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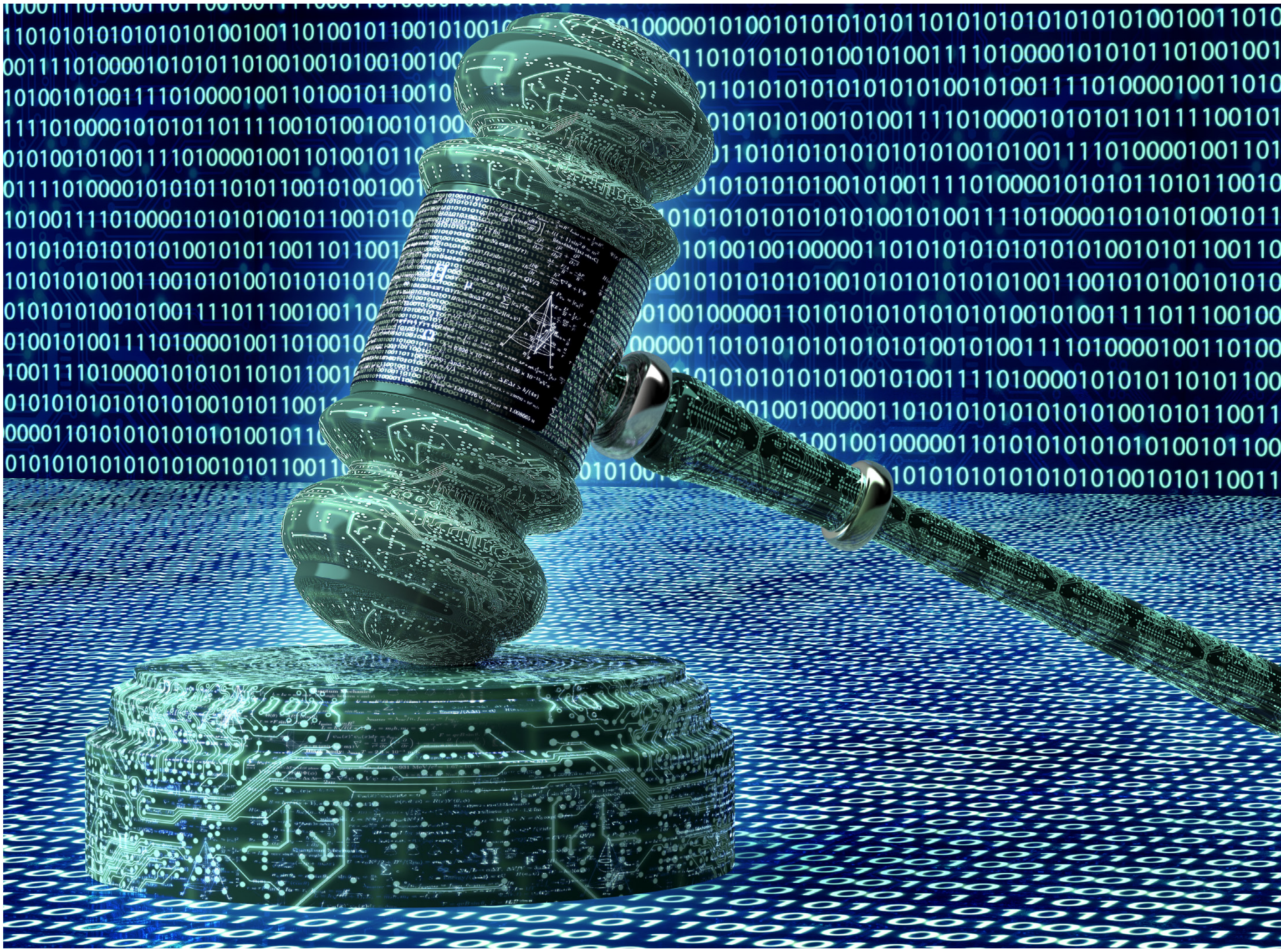

Judging Big Tech

Insights on applying U.S. antitrust laws to digital markets

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Reconsidering the 'rule' against cross-market justifications in conduct cases

By Erika M. Douglas, Temple University Beasley School of Law

Overview

Judge Milan Smith Jr. of the Court of Appeals for the 9th Circuit worried recently that antitrust law is experiencing "an unwitting expansion of the Rule of Reason inquiry."[1] His concern is over "cross-market" or "out-of-market" justifications for anticompetitive conduct. In rule-of-reason cases, the plaintiff bears the initial burden and must demonstrate that the defendant's conduct has significant anti-competitive effects in a relevant antitrust market.[2] If met, the defendant may then avoid liability by showing that its conduct, in fact, has legitimate, procompetitive effects.[3] Judge Smith noticed that defendants were avoiding liability by proving such procompetitive effects in *different* markets than where the plaintiff demonstrated the initial harm—a cross-market justification.[4]

In conduct cases, does the law require the defendant to show procompetitive effects in the same market where the plaintiff made its showing? Or will any market do? The answer has the power to change important case outcomes—including pending, high-stakes conduct cases against digital platform operators, such as Google Inc., Facebook Inc. (now Meta Platforms Inc.), and Apple Inc.

The recent U.S. antitrust reform movement has paid surprisingly little attention to out-of-market justifications. Over the past 5 or so years, antitrust law and policy have faced unprecedented demands for change. In particular, antitrust scholars and agency leadership who ascribe to the neo-Brandeisian school of antitrust thought seek to better capture harms from corporate transactions and misconduct, and to reverse developments of Chicago School antitrust law and economics over the past 40 years. Though the proposals for change vary, many share a common goal of making antitrust law less defendant-friendly. The law on cross-market justifications is squarely relevant to this reform effort. If defendants can prove that their conduct has significant procompetitive effects, they are likely to win the case.[5] Whether cross-market effects are credited as a procompetitive justification could well tip the scale decisively in a defendant's favor—or against it.

This chapter focuses on cross-market justifications in antitrust cases against large digital platforms. However, the same legal controversy—whether to credit cross-market justifications—is important to other areas of antitrust law. There has been a growing interest in using antitrust law to protect workers from anticompetitive conduct in U.S. labor markets. Yet a recent high-profile case permitted the National Collegiate Athletic Association to justify certain harms to student athlete labor market competition based on out-of-market justifications that benefitted consumers of college sports.[6] Both labor market and digital platform cases press the question of whether cross-market justifications are properly cognizable in antitrust law.

The law is clear for mergers: It generally bars the crediting of cross-market efficiencies.[7] Any procompetitive benefits must be demonstrated in the same market as the anticompetitive harms.[8] This rule is drawn from the text of Section 7 of the Clayton Antitrust Act of 1914, which bars anticompetitive transactions "in any line of commerce."[9] In its 1963 decision in *United States v. Philadelphia National Bank*, the Supreme Court confirmed that this Clayton Act phrase bars justification of a transaction based on procompetitive effects in another line of commerce.[10] The federal government successfully made its case, showing that the proposed merger of Philadelphia's second- and third-largest banks was likely to substantially lessen competition in commercial banking within a four-county area of Philadelphia.[11]

The defendant banks then tried to claim an out-of-market justification, arguing that the merger would provide them with the capital necessary to offer larger loans and thus to better compete with New York banks.[12] The Supreme Court refused to credit the procompetitive effects of the merger in this other market for New York commercial banking as a justification for the anticompetitive effects demonstrated in the initial market for Philadelphia commercial banking. The court reasoned that such cross-market effects were beyond the scope of Section 7 of the Clayton Act.[13] Crediting such effects, the court worried, would also lead to a slippery slope of justification for any merger that enabled competition against larger rivals elsewhere.[14] Since *Philadelphia National Bank*, courts have consistently found a bar against cross-market efficiencies in merger cases.[15]

For nonmerger or anticompetitive "conduct" cases, the law is much less clear. Section 1 of the Sherman Antitrust Act of 1890 prohibits concerted, unreasonable restraints of trade, and Section 2 prohibits unlawful monopolization or attempted monopolization.[16] Unlike the Clayton Act, the Sherman Act is silent on cross-market justifications. For conduct cases, the Supreme Court has not decided the law, though certain cases acknowledge the legal issue of whether to credit cross-market effects.[17] Courts of appeal describe the law on such cross-market justifications variously as "not settled"[18] and not "squarely addressed" by precedent.[19] Yet certain lower courts and commentators still declare a "rule" against cross-market justifications in conduct cases under the Sherman Act.[20] Such declarations are inevitably based on the Supreme Court's decision in *United States v. Topco Associates, Inc.*[21] and find clarity that the decision itself lacks.

This chapter begins with an explanation of why the law on cross-market justifications matters for pending digital platform cases. These cases tend to involve multiple, interconnected markets, which predisposes them to claims of cross-market effects.

To inform the law on cross-market justifications in these digital platform cases, the chapter then re-examines the *Topco* decision and its lineage. It finds that *Topco* does not establish a "rule" against cross-market justification in conduct cases, despite being the case most-often cited for such law. From *Topco* onward, there is a persistent gap in the law on cross-market justifications. The chapter argues that this gap has become increasingly problematic. Courts are either engaging in workarounds that distort established principles of market definition, as in *Ohio v. American Express Co.*,[22] or simply not addressing the law at all, as in the *National Collegiate Athletic Association v. Alston et al.*[23] decision. This legal duct-taping could be avoided by deciding the law on cross-market justifications.

The chapter concludes with guidance for courts seeking to develop this long-overdue rule of law. It contends that nothing in existing law prevents courts from developing legal rules on cross-market justifications. If anything, existing cases express more concern with permitting such effects than limiting them, emphasizing concern over the fairness and judicial administrability of analyzing cross-market justifications. Still, the chapter finds support in appellate, commentator, and agency guidance for consideration of cross-market justifications in a narrow situation: when the procompetitive effects are significant in magnitude and closely related to relatively minor competitive harms.

Cross-market justifications in digital platform conduct cases

The law on cross-market justifications is well worth examining. It has the power to change case outcomes, including in pending agency cases against digital giants. As outlined above, most antitrust cases proceed based on a burden-shifting framework. The plaintiff must first make a *prima facie* showing that the defendant engaged in anticompetitive conduct.[24] If the plaintiff makes its initial case, then the burden shifts to the defendant.[25]

The defendant may then avoid antitrust liability by showing a "plausible (and legally cognizable) competitive justification" for its conduct.[26] If the defendant proves that its conduct has significant procompetitive effects, then the research suggests that the defendant will often prevail. Although there are important additional steps in the rule-of-reason analysis,[27] courts rarely reach these steps (and if courts do, the tendency is still to find for the defendant).[28]

U.S. federal and state antitrust enforcers are in the midst of the most significant anti-monopolization cases yet against modern technology giants.[29] This includes a major U.S. Department of Justice Antitrust Division case alleging Google engaged in unlawful monopoly maintenance pursuant to the Sherman Act.[30] The government claims that Google is the dominant provider of online search and used exclusionary agreements to foreclose search competition.[31] The case alleges that these agreements made Google's search engine the default, preset option for virtually all search access points.

