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Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis

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Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis

Abstract

The rule of reason articulated by the Supreme Court in 1918 in *Chicago Board of Trade* has long been the target of scorn and ridicule by scholars and judges. The rule, which is used to determine the legality of restraints under Section 1 of the Sherman Act, instructs courts to identify and balance a restraint's competitive effects - restraints that are net procompetitive are legal. Critics argue that the rule is easy to state but impossible to apply, as it asks courts to identify the unidentifiable and balance the unbalanceable. Despite the steady criticism, the rule has remained the exclusive rule of reason approach of the Supreme Court for nearly a century.

Yet, perhaps in an attempt to improve the test, each of the federal circuits has incorporated the less restrictive alternative inquiry as an independent and dispositive prong of the rule of reason. Under this newly created test, a restraint that achieves a net procompetitive benefit - and thus is legal under the Supreme Court standard - is illegal if the procompetitive benefits could have been attained by a less restrictive alternative. Surprisingly, the new test has not only avoided much criticism, but has received widespread support from scholars across the ideological spectrum.

Rather than improve the rule of reason, however, use of the less restrictive alternative inquiry as a dispositive factor transforms an already difficult analysis into a virtually unworkable multi-tiered balancing adventure. It adds a new level of confusion and opacity to Section 1 analysis and threatens to change the role of antitrust law from an *ex ante* deterrent of net anticompetitive behavior to an *ex post* regulator of net procompetitive business decisions.

This Article examines the historical use of the less restrictive alternative inquiry and its emergence in the modern rule of reason analysis. The Article argues that use of the inquiry in the modern rule of reason is both theoretically and practically flawed. The Article concludes that proof of less restrictive alternatives should be used solely as proof of anticompetitive intent, which in turn should only be used as one factor to aid courts in balancing the competitive effects of a restraint of trade. Such use of the search for less restrictive alternatives is consistent with nearly one hundred years of Supreme Court precedent and maintains the proper focus of the antitrust laws on the competitive impact of the restraint.

Keywords

Competitive effects of restraint, Pro-competitive benefits, Less restrictive alternative

THE MISUSE OF THE LESS RESTRICTIVE ALTERNATIVE INQUIRY IN RULE OF REASON ANALYSIS

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INTRODUCTION

Since its creation in 1918, the rule of reason articulated in *Chicago Board of Trade*¹ has been under constant attack. Referred to as the “antitrust equivalent to . . . water torture,”² the rule, which is the primary method for determining the legality of restraints under Section 1 of the Sherman Act,³ is criticized for, inter alia, representing nothing more than a muddled set of platitudes with no meaningful standards.⁴ The test requires courts to identify and balance the procompetitive benefits and anticompetitive effects of the restraint at issue to determine the restraint’s net competitive effect.⁵ While the purpose of the test—to prohibit net anticompetitive conduct—is clear, critics argue that its execution is cripplingly obtuse and is akin to the proverbial “search for a needle in a haystack.”⁶ Despite the persistent assaults on the rule and calls for its reform, the Supreme Court has not veered from the course it set in 1918.⁷

Yet, while the Supreme Court has adhered to the same rule of reason analysis for nearly a century, the circuit courts have dramatically changed the test, as each circuit has adopted its own version of a less restrictive alternative inquiry as an independent and dispositive prong.⁸ The search for less restrictive alternatives has a long and interesting juridical history. Though more commonly associated with constitutional law, the means-oriented less restrictive alternative inquiry originated in common law restraint of trade cases and was the first rule of reason test in antitrust law.⁹ While the

1. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238–41 (1918).

2. *In re Detroit Auto Dealers Ass’n*, 955 F.2d 457, 475–76 (6th Cir. 1992) (quotation omitted).

3. 15 U.S.C. § 1 (2006).

4. See, e.g., Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 15 (1981) (commenting that the rule of reason is “[a] standard so poorly articulated and particularized, applied by tribunals so poorly equipped to understand and apply it”).

5. *Bd. of Trade*, 246 U.S. at 238.

6. Panel Discussion, *Market Power and Entry Barriers*, 57 ANTITRUST L.J. 701, 714 (1989).

7. See, e.g., *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 759 (1999) (examining the facts of the case using the rule of reason analysis).

8. See, e.g., *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (holding that the plaintiff can overcome a showing that the restraint has a net procompetitive effect by identifying an alternative means of achieving the same effect).

9. The classic formulation of the early test is contained in then-Judge Taft’s much-lauded decision in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1898). See Dennis A. Yao & Thomas N. Dahdouh, *Information Problems in Merger Decision Making and Their Impact on Development of an Efficiencies Defense*, 62 ANTITRUST L.J. 23, 37 (1993) (discussing the importation of the inquiry from antitrust law to constitutional law).

inquiry was embraced by the Supreme Court in constitutional law jurisprudence, particularly during the civil rights movement, the Supreme Court refused to adopt its use in rule of reason cases, opting instead for the balancing test in *Chicago Board of Trade*.¹⁰ The inquiry, therefore, disappeared entirely from rule of reason jurisprudence for nearly half a century, only to gradually reemerge as a distinct part of a new rule of reason test.

Under the new rule of reason test, a restraint that achieves a net procompetitive impact—and thus is legal under the Supreme Court standard—is illegal if that impact could have been attained by a less restrictive alternative.¹¹ Perhaps in an attempt to improve the rule of reason analysis, the new test has been adopted by every circuit and has received nearly universal approval from scholars across the ideological spectrum.¹² Rather than add clarity to the rule of reason, however, this additional prong adds a new level of confusion and opacity to Section 1 analysis and changes the role of antitrust law from an ex ante deterrent of net anticompetitive behavior to an ex post regulator of net procompetitive business decisions. If the *Chicago Board of Trade* approach requires courts to search for a needle in a haystack, the new rule of reason requires a search for the sharpest needle in the haystack. The new rule threatens to undermine antitrust enforcement and is inconsistent with almost one hundred years of Supreme Court precedent. Nevertheless, it has managed to avoid serious criticism. This Article examines the theoretical and practical flaws of this new rule of reason and argues that the less restrictive alternative inquiry should not be an independent and dispositive prong of the rule of reason. Instead, proof of less restrictive alternatives should be used solely as proof of intent to aid courts in balancing the competitive effects of a restraint of trade.

This Article will proceed as follows. Part I provides an overview of the evolution of the rule of reason analysis in antitrust law and explores the creation, disappearance, and reemergence of the less

10. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007) (overturning the per se rule against vertical price restraints in favor of a rule of reason approach because there are occasions when such restraints will have a procompetitive effect).

11. See, e.g., *Clorox*, 117 F.3d at 56 (outlining the three part analysis framework as the proper way to determine if Lysol trademark agreements produced anticompetitive effects and harmed the public).

12. See generally 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, 231 (2002) (discussing the rule of reason standards used by different circuits and noting their scholarly support).

restrictive alternative inquiry. This section explains how use of the inquiry by circuit courts has created a "New Rule of Reason" that is fundamentally different from the test first announced by the Supreme Court in *Chicago Board of Trade*. Part II discusses the theoretical flaws of the use of the less restrictive alternative inquiry as part of the New Rule of Reason analysis. Part III examines the practical difficulties of the inquiry as part of the New Rule of Reason. Part IV explains why the inquiry cannot be used as a heuristic to replace the traditional *Chicago Board of Trade* rule of reason analysis. Part V discusses the proper role of the inquiry and provides a more workable framework for antitrust analysis of agreements between competitors.

I. THE EVOLUTION OF THE RULE OF REASON AND THE LESS RESTRICTIVE ALTERNATIVE ANALYSIS

A. *The Original "Rule of Reason" and the Origins of the Less Restrictive Alternative Test*

Much of modern antitrust law focuses on the dangers of monopolization and agreements among horizontal competitors. The primary fear is that monopolies and horizontal cartels will reduce output and raise prices to consumers. A complex body of antitrust law has therefore developed to prevent anticompetitive restraints and protect consumer welfare. This modern approach to antitrust law, however, bears little resemblance to its common law origins.

Prohibitions against restraints of trade began in the fifteenth century when judges declared illegal all contracts that prevented a person from practicing his profession.¹³ Most of these cases arose in the context of covenants not to compete.¹⁴ As the common law

13. See, e.g., Lee Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23, 23 n.1 (1964) (noting that the public's need for any available skilled labor due to its scarcity necessitated such an approach limiting the restrictions on covenants not to compete). As then-Professor Taft explained:

It was regarded as against the general interest of freedom of labor and trade to enforce a man's agreement to disable himself to earn his own livelihood, and so to become a charge upon the community. Probably that was the sole purpose at first. Later on the kings exercised the power to grant the privilege to individuals of exclusive dealing in particular trades, and they did this by patents for monopolies. Naturally, such an exclusion of all others from any particular business or trade by arbitrary royal act stirred the indignation of the people, and the abolition of those statutory monopolies followed.

WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 7 (1914).

14. The first reported case to rule on the validity of a covenant not to compete was *Dyer's Case*, where the court held that the plaintiff's restraint was per se illegal, concluding "by God, if the plaintiff were here he would go to prison until he paid a

developed, courts recognized that some of these restraints should be permitted because they were used in support and furtherance of legitimate goals. In order to determine which restraints were permissible, or “reasonable,” the courts adapted a form of the less restrictive alternative test as part of an early “rule of reason.”¹⁵ The initial version of this rule was discussed in *Mitchel v. Reynolds*,¹⁶ where the court held that a covenant not to compete will be enforced only where the restraint is “particular.”¹⁷ The test was more fully articulated in *Horner v. Graves*.¹⁸

fine to the King.” Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685, 691 (Ohio C.P. 1952) (quoting *Dyer’s Case*, Y.B. 2 Hen. 5, fol. 5, Mich., pl. 26 (1414)). An Ohio Judge later eloquently explained the reason for the per se illegality of the covenants:

Over five hundred years of colorful history look down on this type of litigation. . . . Skill in a trade was the vital factor in a man’s economic status and it was obtainable only through apprenticeship to an experienced worker. The guild system permitted a man to work only in the trade in which he was apprenticed. Membership in a guild was not easily attained. Travel was difficult. Strangers were not welcome. If a man couldn’t work at his trade in his particular locality, he could hardly work at all; might become a pauper; and the public would be deprived of a worker at a time when the Black Death had made workmen scarce. In that background when, in 1415, the celebrated *Dyer’s Case* came before Judge Hall (Hull?), he became so enraged by an attempt to restrain a dyer from working in a town for just a half year that in bad French he cursed the deal void

Id. (citation omitted).

15. See *infra* notes 17–33 and accompanying text (describing the evolution of the rule of reason test).

16. (1711) 24 Eng. Rep. 347, 348 (K.B.).

17. *Id.* The analysis of less restrictive alternatives serves a significant role in constitutional law, see *infra* notes 159–162 and accompanying text, but constitutional law borrowed the analysis from antitrust and restraint of trade jurisprudence, see Yao & Dahdouh, *supra* note 9, at 37.

The first use of the inquiry in United States constitutional law occurred in 1821. See *Anderson v. Dunn*, 19 U.S. 204, 231 (1821) (limiting the contempt power of Congress to “the least possible power adequate to the end proposed”). The inquiry was later used in the nineteenth century to limit the police power of the state. See, e.g., *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (“To justify the state in thus interposing its authority in behalf [sic] of the public, it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose . . .”). The inquiry now plays a key role in strict scrutiny cases. See *infra* notes 159–162 and accompanying text.

German administrative law utilized a similar doctrine to limit the exercise of its police power. The doctrine, referred to as “The Rule of the Mildest Means,” requires that “the means least burdensome to the individual affected and to the public must be chosen.” Fritz Morstein Marx, *Comparative Administrative Law: Exercise of Police Power*, 90 U. PA. L. REV. 266, 289 (1942). The rule was created, in part, to prevent the police “from shooting sparrows with cannon balls.” *Id.* at 285 (quotation omitted).

18. (1831) 131 Eng. Rep. 284, 287 (K.B.). The court held that the restriction on a dentist’s assistant was unreasonably overbroad because it prevented the assistant from practicing within 100 miles of his employer’s town. *Id.* at 288. Given the personal nature of the service and the limits on transportation at the time, the court had no difficulty in finding that the covenant was more restrictive than necessary. *Id.*

[W]e do not see how a better test can be applied to the question . . . than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable.¹⁹

This rule of reason was consistently used by courts in England and the United States before²⁰ and after²¹ the passage of the Sherman Act. Significantly, not all of these cases involved covenants not to compete. For example, in *More v. Bennett*,²² the restraint at issue was an agreement among Chicago stenographers to fix a schedule of prices.²³ The court applied the “reasonably necessary” test in striking down the agreement.²⁴ And, in *Collins v. Locke*,²⁵ the court upheld as reasonably necessary an agreement among stevedores in a certain port to divide up the stevedoring business.²⁶

This rule of reason became the centerpiece of then-Judge Taft’s much-lauded²⁷ 1898 opinion in *United States v. Addyston Pipe & Steel Co.*²⁸ In *Addyston*, Taft synthesized the common law decisions from the United States and England and set forth the definitive standard

19. *Id.* at 287.

20. *See, e.g.*, *Tallis v. Tallis*, (1853) 118 Eng. Rep. 482, 487 (K.B.) (“A covenant . . . is not void as being in restraint of trade, unless the restraint appears to be greater than the protection of the covenantee can reasonably require.”); *Hitchcock v. Coker*, (1837) 112 Eng. Rep. 167, 173 (K.B.) (“[W]here the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable in law.”). For a comprehensive discussion of the early covenant-not-to-compete cases, see Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629–46 (1960).

21. *See, e.g.*, *More v. Bennett*, 29 N.E. 888, 891 (Ill. 1892) (explaining that “to be valid, [the restraint] must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased”); *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 691 (Ohio C.P. 1952) (“Is the restraint reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate interest?”).

22. 29 N.E. 888, 891 (Ill. 1892).

23. *Id.* at 890.

24. *Id.* at 891.

25. (1879) 4 App. Cas. 674 (P.C.).

26. *Id.* at 687.

27. *See, e.g.*, ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 26 (1993) (“Indeed, given the time at which it was written, [the Sixth Circuit’s decision in] *Addyston* must rank as one of the greatest, if not the greatest, antitrust opinions in the history of the law.”).

28. 85 F. 271 (6th Cir. 1898), *aff’d and modified*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1898).

for determining the legality of a restraint of trade.²⁹ Taft first drew a distinction between naked and ancillary restraints.³⁰ Naked restraints had no purpose other than restraining trade and thus were illegal.³¹ Ancillary restraints, such as most covenants not to compete, however, were incidental and collateral to a legitimate agreement and were thus subject to a “rule of reason” analysis (the “*Addyston* Rule of Reason”).³² Under the *Addyston* Rule of Reason, a restraint was legal if “reasonably necessary” for the underlying legitimate agreement to exist at all.³³ Taft explained that a restraint was reasonably necessary if it was “reasonably adapted and limited to the necessary protection of a party in carrying out [the underlying agreement.]”³⁴

29. See *id.* at 279–82 (noting that prior to the Sherman Act, unreasonable restraints of trade were merely unenforceable contracts) (referencing *Horner v. Graves*, (1831) 131 Eng. Rep. 284 (K.B.)).

30. *Id.* at 279–80.

31. *Id.* at 282.

32. See, e.g., Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the “Rule of Reason” in Restraint of Trade Analysis*, in 15 RESEARCH IN LAW AND ECONOMICS 1, 62 (Richard O. Zerbe, Jr. & Victor P. Goldberg ed., 1992) (explaining that an ancillary restraint “functions to facilitate, that is, ‘regulates,’ a joint productive effort or other primary transaction between the parties. The term ‘regulation’ . . . implies that a control exists to serve some other function or purpose beyond control for its own sake”).

33. *Addyston*, 85 F. at 281. As President Taft later remarked, the ancillary restraints discussed in *Addyston* were legal:

because it was said that they were reasonable restraints of trade. Now, they were reasonable not because in a general way the judges thought they would not hurt anybody under the particular circumstances, but they were held to be reasonable as measured by the lawful purpose of the principal contract to which they were subsidiary and ancillary.

This gave a definition for judicial guidance. It laid down the purposes to which such a contract must be confined, and it was not open to the criticism that it enlarged judicial discretion into legislative action. . . . What I wish to insist upon and emphasize as much as I can is that when it is said that a contract in restraint of trade was reasonable at common law, it was not a contract in which the restraint was the sole or chief object of the contract. The restraint was a mere instrument to carry out a different and lawful purpose of the main contract.

TAFT, *supra* note 13, at 11–12.

34. *Addyston*, 85 F. at 283. Then-Professor Taft would later give a more detailed explanation of the rule:

If a man had a business and wished to sell it, with its good will, he could get a better price if he might lawfully bind himself not to interfere with that business which he was selling by engaging in the same business within the same territory. This was in the interest of the purchaser, because he wished to secure the benefit of his bargain and make legitimate profit out of it, and it was not contrary to the public interest, because it did not affect the public. The condition of trade was not changed by the transfer from one to the other, and the *status quo* was maintained by the agreement.

Of course, if the restraint upon the seller’s going into business was larger in its scope than the business which he sold, either in the matter of territory or in the character of the business, it was beyond the proper and legitimate purpose of such a restraining term of the contract.

TAFT, *supra* note 13, at 8–9.

The determinative factor in the *Addyston* Rule of Reason and common law rule of reason cases was the same: a restraint was reasonable, and thus legal, if it was narrowly tailored, or no more restrictive than necessary to accomplish the legitimate ends of the underlying contract.³⁵ This test raised the following question: “what is necessary in the particular instance for the protection of the covenantee in his enjoyment of the main contract?”³⁶ Although couched in terms of “reasonable necessity,” the test—which would later be imported into U.S. constitutional law—was the earliest formulation of the less restrictive alternative test.³⁷ That is, the restraint was reasonably necessary if no less restrictive alternatives were available.³⁸

The *Addyston* Rule of Reason was thus a means-oriented inquiry that ignored the overall competitive impact of the restraint, focusing solely on the legitimacy of the underlying agreement and the necessity of the restraint ancillary to that agreement.³⁹ Judge Taft had

35. See, e.g., Clarence E. Eldridge, *A New Interpretation of the Sherman Act*, 13 MICH. L. REV. 1, 10 (1914) (“[T]he restraint imposed must be no greater than was necessary to a full consummation of the indispensable main, lawful purpose.”).

36. *Antitrust Significance of Covenants Not to Compete*, 64 MICH. L. REV. 503, 507 (1966) [hereinafter *Covenants*]; see also, e.g., *Hall Mfg. Co. v. W. Steel & Iron Works*, 227 F. 588, 592 (7th Cir. 1915) (explaining that legality was determined by “whether on the facts of the particular case the restraint is greater than is reasonably necessary for the protection of the purchaser of the business and good will”).

37. See Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1463 (1967) (arguing that the Supreme Court has abandoned the concept of economic due process through its failure to extend the less restrictive alternative principle to economic regulations); Yao & Dahdouh, *supra* note 9, at 37 (discussing the strict application of the least restrictive alternatives test used in constitutional law).

38. See, e.g., Carstensen, *supra* note 32, at 66 (noting that the measure of legality under a reasonable necessity test is whether less restrictive alternatives exist); Thomas E. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 908–09 n.73 (1987) (explaining that the language in the Sixth Circuit’s decision in *Addyston* may “be read to encompass an examination of less restrictive alternatives”); Stephen F. Ross, *Network Economic Effects and the Limits of GTE Sylvania’s Efficiency Analysis*, 68 ANTITRUST L.J. 945, 957 (2001) (explaining that the less restrictive alternative analysis “dates back to the progenitors of the rule of reason under English common law”); Richard S. Wirtz, *Purpose and Effect in Sherman Act Conspiracies*, 57 WASH. L. REV. 1, 34 (1981) (observing that “for all practical purposes, it would seem, the criteria for ‘reasonable necessity’ and ‘least restrictive alternative’ must be the same”); see also, e.g., PHILLIP AREEDA, *THE “RULE OF REASON” IN ANTITRUST ANALYSIS: GENERAL ISSUES* 8 (Federal Judicial Center 1981) (explaining that “one must ask whether there is a less restrictive way to accomplish that objective or, stated another way, whether the restriction is ‘reasonably necessary’ to achieve it”); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1322 (“A direction to enforce only restraints that are no larger than necessary is but another way of saying that there are no less restrictive alternatives.”).

39. See Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) (arguing that the “genius” of a means-oriented test “is that outcomes can be determined at the threshold without the need for messy balancing”).

cautioned against the use of a cost-benefit analysis or balancing test in gauging the reasonableness of a restraint.⁴⁰ The search for less restrictive alternatives thus played an essential normative role in the *Addyston* Rule of Reason, as it served as the only check—other than the threshold ancillary/naked distinction—on the anticompetitiveness of the restraint.⁴¹ Once a restraint was determined to have some legitimate or procompetitive purpose, the *Addyston* test was used only to maximize the efficiency of the method used to achieve that purpose. Put another way, the inquiry was used to minimize the anticompetitive impact of the restraint. It was not used, and cannot be used, to determine the net effects of a restraint. The operative question asked by the test was thus *not* whether the procompetitive benefits of the restraint outweighed its anticompetitive effects. The less restrictive alternative inquiry was not used as a proxy or heuristic for net competitive effect.⁴² The identification, analysis, and weighing of procompetitive and anticompetitive effects was completely absent from the inquiry. If a

40. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283–84 (6th Cir. 1898), *aff'd and modified*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1898); *see also* KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 100 (2003) (noting that Taft thought it inappropriate for courts to perform a “general cost-benefit reasoning in every case”).

41. *See, e.g.*, TAFT, *supra* note 13, at 20 (“[W]e find that the state of the common law when Congress passed the anti-trust statute was that contracts in restraint of trade, in so far as they restrained a party to the contract, were void, unless they were reasonable in the sense that they were merely ancillary to a main contract which was lawful in its purpose, and were reasonably adapted and limited to that purpose.”); Blake, *supra* note 20, at 632 (observing that in “early common law . . . restraints incident to the transfer of business interests have always been held valid if reasonably tailored to the scope of the transaction”); Eldridge, *supra* note 35, at 6 (noting that a restraint of trade “is valid and enforceable unless the restraint is greater than necessary for the protection of the parties and therefore unreasonable”); 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, 1005 (1988) (noting that the pre-Sherman Act ancillary restraints doctrine “focused only on what in modern antitrust parlance would be considered procompetitive effects”); Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B.A. ANTITRUST L. SYMP. 1, 4 (“The salutary principle of invalidating arrangements that are more restrictive than necessary was one of the great developments of the common law . . . It was indeed the heart of a properly applied ancillary restraint doctrine.”). As Justice Harlan stated in his dissent in the Sugar Trust Case:

[A]n agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be consideration to support it. In order that it may not be unreasonable, *the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made.*

United States v. E. C. Knight Co., 156 U.S. 1, 24 (1895) (Harlan, J., dissenting) (emphasis added).

