

11-1-1999

The Real Rule of Reason: Bridging the Disconnect

Michael A. Carrier

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. Rev. 1265 (1999).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1999/iss4/4>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Real Rule of Reason: Bridging the Disconnect

*Michael A. Carrier**

INTRODUCTION	1267
I. NONBALANCING UNDER THE RULE OF REASON: THE SURVEY	1272
A. <i>Vertical Restraints</i>	1273
1. <i>Territorial, customer, and other restrictions</i>	1274
a. <i>The results</i>	1275
b. <i>Three instances of balancing</i>	1276
2. <i>Refusal-to-deal cases</i>	1277
a. <i>The results</i>	1278
b. <i>Two instances of balancing</i>	1278
c. <i>Instances of burden-shifting</i>	1279
3. <i>Exclusive dealing</i>	1280
a. <i>The results</i>	1280
b. <i>One instance of balancing</i>	1281
c. <i>Instance of burden-shifting</i>	1281
4. <i>Tying</i>	1281
a. <i>The results</i>	1282
b. <i>One instance of balancing</i>	1283
B. <i>Horizontal Arrangements</i>	1283
1. <i>Unfair competition</i>	1283
a. <i>The results</i>	1284
b. <i>Four instances of balancing</i>	1284
c. <i>Instances of burden-shifting</i>	1287
2. <i>Trade association rules and activities</i>	1288
a. <i>The results</i>	1288
b. <i>Nine instances of balancing</i>	1289
c. <i>Instance of burden-shifting</i>	1292

* Associate, Covington & Burling, Washington, D.C. B.A. 1991, Yale; J.D. 1995, Michigan. I would like to thank Stephen Calkins, Tom Kauper, and Gregg Levy for helpful comments on an earlier draft of this Article and Harold Chen, Ken Drexler, Gary Mendelsohn, and Steve Teplinsky for useful discussions. Even more important, I would like to thank my wife, Sharri Horowitz, for her patience and understanding.

1266 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

C. <i>Survey Results</i>	1293
II. THE PROPRIETY OF THE RULE OF REASON FACTORS	1294
A. <i>The Sources</i>	1294
1. <i>The legislative history of the Sherman Act</i>	1294
2. <i>Common law</i>	1298
a. <i>English common law</i>	1299
b. <i>American common law</i>	1301
3. <i>Chicago School of Economics</i>	1303
4. <i>Post-Chicago School</i>	1305
5. <i>Applying the sources</i>	1307
B. <i>Anticompetitive Effect</i>	1308
1. <i>Legislative history</i>	1308
2. <i>Common law</i>	1313
3. <i>Chicago School</i>	1314
4. <i>Post-Chicago School</i>	1315
C. <i>Procompetitive Justifications</i>	1316
1. <i>Legislative history</i>	1316
2. <i>Common law</i>	1317
3. <i>Chicago School</i>	1318
4. <i>Post-Chicago School</i>	1319
D. <i>Reasonable Necessity or Less Restrictive</i> <i>Alternatives</i>	1320
1. <i>Legislative history</i>	1320
2. <i>Common law</i>	1321
3. <i>Chicago School</i>	1322
4. <i>Post-Chicago School</i>	1323
E. <i>Balancing</i>	1324
1. <i>Legislative history</i>	1324
2. <i>Common law</i>	1325
3. <i>Chicago School</i>	1326
4. <i>Post-Chicago School</i>	1327
III. THE CAPACITIES OF COURTS	1328
A. <i>Anticompetitive Effect</i>	1329
1. <i>Output</i>	1329
2. <i>Price</i>	1330
3. <i>Other factors</i>	1331
B. <i>Procompetitive Justifications</i>	1333
C. <i>Reasonable Necessity or Less Restrictive</i> <i>Alternatives</i>	1336
1. <i>Less restrictive alternatives</i>	1336

1265]	THE REAL RULE OF REASON	1267
	2. <i>Reasonable necessity</i>	1341
	D. <i>Balancing</i>	1346
	1. <i>Theory</i>	1346
	2. <i>The cases</i>	1349
	E. <i>Taking Stock</i>	1357
	1. <i>Anticompetitive effect</i>	1358
	2. <i>Procompetitive justifications</i>	1358
	3. <i>Reasonable necessity/less restrictive alternatives</i>	1358
	4. <i>Balancing</i>	1359
	IV. CONSEQUENCES OF THE DISCONNECT AND THE MODIFICATION	1360
	A. <i>Parties</i>	1360
	1. <i>Fewer cases</i>	1360
	2. <i>More focused litigation</i>	1362
	B. <i>Courts</i>	1363
	V. CONCLUSION	1364

INTRODUCTION

The most famous doctrine in antitrust law is the “Rule of Reason.” And anyone who knows anything about the Rule of Reason knows that courts and juries applying the Rule balance the anticompetitive effects of the antitrust agreement at issue against its procompetitive effects.¹ Any antitrust practitioner can explain that whichever side of the scale weighs heavier determines the outcome: if the court finds that the anticompetitive effects predominate, it invalidates the agreement; if the procompetitive effects win out, it upholds the agreement.