The Federal Trade Commission is also litigating a major conduct case against the leading online social networking company, Facebook. The agency alleges that Facebook engaged in a pattern of acquisitions and other conduct, described as a "buy or bury" strategy, to unlawfully monopolize the market for personal social networking.[32] There has also been a flurry of significant state antitrust litigation filed against Google, Facebook, and Amazon.[33] These cases, along with similar private litigation,[34] are likely to raise claims of cross-market justifications. The defendants operate multisided online platforms.[35] This means the cases are likely to involve multiple interrelated but distinct markets, between which the defendants intermediate. The Department of Justice complaint against Google, for example, alleges separate markets for online "search" and types of "search advertising," with Google operating across both.[36] In its case against Facebook, the Federal Trade Commission alleges not only a relevant market of "personal" social networking[37] but also harm from Facebook's conduct to advertisers, in what is a presumably separate market.[38]

Although the Supreme Court has examined more traditional two-sided platforms, such as newspapers (which intermediate between readers and advertisers),[39] this is the first generation of government conduct cases against dominant digital platforms. The characteristics of digital platforms and markets are likely to present new issues to courts, as one Supreme Court decision has already acknowledged.[40]

Competition on the various sides of these digital platforms is often distinct but intertwined through significant cross-side network effects.[41] For Google, the search traffic from users—one "side"—affects the success of the advertising side of the business. In simple terms, the more search traffic, the more tailored search results Google can produce, at least up to a certain point. And the more search traffic, the more likely advertisers are to place and value ads that reach the users of search. Similarly, end-user engagement on Facebook's social network drives the value of advertising on that network through cross-side effects. The attention of users attracts advertisers that fund these platform with paid ads.

Cross-side effects appear in several cases on the distribution of apps as well.[42] Apple, for example, operates an online app store that depends on multiple sides—end users who download and use apps and the developers who create the apps that attract such users to Apple's online store.

These characteristics shared by many digital platforms—intermediation between multiple, interconnected markets with cross-side effects—create the potential for distinct competitive effects on each side, and thus for claims cross-market justifications. Harm may be inflicted on one "side" of users to the benefit of the other side, which faces a distinct set of competitors and market conditions.[43] Many of the government cases against large digital platforms are at a relatively early stage, but the nature of these businesses make cross-market justifications arguments likely to appear.

Take the recent example of *Epic Games Inc. v. Apple Inc.*[44] in the Northern District of California. The plaintiff, a developer of video gaming apps, met its initial burden under Section 1 of the Sherman Act by demonstrating the anticompetitive effects of certain rules that Apple imposed on developers who distribute through the Apple app store.[45] Epic demonstrated these effects in the market for mobile game transactions. Apple then successfully established two procompetitive justifications for its conduct. First, the court accepted that some of the app store rules improved the privacy and security of Apple's operating "ecosystem," which benefitted end consumers and encouraged them to engage in mobile gaming transactions.[46] Second, this improvement of privacy and security, in turn, improved competition between mobile devices.[47] The latter justification credits an out-of-market justification. The plaintiff demonstrated anticompetitive effects in the market for mobile gaming transactions, yet the court accepted a second procompetitive justification in the likely separate (although related) market for mobile devices.[48]

Revisiting *Topco*: There is no 'rule' against cross-market justifications

Courts and scholars invariably invoke *Topco* when identifying a "rule" against cross-market justifications. The decision is often cited but rarely examined, and its meaning has been lost over years of recitation. This section reexamines *Topco*. It argues the decision offers mixed *dicta* both for and against the crediting of cross-market justifications but does not decide the law.

In *Topco*, the government sought injunctive relief against the defendant based on alleged violations of Section 1 of the Sherman Act.[49] Topco was a cooperative composed of small- and medium-sized grocery store chains. Topco acted as a procurement agent, sourcing private-label food products that were sold to its members for their retail stores.[50] The government's case focused on a rule that the Topco co-op imposed on its members, which required each member to sell only within its assigned territory—a geographic market division. The government argued that this horizontal restraint between Topco members violated Section 1 as a conspiracy in restraint of trade.[51] The government also challenged a second Topco rule that prohibited members from selling any Topco-branded products at the wholesale level (a vertical restraint).[52]

Topco argued that these territorial divisions were necessary to the existence of its private-label program—it contended that the cooperative could not be successful without these restraints.[53] Topco argued that this successful private-label program, in turn, increased competition by enabling its members to compete with larger regional and national chains.[54] The district court applied the rule of reason, inquiring into the effects of Topco's practices to find them reasonable and procompetitive.[55] The government appealed directly to the Supreme Court, as permitted at the time. The Supreme Court found that Topco's practices were unlawful applying instead a *per se* standard.[56] Unlike the rule of reason, under the *per se* rule, courts need not inquire into effects on competition. Instead, the conduct is presumed unlawful based on judicial experience that indicates its "pernicious effect on competition and lack of any redeeming virtue." [57]

Justifications are considered only under the rule of reason, not when the *per se* standard is applied.[58] How, then, did *Topco*—ultimately a *per se* case—become the precedent for a purported bar on cross-market justifications? In what became the most-cited passage against crediting such effects, the Supreme Court explained that the Sherman Act is the "Magna Carta of free enterprise" and thus guarantees every business the "freedom to compete."[59] Invoking this freedom and *Philadelphia National Bank*, the Supreme Court found that the lower court lacked the authority to foreclose competition "with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."[60]

Such matters, the court continued, are better left to Congress. It explained that "courts are ill-equipped and ill-situated for such decision-making," which would require them to "analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy."[61]

It is easy to see how these statements, read out of context, have been taken as a bar on cross-market justifications. The sentiment is strong. On closer examination, though, the *Topco* case does not establish a rule against out-of-market justifications, for several reasons. First, although *Topco* is invoked to bar cross-market justifications under the rule of reason, the Supreme Court decided in favor of Topco under the *per se* rule. This means the legal question of whether to credit such justifications was never before the court, and the comments on cross-market balancing under the rule-of-reason analysis are only *dicta*.

In fact, read in context, much of the Supreme Court's reasoning is merely a defense of the *per se* rule in general. The court is narrating the *per se* rule's benefits over the rule of reason. The most-cited passage of *Topco*, described above, is preceded by a lengthy explanation that *Topco*'s horizontal, territorial restraint is subject to the *per se* standard, not the rule of reason that the district court had mistakenly applied. The Supreme Court explains that:

> *Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.*[62]

In short, the Supreme Court is simply talking about which analytical standard applies to the case at hand.

In its general defense of the value of *per se* rules, the Supreme Court elaborates on the difficulties inherent in weighing the various effects on competition under the rule of reason. The effects-based inquiry under rule-of-reason inquiry certainly demands more of courts than the application of *per se* rules. That is uncontentious. But the *Topco* decision provides no definitive answer to the more specific question of whether, once a court decides the rule of reason applies, cross-market justifications may be credited within that the rule-of-reason analysis.

In fact, *Topco* describes the rule-of-reason analysis as difficult because it demands that courts consider "the industry involved, as well as related industries."[63] This argument—that *per se* rules are useful because they avoid the need for weighing across industries—necessarily implies that such cross-industry weighing may be a part of rule-of-reason cases. Although *dicta* within the *Topco* decision discourages courts from "choosing" between industries, this implicitly acknowledges that the rule of reason may demand that courts do precisely that.[64]

The law has changed in several ways since *Topco* such that the case would likely be decided under the rule of reason today.[65] The Supreme Court has since said that the rule of reason "presumptively applies,"[66] and more and more conduct has become subject to it. In particular, over the past 40 years, courts have developed the ancillary restraints doctrine, applying it to conduct tied to legitimate joint ventures similar to the Topco cooperative.[67] The ancillary restraints doctrine serves to distinguish between "naked" restraints on competition, which remain subject to the *per se* rule, and restraints that are reasonably related to, and necessary to achieve, the procompetitive benefits of a joint venture.[68] The latter category—restraints that advance the legitimate and efficient objectives of a joint venture—are instead subject to scrutiny under the more lenient rule of reason. Precise formulations of the ancillary restraints doctrine vary, but this is its function.[69]

The majority in *Topco* does not address the ancillary restraints doctrine, but Chief Justice Warren Burger's dissent echoes the direction this law later took. Chief Justice Burger explains that Topco's members agreed to "certain minimal ancillary restraints" for the lawful purpose of marketing their private-label product line, which would be cost-prohibitive for any one member to develop alone.[70] He reiterates the district court finding that the removal of Topco's restraints was not likely to increase competition between sellers of Topco's private label but would instead likely lead to the demise of the Topco private-label brand, which would become economically infeasible.[71]

Lastly, since *Topco*, Supreme Court jurisprudence on the rule of reason has begun to distinguish between cross-brand competition and same-brand competition. *Topco* treats same-brand competition and cross-brand competition as equal in significance under the Sherman Act, reasoning that cooperative members should have the freedom to choose which is more important.[72] But since the 1977 decision in *Continental T.V. Inc. v. GTE Sylvania Inc.*, a number of Supreme Court cases have emphasized that cross-brand competition is "the primary concern of antitrust law."[73] *GTE Sylvania* and its progeny recognized that competition between brands could actually be improved by restraints on same-brand competition, particularly vertical restraints imposed on same-brand retailers.[74] Both the ancillary restraints doctrine discussed above and the *GTE Sylvania* jurisprudence develop a more nuanced view than *Topco* on the promotion of competition. Each recognizes that in certain circumstances, the elimination of specific subtypes of rivalry among same-brand producers could, in fact, produce consumer welfare benefits.[75]

But even if the Supreme Court had applied the rule of reason in *Topco*, all of the effects were in the same market for the challenged territorial restraints.[76] The government alleged that Topco's territorial restrictions on its cooperative members reduced competition in the market for grocery retailing. Topco then asserted a justification in the same market. It claimed that its territorial restraints enabled its small member chains to better compete against larger grocery retailers.[77] Both the restraints and the justification were in the market for grocery retailing. No cross-market justifications were at issue on the facts for Topco's territorial restraint, so this particular claim did not present an opportunity for the Supreme Court to address the cognizability of such justifications.[78]

Finally, *Topco* premises its aversion to choosing between "sectors" of the economy on *Philadelphia National Bank*.[79] While it is not uncommon to borrow from merger cases in the law of monopolization (and vice versa), in this case, the Supreme Court left unaddressed an important statutory difference. Although *Philadelphia National Bank* also included a Sherman Act Section 1 claim, the Supreme Court's reasoning for the clear prohibition on cross-market efficiencies was based on the text of Section 7 of the Clayton Act, which prohibits combinations that substantially lessen competition "in any line of commerce."[80] This is read to require a separate market-by-market evaluation of merger effects[81]—since a substantial anticompetitive effect in any single relevant market is sufficient to bar the transaction, by implication, a procompetitive effect in another market cannot cure that violation.

