ESSAYS

RULE OR REASON? THE ROLE OF BALANCING IN ANTITRUST LAW

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Antitrust law has two basic ways of analyzing conduct alleged to be anticompetitive.[1] Some conduct is viewed as so inherently pernicious that it is deemed illegal per se: proof that you engaged in the act is enough to condemn you. Everything else is judged under the "rule of reason," a test that considers and balances the harms and benefits of individual conduct.[2] Over the past four decades, the per se rule has been narrowed to the vanishing point by courts concerned about false positives.[3] The result is that with rare exceptions, everything in antitrust falls into the rule of reason's balancing test.

Given that the rule of reason is often said to be at the center of antitrust law, and that balancing is at the heart of the rule of reason, it is quite surprising to discover that courts almost never do any actual balancing of harms and benefits.[4] In 97% of cases in the modern

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1 Technically, there is a third way, but such a "quick look" review is not frequently applied. *See infra* notes 29–31 and accompanying text.

2 *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238–39 (1918).

3 Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 700–01 (2009) ("Courts in the last three decades have dismantled every per se rule applied to vertical conduct, limited the per se rule in horizontal conspiracies in a variety of ways, made it harder for plaintiffs to infer conspiracies, all but eliminated predatory-pricing claims, and substantially restricted the role of monopolization cases." (footnotes omitted)).

4 *See infra* Part II.

antitrust era, courts have not even made it past step one of the rule of reason[5] because plaintiffs failed to demonstrate a significant anticompetitive effect.[6] Balancing takes place in only approximately 3% of cases that go to judgment.[7] Indeed, balancing has become so rare that in the Supreme Court's most recent articulation of the rule of reason test, it omitted the actual balancing of anticompetitive harms and procompetitive benefits altogether![8] In so doing, the Court—seemingly unwittingly—took sides in a circuit split over the test for the rule of reason, choosing a three-step, burden-shifting approach without balancing over the four-step approach some courts have articulated and the different three-step approach other circuits have applied, each of which includes balancing.[9] But the Court did so without acknowledging that there was any such divide, much less that it was resolving the disagreement, and it did so in dictum, in a case that didn't require it to determine what the test actually was.

The result has been confusion. The Ninth Circuit recently articulated a four-step test for the rule of reason notwithstanding *NCAA v. Alston*.[10] Other circuits have disagreed.[11] But none of the circuits that omit the balancing inquiry have confronted the fundamental oddity of a "rule of reason" that turns out, in their formulation, to be all rule and no reason.

In this Essay, we argue that the proper test for antitrust's rule of reason is a four-step, burden-shifting framework that ends with a balancing of the likely harms and benefits of particular conduct. One reason balancing has become rare even in circuits that permit it is that it seems hard. Antitrust is shot through with economic theory and evidence, and courts aren't experts in economics. So they tend to look for shortcuts that allow them to resolve the case without having to apply that economic evidence to assess the likely net effect of a

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5 For a discussion of the steps of the rule of reason, see *infra* Part II.

6 *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009).

7 Balancing occurred in 26 of 897 cases. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1293 (finding balancing in 20 of 495 cases between June 1977 and February 1999, *id.* at 1269 n.13); Carrier, *supra* note 6, at 828–29 (finding balancing in 5 of 222 cases between February 1999 and May 2009). In connection with the *NCAA v. Alston* lawsuit, one of us updated the research, finding balancing in 1 of 180 cases between May 2009 and February 2021.

8 *See* NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021) (discussing three-step burden shifting test). For Justice Breyer's contemplation of balancing in *Ohio v. American Express Co.*, see *infra* note 74 and accompanying text.

9 *See infra* Part II.

10 *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 993–94 (9th Cir. 2023) (including a balancing test at step four).

11 *See, e.g.*, *infra* notes 62–67 and accompanying text.

defendant's conduct. But those shortcuts themselves reflect (often implicit) economic judgments, and those judgments are frequently wrong, or at least contestable. Further, the entire project of the Chicago School approach to antitrust has been to reject a prior set of shortcuts (in the form of the per se rule) on the grounds that the economic effects of many sorts of conduct were too complicated for simple rules.[12] But that logic cuts both ways. If we are to ground antitrust analysis in the rule of reason because simple rules get it wrong, that analysis needs to employ reason, not just rules.

In Part I, we briefly discuss the history and basic framework of proof in antitrust law. In Part II, we show how courts have settled on different tests for the rule of reason, and how those tests reflect fundamentally different approaches to the entire enterprise. In Part III, we argue that courts must be willing to confront the hard work of balancing the likely harms and benefits of conduct alleged to be anticompetitive.

I. THE RISE AND FALL OF THE PER SE RULE

The Sherman Act does not specify a particular rule for assessing the anticompetitive nature of challenged conduct. Indeed, the statute doesn't require that conduct be adjudged anticompetitive at all. It forbids all acts of contract, combination, and conspiracy in restraint of trade, and all monopolization.[13] Courts, however, quickly decided that the statute couldn't mean what it said, for all business contracts in some sense restrain trade by foreclosing other options. Instead, the Supreme Court held that the law was intended to prohibit only unreasonable restraints of trade.[14]

But how were courts to decide which restraints were unreasonable? Some conduct, like fixing prices among competitors, was clearly within the contemplation of the Act and had little potential benefit.

12 For a discussion of the replacement of the old shortcuts with new pro-defendant shortcuts like per se legality and quick-look approval, see Christopher R. Leslie, *Disapproval of Quick-Look Approval: Antitrust After* NCAA v. Alston, 100 WASH. U. L. REV. 1 (2022).

13 15 U.S.C. §§ 1–2 (2018).

14 *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66 (1911) ("If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide . . . ."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says.").

Courts soon decided that such restrictions were illegal "per se."[15] They were by their nature unreasonable, so proof of the restriction itself was enough to condemn it. Other restraints, by contrast, might be justified by procompetitive benefits. Courts developed the "rule of reason" to evaluate those restraints on a case-by-case basis, balancing the procompetitive benefits against the anticompetitive harms.[16] Not every potential social benefit qualifies under the rule of reason. The question is not whether a restraint on competition serves worthwhile social purposes but whether it promotes competition. Thus, courts regularly reject arguments by private parties that competition itself is bad in their industry for some reason.[17] Governments can make the judgment that other values override competition, but private parties don't get to.[18]

The category of things labeled illegal per se expanded over the first several decades of the Sherman Act. In part that was a function of judicial experience; courts that saw numerous cases of a particular type were more comfortable drawing the conclusion that that kind of restraint had no redeeming competitive value.[19] But it also reflected the creativity of private actors in trying to evade the antitrust laws by coming up with new ways to restrain trade.[20]

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15 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) ("[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act . . . ."); United States v. Trenton Potteries Co., 273 U.S. 392, 396–401 (1927); *see* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); United States v. Addyston Pipe & Steel Co., 85 F. 271, 292–93 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 237 (1899).

