THE DEMISE OF THE RULE OF REASON

by
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The rule of reason under Section 1 of the Sherman Act, the primary framework for analyzing the legality of agreements in restraint of trade, has degenerated into a muddled and incoherent guessing game, with courts applying disparate and convoluted versions of the test that are inconsistent across and within circuits and are untethered from the basic goals of antitrust law. A primary cause of the atrophy of the rule of reason has been the ascension of the less restrictive alternative as the dispositive analytical factor for determining the legality of restraint of trade. Rather than focus on the net competitive effect of a restraint, the modern rule of reason has transformed into a means-ends analysis that focuses on the availability of less restrictive alternatives.

The transformation of the rule of reason has accelerated through a series of antitrust challenges to the amateurism model of the National Collegiate Athletic Association (NCAA). These cases have generated significant attention because of their potential impact on the future of college sports and the economic rights of college athletes, but their impact on the future of the rule of reason and antitrust law has gone virtually unnoticed. These cases illuminate the fatal flaws of the modern rule of reason and the devolution of antitrust law into a new "sea of doubt."

Every federal circuit has adopted at least one of three different new permutations of the rule of reason that have emerged over the last few decades, each using a form of the less restrictive alternative analysis as a dispositive factor while subverting or eliminating the traditional balancing of competitive effects. The first version of the new rule of reason is a conjunctive test that hinges legality on whether the restraint's procompetitive benefits outweigh its anticompetitive effects and whether there were no less restrictive alternatives for achieving those benefits. The second variant excludes balancing and asks solely whether the restraint's procompetitive benefits could have been achieved through less restrictive alternatives. The third permutation also excludes balancing and asks only whether the restraint is "directly related" to its procompetitive benefits.

These new frameworks have exacerbated the complexity and confusion of the rule of reason and threaten to convert antitrust law from an ex ante *deterrent of anticompetitive conduct to an* ex post *regulator of procompetitive business decisions. This Article examines the evolution of the rule of reason and traces the emergence, disappearance, and reappearance of the less restrictive alternative as the analytical core within the rule of reason. This Article also provides a new descriptive framework for analyzing the*

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different formulations of the modern rule of reason analysis and assesses the flaws of each of the formulations, with a focus on the antitrust challenges to the NCAA's amateurism model. The Article concludes that the role of the less restrictive alternative should be limited to reorient the rule of reason on the overall competitive effect of the challenged restraint. A renewed focus on the net competitive effect will provide a clearer and more coherent framework for the rule of reason and better serve the competition-protecting function of antitrust law.

I. INTRODUCTION

The rule of reason, the primary method for determining the legality of agreements under Section 1 of the Sherman Act,[1] has devolved into a shapeless and

[1] *See, e.g.*, Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies

unpredictable free-for-all, with courts applying multiple versions of the test that are inconsistent with each other and incompatible with the underlying goal of antitrust law. The primary cause of the demise of the rule of reason is the amplified and improper use of the less restrictive alternative inquiry as the analytical centerpiece. The shift to a means-ends-oriented approach and away from the rule of reason's traditional cost-benefit analysis and balancing of competitive effects has untethered the rule of reason from a principled framework for analyzing the legality of restraints of trade and has entrenched it as a "litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes."[2]

The mutation of the rule of reason has accelerated through a series of cases involving challenges to the National Collegiate Athletic Association's (NCAA) amateurism model. Although much of the attention surrounding these cases has understandably focused on their potential impact on the future of college sports and the level of compensation received by college athletes, the impact of these cases on the future of antitrust law and the rule of reason analysis of all restraints of trade has been largely overlooked. The NCAA amateurism cases, including *O'Bannon v. NCAA*[3] and *NCAA Grant-in-Aid Cap Antitrust Litigation*,[4] highlight both the fatal flaws of the modern rule of reason and the inconsistent and disparate permutations of the test adopted by the courts. These cases also underscore the fundamental difference between the means-ends analysis embedded in the new versions of the rule of reason and the balancing test embedded in the Supreme Court's classic version of the rule, applied in *Chicago Board of Trade* in 1918.[5]

Three different new frameworks of the rule of reason have emerged over the last few decades. The core feature shared by all three variations is the use of the less restrictive alternative as a dispositive factor in the rule of reason and the minimization or elimination of the traditional balancing of competitive effects. The first formulation of the rule of reason determines the legality of a restraint by balancing its procompetitive benefits and anticompetitive effects and determining whether there were less restrictive alternatives for achieving the procompetitive benefits.[6] The second formulation of the rule of reason hinges the legality of the restraint solely on whether the restraint's procompetitive benefits could have been achieved through less restrictive means, without regard to the restraint's net competitive effect.[7] The third (and most extreme version) of the test asks only if the restraint is "directly related" to its procompetitive benefits.[8] Every federal circuit has adopted at least

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rule of reason analysis."). For an excellent "litigation field guide" to the rule of reason, see Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018).

2 Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979) (discussing a similar analysis under Section 2).

3 O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

4 *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

5 Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

6 *See, e.g.*, LifeWatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 336 (3d Cir. 2018).

7 *See, e.g.*, Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506–07 (2d Cir. 2004); *cf. infra* note 68 and accompanying text.

8 Schering-Plough Corp. v. Fed. Trade Comm'n, 402 F.3d 1056, 1065 (11th Cir. 2005) ("In rebuttal then, the plaintiff must demonstrate that the restraint is not reasonably necessary to

one version of these new rule of reason analyses.[9]

These new formulations of the rule of reason have added a new level of confusion and opacity to the Section 1 analysis. By allowing restraints that are collateral to relatively small procompetitive aims but are overwhelmingly net anticompetitive, the formulations create problems that may neuter the competition-protecting function of antitrust law. Depending on the formulation, the new tests are either underinclusive or over-inclusive and morph the role of antitrust law from an *ex ante* deterrent of net anticompetitive behavior to an *ex post* regulator of procompetitive business decisions. These modern approaches are shifting and vague and threaten to set antitrust law on a new "sea of doubt."[10]

This Article builds on an earlier critique of the misuse of the less restrictive alternative analysis and argues that the new formulations of the rule of reason and their enhanced use of the less restrictive alternative inquiry should be rejected.[11] There is no easy fix for the complex analysis of the legality of restraints under Section 1 of the Sherman Act, but a more limited and focused use of the less restrictive alternative analysis, reoriented within the overall competitive effect of the challenged restraint, can provide a clearer and more coherent standard.

This Article will proceed as follows. Part II provides an overview of the evolution of the rule of reason analysis in antitrust law and explores the creation, disappearance, and reemergence of the use of the less restrictive alternative inquiry and its role in the new formulations of the rule of reason. Part II will also provide a new descriptive framework for the three different permutations of the rule of reason analysis. Part III discusses the flaws of the new formulations of the rule of reason with a focus on the challenges to the NCAA's amateurism model. Part IV discusses the proper role of the less restrictive alternative test and a framework for incorporating it into the rule of reason.

II. THE EVOLUTION OF THE RULE OF REASON

A. The Original Rule of Reason: Dispositive Use of the Less Restrictive Alternative Test

The earliest treatment of restraints of trade centered on covenants not to compete. Beginning in the fifteenth century, judges prohibited all contracts that barred a person from practicing his profession.[12] In the early 18th century, the judicial approach to covenants not to compete shifted from a complete bar to a rudimentary version of a rule of reason that incorporated a less restrictive alternative analysis.[13] Pursuant to this approach, a covenant not to compete was unenforceable if it was

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achieve the stated objective.").

[9] *See generally* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U.L. REV. 561, 581 (2009).

[10] *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898) (warning that "administration of justice according to so shifting, vague and indeterminate a standard" has led courts to "set sail on a sea of doubt").

[11] *See* Feldman, *supra* note 9, at 561.

[12] *See* Lee Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23, 23 (1964) (discussing the origins of the rule of reason in early cases).

[13] *See, e.g.*, Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 348 (Ch).

not reasonably necessary for achieving a legitimate underlying purpose.[14]

This means-ends analysis eventually expanded beyond covenants not to compete and was applied to a variety of restraints on trade outside of the employment context under the common law.[15] Then Judge Taft entrenched the means-ends inquiry as the dominant form of analysis for restraints of trade in the landmark *United States v. Addyston Pipe & Steel Company* decision.[16] *Addyston* created a dichotomy for agreements in restraint of trade. An agreement with no purpose other than to restrain trade—like a price-fixing agreement among competitors—was labeled as an "illegal restraint," and was automatically illegal.[17] An agreement that was incidental and collateral to a legitimate agreement—like most covenants not to compete—was labeled as an "ancillary restraint" and was subject to a rule of reason analysis.[18] The sole question under the "*Addyston* Rule of Reason" was whether the ancillary restraint was "reasonably necessary" for the underlying legitimate agreement to exist.[19] Restraints that were more restrictive than necessary (i.e., where less restrictive alternatives existed to accomplish the same legitimate objectives) failed the rule of reason and were unenforceable. Restraints that were reasonably necessary (i.e., where less restrictive alternatives did not exist) were enforceable. Judge Taft explicitly favored this means-ends approach to a more traditional balancing test, and thus the relative weight of the procompetitive benefits and anticompetitive effects of the restraint were not considered. Instead, the less restrictive alternative served as the dispositive question (after the threshold naked/ancillary distinction) under the common law and early post-Sherman Act rule of reason.[20]

B. Chicago Board of Trade*: The Search for Net Competitive Effects*

The Supreme Court veered sharply from the means-ends analysis in *Addyston* and adopted a balancing test that centered on the net competitive effect, the very type of cost-benefit analysis rejected by Judge Taft.[21] This shift was formalized in

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[14] Horner v. Graves (1831) 131 Eng. Rep. 284, 287–88 (CP) (holding that a restriction on a dentist's assistant was unreasonably overbroad and more restrictive than necessary because it prevented the assistant from practicing within 100 miles of his employer's town).

[15] *See, e.g.*, More v. Bennett, 29 N.E. 888, 891 (Ill. 1892) (applying test to price-fixing agreement among stenographers); Collins v. Locke [1879] 4 App. Cas. 674 (PC) 10 (appeal taken from B.C.) (applying test to horizontal market division among stevedores).

[16] United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–83 (6th Cir. 1898); *see, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984) ("The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act Section 1 analysis by [Judge] Taft in *United States v. Addyston Pipe & Steel Co.*").

[17] *Addyston*, 85 F. at 288.

[18] For a comprehensive discussion of *Addyston* and the development of the rule of reason, see Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 296–98 (1986).

[19] *Addyston*, 85 F. at 281–82.

[20] Use of the less restrictive alternative inquiry by the U.S. Supreme Court dates to at least 1821, when the Court used it as a check on the contempt power of Congress. *See* Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMM. L. & POL'Y 259, 263 (2001).

[21] *See, e.g.*, Feldman, *supra* note 9, at 577; Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint*

Board of Trade of Chicago v. United States in 1918,[22] which changed the functional approach of the rule of reason from a means-ends analysis to a cost-benefit balancing test. The basic purpose of *Board of Trade*'s rule of reason (the "*Board* Rule of Reason") was to determine the net competitive effect of the restraint, a question that the *Addyston* Rule of Reason never sought even to ask. The *Board* Rule of Reason offers a binary outcome: A net procompetitive restraint—that is, a restraint whose procompetitive benefits outweigh its anticompetitive effects—is legal. A net anticompetitive restraint—that is, a restraint whose anticompetitive effects outweigh its procompetitive benefits—is illegal.

While the *Addyston* test asked whether the restraint was reasonably necessary to achieve a legitimate goal, the *Board* Rule of Reason asked "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."[23] The Supreme Court thus implicitly rejected the use of ancillary restraints doctrine and the less restrictive alternative inquiry, and the less restrictive alternative test largely disappeared from antitrust jurisprudence for several decades, replaced by the wide-ranging, multi-factored balancing test from *Board of Trade*. This balancing test hinged legality on the net competitive effect of the restraint rather than the presence or absence of less restrictive alternatives or the fit of the restraint.[24] A net anticompetitive restraint is thus illegal under *Board of Trade* even if no less restrictive alternatives exist. Likewise, a restraint that is net procompetitive cannot be doomed simply because less restrictive alternatives exist to achieve those benefits.

The *Board* Rule of Reason was attacked from its inception,[25] criticized for veering from its common law/*Addyston* origins and over-complicating the Section 1 analysis by shifting to an opaque balancing test. The criticism focuses on both the difficulty of identifying effects on competition with any precision and on the challenges of trying to balance these seemingly incommensurate effects.[26] Courts and commentators cannot agree on the definition of "competition" for purposes of antitrust law, yet—the critics argue—*Board of Trade* requires courts to identify and then

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Ventures After the Supreme Court's Dagher *Decision*, 57 EMORY L.J. 735, 745 (2008) ("For nearly eighty years, the federal courts neglected Judge Taft's approach.").

22 Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

23 *Id.*; *see also, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) ("The goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007))).

24 *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978); *see also, e.g.*, Jeffrey L. Harrison, *An Instrumental Theory of Market Power and Antitrust Policy*, 59 SMU L. REV. 1673, 1683 (2006).

25 *See* Case Note, *Restraint of Trade: Board of Trade Rule Limiting Hours of Trade*, 31 HARV. L. REV. 1154, 1156 (1918) (observing that the *Board of Trade* "may come back to give trouble"); Comment, *Efficiency or Restraint of Trade*, 27 YALE L.J. 1060, 1061 (1918) (noting that the rule of reason was "much misunderstood and much criticised when it was first announced").

26 *See, e.g.*, *In re* Detroit Auto Dealers Ass'n, Inc., 955 F.2d 457, 475–76 (6th Cir. 1992) (Ryan, J., concurring and dissenting) (quotation omitted) (comparing the *Board of Trade* test to the "antitrust equivalent [of] . . . water torture"); *see also, e.g.*, Stephen Calkins, California Dental Association*: Not a Quick Look but not the Full Monty*, 67 ANTITRUST L.J. 495, 521 (2000); Feldman, *supra* note 9, at 600.

balance these ill-defined concepts.[27] Justice Scalia noted the difficulty inherent in such a test, analogizing it to "judging whether a particular line is longer than a particular rock is heavy."[28] The challenges inherent to the balancing test are heightened in the antitrust context, where, given the disagreement over the basic definition of competition, one can argue that it is not always entirely clear whether we are evaluating a "line" or a "rock."[29] In practice, however, courts have overcome this challenge by fastidiously avoiding any precise balancing in most cases, instead finding that one of the parties has failed to allege any procompetitive or anticompetitive effect at all.[30]

Despite the unwavering attacks, *Board of Trade*'s balancing test and search for net competitive effects became entrenched as the rule of reason analysis, completely displacing *Addyston*'s less restrictive alternative analysis.[31] The phrase "less restrictive alternative" was not even mentioned in the context of the rule of reason for the first 40 years after *Board of Trade* was decided in 1918.[32] The less restrictive alternative test, however, reappeared in the Section 1 analysis in the second half of the twentieth century and has gradually reemerged as the dominant approach in the

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[27] *See id.* at 520–21 ("As any law student struggling to master the subject knows, antitrust is an *Alice in Wonderland* world where words do not always mean what they say.").

[28] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

[29] *See, e.g.*, Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 371 (2000) ("Competition regulation is too complicated. With no consensus on specific antitrust issues, the federal courts cannot produce a single national policy that can be consistently applied by the district courts."); C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 947–51 (2016) (noting the difficulty of calculating net competitive effects); Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171, 173 (2011) (noting that "[a]pplying antitrust laws to innovative companies . . . has always been a perilous proposition" in the context of Section 2 of the Sherman Act); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1384 (2009) (noting that the "rule of reason provides little predictability to market participants").

