AMEX IN CONTEXT: TRACING THE APPLICATION OF THE RULE OF REASON TO VERTICAL RESTRAINTS

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I. INTRODUCTION

In his 1911 State of the Union address, President William Howard Taft, the former and future jurist, discussed the development of antitrust law since the Sherman Act's passage: "Slowly the mills of the courts ground, and only gradually did the majesty of the law assert itself."[1] While Taft allowed for the possibility that some changes to the law may be beneficial, he also argued that the "object" of the Act was "near achievement," and spoke against those calling to "abandon this work of twenty years and try another experiment[.]"[2] Ultimately, the experiment was not abandoned, and the Sherman Act remains at the center of antitrust law in the United States.

Meanwhile, the "mills of the courts" have continued to grind away. Various judges, justices—including the eventual Chief Justice Taft himself[3]—and scholars have shaped the contours of antitrust law. One area of ongoing development is the organic rule of reason, which Taft played no small role in

[1] *See* William Howard Taft, President of the U.S., Third Annual Message to the Senate and House of Representatives (Dec. 5, 1911) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=29552 [perma.cc/ZK4K-EHB6]). At the time, the State of the Union consisted of written remarks delivered to Congress; it was not given in person. *See id.*

[2] *Id.*

[3] For example, in United States v. Gen. Elec., Co., 272 U.S. 476 (1926), Taft's opinion bore upon the interplay of antitrust and agency law.

originating.[4] The rule of reason was first articulated in *United States v. Addyston Pipe & Steel Co.*[5] in 1898 and played an important role, not long after, in the titanic cases of *Standard Oil of New Jersey v. United States*[6] and *United States v. American Tobacco Co.*[7] During Taft's presidency, however, the Supreme Court held that vertically imposed price restraints were per se illegal,[8] and, over the decades that followed, the rule of reason began to wither and was gradually replaced, in significant part, by a series of per se rules.

In the late 1970s, however, the rule of reason was reborn when the Supreme Court overruled a decision rendered only ten years earlier.[9] That renaissance evolved in the ensuing decades into a clear focus on interbrand competition and a directive to capture the full effects of vertical restraints on competition in the relevant market.[10] In 2007, the Court held that even vertical minimum price restraints should be evaluated under the rule of reason.[11]

The most recent development in the application of the rule of reason to vertical restraints involved two-sided

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[4] For a more detailed summary of the rule of reason, and William Howard Taft's place in its development, please see William H. Rooney & Timothy G. Fleming, *Introduction: William Howard Taft, The Origin of the Rule of Reason, and the* Actavis *Challenge*, 2018 COLUM. BUS. L. REV. 1 (2018).

[5] *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 291–93 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

[6] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66–67 (1911).

[7] *See* United States v. Am. Tobacco Co., 221 U.S. 106, 178–79 (1911).

[8] *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 406 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[9] *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977) (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

[10] *See* State Oil Co. v. Khan, 522 U.S. 3, 15 (1997).

[11] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

transactional platforms,[12] which are becoming increasingly common in the internet age. The transactional platform reviewed by the Court, however, arose in the "old-school" world of plastic credit cards and resulted in the landmark decision of *Ohio v. American Express Co.*[13] There, the Court maintained its focus on interbrand competition and aggregate competitive impact by reviewing the analytical framework within which the case had been decided by the district court: the definition of the relevant market and the unit of output that serves as a barometer for competition in that market.[14]

The Court held that the relevant market in which to assess a vertical restraint that is ancillary to a transactional platform should consist of the transactions that are consummated by the platform.[15] The restraint—whether on merchants or on cardholders—should be assessed by its impact on the volume and price of the relevant output, i.e. the transactions consummated by the platform and those by competing platforms.[16]

The Court then reviewed—through the newly defined legal framework—the evidence that had been submitted in the case and concluded that the plaintiffs had not met their burden of demonstrating a reduction of output or increase in price of the relevant credit-card transactions.[17] The decision marked a further step in the evolution of the organic rule of reason in the complex and dynamic competitive conditions that are typical of the modern economy.

[12] In a two-sided platform, a business "provide[s] a common (real or virtual) meeting place and . . . facilitate[s] interactions between members of . . . two distinct customer groups." David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 667, 667 (2008). In two-sided transactional platforms, as discussed in this Article, those interactions consist of commercial transactions, and a platform cannot make a sale to one side without simultaneously selling to the other. *See* Ohio v. Am. Express Co., 138 S. Ct 2274, 2280 (2018).

[13] *Am. Express Co*, 138 S. Ct 2274 (2018).

[14] *See id.* at 2286–87.

[15] *Id.* at 2285–86.

[16] *Id.* at 2286.

[17] *Id.* at 2289–90.

II. *DR. MILES* AND THE AGE OF PER SE ILLEGALITY

During President Taft's term, the Supreme Court authored several crucial antitrust opinions. One of them, *Dr. Miles Medical Co. v. John D. Park & Sons Co.* ("*Dr. Miles*"),[18] would prove especially controversial. Judge and antitrust scholar Robert Bork would later refer to one paragraph in the decision as a "decisive misstep that has controlled a whole body of law."[19] In *Dr. Miles*, a medicine company's agreements with "jobbers and wholesale druggists" set the price of the drugs not only for sales to those jobbers and wholesale druggists, "but also the wholesale and retail prices."[20] The company, Dr. Miles Medical Co. ("Dr. Miles"), sued a wholesale drug business for acquiring Dr. Miles's medicines and selling them at less than the price Dr. Miles had set.[21]

The Supreme Court, affirming a lower court's dismissal, found that the resale price-setting itself was illegal. Citing to principles of contract law, the Court found a lack of support for the proposition that a manufacturer "may impose upon purchasers every sort of restriction." To wit: "[A] general restraint upon alienation is ordinarily invalid."[22]

The Court found that, in restricting trade through those agreements, Dr. Miles could "fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other."[23] Thus, ignoring any difference in horizontal and vertical restraints, the Court concluded that

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[18] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[19] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 32 (2d ed. 1993).