16 *See Standard Oil*, 221 U.S. at 65–67; United States v. Am. Tobacco Co., 221 U.S. 106, 179–81 (1911).

17 *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 116–17 (1984); *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 694–96; NCAA v. Alston, 141 S. Ct. 2141, 2158–60 (2021).

18 *See* Parker v. Brown, 317 U.S. 341, 350–52 (1943). When states delegate the ability to restrict competition to private parties, courts are careful to ensure there is actual state policy in play and not just industry capture. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 504–06 (2015); City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 379–80 (1991); *see also* David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 357–58 (1994) ("States are entitled to deference when they are pursuing a legislative program toward some policy end, but not when they are simply enacting without significant review the anticompetitive policies proposed to them by private actors who stand to benefit." *Id.* at 357.).

19 *E.g.*, Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.").

20 *See e.g.*, E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 611–13 (1914) (dealers refused to buy supplies from wholesalers engaged in dual distribution);

While agreements to restrain trade were often condemned as illegal per se in the first century of the Sherman Act, most single-firm conduct was not judged as strictly.[21] In part this is because it is easier to identify and condemn an agreement than to assess the behavior of a single firm. In part it is because single-firm conduct is condemned under the Sherman Act only if it is done to acquire or maintain monopoly power through anticompetitive conduct or by a company attempting to become a monopoly through anticompetitive conduct, which means that the nature of the firm and purpose of its behavior matter more than they might in cases involving agreements.[22] But it is also because we worry more about the error costs of condemning unilateral business conduct than we do agreements. Companies can always avoid agreeing with rivals. They can't avoid engaging in business at all.

In the last fifty years, the Supreme Court has pulled back substantially on the per se rule, putting more and more things into the rule-of-reason bucket instead. Many forms of vertical contracts (agreements between buyers and sellers) that were once condemned as illegal per se are now treated more leniently.[23] But even agreements between competitors are more often viewed under the rule of reason. Joint ventures are often, though not always, given rule-of-reason

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Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 461–68 (1941) (involving trade organization of designers and manufacturers of women's garments boycotting retailers "who follow a policy of selling garments copied by other manufacturers," *id.* at 461.); *Dr. Miles*, 220 U.S. at 394–409 (distributor required resale price maintenance that eliminated dealer competition).

21 *See, e.g.*, *Standard Oil*, 221 U.S. 1; Louis Kaplow, *Balancing Versus Structured Decision Procedures: Antitrust, Title VII Disparate Impact, and Constitutional Law Strict Scrutiny*, 167 U. PA. L. REV. 1375, 1391 n.23 (2019) ("The rule of reason, as announced in *Standard Oil* . . . , was explicitly directed at interpreting Sherman Act § 1, but the Court indicated that the inquiry is the same under § 2."). There are certain exceptions. Extending a patent beyond its expiration is illegal per se, though arguably under patent, not antitrust policy. *See* Brulotte v. Thys Co., 379 U.S. 29, 32–33 (1964); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 458–59 (2015). And tying arrangements are subject to a modified form of the per se rule whether or not they involve actual agreements (though they often do). Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–15 (1984), *abrogated on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); *see generally* Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement*, 60 OHIO ST. L.J. 1773 (1999).

22 *See* Leslie, *supra* note 21, at 1776–77.

23 *See* Leegin Creative Leather Prods., Inc v. PSKS, Inc., 551 U.S. 877, 907 (2007); State Oil Co. v. Khan, 522 U.S. 3, 22 (1997); Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 339–40 (1990); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977).

treatment today.[24] Trade associations and standard-setting organizations are as well.[25] Collective IP licensing organizations also get rule-of-reason treatment.[26] Further, courts are reluctant to condemn new restraints of trade as illegal per se even when it seems obvious that they are designed to prevent competition and have no redeeming social benefits.[27] They refuse to treat conduct as illegal per se if it happens in a slightly new form or in a new industry, even if it fits quite easily within an existing per se category.[28] And the development of an intermediate "quick-look" test[29] has made it easier for courts to avoid creating new per se rules.[30] Instead, the court takes a "quick look" at the restraint to see if there are any arguably procompetitive benefits, and if there are, shunts the case into the rule of reason.[31]

The retreat from the per se rule is also part of a broader retreat from antitrust enforcement in the last several decades. In part this reflects a prior era of overreach in the 1950s and 1960s.[32] New economic learning taught us that many agreements between buyers and

24 Texaco Inc. v. Dagher, 547 U.S. 1, 7–8 (2006); *see also* Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all.").

25 Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999) (trade association); Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646, 649, 652–53 (5th Cir. 1977) (same); Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n, 666 F.2d 1130, 1137 (8th Cir. 1981) (same); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500–01 (1988) (standard-setting organization); Consol. Metal Prods., Inc. v. Am. Petrol. Inst., 846 F.2d 284, 291–92 (5th Cir. 1988) (same); *see also* 2 HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER R. LESLIE & MICHAEL A. CARRIER, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 35.02 (3d ed. Supp. 2023).

26 *See, e.g.*, *Broad. Music, Inc.*, 441 U.S. at 24.

27 *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 158–59 (2013). On the clear economic harm of "reverse payments" keeping competitors out of pharmaceutical markets, see Herbert Hovenkamp, Mark Janis & Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 MINN. L. REV. 1719, 1749–56 (2003); C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1568–73 (2006); Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 MICH. L. REV. 37, 39–40 (2009). Some courts have not treated conspiracies to impose tying arrangements as per se illegal, even though they should be. Christopher R. Leslie, *Tying Conspiracies*, 48 WM. & MARY L. REV. 2247, 2286–92 (2007).

28 *See, e.g.*, Staley v. Gilead Scis., Inc., 446 F. Supp. 3d 578, 601–05 (N.D. Cal. 2020). Full disclosure: one of us (Lemley) represented plaintiffs in this case.

29 *See Cal. Dental Ass'n*, 526 U.S. 756; Am. Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.39 (1984); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

30 *See, e.g.*, N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 362–63 (5th Cir. 2008).

31 Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35–36 (D.C. Cir. 2005).

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

sellers could serve valuable economic purposes.[33] It makes sense to analyze those cases under the rule of reason. But the retreat from the per se rule also reflects an ideological commitment by the Chicago School to the idea that antitrust enforcement was generally unnecessary and often counterproductive.[34] The result is that it has been many decades since a new category of restraint has been deemed illegal per se, and many things that were once illegal per se are now judged under the rule of reason.

One would expect that courts' increased reliance on the rule of reason would mean more antitrust trials on competitive effects. After all, the whole point of the rule of reason is to assess the facts of each case on the merits. And rule-of-reason antitrust cases are very fact-intensive, requiring detailed economic analysis of the market, consumer response, and predictions about entry and competitor behavior. None of that seems easy to resolve without a trial.