Guess what? Everyone is wrong.

This Article takes a new look at the Rule of Reason. It surveys all of the Rule of Reason cases in the modern era and finds that, in reality, courts rarely conduct the balancing for which the Rule is known. The Article concludes that in an astonishing

1. This Article will henceforth refer to and consider balancing only by courts. Instances in which courts have balanced anticompetitive and procompetitive effects or have passed upon the validity of jury verdicts can be discovered by traditional research tools; jury balancing cannot. That juries may play a marginally more significant role than can be pinpointed does not affect the conclusions drawn by this Article.

1268 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

96% of Rule of Reason cases, courts do not balance anything.²

Instead, many recent courts have engaged in an exercise of burden-shifting, typically dismissing the case at any one of three stages that precedes the ultimate balancing.³ In the initial stage, the plaintiff must show a significant anticompetitive effect resulting from the restraint.⁴ The plaintiff can clear this threshold by demonstrating either an actual adverse effect, such as a reduction of output or an increase in price, or a potential adverse effect, which requires proof of market power.⁵ If the plaintiff cannot make this showing, the court will dismiss the case. In 84% of the cases, the lawsuit is disposed of at this stage.

If the plaintiff can demonstrate an anticompetitive effect, the burden shifts to the defendant to demonstrate a legitimate procompetitive justification for the restraint.⁶ The defendant's failure at this step will lead to the invalidation of the restraint; this happened in 3% of the cases surveyed. If the defendant

2. This conclusion applies across the realm of antitrust cases. Courts determined the validity of restraints without balancing anticompetitive and procompetitive effects in 98% of the cases involving vertical restraints, 99% of refusal-to-deal cases, 99% of exclusive dealing cases, 97% of tying cases, 94% of unfair competition cases, and 86% of cases involving association rules or practices. *See infra* notes 18-207 and accompanying text.

3. Although the burden of production shifts between the parties at each stage, the burden of persuasion always remains on the plaintiff to show an unreasonable restraint of trade. *See, e.g.,* *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983); *Bellam v. Clayton County Hosp. Auth.*, 758 F. Supp. 1488, 1493 (N.D. Ga. 1990); VII PHILLIP E. AREEDA, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1507b, at 397 (1986).

4. *See, e.g.,* *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 546 (2d Cir. 1993); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991); *Nationwide R.A.C. Sales, Inc. v. Ford Motor Co.*, No. C 96-2877 FMS, 1997 WL 88399, at *4 (N.D. Cal. Feb. 20, 1997). When this Article refers to the plaintiff's proof of "anticompetitive effect," it implies that such effect is significant or substantial. A scintilla of an anticompetitive effect is not enough.

5. *See, e.g.,* *Flegel v. Christian Hosp., N.E.-N.W.*, 4 F.3d 682, 688 (8th Cir. 1993); *Capital Imaging Assocs.*, 996 F.2d at 546-47; *Bhan*, 929 F.2d at 1413. In a narrow subset of cases, those applying a "quick look" Rule of Reason, the court presumes harm to competition in the absence of both an actual adverse effect and a lack of market power. In these cases, the parties typically have entered into a "naked" agreement not to compete in terms of price or output. *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984); *see also* *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-62 (1986); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978).

6. *See, e.g.,* *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995); *Capital Imaging Assocs.*, 996 F.2d at 547; *Bhan*, 929 F.2d at 1413.

meets this burden, the burden then returns to the plaintiff to show either that the restraint is not reasonably necessary to achieve the objectives of the restraint⁷ or that the objectives could be achieved by alternatives “less restrictive” of competition;⁸ at most, 1% of the cases were dismissed on this ground.⁹ If the plaintiff satisfies this factor, then she prevails;¹⁰ if she does not, then the court balances the restraint’s anticompetitive and procompetitive effects.¹¹ Balancing occurred in only 4% of Rule of Reason cases. In short, by time the court balances anything, most cases have long since been disposed of.

Part I of this Article surveys the cases in the modern era—since the decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*¹²—in which courts have applied the Rule of Reason.¹³ It

7. See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir.), cert. denied, 119 S. Ct. 65 (1998); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993); *Yeager’s Fuel, Inc. v. Pennsylvania Power & Light Co.*, 953 F. Supp. 617, 657 (E.D. Pa. 1997).