[30] *See, e.g.*, 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1507d (3d ed. 2010) (characterizing balancing as a "last resort"). Professor Michael Carrier has conclusively and impressively shown that a significant majority of rule of reason cases are decided based on one party's failure to set forth evidence of procompetitive or anticompetitive effects. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265, 1270 (1999); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827–28 (2009); *see also, e.g.*, Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 914 (1985) (noting that precise balancing is unnecessary in many cases decided under the rule of reason).

[31] *See, e.g.*, Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996) ("Indeed, the traditional rule of reason inquiry has essentially remained unchanged since it was first announced by the Supreme Court in *Chicago Board of Trade* and focuses on the competitive significance of the restraint."); Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994) (*Board of Trade* contemplated "the balancing of a wide variety of factors and considerations, many of which are not necessarily comparable or correlative.").

[32] *See* Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 928 (1999) ("For nearly eighty years, the federal courts neglected Judge Taft's approach.").

modern rule of reason tests in the federal circuit and district courts. The inquiry also finally appeared—albeit in dicta—as part of a rule of reason decision in the Supreme Court in 2018.[33]

C. The Reemergence of the Less Restrictive Alternative Test and the Gradual Transformation of the Rule of Reason

Despite the Supreme Court's adoption of a balancing test for the rule of reason rather than a means-ends analysis, the less restrictive alternative test slowly reemerged in antitrust law in the lower courts beginning in the 1970s,[34] initially reintroduced as a limited preliminary inquiry but evolving over the last few decades to its current role as the dominant and dispositive factor in the rule of reason.[35] The foundational modern version of the means-ends analysis first explicitly reappeared in Judge Bork's opinion in *Rothery Storage*, where he reintroduced the ancillary restraints doctrine.[36] Like its predecessor, under the modern doctrine, "[t]o be ancillary . . . an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose."[37]

Similar to its predecessor in the common law and to *Addyston*, this modern ancillary restraints doctrine asks whether the restriction is "reasonable" to make the productive transaction work.[38] In other words, both the modern and original versions of the ancillary restraints test ask whether there are less restrictive alternatives available to achieve the same procompetitive benefits as the challenged restraint. Unlike its predecessor, however, the modern ancillary restraints doctrine plays a much more limited role than Judge Taft's *Addyston* formulation.[39] In *Addyston*, a collateral restraint is legal if it is reasonably necessary to achieve a procompetitive benefit.[40]

Under the modern version of the ancillary restraints doctrine, however, a finding that a restriction is "reasonably necessary" does not render the restraint "automatically lawful." Rather, as Judge Bork held, "[t]he function of the ancillarity

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33 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

34 *See, e.g.*, Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248 (3d Cir. 1975) (requiring the plaintiff to show that the challenged restraint was not "fairly necessary"); *see also* Renee Grewe, *Antitrust Law and the Less Restrictive Alternatives Doctrine: A Case Study of Its Application in the Sports Context*, 9 SPORTS LAW. J. 227 (2002).

35 *See, e.g.*, Feldman, *supra* note 9, at 581.

36 Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986).

37 *Id.*; *see also* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 392 (1967) (The "doctrine of ancillary restraints was assimilated into the jurisprudence of this country in the nineteenth century."). *See generally* Gregory J. Werden, *The Ancillary Restraints Doctrine After* Dagher, 8 SEDONA CONF. J. 17, 18 (2007).

38 *Rothery Storage*, 792 F.2d at 214 ("The challenged restraint is ancillary . . . [and] the reasonableness of the restraint is so clear . . . .").

39 *See, e.g.*, John J. Miles, *Joint Venture Analysis and Provider-Controlled Health Care Networks*, 66 ANTITRUST L.J. 127, 151–52 (1997) (noting that the modern ancillary restraints analysis entails a rough analysis that does not require examination of less restrictive alternatives).

40 United States v. Addyston Pipe & Steel Co., 85 F. 271, 289 (6th Cir. 1898).

concept is merely to take the questioned agreement out of the per se category and subject it to the [rule of reason]."[41] In other words, the modern ancillary restraints analysis is separate from and precedes the balancing of competitive effects under the rule of reason. If a restraint is reasonably necessary to achieve a legitimate benefit, the restraint is then subject to the rule of reason and is only legal if it is net procompetitive.

Multiple courts[42] and commentators[43] have confirmed this limited use. For example, in *BMI v. Columbia Broadcasting Systems*, the Supreme Court, citing *Addyston,* held that a blanket license for copyrighted musical compositions was reasonably necessary to the furtherance of legitimate goals.[44] This finding of ancillarity did not render the blanket license legal automatically: it only allowed it to avoid per se illegality, but it was still subject to scrutiny under the rule of reason to determine the restraint's net competitive effects.[45] Similarly, the Seventh Circuit has held that if a court determines that a restraint is ancillary "then the court must apply the Rule of Reason to make a more discriminating assessment."[46]

The modern ancillary restraints doctrine thus does not serve as the ultimate test of the legality of a restraint.[47] A finding of ancillarity is, however, relevant to the subsequent rule of reason analysis.[48] Although ancillary restraints are not legal per se, they are more likely to survive the rule of reason and its search for net competitive effects by providing a "thumb on the scale" or a rebuttable presumption of

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41 Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 384 (1966); *see also, e.g.*, James A. Keyte & Karen Lent*, Reasonable as a Matter of Law: The Evolving Role of the Court in Rule of Reason Cases*, ANTITRUST, Summer 2014, at 62, 64 ("But then came decades where application of the ancillary restraints doctrine meant only that the plaintiff could not use a per se standard of illegality or a quick look presumption of illegality, but rather was required to plead and prove its claims under the 'full' rule of reason.").

42 *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 740 (1988) (Stevens, J., dissenting) ("Although vertical nonprice restraints may have some adverse effect on competition, as long as they serve the main purpose of a procompetitive distribution agreement, the ancillary restraints may be defended under the rule of reason."); Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) ("[W]here a restraint *is* reasonably necessary to achieve a joint venture's efficiency-enhancing purposes (i.e., ancillary), it will be analyzed under the rule of reason."); Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1336 (Fed. Cir. 2010) (noting that ancillary restraints "are also assessed under the rule of reason.").

43 *See, e.g.*, Gregory J. Werden, *The Ancillary Restraints Doctrine After* Dagher, 8 SEDONA CONF. J. 17, 18 (2007) (noting that the ancillary restraints doctrine is not "the keystone of Section 1 analysis").

44 Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21 (1979) ("[A] bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established."); *see also Salvino*, 542 F.3d at 339 n.8 (noting that *BMI* implicitly applied the ancillary restraints doctrine).

45 *BMI*, 441 U.S. at 24.

46 Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985).

47 *See* Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 993 (1988) (noting that the original ancillary restraints doctrine "bore no resemblance to the modern antitrust rule of reason").

48 *See id.* at 1004 (arguing that the modern ancillary restraints doctrine has "lost all independent significance").

legality.[49] After all, a finding of ancillarity includes a determination that the restraint achieves a procompetitive benefit, thus the plaintiff will have a heavy burden to show that the restraint's anticompetitive effects outweigh these benefits.[50]

The less restrictive alternative analysis, then, expanded from the ancillary restraints doctrine that preceded the rule of reason to become a factor in the rule of reason analysis itself. This expansion was slow and modest, with courts initially using the less restrictive alternative inquiry as one of several non-dispositive factors to consider in determining the net competitive effect of the challenged restraint under the *Board* Rule of Reason framework.[51]

For example, in the dissent in *United States v. Apple, Inc.*, Judge Jacobs emphasized that "[t]he reasonableness of the restraint . . . boils down to whether the dominant effect of the agreement is to promote competition or restrain it."[52] Judge Jacobs concluded that Apple's restriction was reasonable and, thus, legal because the procompetitive benefits of the restriction clearly outweighed its anticompetitive effects. Judge Jacobs explicitly addressed and rejected a series of less restrictive alternatives proffered by the government and concluded that absence of less restrictive alternatives supported the conclusion that the challenged restraint was net procompetitive.[53] The less restrictive alternative inquiry was used to shed light on the net competitive effect of the restraint rather than as an independent and dispositive basis for invalidating or upholding the restraint. Similarly, the Fourth Circuit held that the availability of less restrictive alternatives is one factor to consider as part of a "thorough analysis of [a restraint's] net effects on competition."[54] Further, plaintiffs ultimately "must prove that the [challenged restraints] caused anticompetitive harms which outweighed any procompetitive justification."[55]

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[49] *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984); Aydin Corp. v. Loral Corp., 718 F.2d 897, 901 (9th Cir. 1983) ("Whether a restraint that does not fall within a per se category is ancillary to a valid agreement is relevant only in the sense that ancillarity increases the probability that the restraint will be found reasonable.").

[50] *See, e.g.*, *Aydin*, 718 F.2d at 901.

[51] *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979) (noting "that no single test determines [the] reasonableness" of a restraint under Section 1 but that "the existence of alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct."), *aff'd in part, rev'd in part, and vacated on other grounds*, 938 F.3d 43; US Airways, Inc. v. Sabre Holdings Corp., No. 11 Civ. 2725 (LGS), 2017 WL 1064709, at *16 (S.D.N.Y. Mar. 21, 2017) ("In the alternative, if the jury found that these alternatives were not less restrictive or reasonably available—as Sabre argued—they would become part of the jury's ultimate weighing of the competitive harms and benefits of the challenged behavior.").

[52] United States v. Apple, Inc., 791 F.3d 290, 349 (2d Cir. 2015).

[53] *Id.* at 351 ("The absence of alternative means bespeaks the reasonableness of the measures Apple took."); *see also* Graphic Prods. Distribs., Inc. v. ITEK Corp., 717 F.2d 1560, 1577 n.31 (11th Cir. 1983) ("We agree that the reasonably necessary standard helps to illuminate . . . the effects of the restriction on competition overall.").

[54] Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509 (4th Cir. 2002).

[55] Robertson v. Sea Pines Real Estate Cos., Inc., 679 F.3d 278, 291 (4th Cir. 2012); *see also, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1188–89 (D.C. Cir. 1978) (holding that a restraint of trade cannot "be justified merely by showing that it is a relatively less anticompetitive means of attaining [procompetitive] benefits . . . . Rather, a [restraint] can survive scrutiny under the rule of reason only if it is demonstrated to have positive, economically *procompetitive* benefits that offset its anticompetitive effects . . .").

The less restrictive alternative inquiry quietly expanded into a fundamentally new role in the 1970s, shifting from a small part of the overall balancing of a restraint's net competitive effect within the rule of reason to the centerpiece and entirety of the rule of reason analysis.[56] This expansion has transformed (or reverted) the rule of reason to a means-ends analysis that rests legality exclusively on the fit of the restraint rather than its net competitive effect. Rather than merely serving as one of many factors in the overall rule of reason, under this new framework, the less restrictive alternative analysis *is* the rule of reason.[57] This is a remarkable evolution for the less restrictive alternative inquiry—from the core of the common law test, to adoption by Judge Taft in *Addyston*, to rejection by the Supreme Court and disappearance from antitrust jurisprudence, to reemergence as the dispositive factor in the rule of reason.[58]

D. The New Rule of Reason and the Outsized Role of the Less Restrictive Alternative Analysis

The expansion of the less restrictive alternative inquiry into the rule of reason has led to the creation of three related permutations of a new rule of reason analysis that represent a significant departure from the *Board* Rule of Reason and its balancing test. The core feature shared by all three versions of the analysis is the use of a form of the less restrictive alternative as a dispositive factor in the rule of reason and the minimization or complete elimination of the traditional balancing of competitive effects. The first variation of the test employs both balancing and the means-ends analysis while two other new forms of the rule of reason completely ignore the balancing of competitive effects and exclusively employ one of two forms of the less restrictive alternative inquiry. This subsection will explore each of these related formulations.

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[56] *See supra*, notes 51–55 and accompanying text.

[57] *See, e.g.*, Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75 (3d Cir. 2010) (citation omitted) (quotation omitted) ("The plaintiff then must demonstrate that the restraint itself is not reasonably necessary to achieve the stated objective. In other words, [e]ven if an anticompetitive restraint is intended to achieve a legitimate objective, the restraint only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant."); United States v. Am. Express Co., 88 F. Supp. 3d 143, 224 (E.D.N.Y. 2015) (quoting Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 543 (2nd Cir. 1993)) ("In the event Defendants provide a valid justification for the challenged restraints, Plaintiffs must prove either that the challenged restraints are not reasonably necessary to accomplish Defendants' legitimate objective(s), or that the same objective(s) may be 'achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.'"), *rev'd and remanded*, 838 F.3d 179, 224 (2d Cir. 2016); *In re* Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734, 760 (E.D. Pa. 2015) (quoting United States v. Brown Univ., 5 F.3d 658, 679 (3d Cir. 1993)) ("To determine if a restraint is reasonably necessary, courts must examine first whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through a substantially less restrictive alternative."); *see also* Feldman, *supra* note 9, at 581.

[58] For an excellent analysis of the less restrictive alternative analysis in the rule of reason context, *see* Hemphill, *supra* note 29, at 938.

1. The Combined Rule of Reason: Less Restrictive Alternative Inquiry as an Additional, Independent, and Dispositive Prong of the Rule of Reason

The first version of the modern rule of reason (the "Combined Rule of Reason") incorporates both the less restrictive alternative inquiry and the balancing of competitive effects as potentially dispositive factors to determine the legality of a restraint.[59] This approach thus asks both whether the restraint is reasonably necessary to achieve a procompetitive benefit and if the procompetitive benefits of the restraint outweigh its anticompetitive effects. The key distinction between this approach and the more traditional *Board* Rule of Reason is that the less restrictive alternative inquiry is a dispositive alternative basis for invalidating restrictions, rather than simply a factor to consider as part of the overall determination of net competitive effects.[60]

Although many courts utilize similar language in describing the Combined Rule of Reason, there is significant disparity across and even within circuits as to the order of operation of the means-ends analysis and balancing, in addition to the significance of each.[61] Under one form of this test, adopted by the Third Circuit, the

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[59] *See, e.g.*, LifeWatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 336 (3d Cir. 2018) (stating that the rule of reason "seeks to determine whether the restraint's harmful effects are outweighed by any procompetitive justifications and, if so, whether there are less restrictive alternatives"); Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997) (noting that the competitive effect and availability of less restrictive alternatives are relevant to the rule of reason analysis).

[60] In some cases, it is unclear whether the plaintiff's failure to prove the existence of less restrictive alternatives was the independent and dispositive reason for upholding the legality of the restraint or whether it was part of the court's determination that the restraint was net procompetitive and thus legal. *See, e.g.*, Suture Express, Inc. v. Owens & Minor Distribution, Inc., No. 12-2760-DDC-KGS, 2016 WL 1377342, at *31–32 (D. Kan. Apr. 7, 2016) (noting the absence of less restrictive alternatives in concluding that the procompetitive benefits of the challenged restriction "justify" any anticompetitive effect).

[61] Most courts employ a 4-step burden-shifting test for this version of the analysis. Typically, the first two steps mirror the *Board of Trade* test. In step one, the burden is on the plaintiff to identify anticompetitive effects. In step two, the burden shifts to the defendant to identify procompetitive benefits. Assuming these burdens are met, some courts will shift the burden back to the plaintiff in step three to identify less restrictive alternatives. If the plaintiff is able to identify less restrictive alternatives, the restriction is illegal. If, however, there are no less restrictive alternatives, the court then proceeds to balance the competitive effects in step four. *See, e.g.*, Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991); *see also LifeWatch*, 902 F.3d at 336.