But that has not turned out to be true in practice. Courts under the influence of the Chicago School have found multiple ways to short-circuit antitrust claims. They have imposed draconian new standing requirements on private antitrust suits.[35] They have permitted arbitration agreements to eviscerate antitrust enforcement by direct purchasers.[36] They have prohibited indirect purchasers (often the only plausible private plaintiffs) from suing to recover their overcharges.[37] They have cut back dramatically on class actions, the only viable means of private enforcement in many markets.[38] And antitrust agencies influenced by the Chicago School have stopped blocking mergers that would have been challenged in a prior era.[39]

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33 *E.g.*, Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1350, 1356 (9th Cir. 1982) (trade secrets); *see also, e.g.*, Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 55–61 (2d Cir. 1997) (trademarks); *cf.* Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO L.J. 2055, 2092 (2012).

34 *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2–4 (1984).

35 *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488–89 (1977); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 (1986); Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 339–40 (1990); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529–33, 538–46 (1983); Blue Shield of Va. v. McCready, 457 U.S. 465, 473–78 (1982).

36 *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 232–35 (2013).

37 Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–48 (1977).

38 *See* Comcast Corp. v. Behrend, 569 U.S. 27, 35–38 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–52 (2011).

39 Mark A. Lemley, *Free the Market: How We Can Save Capitalism from the Capitalists*, 76 U.C. L.J. 115, 123–26 (2024); *see* Jorge L. Contreras, *Free Market State (of Mind): Antitrust Federalism, John J. Flynn and the Utah Constitution's Free Market Clause*, 2023 UTAH L. REV. 279, 282–83 (citing critical sources).

Even when an antitrust case does make it to court despite those restrictions, courts have made it much easier to throw those cases out. They have imposed restrictive market definition tests and used them to dismiss cases at the pleading stage.[40] They have required proof of the plausibility of an antitrust theory at the pleading stage to an extent not required in any other area of civil procedure.[41] They have inappropriately applied pro-defendant summary judgment standards.[42] And they have been more receptive to arguments about procompetitive benefits within the rule of reason at summary judgment rather than sending the rule-of-reason case to trial.[43]

One of us has argued elsewhere that the Chicago School attack on antitrust has gone too far and led to serious harm to the market economy.[44] But there is no question that it has been effective. Antitrust analysis today is overwhelmingly about the rule of reason, not the per se rule. And as we show in the next Part, rule-of-reason analysis today is overwhelmingly about rules, not reason.

II. THE THREE- OR FOUR-PART RULE-OF-REASON TEST, WITH OR WITHOUT BALANCING

As historically developed, the prototypical rule of reason was a simple balancing test that sought to distinguish between reasonable and unreasonable restraints of trade by considering their likely effects on competition. The seminal case establishing the rule of reason, *Standard Oil Co. of New Jersey v. United States*, explained that "the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of [either section 1 or section 2] have been committed, is the rule of reason guided by the established law."[45] In *Board of Trade of Chicago v. United States*, the Court then offered the oft-cited passage that made clear that this was a fact-specific balancing inquiry that considered a wide range of evidence:

> 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

40 *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–87 (2018); FTC v. Qualcomm Inc., 969 F.3d 974, 992–93 (9th Cir. 2020). For criticism of the entire enterprise of market definition, see Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

41 *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007).

42 *See* Christopher R. Leslie, *False Analogies to Predatory Pricing*, 172 U. PA. L. REV. 329, 332 (2024).

43 *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–98 (1986); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763–64 (1984).

44 Lemley, *supra* note 39, at 123–24, 129, 145–46.

45 Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62 (1911).

> 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.[46]

Over time, courts began to add layers to this analysis. There were cases in which the court concluded that the plaintiff could not show any injury to competition, and in those cases it seemed unnecessary to go further.[47] Indeed, in the last fifty years the courts have overwhelmingly rejected rule-of-reason cases on this ground.[48] Conversely, there were cases where there was little or no evidence of a procompetitive reason for defendants' conduct.[49] In those cases too it seemed unnecessary to engage in a plenary evaluation of the evidence; a "quick look" would suffice to condemn such a restraint.[50]

When neither is true, however—when there are plausible claims of both anticompetitive harms and procompetitive benefits—courts must evaluate how to decide between them. And it is here that the Supreme Court may recently (and accidentally?) have short-circuited an analysis that had been developing in the lower courts. Courts traditionally approached this situation by balancing: plaintiffs show the harms to competition, defendants show the benefits, and the factfinder weighs the two against each other.[51] Indeed, that balancing of harms and benefits was central to the traditional idea of the rule of

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

47 *See, e.g.*, Appalachian Coals, Inc. v. United States, 288 U.S. 344, 375 (1933) ("[N]othing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets."), *overruled on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

48 *See* NCAA v. Alston, 141 S. Ct. 2141, 2161 (2021) ("[C]ourts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect." (citing Brief of *Amici Curiae* 65 Professors of Law, Business, Economics, and Sports Management in Support of Respondents at 21 & n.9, *Alston*, 141 S. Ct. 2141 (Nos. 20-512, 20-520) ("Since 1977, courts decided 90% (809 of 897) on this ground . . . ." *Id.* at 21 n.9.))).

49 FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109–110 (1984); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 693 (1978).

50 *See Ind. Fed'n of Dentists*, 476 U.S. at 459; *Bd. of Regents*, 468 U.S. at 109–110; *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 692.

51 *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 68 (1911).

reason. It was precisely what made the rule of reason different from the per se rule.[52]

A number of courts and commentators pointed out, however, that just weighing costs and benefits could mislead if the benefits the defendant pointed to could be achieved without engaging in the anticompetitive conduct in question.[53] If so, the defendant couldn't justify its anticompetitive conduct on the ground that it was necessary to achieve the procompetitive benefit. The result was that courts also narrowed down the range of disputes by considering whether proffered procompetitive justifications could be achieved through less restrictive alternatives.[54]

The result has been that the rule of reason is not just blanket balancing, but in most circuits has become a burden-shifting approach that weeds out cases at successive steps.[55] At step one, plaintiffs lose if

52 *See, e.g.*, *id.* at 63–68; United States v. Am. Tobacco Co., 221 U.S. 106, 178–83 (1911).

53 *See, e.g.*, C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 929 (2016).

54 *See generally id.* at 929; Carrier, *supra* note 7, at 1336–41. *See also* Fortner Enters. Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969) ("[T]ying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way . . . ."); Ark. Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98, 104 (2d Cir. 2010), *abrogated by* FTC v. Actavis, Inc., 570 U.S. 136 (2013); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991) ("[P]laintiff . . . must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner."); 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."); Wilk v. Am. Med. Ass'n, 719 F.2d 207, 227 (7th Cir. 1983) (noting defendant's obligation to show that procompetitive justification "could not have been adequately satisfied in a manner less restrictive of competition").