[20] *Dr. Miles*, 220 U.S. at 374.

[21] *Id.* at 382.

[22] *Id.* at 404.

[23] *Id.* at 408.

"[t]he complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."[24]

Professor Bork admired Taft's antitrust jurisprudence[25] but had no such fondness for the *Dr. Miles* opinion. He asserted that the opinion did not clarify "whether the arrangement was truly vertical . . . or the result of pressure upward from a horizontal agreement among the resellers."[26] Bork argued that Justice Hughes's opinion in *Dr. Miles* suffered from an error: The "implausible assumption that a manufacturer's interest in eliminating price rivalry among its resellers must have the same motives and consequences as the interest of resellers in forming a cartel."[27] Bork, however, believed that "Dr. Miles, unless it was being coerced by a reseller cartel, could have had no interest in creating a monopoly profit for its resellers at its own expense."[28] The per se rule, Bork argued, was "created on an erroneous economic assumption."[29]

The adoption of a per se rule in *Dr. Miles* foreshadowed a general decline in courts' use of the rule of reason. For decades, "the rule of reason [was] almost completely replaced by a comprehensive network of per se rules."[30] For example, in *United States v. Arnold, Schwinn & Co.* ("*Schwinn*"),[31] the Court held that vertically imposed "territorial restrictions upon resale" of goods, as well as "restrictions of outlets with which the distributors may deal and . . . restraints upon retailers to whom the goods are sold[,]" were per se Sherman

[24] *Id.* at 409.

[25] *See* BORK, *supra* note 19, at 26–30.

[26] *Id.* at 33.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 337 (2000).

[31] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

Act violations.[32] "Under the Sherman Act," the Court found, "it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."[33]

The mills continued to grind, however, and a decade after *Schwinn*, a sea change in antitrust jurisprudence arrived.

III. *GTE SYLVANIA* AND THE NEW FOCUS ON INTERBRAND COMPETITION

While the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.* ("*GTE Sylvania*") purported to "return" to the state of law prior to the aberration that was *Schwinn*,[34] Timothy Muris, former Federal Trade Commission ("FTC") Chair and current George Mason University Foundation Professor of Law, has characterized the opinion as "a stark departure from prior law."[35] The *GTE Sylvania* Court, according to Muris, "abandoned the . . . effort to broaden per se rules . . . abandoned noneconomic goals, such as dealer autonomy, and clearly grounded antitrust analysis upon the economic impact of restraints on consumers . . . . [T]he Court made clear that . . . restraints must be judged on 'demonstrable economic effect.'"[36]

By turning the focus squarely onto economic effects, the Court paved the way for subsequent effects-driven rule of reason analysis. The idiosyncratic contours of the watershed *GTE Sylvania* opinion warrant some exploration.

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[32] *Id.* at 379.

[33] *Id.*

[34] *GTE Sylvania*, 433 U.S. at 59.

[35] Timothy J. Muris, GTE Sylvania *and the Empirical Foundations of Antitrust*, 68 ANTITRUST L.J. 899, 902 (2001).

[36] *Id.*

A. Background and Lower Court Decisions

GTE Sylvania Inc. ("Sylvania") manufactured and sold television sets.[37] Around fifteen years prior to the Supreme Court decision, Sylvania shifted its sales strategy and began "sell[ing] its televisions directly to a smaller and more select group of franchised retailers."[38] With the "hope of attracting the more aggressive and competent retailers thought necessary to the improvement of the company's market position[,]" Sylvania "limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised."[39] This model allowed Sylvania to increase its market share.[40]

In 1965, Sylvania became embroiled in a dispute with one of its franchisees, Continental T.V., Inc. ("Continental"), after Sylvania permitted one of Continental's rivals to sell Sylvania televisions near a Continental franchise.[41] Continental protested the new franchise, cancelled a Sylvania order, and placed an order with a Sylvania rival.[42] Continental eventually announced a plan to open a store in Sacramento and sell Sylvania products there, despite Sylvania's withholding permission.[43] The dispute spiraled and soon led to litigation in which, in cross-claims, Continental accused Sylvania of violating section 1 "of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations."[44]

After a trial, the district court instructed the jury that, if it found Sylvania had entered into an agreement "with one or more of its dealers pursuant to which Sylvania exercised

37 *See GTE Sylvania*, 433 U.S. at 38.

38 *Id.*

39 *Id.*

40 *See id.* at 38–39.

41 *See id.* at 39.

42 *See id.*

43 *See id.*

44 *Id.* at 40.

dominion or control over the products sold to the dealer . . . you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise" to be a Sherman Act violation.[45] The jury so found, but the Ninth Circuit reversed.[46] While bound by *Schwinn*, the Circuit Court found "that Sylvania's location restriction had less potential for competitive harm than the restrictions invalidated in *Schwinn* and thus should be judged under the 'rule of reason' rather than the per se rule stated in *Schwinn*."[47]

B. The Supreme Court's About-Face

The Supreme Court announced it was "unable to find a principled basis for distinguishing" the earlier *Schwinn* decision.[48] The Court continued: "In intent and competitive impact, the retail-customer restriction [i]n *Schwinn* is indistinguishable from the location restriction in the present case. In both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired."[49] The Court then turned to whether the per se rule found in *Schwinn* was justified, and, remarkably, found that it was not.

Marking the beginning of what would become a decades-long erosion of the breadth of the per se rule, the Court observed that "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."[50] Agreements were per se illegal if they had a "pernicious effect on competition and lack . . . any redeeming virtue."[51] Only four years prior to *Schwinn*, the Court found that the rule of reason was appropriate for vertical restraints due to "uncertainty" as to whether vertical restraints met the

45 *Id.* at 40–41 (internal quotations omitted).