The Supreme Court confirmed this view in *Philadelphia National Bank*, reasoning that the defendant's claimed justifications would require a reckoning of "social or economic debits and credits" beyond the scope of the statutory language of Section 7.[82] The merger substantially lessened competition in Philadelphia, and the transaction's broader economic benefits elsewhere could not save it from condemnation under the Clayton Act. For conduct cases, though, the Sherman Act contains no equivalent statutory language that could be read to bar cross-market justifications. *Topco* adopts *Philadelphia National Bank* without addressing this statutory difference.

As this discussion illustrates, much of the confusion regarding cross-market justifications traces back to *Topco* itself. *Topco* relies on law from a merger case without addressing statutory differences for conduct cases. In *Topco*, the Supreme Court had no occasion to consider cross-market justifications on the facts or the law as applied under the *per se* rule. Viewed in context, much of the *Topco* reasoning is just a defense of such *per se* rules, which the court found less complex to apply than the rule of reason. This defense seems to admit that the rule of reason is complex because it may require courts to consider cross-market justifications. To whatever extent *Topco* developed the law on cross-market justifications, it did not create a rule against considering or crediting such effects.

Topco's legacy: Continuing ambiguity in the law of cross-market justifications

Later cases reinforce the ambiguity of *Topco* as a precedent on cross-market justifications. Since the decision, appellate courts have displayed a striking pattern of declining to clarify whether such justifications are barred in conduct cases. The few cases that actually acknowledge this question of law have observed for decades now that no appellate court has "squarely" addressed the law,[83] and that it is "not settled."[84] Several of these decisions canvas the ambiguous support for and against a bar against cross-market justifications, then—frustratingly—decline to decide the law, leaving the doctrine just as unclear as they found it.[85]

More often, appellate cases do not address the legal question directly. Instead, the tendency is to engage in the evasive approaches discussed below. This section argues that this eternally unsettled law on cross-market justifications is problematic for precisely this reason—it is pushing courts to engage in at least two workarounds. The first ignores the unsettled legal question and instead simply credits the cross-market justifications claimed by defendants. The second contorts established principles of market definition to render out-of-market effects "in market," as in the Supreme Court's *Ohio v. American Express Co.*[86] decision, one of the most significant recent cases to reference—but not decide—the law of cross-market justifications.

Ambiguity in the law: Crediting cross-market justifications without addressing the legality

If there is a rule against cross-market justifications, courts seem to disregard it with regularity in conduct cases. Recent, high-profile decisions such as *NCAA v. Alston*[87] and *Epic v. Apple*[88] credit such effects without addressing the legality of doing so. This is not a minor issue—if the law barred cross-market justifications, that would change the outcome of certain claims in both of these cases.

In *NCAA v. Alston*, student athletes challenged the National Collegiate Athletic Association's various limits on athlete compensation as an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[89] Most importantly here, the lower courts permitted the NCAA to justify a restraint on student athlete compensation based on its out-of-market benefits to consumers of amateur sports.[90]

At the first step in the rule-of-reason analysis, the student athletes proved that the NCAA's restrictions decreased their compensation to below competitive levels in the input market for student athlete labor.[91] But the NCAA managed to prove that certain of its rules had procompetitive effects in a different market—the output market for amateur sporting events.[92] The district court cautiously credited the NCAA's justification that its restrictions on athlete compensation preserved amateurism, finding that the NCAA's compensation limits may have some effect in maintaining consumer demand for amateur sport by helping to differentiate amateur from professional sport.[93]

At the next step in the rule-of-reason analysis, the district court then considered whether the NCAA could achieve these claimed procompetitive benefits using a substantially less restrictive alternative. It reached different conclusions for two distinct types of restraints that the NCAA had imposed on athletes. The court found that the NCAA's limits on benefits based on athletic performance were reasonably tailored to this justification of preserving amateurism and thus were lawful. But the NCAA's limits on education-related compensation were struck down. There was no real evidence that the educational-benefit limits served to differentiate amateur sports, and further, there were less restrictive rules that could still achieve the same benefit of preserving consumer demand for amateur sports.[94]

The Court of Appeals for the 9th Circuit affirmed the district court findings, and the majority did not address the legality of cross-market justifications.[95] Judge Milan Smith Jr., however, issued a concurring opinion that objected to the NCAA's out-of-market justification on the grounds of judicial unadministrability and nonjuridicability.[96] It was in this opinion that Judge Smith expressed the concern where this chapter began—that the "Rule of Reason framework has shifted toward this cross-market analysis without direct consideration or a robust justification."[97]

The NCAA appealed to the Supreme Court on numerous grounds, but the parties did not raise the issue of cross-market justification.[98] This was because only the NCAA appealed, seeking a ruling that its education benefits, which had been struck down by the lower court, in fact survived antitrust scrutiny. The Supreme Court thus did not have occasion to consider the athletic performance rules that remained in place—and for which the NCAA had received a favorable ruling from the lower courts based on its out-of-market justifications.

Despite this, the Supreme Court observed twice in its *NCAA* decision that this legal question of cognizability of cross-market justifications is lurking in the background of the case.[99] The Supreme Court also noted, but declined to address, an *amici* argument that courts ought not trade off competition between markets, on the grounds that input market competition in the labor market is "incommensurable" with output market competition in the consumer market for amateur sporting events.[100] The Supreme Court decision left virtually all of the lower court reasoning intact and affirmed the injunction barring the NCAA's restraints on education-related compensation.

Ultimately, this course of litigation against the NCAA permitted "significant" anticompetitive harms to the student athlete labor market.[101] The unchallenged aspects of the lower court decisions allowed restraints on athletic performance compensation to be offset by marginal benefits to consumers in the market for amateur sports. The legality of crediting cross-market justifications was not decided, yet those effects determined the result in the litigation for those restraints the NCAA justified. If the law had barred such cross-market justifications, then the NCAA would have had no apparent justifications for either of its compensation limits. The student athletes would have prevailed in challenging all of the restraints, ending the case before any need to consider potentially less restrictive alternatives.

Another recent, high-profile case—this time involving an online platform—has similarly bypassed the question of whether it is lawful to credit cross-market justifications. As mentioned above, in *Epic v. Apple*, the Northern District of California credited an out-of-market justification argued by tech giant Apple.[102] Epic, a video game app developer, challenged the rules for app distribution and payment imposed by Apple on many of the developers who distribute their apps through its app store. Epic demonstrated that the rules were *prima facie* anticompetitive in the market for mobile gaming transactions.[103] But Apple successfully argued that its rules were justified based on their competitive effects in the likely separate market for mobile devices and related operating systems.[104]

One of the justifications the court accepted was that Apple's rules enabled the company to maintain privacy and security protections in its online ecosystem and thus to better compete with other mobile operating systems—particularly Google Android.[105] Importantly, the *Epic* decision does not address the law on whether such out-of-market effects are cognizable as a justification.[106] The court stopped short of engaging in any balancing of the procompetitive and anticompetitive effects, meaning that Apple avoided Section 1 liability based on its justifications. As of the publication of this chapter, the case is on appeal to the 9th Circuit Court of Appeals.

NCAA v. Alston and *Epic v. Apple*, along with other cases, consider or credit cross-market justifications without addressing whether this is permitted by law. This creates an opacity problem in law and policy. The Court of Appeals for the 1st Circuit observed this problem in its 1994 decision in *Sullivan v. National Football League*.[107] The court explains that the crediting of cross-market justifications without any express consideration of their legality is problematic because it makes it "impossible to tell whether [courts are] consciously applying the rule of reason to include a broad area of procompetitive benefits in a variety of markets" or "simply not being very careful and inadvertently extend[ing] the rule of reason past its proper scope."[108]

Cases such as *NCAA v. Alston* and *Epic v. Apple* suggest that the "rule" on cross-market justifications either does not exist in law or that it is regularly being disregarded. The courts do not reveal which it is. Lower courts in particular are left without guidance on the law, and some have concluded that the law requires the opposite—a barring of cross-market justifications.[109]

Another effect of this legal obscurity is to bury related policy questions. Should courts accept trade-offs between labor markets and consumer markets, such as that in *NCAA v. Alston*? If courts expressly examined the law of cross-market justifications—whether they found such effects to be cognizable or not—it would drive such policy dilemmas to the surface, fuel debate, and perhaps prompt changes or development of U.S. antitrust law. Of course, the courts themselves are not necessarily to blame—as in the appeal to the Supreme Court from *NCAA v. Alston*, the parties do not necessarily place legal questions of cross-market effects squarely before the court to decide. The law and policy on cross-market justifications has, over time, remained persistently unclear.

Ambiguity in the law of cross-market justifications prompts distorted market definitions

The perceived bar on cross-market justifications is pushing courts toward another problematic workaround: distortions of market definition. Courts will sometimes lump multiple markets together into one, effectively moving those cross-market justifications "in-market." This unprincipled collapsing of markets occurred in the highly criticized Supreme Court decision *Ohio v. American Express Co*.[110] Instead of distorting market definition principles, the *American Express* case should have directly addressed cross-market justifications.