42. *See, e.g.*, *Covenants*, *supra* note 36, at 510 (“[T]he *sole* standard under federal law should be whether the restraint is reasonably necessary to protect the main transaction.”).

less restrictive method were available, the method being used was, by definition, unreasonable, regardless of its net effects.⁴³

*B. The Sherman Act, Board of Trade Rule of Reason,
and the Search for Net Effects*

The passage of the Sherman Act in 1890 and its subsequent interpretation by the Supreme Court changed the course of antitrust jurisprudence. Though many disagree with the wisdom of the course change,⁴⁴ there is no question that the Sherman Act and its subsequent interpretation represented a dramatic shift.⁴⁵ The Act, read literally, condemns “[e]very contract” in restraint of trade, requiring the courts to give it shape and meaning.⁴⁶ Early on, the Supreme Court struggled with the task and issued a series of confusing and inconsistent opinions, occasionally relying on an *Addyston*-type Rule of Reason.⁴⁷ A significant shift in antitrust jurisprudence occurred in 1911, when the Court broke away from the *Addyston* test and established a new set of rules in *Standard Oil Co. v. United States*⁴⁸ for determining the legality of a restraint of trade. This new standard focused on the “necessary effect” of the restraint at

43. The less restrictive alternative inquiry also became part of contract and property jurisprudence. See RESTATEMENT (SECOND) OF PROPERTY § 187 (1969); RESTATEMENT (FIRST) OF CONTRACTS § 515 (1932). For a detailed discussion of the use of the inquiry in these contexts, see Daniel A. Farber & Brett H. McDonnell, “Is there a Text in this Class?” *The Conflict between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 624, 639 (2005).

44. In 1910, Justice Holmes wrote that “I don’t disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence,” and referred to the Act as “foolish, absurd, and stupid.” MILTON HANDLER, ANTITRUST IN PERSPECTIVE: THE COMPLEMENTARY ROLES OF RULE AND DISCRETION 13 (1982) (quotations omitted). See, e.g., Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1193–94 (1988) (arguing that the Court’s decisions involving the rule of reason have been largely silent on its overall application).

45. See, e.g., William Letwin, *The First Decade of the Sherman Act: Judicial Interpretation*, 68 YALE L.J. 900, 918 (1959) (noting that the Supreme Court “took the explicit position that the Sherman Act went beyond the common law”). But see Carstensen, *supra* note 32, at 60, 63 (noting that while *Chicago Board of Trade* “suggest[ed] a radical change in direction” in antitrust law, the “decision was but an application of the substantive tests of ancillary and reasonable necessity which the Court had adumbrated in the prior quarter of a century”).

46. 15 U.S.C. § 1 (2006). For a comprehensive early history of the Sherman Act, see Letwin, *supra* note 45.

47. See, e.g., *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49–52 (1912) (relying on precedent other than *Addyston*, to review a corporation that manufactures eighty-five percent of all enameled ironware); *Shawnee Compress Co. v. Anderson*, 209 U.S. 423, 434–35 (1908) (finding, without citation to *Addyston*, that the lease in question was an illegal restraint of trade); see also, e.g., Carstensen, *supra* note 32, at 57 (discussing the use of an *Addyston*-type functional analysis by the Supreme Court from 1895–1918).

48. 221 U.S. 1 (1911).

issue.⁴⁹ Justice White elaborated on the test later that year in *United States v. American Tobacco Co.*,⁵⁰ holding that the Sherman Act only prohibited agreements “which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade.”⁵¹

In 1918, Justice Brandeis capped the dramatic paradigm shift in antitrust law and articulated the classic post-Sherman Act test for determining the legality of a restraint under Section 1 of the Sherman Act in *Chicago Board of Trade*.⁵² According to Justice Brandeis, the operative question was “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.”⁵³ This new rule of reason (the “*Board* Rule of Reason”) reinvented the Section 1 analysis,⁵⁴ eschewing the less restrictive alternative inquiry and embracing a broad, multi-factored balancing test.⁵⁵

Rather than anchoring the test on the necessity of the restraint, the Court focused its gaze on the competitive effects of the restraint.⁵⁶

49. *Id.* at 65.

50. 221 U.S. 106 (1911).

51. *Id.* at 179. Justice White first discussed the concept of a rule of reason in his dissent in *Trans-Missouri*. *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 355 (1897) (White, J., dissenting).

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

53. *Id.*

54. See, e.g., Jeffrey L. Harrison, *An Instrumental Theory of Market Power and Antitrust Policy*, 59 SMU L. REV. 1673, 1683–84 (2006) (providing examples of the Court upholding restraints under the rule of reason approach that would have constituted per se violations pre-*Board*).

55. Justice Brandeis explained that:

the legality of an agreement or regulation cannot be determined by so simple a test[] as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, 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.

Bd. of Trade, 246 U.S. at 238.

56. See, e.g., *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 771, 774 (1999) (examining the restraint for a “net procompetitive effect” or a “net anticompetitive effect”); Nat’l

The *Board* Rule of Reason seeks to answer a question that *Addyston* did not raise—what is the net competitive effect of the restraint? The *Board* Rule of Reason, therefore, requires courts to perform a cost-benefit analysis of the anticompetitive and procompetitive effects of a restraint. The crucial question to be answered by Section 1 of the Sherman Act is whether the procompetitive benefits of the restraint in question outweigh its anticompetitive effects.⁵⁷ If the restraint is net procompetitive—that is, if the market is better off with the restraint than without it—it is legal under the Sherman Act.⁵⁸ Under the *Board* Rule of Reason, there is no difference in legality between an agreement that has a net procompetitive impact and an agreement that has a greater net procompetitive impact. They are both legal. A more efficient, or less restrictive alternative, is not “more legal.” The relevant comparison is between the state of the market with and without the restraint, not the state of the market with the restraint and with a different restraint. Thus, a restraint is only illegal if its anticompetitive effects outweigh its procompetitive benefits.

This new rule of reason was attacked from the moment Justice Brandeis penned the opinion and has been the subject of unrelenting attack ever since.⁵⁹ The test has been likened to, inter

Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 691 (1978) (stating that “the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition”); *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 321 (7th Cir. 2006) (“Under the rule of reason, [plaintiff] had the burden to demonstrate that [the restraint’s] net effect was anticompetitive.”); *Viazis v. Am. Ass’n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002) (“If, by contrast, the restraint should be judged according to the rule of reason, its net potential for competitive harm must be evaluated by weighing its probable anticompetitive effects against any procompetitive benefits.”); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 988 (8th Cir. 1982) (“[R]ule of reason analysis should be used to determine the net effect on the market.”); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1367 (5th Cir. 1980) (stating that the purpose of the rule of reason is to “assess . . . the net competitive impact of the practice”).

57. See, e.g., *Cal. Dental Ass’n*, 526 U.S. at 791 (Breyer, J., concurring in part and dissenting in part) (“The basic question is whether this, or some other, theoretically redeeming [procompetitive benefit] in fact offsets the restrictions’ anticompetitive effects . . .”); see also, e.g., Carstensen, *supra* note 32, at 11 (explaining that under a “consequential analysis . . . [i]f a restraint appears to have a net positive effect, or even if it is on balance apparently neutral, then it is desirable or at least not unlawful. If it has a net negative effect, it is undesirable”).

58. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 104–05 (1984) (noting that the relevant comparison for the Section 1 analysis is the competitive state of the market with and without the restraint in question); see also, e.g., FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2, at 4 (April 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (“Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement.”).

59. Then-Professor Taft stated:

alia, “the antitrust equivalent to Chinese water torture,”⁶⁰ the “most curious *obiter dictum* ever indulged in by the Supreme Court,”⁶¹ the “Full Monty,”⁶² and a “blowfish.”⁶³ One of the primary criticisms is that the *Board* Rule of Reason replaced the clear principles of the *Addyston* test with a muddled set of platitudes.⁶⁴ It added *ex ante* confusion and uncertainty and traded the relative simplicity and predictability of the means-oriented *Addyston* test for an amorphous balancing test that requires situation-specific factual inquiries. The test requires courts to identify a variety of poorly defined (or undefined), disparate and incommensurate factors, broadly labeled

[T]he phrase “the rule of reason” brought out the condemnation of everybody of demagogic tendencies prominent in politics, and evoked from statesmen of little general information and less law, proposals to amend the statute, “to put teeth” into it, and to eliminate from the power of the court the right to use the rule of reason in the construction and application of the anti-trust law.

TAFT, *supra* note 13, at 94; see Comment, *Negotiability and the Renvoi Doctrine*, 27 YALE L.J. 1046, 1061 (1918) (noting that “[t]he ‘rule of reason’ [was] much misunderstood and much criticized when it was first announced”); Editorial, *Restraint of Trade: Board of Trade Rule Limiting Hours of Trade*, 31 HARV. L. REV. 1154, 1156 (1918) (noting that the test announced in *Chicago Board of Trade* “may come back to give trouble”); see also, e.g., Robert Dishman, *Mr. Justice White and the Rule of Reason*, 13 REV. OF POL. 229, 229 (1951) (“The ‘rule of reason’ remains after almost forty years the most curious *obiter dictum* ever indulged in by the Supreme Court of the United States.”); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 913–14 (1985) (“The balancing process inherent in any rule of reason analysis . . . at least as currently applied . . . produces a hopeless morass.”); Roberts, *supra* note 41, at 999, 1000 (“In establishing the Rule of Reason, the Court made a colossal blunder” because it “interpreted [the language of Section 1] as if Congress was either illiterate or stupid for not saying what it intended.”).

Perhaps the most scathing attack of this approach came from Justice Harlan in his dissenting opinion in *American Tobacco*, seven years before *Chicago Board of Trade*.

Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the anti-trust act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word ‘unreasonable’ or ‘undue.’ All that is said in the court’s opinion in support of that view is, I say with respect, *obiter dicta*, pure and simple.

United States v. Am. Tobacco Co., 221 U.S. 106, 193 (1911) (Harlan, J., concurring in part and dissenting in part).

60. *In re* Detroit Auto Dealers Ass’n, Inc., 955 F.2d 457, 475–476 (6th Cir. 1992) (quotation omitted).

61. Dishman, *supra* note 59, at 229.

62. Stephen Calkins, California Dental Association: *Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 521 (2000).

63. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 105 (2005).

64. See, e.g., HYLTON, *supra* note 40, at 93–94 (“With one bold stroke, the Supreme Court cut the cord connecting then-undeveloped Sherman Act case law to its most likely foundation in common law doctrine.”). But see BORK, *supra* note 27, at 34 (arguing that the early Supreme Court opinions addressing the Sherman Act were “so thoroughly misunderstood that many people believed the Supreme Court had subverted the Sherman Act”).

as “procompetitive benefits” and “anticompetitive effects.”⁶⁵ And, given the unyielding disagreement regarding the meaning of “competition,” critics of the test argue that notions of procompetitive and anticompetitive effects are widely divergent and virtually impossible to identify.⁶⁶

Even if a court is able to identify the procompetitive benefits and anticompetitive effects of the agreement, the test gives no real guidance as to how these two core values should be balanced and weighed.⁶⁷ There is also general skepticism about the ability of judges or juries to balance different competitive effects with any real

65. See, e.g., Pitofsky, *supra* note 59, at 905 (“[E]fficiencies are difficult to quantify, and even more difficult to ‘trade off’ against anticompetitive effects.”); Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 ANTITRUST L.J. 391, 393 n.12 (2000) (discussing difficulties in applying the *Chicago Board of Trade* balancing test).

66. The various schools of thought hold widely different opinions on the definition of competition. For example, some focus solely on notions of allocative efficiency and promotion of consumer welfare. Others key on concepts of distribution of wealth, others put the greatest weight on the existence of “free” markets, some still cling to populist ideals. The only real consensus is that there is no consensus regarding the definition of competition and the goals of antitrust law. 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, 368 (2000) (explaining Judge Posner’s characterization of three competing positions); Kauper, *supra* note 38, at 896 (explaining various opposing opinions on the goals of antitrust law). For more detailed discussions of the debate and disagreement regarding the definitions of competition, see, e.g., William F. Baxter, who wrote that

After close to a century of antitrust jurisprudence, a vigorous debate continues over the proper means of furthering the original congressional goals of competition and free enterprise. As a result, uncertainty remains over the measure against which the social desirability (and hence legality) of various types of business conduct should be tested.

William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 671 (1982) (citations omitted).

67. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2730 (2007) (Breyer, J., dissenting) (“How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.*”); see also, e.g., Arthur, *supra* note 44, at 1193–94 (noting that the Court has not explained what is necessary to establish an anticompetitive effect or a procompetitive benefit); Harvey J. Goldschmid, *Horizontal Restraints in Antitrust: Current Treatment and Future Needs*, 75 CAL. L. REV. 925, 926 (1987) (concluding that the rule of reason is “simply unworkable”). The 1913 Report of the Senate Interstate Commerce Committee illustrates the early criticism leveled at the rule of reason:

It is inconceivable that in a country governed by a written constitution and statute law the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve In the end nine justices of the Supreme Court will be asked to say whether the restraint of trade brought about through this combination is a due or an undue restraint, and the answer which each justice makes to that question will depend upon his individual opinion as an economist or sociologist, the conclusion of the court being in substance an act of legislation passed by the judicial branch of the Government to fit a particular case.

S. REP. No. 1326, (1913), *as reprinted in* 49 CONG. REC. 4126, 4129 (1913).

accuracy or consistency.⁶⁸ As Justice Scalia has noted, balancing incommensurate values, such as procompetitive benefits and anticompetitive effects, is the equivalent of “judging whether a particular line is longer than a particular rock is heavy.”⁶⁹ The test is therefore attacked for complicating and elongating the litigation process and requiring judges to engage in ex post policymaking isolated from any clear ex ante standards.

The criticisms are summed up well by Professor Hovenkamp:

Justice Brandeis’s version of the rule of reason created one of the most costly procedures in antitrust practice. Under it courts have engaged in unfocused, wide-ranging expeditions into practically everything about the business of large firms in order to determine whether a challenged practice was unlawful. Justice Brandeis’s celebrated statement never defines what it is that courts are supposed to look for. His distinction between a restraint that “merely regulates” or “promotes” competition and those that “may suppress or even destroy” it can expand and contract like a blowfish, meaning almost anything at all.⁷⁰

68. See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440–41 (1978) (holding that “the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct”); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 (1972) (noting that “courts are of limited utility in examining difficult economic problems”); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229–30 n.11 (D.C. Cir. 1986) (“Weighing [competitive] effects in any direct sense will usually be beyond judicial capabilities.”); see also HOVENKAMP, *supra* note 63, at 108 (“Meaningful balancing, which involves placing cardinal values on both sides of a scale and determining which is heavier, is virtually never possible. A court will rarely be in a position to compute a number that measures the social cost of any market power being exercised, and then another number that measures claimed benefits, and net them out.”); *Carrier*, *supra* note 38, at 1349 (“Like it or not, balancing is with us. And as long as we do not expect mathematical precision—which, in any event, is impossible—balancing is not necessarily a bad thing.”); Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 33 (1978) (“[T]here is no reliable way in which a balance of this sort can be made.”).

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

70. HOVENKAMP, *supra* note 63, at 105; see also *id.* at 149 (noting that under the *Chicago Board of Trade* analysis, “one dumps every scrap of information available about an industry onto a large table and then tries to sort out the positives and negatives”); LAWRENCE SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 188 (1977) (remarking that the rule of reason analysis “must be referred to the arts rather than the sciences of judgment”); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 (1984) (“Of course judges cannot do what such open-ended formulas require. When everything is relevant, nothing is dispositive.”); Posner, *supra* note 4, at 15 (commenting that the rule of reason is “[a] standard so poorly articulated and particularized, applied by tribunals so poorly equipped to understand and apply it”); Roberts, *supra* note 41, at 998 (“[I]n 1911 the Supreme Court led antitrust . . . into the twilight zone with its announcement of the ‘Rule of Reason’ in *Standard Oil* . . .”).

In short, critics contend that the test asks courts to identify the unidentifiable and balance the unbalanceable.

Much of this criticism, however, at least in terms of the modern application of the *Board* Rule of Reason, may be overstated because courts are rarely required to perform a real or precise balancing test when applying the rule of reason. Rather, in nearly all cases, the competitive effects are overwhelmingly net pro- or anticompetitive, or one of the parties has failed to allege any pro- or anticompetitive effects at all.⁷¹ Additionally, a weakness of the balancing test may be the inability of judges and scholars to agree on the goals of the antitrust laws and the meaning of competition. The real flaw in the *Board* Rule of Reason may be a flaw that is inherent in all of antitrust analysis, particularly any analysis that requires a tangible definition of competition as well as measurable and observable indicia of competitive effects.⁷²

Regardless of the validity and persistence of criticism and calls for reform,⁷³ the Supreme Court has yet to veer from the *Board* Rule of

71. The Second Circuit's decision in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), is illustrative of the typical rule of reason case. In *Visa*, the court invalidated the restraint at issue under the rule of reason after identifying the restraint's anticompetitive effects and noting that there was "no evidence" of countervailing procompetitive benefits. *Id.* at 243; see also, e.g., *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 940 (7th Cir. 2000) (invalidating a restriction under the rule of reason after holding the defendant had not proved that the restriction produced any procompetitive benefits).

As Professor Michael Carrier has comprehensively explained, the overwhelming majority of rule of reason cases are disposed of because one side puts forth no evidence of valid anticompetitive or procompetitive effects. Carrier, *supra* note 38, at 1322; see also, e.g., HOVENKAMP, *supra* note 63, at 107 ("Hopefully, few cases will require real balancing . . ."); Phillip Areeda, *A Second Century of the Rule of Reason*, 59 ANTITRUST L.J. 143, 149 (1990) ("In practice, courts undertake a rough qualitative balancing, asking whether any one element stands out as predominant."); Arthur, *supra* note 66, at 367 (criticizing the balancing test but noting that "courts avoid actual balancing"); Pitofsky, *supra* note 59, at 914 (noting that precise balancing is unnecessary in many cases decided under the rule of reason); Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CAL. L. REV. 835, 838 (1987) (noting that with *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), "a real structure was imposed on the undisciplined shopping list—nature of the business, history of the restraint, and all the rest—that Justice Brandeis had tendered to juries in [*Chicago*] *Board of Trade v. United States*.").

72. See, e.g., Sullivan, *supra* note 71, at 841 ("[M]uch of the disagreement about the meaning and significance of particular [antitrust] cases is traceable not to differences in either perception or analysis, but to different value choices."); see also *supra* notes 66–67 and accompanying text.

73. See, e.g., Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 271 (1986) (proposing that the *Chicago Board of Trade* rule of reason be replaced with an *Addyston*-type analysis); Donald L. Beschle, "What, Never? Well, Hardly Ever": *Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471, 474–75 (1987) (noting that "the indefinite nature of [the rule of reason] . . . has led to persistent calls for more precise and stringent rules").

Reason.⁷⁴ Repeatedly, the Court has made clear that the *Board* Rule of Reason is the proper test and that the role of antitrust law is to act as a gatekeeper, ferreting out net anticompetitive activity. Certain categories of agreements are inherently anticompetitive and so likely to have a net anticompetitive impact that they are considered per se illegal and are condemned without any further analysis.⁷⁵ For all other agreements, the Sherman Act requires courts to apply the *Board* Rule of Reason to determine the net competitive effect of an agreement by balancing its pro- and anticompetitive effects.⁷⁶ If the effects of the agreement are net procompetitive, the analysis is over and the restraint is legal.⁷⁷ The “reasonably necessary” test articulated in *Addyston* and the search for less restrictive alternatives disappeared from rule of reason analysis, as the inquiry was irrelevant to the determination of net competitive effects. No court even mentioned the less restrictive alternative test in the rule of reason context the first forty years after *Chicago Board of Trade* was published in 1918.⁷⁸ The test, which served as the foundation of the *Addyston* Rule of Reason and common law restraint of trade jurisprudence, had vanished.

C. *Rebirth of the Less Restrictive Alternative Test*

After *Chicago Board of Trade*, the less restrictive alternative test emerged in three different antitrust contexts, none of which provides support for its current use by federal circuit courts in the rule of reason. The Supreme Court first used the test as part of the determination of the per se illegality of tying arrangements.⁷⁹ A tying

74. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2713 (2007); *see also, e.g.*, *United States v. Brown Univ.*, 5 F.3d 658, 668 n.8 (3d Cir. 1993) (“The contours of the traditional rule of reason inquiry have remained largely unchanged since they were first defined in *Chicago Board of Trade v. United States* . . .”); BORK, *supra* note 27, at 43 (*Chicago Board of Trade* is “often quoted as the quintessential expression of the rule of reason”).

75. *See, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (explaining that the “principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation . . . to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken”).

76. *Supra* note 57 and accompanying text.

77. *See, e.g.*, *Leegin*, 127 S. Ct. at 2720 (commenting that the rule of reason “is designed and used to eliminate anticompetitive transactions from the market”); *see also* discussion *supra* notes 56–58.

78. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918). The one exception being *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912). *See* discussion *supra* note 47; *see also* Thomas 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.”).

79. *Int’l Salt Co., Inc. v. United States*, 332 U.S. 392 (1947); *see IBM Corp. v. United States*, 298 U.S. 131, 138 (1936) (discussing the relevance of less restrictive

arrangement is an agreement by a party to sell one product (the “tying product”) only on the condition that the buyer also purchases a different product (the “tied product”). Tying violations are an anomaly in Sherman Act jurisprudence. Unlike the traditional categories of per se violations—price fixing, group boycotts, and horizontal market divisions—tying arrangements are subject to a quasi-per se rule.⁸⁰ Under the traditional per se approach, proof of the agreement itself leads to an irrebuttable presumption of illegality, under the theory that the given type of agreement—price fixing, etc.—is inherently net anticompetitive and thus would always violate the rule of reason. The per se classification merely serves as a judicial shortcut.