46 *See id.* at 41.

47 *Id.*

48 *Id.* at 46.

49 *Id.*

50 *Id.* at 49–50.

51 *Id.* at 50 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

per se standard, and the *Schwinn* court "announced its sweeping per se rule without even a reference to [*Northern Pacific Railway Co. v. United States*] and with no explanation of its sudden change in position."[52] The *GTE Sylvania* court therefore set out to undertake such an analysis.

Justice Powell began by stating that "[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition[,]" and that "the Court in *Schwinn* did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit."[53] Instead, the *Schwinn* court distinguished between agreements where title to the goods passed and agreements where title did not pass; in the former circumstance a per se rule applied, while the rule of reason applied in the latter.[54] The Court found "no analytical support" for the distinction in the *Schwinn* opinion, or even an "assertion . . . that the competitive impact of vertical restrictions is significantly affected by the form of the transaction."[55]

C. A New Focus on Interbrand Competition

The *GTE Sylvania* Court examined the intrabrand and interbrand effects of the restraints at issue. "Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers[,]" the Court noted, and further stated that "[l]ocation restrictions have this effect because of practical constraints on the effective marketing area of retail outlets."[56] However, the Court found that, "[a]lthough intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be

[52] *Id.* at 50–51 (citing White Motor Co. v. United States, 372 U.S. 253 (1963)).

[53] *Id.* at 51–52.

[54] *See id.* at 52.

[55] *Id.* at 54.

[56] *Id.*

limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers."[57] In contrast to *Schwinn*, the impact did not, the Court found, depend on whether the title to the goods passed or not.[58]

The Court then turned to the procompetitive benefits of the vertical restrictions. "Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."[59] Justice Powell wrote that "new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer[,]" while "[e]stablished manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products."[60] Furthermore, as the Court noted, some economists "argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products."[61]

The Court rejected the distinction between "sale and nonsale transactions" that the *Schwinn* Court applied.[62] Turning to vertical restraints generally, the Court found that they were "widely used in our free market economy[,]" that "there is substantial scholarly and judicial authority supporting their economic utility[,]" and that "[t]here is relatively little authority to the contrary."[63] The Court therefore overruled *Schwinn* and "return[ed] to the rule of reason that governed vertical restrictions prior to Schwinn."[64]

57 *Id.*
58 *See id.*
59 *Id.*
60 *Id.* at 55.
61 *Id.* at 56.
62 *Id.* at 57.
63 *Id.* at 57–58.
64 *Id.* at 58–59.

D. Scholars' Assessment

Writing in the near-immediate aftermath of *GTE Sylvania*, Professor Bork argued that the opinion "displays a far higher degree of economic sophistication" than did prior decisions, and offered an "approach that, generally applied, is capable of making antitrust a rational, proconsumer policy once more."[65] He noted that both the majority and concurrence "gave weight to business efficiency in framing their respective rules" and bemoaned the fact that "[f]or years the Court has denigrated business efficiency[.]"[66] Professor Bork then expressed a hope that "[*GTE*] *Sylvania* may presage a general reformation of a policy gone astray."[67]

Writing at a greater remove than Professor Bork, Professor Muris called *GTE Sylvania* a "milestone" that "firmly grounded antitrust on economic analysis."[68] Muris predicted that, in the wake of *GTE Sylvania*, subsequent "controversies" in antitrust would be decided "based upon empirical evidence."[69]

E. Expanding the Rule of Reason to Vertical Maximum Price Restraints

Only two decades after *GTE Sylvania* was decided, the Supreme Court jettisoned another vertical per se rule.[70] In the 1968 decision of *Albrecht v. Herald Co.*, decided in the immediate wake of the *Schwinn* decision and the increasing momentum that *Schwinn* exerted in favor of per se liability, the Supreme Court affirmed the application of the per se rule to vertical maximum price restraints.[71]

By 1997, however, a reconsideration of that rule was approaching. In *Kahn v. State Oil*, the Seventh Circuit

65 BORK, *supra* note 19, at 287.

66 *Id.*

67 *Id.*

68 Muris, *supra* note 35, at 911.

69 *Id.* at 912.

70 State Oil Co. v. Kahn, 522 U.S. 3, 13–18 (1997).

71 390 U.S. 145 (1968), *overruled by* State Oil Co. v. Kahn, 522 U.S. 3 (1997).

determined that "[the defendant had] engaged in [vertical] maximum price fixing,"[72] which, in light of *Albrecht*, left the Seventh Circuit little room to maneuver. Writing for the court, Judge Richard Posner described *Albrecht* as "unsound when decided" and "inconsistent with later Supreme Court decisions."[73] Among those decisions was *GTE Sylvania*.[74]

Judge Posner further opined that "[*Albrecht*] should be overruled. Someday, we expect it will be."[75] In the meantime, however, the Seventh Circuit applied the per se rule and found for the plaintiff. State Oil sought certiorari, and the Supreme Court accepted Judge Posner's invitation to reconsider *Albrecht*.[76]

The *State Oil* Court noted that its prior decisions "have hinted that the analytical underpinnings of *Albrecht* were substantially weakened by *GTE Sylvania*."[77] Informed by the "general view that the primary purpose of the antitrust laws is to protect interbrand competition," the Court concluded that "it [was] difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation."[78]

"After reconsidering *Albrecht*'s rationale and the substantial criticism the decision has received," the Court found "insufficient economic justification for *per se* invalidation of vertical maximum price fixing."[79] With that 1997 holding, the Court moved another category of vertical restraints into the realm of the rule of reason where the restraint would be assessed according to its aggregate impact on interbrand competition.

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72 Kahn v. State Oil Co., 93 F.3d 1358, 1361 (7th Cir. 1996), *rev'd*, 522 U.S. 3 (1997).

73 *Id.* at 1363.

74 *Id.* (discussing *GTE Sylvania*'s overruling of *Schwinn*).