In *American Express*, the Antitrust Division of the U.S. Department of Justice and several states brought a Section 1 of the Sherman Act challenge against credit card company American Express.[111] The case disputed the company's "anti-steering" provisions in its merchant agreements.[112] These provisions barred merchants from suggesting or inducing cardholders to use other credit cards at the point of purchase.[113] Without these rules, such "steering" was likely, because other cards charged merchants much lower transaction-processing fees than American Express.[114] When consumers use those cards, the merchants take home more of the transaction amount. The district court considered the competitive effects of the American Express rules on merchants and found anticompetitive effects. The rules drove up merchant processing fees, not just for American Express cards but for all types of payment cards.[115]

At the next stage in the rule-of-reason analysis, American Express then argued two justifications for its rules, one of which involved cross-market effects.[116] The company claimed the challenged rules were required to maintain its distinct business model, which emphasized cardholder spending and enhanced cardholder benefits. While its competitors earned interest from cardholder balances, American Express did not—its profits came only from cardholder spending. American Express argued that this difference made its margins critical to fierce competition with credit cards issued by Visa Inc., MasterCard Inc., and Discovery Ltd.—all of which had the benefit of another source of earnings in the form of interest from cardholders.

This argument of American Express, the district court explained, would require the court to balance the restraints of procompetitive effects in a "separate, though intertwined, antitrust market" against the anticompetitive effects on merchants.[117] American Express was, in essence, saying it needed to limit steering to maintain its margins in the network services market because those margins enabled the company to offer enhanced cardholder benefits that fueled its competitiveness in cardholder issuance, a separate market. In analyzing this argument, the district court cited *Topco*, explaining that "[a]s a general matter … a restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market."[118]

Despite this, the district court concluded that the relevant law was undecided, as no Court of Appeals for the 2nd Circuit cases had determined whether to weigh cross-market justifications in the specific situation of interrelated markets that "together comprise a single two-sided platform" like the American Express credit card business.[119] Thus, even if the law on cross-market effects was generally decided in *Topco*—itself a questionable conclusion—that case did not answer the specific question before that court.[120] Leaving its analysis of the law at that, the district court went on to explain that even if cross-market balancing was permitted, American Express would lose the case because it failed to establish that its rules were reasonably necessary to competition on the cardholder side of the platform or that any such gains offset the competitive harm in the market for merchant services.[121]

The Court of Appeals for the 2nd Circuit reversed, finding the anti-steering provisions did not violate federal antitrust law.[122] The Supreme Court then affirmed on appeal. This difference in outcomes at the *American Express* trial and appellate court levels was primarily due to market definition. The district court defined two separate (albeit interrelated) markets in the case: the market for merchant services and the related-but-distinct market for cardholders.[123] The 2nd Circuit Court and Supreme Court majority, however, adopted a different approach, collapsing two separate markets into a single "two-sided" market for credit card transactions, which encompassed both the merchant side and cardholder services.[124]

This difference led the Supreme Court to conclude that the government had failed to prove adequate competitive harm by "wrongly" establishing harm only to the merchant "side" of the market.[125] The Supreme Court found that the government had to prove harm to both merchants and cardholders to carry its initial burden of showing anticompetitive effects.[126]

American Express is one of the most criticized antitrust decisions of the 21st century, in no small part because the Supreme Court upset well-established principles of market definition.[127] Market definition is deeply rooted in the concept of substitutability of demand (and sometimes also supply substitution).[128] If prices rose for one product, what would buyers choose as an alternative to a particular product? This is a common measure used to identify competitors and the bounds of markets. The market the Supreme Court adopted in *American Express* lacks this key feature of demand substitution.[129] Merchant services and cardholder services are not substitutable for each other.[130] Consumers would not use merchant-side payment processing services to make a purchase on their credit cards—the two services are distinct in their role and function.

The *American Express* majority realized, correctly, that these two sides of the platform were interrelated, and that it needed to consider whether and how to evaluate the competitive effects on both sides (merchants and cardholders) to understand the impact of American Express' conduct. Credit card networks intermediate between cardholders and merchants such that the market for merchant services could affect competition in cardholder services or vice versa. Declining competition in merchant fees, for example, might enable American Express to raise its fees and, in turn, to fund greater card rewards offered on the cardholder side (as American Express argued in the case).

The problem was in how *American Express* chose to account for these effects. The potential for these cross-side competitive effects does not automatically make cardholder services and merchant services part of the same market. The court had at least two potential options to frame its analysis: Contort market definition to find a transaction market (as it did), or define the market under existing law and economics, then consider whether to credit out-of-market effects.[131] The Supreme Court took the first approach, defining a "transaction's worth" of credit-card processing in a two-sided market lumping together cardholder and merchant services. This distorted principles of market definition in a cumbersome and confusing way.

Instead, *American Express* should have taken the second approach, applying the established principles of market definition to each side of the platform, evaluating the competitive effects in each market, then considering any relevant cross-market justifications.[132] This alternative approach usefully disentangles the market definition from its competitive-effects analysis.[133] It accounts for the economic reality of potential cross-side effects, while staying consistent with established principles of market definition in economics and law.

A perceived lack of authority to consider cross-market justifications may have nudged the Supreme Court majority toward its problematic market definition in *American Express*. In fact, a prediction of this very problem appears in a discussion of out-of-market effects for mergers, where one scholar worries that "lacking legal authority" to consider cross-market justifications, "a court could abandon sound market delineation principles."[134] This is precisely what occurred in *American Express*.

In Justice Stephen Breyer's *American Express* dissent, he notes that he would have considered cross-market justifications directly.[135] Yet his dissent still manages to leave the law on such effects unclear. Justice Breyer reasons that American Express should have had "an opportunity to ask" the 2nd Circuit Court whether its procompetitive benefits in the cardholder market offset the demonstrated anticompetitive effects in the market for merchant services.[136] But he immediately follows this with an observation that proving such effects would have been an "uphill battle" for American Express, as "[a] Sherman Act § 1 defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another."[137]

Justice Breyer also quotes *Topco*'s *dicta* in support of this conclusion. He repeats its warning that Congress is better suited than the courts to determine whether competition in one portion of the economy should be sacrificed for greater competition in another—a decision, he writes, that courts are "ill-equipped and ill-situated" to make.[138]

Some scholars interpret Justice Breyer's comments as support for a bar on cross-market justifications in the law, although they acknowledge the reasoning is less than clear.[139] But Justice Breyer's invocation of *Topco* can just as easily be read the other way. If such effects were barred by law, then there would be more than just an "uphill battle required to prove them," and there would be no reason to encourage lower courts to consider such evidence, as he does. His comments seem to be about the evidentiary difficulties of proving out-of-market effects, particularly for American Express. The dissent leaves the law about as ambiguous as it found it.

The *American Express* majority opinion is now driving incorrect analysis and outcomes in other cases with multisided platforms, a concerning effect of the decision.[140] *American Express* threatens to do the same in pending and future cases against large technology platforms, many of which may involve cross-side network effects akin to *American Express*. That case was correct only insofar that courts, in their evaluation of competitive effects, might consider the various separate sides of a platform where there is evidence of cross-side effects.

Consider, for example, Google's search and search advertising businesses. Online ads and online search are decidedly related but also not within the same market. Yet it may be appropriate to consider how Google's restraints on search competition affect advertising competition. Despite such effects being cross-market, they could prove relevant to a full understanding of the allegedly anticompetitive restraints imposed by Google.

At the same time, search and search advertising are likely different markets because services on each side of the platform are not interchangeable from a demand perspective in this context. End-users of online search services would not substitute advertising services offered to the other "side" of the platform, or vice versa. Lumping these different services into one market would repeat the mistakes of *American Express*.

Clear law on cross-market justifications would help to avoid similar market definition mistakes in pending and future cases against digital platforms. As the *American Express* dissent predicts, cases with significant cross-market justifications may be rare. But even if rare, such litigation may also be high-stakes, as demonstrated by *NCAA v. Alston*, *American Express* (if it had been correctly framed), and *Epic v. Apple*. This makes the law of cross-market justifications well worth addressing.

Developing the law on cross-market justifications

This chapter argues that the law on cross-market justifications is unsettled, despite its common depiction otherwise. The discussion leads, of course, to the normative question of what the law should be. A full examination of the potential formulations of a legal rule on cross-market justifications, and their pros and cons, could easily fill another chapter. Instead, this short chapter offers three important observations for courts seeking to shape the law in this space.

First, there is nothing in the existing law that prevents judicial development of the law on cross-market justifications. As this chapter argues, *Topco* and other appellate cases simply have not addressed this law. In many cases, courts have not been presented with the legal question of whether to credit such effects when they could have been. In others, courts have stopped short of addressing this law or have bypassed it by relying on other, problematic approaches. This has left a lacuna on the law of cross-market justifications that remains open for the courts to fill in conduct cases. Other scholars have argued similarly that courts have the power to determine the law on cross-market effects, albeit in the more specific context of labor market cases.[141]

While legislative intervention would be useful to clarify this law more quickly, there is nothing stopping courts from developing the law of cross-market justifications in the common law tradition. As the Supreme Court observed in *National Society of Professional Engineers v. United States*, "Congress ... did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[142] Since *Topco*, courts have shaped many of the doctrinal intricacies of the rule of reason, and courts could continue to do so here for cross-market effects.[143] Such judicial development of the law would be preferable to the long-ambiguous state of this doctrine now.