Under a similar version of this test, the order of the third and fourth steps is reversed. Assuming the plaintiff and defendant meet their initial burdens of proving anti- and procompetitive effects, the court balances the competitive effects in step three. If the restraint is net anticompetitive, it is illegal. If the restraint is net procompetitive, the test proceeds to the fourth step, where the plaintiff may still prevail by identifying less restrictive alternatives. *See, e.g.*, *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 271–72 (6th Cir. 2014).

A third, related approach uses a three-step burden shift and merges the less restrictive alternative analysis into the second stage of the test. Under this variation, a court rejects the defendant's proffered procompetitive justifications if they could have been achieved through less restrictive means. If the restriction is reasonably necessary to achieve the procompetitive benefits (in other words, if there are no less restrictive alternatives), then the court proceeds to balancing in the final step. *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993).

A fourth, related approach uses a similar three-step burden shift but requires the defendant

balancing of competitive effects is the primary and dominant factor.[62] The balancing of competitive effects precedes the potential analysis of less restrictive alternatives. A restriction that is found to be net anticompetitive—that is, whose anticompetitive effects outweigh its procompetitive benefits—is illegal regardless of its fit or the presence or absence of less restrictive alternatives. But, a restriction that is found to be net procompetitive—that is, whose procompetitive benefits outweigh its anticompetitive effects—must also be evaluated under the less restrictive alternative inquiry and is only legal if there are no less restrictive alternatives for achieving those benefits. A restraint is only legal under this version of the test if it is both net procompetitive *and* if the procompetitive benefits could not have been achieved in a less restrictive manner.[63] However, a restraint is not necessarily legal under this version of the test simply because a plaintiff is unable to prove the existence of less restrictive alternatives. Instead, even the most narrowly tailored restraint (i.e., a restraint with no less restrictive alternatives) must survive the traditional *Board of Trade* balancing test and its search for net competitive effects.[64] The means-ends inquiry in this form of the test thus operates primarily as a sword for plaintiffs—the existence of less restrictive alternatives can invalidate an otherwise net procompetitive restraint, but the absence of alternatives cannot validate an otherwise net anticompetitive one.

In contrast, both the Eighth and Tenth Circuits suggest a different framework for the Combined Rule of Reason where the less restrictive alternative inquiry operates predominantly as a shield for defendants rather than a sword for plaintiffs.[65] Under this approach, the presence of less restrictive alternatives does not, by itself, invalidate the restraint. Rather, if a plaintiff can prove the existence of less restrictive alternatives, the court will then determine the legality of the restraint by balancing the procompetitive benefits and anticompetitive effects.[66] If, however, the plaintiff

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to show "that the challenged conduct promotes a sufficiently pro-competitive objective" in step two. *Id.* It is unclear if this version of the test requires a balancing of competitive effects in step two, or only a non-nominal showing of procompetitive benefits, before moving to the less restrictive alternative inquiry. *See, e.g.*, *In re Wellbutrin*, 133 F. Supp. 3d at 753. If there is no balancing, this test is more appropriately characterized as a version of the Stand-Alone Test. *See infra* notes 68–94 and accompanying text.

62 *See, e.g.*, *Brown Univ.*, 5 F.3d at 669 ("If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. . . . To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.").

63 *See* King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 412 (3d Cir. 2015).

64 *See, e.g.*, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. 375 F. Supp. 3d 1058, 1108 (N.D. Cal. 2019) (noting that "balancing is appropriate as a final consideration where no viable less restrictive alternative has been established.").

65 *See, e.g.*, Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1310 (10th Cir. 2017); Flegel v. Christian Hosp., Ne.–Nw., 4 F.3d 682, 688 (8th Cir. 1993). This approach also uses the first two steps from the *Board of Trade* burden-shifting test and requires the plaintiff and defendant to offer offsetting anticompetitive and procompetitive effects, respectively. If these initial burdens are met, the burden shifts to the plaintiff to identify a less restrictive alternative for achieving the defendant's procompetitive benefits.

66 *Buccaneer*, 846 F.3d at 1310; *Flegel*, 4 F.3d at 688.

cannot prove the existence of a less restrictive alternative, this approach suggests that the restraint is legal, regardless of the net competitive effect.[67] In other words, a restraint is legal under this approach if there are no less restrictive alternatives to achieving its procompetitive benefits *or* if the restraint is net procompetitive. Conversely, a restraint is illegal if a less restrictive alternative exists *and* the restraint is net anticompetitive.

2. The Stand-Alone Test: Less Restrictive Alternative Inquiry as the Exclusive Dispositive Factor in the Rule of Reason

The second permutation of the modern rule of reason analysis rejects the balancing of competitive effects and uses the less restrictive alternative inquiry as the sole determinant of legality (the "Stand-Alone Test").[68] This represents a new modern version of the *Addyston* Rule of Reason and hinges the legality of a restraint on its fit, not its net competitive effect. The Stand-Alone Test uses the less restrictive alternative as a substitute—rather than an aid—for identifying a restraint's impact on competition. In fact, as with the original *Addyston* test, the net competitive effect of the restriction is not only non-determinative, it is also rarely even considered under this analysis.[69] Instead, the less restrictive alternative inquiry seeks to determine if the challenged restraint is sufficiently narrowly tailored, much like a narrowly-tailored analysis is used in constitutional law and other areas of law.[70]

Under the Stand-Alone Test, courts apply a three-step burden-shifting framework.[71] In the first step, the plaintiff must demonstrate that the challenged

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[67] *Buccaneer*, 846 F.3d at 1310.

[68] *See, e.g.*, Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506–07 (2d Cir. 2004) (quoting Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 543 (2nd Cir. 1993) (internal citations omitted) ("Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior 'had an *actual* adverse effect on competition as a whole in the relevant market.' . . . If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means."); King Drug Co. of Florence, Inc. v. Cephalon, Inc., 88 F. Supp. 3d 402, 416 (E.D. Pa. 2015) (quoting Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75 (3d Cir. 2010) ("Lastly, if the defendant presents sufficient evidence of procompetitive justifications, the plaintiff must then rebut those justifications and establish that the 'restraint is not reasonably necessary to achieve the stated objective.'"); *see also* Hemphill, *supra* note 29, at 976–77 (discussing the use of the less restrictive alternative test the sole test for legality under Section 1).

[69] Oddly, despite the outsized role *Addyston* plays in these cases, courts rarely cite to the case when applying its analysis.

[70] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018); *cf.* Arthur, *supra* note 29, at 383.

[71] *See, e.g.*, N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., 883 F.3d 32, 45 (2d Cir. 2018) (quoting United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018)) (shifting burden to the plaintiff in the third step of the rule of reason analysis to prove that "any legitimate competitive benefits offered by [the defendant] could have been achieved through less restrictive means"); *In re* Mushroom Direct Purchaser Antitrust Litig., 319 F.R.D. 158, 190 n.30 (E.D. Pa. 2016) (same). In practice, the line between the various formulations of the Rule of Reason is often blurred or unclear because of inconsistent or incomplete application of the tests.

agreement had an anticompetitive effect in the relevant market.[72] In the second step, the burden shifts to the defendant to offer evidence of procompetitive benefits.[73] If these burdens are met, the burden shifts back to the plaintiff to prove the existence of less restrictive alternatives to the challenged restraint. This three-step test shares a superficial resemblance to the Combined Rule of Reason:[74] it begins with the classic anticompetitive benefit/procompetitive effect 2-step burden shifting and ends with an analysis of less restrictive alternatives. The Stand-Alone Test, however, is starkly different from both the Combined Rule of Reason and the original *Board of Trade* test because it completely eschews the traditional balancing of competitive effects.[75] While the Stand-Alone Test requires proof of both anticompetitive and procompetitive effects, this proof is not used to derive the net competitive effect of the restraint and the relative weight of the competitive effects is not relevant. Instead, this proof is used as the benchmark for the fit of the challenged restraint and the validity of less restrictive alternatives.

Thus, if the plaintiff meets its initial burden of identifying anticompetitive effects and the defendant meets its burden of identifying procompetitive benefits, there is no balancing of the competitive effects. Once the procompetitive benefits have been established, the sole focus is on the presence or absence of less restrictive alternatives to achieve those benefits. If the plaintiff can prove that there are less restrictive alternatives for achieving the benefits, the restriction is illegal.[76] If there are no less restrictive alternatives, the restriction is legal.[77] The legality of a restraint under the Stand-Alone Test thus rises and falls entirely on the question asked by the original *Addyston* analysis: whether the restraint is reasonably necessary for achieving a legitimate goal, regardless of the net competitive effect of the restraint.[78]

Although several circuit courts have utilized this approach for many years, the Supreme Court had not formally recognized use of the less restrictive alternative inquiry as part of the rule of reason until the 2018 decision in *Ohio v. American*

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72 *N. Am. Soccer*, 883 F.3d at 42.

73 *Id.*

74 *See supra* notes 59–67 and accompanying text.

75 Although this approach excludes a balancing of procompetitive benefits and anticompetitive effects, some courts have explained that balancing is implicit in the less restrictive alternative inquiry. *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1103 (1st Cir. 1994) ("One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint.").

76 There are numerous formulations of the less restrictive alternative inquiry, ranging from courts asking whether a restriction is "reasonably necessary" to accomplish the procompetitive benefits, Schering-Plough Corp. v. Fed. Trade Comm'n, 402 F.3d 1056, 1065 (11th Cir. 2005), to whether the restraint is the "least restrictive alternative," Kreuzer v. Am. Acad. of Periodontology, 735 F.2d 1479, 1495 (D.C. Cir. 1984), to whether the restriction is "*patently and inexplicably* stricter than is necessary," O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1075 (9th Cir. 2015).

77 *See, e.g.*, *Schering-Plough Corp.*, 402 F.3d at 1065.

78 S*ee, e.g.*, Jonathan B. Baker, *Competitive Price Discrimination: The Exercise of Marker Power Without Anticompetitive Effects (Comment on Klein and Wiley)*, 70 ANTITRUST L.J. 643, 653 n.30 (2003) ("[I]f the defendants had a practical 'less restrictive alternative' for achieving the procompetitive benefits at less threat of harm to competition, the conduct would be found unreasonable regardless of the relative magnitude of the benefits and harms.").

Express.[79] In that case, for the first time in 100 years, the Supreme Court suggested that the operative question in the rule of reason was the presence or absence of less restrictive alternatives, *not* the net competitive effect of the restraint.[80] In particular, the court identified a three-step burden-shifting test that did not include the balancing of competitive effects:

> [T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. . . . If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[81]

The Supreme Court held in *American Express* that the plaintiff had not met its burden of proving anticompetitive effects in the relevant market, so the Court did not actually perform the 3-step balance-less test, and the announcement of this new standard is arguably merely dicta. To add to the confusion, in dissent, Justice Breyer articulated a different choose-your-own-adventure version of the rule of reason test, stating that a plaintiff can win by proving the existence of less restrictive alternatives "or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer."[82]

The Stand-Alone Test, however, has been applied in several recent cases, most notably by the Ninth Circuit in *O'Bannon v. NCAA*.[83] In *O'Bannon*, former Division I student-athletes brought a class action antitrust suit against the NCAA, challenging a subset of the vast set of "amateurism" rules that prevent student-athletes from receiving a share of revenue the NCAA and its member institutions receive from the use of student-athletes' name, image and likeness ("NIL") in live game broadcasts, related footage, and video games.[84] The district court analyzed the relative anticompetitive effects (restriction on competition for licensing of right of publicity for college athletes) and procompetitive benefits (promotion of amateurism) and ultimately invalidated the rules in part because the NCAA's procompetitive benefits could be achieved through less restrictive alternatives.[85] In particular, the court held that permitting schools to hold a portion of licensing revenues in a trust, to be distributed after the college athletes left college, was a less restrictive alternative for achieving the NCAA's amateurism goals.[86]

The Ninth Circuit reversed, focusing solely on the less restrictive alternative inquiry.[87] The Ninth Circuit upheld the district court's conclusion "that there is a

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[79] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

[80] *Id.*

[81] *Id.* (internal citations omitted).

[82] *Id.* at 2291 (Breyer, J., dissenting). For an excellent discussion of *Ohio v. American Express*, *see* Michael A. Carrier, *The Four-Step Rule of Reason*, ANTITRUST, Spring 2019 at 50, 53.

[83] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015).

[84] *Id.* at 1055.

[85] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

[86] *Id.* at 1005.

[87] *O'Bannon*, 802 F.3d at 1076.

concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers." The Ninth Circuit concluded, however, that no less restrictive alternatives existed to achieve these benefits. In particular, the Ninth Circuit held that allowing deferred cash payments for NIL was not equally effective at maintaining amateurism because "not paying student-athletes is *precisely what makes them amateurs*."[88]

Significantly, the Ninth Circuit did not attempt to balance the competitive effects of the restrictions or to otherwise determine their net competitive effect.[89] In fact, the court did not even mention the relevance of the overall competitive effect of the challenged rules. Instead, the court ruled that the NCAA's restrictions were legal because they were reasonably necessary for achieving its procompetitive benefits.[90] The court explained that a restriction should only be held illegal under Section 1 of the Sherman Act where the plaintiff can prove that the "restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives."[91]

The Eastern District of New York applied a similar analysis in *North American Soccer League v. United States Soccer Federation*, eschewing a balancing test and instead announcing that the plaintiff must provide evidence of "some alternative . . . that offers the same procompetitive benefits . . . without significantly increased cost."[92] The court, as in *O'Bannon*, made no attempt to balance the respective competitive effects and upheld the legality of the challenged restraint exclusively on the grounds that the plaintiff had failed to allege an adequate less restrictive alternative.[93]

These cases represent a significant departure from the core competitive-effects balancing function of the traditional *Board* Rule of Reason and mark a reversion to

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88 *Id.* The Ninth Circuit further explained: "Having found that amateurism is integral to the NCAA's market, the district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is 'virtually as effective' for that market as being as amateur. Or, to borrow the Supreme Court's analogy, the market for college football is distinct from other sports markets and must be 'differentiate[d]' from professional sports lest it become 'minor league [football].'" *Id.* at 1076–77 (citation omitted).

89 *See* Michael A. Carrier, *How Not to Apply the Rule of Reason: The* O'Bannon *Case*, 114 MICH. L. REV. FIRST IMPRESSIONS 73, 73–76 (2015) ("[T]he Ninth Circuit applied a version of the Rule of Reason that short-circuited the analysis and insufficiently deferred to a district court judge who presided over an exhaustive trial on amateurism. . . . The court erred in not continuing the analysis to balancing.").

90 *O'Bannon*, 802 F.3d at 1075.

91 *Id.* (emphasis in original). The court observed that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap." *Id.* at 1078. The court added that if a restraint is more restrictive than necessary, "an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative." *Id.* at 1075.

92 N. Am. Soccer League, LLC. v. U.S. Soccer Fed'n, Inc., 296 F. Supp. 3d 442, 474 (E.D.N.Y. 2017) (quoting *O'Bannon*, 802 F.3d at 1074).

93 *Id.* at 474–77. In contrast, the Second Circuit applied the Combined Rule of Reason, citing *Board of Trade* for the proposition that the "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." N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., 883 F.3d 32, 42 (2d Cir. 2018) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978)).

the means-ends analysis formally adopted in *Addyston*. Although most courts have studiously avoided actual balancing within the *Board of Trade*'s framework,[94] this approach completely reads out any explicit balancing and relies exclusively on the fit of the restraint and the less restrictive alternative inquiry.