75 *Id.*

76 State Oil Co. v. Khan, 519 U.S. 1107 (1997) (granting cert.).

77 State Oil Co. v. Kahn, 522 U.S. 3, 14 (1997).

78 *Id.* at 15.

79 *Id.* at 18.

IV. *LEEGIN* AND THE ELIMINATION OF PER SE ILLEGALITY FOR VERTICAL MINIMUM PRICE RESTRAINTS

The increased focus on economic effects and interbrand competition that *State Oil* reflected led ten years later to the Court's overruling per se liability for vertical minimum price restraints, nearly a century after that rule was adopted in *Dr. Miles*. In 2007, the Supreme Court, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* ("*Leegin*"),[80] noted that prior courts had "abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors" and that "[r]espected economic analysts . . . [have] conclude[d] that vertical [minimum] price restraints can have procompetitive effects."[81] The restraints should therefore "be judged by the rule of reason."[82]

A. The Pricing Dispute

Leegin, a leather goods manufacturer, sold "a variety of women's fashion accessories" under its Brighton brand.[83] The brand was mostly sold to "smaller retailers," as Leegin's president believed such retailers "treat customers better" than larger retailers.[84] PSKS, Inc. operated Kay's Kloset, a women's apparel store in Texas; "Brighton was the store's most important brand[.]"[85]

In 1997, Leegin began refusing to "sell to retailers that discounted Brighton goods below suggested prices."[86] Leegin claimed it "adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that

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

[81] *Id.* at 882.

[82] *Id.*

[83] *Id.*

[84] *See id.*

[85] *Id.* at 882–83.

[86] *Id.* at 883.

discounting harmed Brighton's brand image and reputation."[87]

Leegin had another initiative in which stores received certain benefits in exchange for, among other things, promising "to sell at Leegin's suggested prices."[88] Kay's Kloset was such a store, but was excluded from the initiative "[a]fter a Leegin employee visited the store and found it unattractive[.]"[89] Kay's Kloset began selling Brighton goods at discounted prices, claiming it needed to do so to compete with retailers who were undercutting it.[90] Eventually, after a request to end the discounting was rebuffed, Leegin stopped selling to Kay's Kloset.[91]

PSKS sued Leegin, arguing that the prohibition on discounts and the associated incentive program amounted to price-fixing.[92] The district court excluded expert testimony on the procompetitive benefits of the policy, "relying on the *per se* rule established by *Dr. Miles*."[93] The Fifth Circuit affirmed.[94]

B. The Supreme Court's Review

The *Leegin* Court attacked the rationale underlying *Dr. Miles*. *Leegin* criticized the *Dr. Miles* Court for "relying on the common-law rule against restraints on alienation" and thereby "justif[ying] its decision based on 'formalistic' legal doctrine rather than 'demonstrable economic effect.'"[95] In a similar vein, *Leegin* observed that the *Dr. Miles* Court "relied on a treatise published in 1628 [for the rule against restraints on alienation], but failed to discuss in detail the business

87 *See id.*

88 *Id.*

89 *Id.* at 883–84.

90 *Id.* at 884.

91 *Id.*

92 *See id.*

93 *Id.*

94 *Id.* at 884–85.

95 *Id.* at 887–88 (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977)).

reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints."[96]

The Court also noted that cases subsequent to *Dr. Miles* "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones."[97] The Court therefore examined, "in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and . . . whether the *per se* rule is nonetheless appropriate."[98]

The Court found that "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[99] In considering those justifications, the Court found that "[a] single manufacturer's use of vertical price restraints tends to eliminate *intrabrand* price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival [interbrand] manufacturers."[100] Vertical price restraints also have the "potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between."[101]

The Court further found that, "[a]bsent vertical price restraints[,] . . . discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate."[102] In addition, the restraints at issue could "facilitat[e] market entry for new firms and brands" and "encourag[e] retailer services that would not be provided even absent free riding."[103] The Court, however, did accept that vertical price restraints could facilitate either wholesaler or retailer cartels, or be "abused

[96] *Id.* at 888.
[97] *Id.*
[98] *Id.* at 889.
[99] *Id.*
[100] *Id.* at 890 (emphasis added).
[101] *Id.*
[102] *Id.* (citing Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977)).
[103] *Id.* at 891–92.

by a powerful manufacturer or retailer."[104] Nonetheless, the Court found that, because the effect of the restraints would not "always or almost always" have an anticompetitive effect, and because a per se rule would "proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation."[105]

The Court rejected PSKS's argument that "vertical price restraints should be *per s*e unlawful because of the administrative convenience of *per se* rules," and instead found that a reduction in costs, on its own, was insufficient to justify the rule.[106] PSKS also noted that the restraint could "lead to higher prices"; the Court found that, in prior cases, vertical restraints had been evaluated under the rule of reason "even though prices can be increased in the course of promoting procompetitive effects."[107] The Court also found that PSKS had failed to account for ways in which the restraint could lead to lower prices.[108] After a comprehensive discussion, the Court found the stare decisis arguments unpersuasive, overruled *Dr. Miles*, and held "[v]ertical price restraints are to be judged according to the rule of reason."[109]

V. THE *AMEX* DECISION

With the rule of reason firmly established as the standard for evaluating vertical restraints, the Supreme Court confronted the competitive complexity typical of our modern economy in *Ohio v. American Express Co*. ("*Amex*").[110] The case involved the "platform" of credit cards and the dynamic efforts of a credit-card network—here, American Express—to

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104 *Id.* at 892–93.
105 *Id.* at 894 (internal quotations omitted).
106 *Id.* at 894–95.
107 *Id.* at 895–96.
108 *See id.* at 896.
109 *Id.* at 907.
110 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

attract merchants and cardholders to maximize credit-card transactions from which American Express collected a fee.[111]

The U.S. District Court for the Eastern District of New York characterized the credit-card "network services" ecosystem as a "two-sided platform" catering to cardholders on one side and merchants on the other.[112] The district court found that certain antisteering[113] provisions, or nondiscrimination provisions ("NDPs"), restricted interbrand competition in the "network services market," in which credit cards compete to sell "acceptance services" utilized by merchants.[114] The district court held that "[p]roof of anticompetitive harm to merchants, the primary consumers of American Express's network services, [was] sufficient to discharge Plaintiffs' burden in this case[,]" although it also found harm to cardholders.[115]

The Second Circuit Court of Appeals reversed on the ground that the district court had taken too narrow a view of the relevant market and that the markets for consumer services and merchant services needed to be considered as part of a single, "two-sided" transactional market.[116] The Second Circuit held that "the Plaintiffs' initial burden was to show that the NDPs made *all* Amex consumers on both sides

111 *See id.* at 2280–83.