55 *See* Carrier, *supra* note 7, at 1268. Two circuits may not apply the burden-shifting approach. The First Circuit's articulation of the rule of reason requires the plaintiff to make out "a burdensome multipart showing: that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anticompetitive consequences, and that those detriments outweighed efficiencies or other economic benefits." Am. Steel Erectors, Inc. v. Loc. Union No. 7, 815 F.3d 43, 67 (1st Cir. 2016) (quoting Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)). That approach, which appeared to leave the burden on the plaintiff at all times, may have been overruled *sub silentio* by a later decision relying on the Supreme Court's articulation of the three-step test. Vázquez-Ramos v. Triple-S Salud, Inc., 55 F.4th 286, 299 (1st Cir. 2022) ("Typically, courts apply a burden-shifting framework to determine whether a restraint violates the rule of reason." (citing Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018))).

The Fourth Circuit has recently described the rule of reason as a totality-of-the-circumstances inquiry "into the specific business and market, along with the restraint's history, nature, and effect, to identify the specific restraint's actual competitive impact" without discussing burden-shifting. United States v. Brewbaker, 87 F.4th 563, 573 (4th Cir. 2023) (citing Leegin Creative Leather Prods., Inc v. PSKS, Inc., 551 U.S. 877, 885–86 (2007)). Other circuits too have occasionally dropped the burden-shifting framework, especially in older cases. *See infra* notes 62–66.

they can't prove anticompetitive effects. At step two, defendants lose if they can't point to procompetitive benefits. At step three, we allow the plaintiff to show that the anticompetitive restraint is not reasonably necessary to achieve the defendant's objective or (in a formulation that has been used more recently) an alternative restraint could achieve all or most of the defendant's objectives while harming competition less. Finally, having thus eliminated all the cases that don't strictly require balancing, in step four the factfinder must balance the benefits against the harms in order to evaluate the net effect of the conduct. As the Second Circuit has noted, this final balancing step "is easier to state than to apply. . . . Resolving this under the rule-of-reason approach requires a careful and complete analysis of the competitive effects of the challenged restraint."[56]

The Ninth Circuit set out this framework succinctly—and correctly—in *Epic Games v. Apple Inc*:[57]

> At step one, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."
>
> . . . .
>
> . . . If a plaintiff establishes at step one that the defendant's restraints impose substantial anticompetitive effects, then the burden shifts back to the defendant to "show a procompetitive rationale for the restraint[s]."
>
> . . . .
>
> . . . At step three of the Rule of Reason, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."
>
> . . . .
>
> . . . [W]here a plaintiff's case comes up short at step three, the district court must proceed to step four and balance the restriction's anticompetitive harms against its procompetitive benefits.[58]

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56 Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993).

57 Whether the court correctly *applied* the framework is a different matter.

58 Epic Games v. Apple, Inc., 67 F.4th 946, 983, 985–86, 990, 994 (9th Cir. 2023) (first citing *Am. Express*, 138 S. Ct. at 2284; then citing NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021)); and then quoting *id.*) The Ninth Circuit noted that its own precedent had been inconsistent on whether there even was a fourth step. *Id.* at 993 ("We have been inconsistent in how we describe the Rule of Reason. Some decisions, when describing the Rule

Similarly, the Second Circuit has in the past applied this four-step burden-shifting approach:

> [P]laintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market . . . .
>
> After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive "redeeming virtues" of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole. . . .
>
> Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior.[59]

The same test has been articulated by the Fifth Circuit.[60] A similar four-step burden-shifting test—with a broader third step that allows the plaintiff to show either "that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a *substantially* less restrictive manner"—has been employed for decades by the Tenth Circuit.[61]

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of Reason, contemplate a fourth step. Others do not. Because of the paucity of cases that survive step one (let alone require a court to exhaust the three agreed-upon steps), most of our decisions have not required us to actually proceed to the portion of the analysis where Epic and its amici argue balancing would occur." (citations omitted) (first citing FTC v. Qualcomm, Inc., 969 F.3d 974, 991 (9th Cir. 2020); then citing Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001); then citing In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1263 (9th Cir. 2020); and then citing Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001))).

59 *Cap. Imaging*, 996 F.2d at 543 (quoting 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1502 (5th ed. 2024)) (citing *Bhan*, 929 F.2d at 1413; then citing *Kreuzer*, 735 F.2d at 1493–95). However, the Second Circuit has, in recent years, abandoned the final balancing step. *See infra* note 63 and accompanying text.

60 Impax Lab'ys, Inc. v. FTC, 994 F.3d 484, 492 (5th Cir. 2021). The *Impax Laboratories* court cited to *Ohio v. American Express* for the first three steps of the analysis, but relied on *Apani Southwest, Inc. v. Coca-Cola Enterprises* for the final balancing step. *Id.* (first citing *Am. Express*, 138 S. Ct. at 2284; and then citing Apani Sw., Inc. v. Coca-Cola Enters., 300 F.3d 620, 627 (5th Cir. 2002)). For discussion of *American Express*'s omission of the final balancing step, see *infra* notes 68–85 and accompanying text. *Apani Southwest* follows a line of older Fifth Circuit cases that cast the rule of reason in terms of a totality-of-the-circumstances balancing test, rather than a burden-shifting standard. *See, e.g.*, Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc., 200 F.3d 307, 313 (5th Cir. 2000).

61 Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1310 (10th Cir. 2017) (emphasis added) (quoting Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1205 (10th Cir. 2006) (quoting Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998))).

But not all courts apply this four-factor test. Some other circuits speak of a three-factor test that includes the final balancing step but omits the less-restrictive-alternative analysis. The D.C. Circuit did so in *United States v. Microsoft Corporation*, for instance, even though it cited as support the Second Circuit's four-factor test from *Capital Imaging*.[62] To come full circle, the Second Circuit now uses the very same three-step test, citing to the D.C. Circuit's treatment in *Microsoft*.[63] The

But see Suture Express, Inc. v. Owens & Minor Distrib., Inc., 851 F.3d 1029, 1038 (10th Cir. 2017) (citing *Law*, 134 F.3d at 1019) (articulating a three-step test, based on *Law*, that omits the final balancing step).

62 United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc) (per curiam) ("[T]he plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. . . . [I]f a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim. . . . [I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. In cases arising under § 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the 'rule of reason.'" (citations omitted) (first citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984); then citing United States v. Arnold, Schwinn & Co., 388 U.S. 365, 374 n.5 (1967), *overruled on other grounds* by Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); then quoting Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483 (1992); and then citing *Capital Imaging*, 996 F.2d at 543)). Ironically, the Second Circuit test itself cited an earlier D.C. Circuit test for the less-restrictive-alternatives prong. See *Cap. Imaging*, 996 F.2d at 543 (citing *Kreuzer*, 735 F.2d at 1493–95).