3. The Truncated Stand-Alone Analysis: Truncated Less Restrictive Alternative Inquiry as the Stand-Alone Rule of Reason

The third formulation of the modern rule of reason rejects the explicit balancing of competitive effects and replaces it with a truncated and watered-down stand-alone version of the less restrictive alternative inquiry (the "Truncated Stand-Alone Analysis" or "TSA"). Rather than asking whether the restriction is reasonably necessary to achieve the procompetitive benefit, the diluted version of the test in the TSA asks only whether the restriction is directly or reasonably related to the procompetitive benefit.[95]

The genesis of this version of the analysis can be traced, at least in part,[96] to the judicially-crafted "quick look" rule of reason, which allows courts to invalidate restraints after no more than a cursory examination.[97] The quick look is applied when restraints are obviously anticompetitive, such that "no elaborate industry analysis is required to demonstrate [its] anticompetitive character,"[98] and the rule of reason can be applied in the "twinkling of an eye."[99] The quick look provides a rebuttable presumption of illegality and places the initial burden on the defendant to identify substantial procompetitive benefits to offset the obvious anticompetitive effects of the restraint.[100] In other words, the challenged restraint is presumptively net anticompetitive, but this presumption can be rebutted by strong proof that the restraint is actually net procompetitive.

Although the quick look has been used predominantly in cases where the

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94 *See supra* note 30 and accompanying text.

95 *See, e.g.*, Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335–36 (7th Cir. 2012).

96 Professor Gary Roberts has long argued for the application of this truncated analysis in the context of professional sports league governance rules. *See* Roberts, *supra* note 47, at 1007–08.

97 11 HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 1911a (3d ed. 2010).

98 As the Supreme Court has explained, the quick look is appropriate when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect." Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999) (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692).

99 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010) (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 n.39 (1984)).

100 The quick look rule of reason acts as a shortcut by shifting the initial burden of persuasion to the defendant and providing a rebuttable presumption of illegality. *See Cal. Dental*, 526 U.S. at 770. In the full rule of reason, the initial burden is on the plaintiff to allege anticompetitive effects in a relevant market. If this burden is met, the burden shifts to the defendant to identify offsetting procompetitive benefits. If the defendant meets this burden, then the court is tasked with balancing the relative competitive effects. In the quick look rule of reason, the anticompetitive effects are presumed, and the initial burden shifts immediately to the defendant to identify procompetitive benefits. If the defendant fails to meet this burden and overcome the presumption of illegality, the restraint is net anticompetitive and thus illegal. If the defendant meets the burden, then the court is tasked with identifying the restraint's net competitive effect. *See id.*

restraint at issue is presumptively net anticompetitive, the doctrine has been turned on its head to provide a presumption of legality to restraints that appear to be overwhelmingly net procompetitive (the "reverse quick look rule of reason").[101] The specific contours of the reverse quick look rule of reason have not been defined, but the Supreme Court has suggested that it is the mirror image of the traditional quick look rule of reason.[102] Restraints that are judged under the reverse quick look are afforded a rebuttable presumption of legality that can be overcome by a strong showing of anticompetitive effect.[103] In other words, the challenged restraint is presumptively net procompetitive, but this presumption can be rebutted by strong proof that the restraint is actually net anticompetitive.

While the TSA appears to be an offshoot of the reverse quick look rule of reason, it is dramatically different in theory and in practice. The distinguishing feature of the TSA is that it not only reads out the balancing element of the rule of reason, but it also guts the means-ends analysis and only employs a cursory analysis of the fit of the restraint.[104] Rather than asking whether the challenged restraint is reasonably necessary to the purported procompetitive benefits, the TSA asks only if the restraint was directly *related* to the purported benefits.[105] If the restraint is reasonably related, the TSA essentially concludes that it is "per se legal" with no further analysis.[106] This places an impossibly low burden on defendants, as the fit of the restraint is largely irrelevant as long as it is reasonably related to a procompetitive benefit. And, unlike the traditional quick look and reverse quick look rules of reason, the TSA denies a plaintiff the opportunity to rebut the presumption of legality.[107] The TSA thus opens the door for false negatives and makes it almost inevitable that anticompetitive or obviously overly restrictive agreements will withstand its feathery scrutiny.

This version of the test has primarily emerged in the Seventh Circuit in cases challenging a variety of restrictions imposed by the NCAA. For example, in *Agnew*

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101 *Am. Needle*, 560 U.S. at 203 (In the context of proving the *legality* of a restraint, Justice Stevens observed: "And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye") (internal quotation omitted); *see also* James A. Keyte, *"Quick Looks" and the Modern Analytical Framework for Assessing Legitimate Competitor Collaborations*, ANTITRUST, Summer 2016, at 23, 26 (discussing the creation of a "*defendant's* quick look" that can uphold restrictions in the "twinkling of an eye"); Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1795 (1994) (arguing that ancillary vertical restraints should be entitled to a presumption of legality).

102 *See Am. Needle*, 560 U.S. at 202–04.

103 Unlike the traditional quick look rule of reason, there is no burden shifting with the reverse quick look because in both tests the initial burden is on the plaintiff to identify anticompetitive effects. And, in both tests, the antitrust challenge fails if the plaintiff fails to meet this initial burden.

104 *See* Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335–36 (7th Cir. 2012).

105 *Id.*

106 In terms of the traditional per se illegality doctrine, which declares certain categories of conduct to be inherently net anticompetitive and therefore per se illegal, the TSA would create a test of per se legality, where all restraints that are reasonably related to a legitimate goal are inherently net procompetitive and thus legal.

107 *Cf. Agnew*, 683 F.3d at 347.

v. NCAA, the Seventh Circuit concluded that NCAA restrictions on scholarships are legal under antitrust law as long as they are "directly related" to a procompetitive benefit (e.g., amateurism), without regard to any need for balancing the restriction's competitive effects.[108] In *Rock v. NCAA*, the Southern District of Indiana, relying on *Agnew*, applied the TSA to a related series of NCAA restrictions and explicitly read out any balancing requirement from the rule of reason.[109] Similarly, in *Pugh v. NCAA*,[110] the Seventh Circuit explicitly rejected any balancing requirement and held that any potential anticompetitive effects of the NCAA restraints in question were irrelevant.[111] The court concluded that the challenged restraints were "directly related" to the NCAA's legitimate amateurism goals and thus "it is presumptively procompetitive and no further analysis under the Sherman Act is required."[112] Although this unique analysis is likely attributable in part to the unique antitrust deference afforded to the NCAA,[113] there is no reason this analysis could not spread to other sports leagues and non-sports joint ventures.

III. FLAWS OF THE MODERN VERSIONS OF THE RULE OF REASON

The common thread—and flaw—in the modern versions of the rule of reason is the use of some form of the less restrictive alternative as the dispositive factor in determining the legality of a restraint. Proponents of the modern tests argue that they are vast improvements over the balancing test from *Board of Trade* and offer simpler, less expensive, and more predictable approaches for determining the legality of agreements under Section 1 of the Sherman Act. Although each of the tests offers superficial appeal and the lure of a better antitrust trap, most of the purported benefits are illusory. Rather than offering a more efficient framework for gauging the legality of restraints of trade, these tests create new problems, fail to solve many of the old ones, obfuscate the analysis, and are untethered from the fundamental goal of antitrust law. This Part will address the problems created by these new variations of the rule of reason and their overreliance on the less restrictive alternative inquiry.

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108 *Id.* at 335, 345. This prohibition has since been lifted by the NCAA. In *Agnew*, former NCAA Division I football players challenged the NCAA's cap on the number of athletic scholarships and prohibition of multi-year scholarships as illegal under Section 1 of the Sherman Act. *Id.* at 332–33.

109 Rock v. Nat'l Collegiate Athletic Ass'n, 928 F. Supp. 2d 1010, 1026 (S.D. Ind. 2013).

110 Pugh v. Nat'l Collegiate Athletic Ass'n, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at *3–4 (S.D. Ind. Sept. 27, 2016). In *Pugh*, the plaintiff challenged the NCAA's transfer restrictions, which rendered a college athlete ineligible to participate in intercollegiate competition for one year after transferring from a four-year institution.

111 *Id.* at *4 ("In addition, although Pugh alleges to have suffered economic harm by having to take a diminished grant-in-aid at his transfer school, it does not change the Court's conclusion.").

112 *Id.* The Southern District of Indiana then reached the identical conclusion in Deppe v. Nat'l Collegiate Athletic Ass'n, No. 1:16-cv-00528-TWP-DKL, 2017 WL 897307, at *4 (S.D. Ind. Mar. 6, 2017) ("Accordingly, because the challenged bylaw is directly related to eligibility, it is presumptively procompetitive and no further analysis under the Sherman Act is required.").

113 *See infra* notes 178–81 and accompanying text.

A. The Flaws of the Less Restrictive Alternative Inquiry in the Combined and Stand-Alone Rule of Reason Tests

The less restrictive alternative is the centerpiece of the modern rule of reason framework. The Combined Rule of Reason Test asks both whether the procompetitive benefits of the challenged restraint outweigh its anticompetitive effects and if the procompetitive benefits could have been achieved with a less restrictive alternative, while the Stand-Alone Test asks only whether the procompetitive benefits of the challenged restraint could have been achieved with a less restrictive alternative. The centrality of the less restrictive alternative inquiry in these analyses creates a number of problems that render the modern rule of reason tests unworkable as the standard for evaluating the legality of restrictions under Section 1 of the Sherman Act.

Although the Combined Rule of Reason and Stand-Alone Tests have significant theoretical differences from each other,[114] in practice, the dispositive question in both tests is whether a less restrictive alternative exists to achieve the restraint's procompetitive benefits. That is, even courts that announce that they are applying the Combined Rule of Reason Test have increasingly ignored the competitive effect and focused almost exclusively on the fit of the restraint and the presence or absence of less restrictive alternatives. Thus, in practice, the Combined Rule of Reason Test has become virtually indistinguishable from the Stand-Alone Test—in both, the means-ends analysis has swallowed the balancing test. Given the primary role of the less restrictive alternative in both versions of the modern rule of reason, this Section will consider the two tests together (the "Modern Tests") in analyzing their respective shortcomings, with a focus on the problems created by the overreliance on the less restrictive alternative inquiry. The TSA will be considered in the subsequent Section.

1. Disconnect from the Basic Goal of Antitrust Law and Shift Towards an Improper Regulatory Function

The most significant flaw of the Modern Tests is that they unhinge antitrust law from a coherent framework by relying on the less restrictive alternative analysis as a dispositive factor. The less restrictive alternative analysis entrenches and amplifies the problems that have riddled the rule of reason for over a century—it invites courts to engage in standard-less economic regulation without any meaningful transparency or coherency in the law.

The net competitive effect benchmark—that was established in 1918 in *Board of Trade* and endured for nearly a century—created a binary framework for legality. If the procompetitive benefits of the agreement outweigh its anticompetitive effects, it is legal. If the anticompetitive effects outweigh the procompetitive benefits, it is illegal. There are no gradations of legality.[115] The binary nature of the rule of

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114 The Combined Rule of Reason subverts, but does not completely ignore, the significance of the net competitive effect because a restraint that is net procompetitive can still be invalidated if a court determines that there were less restrictive alternatives available to achieving the procompetitive benefits. For a comprehensive discussion of the flaws of the Combined Rule of Reason, *see* Feldman, *supra* note 9, at 599.

115 Historically, antitrust law has played a passive role and does not compel firms to maximize competition. Rather, it has only imposed negative duties that prevent firms from

reason reflects the limits of judges and juries to perform complex economic analyses. Courts are simply not competent to gauge the relative competitive effects of actual and hypothetical restraints[116] with any specificity or accuracy.[117] These limits, in conjunction with fundamental notions of judicial and administrative efficiency, compel an approach that does not seek perfection, but rather seeks only to ensure that the market is better off with the restraint than without it.[118]

The Modern Tests, however, do not seek to determine whether the market is better off with or without the challenged restraint. Rather, these tests seek to determine whether the market would have been better off with an alternative restraint. Premising liability on the failure of a party to use a hypothetically less restrictive alternative not only disconnects antitrust from its binary competition-protecting role, but also asks courts to gauge legality based on "degrees of efficiency."[119] The role of antitrust law, however, is not to fix imperfections; it is to ensure that the market is not worse off with the challenged restraint.

The less restrictive alternative inquiry not only asks questions that antitrust law was not designed—and courts are not equipped—to answer,[120] but also converts antitrust law into a quasi-regulatory role that strikes down restrictions *ex post* for not being optimally efficient.[121] Although it is understandably tempting for a court or plaintiff to engineer the optimal restriction on competition, the role of antitrust law should end if a restraint is found to be net procompetitive.[122] Permitting or requiring a court to strike down a net procompetitive restriction solely because there were

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harming competition. *See* USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 513 (7th Cir. 1982) ("There is a difference between positive and negative duties, and the antitrust laws . . . have generally been understood to impose only the latter."); *see also, e.g.*, Alan Devlin, *Antitrust as Regulation*, 49 SAN DIEGO L. REV. 823, 835 (2012) ("[T]he Sherman Act . . . merely imposes narrow limits . . . on commercial actors' right to conduct their affairs in a manner that proves injurious to consumers.").

116 *See, e.g.*, Devlin, *supra* note 115, at 848 ("[C]ourts have exceedingly limited ability to gauge the welfare effects" of allegedly anticompetitive conduct).

117 This is another long-standing criticism of the less restrictive alternative doctrine in constitutional law. *See, e.g.*, Bunker & Erikson, *supra* note 20, at 260 ("Are courts even institutionally competent to answer questions about the costs or efficacy of alternative regulatory schemes?").

118 *See, e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) ("[U]nlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents . . ."); *see also* Feldman, *supra* note 9, at 590.

119 Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 227–28 (D.C. Cir. 1986). *But see* Hemphill, *supra* note 29, at 937 (arguing that "[a]n examination of unchosen alternatives—both their pros and cons—is a standard element of cost-benefit analysis").

120 *See, e.g.*, Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 100 (2002) ("The antitrust laws and antitrust enforcement institutions are not designed or well suited to identify and 'fix' all market imperfections that lead markets to depart from textbook models of perfect competition.").

121 *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1075 (9th Cir. 2015) (noting that the less restrictive alternative analysis is not an invitation for courts "to make marginal adjustments to broadly reasonable market restraints" or "to micromanage organizational rules").

122 *See, e.g.*, Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 597 (7th Cir. 1996) ("Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act.").

hypothetically less restrictive alternatives for achieving the same benefits would open the door for courts to use antitrust law as a sword for second-guessing business decisions rather than a shield to protect competition.[123] As courts have consistently held, "it is not a violation of the Sherman Act to make an error in business judgment."[124] Rather, a bad business judgment should violate antitrust law only if the decision has a net anticompetitive effect.[125]

And, while not a test of "absolute necessity,"[126] the less restrictive alternative inquiry at the core of the Modern Tests does not have any limiting principle and heightens the risk for false positives.[127] If strictly applied, the inquiry would permit courts to strike down clearly welfare-enhancing restrictions merely because the court was able to conjure up a theoretically less restrictive alternative than that employed by the defendants.[128] But, as Justice O'Connor observed, "an arrangement, which has little anticompetitive effect and achieves substantial benefits . . . is hardly one that the antitrust law should condemn."[129] The presence of less restrictive alternatives should be irrelevant where a restraint is clearly net procompetitive, yet a literal application of the modern rule of reason would place virtually any restraint at risk of condemnation, even when such condemnation would conflict with the goals of antitrust law. Judge Taft's statement in *Addyston* that "[w]hatever restraint is larger than the necessary protection . . . the party requires can be of no benefit to either"[130] is simply not true in the context of our antitrust regime that should only punish

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123 *See* Devlin, *supra* note 115, at 825.