The per se test is applied with less rigidity in tying cases, as proof of the tying agreement leads only to a rebuttable presumption of illegality. If the defendant can prove both that the tying arrangement serves some procompetitive purpose and that the tying arrangement is the least restrictive method for achieving the procompetitive purpose, the tying arrangement is subject to the traditional *Board Rule of Reason*.⁸¹ Otherwise, the tying agreement is per se illegal.⁸² As Professor Donald Turner explained in his influential analysis of tying violations, “[a] per se rule is clearly justified if . . . the other interests can be equally well or nearly as well served by less restrictive devices.”⁸³ The less restrictive alternative inquiry is thus to soften and provide an exception to the otherwise rigid per se rule, but not as a

alternatives). One of the first tying cases to explicitly address the less restrictive alternative was *United States v. Jervold Electronics Corp.*, 187 F. Supp. 545, 561 (E.D. Pa. 1960). For an early and influential discussion of the less restrictive alternative in tying cases, see Donald F. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958) [hereinafter *Validity*] and Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallellism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

80. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 n.26 (1984) (noting that “while the Court has spoken of a ‘per se’ rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis”).

81. See, e.g., *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (holding that tying arrangements are per se illegal “because [they] generally serve[] no legitimate business purpose that cannot be achieved in some less restrictive way”). For a comprehensive discussion of the use of less restrictive alternatives in the tying analysis, see Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 17–22 (1997).

82. See, e.g., *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1349–50 (9th Cir. 1987) (discussing the relevance of the less restrictive alternative inquiry in tying cases); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971) (determining that specification should be used because it is a less restrictive alternative than restraint of trade).

83. Turner, *Validity*, *supra* note 79, at 59.

part of the rule of reason analysis.⁸⁴ If the tie avoids per se condemnation, however, the application of the rule of reason remains the same—a court balances the procompetitive benefits and anticompetitive effects of a restraint to determine its net effects.⁸⁵

The inquiry then emerged in the rule of reason context for the first time in 1963 in Justice Brennan's concurrence in *White Motor Co. v. United States*.⁸⁶ In *White Motor*, the Supreme Court addressed the legality of vertical territorial and customer restrictions.⁸⁷ In oral argument before the Supreme Court, the Government argued for a return of the *Addyston* focus on less restrictive alternatives, claiming that territorial and customer restrictions should be illegal per se because, inter alia, primary responsibility clauses were less restrictive alternatives for achieving the same procompetitive objectives.⁸⁸ The majority rejected the per se illegal characterization of the restrictions

84. Proof of the presence of a less restrictive alternative typically indicates that the tied sale was forced on the purchaser, and thus is inherently anticompetitive. *See id.* at 64 (noting that “[s]ince a tying arrangement in the vast majority of cases performs no useful function that cannot be performed by less restrictive courses of action, it is quite reasonable to presume an illegal purpose, and some power over the tying product, from the mere fact that tie-ins were used”).

85. The Supreme Court has also allowed a defendant to use the absence of less restrictive alternatives to avoid per se condemnation in other antitrust cases. *See, e.g., Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 8–9 (1979) (disagreeing with the Court of Appeals' conclusion that blanket licenses are per se illegal).

86. 372 U.S. 253, 264 (1963) (Brennan, J., concurring). Interestingly, the least restrictive alternative test emerged as an integral part of constitutional scrutiny during this time period in strict scrutiny cases, particularly in regulations implicating civil rights. *See, e.g., Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960). Justice Brennan authored several of these opinions. *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963) (“Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”); *infra* notes 159–162 and accompanying text.

87. In *White Motor*, the defendant had entered into vertical agreements that, inter alia, restricted the geographic areas within which distributors and dealers were permitted to sell trucks and parts, restricted the customers to whom distributors and dealers were permitted to sell trucks for resale, and fixed the resale price for trucks and parts sold by distributors to dealers for retail sale. *White Motor*, 372 U.S. at 255–56.

88. *Id.* at 266–67; *see* Charles E. Stewart, Jr., *Exclusive Franchises and Territorial Confinement of Distributors*, 22 A.B.A. SEC. OF ANTITRUST L. 33, 41 (1963) (observing that the “[g]overnment strongly pressed the contention that the primary responsibility arrangement was a less restrictive alternative to territorial confinement, and adequately served the legitimate business needs of White [Motor]”). Three years later, Donald Turner, in his role as Assistant Attorney General in charge of the Antitrust Division, wrote a short piece for the New York Bar Association where he argued on behalf of the government that vertical territorial restrictions should be per se illegal, with limited exception, because less restrictive alternatives exist that adequately achieve the same legitimate goals. Turner, *supra* note 41. As Turner explained, “[M]y tentative view is that territorial restrictions on dealers are more restrictive than is necessary to obtain legitimate objectives in all but very limited circumstances. There are ample alternative devices, all less restrictive than territorial restraints, whereby a manufacturer can attempt to achieve an efficient, aggressive marketing system.” *Id.* at 6.

because of the uncertainty of the impact of such restraints, and ignored the government's arguments regarding less restrictive alternatives.⁸⁹ Instead, the Court held that the traditional *Board* Rule of Reason should apply to determine the net competitive effects of the restraint.⁹⁰

In his concurrence, however, Justice Brennan argued that the less restrictive alternative inquiry was "pertinent" to the rule of reason inquiry because the role of the court is not only to determine if the defendant has a procompetitive justification for its restraint, "but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in light of the extenuating interests."⁹¹ Justice Brennan then clarified the significance of the proof of less restrictive alternatives: "its presence invites 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."⁹² In other words, as discussed below, the inquiry was used to shed light on the intent or purpose of the agreement.

Later that year, in *Silver v. New York Stock Exchange*,⁹³ the Supreme Court used the *Addyston*-style less restrictive alternative inquiry in its third different context as part of a very specialized rule of reason to determine the application of Section 1 of the Sherman Act to federally regulated agencies.⁹⁴ In *Silver*, the New York Stock Exchange denied non-member brokers access to wire service facilities, arguing that federal securities laws provided them with an implied, qualified immunity from antitrust scrutiny.⁹⁵ The Supreme Court invalidated the restriction, holding that antitrust immunity is "implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."⁹⁶ Courts subsequently used the holding in *Silver* to create a new "rule of reason" that incorporated a number of factors, including, inter alia, a consideration of whether the regulation at issue was "no more extensive than necessary."⁹⁷ Use of this rule of reason, however, has

89. *White Motor*, 372 U.S. at 261.

90. *Id.* at 263-64.

91. *Id.* at 271, 270 (Brennan, J., concurring).

92. *Id.* at 270 n.9.

93. 373 U.S. 341 (1963).

94. *See id.* at 364 (concluding that the actions of the Stock Exchange violated the Sherman Act).

95. *Id.* at 344.

96. *Id.* at 357.

97. *Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n, Inc.*, 511 F. Supp. 1103, 1116 (D. Neb. 1981); *see, e.g., Neeld v. Nat'l Hockey League*, 594 F.2d 1297, 1300 (9th Cir. 1979) (affirming the dismissal of a one-eyed hockey player's Sherman Act claim

been limited to discrete situations where a federal agency is statutorily authorized to regulate an industry, thereby making it all but disappear.⁹⁸ Significantly, courts have made clear that the additional factors in the *Silver* test, such as the search for less restrictive alternatives, are relevant to the legality of the exercise of statutory authority, not to the legality of the restraint under antitrust law.⁹⁹

Soon after the emergence of the less restrictive alternative inquiry in these contexts, each of the federal circuits gradually adopted the inquiry as an independent and dispositive prong of the rule of reason,¹⁰⁰ and the new test quickly began to receive widespread scholarly support.¹⁰¹ This transformation occurred despite the limited

against the National Hockey League because the primary purpose of the League's by-law excluding one-eyed players was safety, rather than anticompetitiveness); *Hatley v. Am. Quarter Horse Ass'n*, 552 F.2d 646, 652-53 (5th Cir. 1977) (affirming the lower court's dismissal of plaintiff's antitrust claim by declining to apply a *per se* rule that would have deemed defendant's refusal to register plaintiff's colt a group boycott in violation of the Sherman Act); *Gunter Harz*, 511 F. Supp. at 1121 (dismissing the antitrust claim of a manufacturer of double-string tennis rackets in part because "the temporary freeze on the use of double-strung rackets in sanctioned play was no more extensive than necessary to further the legitimate goal of conducting the game in an orderly fashion"). Other factors included the presence of procedural safeguards. *Id.* at 1116.

98. See, e.g., *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 147 (2d Cir. 2003) (describing the limited role of the *Silver* rule of reason); *Behagen v. Amateur Basketball Ass'n of the U.S.*, 884 F.2d 524, 527 (10th Cir. 1989) (immunizing the actions of the United States Olympic Committee from antitrust scrutiny because they "were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics").

99. For instance, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Court held that

A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive. When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition.

Id. at 298.

100. See Grewe, *supra* note 12, at 236-45 (discussing the rule of reason standards used by each circuit); Robert Pitofsky, Panel Discussion, *Antitrust Counseling in an Era of Change: Conflict Between Enforcement Policy and Case Law*, 51 ANTITRUST L.J. 50, 59 (1982) (noting that "[n]inety years of history indicates that [the less restrictive alternative] question itself is a part of the rule of reason"); *infra* notes 106-122 and accompanying text (identifying the burden of proof in each circuit).

101. See, e.g., AREEDA, *supra* note 38, at 10 (explaining the benefits of a less restrictive alternative over a least restrictive alternative test); Kauper, *supra* note 38, at 909 ("Society should not bear the costs of anticompetitive conduct in the name of efficiency if it can have the efficiency without the adverse competitive effects."); Pitofsky, *supra* note 100, at 59 ("There is nothing wrong, in a rule of reason analysis, with someone asking whether there is a significantly less restrictive alternative."); Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust*

use of the inquiry in Justice Brennan's *White Motor* concurrence, the narrow application of the *Silver* doctrine, and the fact that the Supreme Court never even suggested veering from the *Board* Rule of Reason and its focus on net competitive effects. Surprisingly, courts and commentators typically incorporated the less restrictive inquiry without citation or with just a general citation to *White Motor*.¹⁰² It eventually became a standard part of a new rule of reason test (the "New Rule of Reason") used by the lower courts.

Pursuant to this new rule of reason, courts must apply both the *Board* Rule of Reason and the *Addyston* Rule of Reason. First, courts apply the balancing test from *Board of Trade*. If the procompetitive benefits of the restraint outweigh the anticompetitive effects, the court must then apply the less restrictive alternative test from *Addyston*. Under this New Rule of Reason, a restraint can only survive if it is net procompetitive *and* if the procompetitive benefits could not have been achieved in a less restrictive manner.¹⁰³ As the U.S. Court of Appeals for the Second Circuit explained,

establishing a violation of the rule of reason involves three steps. First, the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole on the relevant market. Then, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. *Should the defendant carry this*

Laws, 1997 U. ILL. L. REV. 519, 525 (1997) ("NCAA also reflects the long tradition in antitrust law that proscribes overly restrictive agreements among rivals, even when they have legitimate reasons to combine their economic activities."); Sullivan, *supra* note 71, at 851 (stating that "even if . . . claimed efficiencies are real and significant, if they can be substantially obtained by means significantly less threatening to competition," then the restraint violates the rule of reason); Wirtz, *supra* note 38, at 32 (concluding that "the public interest lies in securing [procompetitive benefits] at the least possible sacrifice. A restraint that confers certain benefits at the cost of unnecessary injury to competition can fairly be said to be, to the extent of that unnecessary injury, 'unreasonable.'").

Surprisingly, most discussions of the less restrictive alternative inquiry in the rule of reason simply assume that the inquiry is a basic and important part of the test, without any real explanation as to how and why it became a part of the test. See, e.g., Martin B. Louis, *Vertical Distribution Restraints after Sylvania: A Postscript and Comment*, 76 MICH. L. REV. 265, 272 n.44 (1977) ("The availability of less restrictive alternatives has always been a basic consideration under the rule of reason, as Justice Brennan carefully noted in his concurring opinion in *White Motor*.").

102. See, e.g., John L. Murchison, Jr., *Patent Acquisitions and the Antitrust Laws*, 45 TEX. L. REV. 663, 685 (1967) (briefly referencing *White Motor* in explaining that the rule of reason requires a balancing of competitive benefits and an examination of less restrictive alternatives).

103. See, e.g., Jonathan B. Baker, *Competitive Price Discrimination: The Exercise of Market Power Without Anticompetitive Effects*, 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.").

*burden [of proving that the restraint is net procompetitive], the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.*¹⁰⁴

There is no uniformity in the application or even statement of the test, either across or within the federal circuits. Instead, confusion and inconsistency permeate the decisions. The two most significant variables in the test are the level of requisite “restrictiveness” and the burden of persuasion. With respect to the burden of persuasion, the majority of the circuits place the burden on the plaintiff to prove the existence of a less restrictive alternative.¹⁰⁵ The U.S. Courts of Appeals for the District of Columbia and the Seventh Circuit, however, place the burden on the defendant to prove the absence of less restrictive alternatives,¹⁰⁶ while the U.S. Courts of Appeals for the Eleventh and Second Circuits have been inconsistent, placing the burden on the defendant in one case and the plaintiff in another.¹⁰⁷ The level of restrictiveness varies from “least restrictive” to “reasonably necessary.”¹⁰⁸

104. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (quotations omitted) (citations and formatting omitted) (emphasis added); *see also*, e.g., *Pitofsky*, *supra* note 59, at 913 (“A rule of reason analysis means balancing anticompetitive effects against efficiencies and other business justifications, and then examining whether comparable efficiencies could have been achieved in a less restrictive way.”).

105. This burden is best demonstrated by *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), which stated that

[i]f 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. A restraint on competition cannot be justified solely on the basis of social welfare concerns. To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

Id. at 669 (citation omitted).

106. *See Wilk v. Am. Med. Ass’n*, 895 F.2d 352, 363 (7th Cir. 1990) (upholding the lower court’s finding that the defendant AMA did not meet its burden of proof); *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1495 (D.C. Cir. 1984) (concluding that “because the [defendant] has failed to demonstrate that the limited practice requirement is the least restrictive method available to achieve the asserted goal it is, at this stage of the proceeding, an insufficient justification for a practice that in other respects has an anticompetitive potential—albeit minimal”) (footnote omitted).

107. *Compare Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1573 (11th Cir. 1983) (noting that defendant may show that the “restraints were reasonably necessary to achieve legitimate, pro-competitive purposes”), *with Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005) (explaining that “the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective”).

108. *See infra* notes 109–122 and accompanying text (comparing the varying degrees of proof required by the federal circuits).

The D.C. Circuit employs the most extreme version of the test, as illustrated in *Kreuzer v. American Academy of Periodontology*,¹⁰⁹ placing the burden on the defendant to show that the restraint employed was the *least restrictive* alternative, regardless of the net effects of the restraint.¹¹⁰ In *Kreuzer*, a periodontist brought a Section 1 claim against the American Academy of Periodontology's ("AAP") "limited practice requirement," which prevented members from performing non-periodontic services.¹¹¹ The district court granted summary judgment for the AAP, concluding that the AAP had no anticompetitive intent in implementing the restriction.¹¹² The D.C. Circuit reversed based on the court's failure to consider the competitive effects of the restraint, and remanded the case, instructing the district court to apply the New Rule of Reason.¹¹³ The D.C. Circuit stated that the defendant had to show that its restriction was net procompetitive and that it was the "*least restrictive means of achieving the desired goal*,"¹¹⁴ even where the procompetitive benefits of the restriction are clear and the anticompetitive effects are minimal.¹¹⁵

The Second Circuit¹¹⁶ and the U.S. Court of Appeals for the Fourth Circuit¹¹⁷ employ a similar test, but shift the burden to the plaintiff to

109. 735 F.2d 1479 (D.C. Cir. 1984).

110. *Id.* at 1495; *see also* *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1187–88 (D.C. Cir. 1979) (concluding that the draft offered by the defendant was not the least restrictive restraint on trade).

111. *Kreuzer*, 735 F.2d at 1482.

112. *Id.*

113. *Id.* at 1495–96.

114. *Id.* at 1496 (emphasis added).

115. *Id.* at 1494–95.

116. *See* *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (explaining that the plaintiff must first show that the challenged action had an actual adverse effect on competition as a whole. Then, the burden shifts to the defendant to show that the action has procompetitive benefit. If the defendant succeeds, the burden shifts back to the plaintiff to show that the same procompetitive benefit could have been achieved through less restrictive means); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) (explaining that the burden shifts back to the plaintiff if the defendant can show that the contested action has procompetitive benefits). The Second Circuit has been inconsistent in its approach. In an earlier case, the Second Circuit "agree[d] with the Third Circuit that a better charge would be to require that 'the restraints . . . not exceed the limits reasonably necessary to meet the competitive problems'" and suggested that the inquiry was not a dispositive factor in the analysis. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979) (quoting *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1320, 1249 (3d Cir. 1975) (emphasis omitted)). However, the Second Circuit later held that the defendant had "to come forward with proof that any legitimate purposes could not be achieved through less restrictive means." *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1261 (2d Cir. 1982).

117. *See* *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 510–11 (4th Cir. 2002) (remanding to the district court with instructions to more carefully scrutinize the presumption in favor of procompetitive justifications); *Metrix Warehouse, Inc. v.*

show that the “same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.”¹¹⁸ While the shift removes the burden from the defendant, the test still permits a court to invalidate a restraint if it is not the least restrictive alternative available to the defendant. The Third and Eleventh Circuits place the burden on the plaintiff to show that the restraint was not “fairly necessary”¹¹⁹ or “not reasonably necessary”¹²⁰ to accomplish the procompetitive benefits.¹²¹ The Sixth, Eighth and Ninth Circuits all place a more demanding burden on the plaintiff, requiring it to show that any legitimate goals can be achieved by the defendant in a “substantially less restrictive manner.”¹²²

Regardless of the specific version of the New Rule of Reason, the general inquiry marked a dramatic shift in antitrust analysis because it reintroduced the narrow tailoring requirement of *Addyston* into the rule of reason. Under the *Board* test, a restraint is legal as long as its effects are net procompetitive, meaning the market must be better off with the restraint than it would have been without the restraint.

Daimler-Benz Aktiengesellschaft, 828 F.2d 1033, 1041–42 (4th Cir. 1987) (denying MBNA’s motions for a directed verdict and judgment because MBNA failed to establish that its replacement parts tie-in was the least restrictive method of avoiding groundless warranty claims).

118. *Clorox Co.*, 117 F.3d at 56 (quoting *K.M.B. Warehouse*, 61 F.3d at 127). The First and Fifth Circuits have articulated a similar test but do not indicate who bears the burden of persuasion. See *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.”); *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 945 n.6 (5th Cir. 1975) (“The question whether there exists an alternative less destructive of competition than the restrictions imposed by [the defendant] in this case is, of course, a proper inquiry under the traditional rule of reason analysis.”).

119. *Am. Motor Inns*, 521 F.2d at 1248.

120. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005); see also, e.g., *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1213 (11th Cir. 2002) (“Rule of reason analysis requires the plaintiff to prove (1) an anticompetitive effect of the defendant’s conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification.”).

121. The Third and Eleventh Circuits assert that their tests do not require proof that the restraint was the “least restrictive alternative.” *Am. Motor Inns*, 521 F.2d at 1248.

122. *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005) (quoting *Nat’l Hockey League Players’ Ass’n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996); *Flegel v. Christian Hosps. Ne.-Nw.*, 4 F.3d 682, 688 (8th Cir. 1993) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 873 (9th Cir. 1986) (ruling in favor of Blue Cross in part because the plaintiffs did not sufficiently demonstrate the existence of a viable alternative). Similarly, the Federal Trade Commission and the Department of Justice only consider procompetitive benefits that could not have been achieved “by practical, significantly less restrictive means.” FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE, *supra* note 58, § 3.36(b), at 24.

Under the new test, a net procompetitive effect is not sufficient. Instead, it must be the *most*¹²³ net procompetitive restraint possible, meaning the market must be better off with the restraint than it would have been with *other* restraints. The New Rule of Reason thus requires courts to narrowly tailor conduct that the *Board* Rule of Reason has already determined to be legal. This approach is both theoretically and practically flawed.¹²⁴

II. THEORETICAL FLAWS OF A DISPOSITIVE LESS RESTRICTIVE ALTERNATIVE INQUIRY

Proponents of the less restrictive alternative test argue that it is superior to the *Chicago Board of Trade* balancing test because it is easier to perform, less expensive, and leads to more predictable results.¹²⁵ These arguments, however, lend no support to the New Rule of Reason because that test combines both the *Board* balancing test and the less restrictive alternative test. It is therefore more difficult to perform, costlier, and less predictable. Even if used as the exclusive test, however, the search for less restrictive alternatives is fundamentally flawed, because it does not answer the basic question raised by Section 1 of the Sherman Act.

Chicago Board of Trade and every Supreme Court decision that follows makes clear that antitrust law requires a determination of the net competitive effect of a restraint by comparing the state of competition before (or without) the restraint versus after (or with) the restraint.¹²⁶ The purpose of Section 1 and the rule of reason is “to form a judgment about the competitive significance of the restraint.”¹²⁷ Thus, the question courts must answer is: does the restraint promote or destroy competition?¹²⁸ In other words, is the restraint net pro- or anticompetitive? Despite the unrelenting criticisms leveled at the *Board* Rule of Reason over the last century,

123. The standard in the Sixth, Eighth, and Ninth Circuits is, however, at least in theory, less demanding. See *supra* note 122 and accompanying text.

124. These flaws are amplified with the more extreme variations of the test, such as that used by the D.C. Circuit, where the chosen restraint must be the “least restrictive” alternative or the alternatives must only be slightly less restrictive. See *supra* notes 108–110 and accompanying text.

125. Cf. *infra* Part IV (explaining the disadvantages of the less restrictive alternatives test).

126. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 103–04 (1984) (explaining that the Court’s inquiry is whether the challenged restraint enhances competition); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (explaining that the rule of reason inquiry focuses directly on a challenged restraint’s impact on competition).

127. *NCAA*, 468 U.S. at 103 (quoting *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 692).

128. See *supra* notes 56–58 and accompanying text (establishing the rule of reason test focuses on a restraint’s competitive effect on the market).

this underlying question and the basic purpose of the antitrust laws has never been modified by the Supreme Court since the inception of *Chicago Board of Trade* in 1918.¹²⁹

The basic flaw of the use of the less restrictive alternative as an additional dispositive prong of the rule of reason is that it changes the fundamental purpose of the Section 1 analysis and divorces itself from the mission of *Chicago Board of Trade* by comparing the state of competition after (or with) the restraint with the state of competition with alternative restraints. This inquiry may tell us if the challenged restraint is more or less efficient than its alternatives, but it does not measure the net effect of the restraint and therefore avoids the fundamental question raised by the Supreme Court in *Chicago Board of Trade*.¹³⁰ A restraint that is not as effective as available alternatives may be direct evidence of a bad business decision, but it is not evidence of net anticompetitive effect.