8. See, e.g., *Clorox*, 117 F.3d at 56; *K.M.B. Warehouse Distribs.*, 61 F.3d at 127; *Flegel*, 4 F.3d at 688; *Bhan*, 929 F.2d at 1413.

9. Although courts in the majority of these cases found that the restraint was reasonably necessary, they did not follow the burden-shifting approach. See *infra* notes 526-530 and accompanying text.

10. See VII AREEDA, *supra* note 3, ¶ 1507, at 397.

11. See *id.*

12. 433 U.S. 36 (1977).

13. The Court in *Sylvania* held that courts are to consider vertical nonprice restraints under the Rule of Reason. See *id.* at 58-59. The survey’s twenty-two-year time frame provides a complete view as to courts’ treatment of Rule of Reason cases. If anything, the period is overinclusive, as courts in 1999 have applied a marginally different analysis—articulating more specifically the burden-shifting approach—than was applied in 1977. But to the extent these figures do not accurately portray the actions of recent courts, they *overstate* the number of cases in which balancing occurs. Over the past two decades, courts have decided fewer and fewer cases by balancing. For example, between 1978 and 1988, courts balanced in fourteen cases. In the next ten years, balancing occurred in only six cases. See *infra* note 548 and accompanying text. Given the significance of the *Sylvania* case, drawing the line in 1977 should not be a matter of controversy. See, e.g., Robert H. Lande, *Beyond Chicago: Will Activist Antitrust Arise Again?*, XXXIX ANTITRUST BULLETIN 1, 18 (1994) [hereinafter Lande, *Beyond Chicago*] (noting rise of the Rule of Reason since 1977); John E. Lopatka, *Stephen Breyer and Modern Antitrust: A Snug Fit*, XL ANTITRUST BULLETIN 1, 24 (1995) (dating the modern era of antitrust from 1977). To the extent that unreported jury verdicts are based on a proportionally higher degree of balancing, the figures may shift slightly.

A word about the procedural stage of cases meriting inclusion in this survey. The survey includes all cases—discovered through broad searches on WESTLAW—in which a court has entered a final judgment in an antitrust dispute that it has decided (at least in part) under the Rule of Reason. Where courts have ruled upon jury verdicts, the judgments are included. Also included are judgments after nonjury trials and courts’ grants of summary judgment and motions to dismiss. All of the above observations apply only to the antitrust issues of a case; the continued vitality of non-antitrust

1270 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

separately treats cases in six categories: (1) vertical nonprice restraints; (2) refusals to deal; (3) exclusive dealing arrangements; (4) tying arrangements; (5) unfair competition practices; and (6) association rules and practices.¹⁴ Part I finds that, for all six types of restraints, courts overwhelmingly dispose of the case before balancing. In particular, courts typically conclude that the plaintiff fails to demonstrate a significant anticompetitive effect.

Part II begins to tackle the normative questions suggested by the descriptive survey of Part I. This Part explores whether courts *should* consider the factors examined: anticompetitive effect, procompetitive justifications, the reasonable necessity of the restraint, the presence of less restrictive alternatives, and balancing. Four sources inform the conclusions as to each factor: (1) the legislative history of the Sherman Act; (2) the common law preceding the Sherman Act;¹⁵ (3) an influential school of antitrust philosophy—the “Chicago School of Economics”; and (4) an offshoot of the Chicago School—the “Post-Chicago School.”

Section A provides a brief overview of each of the sources. It does not pretend to offer a comprehensive study of each source; rather, it highlights characteristics relevant to an analysis of the various factors. Section B examines anticompetitive effect from the viewpoint of each of the sources. This Section concludes that all four sources recommend the inclusion of anticompetitive effect in the Rule of Reason analysis. Section C canvasses procompetitive justifications. This Section finds that

claims does not affect the inclusion of the case in the survey. Finally, the survey does not include cases that have not reached a final determination, such as denials of summary judgment or motions to dismiss, or grants or denials of preliminary injunctions unaccompanied by final findings.

14. In the context of a noncategorical statute such as the Sherman Act, this stratification is, in a sense, artificial. For example, exclusive dealing and tying arrangements could be grouped as vertical nonprice restraints. In addition, refusals to deal and tying arrangements could possess both vertical and horizontal components. The practices are differentiated here to gain a more precise view as to courts' actions. In addition, a few cases will not fall systematically into particular categories. For cases involving claims in two or more categories, this Article groups the case in the category that appears integral to the restraint or that provides the basis for the court's holding. Any disagreements at the margins as to the category in which certain cases appear do not affect the underlying thesis. No matter how the cases are categorized, the conclusion is uniform: courts do not balance.