124 Natrona Serv., Inc. v. Cont'l Oil Co., 435 F. Supp. 99, 110 (D. Wyo. 1977); *see also, e.g.*, Foster v. Md. State Sav. & Loan Ass'n, 590 F.2d 928, 935 (D.C. Cir. 1978) (holding that defendant's "legitimate exercise of business judgment . . . is outside the scope of the antitrust laws").

125 Use of the less restrictive alternative as the dispositive factor in the rule of reason is also inconsistent with the well-established ancillary restraints doctrine. Under the ancillary restraints doctrine, an agreement that might otherwise be considered per se illegal is subject to the rule of reason (and its search for competitive effects) if the agreement is reasonably necessary to achieve a legitimate procompetitive benefit. *See supra* notes 36–41 and accompanying text. Yet, under the Modern Tests, an agreement is legal if it is reasonably necessary to achieve a legitimate procompetitive benefit. It simply cannot be the case that a finding of ancillarity both removes a restraint from per se illegality and also renders it per se legal.

126 Nat'l Football League v. N. Am. Soccer League, 459 U.S. 1074, 1079 (1982) (Rehnquist, J, dissenting) ("The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity."), *denying cert. to* 670 F.2d 1249 (2d Cir. 1982).

127 Devlin, *supra* note 115, at 828.

128 *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979); Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975) ("Application of the rigid 'no less restrictive alternative' test in cases such as this one would place an undue burden on the ordinary conduct of business. Entrepreneurs . . . would then be made guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade.").

129 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 44 (1984) (O'Connor, J., concurring), *abrogated by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); *see also, e.g.*, Pitofsky, *supra* note 30, at 911 (noting use of the less restrictive alternative to invalidate agreements is inconsistent with antitrust law, particularly when the anticompetitive effects of the agreement are substantially outweighed by its procompetitive benefits).

130 United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898).

agreements that are net anticompetitive. A restraint can be larger than necessary but still offer significant (and net) procompetitive benefits. Permitting a court to invalidate an otherwise net procompetitive agreement because of the possible existence of less restrictive alternatives will not only potentially unduly restrict and deter procompetitive conduct but will also encourage the overregulation of business conduct by the courts and place an unreasonably high burden on defendants to select some unknowable "optimal" course of conduct.

Conversely, the Modern Tests allow courts to uphold clearly welfare-reducing restrictions solely because a defendant was able to prove that no less restrictive alternatives existed for achieving the restraint's relatively insignificant procompetitive benefits, and thus increases the risks for false negatives. In other words, there may be cases where the restriction only achieves relatively minor procompetitive benefits and causes relatively significant anticompetitive effects. Under the *Board* Rule of Reason, this type of agreement would be struck down because it is net anticompetitive. Under the Modern Tests, however, the court would focus only on the procompetitive benefits and ask whether a less restrictive alternative exists to achieve those benefits, without regard to the overall competitive effect.[131] The Modern Tests may thus place an unreasonable burden on the plaintiff, requiring it to prove the presence of hypothetical less restrictive alternatives, despite clear evidence of actual anticompetitive effect.[132]

This does not mean that the fit of the restriction or the presence of less restrictive alternatives is irrelevant to the rule of reason analysis.[133] As discussed below, clear evidence that an agreement was more harmful to competition than necessary can be used as proof that the purported benefits were pretextual and therefore should be ignored when determining the restraint's net competitive effects.[134] Thus, overly restrictive agreements will be condemned if they are net anticompetitive, but the presence of less restrictive alternatives should not be used to invalidate an otherwise procompetitive agreement. Interference by a court after a restraint is determined to be net procompetitive is no different and no more appropriate than judicial regulation of any other business decision.[135]

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131 *See* Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 38 (D.C. Cir. 2005) ("[I]f the only way a new product can be profitably introduced is to restrain the legitimate competition of older products, then one must seriously wonder whether consumers are genuinely benefitted by the new product.").

132 *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1075 (9th Cir. 2015).

133 *See* Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 137 (2017) (arguing that the less restrictive alternative inquiry is necessary to protect against restraints that "needlessly harm[] competition, just as it is unreasonable to use nuclear weapons, or even DDT, to kill mosquitoes posing a threat to public health").

134 *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994) ("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"); Image Tech. Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 618–19 (9th Cir. 1990) (noting that presence of less restrictive alternatives is evidence of pretext).

135 *See, e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 411 (1911) (Holmes, J., dissenting) ("I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for

Untethering the analysis from the search for competitive effects has left courts (and litigants) without any meaningful guidance for the application of the rule of reason.[136] The amplification of the means-ends analysis without any real guardrails has led rudderless courts to create wildly inconsistent rule of reason frameworks and tests across and even within circuits.[137]

2. Illusion of Simplicity

Despite the disconnect between the enhanced use of the less restrictive alternative analysis in the Modern Tests and the goals of antitrust law, scholars have advocated for their adoption as a much-needed heuristic for the traditional rule of reason.[138] Although heuristics often involve a tradeoff between simplicity and accuracy,[139] the expanded use of the less restrictive alternative inquiry fails as a heuristic because it sacrifices accuracy without any meaningful simplification of the antitrust analysis. Granted, balancing procompetitive benefits and anticompetitive effects is a difficult task, but it is no more difficult than other balancing tests courts are routinely asked to perform in other areas of law.[140] Nevertheless, converting the rule of reason to a means-ends analysis provides only the illusion of simplicity and uniformity.[141]

Part of the illusion is created by the explicit effort to read competitive effects balancing out of the rule of reason test. The less restrictive alternative inquiry, however, does not avoid balancing or solve the problems lurking in the attempted comparison of incommensurate values. It merely cloaks balancing in a means-ends analysis that actually requires a more complex counterfactual analysis and balancing of competitive effects than the test it purports to simplify.[142] Whereas the traditional

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interference is very clear."), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); *see also, e.g.*, 7 AREEDA & HOVENKAMP, *supra* note 30, at ¶ 1505 ("'Metering' small deviations is not an appropriate antitrust function any more than is the defense that a price fix is lawful if the fixed price is 'reasonable.'").

136 These Modern Tests thus may be deficient under rule of law principles. For an excellent discussion of the rule of reason and rule of law principles, *see* Stucke, *supra* note 29, at 1418–29.

137 *See, e.g.*, Arthur, *supra* note 18, at 309 (discussing the "split personality in antitrust cases . . . reminiscent of that of the heroine in *The Three Faces of Eve*").

138 *See, e.g.*, Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 688–89 (1991) (arguing that the ancillary restraints analysis would be a faster and more transparent mechanism for judging the legality of restraints under Section 1); Keyte & Lent, *supra* note 41, at 67 (noting that "courts may channel pretrial discovery and motion practice to avoid litigation cost where judicial experience shows that challenged restraints appear necessary to further legitimate, procompetitive activity . . .").

139 *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1292–93 (2003).

140 *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994) ("[A]lthough balancing harms and benefits in different markets may be unwieldy and confusing, such is the case with a number of balancing tests that a court or jury is expected to apply all the time . . . many of which are not necessarily comparable or correlative . . .").

141 *See, e.g.*, Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1622 (1986) (arguing that the ancillary restraints doctrine asks for answers that are "virtually unknowable"). In contrast, the Combined Rule of Reason offered not even the illusion of simplicity.

142 *See, e.g.*, Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885–86 (1990),

rule of reason attempts to compare the level of competition in the market with and without the restraint, the less restrictive alternative inquiry attempts to compare the level of competition in the market with the restraint that exists versus the level of competition that might exist with hypothetical restraints.[143] The counterfactual analysis embedded in a means-ends inquiry thus riddles the test with uncertainty and speculation[144] because it requires courts to compare the relative net competitive impact of an actual restraint with the competitive impact of a restraint that was not imposed.[145] This requires courts to speculate about competitive effects that *might*

(referring to strict scrutiny as a balancing test), *superseded by statute*, Religious Freedom Restoration Act of 1993, Public L. No. 103-141, 42 U.S.C. § 2000bb; *see also, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1336 (2007) (noting that strict scrutiny may be "little more than a weighted balancing test"); Alan J. Meese, *Antitrust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111, 113 (1996) (noting that balancing is implicit in the less restrictive alternative analysis in tying); Alan O. Sykes, *Regulatory Consistency Requirements in International Trade*, 49 ARIZ. ST. L.J. 821, 829 n.27 (2016) ("In practice, the less restrictive alternative analysis may be conceptualized as a crude form of cost-benefit analysis, asking whether a more cost-effective way to address the regulatory issue exists.").

143 *See, e.g.*, US Airways, Inc. v. Sabre Holdings Corp., No. 11 Civ. 2725 (LGS), 2017 WL 1064709, at *15 (S.D.N.Y. Mar. 21, 2017) (noting that the rule of reason's less restrictive alternative analysis requires a "weighing of . . . alternatives against the challenged restraints and the determination of which is less restrictive to competition"), *aff'd in part, rev'd in part, and vacated on other grounds*, 938 F.3d 43 (2d Cir. 2019).

144 *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 233 (1993) (noting that a "counterfactual proposition is difficult to prove in the best of circumstances"); *see also, e.g.*, Stephen F. Ross & Wayne S. DeSarbo, *A Rapid Reaction to* O'Bannon*: The Need for Analytics in Applying the Sherman Act to Overly Restrictive Joint Venture Schemes*, 119 PENN ST. L. REV.: PENN STATIM 43, 58 (2015) ("One of the obstacles courts face when reviewing antitrust challenges to long-standing agreements among competitors is the difficulty of determining with any confidence what 'would otherwise be'—in the words of a foreign competition law tribunal, what is the 'counterfactual.'"); Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 345 (1992) ("Take, for example, an action in tort. Most obviously, counterfactual considerations loom in the determination of factual causation and remedy. The factual causation, or cause-in-fact, inquiry requires that the factfinder determine whether the defendant's tortious conduct, or defective product, causally contributed to the plaintiff's injury."); Amy Knight Burns, Note, *Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA*, 65 STAN. L. REV. 203, 208 (2013) ("When considering the things that might have happened but definitely did not, there are infinite possibilities. Because it is impossible to be certain about what would have happened in the absence of any one event, every counterfactual possibility will come with a degree of probability. That is, how likely is the counterfactual? It could be nearly certain, or it could be possible but wildly unlikely, or anywhere in between.").

145 Counterfactual analysis can be a part of the inquiry under the *Board* Rule of Reason, as the test asks for a comparative assessment of competition with the restraint (the factual analysis) and without the restraint (the counterfactual analysis). But, this counterfactual question can be answered more easily in the traditional balancing context because the test often asks for a comparison between competition in the market before and after a restraint was enacted. It is thus often not a counterfactual question at all, because the level of competition that existed before the restraint is factual, not counterfactual. The net competitive effects test therefore seeks to compare the level of competition without the restraint (a factual question) with the level of competition with the restraint (a factual question). This is still a difficult comparison, but it is far easier than trying to compare the level of competition with the restraint (a factual question) versus the level of competition with hypothetical alternatives (counterfactual scenarios). The counterfactual analysis is also part of the inquiry in many international competition law regimes. *See, e.g.*, *Rugby*

have happened and, by definition, limits the analysis to possibilities and probabilities rather than objective proof.[146] The counterfactual analysis required by the less restrictive alternative test thus renders the task closer to fantasy than reality[147] and smuggles unknowable inquiries into a mirage of objectivity.[148] Antitrust law should require verifiability and objectivity, but the less restrictive alternative inquiry does not provide that. Instead, it just provides the appearance of it.[149]

The analysis is further complicated by the fact that most restraints contested under Section 1 are multifaceted and multipurpose agreements that result in a broad mix of anticompetitive and procompetitive effects.[150] Courts are thus required to distinguish and compare multiple competitive effects across multiple restraints, including hypothetical restraints that may—but do not necessarily—exist.[151] This analysis, which by definition requires courts to ask "what might have been," is inherently imprecise and allows the test to be easily manipulated to achieve results

Union Players' Ass'n Inc. v Commerce Comm'n (No. 2), (1997) 3 NZLR 301 (HC) at 308 (assessing the challenged restraint against a counterfactual which is "the Commission's pragmatic and commercial assessment of what is likely to occur in the absence of the proposed arrangement"); *see also* Mark N. Berry, *New Zealand Antitrust: Some Reflections on the First Twenty-Five Years*, 10 LOY. U. CHI. INT'L L. REV. 125, 147–49 (2012); Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375, 415 (2005) (discussing use of counterfactual analysis in European Union Competition law).

146 James A. Henderson, Jr., *A Defense of the Use of the Hypothetical Case to Resolve the Causation Issue—the Need for an Expanded, Rather than a Contracted, Analysis*, 47 TEX. L. REV. 183, 197 (1969) ("The secret to accomplishing the impossible in this regard is to remember that when we employ the 'but for' test we are dealing in possibilities and probabilities, not certainties, and that we have control over who shall bear the burden on this issue. Rarely, if ever, is either party able to demonstrate with anything approaching certainty what would have happened in the absence of the defendant's negligence."); James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 914 (1982) ("[C]ourts must try to avoid hypothetical 'what would have happened if . . . ?' questions in the course of resolving tort disputes. When such hypotheticals are addressed in adjudication, attention focuses on events that never occurred and circumstances that never existed. If liability rules require answers to such questions, proof gives way to speculation.").

147 *See* Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581, 594 (2006) ("As an analytical solution, however, counterfactual history is as unworkable as it is obvious. The skein of legal time having unraveled as it has, no one can retrace or reconstruct its missteps, let alone redeem them . . . A path-dependent universe yields no answers to questions of this sort, and all counterfactual speculation accordingly belongs in the realm of fantasy.").

148 *See, e.g.*, Berry, *supra* note 145, at 149 ("Counterfactual analysis can be problematic because predictions as to the future structure and workings of markets are inherently uncertain."); Devlin, *supra* note 115, at 827–28; Morris G. Shanker, *A Retreat to Progress: A Proposal to Eliminate Damage Awards for Loss of Business Profits*, 85 COM. L.J. 83, 87 (1980) ("In trying to figure out the extent of future lost business profits . . . we permit our courts to pretend to know what really is unknowable.").

149 *Cf.* Henderson, *Process Constraints*, *supra* note 146, at 913 ("First, if litigants are to have an opportunity to present proofs in support of their arguments, liability rules must refer to facts that can in most instances be verified objectively.").

150 *See, e.g.*, Arthur, *supra* note 29, at 344 (noting that Taft's *Addyston* test was "not designed for the complex decisionmaking required by more ambitious microeconomic regulation").

151 This analysis is also subject to significant levels of hindsight bias. *See generally* Devlin, *supra* note 115, at 876.

that are incompatible with antitrust law's basic goals.[152] For example, one formulation of the test holds that a restraint is "reasonably necessary" if its procompetitive benefits "cannot be reasonably attained through means that are less restrictive of competition."[153] This formulation raises more questions than it helps answer. How can one identify the reasonableness of attaining hypothetical alternatives? How can one identify the level of competition restricted by the agreement in question? How can one identify whether the hypothetical restraint will be less restrictive? How much less restrictive must the alternative restraint be?

Part of the risk, as Justice Breyer noted in the context of using the less restrictive alternative analysis in constitutional law, is placing a burden on the defendant to "disprove the existence of magical solutions, i.e., solutions that, put in general terms, will solve any problem less restrictively but with equal effectiveness."[154] Justice Blackmun echoed this sentiment by remarking that "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to" strike down an agreement.[155] This discretion invites judges to achieve whatever result they wish unbounded by any clear standards,[156] and only heightens the unpredictability[157] and opaqueness of antitrust law, leading to decisions that are "ad hoc, localized, and incoherent."[158] After all, as the Second Circuit has noted, "necessity is a slippery concept."[159] The Modern Tests simply provide no meaningful standard for

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152 *See supra* notes 38–41 and accompanying text; *cf.* Matthew D. Bunker et. al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 373 (2011).

