant fees or HAC policies means that fees are substantially higher than those achieved on credit card transactions in the EU via regulation, equaling 0.3% of the transaction.[177] Based on a recent study, the average interchange fees for Mastercard and Visa credit cards in 2019 ranged from 1.15% to 2.5%.[178] Others estimate the average interchange fees for all credit cards in the United States at 1.81%.[179] In 2016, the Federal Reserve Bank of Kansas estimated that the average interchange fees for Mastercard ranged from 1.5% (no premium) to 2.1% (premium) and that the average interchange fees for Visa ranged from 1.4% (no premium) to 2.1% (premium).[180] Because of heightened antitrust standards in the United States, US merchants pay approximately six times more for interchange fees to credit card companies than their European counterparts: approximately 1.8% versus 0.3% of the transaction.[181] Merchants pass through some or all of those merchant fees in the form of higher end-user prices.[182] A portion of

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176 *See id.* at 2284.

177 European Commission Press Release IP/15/4585, Commission Welcomes European Parliament Vote to Cap Interchange Fees and Improve Competition for Card-Based Payments (Mar. 10, 2015), https://perma.cc/7NYD-V4ME ("As a general rule, the Regulation will cap interchange fees at 0.2% of the transaction value for consumer debit cards and at 0.3% for consumer credit cards.").

178 Lyle Daly, *Average Credit Card Processing Fees and Costs in 2019*, THE ASCENT (Sept. 13, 2019), https://perma.cc/RNN3-XAHG.

179 *See* Yowana Wamala, *Interchange Fees Explained*, VALUEPENGUIN, https://perma.cc/A4Z7-XDNV; *see also* Randy Hayashi, *What Are the Average Credit Card Processing Fees That Merchants Pay? [2020 UPDATE]*, PAYMENT DEPOT (Jan. 24, 2020), https://perma.cc/R3HL-MCLS (estimating the interchange fee of 1.5% to 2.9%, equal to seventy to ninety percent of the total processing fee); Frank Kehl, *What Are Interchange Fees For Credit Card Processing?*, MERCHANT MAVERICK (Aug. 20, 2019), https://perma.cc/YJ3R-SRHM ("[I]n the United States, the average interchange rate is around 0.3% for debit cards and 1.8% for credit cards.").

180 *See* FUMIKO HAYASHI & SABRINA MINHAS, FED. RES. BANK OF KAN. CITY, CREDIT AND DEBIT CARD INTERCHANGE FEES IN VARIOUS COUNTRIES 1–4 (2016), https://perma.cc/DD4Z-XHKR.

181 *See id.*

182 *See* AnnaMaria Andriotis & Harriet Torry, *The Credit-Card Fees Merchants Hate, Banks Love and Consumers Pay*, WALL ST. J. (June 21, 2020, 5:30 AM), https://perma.cc/KPF2-EXKE.

those excess merchant fees are used to subsidize rewards for wealthier cardholders, such as celebrity-chef-catered American Express airport lounges, complicating the welfare impact for those cardholders.[183] But the restraint unequivocally raises prices for low-reward cardholders and cash payers without any offsetting benefit, a regressive result.

IV. Policy Implications

Is the United States better off under its more permissive antitrust standard? There is some evidence that byproducts of lax antitrust enforcement are higher prices (markups), larger concentration of economic power, and lower wage shares.[184] The resulting power imbalances and income inequality may be contributing to societal fissures. Rather than abandon the consumer-welfare standard, however, this Article offers more modest reforms: (1) shifting the presumptions in vertical merger review under certain fact patterns, such as a merger involving a dominant platform; (2) filling the current gaps in section 2 cases with regulations outside of antitrust, such as a Net Tribunal housed at the FTC or new digital agency to police self-preferencing by dominant platforms; and (3) reversing bad case law, such as the antitrust exemptions in two-sided markets in *Amex*[185] and the forced arbitration in *American Express Co. v. Italian Colors Restaurant*[186] and *Epic Systems Corp. v. Lewis*.[187]

A. *The Inadequacy of Existing Monopolization Laws*

Antitrust is an imperfect remedy for certain categories of potentially anticompetitive conduct.[188] This is particularly true for the tendency of the dominant "tech platforms," such as Amazon, Apple, Google, and Facebook, to engage in "self-preferencing," which disadvantages rivals with whom they compete horizontally on a portion of the platform. It is true that some types of exclusionary conduct by tech platforms fall within existing antitrust frameworks, such as Facebook's discriminatory refusal

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183 *See, e.g.*, *The Global Lounge Collection*, AM. EXPRESS, https://perma.cc/M77D-6XKZ.