The role of antitrust law is not to fix imperfections, but rather to ensure a satisfactory level of performance.¹³¹ The less restrictive alternative inquiry, however, provides an invitation for plaintiffs to challenge and courts to examine every business decision made by a firm. Once a court makes a determination of the net competitive effect of a restraint, the role of antitrust law is complete. If the restraint is net anticompetitive, it is illegal. If it is net procompetitive, it is legal, and nothing more than a business decision made by a firm or group of firms. Interference by a court after a restraint is determined to be net procompetitive is no different and no less inappropriate than judicial regulation of any other business decision.¹³² Use of the less restrictive alternative inquiry thus changes

129. *Bd. Of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (proclaiming that “[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition”).

130. *Id.*

131. As one economist has noted:

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. Neither the state of economic science, nor the capabilities of public and private policy enforcement institutions, would make it feasible or desirable for antitrust policy to seek to identify a wide range of market imperfections, and associated firm behavior and market structures, and then to evaluate each case to determine whether some way can be found to improve economic efficiency by changing the structure of the market or constraining firm behavior.

Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 98 (Apr. 2002).

132. See, e.g., *Dr. Miles Med. Co. v. John D. Parke & Sons Co.*, 220 U.S. 373, 411 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 2127 S. Ct.

the role of Section 1 from an ex ante deterrent of anticompetitive behavior to an ex post, ad hoc regulator and micro-manager of procompetitive business decisions.¹³³ Putting aside (for a moment) the fact that courts are not equipped to second-guess business judgments, the inquiry fundamentally changes the rule of reason and coverts it from a “satisficing”¹³⁴ test to a “maximizing” test. This change conflicts with both the basic purpose of Section 1 of the Sherman Act and notions of judicial efficiency that underlie antitrust law.

A. *Maximizing Versus Satisficing*

A maximizing test “selects the best alternative from among all those available.”¹³⁵ The less restrictive alternative inquiry is a quintessential

2705 (2007) (“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 interference is very clear.”) (Holmes, J., dissenting); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986) (“Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment.”); *Foster v. Md. State Sav. & Loan Ass’n*, 590 F.2d 928, 935 (D.C. Cir. 1978) (holding that defendant’s failure to use allegedly less restrictive alternatives was a “legitimate exercise of business judgment that is outside the scope of the antitrust laws”). As Professor Bork explained:

For a court to strike down, for example, a vertical market division on the theory that the manufacturer had made a mistake as to the most efficient mode of distribution would be equivalent to judicial supervision of any other normal business judgment. The court might as well second-guess management’s judgment on assembly line planning, inventory policy, product design or any of the other decisions that affect efficiency. Whatever else it is, the Sherman Act is not a device for imposing upon the entire economy, or any aspect of the economy’s behavior, a judicial form of public utility regulation.

Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 404 (1965). Or, as Milton Handler wrote:

But what about the business man? Why should he be required to experiment with less restrictive (and possibly less effective and less practical) alternatives on pain of incurring severe antitrust liability? Why should he be second-guessed by economic theoreticians because he has elected to cope with his distribution problems in a business-like manner, selecting the arrangements which promise to be most effective from a business point of view?

Milton Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 YALE L.J. 92, 124 (1966); see also *infra* note 172 and accompanying text.

133. Cf. Bork, *supra* note 27, at 26 (observing that permitting a reasonable price defense in price fixing cases would put courts in the impossible position of “allowing cartels but policing their prices and behavior”).

134. The concept of a “satisficing” model is attributed to Herbert A. Simon. The model is consistent with the theory of bounded rationality. Paul Mosley, *Towards a “Satisficing” Theory of Economic Policy*, 86 ECON. J., Mar. 1976, at 59, 60; Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV., Sept. 1979, at 493 (1979).

135. HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* xxix (3d ed. 1976).

maximizing test because it seeks to achieve the most efficient method for accomplishing the procompetitive benefits of a restraint. As discussed above, use of this maximizing test in the *Addyston* analysis was essential because it served as the only check on the anticompetitiveness of a restraint.¹³⁶

A satisficing test, however, “looks for a course of action that is satisfactory or ‘good enough,’”¹³⁷ and only has two outcomes—“good enough and not good enough.”¹³⁸ A satisficing test factors in the costs and probability of achieving perfection and settles for a less-than-ideal outcome.¹³⁹ Significantly, the sub-optimal result is “satisfactory,” or “good enough,” not solely because of the costs of achieving perfection, but also because of the recognition—due to incomplete or unavailable information and information-processing constraints—that the optimal result is likely impossible to achieve.¹⁴⁰ As one scholar has put it, the “difference between satisficing and [maximizing] . . . is the difference between searching for the sharpest needle in the haystack and searching for a needle that is sharp enough for sewing.”¹⁴¹

The *Board* Rule of Reason is by design, if not necessity, a satisficing test because an agreement that is net procompetitive is “good enough” while an agreement that is net anticompetitive is “not good

136. See *supra* note 41 and accompanying text (explaining the role that the search for the less restrictive alternative played in the *Addyston* Rule of Reason test when determining the legality of the restraint).

137. Tom & Pak, *supra* note 65, at 394.

138. Mosley, *supra* note 134, at 60. According to Herbert Simon, under the satisficing model, a decision maker forms “some aspiration as to how good an alternative he should find. As soon as he discovered an alternative for choice meeting his level of aspiration, he would terminate the search and choose that alternative.” Simon, *supra* note 134, at 503; see also, e.g., SIMON, *supra* note 135, at xxix (noting that some “[e]xamples of satisficing criteria, familiar enough to businessmen if unfamiliar to most economists, are ‘share of market,’ ‘adequate profit,’ [and] ‘fair price’”).

139. See Robert G. Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CAL. L. REV. 1, 29 (1984) (highlighting that limited options, time constraints, or basic routines save individuals deliberation time, leading them to choose imperfect but satisfactory options).

140. See Simon, *supra* note 134, at 503 (“[T]he important thing about the . . . satisficing theory is that it showed how choice could actually be made with reasonable amounts of calculation, and using very incomplete information, without the need of performing the impossible—of carrying out [an] optimizing procedure.”); see also, e.g., Sullivan, *supra* note 71, at 865 (“Rationality is bounded and information is often costly, asymmetrically distributed, inaccurate, or simply unavailable.”); David Ward, *The Role of Satisficing in Foraging Theory*, 63 OIKOS 312, 313 (1992) (offering the analogy, in the ecological context, of a predator searching for prey being forced by limited time and information to choose a less-than-ideal hunting strategy).

141. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1078 (2000).

enough.”¹⁴² Once the threshold of “good enough” is met, the inquiry is over. The test embeds notions of judicial and administrative efficiency and recognizes the limits of antitrust analysis and economic theory¹⁴³ and the costs of complying with a rigid maximizing test.¹⁴⁴ The *Board* satisficing test does not seek to achieve the most efficient or “best” economic outcome or the “perfect” result, because such a result is costly to achieve and difficult to identify. Rather, the test only seeks to ensure that the market is better off with the restraint than without it.¹⁴⁵ The antitrust laws encourage firms to be innovative and creative in their quest to survive in competitive markets, so long as their creativity and innovation have a net procompetitive impact.¹⁴⁶ Once this satisfactory result is met, the law is willing to sacrifice the “perfect” result and its marginal benefits, and any further costs of compliance or adjudication are spared.

The less restrictive alternative test converts the rule of reason into a “maximizing” test by seeking to achieve the most efficient result. According to this New Rule of Reason, it is no longer enough to show that the result of the agreement is “good enough.” It must be the “best” result. The *Board* Rule of Reason does not, and was never meant to, achieve the “best” result.¹⁴⁷ As Judge Bork noted, the rule was never intended to require a court to “calibrate degrees of reasonable necessity. That would make the lawfulness of conduct turn upon judgments of degrees of efficiency. There is no logical reason why the question of degree should be important.”¹⁴⁸ And,

142. See Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 85 (2007) (referring to antitrust as a “tipsy” doctrine—“at a certain point, the conduct tips suddenly from beneficial to harmful”).

143. See *supra* notes 67–69 and accompanying text (discussing the challenges courts face in attempting to identify and accurately and consistently weigh competitive effects).

144. See *infra* notes 192–193 and accompanying text (identifying the increased litigation costs to defendants that result from a less restrictive alternative tests because of judicial inconsistency).

145. Cf. *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 the rules and precedents . . .”).

146. See Crane, *supra* note 142, at 87 (considering the various approaches law firms might take in response to a strict rule and the potential consequences of those approaches).

147. Use of a dispositive less restrictive alternative requirement is also inconsistent with the “antitrust injury” doctrine, under which a private plaintiff must prove that its injury was “of the type the antitrust laws were intended to prevent.” *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quotation omitted). The antitrust laws were not designed to prevent agreements that are not optimally efficient.

148. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227–28 (D.C. Cir. 1986).

more significantly, the Supreme Court has explicitly stated that the relative levels of efficiency of alternative restraints are irrelevant.¹⁴⁹

Under the *Board* Rule of Reason, if the restraint is net procompetitive, it is legal regardless of the possibility of a more procompetitive alternative.¹⁵⁰ A restraint is illegal because its anticompetitive effects outweigh its procompetitive benefits, *not* because there are less restrictive alternatives to achieving those benefits.¹⁵¹ Justice O'Connor made this point clear in her concurrence in *Jefferson Parish Hospital District No. 2 v. Hyde*,¹⁵² when she explained that "an arrangement [that] has little anticompetitive effect and achieves substantial benefits . . . is hardly one that the antitrust law should condemn."¹⁵³ In such a case, the argument that there are less restrictive alternatives "is simply irrelevant."¹⁵⁴

Use of the less restrictive alternative inquiry as a dispositive prong changes the fundamental purpose of the antitrust laws. Under

149. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.29 (1977) ("Although distinctions can be drawn among the frequently used restrictions, we are inclined to view them as differences of degree and form. We are unable to perceive significant social gain from channeling transactions into one form or another." (citation omitted)); *see also* Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859, 863 (1988) ("The Supreme Court well-summarized the issue in *GTE Sylvania*, stating that antitrust does not exist to organize business in specific ways.").

150. *See, e.g.*, Handler, *supra* note 132, at 125 ("[T]he legality of a restraint must be related to the basic antitrust goal of preserving competition and preventing monopoly. If the restraint promotes and does not suppress competition, it should be upheld under the rule of reason despite the availability of less restrictive alternatives. This was the wise counsel of Justice Brandeis to which we should adhere.") (footnote omitted).

151. *See* Thomas M. Jorde & David J. Teece, *Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 ANTITRUST L.J. 579, 618 (1993) ("[T]he existence of an obvious and substantially less restrictive alternative may be a factor considered in overall rule of reason balancing, but it should not be elevated to a separate stage of analysis nor be available as a 'trump card.'"); *cf.* *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.").

152. 466 U.S. 2 (1984), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

153. *Id.* at 44 (O'Connor, J., concurring); *see* Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 911 (1985) (noting that the use of the less restrictive alternative test to invalidate agreements is inconsistent with antitrust law, particularly when the anticompetitive effects of the agreement are substantially outweighed by its procompetitive benefits).

154. *Jefferson Parish*, 466 U.S. at 44 n.13; *cf.* Struve, *supra* note 37, at 1466 (explaining that if an "administrative regulation is 'rational,' the existence of [less restrictive alternatives] is virtually immaterial"). The *Board* Rule of Reason, of course, still requires causation. That is, the challenged restraint must actually achieve or further procompetitive benefits. A restraint that fails to achieve procompetitive benefits might be illegal, not because there are less restrictive alternatives, but simply because there is no causal relationship between the restraint and the procompetitive benefits of the restraint. *See infra* note 317 and accompanying text.

Chicago Board of Trade and after nearly 100 years of Supreme Court precedent, Section 1 of the Sherman Act is intended to act as a gateway prohibiting agreements that cause a net anticompetitive effect on a market. The New Rule of Reason, however, uses Section 1 to prohibit agreements that are not procompetitive enough.¹⁵⁵ It therefore transforms antitrust into an interventionist law where judges are required to second-guess complex business judgments of defendants.¹⁵⁶

B. Less Restrictive Alternative Inquiry in Other Areas of Law

Incorporation of the less restrictive alternative test as an additional dispositive prong of the rule of reason is also inconsistent with virtually every other application of a maximizing, less restrictive alternative test in other areas of law. The maximizing test is used where a violation of the law, or an infringement of some fundamental right, is permitted to accomplish some other legitimate and overriding objective.¹⁵⁷ In such cases, the maximizing test is used to minimize the violation or infringement and the consequent harm.¹⁵⁸ The key element is that there is an *actual* violation of the law or infringement of rights.

For example, in U.S. constitutional law, a governmental policy that infringes fundamental rights and liberties is subjected to a maximizing test, strict scrutiny.¹⁵⁹ Any infringement of fundamental

155. See Meese, *supra* note 81, at 73 (explaining that invalidating tying arrangements based on the mere existence of a similarly beneficial alternative penalizes firms “for failing to benefit society sufficiently”).

156. See, e.g., *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 528 F.2d 1230, 1249–50 (3d Cir. 1975) (expressing concern that the less restrictive alternative test creates dual problems of burdening business and putting courts “in the position of second-guessing business judgments as to what arrangements would or would not provide ‘adequate’ protection for legitimate commercial interests”); see also, e.g., *Ross*, *supra* note 38, at 957 (noting that under the less restrictive alternative inquiry in common law restraint of trade cases, “judges carefully reviewed and ‘second-guessed’ the defendant if it appeared that the restraint was overly restrictive”).

157. The maximizing less restrictive alternative test was necessary in the *Addyston* Rule of Reason because the analysis focused primarily (if not exclusively) on the procompetitive benefits of the restraint. The maximizing requirement thus served as the only check on the anticompetitive impact of the restraint. See *supra* note 41 and accompanying text. But see *Roberts*, *supra* note 41, at 1010 & n.244 (discussing Judge Taft’s corollary to the *Addyston* rule that restrictions should be ancillary to the aims of the agreement, not in their strictness, but in their extent).

158. Cf. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (proposing that the application of a per se rule in the antitrust context turns on whether the restraint was unreasonable).

159. Such rights include speech, religion, association, etc. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2789 (2007) (“It is well established that when a governmental policy is subjected to strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.”) (quotation omitted);

rights is illegal if a less restrictive alternative was available that “would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”¹⁶⁰ As the Supreme Court has explained, the purpose of this test is to ensure that the fundamental right “is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate [conduct] is not chilled or punished.”¹⁶¹ Notably, use of the strict scrutiny maximizing test became a significant part of Supreme Court constitutional jurisprudence in the civil rights cases in the 1960s. Justice Brennan authored several of the majority and concurring opinions and made clear that a maximizing test—while not appropriate for antitrust regulation—was integral for the protection of constitutional rights, as the “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”¹⁶²

The World Trade Organization (“WTO”) employs a maximizing test for similar purposes. There, the inquiry is used to permit “parties to impose . . . restrictive measures inconsistent with the [law] to pursue overriding public policy goals to the extent that such inconsistencies [are] unavoidable.”¹⁶³ Parties are allowed to violate the law in furtherance of some other (more) important policy, as

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (“The term ‘narrowly tailored,’ so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used.”). For a comprehensive analysis of the less restrictive alternative requirement in other areas of law, see generally Struve, *supra* note 37.

160. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004); see also, e.g., *Seattle Sch. Dist.*, 127 S. Ct. at 2789 (noting that strict scrutiny requires an “inquiry into less restrictive alternatives”).

Interestingly, if not ironically, constitutional law borrowed the least restrictive alternative test from antitrust jurisprudence. See *supra* note 37 and accompanying text.

161. *Ashcroft*, 542 U.S. at 666 (2004). In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Supreme Court explained, “[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.” *Id.* at 488.

162. *NAACP v. Button*, 371 U.S. 415, 438 (1963); see also, e.g., *Braunfield v. Brown*, 366 U.S. 599, 612 (1961) (Brennan, J., concurring in part and dissenting in part) (stating that First Amendment freedoms are “susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect” (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943))).

163. Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 405–06 (2003) (quotation omitted). Maximizing tests are used for the same purpose in a variety of other areas of international law, including, for example, constitutional law in Germany (the “mildest means” doctrine) and Switzerland. See Struve, *supra* note 37, at 1464 (acknowledging the West German and Swiss economic less restrictive alternative principles); see also, e.g., Sir Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 73 (2005) (“Under German law, limitations such as the restrictions imposed by the City of Cape Town regarding billboards would thus have to be capable of achieving the legislative or administrative aim (Geeignetheit); they would have to be the mildest means by which this aim can be achieved (Erforderlichkeit).”).

long as less restrictive alternatives are not available. For example, the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures permits WTO members to institute regulations designed to prevent the spread of diseases, as long as "such measures are not more trade-restrictive than required to achieve their appropriate level of phytosanitary protection."¹⁶⁴

This same rationale justifies the use of a maximizing test in *Silver v. New York Stock Exchange*.¹⁶⁵ Under *Silver*, statutorily authorized regulations are impliedly immune from antitrust scrutiny, but the immunity is "implied only if necessary to make the [regulation] work, and even then only to the minimum extent necessary."¹⁶⁶ The Supreme Court explained the rationale for applying a maximizing test in this unique situation: "[I]t was the specific need to accommodate the important national policy of promoting effective exchange self-regulation, tempered by the principle that the Sherman Act should be narrowed only to the extent necessary to effectuate that policy, that dictated the result in *Silver*."¹⁶⁷

In all of these cases, the abridgement of a basic right triggers the maximizing requirement. If a law, and the rights protected by that law, must be violated to achieve some other goal, the extent of the violation should be *minimized* to the greatest possible extent.¹⁶⁸ It is not enough to show that the challenged measure achieves the stated goal, or that the benefits of the achieved goal outweigh the harm to the public. Instead, when speech, religion, or some other fundamental right is at stake, the law demands more than a "satisfactory" or "reasonable" result; the means used must be optimal, necessary, or the least restrictive.¹⁶⁹

The essential characteristics of these tests are that they are used to minimize actual harm. There is, however, no cognizable harm once a restraint has been determined to be net procompetitive. Proof of

164. Sykes, *supra* note 163, at 406 (quotation omitted).

165. 373 U.S. 341 (1963); *see supra* notes 94–99 and accompanying text (describing the *Silver* case and explaining that, although the Court conducted a less restrictive alternative test, the *Silver* rule has been nearly abandoned).

166. *Silver*, 373 U.S. at 357.

167. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 292 (1985). A similar analysis is used in *per se* illegality cases, where restrictions that would otherwise constitute *per se* violations of the law are evaluated under the rule of reason if the defendant can show that there were no less restrictive alternatives. *See infra* note 197 and accompanying text.

168. *See, e.g., In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 144 (2d Cir. 2003) ("It is a cardinal principle of construction that repeals by implication are not favored.") (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

169. *See, e.g., Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 24 (1972) (discussing the maximizing aspect of strict scrutiny).

some restraint of trade is not the equivalent of a violation of the antitrust laws because all contracts restrain trade in some manner.¹⁷⁰ *Chicago Board of Trade* and almost 100 years of Supreme Court precedent instruct that the antitrust laws are only concerned with a restraint when it is net anticompetitive.¹⁷¹ If the restraint is net anticompetitive, there is a legally recognized injury, and the restraint is illegal. At that point, no further inquiry is necessary and no amount of narrow tailoring can save the violation. If the restraint is net procompetitive, there is no cognizable injury, and it is legal.

The New Rule of Reason thus fundamentally changes the underlying purpose of antitrust law and the role of maximizing tests by requiring courts to narrowly tailor agreements that are *legal*. In the absence of any illegal activity, the New Rule of Reason's search for less restrictive alternatives is an exercise in maximizing efficiency, not minimizing harm. It therefore conflicts with the essential character of maximizing tests. Moreover, it forces courts to second-guess legitimate business decisions made by firms and thus violates the basic principle articulated by the Supreme Court that a "business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."¹⁷²

C. *Judicial Efficiency*

Use of the less restrictive alternative inquiry as a dispositive prong of the rule of reason is also contrary to the notions of administrative efficiency and judicial economy that underlie much of antitrust law.¹⁷³

170. See *supra* note 46 and accompanying text (concluding that, because the Sherman Act theoretically blocks all trade contracts, courts must interpret the Act's boundaries); see also *Nw. Wholesale Stationers*, 472 U.S. at 289 (stating that the agreement in question was a trade restraint "in the sense that every commercial agreement restrains trade").

171. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2707–08 (2007) (stating that the standard rule of reason test for determining a Section 1 violation distinguishes between an anticompetitive restraint that harms the consumer and one that is procompetitive and beneficial to the consumer); *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (asserting that the "true test of legality" is a determination, using all relevant factors, of whether the restraint "promotes . . . or . . . destroy[s] competition"); see also *supra* Part II.B (describing the development of the net effects test).

172. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 (1984) (discussing business structure in the context of intra-enterprise conspiracy doctrine).

173. See, e.g., *Areeda*, *supra* note 71, at 145 ("Trial judges . . . feel burdened by the complexity of their antitrust cases. Out of necessity, they may become ready to dispose of more antitrust issues summarily."); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 270–71, 271 n.180 (1960) (noting that judges' attempts to weigh all relevant factors of complex merger

Efficiency arguments are particularly compelling in the antitrust context because the laws cover a significant amount of economic activity.¹⁷⁴ The antitrust laws were designed and interpreted with the recognition that it is not feasible for courts to micromanage firms' business practices or identify all inefficiencies in economic behavior. For example, courts have long used administrative arguments to justify the potential overinclusiveness of per se rules.¹⁷⁵ The per se test relies on a threshold finding that certain categories of behavior are "inherently anticompetitive."¹⁷⁶ Once that threshold is met, the antitrust inquiry ends and the agreement is invalidated because of the significant probability that the agreement is net anticompetitive.¹⁷⁷ The inquiry is cut short, despite the possibility that the agreement may be net procompetitive, because of the limited marginal utility of further analysis and the recognition that judicial economy is a

antitrust cases place extreme burdens of time and expense on courts as well as litigants, and proposing that greater judicial efficiency could be obtained through procedural techniques and stronger judicial management); *see also supra* Part III.B (discussing the use of a maximizing test to achieve a policy objective in cases where a fundamental right is infringed rather than in antitrust cases where the goal is to ensure that competition is being encouraged).

174. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 75 (1983) ("The costs of applying rules often loom especially large in the formulation of standards designed to govern a large volume of disputes. In these situations a desire to minimize litigation costs by using bright-line rules may outweigh countervailing considerations.").

175. *See, e.g., Leegin*, 127 S. Ct. at 2726 (Breyer, J., dissenting) (recognizing that "sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, *e.g., so difficult to prove*), that courts have" resorted to a per se rule) (emphasis added); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982) ("As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable."); *see also, e.g., Robert Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1489 (1983) (explaining that per se rules "are practical rules of judicial convenience" but noting that, in the antitrust context, per se rules are often only applied to conduct with "serious anticompetitive consequences" and no business justification).