63 New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638, 652 (2d Cir. 2015) ("Under the *Microsoft* framework, once a plaintiff establishes that a monopolist's conduct is anticompetitive or exclusionary, the monopolist may proffer 'nonpretextual' procompetitive justifications for its conduct. The plaintiff may then either rebut those justifications or demonstrate that the anticompetitive harm outweighs the procompetitive benefit." (first quoting *Microsoft*, 253 F.3d at 59; and then citing *id.* at 58–59)).

Eleventh Circuit,[64] the Third Circuit,[65] and the Seventh Circuit[66] also follow *Microsoft*'s version of the three-step test with balancing but without less restrictive alternatives.[67]

Most troubling, the Supreme Court in its two most recent rule-of-reason cases has spoken in dictum of a different three-factor test—one that includes less restrictive alternatives but omits the rule-of-reason balancing entirely.[68] In *Ohio v. American Express Co.*, the Court described the rule of reason as "a three-step, burden-shifting framework"

64 McWane, Inc. v. FTC, 783 F.3d 814, 833 (11th Cir. 2015). In *McWane*, the Court recognized that its prior rule-of-reason framework—which called for the plaintiff to show that "the restraint is not reasonably necessary to achieve the stated objective," Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065 (11th Cir. 2005) (citing *Bhan*, 929 F.2d at 1413)—differed from *Microsoft*'s approach. *McWane*, 783 F.3d at 833. The Court nonetheless described the two tests as "substantially similar." *Id.*

65 Mylan Pharms. Inc. v. Warner Chilcott Pub. Co., 838 F.3d 421, 438 (3d Cir. 2016); *see* Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 335–36 (3d Cir. 2018). In older caselaw, the Third Circuit characterized the third step as requiring a showing that "the restraint is not reasonably necessary to achieve the stated objective." Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010) (quoting United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)). For a discussion of the differences between an analysis based on less restrictive alternatives and reasonable necessity, see Carrier, *supra* note 7, at 1336–46 (raising questions with an analysis based on less restrictive alternatives and recommending one based on reasonable necessity). In an abbreviated discussion of the appropriate standard in a case in which a primary question was whether the rule of reason or per se analysis applied, the Third Circuit described the rule of reason as a free-standing balancing test that "basically asks whether, in light of all the circumstances in a case, the restraint in question is an unreasonable burden on competition." *In re* Processed Egg Prods. Antitrust Litig., 962 F.3d 719, 723 (3d Cir. 2020).

66 Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 463–64 (7th Cir. 2020). Like the Third Circuit, however, the Seventh Circuit has not been entirely consistent in its approach to the rule of reason. For example, in an analysis that centered on whether the plaintiffs alleged a conspiracy, the Seventh Circuit described the rule of reason as a free-standing balancing test. *See* Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co., 29 F.4th 337, 348 (7th Cir. 2022). And even when it has acknowledged the burden-shifting framework, the Seventh Circuit has characterized the third step of the analysis as an opportunity for "the plaintiff [to] dispute [the procompetitive justification] or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective." Agnew v. NCAA, 683 F.3d 328, 336 (7th Cir. 2012).

67 For an argument against using less restrictive alternatives, see Thomas B. Nachbar, *Less Restrictive Alternatives and the Ancillary Restraints Doctrine*, 45 SEATTLE U. L. REV. 587 (2022). *Contra* Hemphill, *supra* note 53 (explaining the need for less-restrictive-alternative analysis).

68 This test was previously adopted by the Sixth Circuit. *See In re* Se. Milk Antitrust Litig., 739 F.3d 262, 271–72 (6th Cir. 2014) (citing NHL Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003)). *Plymouth Whalers*' three-step test cited to *Law*. *Plymouth Whalers*, 325 F.3d at 718 (citing Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998)). But *Law* actually articulated a four-step balancing test. *Law*, 134 F.3d at 1019. Several circuits have adopted this no-balancing three-step test following the Supreme Court's decisions in *American Express* and *Alston*. *See infra* notes 69–99 and accompanying text.

that "distinguis[h][ed] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[69] Under this formulation of the test, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect."[70] Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint."[71] If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[72]

And what happens then? The Court doesn't say. Perhaps the plaintiff wins the case outright if, but only if, they can make the less restrictive means showing? This "hot potato" approach to burden shifting seems to ignore the very real possibility that the same act could have both anticompetitive harms and procompetitive benefits. If a plaintiff shows that conduct has anticompetitive effects, while defendants show that it has procompetitive effects that could not be obtained otherwise, that just tells us that the challenged conduct is both good and bad. It doesn't tell us which of those effects predominates. The only way to answer that question is by balancing the harms and benefits.

To be clear, the *American Express* Court's statement was dictum. The Court in that case addressed American Express's "antisteering" rules, which "prohibit[ed] merchants from discouraging customers from using their Amex card after they . . . entered the store and [we]re about to buy something, thereby avoiding Amex's fee."[73] The plaintiffs alleged that these agreements prevented merchants from using steering to "encourag[e] customers to use other, less-expensive" or otherwise preferred cards and thereby removed networks' incentives to reduce fees.[74] The Court found that the plaintiffs failed to show an anticompetitive effect on both sides of the market, as any effect on

69 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007)).

70 *Id.* (citing Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)).

71 *Id.*

72 *Id.* For discussion of the Court's failure to appreciate the four steps in the rule of reason, see Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50 Spring 2019 at 54 (explaining how balancing is "an essential element of the rule of reason—in history, policy, and necessity").

73 *Am. Express*, 138 S. Ct. at 2280.

74 *Id.* at 2293 (Breyer, J., dissenting).

merchant fees "focuses on only one side of the two-sided credit card market,"[75] and plaintiffs failed to show that Amex's provisions "increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market."[76] So the Court didn't need to get to the balancing step. And perhaps the Court just didn't think about the final step because the data shows it doesn't happen very often.[77]

The Court cited three sources for its rule-of-reason framework.[78] Notably, each of these three sources *explicitly includes balancing* in the analysis. In the first, *Capital Imaging Associates v. Mohawk Valley Medical Associates*, the Second Circuit followed the three-step framework with an unnumbered—but still critical—discussion of a fourth step: "Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior."[79] The second source, the von Kalinowski treatise, articulated a final stage of analysis in which courts "determine[] whether the anticompetitive effects of the agreement actually outweigh those procompetitive effects for which the restraint is reasonably necessary."[80] And the third, the Areeda-Hovenkamp treatise, makes clear that if the plaintiff cannot show a less restrictive alternative, "the harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable."[81]

As one of us has written:

> The Court may have veered off course by following the parties, both of which had described a three-stage analysis with no final balancing of overall competitive effects. But in its brief supporting petitioners, the Solicitor General, citing the leading treatise, correctly explained that "the plaintiff may prevail if it establishes that the restraint's objective 'can be achieved by a substantially less

75 *Id.* at 2287 (majority opinion); *see also* Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. ECON. PERSPS. 125, Summer 2009, at 125; David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 676–78.