Second, although appellate cases do not establish a clear rule against cross-market justifications, the jurisprudence tends to suggest a trajectory for development of this law. Courts have primarily expressed hesitancy in one direction—the concern is over permitting cross-market justifications, not over limiting them.[144] Since the time of *Topco*, courts have rooted their aversion to crediting such effects in two primary concerns: judicial administrability and fairness to those in the market with demonstrated anticompetitive conduct.[145]

Topco observed that cross-sector analysis may be impractical for courts, as it requires them to "analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions."[146] This judicial administrability concern was reiterated recently by Judge Smith of the 9th Circuit Court in his *NCAA v. Alston* concurrence.[147] Leading scholars also imagine an ever-expanding inquiry into competitive effects that would become unmanageable for courts.[148]

The other primary concern is unfairness. By crediting cross-market justifications, are judges making an unfair choice between the value of competition in different markets? Judge Smith's *NCAA v. Alston* concurrence contends that, whether implicitly or explicitly, permitting cross-market justifications may mean the court "make[s] value judgments by determining whether competition in the collateral market is more important than competition in the defined market."[149] Similar concerns echo in the *Topco* majority.[150] If the Sherman Act guarantees freedom to compete, then crediting cross-market justifications, in effect, may deny this freedom in the initial market where the plaintiff demonstrated harm.[151]

Between the administrability and fairness concerns, these cases give the impression of judicial opposition to law that allows widespread admissibility of cross-market justifications. At the same time, it is difficult to justify a complete bar on cross-market justifications. While judicial administrability is a weighty concern, it has limits. Chief Justice Warren Burger observed, in his *Topco* dissent, that courts should not abdicate their analytical role "with no justification other than the enhancement of predictability and the reduction of judicial investigation."[152]

The "whole point" of analysis under the rule of reason is to determine the competitive effects of the restraint.[153] Market definition is not the end goal of antitrust analysis—it is a tool that serves this purpose of assessing competitive effects. In fact, there is growing recognition that market definitions may not even be necessary when there is direct evidence of effects on competition.[154] If the evidence demonstrates procompetitive effects on competition that are interrelated and closely intertwined with alleged harms, a total bar on cross-market effects would value formalism over substance. Such effects would be barred because they fall outside of the market as defined, not because they lack relevancy to understanding how the impugned conduct affects competition. Particularly where the in-market harms to competition are small, and the defendant demonstrates out-of-market effects that are intertwined and significant in their procompetitive benefits, such effects seem hard to ignore.[155] Even commentators who support a general bar on cross-market justifications seem to concede that in these narrow circumstances—small, in-market harms to competition that are inextricably interrelated with significant out-of-market benefits—the law may need to permit defendants some leeway to argue cross-market justifications.[156]

Even in the merger context, federal antitrust agencies recognize some narrow but analogous flexibility in cross-market efficiencies. The joint guidance on horizontal mergers from the Federal Trade Commission and the U.S. Department of Justice provides that the agencies will ordinarily challenge mergers that are anticompetitive in any relevant market.[157] The guidance, however, also concedes that, as a matter of prosecutorial discretion in determining which mergers to challenge, the agencies may consider out-of-market efficiencies that are "inextricably linked" to the relevant market such that any remedy could not feasibly eliminate the anticompetitive effects without sacrificing the linked efficiencies in the market.[158] The agencies observe that such efficiencies are likely rare but will most often make a difference where there are small in-market anticompetitive effects relative to significant out-of-market efficiencies.[159]

As discussed above, there is a much clearer statutory and common law bar against cross-market efficiencies in mergers than there is for cross-market justifications in conduct cases. Despite clearer law against crediting such effects, U.S. agencies have still chosen to recognize this quasi-exception for mergers, rooting their flexibility in prosecutorial discretion. This sliver of permissiveness suggests that, at a minimum, conduct cases might also consider narrow concessions for cross-market justifications that are significant and closely intertwined with anticompetitive effects.

Appellate decisions also offer some support for this view. The Court of Appeals for the 9th Circuit in *Paladin Associates Inc. v. Montana Power Co.* contemplated that "closely related" markets "might be distinguished" from the *Topco* dictum that is so often read to discourage cross-market justifications.[160] However, the court declined to decide the law on such an exception.[161] The Court of Appeals for the 1st Circuit in *Sullivan* expressed similar sentiment when it described the only judicial consensus it could find on cross-market justifications (but flips the logic to discourage unrelated justifications):

> *[W]e can draw at least one general conclusion from the caselaw at this point: courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices; however, courts should also maintain some vigilance by excluding justifications that are so unrelated to the challenged practice that they amount to a collateral attempt to salvage a practice that is decidedly in restraint of trade.*[162]

Ultimately, it remains open to courts to determine whether and when to consider cross-market justifications in conduct cases. In doing so, courts will find support in related jurisprudence, scholarship, and agency guidance for a general bar against cross-market justifications with a narrow exception for significant, interrelated effects.

Conclusion

Courts and commentators refer to a “rule” that bars cross-market justifications in conduct cases. This chapter argues there is no such rule. The law on cross-market justifications is unclear for conduct cases and has been since the 1972 *Topco* decision. We should stop assuming that existing law prohibits such cross-market justifications—it does not, or at least it does not do so clearly enough for courts to bypass this legal issue. This long-ambiguous law is worth clarifying because it has the power to change the outcome of significant cases, in particular the breaking wave of digital platform litigation.

This chapter argues that the persistent ambiguity in the law of cross-market justifications is, in itself, creating problems. It has led courts to ignore the legal question and simply credit cross-market justifications, as in *NCAA v. Alston* and *Epic v. Apple*. This unclear law has also pressed courts into workarounds that distort more established doctrine, such as the unusual market definition in *American Express*.

The chapter concludes with several observations to assist courts in developing the law on cross-market justifications. First, it contends that courts have the power to shape this law, as they have other facets of the rule of reason. Nothing in the existing law on cross-market justifications precludes the judicial development of this doctrine. Second, while the law on cross-market justifications is undecided, related cases suggest more concern over permitting such effects than limiting them, based on judicial administrability and fairness. Still, the chapter finds it is difficult to justify a complete bar on cross-market justifications, given their potential relevance to the competitive effects of challenged conduct. It concludes with the suggestion that appellate, commentator, and agency guidance provide scope for a narrow consideration of cross-market justifications, particularly when the out-of-market benefits to competition are significant and closely interrelated with the in-market harms.

Endnotes

1 In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1266 (9th Cir. 2020) aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) [hereinafter, Alston v. NCAA (9th Cir.)].

2 United States v. Microsoft Corp., 253 F.3d, p. 59 (describing a burden-shifting framework under the rule of reason).

3 Ibid. ("[I]f a plaintiff successfully establishes a prima facie case under § 2 [of the Sherman Act] by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct." (citing *Eastman Kodak Co. v. Image Tech. Servs*., 504 U.S. 451, p. 483 (1992)).

4 *NCAA v. Alston* (9th Cir.) 958 F.3, p. 1266 (permitting the National Collegiate Athletic Association to justify a restraint on student athlete compensation because it had out-of-market benefits to consumers of amateur sports); *Epic Games Inc. v. Apple Inc*., 559 F. Supp. 3d 898, pp. 1068–69 (N.D. Cal., 2021) (crediting a justification in mobile device operating systems/devices where anticompetitive effects were demonstrated in the market for mobile game transactions). This chapter uses the terms "out-of-market justification" or "cross-market justification" interchangeably to refer to such potential procompetitive justification in conduct cases. In discussing mergers, it refers to an out-of-market or cross-market "efficiency."

5 Michael A. Carrier, "The Rule of Reason: An Empirical Update for the 21st Century," George Mason Law Review 16 (4) (2009): 827, 828 (finding that only about 2 percent of rule-of-reason cases in the survey period proceed beyond analysis of justifications).

6 *NCAA v. Alston* (9th Cir.), 958 F.3d 1239, *aff'd sub nom*. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (affirming the lower court decision (i) permitting the NCAA's restraints on athletic performance-based compensation in the labor market, based on procompetitive effects in the market for amateur sport consumption, but (ii) prohibiting the NCAA's restraints on education-related compensation based on the availability of less restrictive alternatives to achieve the claimed procompetitive effects). Note the out-of-market justification issue was not on appeal before the Supreme Court. The case prompted calls to limit defendants' ability to justify anticompetitive restraints on labor by establishing benefits to consumers in another market. Laura Alexander and Steven C. Salop, "Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers," *Georgetown Law Faculty Publications and Other Works* 2447 (2022), available at https://scholarship.law.georgetown.edu/facpub/2447; Ted Tatos and Hal Singer, "The Abuse of Offsets as Procompetitive Justification: Restoring the Proper Role of Efficiencies After Ohio v. American Express and NCAA v. Alston," *Georgia State University Law Review* 38 (4) (2022): 1179. See also a similar debate in the merger context in Ioana Marinescu and Herbert J. Hovenkamp, "Anticompetitive Mergers in Labor Markets," *Indiana Law Journal* 94 (3) (2019): 1031 (calling for some rethinking of merger policy for mergers that harm labor markets).

7 Though not law, the Horizontal Merger Guidelines recognize a narrow exception in the form of prosecutorial discretion, permitting the agencies to consider cross-market efficiencies when so "inextricably linked" that any remedy could not feasibly eliminate the anticompetitive effects in the relevant market without sacrificing efficiencies in other markets. See U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (2010), n. 14. However, it is not clear that current agency leadership shares this view, given the recent repeal of vertical merger guidance based, in part, on that prior guidance recognizing overly-broad merger efficiencies. See Federal Trade Commission, "Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines," September 15, 2021, available at https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf ("The [Clayton Act] does not distinguish between 'horizontal' and 'vertical' mergers, nor does it contain exceptions for mergers that lessen competition but also create some form of efficiency.").

8 *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, p. 370 (1963); Daniel A. Crane, "Balancing Effects Across Markets," *Antitrust Law Journal* 80 (2) (2015): 397 (discussing the bar on cross-market efficiencies in merger cases).

9 15 U.S.C. § 18.

10 *Philadelphia Nat'l Bank*, 374 U.S. 321, p. 370.

11 Ibid., pp. 359–365 (defining the relevant geographic market as a comprising a four-county Philadelphia metropolitan area and finding on competitive effects); Ibid., p. 323 (complaint charging violations of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 7 of the Clayton Act, 15 U.S.C. §18).

12 Ibid, pp. 370–71. Premerger, strict capitalization rules for banks had the effect of driving Philadelphia banking customers above a certain size to use New York City banks for loans. The banks argued that the merger would enable the parties to offer those large loans in Philadelphia instead, enhancing their ability to compete with New York banks. The banks also argued a second justification: that the merger should be permitted because it would bring economic development to the city of Philadelphia.

13 *Philadelphia Nat'l Bank*, 374 U.S., Ibid, p. 371.

14 Ibid., p. 370 ("If anticompetitive effects in one market could be justified by pro-competitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."). Since any efficiencies must be established in the same market where the anticompetitive effects were found, this is sometimes termed a "market specificity" rule. See Crane, "Balancing Effects Across Markets," p. 397.

15 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶972a (4th ed., 2022), (noting "courts have consistently so held" that there is a bar on cross-market efficiencies in merger law).

16 15 U.S.C. §§ 1-2.

17 See discussion in section of this chapter titled "*Revisiting* Topco*: There is No "Rule" Against Cross-Market Justifications*."

18 *NCAA v. Alston* (9th Cir.) 958 F.3d, p. 1257 n. 14, *aff'd sub nom*. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

19 *Sullivan v. National Football League*, 34 F.3d, pp. 1091, 1111 (1st Cir. 1994) ("To our knowledge, no authority has squarely addressed this issue [of the law on cross-market justifications]."); *Paladin Assocs. v. Mont. Power Co*., 328 F.3d, pp. 1145, 1157 n. 11 (9th Cir. 2003) (finding "[i]t may be" that "procompetitive effects in a separate market cannot justify anti-competitive effects in the market ... under analysis" but going on to find that *Topco's* language may not be controlling "because it is a dictum or incomplete or obsolete.").