Use of per se rules has decreased over time, *see, e.g., Beschle, supra* note 73, at 475, but "the per se rule is alive and well," James A. Keyte, *What It Is And How It Is Being Applied: The "Quick Look" Rule of Reason*, 11 ANTITRUST 21, 22 (1997), and the Supreme Court has made clear that judicial efficiency arguments are still "part of the equation," *Leegin*, 127 S. Ct. at 2718.

176. *See, e.g., Copperweld*, 467 U.S. at 768 ("Certain agreements . . . are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused.").

177. The potential overinclusiveness of per se categorization has led to a gradual decline in the use of per se invalidation. *See, e.g., Leegin*, 127 S. Ct. at 2718 (reasoning that administrative efficiency does not justify widespread adoption of per se rules and "relegat[ing] their use to restraints that are manifestly anticompetitive") (quotation omitted).

legitimate goal of antitrust law.¹⁷⁸ The finding of illegality is based, at least in part, on juridical, not economic reasons—on the recognition that the administrative and judicial costs and difficulty of further inquiry into certain categories of behavior outweigh the potential benefits of the behavior.¹⁷⁹ It is always conceivable that the restraint may actually be procompetitive, but it is not worth the judicial costs, potential errors,¹⁸⁰ and the subsequent uncertainty¹⁸¹ to make that determination.¹⁸² Thus, like other satisficing rules, the antitrust laws sacrifice “perfection” for judicial efficiency.

Efficiency arguments provide a particularly compelling rationale to eliminate use of the less restrictive alternative inquiry as an additional dispositive prong of the rule of reason.¹⁸³ It is always conceivable that there is a more efficient method for achieving the procompetitive impact of a restraint—there is always a sharper needle in the haystack. However, the marginal utility of identifying and requiring use of the less restrictive alternative is outweighed by the costs and

178. See, e.g., Pitofsky, *supra* note 175, at 1489 (recognizing that per se rules can assist with “efficient enforcement of the antitrust laws[, which] is a justifiable policy goal”).

179. See, for example, Justice Marshall’s dissent in *United States v. Container Corp. of America*, 393 U.S. 333 (1969), where he wrote:

Per se rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.

Id. at 341 (Marshall, J., dissenting).

180. See, e.g., *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting) (“One cannot fairly expect judges and juries . . . to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs.”).

181. See, e.g., *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293–94 (1985) (remarking that, while “group boycotts” are generally considered per se violations of Section 1 of the Sherman Act, “[e]xactly what types of activity fall within the forbidden category is . . . far from certain”); Pitofsky, *supra* note 175, at 1489 (noting that “there is a virtue in telling businessmen accurately and precisely the location of legal limits on business conduct”).

182. As Justice Breyer explained, “despite the theoretical possibility of finding instances in which [price fixing is] economically justified, the courts have held them unlawful per se, concluding that the administrative virtues of simplicity outweigh the occasional ‘economic’ loss.” *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983); see also, e.g., HOVENKAMP, *supra* note 63, at 104 (“The antitrust process is expensive, cumbersome, and not particularly accurate. We compensate for high administrative costs and uncertainties by adopting a variety of presumptions, or shortcuts.”).

183. Cf. Posner, *supra* note 4, at 23 (arguing that vertical distribution restrictions should be considered per se legal “to lighten the burden on the courts and to lift a cloud of debilitating doubt from practices that are usually and perhaps always procompetitive”).

potential mistakes of identifying that alternative,¹⁸⁴ particularly because courts have long recognized their inability to determine, with any real precision, the procompetitive benefits and anticompetitive effects of a restraint.¹⁸⁵

In per se illegality cases, “the cost of condemnation is slight”¹⁸⁶ because the court is striking down an agreement that is highly unlikely to have any procompetitive benefits, much less a net procompetitive effect. In less restrictive alternative/rule of reason cases, the cost of condemnation (or “false positives”) is great because the court is striking down an agreement that it has already determined to have a net procompetitive effect.¹⁸⁷ These costs include not only the loss of the benefits of the invalidated agreement, but also the loss of the benefits of future net procompetitive agreements that are deterred or discouraged by the invalidation.¹⁸⁸ Conversely, the cost of false negatives is low, as the court is merely permitting an agreement that is net procompetitive but perhaps not *as* net procompetitive as it could have been.¹⁸⁹ In terms of antitrust legality, there is no difference between a net competitive agreement and a “more” net procompetitive agreement; they are both legal.¹⁹⁰

184. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 579 (1992) (“Further investigation and greater deliberation are almost always possible, but after a point would yield little improvement in the quality of the resulting law.”); cf. Posner, *supra* note 4, at 23 (“The same considerations of judicial economy and legal certainty that justify the use of per se rules of illegality in some cases justify the use of per se legality in others.”).

185. See *supra* note 175 and accompanying text (discussing the design of antitrust laws to avoid judicial micromanaging of business practices); see also, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214 (1995) (discussing the constraints of time, energy, and money that often yield imperfect information processing, and remarking that the errors increase as the complexity of the decisions increase).

186. Dennis W. Carlton, Robert H. Gertner & Andrew M. Rosenfield, *Communication Among Competitors: Game Theory and Antitrust*, 5 GEO. MASON L. REV. 423, 425 (1997).

187. See Easterbrook, *supra* note 70, at 15 (asserting that, because of the high costs of deterring beneficial conduct, courts should not attempt to ensnare all questionable but likely beneficial practices to catch very few anticompetitive agreements). Conversely, the cost of permitting the less-than-optimal restraint is low, as the market is still better off with than without the restraint. See *supra* notes 123–124 and accompanying text.

188. See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 35 (2000) (“Standards that require adjudicators to judge citizens’ actions on the basis of a cost-benefit analysis demand considerable effort on the part of citizens who wish to conform to the law in order to avoid sanctions.”).

189. See HYLTON, *supra* note 40, at xv (using economic theory to assert that where “the expected costs of false convictions are greater than those of false acquittals,” courts should create rules of per se legality).

190. See *supra* notes 134–156 and accompanying text (describing the *Board* rule of reason test as the proper “satisficing” test for antitrust analysis, and arguing that the less restrictive alternative maximizing test undermines the goals of antitrust law).

Of course, in the per se illegality context, the potential sacrifice of legitimate agreements is justified by the savings in judicial economy and the avoidance of possible errors. No such savings are achieved by use of the less restrictive alternative inquiry. Instead, the inquiry is necessarily accompanied by tremendous costs to judicial economy and possible errors, as courts are required to identify differences in net competitive effects between actual and hypothetical restraints.¹⁹¹ This leads to additional costs for potential defendants as it makes it more difficult for them to determine the legal consequences of their actions.¹⁹² The high costs required by the less restrictive alternative test—both in terms of current and future economic impact and judicial economy—are thus inconsistent with the notions of judicial efficiency underlying much of antitrust law.¹⁹³

III. PRACTICAL FLAWS OF A DISPOSITIVE LESS RESTRICTIVE ALTERNATIVE INQUIRY

Use of the less restrictive alternative inquiry as a dispositive prong of the rule of reason also presents significant practical difficulties in analyzing restraints under Section 1 of the Sherman Act. The inquiry adds multiple levels of complex analysis to an already complicated test. It asks judges to identify with accuracy the relative competitive effects of hypothetical restraints when judges already struggle to identify the effects of actual restraints. These difficulties lead to a number of significant potential negative effects, including unpredictable results, a higher rate of judicial error, increased administrative costs, and the deterrence of procompetitive behavior.

191. See *infra* notes 199–207 and accompanying text (explaining the challenges of weighing the competitive effects of actual restraints against those of alternative, sometimes hypothetical restraints, and arguing that this process increases judicial inefficiency and costs); see also, e.g., AREEDA, *supra* note 38, at 10 (“[T]o require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that much to competition.”); Diver, *supra* note 174, at 72 (“In the absence of clear standards, factfinding and offers of proof will range far and wide. The rule’s audience will expend effort in interpreting the meaning of the standard and in making successive elaborations of its meaning in individual cases.”).

192. See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1983) (factoring in the client-advisement difficulties for lawyers considering the risk of potential lawsuits surrounding procompetitive business decisions if the court applied a less restrictive alternative test). As Judge Easterbrook has noted, “judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.” Easterbrook, *supra* note 70, at 3.

193. See *supra* note 182 (highlighting courts’ attempts to adopt per se rules in the interest of judicial efficiency to respond to the complexity of antitrust cases).

A. *Difficulties of Application of the Inquiry*

One of the primary criticisms of the *Board* Rule of Reason is that it added confusion and uncertainty to antitrust analysis by replacing the relative ex ante clarity of the means-oriented *Addyston* test with an amorphous multi-factored balancing test. Critics contend that the *Board* test's global inquiry provides no meaningful standards and has led to expensive, unpredictable, and never-ending litigation. As then-Professor Easterbrook argued, the test "puts too many things in issue. . . . Of course judges cannot do what such open-ended formulas require. When everything is relevant, nothing is dispositive."¹⁹⁴ Critics also argue that the *Board* test is flawed because judges and juries are unable to identify, measure, or balance with any precision the competitive impacts of a restraint.¹⁹⁵ If courts cannot identify and balance competitive effects with any precision, the argument goes, how can they determine the net competitive impact of a restraint?¹⁹⁶

Proponents of the less restrictive alternative inquiry argue that its use avoids much of this complexity and the high costs associated with the *Board* Rule of Reason analysis.¹⁹⁷ Professors Lawrence Sullivan

194. Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153, 155 (1984); see also, e.g., Maxwell M. Blecher, *The "New Antitrust" as Seen by a Plaintiff's Lawyer*, 54 ANTITRUST L.J. 43, 45 (1985) ("The increased focus on case facts under the rule of reason will . . . increase the uncertainty involved in litigation, and this uncertainty will increase the number of cases litigated because parties are unsure of what the outcome of a particular case will be.").

195. See, e.g., *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770–72, 774 (1999) (recognizing, by contrasting the majority's view with that of the dissent, that judges could reasonably reach differing conclusions when determining competitive effects, which indicates the difficulty of making this determination precisely and accurately); Easterbrook, *supra* note 70, at 11 (noting that it is "fantastic to suppose" that judges can balance economic effects with any precision because even economists would likely reach different end results); Easterbrook, *supra* note 194, at 145 ("For many practices, even the most careful economists can say no more than that there are possible gains, possible losses Often the best anyone can do is offer a menu of possibilities, some pro- and some anti-competitive."). In fact, most of the "balancing" cases in the Rule of Reason analysis thus do not involve any real balancing at all. See Carrier, *supra* note 38, at 1322–23 (hypothesizing that judges wait for defendants to prove the necessity of the restraint); cf. *Sproles v. Binford*, 286 U.S. 374, 388 (1932) ("To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."); Struve, *supra* note 37, at 1476 (stating that "[t]he factual issues suggested by the less-restrictive-alternative principle may . . . be too narrowly quantitative or technical for the courts to attempt to resolve them").

196. See *supra* notes 67–68 and accompanying text (outlining judges' and scholars' concerns of the near-impossibility of the *Board* test).

197. These proponents have relied in part on common law, see Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 112 n.178 (citing a pre-Sherman Act case applying the less restrictive alternative test), and even recent Supreme Court decisions, see Stephen F. Ross, *An Antitrust Analysis of Sports League*

and Stephen Ross argue that the inquiry can be a useful shortcut, particularly when inquiry into market power and economic effects is difficult and expensive.¹⁹⁸ The New Rule of Reason, however, actually exacerbates all of these complications by using the less restrictive alternative as an additional, conjunctive and dispositive prong and creates a number of new and significant problems.

First, the New Rule of Reason requires judges to perform multiple balancing tests. The term “less restrictive alternative” is a comparative term. Therefore, courts must initially identify and balance the procompetitive benefits and anticompetitive effects of the actual restraint in question.¹⁹⁹ If the restraint is net procompetitive, courts must then determine if any alternatives would have achieved the same procompetitive benefits in a less restrictive manner. In order to do this, courts must identify the procompetitive benefits and the anticompetitive effects of each of the alternatives and then compare them with the benefits and effects of the actual restraint.

These additional comparisons can be extremely difficult, because in most cases, plaintiffs will come forward with alternatives that vary from the original agreement in terms of the likely procompetitive and anticompetitive effects. That is, some alternatives will be alleged to achieve nearly the same benefits, but with decreased anticompetitive impact. Other alternatives will be alleged to achieve greater procompetitive benefits but with the same or slightly higher anticompetitive effects. In either situation, or any variation of it, the less restrictive alternative inquiry requires the courts to compare the

Contracts with Cable Networks, 39 EMORY L.J. 463, 489–90 (1990) (highlighting two Supreme Court decisions that used a less restrictive alternatives rationale), as support for use of the less restrictive alternative inquiry in rule of reason cases. Reliance on pre-Sherman Act common law is misplaced, as the test and theory underlying the rule of reason shifted after the Sherman Act. See *supra* notes 52–55 and accompanying text. Reliance on Supreme Court antitrust jurisprudence is also inapposite, as the Supreme Court has only used the less restrictive alternative inquiry in determining the per se illegality of restraints, not in the actual application of the rule of reason. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 103–04 (1984) (stating that under both per se rules and the rule of reason, the essential question is whether the restraint hinders or encourages competition); *Bd. of Regents v. NCAA*, 707 F.2d 1147, 1154 (10th Cir. 1983), *aff'd*, *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (concluding that because less restrictive means were available, the restraints were per se invalid).

198. See Ross, *supra* note 197, at 492–93 (proposing that the presence of a more limited alternative can stave off a long and costly examination of defendants’ market power); Sullivan, *supra* note 71, at 851 (calling for an end to judicial inquiry based solely on the existence of less competition-threatening measures).

199. See *supra* Part II.B (explaining the passage of the Sherman Act and the development of the *Board* test’s focus on the ultimate competitive effects of the restraint in question).

net competitive impact of the original restraint with the net competitive impact of the alternative restraint.²⁰⁰

Each of the myriad of possible restraints creates a menu of differing levels of efficiencies at varying costs. There is seldom clear proof that one alternative is less restrictive and as effective as the challenged restraint. Instead, each of the alternatives typically represents a “half-way house,” providing some degree of the benefits of the challenged restraint along with some degree of the costs.²⁰¹ Courts must therefore perform multiple complex balancing tests, comparing the relative competitive benefits of the different restraints while identifying and factoring in the added or reduced costs to the parties of the restraints. Even if a court can determine that an alternative restraint leads to greater net competitive benefits, it must also determine if implementation of the alternative is feasible. In

200. As Justice Marshall explained, the least restrictive alternative test “may sound like a mathematical formula. But legal ‘tests’ do not have the precision of mathematical formulas. The key words emphasize a matter of degree.” *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972). A General Agreement on Tariffs and Trade (“GATT”) appellate panel has similarly noted that the determination of whether something constitutes a less restrictive alternative “involves in every case a process of weighing and balancing a series of factors.” Sykes, *supra* note 163, at 408 (quotation omitted); see John J. Barceló III, *Product Standards to Protect the Local Environment—the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 CORNELL INT’L L.J. 755, 770 (1994) (recognizing a “balancing test as inherent in the [least restrictive alternative] concept”); Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMM. L. & POL’Y 259, 266 (2001) (“[T]he very notions of ‘narrowness’ and ‘breadth’ in legal analysis are problematic, because although these terms suggest precise measurement in the physical world, their looser, more metaphorical usage in the law makes them ripe for manipulation and confusion.”); John E. Coons, William H. Clune III & Stephen D. Sugarman, *Educational Opportunity: A Workable Test for State Financial Structures*, 57 CAL. L. REV. 305, 398 (1969) (noting that the least restrictive alternative test in constitutional law is a “soft rule of balancing the interests of person against those of the state” but conceding that the degree to which an alternative must serve the state is “unclear”); Sykes, *supra* note 163, at 415 (arguing that “a least restrictive means test . . . is a crude form of cost-benefit balancing”); Robert M. Bastress, Jr., Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 988 (1974) (advocating a balance of interests and burdens when using the less restrictive alternative test when analyzing constitutional issues in statutes to avoid overinclusiveness).

201. See Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 466 (1966) (examining the economic effects of a variety of vertical restraints and explaining why the alleged less restrictive alternatives “will often be inadequate or even irrelevant”); see also OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 185 (1985) (proposing that a hypothetical less restrictive alternative can ignore customer particularities of viable niche markets and thus can be too simplistic); Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 487 n.109 (2000) (“Less restrictive alternatives, however, are very often both less effective and more expensive to administer than an airtight exclusive territory.”); Meese, *supra* note 197, at 168 (observing that “many of the less restrictive alternatives posited by courts and scholars are either less effective, more expensive to administer, or both”).

other words, given the costs of the alternative restraint, could the defendant have implemented it?²⁰² These comparisons are not simple mathematical calculations based on empirical observations. Instead, they require courts to define and measure competition and levels of competitive effect and make judgments that are inherently normative and value-laden.²⁰³ Each balancing test thus adds another layer of complexity to the analysis, and each additional layer increases the ex ante uncertainty whether an agreement will be classified ex post as a violation of the rule of reason.²⁰⁴

Second, any uncertainty created by the *Board* balancing test is magnified in the New Rule of Reason because judges are asked to identify with precision the effects of *hypothetical* restraints. As the Supreme Court has conceded, “[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice’s effect on competition.”²⁰⁵

202. See, e.g., Isabelle Van Damme, *Sixth Annual WTO Conference: An Overview*, 9 J. INT’L ECON. L. 749, 755 (2006) (discussing the challenges of identifying and comparing the costs of alternatives because simple monetary assessments do not account for regulatory or value costs); cf. *Ashcroft v. ACLU*, 542 U.S. 656, 688 (2004) (Breyer, J., dissenting) (observing that while a judge or attorney could almost always imagine some less drastic alternative legislation, “the budgetary worries and other practical parameters” can preclude Congress from implementing it); W. Cole Durham, Jr., *State RFRA’s and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 718 (1999) (“A prohibitively expensive approach to furthering the state’s interests is not feasible, and, thus, fails to satisfy the least restrictive alternative test because it does not qualify as a genuine alternative at all.”); Yao & Dahdouh, *supra* note 9, at 39 (“Some alternatives, while theoretically possible, are not practical . . .”).

203. R. George Wright has noted that:

Judicial judgments of relative breadth and narrowness are often in themselves richly value-laden. Narrowness and breadth in the law typically involve much more than an incontestable counting or measurement. Instead, legal judgments that one rule is narrower than another often depend crucially on what should be hair-raisingly controversial normative judgments and on deep evaluations that are not remotely akin to observations.

R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 174 (1997); see also Yao & Dahdouh, *supra* note 9, at 36 (“[A] strict least restrictive alternative test virtually amounts to a normative judgment strictly disfavoring consideration of efficiencies and other business justifications.”).

204. Russel B. Korobkin noted that:

Multi-factor balancing tests are less pure and more rule-like than requirements of ‘reasonableness’ because they specify *ex ante* (to a greater or lesser degree of specificity) what facts are relevant to the legal determination. They still fall on the ‘standard’ side of the spectrum, however, because they do not specify how adjudicators should weight the relevant factors. Consequently, citizens often cannot know with certainty *ex ante* whether a particular action will be classified *ex post* as within or beyond the legal boundaries.

Korobkin, *supra* note 188, at 28 (footnote omitted).

205. *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 343 (1982); see also *supra* notes 67–68 and accompanying text (noting the difficulty that courts and juries face in balancing different competitive effects).

While the criticism is valid in cases where careful and precise balancing is required, precision is not typically a premium because in most cases the effects are overwhelmingly (or exclusively) pro- or anticompetitive.²⁰⁶ In other words, in most cases courts are not asked to perform any real balancing.²⁰⁷

Use of the less restrictive alternative inquiry, however, not only requires courts to balance with precision, but requires courts to balance with precision the relative competitive impacts of *hypothetical* alternatives. If courts have trouble identifying and balancing the effects of actual restraints that have been implemented, it is unrealistic to expect a court to be able to determine the relative pro- and anticompetitive effects of hypothetical alternatives. Judges cannot predict, with any confidence (much less any accuracy), the likely economic impact of a restraint that was not actually implemented.²⁰⁸ There are simply too many variables and too many unknowns. The less restrictive alternative test fails to take into account the difficulty of accounting for the impact of exogenous events and the inability to prove causation with any precision.²⁰⁹ It is nearly impossible to identify accurately the relative economic effect of alternative restraints because it is difficult to identify with precision the actual economic effects of *any* restraints—actual or alternative. As then-Professor Easterbrook noted, “[i]f it is hard to find what a given practice does, it is impossible to determine the difference in efficiency between a known practice and some hypothetical alternative.”²¹⁰

Third, each of these problems is compounded by the lack of clarity as to what actually constitutes a less restrictive alternative for purposes

206. Granted, courts may over- or undervalue pro- or anticompetitive effects to avoid any real balancing.

207. See *supra* note 71 and accompanying text (discussing what a typical rule of reason case entails).

208. See Michael A. Carrier, *Resolving the Patent-Antitrust Paradox through Tripartite Innovation*, 56 VAND. L. REV. 1047, 1067 (2003) (“Who can know whether a different path could have led to the same result? Not firms that consider the broad array of business options and must suffer the consequences of the choice, and certainly not courts far removed from such real-world pressures.”); Yao & Dahdouh, *supra* note 9, at 39 (“[W]hile it is difficult enough to prove that an efficiency exists, it is even more difficult to show that no other reasonable means of achieving the efficiency (with less anticompetitive potential) exists.”).

209. See, e.g., Simon, *supra* note 134, at 502–03 (discussing the limits of choosing the optimal alternative).

210. Easterbrook, *supra* note 70, at 9; see, e.g., Areeda, *supra* note 71, at 146 (noting the difficulty of measuring the degree of procompetitive benefits); Posner, *supra* note 4, at 19–20 (discussing the difficulty of comparing the procompetitive benefits and anticompetitive effects of alternative arrangements).

of the New Rule of Reason.²¹¹ Is an alternative “less restrictive” only if it achieves the same level of procompetitive benefits as the challenged restraint but with a lesser anticompetitive impact? If so, how much of a lesser impact is required?²¹² Or, is an alternative “less restrictive” if it achieves greater procompetitive benefits with the same level of anticompetitive impact? If so, how much of a greater impact is required?²¹³ Or, is an alternative “less restrictive,” regardless of the precise procompetitive benefits and anticompetitive effects, as long as its net procompetitive benefits are greater? Or, as several scholars have suggested, is an alternative “less restrictive” if it achieves “nearly” the same procompetitive benefits with a lesser anticompetitive impact?²¹⁴

Fourth, most versions of the inquiry place on the defendant the impossible burden of proving that it has employed the least restrictive method or that the restraint was “necessary.” While only the D.C.