184 *See supra* Part II.

185 *See* 138 S. Ct. 2274, 2287 (2018).

186 570 U.S. 228 (2013).

187 138 S. Ct. 1612 (2018).

188 The following sections are adapted from Dr. Singer's congressional testimony on this subject. Letter from Hal J. Singer, Managing Dir., EconOne, to Hon. David Cicilline, Chairman & Hon. F. James Sensenbrenner, Jr., Ranking Member, H. Subcomm. on Antitrust, Com. & Admin. Law 2 (Mar. 30, 2020), https://perma.cc/279H-ZJYG.

to deal in restricting independent apps' access to Facebook's API or Amazon's tying the purchase of its fulfillment services to unencumbered access to its e-commerce platform.[189] Nevertheless, self-preferencing generally does not fit into any well-received antitrust paradigm.[190] And if one could stretch or reinterpret the antitrust laws to accommodate this type of exclusion, antitrust litigation is too slow, uncertain, and costly "to address the potential harms that flow from self-preferencing—namely, an innovation loss at the 'edges' of the platforms, as independents throw in the towel as a response to an unlevel playing field."[191] In traditional antitrust cases, exclusionary conduct can be measured as an overcharge to purchasers (or underpayments to sellers or workers). This makes the snail's pace of antitrust more tolerable since courts can award treble damages.[192] In contrast, antitrust provides little to no useful guidance on the much thornier economic problem of adequately compensating innovators whose opportunity to profit from their innovations was foreclosed by exclusionary conduct. Accordingly, "[t]he relief in these cases must come quickly."[193]

Many modern courts have interpreted section 2 of the Sherman Act as requiring plaintiffs to prove that the exclusionary conduct at issue inflicted economic harm, most commonly measured as the extent to which the conduct inflated prices above competitive levels or restricted output below competitive levels.[194] Professor Michael Carrier found that, between 1999 and 2009, courts dismissed ninety-seven percent of section 2 "rule-of-reason" cases owing to plaintiffs' inability to prove that the conduct at issue caused anticompetitive effects.[195] When tech platforms engage in self-preferencing to exclude or marginalize edge innovation, they are unlikely to cause empirically demonstrable short-run price or output effects, given that the platform simply replaces the offerings of the

189 *Id.*

190 *Id.*

191 *Id.*; *see also Commission Decision of 27.6.2017 Relating to Proceedings Under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area*, at ¶ 595 (June 27, 2017), https://perma.cc/89J3-R475 ("[T]he Conduct is likely to reduce the incentives of competing comparison shopping services to innovate.").

192 Letter from Hal J. Singer to Hon. David Cicilline & Hon. F. James Sensenbrenner, Jr., *supra* note 188, at 2.

193 *Id.*

194 *See* U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016), https://perma.cc/LS7J-7R6W.

195 *See* Carrier, *supra* note 37, at 50–51.

edge innovator with its own vertically integrated alternative.[196] One potential exception is Google's self-preferencing in search results, which may cause quality degradation over the short run: at least one study has found that Google's affiliated content generates fewer click-throughs—and thus lower quality from advertisers' perspective—than its downstream independent rivals.[197] Yet in practice, plaintiffs have rarely (if ever) been successful in an antitrust case turning primarily on a showing of quality degradation.[198] Far more frequently, degradation in product quality is relegated to an "and also" category in antitrust.[199]