153 David A. Balto, *Cooperating to Compete: Antitrust Analysis of Healthcare Joint Ventures*, 42 ST. LOUIS U. L.J. 191, 229 (1998); *see also* Joseph Kattan & David A. Balto, *Analyzing Joint Ventures' Ancillary Restraints*, ANTITRUST, Fall 1993, at 16.

154 Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 688 (2004) (Breyer, J., dissenting).

155 Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring).

156 *Cf.* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 840–41 (2000) (Breyer, J., dissenting); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 308–09 (1990) ("Too often, causation is a mirage—whatever the factfinder wishes it to be.").

157 *See, e.g.*, Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 945 n.6 (5th Cir. 1975) (noting the difficulty of identifying less restrictive alternatives to an exclusive distributorship where the defendant "has never experimented with nonexclusive distributorships"); Suture Express, Inc. v. Owens & Minor Distribution, Inc., No. 12-2760-DDC-KGS, 2016 WL 1377342, at *31–32 (D. Kan. Apr. 7, 2016) (analyzing and rejecting a series of less restrictive alternatives offered by the plaintiff). The unpredictability of the less restrictive alternative analysis has long been a criticism of its related use in constitutional law. *See, e.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 629 n.9 (1989) (internal quotations omitted) (criticizing the use of the less restrictive alternative analysis "because judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished"); *see also, e.g.*, Lars Noah, *When Constitutional Tailoring Demands the Impossible: Unrealistic Scrutiny of Agencies?*, 85 GEO. WASH. L. REV. 1462, 1468 (2017) (noting that the least restrictive alternative inquiry in constitutional law "lacks predictability and may invite judges to conceal value-laden judgments").

158 Strassfeld, *supra* note 144, at 348.

159 Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 286 (2d Cir. 1979).

determining when or how the presence of a less restrictive alternative will validate an otherwise net procompetitive agreement.[160]

The use of the means-ends analysis by courts as a shortcut to avoid identifying the relevant market in rule of reason cases is illustrative of some of these shortcomings.[161] Identification and classification of the relevant market is a key threshold issue in all Section 1 cases, including the Modern Tests, where a plaintiff must prove that the conduct at issue had an adverse effect on competition within a particular relevant market.[162] Without a well-defined geographic and product market, a court cannot determine the effect that the restraint has on competition.[163] Because of the complex and fact-intensive nature of the relevant market determination, courts often seek shortcuts within the rule of reason, including the less restrictive alternative inquiry, to avoid the elusive relevant market question.[164]

The less restrictive alternative inquiry, however, is an illusory heuristic for identification of the relevant market that merely avoids the fundamental market identification question. To determine if an alternative is less restrictive—i.e., if it has a lesser anticompetitive effect—a court must be able to identify the relevant market, the comparative anticompetitive effects of the restraint at issue, and its alternative in that market. There is simply no logical or transparent way to determine the relative restrictiveness of an agreement (or whether it is reasonably necessary) without also determining the relevant market. The restrictiveness or relative anticompetitive effect of an agreement has no significance outside the context of an identifiable relevant market. Any attempt to use the means-ends analysis in the modern version of the rule of reason to avoid the relevant market determination is therefore of no meaningful utility. The inquiry does not replace the ill-defined goals of antitrust law; rather, it requires more precision in identifying and comparing them.

B. Flaws of the Truncated Stand-Alone Test

The TSA is a watered-down version of the Modern Tests that asks only if the restraint is "reasonably related" to a procompetitive benefit. The TSA has all of the flaws of the Modern Tests discussed above and creates even more significant flaws by failing to provide a sufficiently rigorous or meaningful check on the anticompetitive nature of a restraint.

The TSA's truncated version of the less restrictive alternative inquiry requires

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160 *See* Roberts, *supra* note 47, at 973.

161 *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1394 (9th Cir. 1984) (concluding that a relevant market determination was not necessary for the plaintiff's Section 1 challenge because the "critical question" was whether the defendant's restriction was reasonably necessary for its alleged procompetitive benefits).

162 *See supra* notes 70–71 and accompanying text; *see also, e.g.*, Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1572 (11th Cir. 1991) ("[B]efore we can reach the larger question of whether [defendants] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market."); Aydin Corp. v. Loral Corp., 718 F.2d 897, 902 (9th Cir. 1983) (stating that proof that the defendant's activities had an impact upon competition in a relevant market is an essential element of a rule of reason case.).

163 *See, e.g.*, *L.A. Mem'l Coliseum*, 726 F.2d at 1392 ("The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue.").

164 *See, e.g.*, *id.* at 1396.

only *some* connection between the restraint and the procompetitive benefit.[165] Although this test is relatively simple to perform, given that a defendant only needs to show that the restraint is related to the procompetitive benefits, a court's decision to employ this test is entirely outcome-determinative.[166] That is, if a court uses the TSA instead of the *Board* Rule of Reason (or even the traditional less restrictive alternative inquiry in the Modern Tests), it is virtually certain that the restraint will be upheld regardless of its net competitive effect (or its fit).[167] Application of the TSA as the entirety of the rule of reason would render it virtually impossible to strike down agreements because of the watered-down scrutiny and the lack of consideration of the relative anticompetitive effects.[168] And, given that it does not even require an examination of less restrictive alternatives, the test is too weak to even detect if the restriction is pretextual, driven by illicit motives, or lacks a causal relation with the procompetitive benefits.[169] The TSA thus allows both net anticompetitive conduct and overly restrictive agreements to go untested and would likely increase the number of false negatives and allow competition-reducing conduct to escape condemnation.

Additionally, the TSA creates an asymmetry in the application of the rule of reason. As discussed above, the TSA appears to be an offshoot of the "quick look rule of reason," which provides a shortcut for the complex rule of reason analysis.[170] The traditional quick look rule of reason creates a rebuttable presumption of illegality for restraints that are obviously anticompetitive,[171] such that "no elaborate industry analysis is required to demonstrate [its] anticompetitive character . . . ."[172] The presumption of illegality can be overcome by compelling evidence of the restraint's net procompetitive effect. To attempt to create symmetry in the law, courts have also created the "reverse quick look rule of reason," which creates a presumption of legality for restraints that are obviously procompetitive such that the rule of reason can be applied in the "twinkling of an eye."[173] The presumption of legality

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165 *See supra* notes 104–113 and accompanying text.

166 The test is thus akin to rational scrutiny under constitutional law: "Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny." Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018); *see also, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 841 (2000) (Breyer, J., dissenting) ("[T]he test merely announces an inevitable [negative] result, and the test is no test at all.") (internal citation omitted).

167 *See, e.g.*, Arthur, *supra* note 29, at 383 (noting that a reasonably necessary-type ancillary restraints test may be too defendant-friendly and lead to false negatives); Ross & DeSarbo, *supra* note 144, at 48 (arguing that the reasonably related test, suggested by Professor Roberts, is unlikely to prohibit any joint activity).

168 It is hard to conceive of a legitimate (i.e., non-pretextual) ancillary restraint that would be held illegal under the truncated analysis.

169 *See infra* notes 226–42 and accompanying text.

170 *See supra* notes 96–103 and accompanying text.

171 But do not rise to the level of per se illegality. Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 779–80 (1999).

172 *Id.* at 770. As the Supreme Court has explained, the quick look is appropriate when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect." *Id.*

173 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010); *see supra* notes 98–

can be overcome by compelling evidence of the restraint's net anticompetitive effect.

Both the traditional and reverse quick look rules of reason serve as heuristics for the full rule of reason, but the essential functions of all forms of the rules of reason are the same—to determine the net competitive effect of the restraint.[174] The different versions of the rule of reason are part of a "sliding scale" of assessing the restraint's overall effect on competition and all require some form of balancing. Restraints that are adjudicated under the quick look rule of reason are more likely to be ruled illegal (or legal) because of the initial presumption of illegality (or legality), but this presumption can be overcome by a strong showing of procompetitive benefits (or anticompetitive effects).[175]

The TSA perverts the quick look framework by providing an irrebuttable presumption for restraints that are obviously procompetitive, rather than a rebuttable presumption that can be overcome by strong evidence of anticompetitive effect. This creates an asymmetry in the law. Under the traditional quick look, obviously anticompetitive agreements are not per se illegal. Rather, the quick look still requires a determination of the restraint's net competitive effect, even if the determination is truncated. The TSA's version of the reverse quick look rule of reason, however, requires no determination of the restraint's net competitive effect and, in essence, creates a rule of per se legality.

C. NCAA's Amateurism Defense: Case Studies of the Flaws of the Modern Rule of Reason

The two most recent decisions regarding antitrust challenges to the NCAA's "amateurism" restrictions—*O'Bannon v. NCAA*[176] and *NCAA Grant-in-Aid Cap Antitrust Litigation*[177]—highlight the risk of elevating the less restrictive alternative inquiry to the determinative question in the rule of reason analysis. Although these cases have received significant attention because of their potential impact on the future of intercollegiate athletics and the amateurism model, their impact on the future of the rule of reason analysis has gone largely unnoticed. Both cases are illustrative of many of the flaws of the modern rule of reason analyses and the wild inconsistencies created by the less restrictive alternative analysis.

Before delving into the details of the cases, it is important to have a basic overall understanding of the antitrust treatment of the NCAA. The NCAA has long received antitrust deference from the courts with respect to its amateurism rules. This deference stems from two primary factors. First, courts have recognized the unique interdependence of the competitors in a sports league/association both at

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99 and accompanying text.

174 *Cal. Dental*, 526 U.S. at 779–80 ("[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."); *see also, e.g.*, HOVENKAMP, *supra* note 97, at ¶ 1911a (noting that the function of the quick look rule of reason is "to establish that [the challenged restraint's] principal or only effect is anticompetitive").

175 *Cal. Dental*, 526 U.S. at 770.

176 O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

177 *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

the collegiate and professional level.[178] Put simply, professional and college teams must cooperate for their product—a competition between two teams over the course of a season—to exist. As the Supreme Court held in *Board of Regents v. NCAA*:

> What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.[179]

Second, the NCAA has long argued—and the courts have long accepted—that amateurism is a legitimate procompetitive benefit that helps create a line of demarcation between college and professional sports and therefore increases consumer choice.[180] The Supreme Court has observed that the:

> NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[181]

The judicial deference to the NCAA's amateurism model had continued largely unabated until *O'Bannon v. NCAA*.[182] As discussed above, in *O'Bannon*, a former Division I college basketball player challenged a set of NCAA rules that prevent student-athletes from receiving compensation from the use of their name, image and likeness ("NIL") in live game broadcasts, related footage, and video games.[183] In the district court, Judge Wilken held that the restrictions violated Section 1

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178 *See, e.g.*, *Am. Needle*, 560 U.S. at 202 ("[T[he fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions."); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) ("As Judge Bork has noted: '[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports." (quoting R. Bork, The Antitrust Paradox 278 (1978))); *see also, e.g.*, Michael A. McCann, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 739 (2010).

179 *Bd. of Regents*, 468 U.S. at 101.

180 *Id.* at 101–102.

181 *Id.* at 120; *see also, e.g.*, *O'Bannon*, 802 F.3d at 1073 (holding that NCAA restrictions on compensation help to "preserv[e] the popularity of the NCAA's product by promoting its current understanding of amateurism").

182 Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 22 (2012). For a comprehensive discussion of the *O'Bannon* district court opinion, *see* Marc Edelman, *The District Court Decision in* O'Bannon v. National Collegiate Athletic Association*: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319 (2014).

183 *See supra* notes 83–86 and accompanying text.

because they were more restrictive than necessary for achieving amateurism.[184] In particular, based on one line of testimony presented during trial by an NCAA witness,[185] Judge Wilken concluded that allowing schools to pay up to $5,000 in deferred compensation for use of student-athletes' NILs was a less restrictive alternative for achieving amateurism than a blanket restriction on compensation.[186] Based on this holding, the NCAA was therefore permanently enjoined from prohibiting its member schools from paying up to $5,000 per year in deferred compensation to student-athletes for the use of their NILs through trust funds distributable after they leave school.[187] Judge Wilken's decision was "the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices."[188]

On appeal, the Ninth Circuit reversed, holding that "the district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses" because the "district court ignored that not paying student-athletes is *precisely what makes them amateurs*."[189] According to the

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184 O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

185 Neal Pilson, one of the NCAA witnesses, was asked whether his opinions about amateurism "depend on the level of money" paid to players and testified that "a million dollars would trouble me and $5,000 wouldn't." *O'Bannon*, 802 F.3d at 1077–78. The Ninth Circuit reasoned that:

> [E]ven taking Pilson's comments at face value, as the dissent urges, his testimony cannot support the finding that paying student-athletes small sums will be virtually as effective in preserving amateurism as not paying them. Pilson made clear that he was not prepared to opine on whether pure cash compensation, of any amount, would affect amateurism. Indeed, he was never asked about the impact of giving student-athletes small cash payments; instead, like other witnesses, he was asked only whether big payments would be worse than small payments. Pilson's casual comment—'[I] haven't been asked to render an opinion on that. It's not in my report'—that he would not be troubled by $5,000 payments is simply not enough to support the district court's far-reaching conclusion that paying students $5,000 per year will be as effective in preserving amateurism as the NCAA's current policy.

Id. at 1078.

186 Judge Wilken also held that the NCAA could not agree to limit the scholarship amount below the "cost of attendance." *O'Bannon*, 7 F. Supp. 3d at 982, 1005.

187 This injunction applied to athletes on Football Bowl Subdivision and men's Division I basketball teams. *Id.* at 1007–08. Judge Wilken also concluded that NCAA rules prohibiting schools from providing athletic scholarships up to their "full cost of attendance" were not reasonably necessary to achieve amateurism and thus violated Section 1 of the Sherman Act. *Id.* at 1007.

188 *O'Bannon*, 802 F.3d at 1053.

189 *Id.* at 1076 (emphasis in original). The Ninth Circuit observed that Judge Wilken based her conclusion on "threadbare evidence" presented at trial, noting that "[m]ost of the evidence elicited merely indicates that paying students large compensation payments would harm consumer demand more than smaller payments would—not that small cash payments will preserve amateurism." *Id.* at 1077. As such, "the evidence was addressed to the wrong question. Instead of asking whether making small payments to student-athletes served the same procompetitive purposes as making no payments, the evidence before the district court went to a different question: Would the collegiate sports market be better off if the NCAA made small payments or big payments?" *Id.* The court concluded that, "[a]t best, these pieces of evidence indicate that small payments to players will impact consumer demand less than larger payments. But there is a stark difference between finding that small payments are less harmful to the market than large

Ninth Circuit, paying student-athletes *any* amount above their cost of education would destroy amateurism. The court explained: "Having found that amateurism is integral to the NCAA's market, the district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is 'virtually as effective' for that market as being an amateur."[190]

Both the district court and Ninth Circuit opinions are troubling for a variety of reasons. Although ultimately reversed on the merits, the district court's application of the rule of reason highlights some of the fundamental flaws associated with the amplified use of the less restrictive alternative analysis in the Modern Tests. Despite recognizing that the legality of a restraint hinges on a determination of its net competitive effect,[191] the district court decision completely ignores the net competitive effect of the NCAA's agreement. After identifying the procompetitive benefits and anticompetitive effects of the agreement, Judge Wilken immediately shifted the burden to the plaintiff to identify less restrictive alternatives without any consideration of the agreement's overall competitive effect.[192] The failure to even consider the net competitive effect of the restraint was not only inconsistent with Ninth Circuit precedent[193] but also inconsistent with the rule of reason test announced earlier in the opinion.[194]

The district court opinion also highlights the haphazard post hoc and ad hoc conjecture invited by the less restrictive alternative inquiry. During a lengthy bench trial, Judge Wilken probed many of the witnesses to try to determine whether permitting some amount of compensation to student-athletes above their educational expenses would be a less restrictive alternative to achieving amateurism. One of the NCAA witnesses, Neil Pilson, explicitly testified that he was not qualified or

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payments—and finding that paying students small sums is virtually as effective in promoting amateurism as not paying them." *Id.*

190 *Id.* at 1076. The Seventh Circuit reached a similar conclusion in *Agnew v. NCAA*, noting, in dicta, that "bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education . . . clearly protects amateurism" and "are essential to the very existence of the product of college [sports]." Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 343 (7th Cir. 2012). The court added that, "[f]or the purposes of college sports, and in the name of amateurism, we consider players who receive nothing more than educational costs in return for their services to be 'unpaid athletes.'" *Id.* at 344. The Seventh Circuit concluded that the scholarships regulations at issue in the case were not amateurism rules entitled to broad deference but dismissed the plaintiffs' claims on other grounds.