15. Of course, the common law did not stop in 1890. In fact, its development continues today. But the Article focuses only on the common law at the stage in which it fleshes out the legislative history—the common law of 1890.

three of the sources—the legislative history, Chicago School, and Post-Chicago School—support this factor, and that the fourth—the common law—is neutral. The Section concludes that courts should consider procompetitive justifications as an element of the Rule of Reason analysis.

Section D explores the inquiries as to whether a restraint is reasonably necessary and whether there are less restrictive alternatives. This Section finds that the sources come to contrary conclusions on the factors. The common law would provide substantial approval to courts' consideration of both inquiries, but the Chicago School would not. The other two sources would not tilt the balance: the legislative history would be neutral and the Post-Chicago School would provide, at most, marginal support. The Section concludes that the sources provide lukewarm support for the factor. Section E addresses balancing. This Section concludes that the sources provide moderate approval for this factor: the Chicago School would endorse a limited type of balancing; the Post-Chicago School would champion broad balancing; and the legislative history and common law would be neutral on the factor. The sources thus offer tentative support for balancing.

Part III continues the normative analysis and supplements the conclusions of Part II by examining the capacities of courts. It first asks, as a matter of theory, whether courts can analyze each of the four factors of a Rule of Reason analysis. It then reviews the cases in the survey to determine whether the empirical results conform to the conclusions based on hypothesis. Section A concludes that courts can, as a matter of theory and practice, examine anticompetitive effect. Section B arrives at the same conclusion for procompetitive justifications.

Section C finds that courts can determine whether a restraint is reasonably necessary but that they cannot conduct an analysis based on less restrictive alternatives. This finding, combined with the marginal support provided by the sources, leads to the conclusion that courts should not consider the factor of less restrictive alternatives in conducting analysis under the Rule of Reason. This Section also recommends a shift in the burden of proving reasonable necessity from the plaintiff showing the absence of reasonable necessity to the defendant demonstrating its presence. Such a shift would conform with the parties' varying levels of access to evidence and would remedy the courts' misunderstanding of the nature of the burden. As a

1272 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

result of the shift, this Article recommends combining the second and third stages of the current Rule of Reason analysis, thus requiring the defendant to demonstrate that the restraint is reasonably necessary to achieve a legitimate procompetitive objective. Section D hesitantly concludes that courts can balance. This conclusion would be strengthened if courts continually referenced the overriding goals of consumer welfare and interbrand competition throughout balancing.

Part IV wraps up by exploring the consequences of this Article. Primarily, it examines the likely effects of bridging the disconnect between what practitioners and courts think courts do (balance), on the one hand, and what courts actually do (not balance), on the other. It also explores the consequences of removing the less restrictive alternative analysis from the equation.¹⁶ Section A looks to the effect on the parties. It concludes that a shift in thinking to accord with reality would decrease the number of suits filed and would focus the parties' attention to a greater extent on the relevant factors in a Rule of Reason analysis (in particular) and competition (in general). Section B looks to the effect on courts. Admittedly, there would be less of an effect on courts. Even though they repeatedly cite the prescription that they are to balance anticompetitive and procompetitive effects,¹⁷ the courts usually require the parties to clear the initial stages before balancing. The bridging of the disconnect nonetheless would have salutary effects, in particular by bringing the language and reasoning of antitrust opinions in line with the results, thereby enhancing the legitimacy of antitrust courts. Moreover, the elimination of the analysis based on less restrictive alternatives would prevent post hoc second-guessing of the defendant's justifications.

I. NONBALANCING UNDER THE RULE OF REASON: THE SURVEY

In only 20 out of 495 cases decided under the Rule of Rea-

16. The shift in the burden of production on reasonable necessity should not have significant repercussions.

17. When confronted with Rule of Reason cases, courts usually cite Justice Brandeis's instruction in *Board of Trade of Chicago v. United States* to 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[, as well as] [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained.

246 U.S. 231, 238 (1918).

son in the modern era have courts balanced the anticompetitive and procompetitive effects of the restraints at issue.¹⁸ Part I divides the universe of Rule of Reason analysis into six types of restraints: (1) vertical territorial, customer, and other similar restraints; (2) refusals to deal; (3) exclusive dealing arrangements; (4) tying arrangements; (5) unfair competition practices; and (6) association rules and practices. Each of the Sections of this Part initially provides a brief description of the types of restraints. They then calculate and array the instances of each stage of resolution: anticompetitive effect, procompetitive justification, reasonable necessity, less restrictive alternatives, and balancing. Finally, the Sections provide synopses of cases in which courts conducted balancing and offer instances of courts' application of the burden-shifting construct.