Although exceptions exist to the requirement that plaintiffs demonstrate short-run anticompetitive effects, self-preferencing is not encompassed by them. For example, in *FTC v. Qualcomm Inc.*,[200] the district court held Qualcomm liable for its exclusive dealing without requiring any demonstration of short-run economic harm.[201] Instead, the court laid out an alternative set of economic criteria that could serve as a substitute for direct empirical proof of anticompetitive harm, sometimes referred to by economists as a "surrogate test."[202] For example, a plaintiff in a refusal-to-deal case can prove liability by documenting (among other things) that the defendant exhibited a pattern of engaging in such conduct with independents, and these systematic refusals were motivated by a desire to impede horizontal rivals through a "discriminatory refusal to

196 In many cases of self-preferencing by a digital platform, such as when Google gives preference to a Google-affiliated property in search, there is no price faced by the end user. In other cases, such as when Amazon steers a user to an Amazon-affiliated private label product, the price charged by the private label is often no higher than the price charged by an independent. *See* Jason Aten, *Google's Search Results Aren't Neutral. Here's Why That's a Problem for Your Business*, INC. (Nov. 18, 2019), https://perma.cc/R2TM-A45D; Dennis Green, *Most Amazon Private Labels Aren't Flying Off the Shelves Yet, But the Company is Taking Huge Steps to Change That*, BUS. INSIDER (Mar. 19, 2019, 12:23 AM), https://perma.cc/22YX-AAEX.

197 *See* Michael Luca, Timothy Wu, Sebastian Couvidat, Daniel Frank & William Seltzer, *Does Google Content Degrade Search? Experimental Evidence* 25–26 (Harvard Bus. Sch., Working Paper No. 16-035, 2015), https://perma.cc/5KTA-HME7.

198 *See* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 8–9 (2016) ("[I]n the typical antitrust case, consumer preferences about intangibles such as quality and variety are unobservable, either because the defendant is making a counterfactual claim . . . or because data on consumer behavior is unavailable, too costly to collect, or unreliable.").

199 *See id.* at 19–20.

200 411 F. Supp. 3d 658 (N.D. Cal. 2019). The injunction against Qualcomm has been stayed pending appeal. *See* FTC v. Qualcomm Inc., 935 F.3d 752, 757 (9th Cir. 2019).

201 *See Qualcomm*, 411 F. Supp. 3d at 759–72.

202 *See id.*; CAVES & SINGER, *supra* note 42, at 2.

deal."[203] On the other hand, when a tech platform discriminates in favor of its own content, there is no outright refusal to deal; the independent is instead governed by less favorable economic conditions that are imposed by the platform.[204] Thus, to prevail under this standard, an antitrust plaintiff would have to take the position that self-preferencing is tantamount to a refusal to deal. When a defendant engages in exclusive dealing, one path available to the plaintiff is to show that the exclusionary conduct at issue foreclosed a substantial proportion of the commerce at issue (the "foreclosure share").[205] As before, self-preferencing is not the same as exclusive dealing, so this surrogate test may not be available either.

United States v. Microsoft Corp. is commonly invoked by those searching for an antitrust framework applicable to tech platform self-preferencing; however, this case is unhelpful at best. What the *Microsoft* court actually found was that a showing of anticompetitive effects is a prerequisite to the imposition of structural remedies:

> Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, *i.e.*, whether the court should impose a structural remedy or merely enjoin the offensive conduct at issue. As we point out later in this opinion, divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain. . . . Absent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief.[206]

Given that anticompetitive injury in *Microsoft*—and in virtually any potential self-preferencing case brough against virtually any modern tech platform—would primarily take the form of innovation harms, and given the inherent difficulty in proving such harm, the *Microsoft* precedent would appear to pose significant barriers to securing a structural remedy within existing antitrust frameworks. The inherent vagaries of the innovation process itself make it doubtful that the expected future loss in

[203] *See* Mark S. Popofsky & Ariel A. Martinez, *Section 2 and the Rule of Reason: Report from the Front*, COMP. POL'Y INTL. (Mar. 14, 2016), https://perma.cc/U8QW-EYC3 (describing how plaintiffs won a 2014 case by showing defendant Blue Cross's "discriminatory refusal to deal" with plaintiff Steward Health Care Systems).