76 *Am. Express*, 138 S. Ct. at 2287, 2287–88. *See generally* Carrier, *supra* note 72, at 50, 53.

77 *See supra* notes 40–43 and accompanying text. In fact, 90% (809 of 897) of rule-of-reason cases are resolved at the very first step of the rule of reason, usually on the pleadings or at summary judgment. *See supra* notes 7, 48 (citing sources analyzed).

78 *Am. Express*, 138 S. Ct. at 2284. The discussion in this and the following two paragraphs is adapted from Carrier, *supra* note 72, at 50, 53.

79 Cap. Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993).

80 1 JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION § 12.02[1] (2d ed. 2024).

81 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1502 (5th ed. Supp. 2024).

> restrictive alternative'" and that the plaintiff's "fail[ure] to make that showing" is followed by "the court . . . determin[ing] whether 'the challenged behavior is, on balance, unreasonable.'"[82]

In fact, the Second Circuit in *American Express* recognized—though perhaps it was not obvious on a cursory review because it appeared a paragraph after the articulation of the first three steps—that "[u]ltimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior."[83] In any event, the parties' misstatements of the law do not offer a reasonable basis on which to overturn decades of precedent and fundamentally change antitrust law.

Justice Breyer in dissent offered a different articulation, one that had three steps but also incorporated balancing. His first two steps mirrored those of the majority in asking whether the restraint "has had, or is likely to have, anticompetitive effects" and whether the defendant can "show that the restraint in fact serves a legitimate objective."[84] But Justice Breyer's third step included balancing as part of the analysis, noting that the plaintiff could win "by showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer, *i.e.*, that the agreement 'on balance' remains unreasonable."[85]

Unfortunately, the Court doubled down on this three-part, no-balancing test in its next rule-of-reason case, *NCAA v. Alston*. There, the Court quoted *American Express* for the three-part test.[86] And while this too was dictum—the Court did not need to engage in balancing to resolve the question before it—the Court did include an extended discussion of the less-restrictive-alternatives prong, which was much closer to the heart of the test than in *American Express*.[87]

The Court's discussion of less restrictive alternatives is close to incomprehensible. On the one hand, the Court seems clearly to reject the very idea of a less-restrictive-alternatives requirement,

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82 Carrier, *supra* note 72, at 53 (footnotes omitted) (quoting Brief for the United States as Respondent Supporting Petitioners at 22, *Am. Express*, 138 S. Ct. 2274 (No. 16-1454)).

83 United States v. Am. Express Co., 838 F.3d 179, 195 (2d Cir. 2016) (quoting *Cap. Imaging*, 996 F.2d at 543), *aff'd sub nom. Am. Express*, 138 S. Ct. 2274.

84 *Am. Express*, 138 S. Ct. at 2291 (Breyer, J., dissenting) (first citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 452 (1986); and then quoting 7 AREEDA & HOVENKAMP, *supra* note 81, ¶ 1504b).

85 *Id.* (quoting 7 AREEDA & HOVENKAMP, *supra* note 81, ¶ 1507a).

86 NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021).

87 *Id.* at 2161–62.

notwithstanding the fact that it had just cited that requirement as one of the elements of the rule of reason. It said:

> We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." And judicial acceptance of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition."[88]

The Court justifies this claim by saying that we need to simplify rather than consider the facts in all their actual complexity.[89] That sure sounds like less restrictive alternatives are not a reason to reject a defendant's procompetitive justifications, much less the final determinative element of the rule-of-reason test.

But just two paragraphs later, the Court reverses course. Having noted that the district court found that the NCAA's rule preventing athletes from getting paid had anticompetitive effects and that it also had at least some procompetitive benefits, the Court pointed out what it called a "wrinkle"—that the district court had done precisely the less-restrictive-alternatives analysis prior decisions had called for.[90] That was fine, the Court said:

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88 *Id.* at 2161 (alteration in original) (first quoting Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 227 (D.C. Cir. 1986); then citing Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 n.29 (1977); then quoting 11 AREEDA & HOVENKAMP, *supra* note 81, at ¶ 1913b; and then quoting 7 AREEDA & HOVENKAMP, *supra* note 81, at ¶ 1505b).

89 *Id.* ("'[R]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.' After all, 'even [u]nder the best of circumstances,' applying the antitrust laws 'can be difficult'—and mistaken condemnations of legitimate business arrangements 'are especially costly, because they chill the very' procompetitive conduct 'the antitrust laws are designed to protect.'" (second alteration in original) (first quoting Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983); and then quoting Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004))).

90 *Id.* at 2162 ("The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes 'to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules.' And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits." (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1104 (N.D. Cal. 2019))).

> [W]e see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. . . .

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints "patently and inexplicably stricter than is necessary" to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act.[91]It is hard to know what to make of this. The Court seems to say, on the one hand, that defendants need not use the *least* restrictive means of achieving a procompetitive end, but on the other hand, that the procompetitive benefits will not carry the day if there is a *less* restrictive means of achieving the same goal. But those statements cannot both be true. If a defendant loses if there is a less restrictive means of achieving its objectives, then the defendant *is* required to use the least restrictive means of achieving a procompetitive goal. "The only type of restraint that [does] not have a less restrictive alternative is the least restrictive alternative."[92] Otherwise a less restrictive alternative exists, as it did in *Alston*, dooming the defendant's effort to win. The fact that the Court ultimately held that the defendant's justifications could not stand suggests that it is the second conclusion, not the first, that is the actual rule. At most, perhaps, the Court's contradictory language might signal that if there are two ways of achieving a procompetitive goal that are almost completely equal, the defendant doesn't have to find a way to break the tie. Or perhaps the language is serving as a proxy for a concern about the practical feasibility of the alternative, though that's not what the Court actually said. Or only alternatives that are *substantially* less restrictive will defeat the

91 *Id.* (citations omitted) (quoting *In re NCAA*, 375 F. Supp. 3d at 1104).

92 Carrier, *supra* note 7, at 1337.

defendant's justification. The Ninth Circuit has read it that way.[93] But this analysis can quickly morph into the least-restrictive-alternative analysis the Court started out seeming to disdain.

The Court's failure to even mention the fourth balancing factor has also led to further confusion about whether balancing is required at all.[94] The Ninth Circuit has noted that "Supreme Court precedent neither requires a fourth step nor disavows it,"[95] a fact that made it "wary about [this] invitation[] to 'set sail on a sea of doubt.'"[96] And following *American Express* and *Alston*, the First Circuit[97] and the Second Circuit[98] have joined the Sixth Circuit[99] in ignoring the final balancing step.