112 United States v. Am. Express Co., 88 F. Supp. 3d 143, 150–51 (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).

113 The district court and Second Circuit used the styling "anti-steering." *See, e.g.*, *Am. Express Co.*, 88 F. Supp. 3d at 149 (stating that the defendants chose to litigate "[p]laintiffs' challenge to their anti-steering rules[.]"); United States v. Am. Express Co., 838 F.3d 179, 192 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) ("Plaintiffs alleged in their complaint that absent the anti-steering provisions . . . ."). This Article omits the hyphen in "anti-steering" in accordance with the Supreme Court's styling. *See Am. Express Co.*, 138 S. Ct at 2280 ("Amex requires the merchant to agree to an antisteering contractual provision.").

114 *United States v. Am. Express Co.*, 88 F. Supp. 3d at 151.

115 *Id.* at 208.

116 *Am. Express Co.*, 838 F.3d at 197–200.

of the platform—i.e., both merchants and cardholders—worse off overall" and that Plaintiffs failed to meet that burden.[117]

The Supreme Court affirmed, validating the concept of a two-sided transactional market and retaining the focus under the rule of reason on interbrand competition and aggregate output.[118] The Court found that "Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions."[119]

A. The District Court Decision

1. Background: The Parties, the Platform, and the Restraints

The United States and seventeen states (collectively, "Plaintiffs" or the "Government") brought suit against various credit-card companies challenging certain restraints found in agreements with merchants.[120] All credit-card companies other than American Express Company ("American Express" or "Amex") and American Express Travel Related Services Company (collectively, "Defendants") settled.[121]

The district court began its analysis by determining whether to characterize the platform for credit-card transactions as single-sided or multi-sided.[122] The district court accepted that credit-card transactions occurred on a "two-sided platform" but found that the platform consisted of "two *separate*, yet deeply interrelated, markets: a market for card issuance, in which Amex and Discover compete with thousands of Visa- and MasterCard-issuing banks; and a network services market, in which Visa, MasterCard, Amex,

117 *Id.* at 205–06.

118 *See Am. Express Co.*, 138 S. Ct. at 2289.

119 *Id.* at 2290.

120 *Am. Express Co.*, 88 F. Supp. 3d at 149–50.

121 *Id.* at 149.

122 *See id.* at 154 (stating that "[i]n a two-sided platform, a single firm or collection of firms sells different products or services to two separate yet interrelated groups of customers who, in turn, rely on the platform to intermediate some type of interaction between them").

and Discover compete to sell acceptance services."[123] Despite the interaction of cardholders and merchants in the "network services" market, the district court maintained that cardholders and merchants were participants in distinct markets.[124]

The district court did, however, acknowledge the interrelationship of the markets, saying: "American Express . . . provides cardholders with card-payment services and merchants with card-acceptance services in order to facilitate transactions between the two."[125] American Express "provides these services simultaneously; for every unit of payment services sold to the cardholder at the moment of purchase, a matching service is sold to the merchant in order to execute the transaction, and vice versa."[126]

At issue were provisions in American Express's "standard card acceptance agreements" with merchants.[127] The provisions prevented merchants from:

> offering discounts or other monetary incentives to customers who pay with a particular type of card, offering non-monetary benefits for using a lower-cost card, displaying the logo of one brand more prominently than others, expressing the merchants' preference as to which type of card it would rather accept, or posting each card's cost of acceptance and letting customers make their own decisions as to which mode of payment they prefer.[128]

The court found that "[i]n practice, the NDPs operate to block Amex-accepting merchants from encouraging their customers to use any credit or charge card other than an American Express card, even where that card is less expensive for the merchant to accept."[129]

123 *Id.* at 151 (emphasis added).
124 *Id.* at 150–51.
125 *Id.* at 155.
126 *Id.*
127 *Id.* at 162.
128 *Id.* at 165.
129 *Id.*

The district court described the NDPs as *vertical* restraints.[130] The line of vertical cases reviewed above and their principles regarding interbrand competition and aggregate economic effects were thus relevant to the restraints at issue.

The district court determined that, as "non-price vertical restraints between firms at different levels of production[,]" the NDPs were "properly analyzed under the rule of reason."[131] The court distinguished the restraints from "most vertical distribution agreements between manufacturers/suppliers or dealers/distributors," explicitly citing to *GTE Sylvania* and *Leegin*, in that they "d[id] not purport to restrain intrabrand competition in favor of greater interbrand competition."[132] Rather, "Amex's anti-steering rules admittedly have the primary effect of restraining one form of interbrand competition among the [general purpose credit and charge] card networks in favor of alternative forms of interbrand competition."[133]

2. Defining the Market

The district court held that "the relevant product market for purposes of its analysis of Amex's NDPs is the market for general purpose credit and charge card network services."[134] American Express "urged the court . . . to define the relevant product market in terms of 'transactions,' rather than network services."[135] Such a definition, according to the court, would "take[] the concept of two-sidedness too far."[136] The opinion found:

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130 *Id.* at 167 (characterizing the restraints as non-price vertical restraints); *id.* at 228 n.52 (noting American Express described the restraints as vertical). The court gave no indication that the government challenged this characterization.