A. Vertical Restraints

Ever since the Supreme Court's decision in *Sylvania*,¹⁹ courts have applied the Rule of Reason to vertical nonprice restraints.²⁰ Vertical restraints occur at different levels of the distribution chain, typically between manufacturers or suppliers, on the one hand, and dealers or distributors, on the other.²¹ Such restraints generally reduce intrabrand competition—competition among the distributors of a product of a particular manufacturer²²—by limiting various types of competition among the distributors.²³ On the other hand, vertical restraints

18. This Article uses the term "restraints" to refer to the agreements or arrangements at issue. It is used in a broad sense and has no normative implications.

19. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

20. *Sylvania* overturned the emphasis on whether a manufacturer had passed title to a product to the dealer—holding vertical restraints to be *per se* illegal if title had passed, but analyzed under the Rule of Reason if it had not—that the Court had imposed in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). *See Sylvania*, 433 U.S. at 52, 58-59. The *Sylvania* Court recognized the complex effect of vertical restraints on competition because of the "potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." *Id.* at 51-52. The Court confirmed that interbrand competition "is the primary concern of antitrust law." *Id.* at 52 n.19. It also explained that the exploitation of intrabrand market power often would be counterbalanced by interbrand competition, through which consumers could always turn to different brands of a product. *See id.*

21. *See, e.g., United States v. Topco Assocs.*, 405 U.S. 596, 606 (1972); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988); VII AREEDA, *supra* note 3, ¶ 1437, at 3-4.

22. *See Sylvania*, 433 U.S. at 52 n.19.

23. *See id.* at 54; VIII PHILLIP E. AREEDA, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1602, at 23 (1989).

1274 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

often promote interbrand competition—competition among the manufacturers of the same generic product²⁴—by allowing manufacturers to achieve efficiencies (such as economies of scale) in product distribution. For example, manufacturers entering a market may use the restrictions to encourage dealers to invest capital and labor in their product.²⁵ Or the restraints may allow established manufacturers to induce dealers “to engage in promotional activities or to provide service and repair facilities.”²⁶ Such restrictions also may prevent “free-riding” by allowing dealers to recoup their investment.²⁷

1. Territorial, customer, and other restrictions

Vertical nonprice restraints include territorial, customer, and other similar restrictions. A manufacturer might designate certain territories in which dealers are encouraged to distribute, or are prohibited from distributing, its products.²⁸ Or the manufacturer could impose customer restraints by requiring distributors to sell only to certain customers, by requiring sale directly to customers, or by prohibiting certain types of distribution, for example, mail order sales.²⁹ The manufacturer could decide to add a new distributor or to prohibit a dealer’s transfer of ownership without consent.³⁰ Or a franchisor could decide

24. See *Sylvania*, 433 U.S. at 52 n.19.

25. *Id.* at 55; *Westman Comm’n Co. v. Hobart Int’l, Inc.*, 796 F.2d 1216, 1227 (10th Cir. 1986).

26. *Sylvania*, 433 U.S. at 55; see also *Hobart*, 796 F.2d at 1227; *Cowley v. Braden Indus., Inc.*, 613 F.2d 751, 755 (9th Cir. 1980).

27. An oft-quoted example of free-riding occurs when a dealer provides helpful customer service (perhaps by hiring employees to explain and demonstrate the qualities of a product) and is thereby forced to raise the price of the product. Yet the ungrateful customer may, after receiving this service, buy the product from a competing dealer that offers limited services but lower prices. See VIII AREEDA, *supra* note 23, ¶ 1601, at 14; 1 JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATION* § 19.01[2], at 19-3 (1998); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 927 n.3 (1979) [hereinafter Posner, *Chicago School*].

28. See, e.g., *Jayco Sys., Inc. v. Savin Bus. Machs. Corp.*, 777 F.2d 306 (5th Cir. 1985); *Cowley v. Braden Indus., Inc.*, 613 F.2d 751 (9th Cir. 1980); *Laurence J. Gordon, Inc. v. Brandt, Inc.*, 554 F. Supp. 1144, 1153 (W.D. Wash. 1983); see generally VIII AREEDA, *supra* note 23, ¶ 1600, at 5.

29. See, e.g., *Sports Ctr., Inc. v. Riddell, Inc.*, 673 F.2d 786 (5th Cir. 1982); *American Bus. Sys., Inc. v. Panasonic Indus. Co.*, No. Civ.A.87-4461, 1988 WL 76220 (E.D. La. July 12, 1988); *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274 (C.D. Cal. 1985).