211. See Roberts, *supra* note 41, at 973 (“Less restrictive in what sense? Is such an alternative one that achieves the exact same type and degree of procompetitive benefit while creating less anticompetitive effect? Is it one where there are fewer pro but even fewer anticompetitive effects?”). Similar concerns arise with the use of the less restrictive alternative test in the constitutional law context. As Matthew D. Bunker and Emily Erickson explained:

This search for less restrictive alternatives also raises a series of complex questions: Must the less restrictive alternative regulation achieve the government’s purpose *as well as* the challenged regulation or will some lesser degree of effectiveness suffice? How much less, exactly? What if the alternative costs more to enforce than the challenged regulation?

Bunker & Erickson, *supra* note 200, at 260.

212. See, e.g., Arthur, *supra* note 66, at 380 (arguing that a plaintiff must establish that “a *substantially* less restrictive alternative is equally effective at the same cost”); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 720 (1998) (stating that “obvious and far less restrictive alternatives must be shown either infeasible or inadequate”).

213. See, e.g., Muris, *supra* note 149, at 863 (stating that the less restrictive “alternative must be *clearly* preferable”); Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 581 (1986) (noting that “there must not be a reasonable alternative for accomplishing the objective that restrains competition substantially less”).

214. See 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 1602c (2d ed. 2004) (“[W]e must ask whether a significantly less restrictive alternative would solve the problem nearly as well.”); 11 HERBERT HOVENKAMP, ANTITRUST LAW § 1912i, at (2d ed. 2005) (“[P]laintiff is permitted to show that the same (or nearly the same) procompetitive benefits could be achieved by a realistic, less restrictive alternative.”); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 5.4b (2000) (noting that courts should ask whether the less restrictive alternative proffered by the plaintiff is “nearly as effective”); Meese, *supra* note 197, at 111 (noting that “some scholars have argued that plaintiffs should prevail even if the less restrictive alternative is slightly less effective than the restraint under challenge”); Sullivan, *supra* note 71, at 851 (arguing that courts should ask whether legitimate objectives “can be substantially obtained” by less restrictive alternatives offered by the plaintiff).

Circuit explicitly uses a least restrictive alternative test,²¹⁵ each circuit appears to employ a de facto least restrictive alternative test by allowing a plaintiff to prevail if it can prove the existence of a less restrictive alternative. After all, the only method that does not have a less restrictive alternative is the least restrictive alternative.²¹⁶

A judge, jury, or plaintiff's attorney engaged in a post hoc evaluation of a restraint can always conceive of an alternative that might have had a lesser anticompetitive impact.²¹⁷ As the Third

215. See *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1495 (D.C. Cir. 1984) (“[I]t must be shown that the means chosen to achieve that end are the least restrictive available.”) (citations omitted); see also *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1187-88 (D.C. Cir. 1979) (discussing the least restrictive alternative test with regards to the NFL draft).

216. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (recognizing that a search for less restrictive alternatives requires proof that the means chosen is less restrictive than “any alternative means”); see also *Carrier*, *supra* note 38, at 1337 (noting that “courts looking for a less restrictive restraint will, in effect, conduct a least-restrictive-alternative analysis”). Even the Third Circuit, which rejects use of the least restrictive test, requires a showing that there are no less restrictive alternatives. See *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975) (explaining that the least restrictive alternative test is relevant but not determinative). Commentators and judges, specifically relying on *Addyston*, have stated the test in terms of requiring a showing of “necessity,” or the least restrictive alternative. Thus, even the “weakened” tests, in practice, seem to require a showing of necessity. See *United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 431 (S.D.N.Y. 1980) (holding that a restriction must be necessary to survive the least restrictive alternative test); see also, e.g., Frank A. Camp, *Antitrust-Franchising—Principe v. McDonald’s Corp.—Big Mac Attacks the Chicken Delight Rule*, 7 J. CORP. L. 137, 147-50 (1981) (explaining that the less restrictive alternative requirement requires a showing that the restraint was necessary); Stephen F. Ross, *Some Outside Observations on Overly Restrictive Agreements and the Souths Rugby Case*, 12 AUSTRALIAN COMP. & CONSUMER L.J. 83, 89 (2004), available at <http://www.dsl.psu.edu/faculty/ross/Souths.pdf>. (noting that a restraint is unreasonably restrictive if it is “unnecessary to ensure an efficient” venture).

217. See *Areeda*, *supra* note 213, at 581 (“[A] troubling element of the less-restrictive alternative analysis is where to stop. If four ventures of five firms would be better than one venture of twenty firms, wouldn’t five ventures of four firms each be even better and so on? This is a highly qualitative judgment for which there are no clear answers.”); *Carrier*, *supra* note 38, at 1337 (noting that a court “can always tinker at the margins” to find a less restrictive alternative); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986) (arguing that a case turning on a defendant’s answering questions about business practices that have taken years to develop is difficult because “[s]uch explanations . . . tend to be vague, hard to verify, even damning”); *Handler*, *supra* note 132, at 124 (“The fundamental fallacy in this approach is that, no matter what the restraint, there will almost always be a less restrictive alternative, and indeed, further alternatives to each alternative *ad infinitum*.”). As Gary Roberts noted:

One can always imagine some other form of intra-enterprise control that leaves the subunits with more operational autonomy. Thus, under this least restrictive alternative doctrine, a sports league must constantly manage its affairs in fear that the limitations it places on its member clubs in order to maximize the league product’s quality or to reduce league production costs will, upon arbitrary second-guessing by some antitrust court of a plaintiff’s choosing, be found more restrictive than it [sic] might have been.

Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 381-82 n.176 (1986).

Circuit explained, the least restrictive alternative “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.”²¹⁸ The futility of the defendant’s case is of course exacerbated where courts only require a showing that the alternative is “nearly” as effective in achieving procompetitive benefits.²¹⁹

The addition of the less restrictive alternative thus creates additional problems that significantly increase the ex ante opacity of the rule of reason. These problems and the difficulty of applying this New Rule of Reason may have a number of tangible negative effects. First, the increased complexity of the analysis (and decreased clarity) will lead to higher administrative costs for the parties and the courts.²²⁰

Scholars and judges have long decried the least restrictive alternative test in constitutional law because of the impossible burden it places on defendants. As Justice Breyer stated:

But the Constitution does not, because it cannot, require the Government to disprove the existence of magic solutions, *i.e.*, solutions that, put in general terms, will solve any problem less restrictively but with equal effectiveness. Otherwise, ‘the undoubted ability of lawyers and judges,’ who are not constrained by the budgetary worries and other practical parameters within which Congress must operate, ‘to imagine *some* kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being.’

Ashcroft v. ACLU, 542 U.S. 656, 688 (2004) (Breyer, J., dissenting) (quoting United States v. Playboy Entm’t Group, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting); see also United States v. Sharpe, 470 U.S. 675, 686–87 (1985) (“A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.”); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 161 (1997) (“Subjective standards that turn on differences in degree, such as a ‘pretty much equally effective alternative’ standard, provide little constraint on their face.”).

218. *Am. Motor Inns*, 521 F.2d at 1249; see also, *e.g.*, Pitofsky, *supra* note 153, at 911 (noting 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”).

219. See *supra* note 214 and accompanying text (noting that an alternative can be less restrictive if it has “nearly” the same procompetitive benefits). A less stringent construction of the test—one that requires proof that the alternative is “substantially less restrictive” or “significantly more procompetitive,” for example—eases the burden on the defendant, but still creates uncertainty and invites ad hoc second-guessing.

220. Diver, *supra* note 174, at 74 (“The cost to both the regulated population and enforcement officials of applying a rule tends to increase as the rule’s opacity or inaccessibility increases.”).

Second, the test is likely to lead to more adjudicatory errors, as the less restrictive alternative inquiry increases the number of relevant factors and the complexity of the relationship between the factors.²²¹ With each additional less restrictive alternative offered by a plaintiff, the number of relevant variables and factors increases and their relative values become more complex and difficult to balance. The inevitable result is a higher rate of judicial error and false positives.²²² The increased occurrence of false positives is significant, as it not only eliminates a procompetitive agreement, but also results in treble damages.²²³

The magnitude and frequency of these errors is likely to be exacerbated by the well-documented effects of the hindsight bias.²²⁴ According to the hindsight bias, decision makers tend to overestimate ex post their ability to predict the ex ante likelihood of the occurrence of an event.²²⁵ As Professor Jeffrey Rachlinski explained, “[t]he research on the hindsight bias shows that people blame others

221. Cf. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 295–96 (1960) (noting that errors may increase as the number of relevant factors increases).

222. See, e.g., Crane, *supra* note 142, at 87 (arguing that an increase in variables results in an increase in adjudicatory errors); Eisenberg, *supra* note 185, at 214, 216 (“[I]mperfections in human processing ability increase as decisions become more complex and involve more permutations.... [H]uman ability to calculate consequences, understand implications, and make comparative judgments on complex alternatives is limited.”).

223. See Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1234 n.273 (1992) (noting that treble damages are sometimes dangerous because of the threat posed by false positives); Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1699 (2005) (warning of the legal uncertainty that can result from false positives that cause inappropriate treble damage awards).

224. Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 576, 587 (1998) (noting both that the “[r]esearch by cognitive psychologists has shown that the folk wisdom on hindsight is correct—past events seem more predictable than they really were,” and that the bias is “large enough to have an important impact on the legal system and has been shown to affect the two kinds of decisionmakers upon which the legal system relies—groups (juries) and experienced decisionmakers (judges)” (footnote omitted)).

225. As Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich noted:

The hindsight bias is the well-documented tendency to overestimate the predictability of past events. The bias arises from an intuitive sense that the outcome that actually happened must have been inevitable. People allow their knowledge to influence their sense of what would have been predictable. Because judges usually evaluate events after the fact, they are vulnerable to the hindsight bias.

Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 24 (2007) (footnotes omitted); see also, e.g., Korobkin, *supra* note 188, at 48–49 (discussing the hindsight bias at length); Rachlinski, *supra* note 224, at 572 (“The bias, in general, makes defendants appear more culpable than they really are. The bias can cause judges and juries to find liable even those defendants who attempted to avoid negligence by undertaking all reasonable precautions in foresight.”).

for failing to have predicted adverse outcomes that could not have been predicted.²²⁶ The bias is more pronounced when, as here, the law provides a vague ex ante standard and requires an ex post, fact-specific inquiry.²²⁷ The bias has been found to be particularly problematic in tort law where judges are asked to make ex post determinations regarding the ex ante standard of care taken by the defendant.²²⁸ The search for less restrictive alternatives presents the very same problems, as the inquiry requires courts to determine if the defendant could have chosen a less restrictive method to achieve its procompetitive purposes.²²⁹ The impact of the bias and the likelihood of errors are compounded here because of the ex ante difficulty—for the parties themselves and for third parties—of predicting the economic impact, or relative economic impact, of the various restraints available to the parties.²³⁰

Third, the New Rule of Reason has the potential of overdetering beneficial behavior, as the ex ante uncertainty and risk presented by the less restrictive alternative inquiry (and its higher rate of error) may cause some parties to refrain from otherwise beneficial and net procompetitive conduct.²³¹ Conversely, because the opaqueness of

226. Rachlinski, *supra* note 224, at 588.

227. See Korobkin, *supra* note 188, at 48 (noting that the bias is “especially problematic when a legal standard requires citizens to take only actions that are ‘reasonable’ at the time”). Although these criticisms are applicable to the Board Rule of Reason, they are compounded by the multitude of additional factors that must be considered under the New Rule of Reason.

228. Rachlinski, *supra* note 224, at 595 (“Even in circumstances in which the bias affects both sides of a lawsuit, it is still a powerful force in litigation. Legal judgments made under objective standards are, therefore, probably tainted by the hindsight bias, thereby resulting in incorrect judgments of liability.”).

229. See, e.g., Carrier, *supra* note 208, at 1067 (in determining the presence of less restrictive alternatives, “the timing of the actors’ decisions is telling: a company decides in advance whether a particular activity will achieve its objectives; a court looks backward after the fact and after the success of the activity (or lack thereof) is apparent”); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 802 (1987) (noting that the inquiry asks courts to determine if the “alternative was fairly obvious at the time of the agreement and would have achieved the legitimate objective as effectively and economically”); Jack R. Hlustik, Note, *The Effect of White Motor Co. on Exclusive Selling Arrangements*, 17 VAND. L. REV. 549, 555 (1964) (“It is quite easy to look back and ascertain the effect of the alternatives; it is another matter to predict the competitive effect of numerous alternatives with the ‘penalty’ for the wrong guess being governmental intervention.”).

230. See Victor P. Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91, 111 (1979) (noting that parties have difficulty predicting the economic effects of their business decisions).

231. See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2718 (2007) (noting that striking down procompetitive restraints “can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage” and “may increase litigation costs by promoting frivolous suits against legitimate practices”); United States v. U.S. Gypsum Co., 438 U.S. 422, 441 (1978) (explaining the danger of firms choosing to be “excessively cautious in

the rule makes it difficult for a party to conform (or know how to conform) its conduct to the law, it could underdeter anticompetitive conduct.²³² In other words, the unpredictability of the ad hoc, post hoc inquiry does not properly incentivize procompetitive behavior or provide disincentives to anticompetitive behavior.²³³ Finally, the additional ex ante uncertainty engendered by the New Rule of Reason is also likely to discourage settlements, as economic models suggest that settlements are less likely to occur when the outcome of the litigation is difficult to predict.²³⁴

B. *Application of the Inquiry to Vertical Restraints*

Antitrust law's struggle to deal with vertical restraints provides a helpful framework for illustrating the difficulty of applying the less restrictive alternative inquiry as an additional prong of the rule of reason. Vertical restraints are restrictions imposed by agreement among firms at different stages of the distribution chain, such as contracts between a manufacturer and a dealer.²³⁵ These restrictions are designed to make distribution of the product more efficient and typically reduce intrabrand²³⁶ competition to increase interbrand²³⁷ competition. Courts have long had trouble discerning the anticompetitive effects, procompetitive benefits, and net competitive effects of vertical restraints such as resale price maintenance schemes,

the face of uncertainty regarding possible exposure" to liability under the antitrust laws); Tom & Pak, *supra* note 65, at 400 (discussing the overdeterrent effect of uncertain rules).

232. See, e.g., Korobkin, *supra* note 188, at 36 (discussing the possible overinclusiveness of rules); Tom & Pak, *supra* note 65, at 400 (noting the potential underdeterrent effect of uncertain rules).

233. See Crane, *supra* note 142, at 85 (arguing that predictability is necessary to incentivize appropriate behavior).

234. As Russell B. Korobkin stated:

The *ex ante* certainty that rules provide should encourage more disputes to settle out of court and not require adjudication at all. The economic model of litigation predicts that litigants will bear the high private costs of seeking adjudication only if they have different predictions about the likely outcome of adjudication

Korobkin, *supra* note 188, at 32 (footnote omitted); see also, e.g., Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 353-64 (1980) (discussing the settlement process in antitrust cases).

235. See, e.g., Barbara Ann White, *Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation*, 60 GEO. WASH. L. REV. 1, 7-8 (1991) (noting that "[v]ertical restraints are restrictions imposed by manufacturers in governing the conduct of the distributors of their products").

236. Competition within the same brand.

237. Competition between two or more different brands.

exclusive territories, area of primary responsibility clauses, long-term contracts, tie-ins, and other related restrictions.²³⁸

For almost 100 years, starting with its 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,²³⁹ the Supreme Court declared that it was per se illegal for a manufacturer and its distributor to agree on a minimum resale price for the manufacturer's good.²⁴⁰ In 2007, the Supreme Court finally overruled *Dr. Miles* in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,²⁴¹ and held that vertical minimum price restraints may have significant procompetitive benefits and thus are to be judged under the rule of reason.²⁴² In overruling *Dr. Miles*, the Court discussed the different possible procompetitive benefits of resale price maintenance agreements: stimulation of interbrand competition, increase in distributional efficiency, incentive for retailers to invest in and carry the product, prevention of free riding, facilitation of market entry for new brands, and increase in choices for consumers.²⁴³ The Court also discussed some of the possible anticompetitive effects: facilitation of manufacturer or retailer cartels, reduction in innovation, reduction of intrabrand competition, and barrier to entry of new competitors.²⁴⁴ As the dissent explained, "[t]he upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits."²⁴⁵

This is true for each of the different types of vertical restraints, which has the potential to achieve similar but varying levels of procompetitive benefits and anticompetitive effects. The extent of the benefits and harm—and thus the net competitive impact—varies

238. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51–52 (1977) ("The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.") (footnote omitted); see also, e.g., Eugene F. Zelek, Jr., Louis W. Stern & Thomas W. Dunfee, *A Rule of Reason Decision Model After Sylvania*, 68 CAL. L. REV. 13, 18–23 (1980) (discussing the complexity of the competitive effects of customer and territorial restrictions).

239. 220 U.S. 373 (1911), overruled by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

240. See *id.* at 406–07 (holding that such agreements are void because they hurt the public interest).

241. 127 S. Ct. 2705 (2007).

242. See *Leegin*, 127 S. Ct. at 2725 ("Vertical price restraints are to be judged according to the rule of reason.").

243. *Id.* at 2715–16.

244. *Id.* at 2717.

245. *Id.* at 2729 (Breyer, J., dissenting); see Easterbrook, *supra* note 70, at 6 ("Economists have developed procompetitive explanations for all of these [vertical agreement] practices, sometimes several explanations for each practice.").

from case to case and from restraint to restraint.²⁴⁶ The competitive effects of the restraint can fluctuate based on, inter alia, the business need for the restraint, the nature of the industry, the characteristics of the manufacturer and dealers, the relationship between the manufacturer and the dealers, and the relative preferences of the consumers.²⁴⁷ The actual economic effects of each restraint are often difficult, if not impossible, to measure or identify with any precision. Each of the restraints is likely to have disparate economic impacts not only across different industries, but also within one industry, and even within the relationship between two dealers and the same manufacturer.²⁴⁸

Significantly, many of the restraints that have historically been viewed as having a lesser anticompetitive impact are often less effective at achieving the procompetitive benefits.²⁴⁹ For example, area of primary responsibility clauses have long been touted as less restrictive alternatives for exclusive dealerships.²⁵⁰ Both are primarily designed to prevent free-riding and to prohibit dealers from invading their intrabrand competitors' territories.²⁵¹ While exclusive dealerships achieve these goals by creating exclusive territories,

246. *Leegin*, 127 S. Ct. at 2722–23. For example, despite the anticompetitive dangers of vertical price restraints, “vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition.” *Id.* at 2723. Professor Handler expressed these concerns in the context of Justice Brennan’s concurrence in *White Motor*: “If anything, the lesser sanction suggested by Mr. Justice Brennan—that of partial profit passovers from one dealer to another—may be more risky, since this device might conceivably be viewed as a horizontal agreement among the dealers themselves.” Milton Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159, 167 (1963); see also, e.g., William S. Comanor, *Vertical Price-Fixing, Vertical Marketing Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 1001 (1985) (explaining that the competitive effects of vertical restraints vary from case to case); Karen L. Grimm & David A. Balto, *Consumer Pricing for ATM Services: Antitrust Constraints and Legislative Alternatives*, 9 GA. ST. U. L. REV. 839, 864–66 (1993) (discussing the difficulty in determining if various alternatives are more or less restrictive); Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143, 194 (1997) (noting that “[b]ecause less restrictive alternatives are less effective and more costly to implement, a manufacturer’s failure to adopt them in no way suggests” that an antitrust violation has been committed).

247. See Comanor, *supra* note 246, at 999–1000 (noting that imposition of vertical restraints may decrease consumer welfare for certain consumers).

248. See Goldberg, *supra* note 230, at 110 (discussing the economic impacts of different vertical restraints).

249. See Meese, *supra* note 246, at 190 (stating that “very few, if any, of the less restrictive alternatives identified . . . are equally as effective as exclusive territories or resale price maintenance”).

250. See *infra* notes 252–253 and accompanying text (explaining that although area of primary responsibility clauses are less restrictive because they do not require absolute exclusivity, they are not as effective as exclusive dealerships).

251. See *supra* note 238 and accompanying text (listing exclusive territories and area of primary responsibility clauses as vertical restraints designed to restrict intrabrand competition and encourage interbrand competition).

primary responsibility clauses are “less restrictive” because they only require dealers to use their “best efforts” to promote and sell the manufacturer’s product within their given territory.²⁵² The less restrictive nature of these clauses, however, also means they will often be less effective in eliminating free-riding and preventing invasion of territories because a dealer with primary responsibility in one area may still be able to do business in another area and free-ride off of its competitors.²⁵³ Primary responsibility clauses are also more costly and more difficult to implement and enforce. Violations of exclusive territories are easy to detect; a competitor may not operate outside of its area. Primary responsibility clauses, however, require a more exacting and expensive effort, as the manufacturer must expend the time and resources to determine if the dealer has used “best efforts” within its primary area before moving on to another territory.²⁵⁴ The added cost and complexity may cause the manufacturer to forego any attempts to accurately monitor compliance with the areas of primary responsibility, thus further diminishing its potential procompetitive benefits.²⁵⁵

The relative anticompetitive effects, procompetitive benefits, and costs of implementation of the different vertical restraints thus create an almost impossible burden for a court applying the New Rule of Reason.²⁵⁶ Consider a situation in which a golf club manufacturer, lacking any significant market share or market power, decides to forego its expansive national advertising campaign and instead focuses on local advertising and marketing at the retail level, with an emphasis on point-of-sale services and in-store displays and demonstrations. For example, the manufacturer requires that each of its dealers provide on-site demonstrations of the golf clubs, an in-store “driving range,” video swing analysis, and custom fittings for each customer, so each consumer gets a uniquely designed set of golf

252. See Meese, *supra* note 197, at 169 (describing primary responsibility clauses as a weak alternative to exclusive territories).

253. See *id.* (“The fact that a firm has the primary responsibility for one area does not prevent other firms from invading its territory and thus does little to prevent free riding.”).

254. See *id.* at 169–70 (describing the difficulty and expense associated with enforcing area of primary responsibility clauses because of the vagueness of the clauses and potential disagreement between parties). A similar comparison can be made between profit pass-over clauses and exclusive dealerships. See also Bork, *supra* note 201, at 466 (describing profit pass-over clauses, exclusive dealerships, and area of primary responsibility clauses as often being “inadequate or even irrelevant”).

255. See Bork, *supra* note 201, at 467–69 (concluding that area of primary responsibility clauses are inadequate because of their expense and difficulty to enforce).