[204] *See* Laura Rijnaarts, EU Competition Law and Access to Data 15 (Aug. 2019) (M.A. thesis, Tilburg University) (available at https://perma.cc/KM5S-DEF7).

[205] *See* Mark S. Popofsky, *A Comment on Louis Kaplow's* The Meaning of Vertical Agreement and the Structure of Competition Law, ANTITRUST L.J. ONLINE 12 (Jan. 2017), https://perma.cc/EY8B-YED4 ("[I]n exclusive dealing cases . . . some courts refuse to find liability under Section 1 absent a 40 percent foreclosure share, even when a lower level of foreclosure may support monopolization.").

[206] United States v. Microsoft Corp., 253 F.3d 34, 80 (D.C. Cir. 2001) (per curiam) (citation omitted).

consumer welfare flowing from untimely exit by independents could be established with any "measure of confidence."[207]

The *Microsoft* court was also reluctant to impose a milder form of nonstructural injunctive relief, which would have required that the defendant unbundle Internet Explorer from its operating system. The court instead latched on to an efficiency justification proffered by Microsoft so broad that it could arguably be invoked by virtually any tech platform:

> As for the other challenged act that Microsoft took in integrating IE into Windows—causing Windows to override the user's choice of a default browser in certain circumstances—Microsoft argues that it has "valid technical reasons." Specifically, Microsoft claims that it was necessary to design Windows to override the user's preferences when he or she invokes one of "a few" out "of the nearly 30 means of accessing the Internet." . . . The plaintiff bears the burden not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs it. In the District Court, plaintiffs appear to have done neither, let alone both; in any event, upon appeal, plaintiffs offer no rebuttal whatsoever. Accordingly, Microsoft may not be held liable for this aspect of its product design.[208]

This shield against antitrust scrutiny is referred to as the "firm-boundary" protection.[209] In general, courts are reluctant to find antitrust liability in section 2 cases as long as the conduct at issue does not directly implicate a third-party buyer or seller, and thus remains within the firm's boundaries.[210] Since *Microsoft*, the landscape facing plaintiffs has become increasingly hostile, with many courts disfavoring monopoly-leveraging theories.[211]

Importantly, even if antitrust enforcement could be expanded through new "push-the-boundary" precedents or new legislation tailored to address self-preferencing, there remains the fundamental problem that the lumbering machinery of antitrust is ill suited to provide relief from conduct that inflicts innovation harms in a timely manner.[212] Modern

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207 *Id.*

208 *Id.* at 67.

209 Letter from Hal J. Singer to Hon. David Cicilline & Hon. F. James Sensenbrenner, Jr., *supra* note 188, at 4.

210 *Id.*

211 Eun K. Chang, *Expanding Definition of Monopoly Leveraging*, 17 U. MIAMI BUS. L. REV. 325, 330–31 (2009).

212 *See* Johnathan B. Baker, *Can Antitrust Keep Up?: Competition Policy in High-Tech Markets*, BROOKINGS (Dec. 1, 2001), https://perma.cc/S5NP-T4AE ("The critics' central claim is that the pace of change in high tech is so rapid that antitrust, and the legal machinery within which it must operate, is too slow and potentially counterproductive.").

section 2 cases take, on average, thirty-five months to be adjudicated, not including appeals.[213]

Professors Carl Shapiro and Fiona Scott Morton, both prominent antitrust scholars and practitioners, have recently authored separate reports describing how tech platform practices elude traditional antitrust scrutiny.[214] As Professor Shapiro explains, "The second area where antitrust enforcement has become inadequate is the treatment of exclusionary conduct by dominant firms. The fundamental problem in this area is that the Supreme Court has, over the past 40 years, dramatically narrowed the reach of the Sherman Act."[215] Professor Shapiro also explains that bringing section 2 cases against tech platforms generally would be "difficult," and that pursuing Amazon specifically for manipulating its platform to favor its own merchandise would be "very difficult"[216] under current antitrust laws. Professor Shapiro does not explicitly endorse a regulatory remedy; however, in a Stigler Center report, Professor Scott Morton and her co-authors observe that "a sectoral regulator is likely to be better than antitrust laws at enforcing fairness norms."[217]