30. See, e.g., *Desai v. Impacta, S.A.*, No. Civ.A.89-4817, 1990 WL 132709 (D.N.J. Sept. 7, 1990); *Dr. Pepper Bottling Co. v. Del Monte Corp.*, No. Civ.A.CA3-88-3012-D,

not to grant an additional franchise or to require franchisees to act consistently.³¹

a. The results. The courts found that the plaintiff failed to demonstrate a significant anticompetitive effect in 105 out of 118 cases (89%) involving vertical restraints. Nine of the cases did not fall into any category, as the courts, without considering the anticompetitive and procompetitive effects, found that the restraint at issue was not an unreasonable restraint of trade³² (or that there was no evidence of an unreasonable restraint³³), was reasonable,³⁴ was an unreasonable restraint,³⁵ or was anticompetitive.³⁶ Courts did not decide any of the cases on the ground that the defendant failed to demonstrate a procom-

1990 WL 291495 (N.D. Tex. Jan. 30, 1990).

31. See, e.g., *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 922 F. Supp. 1055 (E.D. Pa. 1996); *Great Clips, Inc. v. Levine*, No. CIV.3-90-211, 1991 WL 322975 (D. Minn. Oct. 9, 1991); *Blanton Enters., Inc. v. Burger King Corp.*, 680 F. Supp. 753 (D.S.C. 1988); *Blaine v. Meineke Discount Muffler Shops, Inc.*, 670 F. Supp. 1107 (D. Conn. 1987).

32. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 694 F.2d 1132, 1139-40 (9th Cir. 1982); *Northeastern Educ. Television v. Educational Television Ass'n*, 758 F. Supp. 1568, 1578 (N.D. Ohio 1990).

A court's summary conclusion that a restraint is reasonable or unreasonable or its finding that there is no evidence of an unreasonable (or a reasonable) restraint cannot be viewed as a type of balancing for two related reasons. First, the court's failure to explicitly discuss anticompetitive or procompetitive effects precludes an assumption that the court considered these effects. A finding of reasonableness or its opposite may be a "gut reaction" as much as it may be implicit balancing, and in the absence of even a mention of anticompetitive or procompetitive effects, we cannot superimpose on the court, post hoc, an intention to balance. Second, even deferring to the court's unsupported conclusions leads to ambiguous results. For example, a court, in finding that there is no evidence of an unreasonable restraint, could mean that there is no evidence of (a) anticompetitive effects outweighing procompetitive effects or (b) any anticompetitive effects at all. Similarly, the unsupported conclusion that a practice is reasonable or unreasonable may imply either implicit balancing or the absence of the countervailing factor (*i.e.*, the absence of an anticompetitive effect if the restraint is found to be reasonable). Therefore, the summary conclusions reached by courts when examining each of the six types of restraints that there is no evidence of an unreasonable (or reasonable) restraint or that a restraint is reasonable or unreasonable or anticompetitive or procompetitive do not fit into any of the categories of the Rule of Reason analysis explored by this Article.

33. See *Lee Klinger Volkswagen, Inc. v. Chrysler Corp.*, 583 F.2d 910, 915 (7th Cir. 1978); *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 960 (2d Cir. 1978).

34. See *Mularkey v. Holsum Bakery, Inc.*, 146 F.3d 1064, 1065 (9th Cir. 1998); *Hunt v. Mobil Oil Corp.*, 465 F. Supp. 195, 222-23 (S.D.N.Y. 1978); *United States v. Arnold, Schwinn & Co.*, 442 F. Supp. 1366, 1368 (N.D. Ill. 1977).

35. See *Eiberger v. Sony Corp.*, 622 F.2d 1068, 1076-81 (2d Cir. 1980).

36. See *Munters Corp. v. Burgess Indus. Inc.*, No. 75.Civ.4622, 1978 WL 1367, at *2 (S.D.N.Y. July 10, 1978).

1276 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

petitive justification. One court held that the defendant showed that the restraint was reasonably necessary to achieve its objectives.³⁷ In only 3 out of 118 cases (2.5%) did the courts balance the anticompetitive and procompetitive effects of the restraint.

b. Three instances of balancing. In *New York v. Anheuser-Busch, Inc.*,³⁸ the court upheld a system of territorial restraints that a brewer-manufacturer imposed on its distributors. The court found that the “numerous beneficial effects on interbrand competition,”³⁹ namely maintaining quality by mandating investment, encouraging advertising and promotion, enabling more efficient distribution, and improving the performance of customer services,⁴⁰ “dramatically outweighed”⁴¹ limited intrabrand effects. The court also found that the defendant lacked market power.⁴²

One case in which an adverse effect on intrabrand competition *did* affect interbrand competition is *Graphic Products Distributors, Inc. v. Itek Corp.*⁴³ In *Itek*, a manufacturer with a 70% market share⁴⁴ granted exclusionary territories to its distributors. The defendant’s market power provided the rare setting in which intrabrand competition “was an important source of competitive pressure on price”⁴⁵ and in which the foreclosure of such competition could have “substantially adverse effects on price competition and consumer welfare.”⁴⁶ The court also found that the defendant’s proffered procompetitive justifications—providing adequate servicing and enhancing market

37. See *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 475 (D.D.C. 1977).

38. 811 F. Supp. 848 (E.D.N.Y. 1993).