191 *O'Bannon*, 7 F. Supp. 3d at 985 ("A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." (quoting Tanaka v. Univ. S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001))).

192 *O'Bannon*, 7 F. Supp. 3d at 1004.

193 *See, e.g.*, *Tanaka*, 252 F.3d at 1063 ("A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects."); *see also* Michael A. Carrier & Christopher L. Sagers, O'Bannon v. National Collegiate Athletic Assocation*: Why the Ninth Circuit Should Not Block the Floodgates of Change in College Athletics*, 71 WASH. & LEE L. REV. ONLINE 299, 309 (2015) ("In addition, even if plaintiffs were not able to demonstrate a less restrictive alternative, that is not grounds for a plaintiff loss. It merely requires the court to balance anticompetitive and procompetitive effects.").

194 *See supra* note 192 and accompanying text. Of course, this internal inconsistency is not unique to *O'Bannon*. *See also, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1396 (9th Cir. 1984) (citing a balancing test but applying the less restrictive alternative test).

prepared to assess how or whether payments of any amount to student-athletes would impact amateurism, but eventually noted that he "would not be troubled by $5,000 payments."[195] Based on this statement, Judge Wilken concluded that allowing deferred payments to student-athletes of up to $5,000 would be a less restrictive alternative, and therefore enjoined the NCAA from setting a cap below $5,000.[196]

This is precisely the type of decision the Supreme Court admonished courts not to make: "act[ing] as central planners, identifying the proper price, quantity and other terms of dealing—a role for which they are ill suited."[197] Yet, the aggressive use of the less restrictive alternative inquiry morphs antitrust law into a micromanaging function that permits judges to make marginal changes to anti- or procompetitive behavior. Replacing one set of artificial limits on compensation for student-athletes with another, slightly higher, artificial set of limits is counter to basic principles of antitrust law and perverts the Sherman Act from a safeguard of competition to a regulatory agency.[198] It also risks converting antitrust law into a judicial sword for second-guessing business judgments based on the post hoc conjecture of a witness or judge that some hypothetical less restrictive alternative exists, rather than a shield to protect competition.[199]

Judge Wilken's $5,000 cap also highlights the absence of a meaningful limiting principle within the less restrictive alternative analysis. Why was $5,000 the appropriate line to draw? Why is $5,100 not a less restrictive alternative? $5,101? What is the stopping point? It is hard to conceive of any business practice that would not have some conceivably less restrictive alternative.[200] Without any limiting principle, the less restrictive alternative represents a "standardless delegation to the federal courts to engage in microeconomic regulation"[201] and provides no clear guidance for parties to differentiate permissible and impermissible conduct.

In reversing Judge Wilken's decision based on the absence of viable less restrictive alternatives without any regard to net competitive effects,[202] the Ninth Circuit illustrates the inverse problems with dispositive use of the less restrictive alternative inquiry. In addition to presenting yet another inconsistency within the less

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195 *O'Bannon*, 7 F. Supp. 3d at 983.

196 *Id.* at 1008.

197 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004); *see also* Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 597 (7th Cir. 1996) ("The district court's opinion concerning the fee reads like the ruling of an agency exercising a power to regulate rates.").

198 *See supra* notes 115–32 and accompanying text; *see also* 7 AREEDA & HOVENKAMP, *supra* note 30, at ¶ 1505 ("If members of a joint venture are found to be unlawfully fixing prices at $10, lowering the price to $8 or some other number is not the type of less restrictive alternative contemplated by antitrust law.").

199 *See* Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975); *see also*, *e.g.*, Pitofsky, *supra* note 30, at 911 (concluding that the less restrictive alternative test "is too demanding since it would place joint venture organizers at the hazard that others might come along later and think of some method of achieving similar efficiencies in a manner that is somewhat less restrictive.").

200 Roberts, *supra* note 47, at 1009 ("There is rarely, if ever, a single [business decision] that might not have a less onerous alternative from someone's perspective.").

201 Arthur, *supra* note 29, at 338.

202 *See* Carrier, *supra* note 82, at 50, 53.

restrictive alternative doctrine, the Ninth Circuit's decision also ratchets up the plaintiff's burden in rule of reason cases. Under the Ninth Circuit's articulation of the less restrictive alternative test, it is no longer sufficient for a plaintiff to prove that a restraint is net anticompetitive or even that it is more restrictive than necessary to achieve the procompetitive benefits. Instead, a plaintiff can only win a rule of reason case—regardless of the restraint's net competitive effect—if it can prove that the restraint was both "*patently and inexplicably* stricter than is necessary."[203] It is unclear how a plaintiff could meet that standard in any case.

Consequently, restraints that are overwhelmingly net anticompetitive (or would be determined to be overwhelmingly net anticompetitive upon an examination of their net competitive effects) would be upheld merely because a plaintiff could not meet the substantial burden of proving that the challenged restraint was patently and inexplicably more restrictive than necessary. In other words, agreements with relatively insignificant procompetitive benefits and significant anticompetitive effects would be upheld if there were no obvious alternatives to achieving those comparatively insignificant benefits. The application of such a test would neuter antitrust law and eliminate any real check on anticompetitive agreements.[204]

Another case involving the NCAA's amateurism rules, *NCAA Grant-in-Aid Cap Antitrust Litigation* ("*Alston*"), further elucidates the flaws with use of the less restrictive alternative inquiry as the dispositive question in the rule of reason analysis.[205] In *Alston,* a group of current and former college athletes brought an antitrust suit challenging the NCAA's set of rules that limit the compensation that student-athletes may receive in exchange for their athletic services. The NCAA again contended that rules preventing schools from offering any compensation beyond their educational expenses (or "cost of attendance") were necessary to maintain amateurism and the distinction between professional and college sports.[206] The plaintiffs contended that the current set of amateurism rules artificially suppressed compensation for student-athletes' athletic services and were not reasonably necessary to maintain amateurism or differentiate between professional and college sports and widen consumer choice.[207]

Judge Wilken again presided over the case, and again provided a tortured rule of reason analysis. Judge Wilken found that the NCAA's restrictions produced "severe" anticompetitive effects "because they essentially eliminate price competition [for] price of the services of student athletes."[208] She then rejected most of the NCAA's amateurism defense, concluding that the NCAA bylaws "disclose[] no principled, articulable difference between amateurism and not amateurism, or 'pay

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203 O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1075 (9th Cir. 2015) (emphasis in original).

204 *See In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019) ("If no balancing were required at any point in the analysis, an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown.").

205 *Id.*

206 *Id.* at 1070.

207 *Id.* at 1062.

208 *Id.* at 1098.

for play' and not 'pay for play.'"[209] Judge Wilken also found that under the current NCAA rules, student-athletes do, in fact, receive compensation in excess of the cost of attendance, yet this has not harmed consumer demand or eroded the distinction between college and professional sports. She thus concluded that the true "distinction between college and professional sports arises from the fact that student-athletes do not receive *unlimited* cash payments, especially those unrelated to education, like those seen in professional sports leagues."[210]

Rather than attempt to balance the "severe" anticompetitive effects and the limited procompetitive benefits, Judge Wilken, citing *O'Bannon*, shifted the burden to the plaintiffs to "show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules."[211] She then concluded that the NCAA could achieve and maintain amateurism through less restrictive alternatives. Judge Wilken identified the following convoluted tripartite alternative to the NCAA's current restrictions: (1) continue to allow a strict cap on compensation unrelated to education (i.e., the same as the current restriction); (2) eliminate limits on non-cash education-related benefits (including, for example, computers and science equipment); and (3) eliminate any limits on cash or cash-equivalent education related benefits (including, for example, academic or graduation awards or incentives) at a level lower than the NCAA's current or future caps on athletic participation awards.[212]

Judge Wilken thus struck down (a portion) of the NCAA's rules as illegal because of her determination that there are less restrictive alternatives for achieving the NCAA's amateurism goals and permanently enjoined the NCAA from agreeing to limit "compensation and benefits related to education."[213] The injunction specifies the list of education-related benefits that cannot be capped or limited by the NCAA, including, *inter alia*, "computers, science equipment, musical instruments, and other tangible items not included in the cost of attendance calculation but nonetheless related to academic studies."[214] The injunction also permits the NCAA and the plaintiffs to seek to modify the list of benefits related to education "at any time,"

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209 *Id.* at 1099.

210 *Id.* at 1101 (emphasis added).

211 *Id.* at 1104.

212 *Id.* at 1109. Judge Wilken thus concluded that:

> Restricting non-cash education-related benefits and academic awards that can be provided on top of a grant-in-aid has not been proven to be necessary to preserving consumer demand for Division I basketball and FBS football as a product distinct from professional sports. Allowing each conference and its member schools to provide additional education-related benefits without NCAA caps and prohibitions, as well as academic awards, will help ameliorate their anticompetitive effects and may provide some of the compensation student-athletes would have received absent Defendants' agreement to restrain trade.

Id. at 1112.

213 *Id.* at 1109.

214 Permanent Injunction at 2, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 4:14-md-02541-CW) (No. 1163). The remainder of the list included: "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post eligibility internships." *Id.*

but only with approval of Judge Wilken.[215]

Much like *O'Bannon*, *Alston* highlights many of the flaws of using the less restrictive alternative analysis as the dispositive factor in the rule of reason. Although once again broadly recognizing that the purpose of the rule of reason is to determine the net competitive effect of the challenged restraint, Judge Wilken explicitly held that balancing was not necessary in this case because less restrictive alternatives existed for achieving the NCAA's procompetitive benefits.[216] The framework for the basic analysis under Section 1 of the Sherman Act thus remains shifting and indeterminate within individual judicial opinions.

Alston also highlights the unpredictability of the Modern Tests and the risk of placing the parties at the whim of a judge or jury's ability to concoct (or not) a hypothetically less restrictive alternative. The specific less restrictive alternative identified by Judge Wilken as the basis for striking down the NCAA's restraints and granting the injunction was not proposed by the plaintiffs—rather, it was created by Judge Wilken.[217] Although it was a modification of the plaintiff's proposal, Judge Wilken's willingness to manufacture her own alternative again embodies the fear that the less restrictive alternative inquiry will make defendants the "guarantors that the imaginations of [judges] could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade."[218] Liability for treble damages—or the possibility of an industry-shifting injunction—should not be based on the second-guessing of business decisions by a judge or jury.[219] Similarly, *Alston* illustrates the risk of morphing antitrust courts into de facto regulatory agencies by requiring the NCAA to seek pre-approval to any changes to the list of "education-related" benefits. This is precisely the type of "deputiz[ation] of district judges as one-man regulatory agencies" that antitrust law should avoid.[220]

Alston also reveals the complex counterfactual balancing required by the less restrictive alternative analysis. To conclude, as Judge Wilken did, that allowing additional education-related benefits is a less restrictive alternative to the NCAA's existing rules is to conclude both that this alternative would achieve a lesser anticompetitive effect and the same procompetitive benefits as the existing rules. Both of those conclusions require a comparison of the relative anticompetitive effects and procompetitive benefits of the NCAA's actual restrictions with the anticompetitive effects and procompetitive benefits of a hypothetical restriction that Judge Wilken concocted after trial. This post hoc and ad hoc analysis renders the rule of reason completely unpredictable and opaque for litigants and untethers it from any

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215 *Id.* at 2, 4.

216 Judge Wilken did suggest, consistent with the Combined Rule of Reason Test, that balancing would be appropriate if no less restrictive alternatives had been shown, otherwise "an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown." *In re NCAA Cap*, 375 F. Supp. 3d at 1109; *see supra* note 48 and accompanying text.

217 *In re NCAA Cap*, 375 F. Supp. 3d at 1062.

218 Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975).

219 *See supra* notes 123–25 and accompanying text.

220 Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 597 (7th Cir. 1996) ("Yet the antitrust laws do not deputize district judges as one-man regulatory agencies.").

principled framework for evaluating the legality of restrictions under Section 1 of the Sherman Act.

IV. REORIENTING THE RULE OF REASON ANALYSIS

The rule of reason has degenerated into a morass of inconsistent, incoherent, and often conflicting frameworks that are incompatible with the fundamental competition-protecting function of antitrust law. The devolution of the rule of reason analysis has resulted primarily from the gradual but dramatic emergence of the less restrictive alternative analysis as the dispositive analytical factor. There is no easy fix for the complicated analysis under Section 1 of the Sherman Act, but a more limited and focused use of the less restrictive alternative analysis would eliminate some of the flaws created by the modern rule of reason analyses.

The fundamental problem with the new rule of reason analyses is that they shift the focus of Section 1 from a restraint's overall competitive impact to its fit or reasonable necessity. For over a century, the goal of antitrust law had been to ensure that a restraint is promoting—and not harming—competition. This was a binary analysis—net procompetitive restraints were permitted; net anticompetitive restraints were not. The new rules of reason, however, use the less restrictive alternative analysis to try to ensure that a restraint is the most efficient way of promoting competition. This is an unreasonable, unrealistic, and improper goal, and the less restrictive alternative should only be used as part of the inquiry into a restraint's net competitive effect.[221] A restraint that is clearly net anticompetitive should not be upheld merely because there were no less restrictive alternatives for achieving its relatively minimal procompetitive benefits.[222] Likewise, a restraint that is clearly net procompetitive should not be struck down merely because there were less restrictive alternatives to achieving the procompetitive benefits.[223] Rather, the rule of reason should be refocused on the competitive impact of the restraint.

Reorientation of the rule of reason on the net competitive effect of the restraint will provide more consistency and coherency to the analysis and minimize the

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221 *Cf.* Nixon v Shrink Mo. Gov't PAC, 528 U.S. 377, 402–03 (2000) (cautioning against presuming that a statute is unconstitutional solely because of the presence of less restrictive alternatives and noting that instead courts balance the relevant interests); Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (rejecting dispositive use of less restrictive alternatives in the context of a police search because the court is "hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the station house"); Cady v. Dombrowski, 413 U.S. 433, 447 (1973) ("The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable."). *See generally* Feldman, *supra* note 9, at 631.

222 *See* Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 301 (S.D.N.Y. 2014) (holding that "overwhelmingly anticompetitive" agreements cannot be saved by the absence of less restrictive alternatives).