B. *Remedies*

This Section discusses some remedies, inside and outside antitrust, to address the gaps in protection identified above. Congress should authorize the FTC or some new digital agency to enforce a new nondiscrimination standard, distinct from an antitrust standard or unfair-or deceptive-acts standard. Legislatures could refine merger statutes to make vertical acquisitions under certain fact patterns, such as by dominant platforms, presumptively illegal, thereby shifting the burden of proof onto the merger proponents. Finally, courts should vacate case law weakening antitrust enforcement.

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213 Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard*, 26 GEO. MASON L. REV. 395, 419–20 tbl.1 (2018).

214 *See* Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69, 79–86 (2019); STIGLER COMM. ON DIGIT. PLATFORMS, FINAL REPORT 85–89 (2019), https://perma.cc/UY3A-KMQ8.

215 Shapiro, *supra* note 214, at 70.

216 *Id.* at 82–83.

217 STIGLER COMM. ON DIGIT. PLATFORMS, *supra* note 214, at 90.

1. Filling the Gaps in Antitrust with Regulations

One option for filling the gaps in antitrust described above would be for Congress to implement "a particular form of non-antitrust intervention—a nondiscrimination regime, patterned off of the nondiscrimination regime created by Congress as part of the 1992 Cable Act."[218] In section 616 of the Cable Act, the Federal Communications Commission ("FCC") was directed "to create a venue in which independent cable networks could bring program-carriage complaints against vertically integrated cable operators, the dominant platform of that era."[219] By conveying the right of private action to victims of discrimination, section 616 "ensured that the level of enforcement would remain steady across different administrations."[220] Several independent networks, including the NFL Network and the Mid-Atlantic Sports Network ("MASN") achieved relief under this standard.[221] Two other networks, Tennis Channel and Game Show Network ("GSN"), "secured findings of discrimination by the FCC's Administrative Law Judge, only to lose on appeal."[222] There is evidence that these protections have fostered innovation by independent cable networks: since the Cable Act was passed, independent cable networks have grown faster than vertically integrated networks owned by cable companies,[223] suggesting that independent networks feel sufficiently confident to pursue risky investments in new programming, knowing that they have at least some protection against cable operators that might otherwise have incentives to appropriate or discriminate against independent programming. Significantly, such cases have taken an average of approximately eighteen months to adjudicate; although this arguably still imposes too long of a

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218 Letter from Hal J. Singer to Hon. David Cicilline & Hon. F. James Sensenbrenner, Jr., *supra* note 188, at 4.

219 *Id.* at 4–5; *see also* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 616, 106 Stat. 1460, 1488 (codified at 47 U.S.C. § 536).

220 Letter from Hal J. Singer to Hon. David Cicilline & Hon. F. James Sensenbrenner, Jr., *supra* note 188, at 5.

221 *See* John Eggerton, *Comcast, MASN Settle Carriage Dispute*, MULTICHANNEL NEWS (Mar. 29, 2018), https://perma.cc/62RJ-D57A (both parties pursued a settlement after filing complaints).

222 Letter from Hal J. Singer to Hon. David Cicilline & Hon. F. James Sensenbrenner, Jr., *supra* note 188, at 5; *see also* David Lieberman, *Tennis Channel Loses Appeal to Reopen Discrimination Case Against Comcast*, DEADLINE (July 6, 2016, 8:53 AM), https://perma.cc/QM49-RZA4.