39. *Id.* at 876.

40. *See id.*

41. *Id.* at 877.

42. *See id.* at 873 (noting that defendant had small market share, there were no significant entry barriers, and the market was characterized by intense price competition). The court did not rest its holding on a lack of market power because of the decision in *Eiberger v. Sony Corp.*, 622 F.2d 1068 (2d Cir. 1980), which held that an anticompetitive effect on intrabrand competition alone could constitute an unreasonable restraint. *See id.* at 1081. The court in *Eiberger* may not yet have been operating under the mandate of *Sylvania*. *See Anheuser-Busch*, 811 F. Supp. at 872 n.69 (“The outcome in *Eiberger* may have resulted more from the case’s timing than its factual circumstances. . . . [T]he trial occurred while *Schwinn* was still the law of the land.”).

43. 717 F.2d 1560 (11th Cir. 1983).

44. *See id.* at 1570.

45. *Id.* at 1575.

46. *Id.*

penetration—were not reasonably necessary to achieve the defendant's goals.⁴⁷

In *Paschall v. Kansas City Star Co.*,⁴⁸ the court upheld a change in a newspaper's distribution system by which the newspaper replaced independent contract carriers with its own delivery agents.⁴⁹ The court found that "the procompetitive effects generated by optimum monopoly pricing⁵⁰ and the unique nature of a newspaper's revenues⁵¹ outweighed the minimal anticompetitive effect of eliminating potential competition."⁵²

2. Refusal-to-deal cases

A refusal to deal can take multiple forms. A manufacturer may select distributors with whom it will deal or it may terminate existing distributors.⁵³ A supplier may decide not to deal with a particular purchaser,⁵⁴ or vice versa.⁵⁵ A hospital or group of medical providers may refuse membership to a doctor.⁵⁶ Refusal-to-deal cases also may have a horizontal compo-

47. *See id.* at 1577-78.

48. 727 F.2d 692 (8th Cir. 1984).

49. *See id.* at 694-95.

50. Under an optimum monopoly pricing theory, a monopolist's vertical integration into a second market would not increase the price of the item in the second market because a monopolist could still only charge the price at which marginal cost equals marginal revenue. *See id.* at 701.

51. Because advertising constitutes a significant portion of a newspaper's revenues, the newspaper would have a greater incentive than would contract carriers "to keep the retail price as low as possible in order to increase circulation," which would increase advertising revenues. *Id.*

52. *Id.* at 704 (internal footnotes added).

53. *See, e.g.,* Sportswear Design, Inc. v. Canstar Sports USA, Inc., Nos. 93-2242, 93-2294, 1995 WL 675615 (6th Cir. Nov. 9, 1995); R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478 (1st Cir. 1994); Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802 (6th Cir. 1988); Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208 (9th Cir. 1987); Filter Queen, Inc. v. Health-Mor Inc., No. 89C5511, 1990 WL 36824 (N.D. Ill. Mar. 20, 1990).

54. *See, e.g.,* Scott & Fetzer Co. v. Peterson, No. 86-C-29-C, 1987 WL 110400 (W.D. Wis. June 1, 1987); Family Boating Ctr., Inc. v. Washington Area Marine Dealers Ass'n, No. 81-694, 1982 WL 1815 (D.D.C. Feb. 23, 1982).

55. *See, e.g.,* Great Escape, Inc. v. Union City Body Co., 791 F.2d 532 (7th Cir. 1986); Wimer v. Holzapfel, 868 F. Supp. 844 (E.D. Tex. 1994).

56. *See, e.g.,* BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n, 36 F.3d 664, 667-68 (7th Cir. 1994) (citing cases); Lie v. St. Joseph Hosp., 964 F.2d 567 (6th Cir. 1992); Tarabishi v. McAlester Reg'l Hosp., 951 F.2d 1558 (10th Cir. 1991); Ok-sanen v. Page Mem'l Hosp., 945 F.2d 696 (4th Cir. 1991); Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 5 F. Supp. 2d 694 (D. Minn. 1998); Davies v. Genesis Med. Ctr., 994 F. Supp. 1078 (S.D. Iowa 1998); Ginzburg v. Memorial Healthcare Sys., Inc., 993 F. Supp. 998 (S.D. Tex. 1997).