20 Jonathan B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Cambridge, MA: Harvard University Press, 2019), p. 292, n.51 (observing that "*Topco* has been treated by lower courts as precluding cross-market welfare trade-offs in non-merger litigation."); *Apotex Inc. v. Cephalon Inc*., No. 2:06-cv-2768, 2017 U.S. Dist. LEXIS 227960, at p. 11 (E.D. Pa. May 24, 2017) (finding that "increased competition in one market cannot justify anticompetitive conduct in an unrelated market." (citing *United States v. Topco Assocs. Inc*., 405 U.S. 596, 610 (1972)); *United States v. Am. Exp. Co*., 88 F. Supp. 3d 143, 229–30 (E.D.N.Y. 2015) ("[a]s a general matter ... a restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market"), rev'd and remanded sub nom. *United States v. Am. Express Co*., 838 F.3d 179, 229-230 (2d Cir. 2016), aff'd sub nom. *Ohio v. Am. Express Co*., 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018); *Law v. NCAA*, 902 F. Supp. 1394, 1406 (D. Kan. 1995) ("Procompetitive justifications for price-fixing must apply to the same market in which the restraint is found, not to some other market." (citing *Topco*, 405 U.S., p. 610)).

21 405 U.S. 596 (1972); See cases citing *Topco*, Ibid note 20.

22 138 S. Ct. 2274.

23 141 S. Ct. 2141 (2021).

24 *United States v. Microsoft Corp*., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (per curiam) (describing the burden-shifting framework); Herbert J. Hovenkamp, "The Rule of Reason," *Faculty Scholarship at Penn Law* 1778 (2018): 83, available at https://scholarship.law.upenn.edu/faculty_scholarship/1778 (noting "most antitrust claims" are evaluated under the rule of reason, which typically employs the burden-shifting framework described).

25 *Microsoft Corp*., 253 F.3d, p. 59.

26 *Polygram Holding Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005).

27 In the event the defendant demonstrates a valid justification for the challenged restraints, plaintiffs must then prove either that the challenged restraints are not reasonably necessary to accomplish defendants' legitimate objective, that the same objective may be "achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole," or that the procompetitive effects shown by the defendant are outweighed by the plaintiff's demonstrated anticompetitive harms. *Capital Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs*., 996 F.2d 537, 543 (2d Cir. 1993). In some of the rule-of-reason cases discussed here, the courts engage in certain of these additional analytical steps after the defendant has established a justification. This chapter focuses on the second step in the analysis: whether or not the defendant can demonstrate a procompetitive justification.

28 Carrier, *supra* note 5 at 828.

29 Amended Complaint, *United States v. Google LLC.*, No. 1:20-cv-03010 (D.D.C. Jan. 15, 2021); *FTC v. Facebook Inc*., 581 F. Supp. 3d 34, 40 (D.D.C. 2022).

30 Amended Google Complaint, Ibid.

31 Ibid., pp. 4–5.

32 Substitute Am. Compl., ¶77, *FTC v. Facebook Inc.*, No.: 1:20-cv-03590-JEB (D.D.C. Sept. 8, 2021); *FTC v. Facebook Inc.*, 560 F. Supp. 3d 1 (D.D.C. 2021) (granting Facebook's motion to dismiss the claims, without prejudice); *FTC v. Facebook Inc.*, 581 F. Supp. 3d 34, 40 (D.D.C. 2022) (granting Facebook's motion to dismiss on one of the FTC's claims, but allowing the amended claims related to Facebook's acquisition strategy to proceed).

33 Complaint, *Utah v. Google LLC*, Docket No. 3:21-cv-05227 (N.D. Cal. Jul 07, 2021) (alleging unlawful monopoly maintenance in Google's app store and in-app payment processing); Complaint, *Colorado v. Google LLC*, No. 20-cv-03715 (D.D.C. Dec. 17, 2020); In re Google Digital Advert. Antitrust Litig., No. 21-CV-6841 (PKC), 2022 WL 4226932, at *44 (S.D.N.Y. Sept. 13, 2022) (denying Google's motion to dismiss all but one of the state's Section 1 and 2 Sherman Act claims); Complaint, *California v. Amazon.com Inc.*, Docket No. (Cal. Super. Ct. Sept. 14, 2022) (alleging price parity policies are anticompetitive); Complaint, *District of Columbia v. Amazon.com Inc.*, Docket No. 2021 CA 001775 B (May 25, 2021) (same); Complaint, *Texas v. Google LLC*, Docket No. 1:21-cv-06841 (S.D.N.Y. Aug. 13, 2021) (alleging Google has monopolized digital advertising); Complaint, In re: Google Digital Advertising Antitrust Litigation, Docket No. 1:21-md-03010-PKC (S.D.N.Y. Aug. 12, 2021) (same); Complaint, In re: Google Play Store Antitrust Litigation, Docket No. 3:21-md-02981) (N.D. Cal. Feb. 5, 2021) (alleging Google monopolized app distribution); Complaint, *New York v. Meta Platforms Inc.*, Docket No. 1:20-cv-03589-JEB (D.D.C. Dec. 9, 2020) (alleging Facebook monopolized social media through acquisitions and conduct).

34 *Epic Games Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1033 (N.D. Cal., 2021) (video-game maker Epic alleging that Apple imposed a series of anticompetitive restraints and engaged in anticompetitive practices in its app store to monopolize the markets for app distribution and in-app payment solutions). The market was instead defined by the court as that for "mobile gaming transactions." The Northern District of California found that Apple's rules did not violate Section 1 or Section 2 of the Sherman Act but did violate state unfair competition law. Ibid. Appeals are pending before the Court of Appeals for the 9th Circuit.

35 A multisided platform offers distinct products or services to different groups who depend on the platform to intermediate between them. The more common term of a "two-sided" platform may be a misnomer in the context of many of these businesses, which involve not only consumers and advertisers (the typically referenced two "sides") but also other sides, such as developers of apps and other third-party services and publishers of advertising, each of which interoperate with the platform. See, for instance, *Ohio v. Am. Express Co.*, 138 S. Ct. p. 2280 (defining a "two-sided platform" as "offer[ing] different products or services to two different groups who both depend on the platform to intermediate between them.").

36 Amended Complaint, *U.S. Dep't of Just. v. Google LLC.*, No. 1:20-cv-03010 at 3 (D.D.C. Jan. 15, 2021). This is consistent with international cases, which have similarly defined separate markets for "online search" and various types of "search advertising." See European Commission "Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising," Press release, March 20, 2019.

37 This market definition was preliminarily accepted by the court, in decisions responding to two initial motions to dismiss by Facebook. *FTC v. Facebook Inc.*, 581 F. Supp. 3d 34 (D.D.C. 2022); FTC v. Facebook Inc., 560 F. Supp. 3d 1 (D.D.C. 2021).

38 Substitute Am. Compl., ¶10, *FTC v. Facebook Inc.*, No.: 1:20-cv-03590-JEB (D.D.C. Sept. 8, 2021).

39 *Times–Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Loraine Journal Co. v. United States*, 342 U.S. 143 (1951).

40 *Ohio v. Am. Express Co.*, 138 S. Ct., p. 2286 (distinguishing newspaper markets from the credit-card platform at stake in the case, as newspapers have "weak indirect network effects" and behave "much like a one-sided market.").

41 David S. Evans, "The Antitrust Economics of Multi-Sided Platform Markets," *Yale Journal on Regulation* 20 (2003): 320, 334–35.

42 Complaint, *Utah v. Google LLC*, Docket No. 3:21-cv-05227 (N.D. Cal. Jul 07, 2021); *Epic Games Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal., 2021).

43 Nancy L. Rose and Jonathan Sallet, "Ohio v. American Express: The Exception That Should Not Become a Rule," *Antitrust* 36 (3) (2022): 76, 80 (describing scenarios with potentially varying effects on users on distinct sides of a multisided platform).

44 559 F. Supp. 3d, p. 898.

45 Ibid.

46 Ibid., p. 1002 (finding of fact) and p. 1038 (accepting two justifications in law). But see Erika M. Douglas, "Data Privacy as a Procompetitive Justification: Antitrust Law and Economic Analysis," Notre Dame Law Review 97 (5) (2022): 430 (examining whether it was correct in law to recognize these justifications in *Epic. v. Apple* and arguing that privacy protections are cognizable as a justification in antitrust law only if those protections also have procompetitive effects).

47 Ibid.

48 The markets are related in that apps are designed to work only with specific mobile operating systems. Devices that use Apple's operating system cannot, for example, download or use apps designed for the Google Android operating system (or vice versa) due to technological differentiation.

49 *United States v. Topco Assocs. Inc*., 405 U.S. 596, 597 (1972) (alleging unlawful restraint of trade under 15 U.S.C.A. § 1).

50 Ibid., p. 598.

51 Ibid., p. 601.

52 Ibid., pp. 603–4 (challenging Topco's prohibition on member wholesaling of Topco products. Members could seek permission to engage in wholesale sales, but permission had to be granted by the other members. Such permission was often sought but always denied.).

53 Ibid., p. 605.

54 Ibid.

55 See *Topco* (District Court), 319 F. Supp., p. 1043 (finding that whatever the anticompetitive effect of the practices, it is "far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories.").

56 *Topco*, 405 U.S., p. 612.

57 *Northern Pacific R. Co. v. United States*, 356 U.S. 1, p. 5 (1958).

58 The existence of a justification may also influence the court in its initial choice to apply the rule of reason standard rather than the *per se* rule. John M. Newman, "Procompetitive Justifications in Antitrust Law," *Indiana Law Journal* 94 (2) (2019): 501, 506–508 (discussing the "two fold role" justifications play, in that the presence or absence of a plausible justification may influence the court's initial choice to apply the rule of reason or the *per se* rule, and then again in consideration of the justification under the rule of reason, if applied).

59 *Topco*, 405 U.S., p. 610.

60 Ibid. (citing *Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963)).

61 Ibid., p. 611–12.

62 *Topco*, 405 U.S., p. 609–10.

63 Ibid., p. 607 (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 2 L.Ed.2d 545 (1958)) (describing the utility of *per se* rules as "avoiding the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, *as well as related industries*.").