223 Letter from Hal J. Singer to Hon. David Cicilline & Hon. F. James Sensenbrenner, Jr., *supra* note 188, at 5.

delay, it remains significantly more rapid than the generally glacial pace of antitrust cases.[224]

In principle, disputes between edge providers and dominant tech platforms could be adjudicated using an analogous venue. The FTC could house this "NET Tribunal," or it could operate as a newly minted digital agency tasked with enforcing a new nondiscrimination standard. Other standards such as interoperability might also fall within its purview.[225] As it did with the FCC in 1992, Congress would have to instruct the agency to develop an evidentiary standard that the tribunal could apply to a complainant's case.[226] Under the program-carriage regime, a complainant must show that: (1) its content is "similarly situated" to that of the dominant platform's vertical affiliate; (2) it received inferior treatment attributable to its lack of affiliation as opposed to some legitimate business reason; and (3) as a result, it has been materially impaired in its ability to compete effectively.[227] The evidentiary standard is different than antitrust standards, which require plaintiffs to demonstrate harm to competition. Rather than requiring a complainant to establish an innovation harm, a showing of harm to the independent serves as a surrogate for innovation harm.

Applied to digital platforms, such a regime would permit private complainants to seek injunctive relief and lost profits reasonably connected to the discriminatory conduct. When the agency acts as a complainant, by contrast, both injunctive and structural remedies could be available. A private right of action for complainants is missing under the current FTC complaint process, whereby only the agency can bring

224 *See* Caves & Singer, *supra* note 213, at 418–20.

225 *See* John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1531–32 (2019) ("[In *United States v. Microsoft Corp.*], a dominant firm (Microsoft) issued a new version of its core product (the Windows operating system) that was designed so as to maximize interoperability with its own complementary product (Internet Explorer) and minimize interoperability with a rival's product (Netscape Navigator, a competing web browser)." (footnote omitted)).

226 Letter from Hal J. Singer to Hon. David Cicilline & Hon. F. James Sensenbrenner, Jr., *supra* note 188, at 5.

227 *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1088 (2019); *see also* Tennis Channel, Inc. v. Comcast Cable Commc'n, L.L.C., 30 FCC Rcd. 849, 850 n.13 (2015) (Order) ("The Commission found, consistent with the ALJ's ruling, that Comcast had discriminated against Tennis Channel on the basis of affiliation and that such discriminatory treatment unreasonably restrained Tennis Channel's ability to compete against Comcast's similarly situated affiliates.").

cases before its administrative law judge under existing standards like antitrust.[228]

Some scholars have expressed skepticism over the sufficiency of a standalone nondiscrimination regime.[229] Yet the mere existence of a nondiscrimination regime should blunt some of the most blatant forms of discrimination. Moreover, any private enforcement brought by complainants with sufficient means to prosecute a case should provide blanket benefits to all independent merchants or content providers, including small ones. And in its capacity as complainant, the agency tasked with housing the Net Tribunal could bring cases of its own; for example, on behalf of small merchants on Amazon's platform or on behalf of small app designers on Apple's platform.

2. Shifting the Presumption in Merger Review

The legal landscape for prosecuting vertical mergers is challenging, potentially discouraging enforcement against future anticompetitive vertical mergers. Because antitrust laws struggle with how to effectively police vertical and conglomerate mergers,[230] Congress should alter the landscape itself. Recent DOJ enforcement actions highlight the rigorous evidentiary burdens the current standards create for enforcers.[231]

Congress should create a presumption against mergers involving dominant platforms, as proxied with very high shares and entry barriers in a relevant market. Professors Jonathan Baker, Nancy Rose, Steven Salop, and Fiona Scott Morton suggest that the agencies should adopt anticompetitive presumptions when certain conditions are met, including, among others, input- and customer-foreclosure and dominant-platform presumptions.[232] A number of large platforms, such as Amazon, Apple, Facebook, and Google are obvious candidates for dominant

228 Letter from Hal J. Singer to Hon. David Cicilline & Hon. F. James Sensenbrenner, Jr., *supra* note 188, at 5.

229 *See, e.g.*, Khan, *supra* note 227, at 1088–90.

230 *See* John Vanderstar, *Conglomerate Mergers: The Developing Antitrust Guidelines*, 44 ST. JOHN'S L. REV. 596, 596 (1970) ("[T]he conglomerate merger does not 'fit' as neatly into antitrust doctrine as other mergers do . . . .").