256. See *id.* at 466–69 (discussing the inherent problems associated with each vertical restraint).

clubs.²⁵⁷ To encourage dealers to carry the brand, to prevent free-riding,²⁵⁸ and to achieve all of the other procompetitive benefits of vertical restraints discussed above, the manufacturer chooses to employ a minimum resale price maintenance agreement.

Assume that a terminated golf club dealer brings suit challenging the agreement under Section 1 and that the defendant is able to show that its resale price maintenance scheme has significant procompetitive benefits, minimal anticompetitive effects, and is net procompetitive.²⁵⁹ Under the New Rule of Reason, the case is just getting started. The court must now determine the relative net competitive effects of the alternative vertical restraints. Ignoring the virtual impossibility of the task,²⁶⁰ assume that the court is able to determine the following:

In terms of procompetitive benefits, the price maintenance agreement was the most effective method for protecting the company's brand name and promoting interbrand competition, was only marginally successful at preventing free-riding, and had no impact on incentivizing new dealers to carry the product. A territorial restriction would have been more effective at preventing free-riding and encouraging new dealers to carry the product, but less effective at protecting the company's brand name and promoting interbrand competition. An area of primary responsibility clause would have been less effective at accomplishing all of the objectives.

In terms of anticompetitive effects, the price maintenance agreement eliminated intrabrand price competition and served as a significant barrier to entry, but did not reduce innovation. A territorial restriction would have eliminated all forms of intrabrand competition and reduced innovation, but would not have served as a significant barrier to entry. An area of primary responsibility clause would have reduced—but not eliminated—intrabrand competition and innovation but would not have served as a significant barrier to entry.

257. This scenario may seem familiar to owners of Ping golf clubs. *See* Brief of Ping, Inc. as Amicus Curiae in Support of Petitioner, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 128 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 173680 (discussing Ping's policy of custom fitting golf clubs).

258. That is, in this case, to prevent customers from receiving the training, the fitting, etc., then walking down the street and buying the clubs at a cheaper price from a dealer who does not provide the same level of training and in-store services.

259. As would likely be the case where the defendant is just one of many competitors in the golf club industry and therefore has no market power and no ability to cause any anticompetitive effects in the overall market.

260. *See supra* Part IV.A (discussing the difficulties of applying the less restrictive alternative inquiry).

Under the New Rule of Reason, the court must now do the very thing it is attacked for being unable to do—balance competitive effects—multiple times on multiple hypothetical restraints. Then, the court must perform yet another balancing act, this time comparing the net effects of the hypothetical restraints against the net effects of the actual restraint. The rule of reason is thus transformed from a difficult and costly balancing test into a completely unmanageable multi-tiered balancing adventure. Use of the less restrictive alternative inquiry compounds all of the problems of the rule of reason test by taking a difficult, complex, costly, unpredictable and error-ridden task—balancing the net effects of a restraint—and requiring courts to perform it multiple times.²⁶¹

C. Case Studies

Although no court of appeals has decided a rule of reason case based solely on the existence of a less restrictive alternative, several cases help illustrate the misuse of and practical and theoretical problems raised by the inquiry.²⁶² For example, in *North American Soccer League v. National Football League*,²⁶³ the National Football League (“NFL”) instituted a rule preventing its owners from owning a share of a team in any other professional sports league, contending that the rule was necessary to ensure loyalty to the NFL and to prevent disclosure of confidential information to the other professional sports leagues.²⁶⁴ The Second Circuit stated that the purpose of the rule of reason was to determine “whether the procompetitive effects of [the] restraint outweigh the anticompetitive effects” and struck down the NFL’s cross-ownership ban after determining it was net anticompetitive.²⁶⁵

The court, however, also noted that “in carrying out a rule of reason analysis, ‘the existence of [less restrictive] alternatives is obviously of vital concern in evaluating putatively anticompetitive

261. The additional level of complexity varies with the different inquiries used by the different circuits. See *supra* notes 104–124 and accompanying text (addressing the variety of tests and burden shifting employed by the circuits).

262. A disproportionate number of these cases arise in the sports industry, where courts have long recognized that some level of cooperation is necessary for the product to exist at all. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 100–02 (1984) (describing the importance of cooperation in preserving amateur intercollegiate athletics).

263. 670 F.2d 1249 (2d Cir. 1982).

264. See *id.* at 1261 (arguing further that procompetitive effects of the rule outweighed any anticompetitive effects).

265. *Id.* at 1259.

conduct”²⁶⁶ and declared that even if the NFL’s restraint were net procompetitive, the “NFL was required to come forward with proof that any legitimate purposes could not be achieved through less restrictive means.”²⁶⁷ The court then gave a brief glimpse of the potential misuse of and haphazard post hoc, ad hoc guesswork that is invited by the less restrictive alternative inquiry, conjuring up alternatives that it claimed were less restrictive yet as effective as the NFL’s ownership ban.²⁶⁸ For example, the court speculated that the NFL’s legitimate concerns regarding conflicts of interest in the sale of broadcast rights and tickets sales could have been remedied by removing cross-owners from its broadcast rights committee.²⁶⁹ Putting aside the fact that the court offered no evidence that this alternative would have been as effective at eliminating broadcast rights conflicts, this proposed alternative does not even address half of the NFL’s concerns—conflicts of interest with respect to sale of tickets. Even if the proposed alternative had addressed ticket sales, how can a court determine the costs and benefits of such a hypothetical solution? How can a court compare the costs and benefits of the hypothetical solution with the costs and benefits of the actual solution used by the NFL? And, assuming, arguendo, that the NFL’s rule had a net procompetitive impact, why should a court spend its time and resources attempting to fine-tune what is essentially a business decision?

Similar concerns are raised by *Hairston v. Pacific 10 Conference*,²⁷⁰ where the University of Washington football team brought an antitrust suit against the Pacific 10 Conference (“Pac-10”) after the team and its star quarterback, Billy Joe Hobert, were punished by the Pac-10 for committing numerous National Collegiate Athletic Association (“NCAA”) violations.²⁷¹ The Ninth Circuit recognized that the punishment—which included a two-year ban on the team from bowl game participation, as well as a limit on the number of football scholarships the school could offer—had anticompetitive effects but concluded that the sanctions had a net procompetitive effect in that they protected the integrity of college football and the

266. *See id.* (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979) (alteration in original)).

267. *Id.* at 1261.

268. *See id.* (noting that the NFL failed to show that its purpose could not be achieved through less restrictive alternatives).

269. *Id.*

270. 101 F.3d 1315 (9th Cir. 1996).

271. *See id.* at 1317 (violations included Hobert receiving \$50,000 in loans).

NCAA.²⁷² Nevertheless, the court noted that the sanctions would have violated the rule of reason if the plaintiffs had shown that the procompetitive benefits could have been achieved in a less restrictive manner, such as through lighter sanctions.²⁷³

Although the plaintiffs failed to meet this burden, the analysis suggested in the opinion is troubling. The NCAA disciplinary rules at issue in *Hairston* have significant and important procompetitive benefits and the Supreme Court has long recognized that the NCAA “needs ample latitude” to regulate collegiate sports.²⁷⁴ The anticompetitive effects incurred by the players who are punished pursuant to these rules, in contrast, are minimal. The balancing test is therefore simple: the procompetitive benefits far outweigh the anticompetitive effects. Yet, the *Hairston* approach invites plaintiffs and judges to second-guess and tinker with the NCAA’s authority to govern itself. If a player had been suspended for eight games, is it up to a court to decide if seven would have been sufficient? If a team was stripped of three of its scholarships, would two have been good enough? How can a trier of fact make these determinations with any confidence or accuracy? And, why are we asking judges to even address these questions?

District courts have seized on the invitation to engage in the dangerous second-guessing invited by the circuit courts. In *Clarett v. National Football League*,²⁷⁵ Maurice Clarett challenged the NFL’s rule limiting eligibility for its entry draft to players who were at least three full seasons removed from high school graduation.²⁷⁶ According to the NFL, it enacted the rule to protect younger players from the physical and mental damage they would incur in the NFL when playing against older, stronger, more experienced professional players.²⁷⁷ Judge Scheindlin held that the rule violated Section 1 for two independent reasons: First, its anticompetitive effects outweighed the (virtually non-existent) procompetitive benefits; second, even if the procompetitive benefits outweighed the anticompetitive effects, the benefits could have been achieved by less restrictive alternatives.²⁷⁸ In discussing the less restrictive alternatives,

272. *See id.* at 1319 (noting that the punishment was not disproportionate to those that had been allowed in the past and that, under the rule of reason, it resulted in more procompetitive effects).

273. *Id.*

274. *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

275. 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev’d in part and vacated in part*, 369 F.3d 124 (2d Cir. 2004).

276. *Id.* at 382.

277. *Id.* at 387.

278. *Id.* at 409–10.

Judge Scheindlin noted that age was a “poor proxy for NFL-readiness” because players develop physically and emotionally at different ages.²⁷⁹ According to the judge, comprehensive individual medical examinations would have been a less restrictive alternative and “better” method for evaluating the physical and mental fitness of high school athletes—“[i]n such a scenario, no player would be automatically excluded from the market and each team could decide what level of risk it is willing to tolerate.”²⁸⁰

Again, the less restrictive alternative inquiry shifted the focus off of the competitive effects of the restraint and onto the judge’s ability to conjure up less restrictive alternatives. And, again, the judge offered an alternative that, even on its face, failed to adequately meet the defendant’s stated objectives. The reason for the rule was to protect the welfare of athletes by preventing teams from drafting players who were not “NFL-ready.” The judge’s alternative removes this very protection by allowing each team to use its discretion in determining a player’s NFL-readiness.²⁸¹ Even if the judge had suggested a system that removed the discretion from the individual teams and therefore superficially met the goals of the NFL, what evidence is there that a test could be created to distinguish the fit from the unfit? How much would the tests cost? If the NFL used such tests, could the plaintiff then offer proof that there were better, faster, or less expensive tests?²⁸² More importantly, what does any of this have to do with the competitive effects of the rule?

The misuse of the inquiry is further highlighted by *McNeil v. National Football League*,²⁸³ where a group of NFL players brought an antitrust claim against the NFL’s right of first refusal or compensation rules (“Plan B Rules”), claiming that the rules

279. *Id.* at 410.

280. *Id.*

281. *See id.* (theorizing that each team could decide for itself how much liability it was willing to incur by drafting young players).

282. Similarly, in *United States v. Brown University*, the Department of Justice brought a Section 1 claim against a financial aid system implemented by MIT and eight Ivy League schools. 805 F. Supp. 288, 289 (E.D. Pa. 1992) *rev’d*, 5 F.3d 658 (3d Cir. 1993). Pursuant to the system, each school agreed that it would only give financial aid on the basis of “demonstrated need,” rather than merit, and shared financial information to set a uniform level of financial aid. *Id.* at 293. The schools claimed the purpose of the system was to provide needy students with financial aid, because absent the restrictions the schools would attempt to outbid each other for the highest achieving students, leaving no financial aid for the students in need. *Id.* at 304–05. The district court invalidated the system, concluding, *inter alia*, that any benefits of the system could have been achieved by less restrictive alternatives. *See id.* at 306 (asserting, in part, that if the institutions are actually serious about needy students then they will find another way to achieve their goal). Notably, the court offered no support for this conclusion other than sheer speculation.

283. No. 4–90–476, 1992 WL 315292 (D. Minn. Sept. 10, 1992).

unreasonably restrained the movement of NFL players after their contracts expired.²⁸⁴ The court concluded that, regardless of the actual procompetitive benefits, the Plan B Rules violated the antitrust laws unless the NFL could prove that the benefits could not have been achieved through a less restrictive alternative.²⁸⁵ Significantly, the presence of less restrictive alternatives was to be determined by comparing the NFL's player restraint system with systems used by other professional sports leagues.²⁸⁶ Thus, under the New Rule of Reason's less restrictive alternative standard, the NFL was in violation of the antitrust laws unless it could show that its rules were as effective as the rules of its competitors.²⁸⁷ Hinging legality on the relative efficiency of a firm's competitors simply does not make sense and is divorced from any sensible interpretation of the antitrust laws. The laws were designed to ferret out net anticompetitive conduct, not to punish firms for failing to be as efficient as their competition.

IV. THE LESS RESTRICTIVE ALTERNATIVE INQUIRY FAILS AS A HEURISTIC

Although it is clear that use of the less restrictive alternative inquiry as an additional prong of the rule of reason is both theoretically and practically flawed, the question still remains whether the inquiry can be used as a heuristic for the *Board* Rule of Reason.²⁸⁸ Heuristics are powerful tools that are used frequently in economics to provide economists with presumptions and shortcuts to simplify complex theoretical issues.²⁸⁹ The key feature of a heuristic is that it must be capable of "actually making or recommending decisions, taking as their inputs the kinds of empirical data that are available in the real world."²⁹⁰ A heuristic "replace[s] abstract, global goals with tangible subgoals, whose achievement can be observed and measured."²⁹¹ Heuristics therefore serve as rules of thumb, and are able to reduce

284. *Id.* at *1.

285. *Id.* at *5. The test becomes even more unfair when the burden is placed on the defendant, as it essentially requires the defendant to prove a negative. That is, to prove the absence of any less restrictive alternatives.

286. *Id.*

287. *See id.* (instructing the jury to consider whether other professional sport leagues were more "competitively balanced").

288. As discussed at length above, the *Addyston* test cannot replace the *Chicago Board of Trade* test because the two tests serve very different purposes. *See supra* Part III.A.

289. *See, e.g.,* Eisenberg, *supra* note 185, at 215 (discussing use of heuristics and their ability to simplify an inquiry).

290. Simon, *supra* note 134, at 498.

291. *Id.* at 501.

the cost and complexity of analysis and increase the certainty and predictability of results.²⁹²

The *Chicago Board of Trade* test would appear to be ideally suited for a heuristic, as its balancing test is constantly criticized for requiring the identification of abstract, global goals—competition, procompetitive, anticompetitive—that are difficult to quantify and weigh. Commentators have therefore proposed a number of different heuristics, including the *Addyston* test,²⁹³ all designed to minimize the complexity of the *Board Rule of Reason*.²⁹⁴ While the merits of these other heuristics are beyond the scope of this Article,²⁹⁵ it appears that the proponents of the *Addyston* test²⁹⁶ have overstated its simplicity and that the theoretical and practical flaws of the less restrictive alternative inquiry are fatal to the inquiry's use as a heuristic for the *Board Rule of Reason*.²⁹⁷

292. See, e.g., Peter Nealis, Note, *Per Se Legality: A New Standard in Antitrust Adjudication under the Rule of Reason*, 61 OHIO ST. L.J. 347, 375–80 (2000) (admitting that use of heuristics could have significant benefits, including greater efficiency, but postulating that there would be some drawbacks as well).

293. Commentators have proposed a number of different variations of the *Addyston* test to serve as a heuristic for the *Board Rule of Reason*. These have been referred to as, inter alia, an ancillary restraints test, a functional analysis, and the *Addyston* test. All of these tests have the same key characteristic—use of some form of a less restrictive alternative test—as described above. See, e.g., Thomas 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 an ancillary restraints test, instead of the *Board Rule of Reason*, would simplify the litigation process).

294. See, e.g., Peter Carstensen & Bette Roth, *The Per Se Legality of Some Naked Restraints: A (Re)Conceptualization of the Antitrust Analysis of Cartelistic Organizations*, 45 ANTITRUST BULL. 349, 368–69 (2000) (arguing for a heuristic that identifies some naked restraints as legal per se as a result of public authorization); Easterbrook, *supra* note 70, at 14, 17 (“Courts should use the economists’ way out. They should adopt some simple presumptions that structure antitrust inquiry The task, then, is to create simple rules that will filter the category of probably-beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risks of competitive injury.”); Daniel Ferrel McInnis, Editor’s Note, *Symposium: The Application of Empirical Economics to Antitrust*, 74 ANTITRUST L.J. 265, 265–66 (2007) (discussing the use of econometrics in antitrust analysis and emphasizing that when properly applied econometrics can filter evidence into an understandable and legally applicable form).

295. For commentary and criticism of these various heuristics, see, e.g., Easterbrook, *supra* note 70, at 17–34 (suggesting some helpful heuristics in antitrust analysis); Richard S. Markovitz, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41, 78 (1984) (criticizing some of Easterbrook’s heuristics).

296. See, e.g., Carstensen, *supra* note 32, at 10 (arguing that an *Addyston* ancillary restraints test could potentially determine whether challenged conduct was anticompetitive).

297. As early as 1918, scholars recognized the difficulty of creating a heuristic for Section 1 cases:

To develop a just, reasonable and practicable construction of the Sherman Anti-Trust Act and apply it to the complicated facts of our industrial and commercial structure is not a simple task. No rule of thumb, no test capable of easy and instant application to every situation, could either work justice or

Even assuming, arguendo, that the less restrictive alternative inquiry were capable of reaching determinations consistent with the goals of the Sherman Act,²⁹⁸ the *Addyston* test is inapt as an effective or appropriate heuristic for the *Board* Rule of Reason because it does not provide tangible or easily observable measures or subgoals. In other words, it is not a true shortcut. Under the *Addyston* test, an ancillary restraint—one collateral to a legitimate agreement—is reasonable if the restraint is reasonably necessary for the underlying legitimate agreement to exist at all.²⁹⁹ Though this test was relatively simple to perform when applied to covenants not to compete, the perceived simplicity of the *Addyston* approach disappears when actually applied to complex restraints.³⁰⁰

Much of the criticism of the *Board* test focuses on the difficulty of defining competition and the complexity of identifying and comparing the competitive effects of an agreement.³⁰¹ In most cases, however, the less restrictive alternative inquiry does little (if anything) to reduce or avoid this complexity, because the inquiry itself is a comparative test that requires an equally precise definition of competition and more complex balancing. The cure, therefore, may be worse than the disease.

Under the *Addyston* test, a court must determine as a threshold matter whether the restraint is naked or is ancillary to some other legitimate activity.³⁰² This initial determination, as even proponents of *Addyston*-type tests concede, can be onerous and may be the “Achilles heel” of this approach.³⁰³ Though couched in terms of

secure the economic ends for which the act was passed. The test of legality must first be expressed in broad general terms, like the act itself; it must then be applied with painstaking study and discrimination to the facts of each case, bearing always in mind the clear general purpose of the act; the border-line between lawful and unlawful must be pricked out; point by point, as specific cases arise.

Negotiability and the Renvoi Doctrine, *supra* note 59, at 1060–61.

298. See *supra* Part III.A (summarizing negative effects of inquiry upon litigants and the courts).

299. See *supra* text accompanying note 33 (explaining the reasonableness of a restraint depends upon the purpose of the underlying contract to which it is ancillary).

300. See *supra* notes 194–196 and accompanying text (discussing practical difficulties courts will encounter in conducting the test).

301. See *supra* notes 200, 202 and accompanying text (providing examples of such criticism).

302. See, e.g., Carstensen, *supra* note 32, at 10 (noting that although separating ancillary from naked restraints may be difficult, or in some cases impossible, it should be attempted in order to examine the scope of the legal restraint).

303. See, e.g., Arthur, *supra* note 66, at 376 (noting that courts need help defining the lawful dealings to which there are ancillary restraints); see also, e.g., STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 122 (1993) (“Significant disagreements will, of course, arise in defining what constitutes a ‘lawful purpose.’”); Carstensen, *supra* note

requiring only an underlying “legitimate agreement,” the ancillary/naked distinction requires courts to define competition and identify competitive effects to distinguish between a procompetitive (or “legitimate”) agreement and an anticompetitive (or “illegitimate”) one.³⁰⁴ Given the lack consensus over a definition of competition, there is widespread disagreement as to what actually constitutes a procompetitive or legitimate agreement for purposes of the *Addyston* approach.³⁰⁵ This initial task is even more demanding because every ancillary restraint is simultaneously pro- and anticompetitive,³⁰⁶ as ancillary restraints restrict in order to achieve some other legitimate procompetitive goal. Further, parties often camouflage naked restraints as ancillary or procompetitive agreements.³⁰⁷ The *Addyston* test therefore does not absolve courts of the difficult task of deciphering the elusive meaning of competition and of distinguishing the procompetitive from the anticompetitive.

Assuming that a court is able to determine that the restraint is ancillary to a legitimate objective, the next step is to determine if there are any less restrictive alternatives for achieving such an objective. This step requires courts to identify and compare the anticompetitive and procompetitive effects of the challenged restraint and its alternatives.³⁰⁸ An alternative restraint is only less restrictive if it is less anticompetitive than the restraint at issue while

32, at 10 (admitting that mixed naked and ancillary restraints may be difficult to analyze); Carstensen & Roth, *supra* note 294, at 357 (“Restraints that might be either naked or ancillary can be called arguably ancillary restraints. In order to classify them unambiguously, a court must take detailed evidence about the economic context in which the restraint operated and weigh the alternative characterizations.”).

304. See, e.g., Piraino, *supra* note 293, at 688 (“[A]ncillary restraints . . . are generally legal because they are intended to implement the pro-competitive purpose of an underlying cooperative arrangement . . . [but] naked restraints . . . should be deemed illegal on their face because they are unrelated to any such purpose.”).

305. See *supra* notes 65–66 and accompanying text. Compare Arthur, *supra* note 66, at 378–79 (arguing that a legitimate agreement must be limited to agreements that involve economic integration and voluntary exchange), with Piraino, *supra* note 293, at 725–26 (arguing that a legitimate agreement must be a “true efficiency-enhancing integration,” and should be one “that benefit[s] consumers”).

306. This is true at least to the extent that all agreements restrain trade. See *supra* note 46 and accompanying text.

307. See, e.g., Arthur, *supra* note 66, at 378 (“The tricky part is that even a naked cartel restraint can be characterized as ‘ancillary’ to some supposedly beneficial purpose . . .”); Carstensen & Roth, *supra* note 294, at 357, 416 (analyzing an argument that a lawful purpose can cure an otherwise unlawful restraint).

308. See, e.g., Ross, *supra* note 197, at 477 (arguing that legality under Section 1 is determined by comparing the competitive effects of the challenged restraint versus the competitive effects of its alternatives); *supra* notes 199–200 and accompanying text.

at the same time achieving the same procompetitive benefits.³⁰⁹ While this task may have been simple when comparing the pro- and anticompetitive effects of covenants not to compete, it is remarkably complex (if not impossible) when comparing the competitive impact of an exclusive dealership versus an area of primary responsibility clause or other vertical restraints that perhaps *could* have been used, but were not.³¹⁰ The *Addyston* test and its less restrictive alternative inquiry therefore replaces the complex balancing test of the *Board* Rule of Reason analysis with its own complex, multi-leveled balancing test.³¹¹ Moreover, while the *Board* test rarely requires any precise balancing,³¹² the less restrictive alternative inquiry demands precision because courts are required to distinguish between often-similarly pro- and anticompetitive restraints.