131 *Id.* at 167.

132 *Id.* at 168.

133 *Id.*

134 *Id.* at 174.

135 *Id.* at 172.

136 *Id.*

> Competition in the GPCC card industry occurs on at least two distinct yet interrelated levels: (1) at the card issuance level, where American Express and Discover compete against each other and against the thousands of Visa- and MasterCard-issuing banks; and (2) at the network services level, where Visa, MasterCard, American Express, and Discover compete.[137]

The court held that "[t]o conflate these separate avenues of competition into a single product market for 'transactions' that is coextensive with the platform itself, as Defendants encourage, would impermissibly and unnecessarily frustrate the court's analysis in this case."[138] Instead, the court held:

> The network services market is a distinct product market for purposes of antitrust analysis, and a firm's conduct therein may be separately scrutinized under the Sherman Act, provided the court recognizes and accounts for the fact that such conduct may indirectly affect competition at another level within the GPCC platform.[139]

3. Assessing Market Power

Having defined the market, the district court found that "American Express's percentage share of the network services market is compelling evidence of market power."[140] The court found that "the proper metric for assigning market shares among the four GPCC networks is the dollar value of the transactions facilitated on those networks."[141] On that unit of measurement, "American Express is the second largest GPCC card network," commanding a 26.4% market share, compared to a 45% share for Visa, a 23.3% share for MasterCard, and a 5.3% share for Discover.[142]

137 *Id.* at 172–73.
138 *Id.* at 173.
139 *Id.* at 173–74.
140 *Id.* at 188.
141 *Id.*
142 *Id.*

The court rejected other proposed "measures of a network's size, such as the number of cards in circulation, the breadth of [the network's] merchant acceptance network . . . and the total number of transactions[.]"[143] The court found that, while those measures would "affect [a] firm's ability to compete in a market characterized by network effects, charge volume is the most direct measure of output in this particular market, and is also the primary determinant of the remuneration networks receive from merchants in exchange for network services."[144] Notably, the output measure selected by the district court for market share calculation was similar to, or effectively the same as, the output measure (i.e, transaction-based) that the Second Circuit and Supreme Court used to assess competitive effects.

The court acknowledged that "Amex's market share alone likely *would not suffice* to prove market power by a preponderance of the evidence were it not for the amplifying effect of cardholder insistence."[145] According to the district court, merchants' ability "to resist potential anticompetitive behavior by Amex . . . is severely impeded by the segment of Amex's cardholder base who insist on paying with their Amex cards and who would shop elsewhere or spend less if unable to use their cards of choice."[146] While cardholder insistence derived from "a variety of sources," the most important was the "robust rewards programs offered by the network."[147] The court accepted merchant testimony that "[t]he foregone profits associated with losing Amex-insistent customers rendered dropping Amex commercially impractical."[148]

The court concluded that "American Express possesses sufficient market power in the general-purpose credit and charge card network services market to satisfy Plaintiffs'

[143] *Id.* at 189.
[144] *Id.*
[145] *Id.* at 191 (emphasis added).
[146] *Id.*
[147] *Id.*
[148] *Id.* at 192.

initial burden under the rule of reason."[149] Although cardholder insistence was integral to the district court's finding of market power, cardholder participation in credit-card transactions was not considered in the district court's competitive assessment.

4. The Competitive Assessment

According to the district court, Amex's "merchant restraints sever the essential link between the price and sales of network services by denying merchants the opportunity to influence their customers' payment decisions and thereby shift spending to less expensive cards."[150] The court further found that, "by disrupting the price-setting mechanism ordinarily present in competitive markets, the NDPs reduce American Express's incentive . . . to offer merchants lower discount rates and, as a result, they impede a significant avenue of horizontal interbrand competition in the network services market."[151]

The court concluded that "the challenged restraints have impaired the competitive process in the network services market, rendering low-price business models untenable, stunting innovation, and resulting in higher prices for merchants and their consumers."[152] The competitive-effects analysis focused on the prices charged to merchants and, indirectly, on the prices that merchants charged to their consumers. The district court did not consider the impact of the challenged restraints on the metric of output that the court used to assess market share and power, which was the value of transactions consummated by the credit-card networks.

149 *Id.* at 207.

150 *Id.*

151 *Id.* at 207–08.

152 *Id.* at 208.

5. No Competitive Justification

The district court was not persuaded by the procompetitive justifications with which Amex responded. Amex first "propose[d] that its [antisteering] rules are necessary to ensure its cardholders enjoy a frictionless and consistent point-of-sale experience when using their American Express cards—what the network terms 'welcome acceptance'—which it asserts is critical to the survival of Amex's differentiated business model."[153] Amex's argument effectively invoked the cardholder-insistence, amplifying factor that was central to the court's finding of Amex's market power: The NDPs were necessary to maximize Amex's completed transactions in competition with other cards (and cash) in the credit-card transactional market.