231 That the DOJ focused on the pricing of AT&T's newly acquired Warner content to distribution rivals—as opposed to other forms of potential discrimination—in the agency's merger challenge indicates that observable price effects are paramount. *See* United States v. AT&T Inc., 310 F. Supp. 3d 161, 164, 194 (D.D.C. 2018) (rejecting the government's proof of price effects), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

232 Jonathan B. Baker, Nancy L. Rose, Steven C. Salop & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, ANTITRUST, Sumer 2019, at 12, 16–17.

platforms. In certain local markets, a cable operator or internet service provider could be characterized as a dominant platform as well.

Vertical merger enforcement is particularly important because monopoly leveraging is said to be a dead letter in antitrust,[233] and because few pathways remain to challenge ex post vertical foreclosure by a vertically integrated firm. The inability to police discriminatory conduct by a vertically integrated firm under the antitrust laws is yet another reason for more vigorous policing of vertical merger enforcement.

3. Reversing Bad Case Law

In several cases, the Supreme Court has overstepped its bounds and twisted the purpose of the antitrust laws to disperse economic power, including by altering the traditional evidentiary standards in favor of defendants. Under traditional antitrust approaches, defendants bear the burden of establishing efficiency defenses—connecting a purported benefit to the restraint that redounds to plaintiffs and quantifying it.[234] In *Amex*, which condoned the use of "anti-steering" provisions in merchant contracts to discourage efforts to persuade customers to use lower-cost credit cards, the majority wrongly decided to place the burden of accounting for offsetting benefits ("offsets") on plaintiffs. In *Philadelphia National Bank*, the Supreme Court ruled that an offset to a third party could not negate the harms to an injured party.[235] At worst, benefits to third parties should be considered a special type of efficiency in two-sided markets, where defendants bear the burden of proof, as suggested in Associate Justice Stephen Breyer's dissent in *Amex*.[236]

Congress should also overturn the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant* and *Epic Systems Corp. v. Lewis*, which removed legal rights for customers and workers, respectively,

233 *See, e.g.*, Schor v. Abbott Lab'y, 457 F.3d 608, 613 (7th Cir. 2006); *id.* at 610 ("'[M]onopoly leveraging' does not violate the antitrust laws unless it takes a particular form, such as [predatory pricing,] a tie-in sale or refusal to deal.").

234 Phillip Nelson & David Smith, *Efficiencies in Antitrust Analysis: A View from the Middle of the Road*, 60 ANTITRUST BULL. 128, 146 (2015).

235 United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370–71 (1963). *See also* Hal Singer, *Restoring Competition in Big Tech*, LAW & LIBERTY (June 17, 2020), https://perma.cc/PDH9-PH74.

236 *See* Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2303 (2018) (Breyer, J., dissenting) ("Notwithstanding its purported acceptance of the three-step, burden-shifting framework I have described . . . the majority addresses American Express' procompetitive justifications now, at step 1 of the analysis . . . And in doing so, the majority inexplicably ignores the District Court's factual findings on the subject.").

to pursue antitrust claims as a class action. The Court demonstrated a bias in favor of dominant firms that forced a weaker counterparty to sign an agreement mandating individual arbitration.

Conclusion

Is the United States better off under its more permissive antitrust standard? Some evidence seems to suggest no. Specifically, evidence suggests that the byproducts of lax antitrust enforcement include higher prices (markups), larger concentration of economic power, and lower wage shares. These resulting power imbalances and income inequality may be contributing to societal fissures. However, the United States should not abandon the consumer-welfare standard in antitrust enforcement. Congress should implement more modest reforms like the following: (1) shifting the presumptions in vertical merger review under certain fact patterns, like mergers involving dominant platforms; (2) filling the current gaps in section 2 cases with regulations outside of antitrust, like a Net Tribunal housed at the FTC or new digital agency to police dominant platform self-preferencing; and (3) reversing bad case law, like antitrust exemptions in two-sided markets and forced arbitration. In the post–*Microsoft* world, the pendulum has shifted in favor of antitrust defendants in monopolizations cases. It is time for a reset.