An additional problem inherent in the *Addyston* approach is the difficulty of proving causation and of accounting for the impact of exogenous factors.³¹³ That is, how can one determine with any confidence if a restraint actually caused specific procompetitive benefits and anticompetitive effects? Additionally, how can one determine if an alternative restraint *would* have caused similar (or greater or lesser) competitive effects? Causation issues cloud not only the comparative or balancing component of the *Addyston* test, but also the threshold ancillary/naked distinction, where courts are asked to decide whether a restraint furthers a legitimate goal.

The key measures of the *Addyston* test, the relative competitive effects, are thus no more easily measurable or identifiable than the key measures of the *Chicago Board of Trade* test.³¹⁴ Creation of

309. See *supra* notes 211–214 and accompanying text. Of course, there is no clarity as to how this determination is to be made.

310. See *supra* Part IV.B.

311. See *supra* notes 302, 308 and accompanying text (describing the two-part *Addyston* test as: (1) identifying whether the restraint was naked or ancillary and (2) determining whether there was a less restrictive alternative available).

312. See discussion *supra* note 71.

313. See, e.g., Simon, *supra* note 134, at 502 (discussing the limits of choosing the optimal alternative). Granted, these problems also infect the *Chicago Board of Trade* test, but the less restrictive alternative test does little to avoid or solve these problems and therefore is not an effective heuristic.

314. Several variations of the *Addyston* test have been proposed to make the task easier to perform by relaxing the less restrictive alternative requirement. For example, Professor Roberts argues that ancillary restraints that are “reasonably related”—not reasonably necessary—to a lawful purpose should be legal. Roberts, *supra* note 41, at 1010; see also Arthur, *supra* note 66, at 380 (arguing that a less restrictive alternative inquiry should not be used and courts should instead look at whether the restraint was reasonably necessary). Although a critique of all of these variations is beyond the scope of this Article, the relaxed versions of the test, while easier to perform, may fall short of protecting the goals of the antitrust laws (to the extent they can be identified) by failing to provide a sufficient check on the anticompetitive effects of the challenged restraint. See *id.* at 383 (noting that a

heuristics to simplify the *Chicago Board of Trade* analysis is a worthy goal, and scientific, mathematic, and econometric models should be incorporated into antitrust law to identify shortcuts to streamline the rule of reason analysis. The *Addyston* test does not streamline the analysis and its use as a heuristic therefore makes little sense.

V. THE PROPER ROLE OF THE LESS RESTRICTIVE ALTERNATIVE
INQUIRY: TO PROVE INTENT

This is not to say that proof of the existence of less restrictive alternatives is irrelevant to the Rule of Reason. Such proof, however, is directly related to the *intent* of the agreement, not its effect. Proof that a restraint is overly restrictive (i.e., that less restrictive alternatives exist) allows for the presumption that the purpose of the restraint is not to achieve the procompetitive goal.³¹⁵ After all, if achievement of the procompetitive goal were the true purpose of the restraint, why not employ the less restrictive alternative? In other words, one can presume that a firm will use the most efficient—i.e., least restrictive—methods available to it. If the firm fails to use the most efficient methods to achieve its legitimate goals, one can presume that it did not intend to actually achieve those goals. Instead, the legitimate goals served as a pretext to cover the true anticompetitive purpose of the restraint.³¹⁶ The intent of the agreement can then be used to help prove its competitive effects.³¹⁷ Since 1918 and *Chicago Board of Trade*,

reasonably necessary-type ancillary restraints test may be too defendant-friendly and lead to false negatives); Ross, *supra* note 197, at 491–92 (arguing that the reasonably related test suggested by Professor Roberts is unlikely to prohibit any joint activity). A less restrictive alternative test that is relatively easy to perform *and* is used as an aid in determining net competitive effects, however, may be a useful heuristic for judging the legality of certain types of agreements.

315. See, e.g., *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1573, 1577 n.31 (11th Cir. 1983) (accepting that a less restrictive alternative analysis is useful to indicate the motive of the defendant); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 758 (D. Md. 1980), *aff'd*, 638 F.2d 15 (4th Cir. 1981) (noting that the less restrictive alternative requirement is useful to “illuminate the true purpose of a restriction”); see also, e.g., BORK, *supra* note 27, at 36–37 (“Bad intent can be shown by . . . the employment of abusive or predatory practices, or by other behavior inconsistent with efficiency.”); Ross, *supra* note 216, at 91 (noting that courts can infer anticompetitive intent from unnecessarily restrictive agreements because “parties do not ordinarily enter into overly broad agreements for the purpose of achieving narrower legitimate results”).

316. See, e.g., BORK, *supra* note 27, at 38 (“If efficiency would have produced comparable results, why resort to such practices?”); Sykes, *supra* note 163, at 419 (recognizing the existence of the argument that “the least restrictive means analysis . . . is political cover for motive review”).

317. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602–03 (1985) (explaining that anticompetitive intent can be probative of the legality of the transaction); see *infra* notes 342–343, 345 and accompanying text.

this is the only manner in which the Supreme Court has used proof of less restrictive alternatives in the rule of reason context.

For example, in his concurrence in *White Motor*, Justice Brennan limited the use of the less restrictive alternative inquiry to providing an inference of anticompetitive intent.³¹⁸ According to Justice Brennan, the existence of a less restrictive alternative did not prove that the restraint employed was, by definition, anticompetitive, and it was not determinative in the rule of reason analysis.³¹⁹ Rather, “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.”³²⁰

The Supreme Court confirmed this limited role of the less restrictive alternative inquiry over forty years later in *Leegin*, when it overruled the per se rule against minimum resale price maintenance agreements.³²¹ The Court recognized that these price maintenance agreements may have significant net procompetitive benefits for both the consumers and the manufacturer instituting the restraint.³²² Net anticompetitive effects were only likely (or at least significantly more likely) in cases where it appeared that the price maintenance agreements were being imposed by the dealers, not the manufacturers. In those cases, the agreements were more akin to horizontal price fixing agreements, which typically lead to higher prices and lower output and are per se illegal.³²³

In its analysis, the Court recognized that proof of the existence of less restrictive alternatives to the vertical resale price maintenance agreements could be relevant to showing that the restrictions were implemented at the insistence of the dealers.³²⁴ After all, if the manufacturer had a more efficient method available for achieving

318. *White Motor Co. v. United States*, 372 U.S. 253, 270-72 (1963) (Brennan, J., concurring) (stating that the presence of less restrictive alternatives could give an inference of intent but that the district court would need to make a finding of fact on the issue).

319. *Id.* at 270-72 (Brennan, J., concurring) (arguing that there would have to be a negative effect on competition).

320. *Id.* at 270 n.9 (Brennan, J., concurring); see also, e.g., Carstensen, *supra* note 32, at 62 (“Unduly restrictive ‘regulation’ makes rational economic sense only if the parties are also seeking to ‘suppress’ competition among themselves in order to gain added cartelistic benefits.”); Meese, *supra* note 197, at 168 (“To be sure, proof that defendants could have adopted a less restrictive and less effective restraint is consistent with the hypothesis that the restraint exercises or creates market power, and that the benefits it creates coexist with anticompetitive harm.”).

321. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2715-16 (2007).

322. *Id.* at 2714-15.

323. See *id.* at 2717 (discussing cases involving horizontal price fixing).

324. *Id.* at 2717-29.

the net procompetitive benefits, why use the less efficient resale price maintenance agreement? The answer to that question, and the presumption drawn, was that the vertical restraints in such cases were simply pretext to hide the fact that the dealers had insisted on the resale price maintenance agreement in furtherance of a horizontal price fixing agreement.³²⁵ Existence of less restrictive alternatives was therefore not used to prove the anticompetitive effect of the restraint, but instead to permit an inference of anticompetitive intent.³²⁶

The Supreme Court also used the existence of less restrictive alternatives strictly as proof of pretext and intent in *NCAA v. Board of Regents*,³²⁷ the landmark case where a group of schools with high-profile football programs successfully challenged the NCAA's attempt to limit the number of times each school's games appeared on television.³²⁸ Pursuant to the NCAA's plan, individual schools were not permitted to sell television rights to their games.³²⁹ The NCAA instead entered into a national television contract that permitted the broadcast of only twenty-eight total college football games per year.³³⁰ Each school could be televised no more than six times in two years, and the networks had to televise the games of at least eighty-two different colleges every two years.³³¹

The NCAA argued that the television plan was procompetitive because, inter alia, it maintained competitive balance and preserved the "academic tradition" that distinguished college football from professional football.³³² The Supreme Court recognized that both of these were legitimate procompetitive goals and acknowledged that the "NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable."³³³ The Court then identified a number of other rules and restraints that more effectively achieved these procompetitive benefits.³³⁴ With respect to the maintenance of competitive balance, the Court noted that regulations on recruiting and limitations on the number of coaches and players per team, as

325. *Id.* at 2719.

326. *Id.*

327. 468 U.S. 85 (1984).

328. *NCAA v. Bd. of Regents*, 468 U.S. 85, 88 (1984).

329. *Id.* at 94.

330. *Id.* at 92-93.

331. *Id.* at 94.

332. *Id.* at 101-02.

333. *Id.* at 102. The Supreme Court explained that by "performing this role, [the NCAA's] actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive." *Id.*

334. *Id.* at 119.

well as restrictions on alumni donations and any other sources of revenue, were all better (or equally effective) alternatives.³³⁵ With respect to the preservation of the unique amateur nature of the sport, the Court noted that restrictions on payments to players and eligibility requirements were more effective options.³³⁶

Significantly, the Court did not find that the NCAA's television plan was illegal because of the existence of these less restrictive alternatives.³³⁷ Instead, the Court made clear that the presence of these alternatives was relevant only as proof that the procompetitive justifications for the restriction were merely pretext, and that the real intent and purpose of the restriction was to reduce output and raise prices.³³⁸ The anticompetitive intent of the restriction was not, however, enough to make it illegal. Rather, the Court invalidated the restriction because its anticompetitive effects (lower output and higher prices) far outweighed its (virtually non-existent) procompetitive benefits.³³⁹ The less restrictive alternative inquiry thus helped shed light on the intent of the defendant, but it was not independently significant of actual anticompetitive effects.³⁴⁰

This is precisely how the less restrictive alternative inquiry is used in the tying analysis and in common law restraint of trade cases. In tying cases, the presence of a less restrictive alternative to the tying mechanism is used not for proof of the anticompetitive effect of the tie, but rather for the inference that the tie was utilized for an illegal or anticompetitive purpose.³⁴¹ Again, the rationale becomes why use the tying arrangement if its legitimate goals could be achieved through a more efficient method?³⁴² As Professor Turner explained, if a less restrictive alternative could perform the same procompetitive functions as the tying arrangement, it is "quite reasonable to presume

335. *Id.*

336. *Id.*

337. *Id.* at 119–20.

338. *Id.* at 120.

339. *Id.* at 113.

340. This analysis, of course, has also been used in the constitutional law context, where the presence of obviously less restrictive alternatives was used to show that the purported legitimate goals of a rule or regulation were merely pretext. *See, e.g.,* *Dunn v. Blumstein*, 405 U.S. 330, 342–43, 353 (1972) (stating that the fact that a waiting period to vote for new residents is obviously unnecessary to further the stated governmental interest makes the restriction illegal).

341. *Supra* II.C.

342. *See, e.g.,* Turner, *Validity*, *supra* note 79, at 64 (explaining that manufacturers can achieve their stated goals simply by requiring higher standards of producers of the tied product); Arthur H. Travers, Jr. & Thomas D. Wright, Note, *Restricted Channels of Distribution under the Sherman Act*, 75 HARV. L. REV. 795, 824, 826 (1962) (focusing on the "asserted business justification" and "measuring a legitimate business need against the actual agreement to determine whether a less restrictive alternative would have sufficed").

an illegal purpose.”³⁴³ And, in the common law restraint of trade cases, a less restrictive alternative was not used as proof of anticompetitive effect. Instead, it provided “a justifiable suspicion that the actual motives behind the restraint were other than the legitimate ones asserted.”³⁴⁴ The presumption was implemented as a heuristic for proving anticompetitive intent, not as proof of actual anticompetitive impact.³⁴⁵

It is therefore not problematic that the New Rule of Reason gives weight to the existence of less restrictive alternatives. It is problematic, however, that courts use their existence as a proxy for a finding of net anticompetitive effect. Such a use is not only theoretically and practically flawed,³⁴⁶ but is also contrary to the well-established role of intent in antitrust cases. The role of intent in antitrust law—and thus the role of proof of less restrictive alternatives—is to help interpret and predict the effects of a restraint. Evidence of anticompetitive intent is *not* the equivalent of anticompetitive effect. Intent cannot, by itself, be dispositive of actual economic effects.³⁴⁷ Regardless of the intent or purpose of the parties, legality in Section 1 cases is determined by the actual economic impact of the restraint.³⁴⁸

As the Supreme Court explained in *Chicago Board of Trade*:

[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

343. Turner, *Validity*, *supra* note 79, at 64; *see also id.* at 62 (stating that if a less restrictive alternative could have achieved the legitimate function of the tying arrangement, “it is a reasonable assumption that the *purpose* of the seller in using a tie-in is to restrain competition”).

344. Travers & Wright, *supra* note 342, at 824.

345. *See, e.g., Covenants*, *supra* note 36, at 509 (noting that courts use a less restrictive alternative test as an easy way of finding the primary purpose of the restraint); *see also, e.g., United States v. Great Lakes Towing Co.*, 208 F. 733, 742 (N.D. Ohio 1913) (“The fact that the restraint of competition was not limited to the locality where the seller was doing business . . . tends to show an intention on the part of the Towing Company to get more than reasonable protection incidental to the good will of the business sold Such [action], unexplained, justifies a presumption of an intent to dominate and control the towing facilities.”).

346. *See supra* Parts II–III.

347. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) (“[E]vidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as . . . ‘anticompetitive’”); *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1552 (11th Cir. 1996) (“The rule of reason analysis is concerned with the actual or likely effects of defendants’ behavior, not with the intent behind that behavior.”).

348. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 103 (1984) (noting that, despite proof of the intent of a restraint, “the [Section 1] inquiry is confined to a consideration of impact on competitive conditions”) (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 690 (1978)).

regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.³⁴⁹

The underlying theory is that “[a]n anticipated effect on competition may be somewhat more likely to have emerged as the true effect than an unanticipated effect.”³⁵⁰ Proof of intent therefore can play an important role in determining the actual effect of a restraint, as it can help a court “judge the likely effects of challenged conduct.”³⁵¹

The less restrictive alternative inquiry should thus be used solely to help courts interpret and predict the procompetitive benefits and anticompetitive effects of a restraint. This, of course, is not an insignificant task, particularly given the difficulty of identifying with precision the competitive effects of a restraint.³⁵² It is, however, a much more limited role than contemplated by the New Rule of Reason, as it serves as an inference for discerning the effect of a restraint instead of a substitute for an actual finding of effect.³⁵³ This limited use of the inquiry maintains the appropriate focus of the antitrust laws on the net effects of the restraint. It helps courts compare the state of the market with the restraint versus without the restraint, not, as the New Rule of Reason requires, the state of the market with the restraint versus the state of the market with alternative restraints. In cases where predictive and interpretive assistance is unnecessary, proof of the intent of the defendant should play no role. Thus, in cases where the actual procompetitive benefits of a restraint clearly outweigh its anticompetitive effects, the presence of less restrictive alternatives should be irrelevant.

349. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918); *see also* *K.M.B. Warehouse Distribs., Inc. 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.”) (citing *New York v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 874 (E.D.N.Y. 1993)); *United States Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993) (noting that “effects are . . . the central concern of the antitrust laws,” and that intent is but “a clue”); *Nw. Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 90 (5th Cir. 1978) (“An evil intent alone is insufficient to establish a violation under the rule of reason, although proof of intent may help a court assess the market impact of the defendants’ conduct.”).

350. *Wilk v. Am. Med. Ass’n*, 719 F.2d 207, 225 (7th Cir. 1983); *see also id.* (“In ascertaining effect or consequence, it is useful to determine the setting in which the restraint was adopted and the effect or consequence which its instigators anticipated.”).

351. *United States v. Brown Univ.*, 5 F.3d 658, 672 (3d Cir. 1993).

352. Courts therefore rely on certain shortcuts, such as market power, to help with the determination. *See supra* notes 289–294 and accompanying text.

353. *See, e.g., Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 948 (9th Cir. 2000) (stating that “‘smoking gun’ evidence of an intent to restrain competition remains relevant to the court’s task of discerning the competitive consequences of a defendant’s actions”).

For example, in *Hairston*, the procompetitive benefits of the NCAA disciplinary decision far outweighed its anticompetitive effects.³⁵⁴ Yet, under the New Rule of Reason, evidence that a less restrictive disciplinary measure would have achieved the same procompetitive benefits could have been used to invalidate the NCAA's decision. Under any reasonable interpretation of *Chicago Board of Trade* and its Supreme Court progeny, invalidation of the NCAA's action would be the wrong result. The presence of less restrictive alternatives to the NCAA's decision does not convert it from net procompetitive to net anticompetitive. Thus, regardless of the intent of the NCAA—good, bad, or indifferent—its action is still clearly net procompetitive and legal. As Professor Areeda has stated, “an admitted intention to limit competition will not make illegal conduct that we know to be procompetitive or otherwise immune from antitrust control.”³⁵⁵ Evidence of less restrictive alternatives should therefore be irrelevant.

Use of the existence of less restrictive alternatives to permit an inference of anticompetitive intent instead of as a proxy for net anticompetitive effect better reflects the practical problems inherent in asking judges and juries to differentiate small incremental differences in competitive effects.³⁵⁶ Given the difficulties judges have identifying and comparing competitive impact with any accuracy or precision, it is illogical to hinge the legality of a net procompetitive restraint on a finding that a hypothetical alternative is less restrictive. If used as just one factor in the overall analysis, the dangers of the errors are minimized. A false positive—that is, an erroneous finding that an alternative is less restrictive—should not be outcome-determinative when errors are likely and unavoidable. This is particularly true in cases, such as *Hairston*, where a court has already determined that the net effects of the restraint are overwhelmingly procompetitive.³⁵⁷

Clear evidence that significantly less restrictive alternatives were available would allow for a strong inference of anticompetitive intent and would have a potentially significant role in discerning net

354. *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (noting that the penalties imposed were less severe than would have been acceptable); see *supra* note 274 and accompanying text.

355. *Cal. Dental Ass'n*, 224 F.3d at 948 (quoting 7 PHILIP E. AREEDA, ANTITRUST LAW § 1506 (1986)); see also *Jorde & Teece*, *supra* note 151, at 618 (“[T]he existence of an obvious and substantially less restrictive alternative may be a factor considered in overall rule of reason balancing, but it should not be elevated to a separate stage of analysis nor be available as a ‘trump card.’”).

356. See *supra* Part III.A (explaining the difficulties courts encounter in applying the New Rule of Reason).

357. *Hairston*, 101 F.3d at 1319.

competitive effects.³⁵⁸ Evidence of the availability of slightly less restrictive alternatives, however, would be given little weight and play little or no role in the determination of net effects, because, as the Ninth Circuit has noted, “ambiguous indications of intent do not help us predict [the] consequences [of a defendant’s acts] and are therefore of no value to a court analyzing a restraint under the rule of reason, where the court’s ultimate role is to determine the net effects of those acts.”³⁵⁹ Regardless of the strength of the evidence, its use would be properly limited to aiding in the determination of the economic impact of the restraint.

Proof of less restrictive alternatives should therefore be used only in situations where it can actually assist a court in determining the net competitive effect of the restraint in question. In most cases, courts are rarely required to engage in any precise balancing because the challenged restraint is either clearly pro- or anticompetitive.³⁶⁰ In cases where there is equally strong or weak evidence of both pro and anticompetitive impact, or where the economic impact is difficult to determine, the existence of less restrictive alternatives can play a significant role in helping a court interpret and predict the impact of the restraint and serve as a tiebreaker.³⁶¹ Proof of less restrictive alternatives can also be used to support or confirm the evidence of actual economic effects. This is precisely how the Supreme Court used the existence of the less restrictive alternatives in *NCAA*.³⁶² In such cases, it is not a question of searching for a more efficient alternative as a proxy for a finding of net anticompetitiveness. Instead, the inquiry is simply a means to aid a court in predicting,

358. Thus, a grossly overly restrictive restraint (one that no “reasonable businessperson” would employ) would likely be judged illegal—not because of intent alone, but because of the strong inference of anticompetitive effect.

359. *Cal. Dental*, 224 F.3d at 948 (quotation omitted).

360. See *supra* note 71 and accompanying text.

361. See, e.g., *Cal. Dental Ass’n*, 224 F.3d at 948 (discussing “the well-established pattern of the Supreme Court to examine intent only in those close cases where the plaintiff falls short of proving that the defendant’s actions were anticompetitive”); *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 614 (1953) (reasoning that unlawful intent can make an otherwise reasonable restraint unreasonable). As the Second Circuit noted:

Distinguishing between efficient and predatory conduct is extremely difficult because it is frequently the case that ‘[c]ompetitive and exclusionary conduct look alike.’ Evidence of intent *and* effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices.

U.S. Football League v. Nat’l Football League, 842 F.2d 1335, 1359 (2d Cir. 1988) (citation omitted).

362. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984) (holding that the evidence that less restrictive alternatives would preserve the integrity of the college football and would increase output meant that the NCAA’s restrictions were anticompetitive); see also *supra* notes 333–338 and accompanying text.

identifying, and interpreting the net impact of a restraint that simultaneously presents strong anticompetitive effects and procompetitive benefits.

The New Rule of Reason therefore misuses the less restrictive alternative inquiry and fundamentally changes the purpose of Section 1 of the Sherman Act. The inquiry must be eliminated as a dispositive prong and lower courts must return the focus of antitrust analysis to the net competitive effects of the restraint.

CONCLUSION

This Article has highlighted the theoretical and practical flaws of using the less restrictive alternative inquiry as an independent and dispositive prong of the rule of reason analysis. The inquiry, which has been adopted by each of the federal circuits, has created a new rule of reason that is fundamentally inconsistent with the goals of the Sherman Act and is virtually impossible to perform. The search for less restrictive alternatives should play a more limited role in Section 1 scrutiny, serving as proof of intent. This role will help courts identify the net competitive effects of restraints and maintain the focus of antitrust law on the promotion and protection of competition.