But the court noted that, "[t]o the extent Defendants maintain that the NDPs drive interbrand competition in the credit-card industry, they focus primarily on the interrelated card issuance market[,]"[154] thereby anticipating the focus of the Second Circuit and the Supreme Court. The district court found no support for the proposition that a restraint that "effectively blocks interbrand competition on price across an entire market may be justified . . . because the defendant firm would be less able to compete effectively in its absence."[155]

The court further found that the defense "would . . . require the court to balance the restraints' pro-competitive effect in a separate, though intertwined, antitrust market against their anticompetitive effect on the merchant side of the GPCC platform[.]"[156] The restraints "shift[ed] the bulk of interbrand competition in the credit and charge card industry to the cardholder side of the platform."[157] The court noted the general rule that "a restraint that causes anticompetitive

153 *Id.* at 225.
154 *Id.* at 227.
155 *Id.* at 227–28.
156 *Id.* at 229.
157 *Id.*

harm in one market may not be justified by greater competition in a different market."[158]

The district court noted that the Second Circuit had not explicitly decided if the rule "precludes jointly weighing the relative gains and losses to interbrand competition in two separate, yet interrelated, markets that together comprise a single two-sided platform."[159] However, even if effects in the two markets could be weighed against each other, "Defendants have failed to establish that the NDPs are reasonably necessary to robust competition on the cardholder side of the GPCC platform, or that any such gains offset the harm done in the network services market."[160] The court also found that American Express's concerns about the impact of removing the NDPs were "not supported by the evidentiary record."[161]

The district court rejected American Express's argument that the restraints "reduc[e] merchants' ability to 'free-ride' on the network's various investments in its merchant and cardholder value propositions."[162] The court, however, found that, "to the extent Defendants have identified potential avenues of free-riding foreclosed by its NDPs, the court finds that the competitive benefits of preventing these forms of merchant behavior do not offset the significantly more pervasive harms done to interbrand competition by the same restraints."[163]

In light of the above, the district court roundly condemned the NPDs as a violation of section 1 of the Sherman Act under the rule of reason. The stage was well-set for the Second Circuit and the Supreme Court to re-examine the application of the rule of reason to vertical restraints that are purportedly designed to maximize platform transactions and to introduce the next major development in rule of reason jurisprudence.

158 *Id.*
159 *Id.*
160 *Id.* at 229–30.
161 *Id.* at 230.
162 *Id.* at 234.
163 *Id.* at 235.

B. The Second Circuit Decision

The Second Circuit reversed, finding that "[t]he District Court's definition of the relevant market in this case is fatal to its conclusion[.]"[164] The court found that "analyzing the effect of Amex's vertical restraints on the market for network services while ignoring their effect on the market for general purpose cards []ignores the two markets' interdependence."[165] Further, "[s]eparating the two markets allows legitimate competitive activities in the market for general [purpose cards] to be penalized no matter how output-expanding such activities may be."[166]

The Second Circuit recast what the district court had seen as two markets into a single market consisting of completed credit-card transactions. The district court's treatment of the two sides of the platform as distinct markets was "error because the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants)."[167]

Turning to the question of Amex's market power, the Second Circuit addressed the district court's finding that American Express was able to impose price increases on merchants without attrition.[168] The Second Circuit's criticism of that finding was rooted in the two-sided output of the platform. According to the Second Circuit, the lower court "did not acknowledge that increases in merchant fees are a concomitant of a successful investment in creating output and value. In order to remain competitive on the cardholder side of the platform, a payment-card network might need to

164 United States v. Am. Express Co., 838 F.3d 179, 196 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

165 *Id.* at 198.

166 *Id.*

167 *See id.* at 200.

168 *See id.* at 201.

increase cardholder rewards—or, in other words, cut prices to cardholders."[169]

The Second Circuit held that, if the network did not increase cardholder rewards, thus ensuring cardholder demand, "merchant attrition likely would continue increasing as a result of the reduction in cardholders."[170] "Over time," the court found, "the reduction in transactions could make the hypothetical price increase unprofitable."[171]

The Second Circuit interpreted the phenomenon of "cardholder insistence" differently from the district court.[172] According to the Second Circuit, cardholder insistence resulted "not from market power, but from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards."[173] The court reasoned that cardholder insistence was the result of cardholder rewards, which were the equivalent of a price decrease to cardholders: "A firm that can attract customer loyalty only by *reducing* its prices does not have the power to *increase* prices unilaterally."[174] Citing the district court's finding that Amex's market share would decline without the rewards, the Second Circuit observed: "That Amex might not enjoy market power without continuing investment in cardholder benefits indicates, if anything, a *lack* of market power; evidence showing that Amex must compete on price in order to attract consumers does not show that Amex has the power to increase prices to supracompetitive levels."[175]

The Second Circuit further found that the lower court's "erroneous market definition caused its anticompetitive effects finding to come up short, for it failed to consider the two-sided net price accounting for the effects of the NDPs on

[169] *Id.* at 202.
[170] *Id.*
[171] *Id.*
[172] *See id.* at 202–03.
[173] *Id.* at 202.
[174] *Id.* at 203.
[175] *Id.*

both merchants and cardholders."[176] For example, "revenue earned from merchant fees funds cardholder benefits, and cardholder benefits in turn attract cardholders. A reduction in revenue that Amex earns from merchant fees may decrease the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment-card networks on the cardholder side[.]"[177]

The Second Circuit found that the Department of Justice could have met its burden by showing that "cardholders engaged in fewer credit-card transactions (*i.e.*, reduced output), that card services were worse than they might otherwise have been (*i.e.*, decreased quality), or that Amex's pricing was set above competitive levels within the credit-card industry (*i.e.*, supracompetitive pricing)."[178] According to the Second Circuit, however, "the evidence presented at trial suggested that industry-wide transaction volume has substantially *increased* and card services have significantly *improved* in quality."[179] The court found that the "evidence of increased output is not only indicative of a thriving market for credit-card services but is also consistent with evidence that Amex's differentiated closed-loop model, supported by its NDPs, has *increased* rather than *decreased* competition overall within the credit-card industry."[180]

The Second Circuit concluded that "[p]laintiffs bore the burden in this case to prove net harm to Amex consumers as a whole—that is, both cardholders and merchants—by showing that Amex's nondiscriminatory provisions have reduced the quality or quantity of credit-card purchases[,]" and that they failed to do so.[181] The Second Circuit accordingly reversed the district court's decision.[182]

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[176] *Id.* at 204.
[177] *Id.* at 205.
[178] *Id.* at 205–06.
[179] *Id.* at 206.
[180] *Id.*
[181] *See id.* at 206–07.
[182] *Id.* at 207.