64 *Paladin Assocs., Inc. v. Mont. Power Co*., 328 F.3d p. 1145, p. 1157 n.11 (9th Cir. 2003) (noting the "Supreme Court's comment" in *Topco* on trading-off effects in different sectors of the economy and commenting that "perhaps that language from Topco is not controlling because it is a dictum or incomplete or obsolete").

65 *Rothery Storage & Van Co. v. Atlas Van Lines Inc*., 792 F.2d 210, pp. 226-229 (D.C. Cir. 1986) (tracing the development of the law on horizontal restraints to find that *Topco* would now likely be evaluated under the rule of reason (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc*., 441 U.S. 1 (1979), *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85 (1984), and *Northern Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co*., 472 U.S. 284 (1985)).

66 *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

67 This doctrine is often traced back to commentary in *United States v. Addyston Pipe & Steel Co*., 85 E 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), but emerged in a more explicit way only more recently. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203, 130 S. Ct. 2201, 2216, 176 L. Ed. 2d 947 (2010) ("When 'restraints on competition are essential if the product is to be available at all,' per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.") (citing *NCAA*, 468 U.S., p. 101); *Texaco Inc. v. Dagher*, 547 U.S. p. 7 (the "[ancillary restraints] doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities,"); *Broad. Music, Inc. v. Columbia Broad. Sys. Inc*., 441 U.S. 1, 21 (1979) (finding the impugned restraint ancillary as "a necessary consequence of the integration necessary to achieve the[] efficiencies" of the agreement); *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679, 689 (1978) (implying the existence of an ancillary restraints doctrine by describing the rule of reason as "a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction"). See Thomas A. Piraino Jr., "The Antitrust Analysis of Joint Ventures After The Supreme Court's Dagher Decision," *Emory Law Journal* 57 (4) (2008): 735, 744 (tracing the emergence of the ancillary restraints doctrine in cases since *Topco*, from around 1979 onward).

68 U.S. Department of Justice and Federal Trade Commission, "Antitrust Guidelines for Collaborations Among Competitors," § 1.2 at 4 (2000) ("Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.").

69 Piraino Jr., "The Antitrust Analysis of Joint Ventures After The Supreme Court's Dagher Decision," pp. 745–47 (observing a lack of clear and consistent means to distinguish which restraints are considered "ancillary"); Gregory J. Werden, "The Ancillary Restraints Doctrine after Dagher," *The Sedona Conference Journal* 8 (2007): 17, 21–24 (describing the different articulations of the law on how to determine which restraints are ancillary or core to a joint venture, and of the law applied to evaluate ancillary restraints once identified).

70 *Topco*, 405 U.S., p. 613 (Burger, C.J., dissenting); *United States v. Topco Assocs. Inc*., 319 F. Supp. 1031, 1038 (N.D. Ill. 1970), rev'd, 405 U.S. 596 (1972) (finding that Topco's territorial restraints improved competition with other supermarkets and were "ancillary and subordinate to the fulfillment of the legitimate, procompetitive purpose of the Topco cooperative, reasonable and in the public interest.").

71 *Topco*, 405 U.S., pp. 623–24 (Burger, C.J., dissenting).

72 *Topco*, 405 U.S., pp. 610–612 (insisting that the impugned restraints deny Topco members "the right to ascertain for itself" which type of competition is more desirable, and that the freedom of both is guaranteed). Though *GTE Sylvania* involved vertical restraints rather than *Topco's* horizontal restraints—an important distinction—the *Sylvania* decision still seems to lessen the force of *Topco's* insistence that same-brand competition must be preserved to the same extent as cross-brand competition. Topco was a cooperative composed of and controlled by horizontal competitors, which, in effect, imposed restrictions on each other. *GTE Sylvania Inc*., 433 U.S., p. 38 (describing the vertical nature of the restraints, imposed by a manufacturer on same-brand retailers); *Topco*, 405 U.S., p. 608 (finding the restraints in the case horizontal).

73 433 U.S. 36, 52 (1977).

74 Ibid.; See also *Leegin Creative Leather Prod. Inc. v. PSKS Inc*., 551 U.S. 877, 890 (2007) (The promotion of interbrand competition is important because the primary purpose of the antitrust laws is to protect [this type of] competition.) (internal quotation omitted); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) ("Our analysis is also guided by our general view that the primary purpose of the antitrust laws is to protect interbrand competition." (citing *Business Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. 717, 726 (1988)).

75 *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 103 (1984) ("a restraint in a limited aspect of a market may actually enhance marketwide competition.") (citing *Continental T.V. Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 51–57, 97 S.Ct. 2549, 2558–2561, 53 L.Ed.2d 568 (1977)); Herbert Hovenkamp, "On The Meaning of Antitrust's Consumer Welfare Principle," *Faculty Scholarship at Penn Carey Law* 2152 (2020), available at https://scholarship.law.upenn.edu/faculty_scholarship/2152 (observing recent confusion and debate over the term "consumer welfare" but noting the common usage to refer to "the aggregate welfare of consumers as consumers, disregarding the welfare of producers.").

76 Milton Handler, "Twenty-Five Years of Antitrust," *Columbia Law Review* 73 (3) (1973): 415, 421-–2 (observing that this issue in *Topco* involved a single market "to wit, the retail distribution of food products.").

77 Ultimately, the district court came to its conclusion not on this justification, but rather at the final weighing step in the analysis, finding the effects of increasing competition with national chains "far outweighed" the reduction in competition from the territorial division. *Topco*, 319 F. Supp., pp. 1042–43.

78 If anything, cross-market justifications could have been an issue on the second count, and then only if the Supreme Court applied the rule of reason. This count challenged Topco's prohibition on member wholesaling of its private-label products.

79 *Topco*, 405 U.S., p. 612 (citing *Philadelphia Nat'l Bank*, 374 U.S., p. 371).

80 15 U.S.C. § 18.

81 *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition"); Robert Pitofsky, "Proposals for Revised United States Merger Enforcement in a Global Economy," *Georgetown Law Journal* 81 (2) (1992–1993): 195, 246 (The key language in the Clayton Act describing impermissible mergers "refers to anticompetitive effects 'in any line of commerce ... in any section of the country'"; clear indication that Congress intended that the effects of mergers be judged in single markets.); Areeda and Hovenkamp, *Antitrust Law*, ¶972a (similarly finding that "An acquisition is declared to be unlawful if it has the requisite anticompetitive effects 'in any line of commerce in any section of the country.' The statute thus plainly contemplates that mergers may involve more than one market, *yet it bases legality on a separate market-by-market appraisal*."); But see also Gregory J. Werden, "Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?" *The Journal of Corporation Law* 43 (1) (2017): 119, 122 (challenging the common view of *Philadelphia National Bank* as barring cross-market efficiencies as a misreading of the case).

82 *Philadelphia. Nat'l Bank*, 374 U.S., p. 371. The decision also articulated a second basis for rejecting the defendant's justification claims, that "[i]f anticompetitive effects in one market could be justified by pro-competitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader." (p. 370).

83 *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) (finding that "no authority has squarely addressed" the law of out-of-market effects); *NCAA v. Alston* (9th Cir.) (Smith, J., concurring) (observing that neither the 9th Circuit nor the Supreme Court has "squarely addressed" the legality of cross-market justifications) *aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

84 *NCAA v. Alston* (9th Cir.) 958 F.3d, p. 1257 n. 14, *aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021). Some lower courts have found the law against crediting cross-market justifications to be more concrete; see cases cited at note 20, *supra*.

85 *NCAA v. Alston* (9th Cir.) 958 F.3d, P. 1257, R. 14; *Sullivan*, 34 F.3d, p. 1112 (nearing a tentative statement of the law, acknowledging "arguably" that the "closely related" effects in the two football markets of the case are such that the procompetitive effects and anticompetitive harms could be compared, but finding no need to enter the "dangerous waters" of deciding this law to resolve the dispute before the court); *King Drug Co. of Florence Inc. v. Smithkline Beecham Corp*., 791 F.3d 388, 410 n.34 (3d Cir. 2015) ("It may also be (*though we do not decide*) that 'procompetitive effects in one market cannot justify anticompetitive effects in a separate market'" (quoting Brief for Nat'l Ass'n Chain Drug Stores Amici Curiae Supporting Appellants, *King Drug Co. of Florence Inc. v. Smithkline Beecham Corp*., 791 F.3d 388 (2015) (No. 14-1243) and citing Topco (emphasis added)); *Paladin Assocs., Inc*., 328 F.3d, p. 1157 n.11 (9th Cir. 2003) (considering "perhaps that language from Topco is not controlling because it is a dictum or incomplete or obsolete or because the case of such closely related markets as those for transport of natural gas and the natural gas itself might be distinguished," but deciding "[i]n any event, *we need not and do not reach this issue* on the permissible bounds of rule of reason inquiry"(emphasis added)). But see also a Court of Appeals for the 3rd Circuit dissent that finds clarity in the law where others do not in *Larry V. Muko, Inc. v. Sw. Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 439 (3d Cir. 1982) (Sloviter, J., dissenting) ("antitrust cases have always rejected the premise that a procompetitive effect in one market will excuse an anticompetitive effect in another." (citing *United States v. Topco Assocs., Inc*., 405 U.S. 596, 609–11 (1972)).

86 *Ohio v. American Express Co*., 138 S. Ct. 2274 (2018).

87 In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), aff'd sub nom. *Nat'l Collegiate Athletic Ass'n v. Alston*, 210 L. Ed. 2d 314, 141 S. Ct. 2141 (2021) [hereinafter *NCAA v. Alston* (District Court)].

88 *Epic v. Apple* , 559 F. Supp. 3d, p. 898.

89 *NCAA v. Alston* (District Court), 375 F. Supp. 3d, p. 1091.

90 *NCAA v. Alston* (9th Cir.), 958 F.3d, p. 1260 (affirming the district court findings on justification); *NCAA v. Alston* (District Court) 375 F. Supp. 3d, p. 1082–83 (accepting the NCAA justification for its the restraint on athletic performance compensation only).

91 Ibid., pp. 1067–70 (district court finding that the NCAA's limits on athlete compensation "produce significant anticompetitive effects" in the market for student-athlete labor).

92 Ibid., pp. 1082–83 (accepting the NCAA justification for its restraint on athletic performance compensation only).

93 Ibid., p. 1082. The NCAA argued three justifications, but only this one was accepted by the District Court.

94 Ibid., p. 1097.

95 *NCAA v. Alston* (9th Cir.), 958 F.3d., p. 1266.