Even where courts continue to apply the balancing step, the Court's omission has led them to treat it rather casually. In *Epic Games*, for instance, despite having found both anticompetitive effects and procompetitive benefits from Apple's refusal to open its App Store to competition, the court viewed its role at step four as confined to "briefly confirming the result suggested by a step-three failure: that a business practice without a less restrictive alternative is not, on balance, anticompetitive."[100] And it affirmed the district court decision even though that decision did not do balancing at all, because the district court said it had considered the evidence and found (without analysis)

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93 Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 990 (9th Cir. 2023) ("[T]his circuit's test—which the Supreme Court approved in *Alston*—requires a '*substantially* less restrictive' alternative. To qualify as 'substantially less restrictive,' an alternative means 'must be "virtually as effective" in serving the [defendant's] procompetitive purposes . . . without significantly increased cost.'" (alterations in original) (citation omitted) (quoting O'Bannon v. NCAA, 802 F.3d 1049, 1070, 1074 (9th Cir. 2015))).

94 This is particularly notable because the district court gave careful attention to the balancing question. *See In re NCAA*, 375 F. Supp. 3d at 1107–09.

95 *Epic*, 67 F.4th at 993.

96 *Id.* at 994 (alterations in original) (quoting NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021)).

97 *See, e.g.*, Vázquez-Ramos v. Triple-S Salud, Inc., 55 F.4th 286, 299 (1st Cir. 2022).

98 *See, e.g.*, US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 55 (2d Cir. 2019) (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)); Watson Lab'ys, Inc., 101 F.4th 223, 237 (2d Cir. 2024); 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 114 (2d Cir. 2021) (quoting Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 507 (2d Cir. 2004), but omitting the final balancing step articulated therein). This approach is inconsistent with older Second Circuit caselaw. *See supra* note 59 and accompanying text.

99 *See supra* note 68 and accompanying text.

100 *Epic*, 67 F.4th at 994. The Ninth Circuit had previously expressed its skepticism about balancing altogether in one important class of cases—those where innovation is one of the alleged procompetitive benefits. *See* Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 1000 (9th Cir. 2010) ("To weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable."). For discussion of the special case of product design changes, see 1 HOVENKAMP ET AL., *supra* note 25, § 12.

that Apple's "restrictions 'have procompetitive effects that *offset* their anticompetitive effects.'"[101]

The result is, frankly, a mess. Crazy as it seems, no one knows how to perform the basic analysis that is central to almost all antitrust cases. And we are moving in the direction of less clarity, not more.

III. RULE OR REASON?

The key to resolving this uncertainty lies in remembering why we are here. The antitrust statutes as written don't expressly call for any sort of balancing; by their terms, they condemn *all* acts of monopolization and all restraints of trade.[102] But courts quickly realized that such a standard was unworkable. The rule of reason is a judicially created doctrine designed to temper the harshness of the statutory language by engaging in a fact-specific, case-by-case inquiry into the merits of challenged conduct.[103]

Unfortunately, over time the rule of reason has become all rule and virtually no reason. Courts have sought to avoid the challenges of assessing (or worse, having a jury assess) complex and conflicting economic evidence by looking for shortcuts to resolve easy cases—and also to make it easier to resolve cases in the defendant's favor. Those shortcuts started out with new doctrines of standing limiting who could sue.[104] They also include strict requirements for market definition and

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101 *Epic*, 67 F.4th at 994 (quoting Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1049 (N.D. Cal. 2021)). Judge Thomas dissented on this point: "The district court did not undertake a formal *Tuolumne* balancing analysis as such, although the majority concludes that the district court's analysis was sufficient. Remand for a formal balancing should be required." *Id.* at 1006 (Thomas, S.R., J., concurring in part and dissenting in part).

The Ninth Circuit also upheld the district court's legal determination that there wasn't a less restrictive alternative even though such a conclusion contradicted its factual finding that there *was* such an alternative. *Compare Epic*, 559 F. Supp. 3d at 1008 (finding a less restrictive alternative in factual findings to constrictive app review pursuant to "notarization" model by which "Apple could continue to review apps without limiting distribution" by "scan[ning] apps using automatic tools and 'notariz[ing]' them as safe before they can be distributed without a warning"), *with id.* at 1041 (rejecting less restrictive alternative in legal discussion because of the "missing . . . human app review which provides most of the protection against privacy violations, human fraud, and social engineering"). *See also id.* at 998, 1000, 1008, 1009 (noting that the "particularly compelling" "third path" of notarization that would have led to "app review [being] relatively independent of app distribution" did not threaten the "increased prices" or "slow[ed] innovation" that resulted from Apple's restrictions).

102 *See supra* note 13 and accompanying text.

103 *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 85 (2018).

104 *See supra* note 35.

market power at the pleading stage.[105] Those requirements are probably too strict already.[106] While Chicago School scholars worried forty years ago that antitrust law condemned conduct that was benign or procompetitive,[107] forty years of raising the bar have meant that the problem is now the opposite.[108]

The burden-shifting approach to the rule of reason operates in practice as a further set of shortcuts. In theory these don't necessarily favor defendants; the burden-shifting approach would favor plaintiffs in a case that cuts off at step two because defendants can't point to a plausible procompetitive justification, for instance. But as the *Alston* court noted, in practice the burden-shifting approach has had the practical effect of reinforcing defendant-favorable shortcuts.[109] This may, of course, be because there are too many weak antitrust cases. But it may also reflect the same unwarranted skepticism towards all antitrust claims that has driven excesses in antitrust standing and market definition.

In either case, the fact that we weed out almost all cases with one form or another of burden-shifting makes it all the more important that we take seriously the claims that remain. Cases in which there are both unique procompetitive and anticompetitive effects to assess are precisely the ones in which it is important to apply an appropriate rule of reason, balancing the harms and the benefits to decide whether the conduct is legal. That balancing is an important reason to have the rule of reason in the first place.[110] It doesn't make sense to treat it as

105 *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567–68 (2007).

106 *See* Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115, 2131–32 (2015); Kaplow, *supra* note 40, at 516.

107 *See, e.g.*, Easterbrook, *supra* note 34, at 4–9; Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 304 (1975).

108 *See* Robin C. Feldman & Mark A. Lemley, *Atomistic Antitrust*, 63 WM. & MARY L. REV. 1869, 1880 (2022); Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. (SPECIAL ISSUE) S67, S68, S79 (2014) (showing that mergers short of monopoly raise consumer prices); Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1720–39 (2013); Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 AM. U. L. REV. 1713, 1714–16 (2020) (discussing courts' skepticism toward circumstantial evidence in antitrust cases); Mark Glick & Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who is Right in Light of Modern Economics?*, 30 GEO. MASON L. REV. 935, 944–48 (2023); Dogan & Lemley, *supra* note 3, at 700–02.

109 *See supra* note 48.