The Department of Justice did not seek certiorari. The case thus might have ended with the Second Circuit's decision, but eleven determined and intrepid co-plaintiff states, led by Ohio—the very state in which Judge William Howard Taft penned the seminal *Addyston Pipe* decision—[183]sought and obtained a writ of certiorari from the Supreme Court.[184] A case of many twists and turns was about to take its final turn, this time into the history of rule of reason jurisprudence.

C. The Supreme Court Decision

The Supreme Court affirmed the Second Circuit.[185] The line of cases from *GTE Sylvania* to *Leegin* curtailed the use of the per se rule in assessing vertical restraints, and *Ohio v. American Express* expanded the rule of reason inquiry to vertical restraints that are ancillary to a two-sided transactional platform. Impact on interbrand competition can be assessed only by reviewing the effect on platform output: consummated transactions.[186]

1. The Definition of the Market

The Court began its analysis by identifying that the "interaction" between cardholders and merchants occurs on a "two-sided platform known as a transaction platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other."[187] The Court reasoned that "[o]nly a company that had both cardholders and merchants willing

[183] The United States Court of Appeals for the Sixth Circuit sat only in Cincinnati, Ohio at its inception and continues to do so today. M. Neil Reed, Tom Vanderloo & Stephanie Woebkenberg, *A History of the United States Court of Appeals for the Sixth Circuit*, FED. LAWYER, Aug. 2016, at 34, 35.

[184] *See* Petition for Writ of Certiorari, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1455); Ohio v. Am. Express Co., 138 S. Ct. 355 (2017) (granting cert.).

[185] *Am. Express Co.*, 138 S. Ct. at 2290.

[186] *See id.* at 2287.

[187] *Id.* at 2280 (citations omitted).

to use its network could sell transactions and compete in the credit-card market."[188]

As a result, credit-card networks are vulnerable to "[i]ndirect network effects," which "exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate."[189] As such, a credit-card network with many participating merchants is more valuable to cardholders than a network with a few participating merchants, and vice-versa.

"Indirect network effects" differ from "direct network effects," the latter of which operate on the same "side" of a platform. For example, social media platforms exhibit strong direct network effects: the more members of a social media network, the more valuable the network becomes to each member. In contrast, indirect network effects operate across both "sides" of the platform—between cardholders on one side and merchants on the other.

Because "two-sided transaction platforms exhibit . . . pronounced indirect network effects and interconnected pricing and demand[,]" the Court found that such platforms are "better understood" as having only one product: "transactions."[190] Under the Supreme Court's reasoning, "[m]erchant services and cardholder services are both inputs to this single product."[191] The Court found it "[t]elling[]" that "credit cards determine their market share by measuring the volume of transactions they have sold."[192]

The district court erred in focusing on increased merchant fees because "the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone."[193] Echoing the Second Circuit, the Court held that, to demonstrate anticompetitive effects,

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188 *Id.* at 2287.

189 *Id.* at 2280.

190 *Id.* at 2286.

191 *Id.* at 2286 n.8.

192 *Id.* at 2286.

193 *Id.* at 2287.

"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."[194]

While the Court continued to speak of two-sided platforms or markets, the Court seems to have defined a "single" and (traditionally straightforward) market for credit-card transactions. The district court had examined transactions as a whole, expressed in the form of the dollar volume, when it calculated market shares and focused on "cardholder insistence" in finding market power.[195] In defining markets and evaluating competitive effects, however, the district court restricted its focus to competitive dynamics among merchants.[196] The Supreme Court, following the Second Circuit, redefined the relevant market to consist of completed credit-card transactions and refocused the competitive assessment accordingly.

2. The Competitive Assessment

The Supreme Court found that "Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants."[197] Plaintiffs attempted to show that the price of transactions was increasing, based on the fact that the increase in merchant fees from 2005 to 2010 was "not entirely spent on cardholder rewards."[198] The Court, however, found such evidence unpersuasive in light of evidence of increased output: "The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%."[199] As a

194 *Id.*
195 *See supra* Section V.A.3.
196 *See supra* Section V.A.4.
197 *Id.* at 2288.
198 *Id.*
199 *Id.*

result, the increase in prices was "equally consistent with growing product demand" as with market power.[200]

The Court also noted that the increased output accompanied an increase in qualitative interbrand competition:

> Amex's business model spurred Visa and MasterCard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served. Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%.[201]

Further, the Court observed that Amex's competitors utilized Amex's higher merchant fees to their advantage by "charging lower merchant fees" and "achiev[ing] broader merchant acceptance," which increases the cards' value to consumers.[202]

The Court also found that there was "nothing inherently anticompetitive" about the NDPs.[203] The provisions "stem negative externalities," such as a lack of "welcome acceptance," which discourage cardholders from using Amex, thus discouraging investments in cardholder rewards.[204] In addition, other card companies could "compet[e] against Amex by offering lower merchant fees or promoting their broader merchant acceptance."[205] The Court concluded that "Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions."[206]

200 *See id.* (internal quotation marks and citation ommitted).
201 *Id.* at 2289.
202 *See id.*
203 *Id.*
204 *See id.*
205 *Id.* at 2290.
206 *Id.*

With that, the Court affirmed the Second Circuit and introduced to rule of reason jurisprudence transactional markets in two-sided platforms with indirect network effects.

VI. CONCLUSION

Following *Ohio v. American Express*, and further to *GTE Sylvania* and *Leegin*, courts will be required to assess the impact on transactions of vertical restraints that are ancillary to the operation of two-sided platforms with indirect network effects. Whether the *Amex* holding will have a broader application to multi-sided platforms remains to be seen.

For now, *Amex* has provided the rule of reason with a new dimension that can be tailored, in the Court's earlier and much-quoted language, to be "meet for the case" by accounting for a restraint's "circumstances, details, and logic."[207]

[207] Cal. Dental Ass'n. v. FTC, 526 U.S. 756, 781 (1999).