96 See further discussion of these objections and Judge Smith's concurrence, *infra*.

97 *NCAA v. Alston* (9th Cir.), 958 F.3d, p. 1269–71 (Smith, J., concurring). Judge Smith is using the term "justification" here to mean "rationale" rather than justification as the term is used in this chapter.

98 *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2155 (2021) ("the parties before us do not pursue this line.").

99 Ibid., p. 2152 ("Admittedly, this asserted benefit accrues to consumers in the NCAA's seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so."); Ibid., p. 2155. ("Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market.").

100 Ibid., p. 2155 (observing that *amici* argue "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off" sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. ... But the parties before us do not pursue this line." (citing Brief for American Antitrust Institute as *Amicus Curiae* 3, 11–12)).

101 Ibid., p. 2152 (district court finding that the NCAA's limits on athlete compensation "produce significant anticompetitive effects" in the market for student-athlete labor). In his concurrence with the Supreme Court decision, Justice Kavanaugh doubts the credibility of the NCAA's amateurism justification, but based on its circularity rather than its out-of-market nature. The NCAA, he says, "asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid. In my view, that argument is circular and unpersuasive." Ibid., p. 2167 (Kavanaugh, J. concurring).

102 *Epic Games Inc. v. Apple Inc*., 559 F. Supp. 3d, pp. 1038–40.

103 Ibid., p. 1038.

104 Ibid.

105 Ibid., pp. 1038–39.

106 For a discussion of the cognizability of privacy protections as a justification, see Erika M. Douglas, "Data Privacy as a Procompetitive Justification: Antitrust Law and Economic Analysis," *Notre Dame Law Review* 97 (5) (2022): 430 (arguing that privacy protections are cognizable as a justification in antitrust law only if those protections also have procompetitive effects).

107 34 F.3d, p. 1111 n.9.

108 Ibid.

109 See lower court cases cited at note 20.

110 138 S. Ct. 2274 (2018). See *Sullivan*, 34 F.3d, pp. 1112–13. After canvasing the mixed law on cross-market justifications, *Sullivan* declines to decide what the law is and proceeds to credit justifications from out of market, convoluting its analysis to find the effects "indirectly" related to the market at issue (and thereby considered in-market and credited).

111 *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018). The initial claim was against other credit card companies as well, but the other defendants settled.

112 Ibid., p. 2283.

113 Ibid.

114 Ibid.

115 *United States v. Am. Exp. Co*., 88 F. Supp. 3d 143, 229 (E.D.N.Y. 2015), rev'd and remanded *United States v. Am. Express Co.*, 838 F.3d 179, 229-230 (2d Cir. 2016), aff'd sub nom. *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018).

116 Ibid., p. 225. The second justification, which the court rejected, was in-market and so it is not addressed here. American Express claimed its rules prevented merchants from "free-riding" on its investments in merchant and cardholder value propositions.

117 Ibid., p. 229.

118 Ibid.

119 Ibid. The district court mentions only the 2nd Circuit in its conclusion and does not consider whether the law of any other circuit court is potentially relevant.

120 Ibid., pp. 229–30.

121 Ibid.

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

123 *United States v. Am. Exp. Co*., 88 F. Supp. 3d p. 143, pp. 151-52 (E.D.N.Y. 2015), rev'd and remanded *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016). The Supreme Court dissent also endorsed this approach in *Ohio v. Am. Express Co*., 138 S. Ct., p. 2295 (Breyer, J., dissenting).

124 *United States v. Am. Express Co*., 838 F.3d, p. 200; *Ohio v. Am. Express Co.,* 138 S. Ct, p. 2287.

125 *Ohio v. Am. Express Co*., 138 S. Ct., p. 2287 (noting plaintiffs failed to carry their burden by "wrongly" focusing on "only one side [the merchant side] of the two-sided credit-card market).

126 Ibid., p. 2288.

127 Steven C. Salop and others, "Rebuilding Platform Antitrust: Moving on from Ohio v. American Express," *Georgetown Law Faculty Publications and Other Works* 2414 (2022), available at https://scholarship.law.georgetown.edu/facpub/2414 (noting the Supreme Court's "tortured analysis [in *Ohio v. Am. Express Co.*] has left courts, agencies, and businesses with a host of puzzles; triggered a flurry of scholarship and commentary, mostly very critical, and invited a flurry of ill-conceived litigation arguments.").

128 U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (2010), p. 7 ("Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis.").

129 Michael Katz and Jonathan Sallet, "Multisided Markets and Antitrust Enforcement," *Yale Law Journal* 127 (2018): 2142, 2158 (observing that the "single-market approach" may fail "to accurately account for product substitution and competitive conditions in multisided platform industries.").

130 Salop and others, "Rebuilding Platform Antitrust," p. 19.

131 Ibid., pp. 24-27 (contrasting the approach of the court in *Ohio v. Am. Express Co*. with a cross-market justification analysis).

132 Ibid., pp. 19–20.

133 Ibid., p. 27 (suggesting that "[i]nstead of the Court's mangled approach of defining a single two-sided platform market, we propose that it makes more sense to balance cross-platform harms and benefits experienced by consumers on the two sides of the platform, defined as two separate markets.").

134 Werden, "Cross-Market Balancing of Competitive Effects," p. 122 ("If the delineation of the relevant market determines which effects of a merger are considered in determining its legality, a court might delineate the relevant market in a manner designed primarily to avoid constraint from the any-market rule.").

135 *Ohio v. Am. Express Co*., 138 S. Ct., p. 2303 (Breyer, J., dissenting).

136 Ibid. (Breyer notes that the district court found "no such effects" in the shopper market).

137 Ibid.

138 Ibid. (citing *United States v. Topco Associates Inc*., 405 U.S., p. 611) (distinguishing vertical price-fixing cases from the allegations in *Ohio v. Am. Express Co*.).

139 Salop and others, "Rebuilding Platform Antitrust," p. 24 (citing Breyer's dissent as "a basis for thinking that [the rule against cross-market justifications] applies also in conduct cases," but acknowledging "the Supreme Court has not been entirely clear").

140 *United States v. Sabre Corp*., 452 F. Supp. 3d 97 (D. Del. 2020) (refusing to enjoin the acquisition of Farelogix by Sabre as Farelogix competed only with one "side" of the Sabre platform. Farelogix sold to travel agencies, while Sabre interacted with both sides (travel agencies and airlines) and, per *Ohio v. Am. Express Co*., two-sided platforms can "only" compete with other two-sided platforms. This conclusion on competition was drawn despite a "preponderance of the evidence" showing that Farelogix was a competitor to Sabre.).

141 Alexander and Salop, "Antitrust Worker Protections," pp. 20–22 (observing, similarly, that the law on cross-market justifications in nonmerger cases has not been clearly decided but explaining that there is a "path to adoption" in prior law to construct such a rule).

142 435 U.S. 679, 688 (1978) (citing 21 Cong. Rec. 2456 (1890) (comments of Sen. Sherman)).

143 See text accompanying notes 65–75 (discussing post-Topco developments in the rule of reason).

144 *Alston* (9th Cir.), 958 F.3d, p. 1271 (Smith, J. concurring) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. (citing *Topco*, 405 U.S., p. 611)). Judge Smith's concurrence in *Alston* also links this concern to administrability, as courts cannot simply "net … out" the effects in one market against those in another, finding no defensible method for courts to do so. Ibid.

145 At times, justiciability has also been raised as a reason for a bar on cross-market justifications. See Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondents at 11, *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

146 *Topco*, 405 U.S., pp. 611–612.

147 *NCAA v. Alston* (9th Cir.) (Smith, J. concurring) ("Realistically, the Rule of Reason analysis is judicially administrable only if it is confined to the single market identified from the outset.").

148 Baker, *The Antitrust Paradigm*, pp. 191–92 ("once the analysis extends beyond the market in which harm is alleged, there may be no principled stopping point short of undertaking what is unrealistic if not impossible: a general equilibrium analysis of harms and benefits throughout the entire economy.").

149 *NCAA v. Alston* (9th Cir.), 958 F.3d, p. 1270 (Smith, J. concurring).

150 *Topco*, 405 U.S., p. 610.

151 *NCAA v. Alston* (9th Cir.), 958 F.3d, p. 1267 (Smith, J. concurring) ("The Sherman Act and related antitrust laws were designed to preserve our economic freedom." (citing Topco, 405 U.S., p. 610)). A more specific but less commonly articulated version of this argument goes further, arguing that if courts choose among markets, that is likely to exacerbate longstanding inequality between consumers and other groups (such as labor). Tatos and Singer, "The Abuse of Offsets as Procompetitive Justification."

152 *Topco*, 405 U.S. 622 (Burger, C.J., dissenting).

153 *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct., p. 2160 (quoting *Ohio v. Am. Express Co*., 138 S. Ct., p. 2284); *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

154 *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61(1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition; proof of actual detrimental effect, such as a reduction in output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effect." (internal quotes omitted)).

155 Salop and others, "Rebuilding Platform Antitrust," p. 25 (observing that ignoring effects on some consumers could "lead the court to condemn conduct that is beneficial to consumers in some overall sense"). This chapter examines only the justifications stage of the rule-of-reason analysis. Other commentators have observed that, should the analysis proceed to the final balancing step in the rule of reason, the varying nature of the in- and out-of-market effects may present challenges in assessing incommensurable harms. See Alexander and Salop, "Antitrust Worker Protections." The Supreme Court also noted this potential concern in *dicta* in *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct., p. 2155 (citing Brief for American Antitrust Institute as *Amicus Curiae* 3, 11–12)).

156 Baker, *The Antitrust Paradigm*, pp. 192–93 (supporting cross-market justifications analysis narrowly when "it is evident from a qualitative comparison that harmful competition in one market is small while the benefit to competition in another market is vastly greater and there is no practical way to obtain the benefits without accepting the harms"); Areeda and Hovenkamp, *Antitrust Law*, ¶ 972 (generally supporting a bar on out-of-market effects for "statutory, administrative, and practical reasons" but excepting "rare" cases, such as when anticompetitive effects in one market are small in proportion to the procompetitive gains in another market); Salop and others, "Rebuilding Platform Antitrust," p. 28.

157 U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (2010), n. 14 ("The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).").

158 Ibid.

159 Ibid.

160 *Paladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1157 n.11 (9th Cir. 2003).

161 Ibid. (declining to decide the law on cross-market justifications because the in-market procompetitive benefits were so significant that no cross-market justifications need be considered to decide the case).

162 *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) (emphasis added).

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info@equitablegrowth.org

740 15th St. NW 8th Floor
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202-545-6002

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