110 We recognize that balancing can range from relatively easy (harms and benefits having opposite, static effects in the same market) to more challenging (effects in multiple markets or cases involving static and dynamic effects). We do not offer a simple presumption that courts can apply to dispose of these cases.

an afterthought, as the Ninth Circuit did in *Epic Games*, much less ignore it entirely, as the Supreme Court did in *American Express* and *Alston*.[111]

Nor should the absence of less restrictive alternatives necessarily count as a shortcut to avoid balancing under the rule of reason. True, an alternative that provided all or nearly all of the claimed procompetitive benefits without the anticompetitive harms would allow us to have our antitrust cake and eat it too. But the reverse is not true. Even if the defendant's conduct provided procompetitive benefits that could not be achieved any other way, that does *not* mean its conduct is necessarily legal. All it means is that the same conduct has both positive and negative effects, not that one predominates. That is precisely why the anticompetitive and procompetitive effects must be weighed. Conduct that causes $4 billion in anticompetitive harm shouldn't be permitted because it is the only way to generate a benefit worth $100,000. The Ninth Circuit in *Epic* was dismissive of the need for balancing in the very circumstance in which it matters.[112] And in fact, balancing in that case could have favored Epic given the questionable procompetitive justifications and strong anticompetitive effects on price and innovation. The same is true in other cases, such as *O'Bannon*.[113]

The burden-shifting test allows courts to avoid the hard questions balancing entails.[114] We acknowledge that some of the balancing will be hard, particularly if the arguments on different sides relate to consequences in different markets or one involves current effects while the other involves predictions about future consequences. But if we are committed to a rule of reason in which the outcome depends on the facts of the case, there is no avoiding the need for a factfinder to assess those facts when they are in dispute. If, on the other hand, we have decided we don't want to do that work, the current structure of the rule of reason seems a poor way to achieve shortcuts. The rationale

111 *See supra* notes 86–87, 100–01 and accompanying text.

112 Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 994 (9th Cir. 2023).

113 *See* Carrier, *supra* note 72, at 50, 54 (discussing *O'Bannon v. NCAA*, in which "[a]n exhaustive trial revealed significant anticompetitive effects" and "the district court concluded that the NCAA's 'malleable' amateurism defense '[could] not justify the rigid prohibition on compensating student-athletes . . . with any share of licensing revenue,'" which meant that the court should have engaged in balancing rather than letting the defendant win just because the plaintiff could not show a less restrictive alternative (second and third alteration in original) (quoting O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1001 (N.D. Cal. 2014))).

114 *See* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1 (2016) (arguing that courts create insuperable burdens to avoid confronting those hard questions).

behind the per se rule (and, arguably, the language of the statute) is that we can resolve many types of antitrust cases without a detailed inquiry into facts, intent, and economic evidence because some kinds of conduct are so likely to harm competition.[115] Conversely, if there is conduct that seems unlikely to harm competition or that we otherwise want to protect for policy reasons, we can declare it per se legal, or effectively so, as we do with unilateral refusals to deal.[116]

Courts have said the per se rule should be applied after sufficient judicial experience with particular conduct.[117] But in practice courts have been very reluctant to conclude they have such experience so expanding the per se rule has proven difficult.[118] Indeed, it has been decades since any new conduct was added to the list of conduct declared illegal per se. But in section 1 cases, courts sometimes apply an intermediate standard—the "quick look" rule-of-reason test. The quick look allows courts to make an early judgment whether suspicious conduct has a plausible procompetitive justification, and therefore belongs in the rule of reason, or whether it can be condemned under the per se rule.[119]

Both per se rules (of legality or illegality) and the quick look save time and resources because they avoid the need for extensive discovery and economic expert analysis to resolve an antitrust case. The rule-of-reason shortcuts, by contrast, do not. While the courts apply the burden-shifting framework at the time of decision, there is no way to know in advance how that analysis will go (or, increasingly, what questions will even be asked). That means that a rule-of-reason case involves full discovery into numerous complex issues relating to markets, market power, anticompetitive effects, justifications, and alternatives.[120] Enormous numbers of documents will be exchanged, many depositions taken, and tens of millions of dollars will be spent hiring expert

115 *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980) (per curiam) ("[A]n agreement among competing wholesalers to refuse to sell unless the retailer makes payment in cash either in advance or upon delivery is 'plainly anticompetitive.'").

116 *See, e.g.*, Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016) (quoting Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457 (2009); *Pac. Bell*, 555 U.S. at 448 (noting that there are only "limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability" (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–611 (1985))).

117 *E.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

118 *See, e.g.*, 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 116–117 (2d Cir. 2021).

119 *See, e.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35–36 (D.C. Cir. 2005); *1-800 Contacts*, 1 F.4th at 115–17; United States v. Apple, Inc., 791 F.3d 290, 329–30 (2d Cir. 2015). Section 2 has not historically had an analogous quick look test, though one scholar recently argued for one. *See* Daniel Francis, *Monopolizing by Conditioning*, 124 COLUM. L. REV. 1917, 1994 (2024).

120 *See* Hovenkamp, *supra* note 103, at 93.

witnesses on both sides, only to have most of that evidence thrown away unused most of the time.

If we are going to go to the trouble of gathering all the evidence we need to really assess the costs and benefits of a practice, we should not ignore it. The economic effects of many practices challenged under the rule of reason are complex, and the law should reflect that complexity.[121] The test for the rule of reason needs to ensure that the plaintiff's failure to show a less restrictive alternative does not end the case but rather leads to balancing to determine the net effect on competition.[122] Otherwise, if we ignore or short-circuit the balancing that the rationale and history of the rule of reason require—if we are to choose the simplicity of rules over the accuracy of reason—there is no reason to continue the charade of having a rule of reason at all. We should return to a world in which groups of practices are prohibited or permitted per se.

121 For discussion of the trade-offs between rules and standards, see generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

122 *Cf.* Jay S. Burgin, Note, Epic Games *Played by the Rule of Reason: Rebalancing Antitrust's Improbable Standard*, 58 COLUM. J.L. & SOC. PROBS. 101 (2024) (endorsing the adoption of fourth-stage balancing in tying rather than monopolization cases). Although we believe a four-step framework makes the most sense to include balancing, it also is consistent with an analysis consisting of three numbered stages followed by balancing at the end of that process. *See supra* notes 78–82 and accompanying text (discussing cases like this cited in *American Express*). It also is consistent with the effects of the shifting of the burdens, as "[t]he burden is already back on the plaintiff at step three, so there is no additional burden shift before the weighing stage." Brief for the United States of America as Amicus Curiae in Support of Neither Party at 19 n.3, Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023) (Nos. 21-16506 & 21-16695); *see id.* ("[W]eighing can be said to *follow* the three-step burden-shifting framework, rather than constituting a separate, fourth step in that framework.").