223 *See* Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 81–82 (3d Cir. 2010) (refusing to consider less restrictive alternatives where restraint was obviously procompetitive); Lektro-Vend Corp. v. Vendo Corp., 500 F. Supp. 332, 354–55 (N.D. Ill. 1980) (rejecting a Section 1 challenge because of failure to prove anticompetitive effect and noting that overbreadth of the restraint is "not the essential inquiry here").

potential for the judicial overreaching and micromanagement that the less restrictive alternative inquiry has invited.[224] The less restrictive alternative can still play a meaningful role in the rule of reason, but its role should be as an aid—rather than a substitute—for identifying a restraint's net competitive effect. This Part discusses how the less restrictive alternative inquiry can be incorporated into the rule of reason to introduce more clarity and certainty to Section 1 scrutiny.[225]

A. Less Restrictive Alternative Analysis to Identify Illicit Motives or Lack of Causation

The most appropriate role of the less restrictive alternative inquiry within the rule of reason is to aid in the determination of the restraint's net competitive effect by shedding light on the intent of the agreement. In particular, the inquiry can help provide evidence of illicit motives[226] because proof that a restriction is more restrictive than necessary suggests that the goal of the restriction was something other than its purported legitimate benefits.[227] In other words, a finding that a restriction was not narrowly tailored to achieve its purported benefits may permit an inference that the agreement was motivated by bad intent and that the alleged justifications are pretext to hide anticompetitive conduct.[228]

Evidence of bad intent is relevant to the rule of reason analysis, but it plays a more limited role than the outcome-determinative function that the less restrictive alternative plays in the modern rule of reason analyses. In antitrust law, evidence of bad intent can be used to help shed light on, interpret, and predict the competitive

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224 *See supra* notes 115–25 and accompanying text.

225 *See, e.g.*, Realcomp II, Ltd. v. Fed. Trade Comm'n, 635 F.3d 815, 825 (6th Cir. 2011) (listing less restrictive alternatives as one of many factors to consider when determining the net competitive effect of a restraint).

226 *See generally* Feldman, *supra* note 9, at 628.

227 *See id.*; *see also, e.g.*, Graphic Prods. Distribs., Inc. v. ITEK Corp., 717 F.2d 1560, 1577 n.31 (11th Cir. 1983) ("We agree that the reasonably necessary standard helps to illuminate both the manufacturer's motive in imposing the restrictions and the effects of the restriction on competition overall."); Donald B. Rice Tire Co. v. Michelin Tire Corp., 483 F. Supp. 750, 758 (D. Md. 1980) (the less restrictive alternative inquiry "is useful to illuminate the true purpose of a restriction. A poor fit between means and ends suggests that the avowed purpose is merely a pretext.").

228 *See, e.g.*, Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1339 (Fed. Cir. 2010) ("A quick-look approach might be justified if the joint venture in this case were a sham, or if the alleged agreement were a naked restraint, i.e., not reasonably necessary to achieve the efficiency-enhancing benefits of the joint venture."); Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring) ("Nevertheless, a *per se* or quick-look approach may apply to joint ventures . . . where a joint venture is essentially a sham, offering no reasonable prospect of any efficiency-enhancing benefit to society . . . ."); Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994) ("[C]ourts 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."); *see also* Arthur, *supra* note 29, at 366 (noting that "the traditional ancillary restraints doctrine did not require courts to make such a searching inquiry, just enough to assure that the claimed justification was not a sham to disguise cartel activity"); Hemphill, *supra* note 29, at 963–65 (discussing the use of the less restrictive alternative to identify anticompetitive intent).

effects of a restraint,[229] but it is beyond cavil that bad intent, by itself, is not sufficient to condemn a restraint.[230] Just as good motives cannot save an otherwise anticompetitive restraint, bad motives cannot doom an otherwise procompetitive one.[231] Likewise, the presence of less restrictive alternatives should not doom an otherwise procompetitive restraint, and the absence of less restrictive alternatives should not save an otherwise anticompetitive one. The legality of a restraint must be determined by its net competitive effect, not the intent or motivation of the parties.

This function of "smoking out" bad intent is consistent with the use of the less restrictive alternative analysis in constitutional law and other areas of law,[232] and it is consistent with decades of Supreme Court antitrust jurisprudence, where the Court has used the existence of less restrictive alternatives to permit an inference of anticompetitive intent, not as proof of actual anticompetitive effect.[233] Limiting the use of the less restrictive alternative inquiry to help prove bad intent will reorient the rule of reason analysis around net competitive effects and harmonize it with the fundamental goal of antitrust law and its gatekeeping function.[234] It will also minimize the risk of false positives, because the legality of a restraint will not rest on the shaky and speculative grounds that a hypothetical less restrictive alternative was available.[235] Rather, the evidence of illicit motive can be used as a factor in determining the overall effect of the restraint.

Similarly, the presence of obvious less restrictive alternatives—or proof that the restraint was not reasonably necessary—can indicate that the challenged

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229 *See, e.g.*, Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("[T]he reason for adopting the particular remedy [and] the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."); K.M.B. Warehouse Distribs. v. Walker Mfg. Co., 61 F.3d 123, 130 (2d Cir. 1995) ("Intent is relevant to the reasonableness inquiry, but only to 'help courts interpret the effects' of defendants' actions.").

230 *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985) ("evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as . . . 'anticompetitive'"); White Motor Co. v. United States, 372 U.S. 253, 270 n.9 (1963) (Brennan, J., concurring) (The "presence [of a less restrictive alternative] invite[d] suspicion either that dealer pressures rather than manufacturer interests brought it about, or that the real purpose of its adoption was to restrict price competition."); United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) (Proof of intent can help "judge the likely effects of challenged conduct.").

231 *See, e.g.*, *Brown Univ.*, 5 F.3d at 672.

232 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018); Johnson v. California, 543 U.S. 499, 506 (2005) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)) ("We therefore apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."); Gratz v. Bollinger, 539 U.S. 244, 302 (2003) (internal quotation omitted) ("Close review is needed to ferret out classifications in reality malign, but masquerading as benign.").

233 *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885–86 (2007) (2007); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 478 U.S. 85, 103 (1984). In fact, Professor Arthur suggests that the original *Addyston* test was designed to fill this very function—"It just asks whether the transaction is a disguised cartel." Arthur, *supra* note 29, at 344.

234 *See supra* notes 115–35 and accompanying text *see also* Feldman, *supra* note 9, at 587.

235 *See supra* notes 142–48 and accompanying text.

restriction did not actually cause the purported procompetitive benefits.[236] As Professor Hovenkamp has explained, the "reasonably necessary" query can help determine whether the restraint at issue causes the procompetitive benefit or is "simply an unnecessary . . . appendage."[237]

For example, in *Arizona v. Maricopa County*,[238] a group of doctors agreed to set a maximum price schedule with insurance companies to guarantee that the insured would receive full reimbursement. The Supreme Court identified an alternative to this plan—have a third party, rather than the doctors, set the fee—that was so obviously less restrictive that the Court held that there was no causal relation between the agreement and its purported procompetitive benefits and, thus, struck down the restraint.[239] The presence of a less restrictive alternative was thus dispositive in *Maricopa* not because it proved that there were more optimal restrictions for achieving the alleged procompetitive benefits, but rather because it made clear that the challenged restriction simply did not cause the alleged procompetitive benefits.[240]

This does not necessarily eliminate the role of the less restrictive alternative inquiry in the rule of reason in every case, but it does limit its role to one factor or tool that can aid in the determination of a restriction's net competitive effect. The weight (if any) of the factor will vary depending on both the evidence of the relative competitive effects of the challenged restriction and the obviousness of any less restrictive alternatives. In cases where no assistance is needed in determining a restraint's net competitive effect—that is, in cases where the restraint's procompetitive benefits clearly and overwhelmingly outweigh its anticompetitive effects or vice versa—the presence or absence of less restrictive alternatives should not be considered.[241] In cases where the net competitive effect is less clear, the presence or absence of less restrictive alternatives should be considered as one factor in the balancing test to the extent it can help interpret the restraint's relative competitive effects.

Strong evidence that obviously less restrictive alternatives were available would allow for a more powerful inference of bad intent and play a more meaningful role in determining the restraint's net competitive effect. Conversely, evidence of marginally less restrictive alternatives would allow for a weak inference of bad intent and play little role in determining net competitive effect. In all cases, the less restrictive alternative inquiry would be subordinate to—though perhaps supportive of—an analysis of the competitive impact of the restriction rather than a direct proxy

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236 *See, e.g.*, Schering-Plough Corp. v. Fed. Trade Comm'n, 402 F.3d 1056, 1073 (11th Cir. 2005) ("Naturally, the restraint imposed must relate to the ultimate objective, and cannot be so broad that some of the restraint extinguishes competition without creating efficiency.").

237 HOVENKAMP, *supra* note 97, at ¶ 1908b; *see* Kattan & Balto, *supra* note 153, at 13–14 (existence of less restrictive alternatives helps show that the challenged restraint "does not relate to any integrative efficiencies").

238 Arizona v. Maricopa Cty. Med. Soc., 457 U.S. 332, 353 (1982).

239 *Id.*; *see also, e.g.*, Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 328 (2d Cir. 2008); Pitofsky, *supra* note 141, at 1620 ("But when efficiencies are offered to justify what would otherwise be anticompetitive restrictions, it is essential to discount those efficiencies where they could be achieved with a substantially lesser level or the complete absence of restraint.").

240 *Maricopa Cty.*, 457 U.S. at 253–54.

241 *See* Feldman, *supra* note 9, at 629.

for competitive effect. This narrower use is consistent with both the underlying goals of antitrust law and the practical limitations of a court's ability to discern slight marginal differences in the competitive effects of hypothetical restraints.[242]

B. Meaningful but Reduced Role as a Heuristic: Rebuttable Presumption of Legality

In addition to its role as a factor within the rule of reason to help shed light on a restraint's net competitive effect, the less restrictive alternative inquiry can also play an important, but non-dispositive, role as a heuristic. Antitrust scholars and judges have long sought threshold "filters" to simplify and shorten the Section 1 analysis of restraints of trade.[243] The less restrictive alternative analysis can play a meaningful role as a threshold filter and heuristic by providing a rebuttable, non-dispositive presumption of legality for restrictions that are reasonably necessary to achieve a procompetitive benefit. In other words, proof that no less restrictive alternatives exist would provide a rebuttable conclusion that the restriction's procompetitive benefits outweigh its anticompetitive effects.[244] This conclusion could be overcome by evidence that the restraint's anticompetitive effects actually outweigh its procompetitive benefits.

Thus, rather than serve as an independent and dispositive question in the rule of reason, the less restrictive alternative inquiry would continue to operate as part of the search for a restraint's net competitive effect but would allow the defendant to place a "thumb on the scale." This would essentially operate as the mirror image of the traditional "quick look rule of reason."[245] While the traditional quick look operates by presuming anticompetitive effect and immediately shifting the burden to the defendant to present significant offsetting procompetitive benefits,[246] the "reverse quick look" would operate by presuming procompetitive benefits and requiring the plaintiff to present a significant offsetting anticompetitive effect. In both scenarios, the quick look places a "heavy burden" on the party to overcome the initial presumption of legality or illegality. And, in both scenarios, the cases can be resolved relatively quickly—in the "twinkling of an eye"[247]—because in most cases the parties will be unable to present sufficient offsetting procompetitive benefits or anticompetitive effects.[248]

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242 *Id.* at 604.

243 *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14 (1984) (discussing the use of filters).

244 *Cf.* Aydin Corp. v. Loral Corp., 718 F.2d 897, 901 (9th Cir. 1983) ("Whether a restraint that does not fall within a per se category is ancillary to a valid agreement is relevant only in the sense that ancillarity increases the probability that the restraint will be found reasonable."); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 269 (7th Cir. 1981) ("[T]he Sherman Act does require that the anticompetitive effect of an ancillary restraint be proven.").

245 *See supra* notes 170–73 and accompanying text.

246 *Id.*

247 *See supra* notes 96–100 and accompanying text.

248 Granted, the traditional quick look operates as more of a shortcut because of the burden shifting, which eliminates the need for the plaintiff to prove anticompetitive effect and places the immediate burden on the defendant to prove offsetting procompetitive benefits. There is no burden shifting with the reverse quick look, as the initial burden remains on the plaintiff to prove anticompetitive effect.

The weight of the presumption of legality afforded to the restraint would be decided by the narrowness of the fit and the strength of the restriction's underlying goal.[249] The stronger the fit and the more significant the underlying legitimate goal, the greater the presumption. A restriction that is necessary for the creation of a new product or venture would thus be entitled to a stronger rebuttable presumption of legality than a restraint that was merely necessary for an enhancement of the product or venture. Although the thumb of legality is more firmly on the scale in the former case, both cases will ultimately hinge on the defendant's ability to prove that the restraints are, in fact, net procompetitive.

This shift is unlikely to change the outcome in most cases, but it provides consistency and coherency in the law by refocusing the rule of reason on the overall competitive effect on the market rather than on the fit of the restraint.[250] If a restraint is truly necessary for achieving a significant procompetitive benefit, it is highly likely (with or without a presumption of legality) that it will survive the rule of reason. In such cases, the defendant can and should prevail quickly without the need for a detailed economic analysis; the defendant should prevail because its restraint is obviously net procompetitive, not because the restraint is narrowly tailored. The fit of the restraint will make it more likely that the defendant prevails and can truncate the analysis, but the fit alone should not be the entirety of the analysis. This modified approach will also help minimize the risk of false negatives because, unlike the less restrictive alternative inquiry in the Modern Tests, it takes into consideration the scope of the anticompetitive effect of the restraint in question and avoids upholding a restriction that is narrowly tailored but only achieves a minimal procompetitive benefit compared to its anticompetitive effect. The less restrictive alternative inquiry can thus help abbreviate the balancing of competitive effects rather than completely replace it.

This modified use not only provides a coherent antitrust analysis that focuses on net competitive effects, but also harmonizes the less restrictive alternative inquiry with the modern ancillary restraints doctrine. The ancillary restraints doctrine was resurrected for a limited use in antitrust law—to allow ancillary restrictions to avoid per se illegality and the conclusive presumption that the agreement is net anticompetitive.[251] Such restrictions are still subject to the rule of reason and are only legal if they are determined to be net procompetitive after balancing the competitive effects.

Under the Modern Tests and the TSA, however, a finding that a restraint is reasonably necessary would not only allow it to avoid per se illegality but would also render it per se legal. That is, a finding that a restraint was reasonably necessary

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249 *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898) ("The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined.").

250 *Cf.* Fallon, *supra* note 142, at 1306 (observing that courts engage in a balancing of interests in strict scrutiny cases under constitutional law).

251 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010), (*citing* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 478 U.S. 85, 101 (1984)) ("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.").

would remove it from the category of conduct that is inherently and irrebuttably net anticompetitive and thus per se illegal and into a new category of conduct that is inherently and irrebuttably net procompetitive and thus per se legal. This plainly cannot be and never was intended to be the result. A finding that a restraint is reasonably necessary to achieve a procompetitive benefit should allow it to avoid per se illegality, but it would be a perverse result if the same finding of reasonable necessity also meant that the restriction were per se legal. Rather, the internally consistent use of the doctrine serves to subject these ancillary restraints to the traditional rule of reason with a rebuttable presumption of legality.

V. CONCLUSION

In this Article, I have provided a descriptive analysis of the new permutations of the rule of reason and have highlighted the flaws of using the less restrictive alternative inquiry as the determinative factor in analyzing the legality of agreements in restraint of trade. The new versions of the rule of reason are shapeless, inconsistent with each other, and incompatible with the underlying goal of antitrust law. The rule of reason and the less restrictive alternative analysis should be reoriented around the net competitive effect of the agreement to harmonize the rule of reason with the competition-protecting role of antitrust law and to provide more clarity and guidance for antitrust litigants.