1278 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

ment—*e.g.*, where a manufacturer conspires with a dealer to boycott competitor dealers—and courts sometimes apply Rule of Reason analysis to these agreements.⁵⁷

a. The results. The nonbalancing continues in these cases. The courts dismissed 133 out of 142 refusal-to-deal cases it decided under the Rule of Reason, or 94%, at the initial stage, finding that the plaintiff failed to prove a significant anticompetitive effect. Two cases were dismissed at the second stage on the ground that the defendant failed to come forward with legitimate procompetitive justifications.⁵⁸ Five of the cases did not fall into any category, as the courts found that there was no unreasonable restraint⁵⁹ or affirmed jury verdicts of reasonable⁶⁰ or unreasonable⁶¹ restraints of trade. Finally, the courts balanced the anticompetitive and procompetitive effects of the restraint at issue in only 2 out of 142 cases (1.4%).

b. Two instances of balancing. In *Williamson v. Sacred Heart Hospital*,⁶² a radiologist challenged a refusal to deal by an HMO. The court concluded that “the procompetitive benefit of allowing consumers the choice of an additional HMO outweighs the anticompetitive effect of the HMO structure.”⁶³ The court also recognized the lack of anticompetitive effect: the defendant had a market share of only 8%, its presence did not “appear . . . [to have] resulted in any detriment to competition,”⁶⁴ and the plaintiff competed successfully in the market.⁶⁵

The second case conducted balancing even though it too could have disposed of the case based on a lack of significant

57. See, *e.g.*, *Doctor's Hosp., Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301 (5th Cir. 1997); *Retina Assocs., P.A. v. Southern Baptist Hosp., Inc.*, 105 F.3d 1376 (11th Cir. 1997); *Thurman Indus., Inc. v. Pay 'n Pak Stores, Inc.*, 875 F.2d 1369 (9th Cir. 1989).

58. See *Wilk v. American Med. Ass'n*, 895 F.2d 352, 362 (7th Cir. 1990); *International Wood Processors v. Power Dry, Inc.*, 593 F. Supp. 710, 722 (D.S.C. 1984).

59. See *W.W. Blackburn v. Crum & Forster*, 611 F.2d 102, 105 (5th Cir. 1980); *Bernard v. Curtis Circulation and Manor Books, Inc.*, No. 77 C 1415, 1978 WL 1364, at *3 (E.D.N.Y. June 15, 1978).

60. See *Fulton v. Hecht*, 580 F.2d 1243, 1249 (5th Cir. 1978).

61. See *American Computech, Inc. v. National Med. Care, Inc.*, No. CV-84-1565-S, 1992 WL 66641, at *4 (9th Cir. Apr. 3, 1992); *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 955-56, 983 (10th Cir. 1990).

62. No. 89-30084-RV, 1993 WL 543002 (N.D. Fla. May 28, 1993), *aff'd*, 41 F.3d 667 (11th Cir. 1994).

63. *Id.* at *50.

64. *Id.*

65. See *id.*

anticompetitive effect. In *Robinson v. Magovern*,⁶⁶ a surgeon challenged a hospital's denial of staff privileges. The court stated that the procompetitive effects of the hospital's staffing policy outweighed the anticompetitive effects.⁶⁷ By granting staff privileges only to applicants "who meet very high standards,"⁶⁸ the hospital increased interbrand competition and "raise[d] the prevailing level of care"⁶⁹ for the public. Although the court stated that the anticompetitive effects of the policy were "not severe"⁷⁰—because a surgeon would have access to other hospital facilities in the market—the court could have concluded that harm suffered by one doctor did not constitute an adverse effect on competition. In short, the two "balancing" cases in the refusal-to-deal context could have been resolved on the ground that the plaintiff failed to demonstrate an anticompetitive effect.

c. Instances of burden-shifting. A handful of refusal-to-deal cases have explicitly articulated the three-stage burden-shifting analysis. In these cases, the courts typically have dismissed the case on the ground that the plaintiff failed to carry its initial burden of showing a significant anticompetitive effect.⁷¹ The cases also confirm the benefits of the burden-shifting construct. In particular, the paradigm prevents the plaintiff from blinding the court with the alleged absence of a procompetitive justification in circumstances where the court should not even be looking at the issue because of the lack of anticompetitive effect.⁷²

66. 521 F. Supp. 842 (W.D. Pa. 1981).

67. *See id.* at 919.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See, e.g.,* K.M.B. Warehouse Distributions, Inc. v. Walker Mfg. Co., 61 F.3d 123, 128-30 (2d Cir. 1995); Flegel v. Christian Hosp., N.E.-N.W., 4 F.3d 682, 688-91 (8th Cir. 1993); Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 546-47 (2d Cir. 1993); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413-14 (9th Cir. 1991); Ginzburg v. Memorial Healthcare Sys., Inc., 993 F. Supp. 998, 1026-27 (S.D. Tex. 1997); Nationwide R.A.C. Sales, Inc. v. Ford Motor Co., No. C-96-2877 FMS, 1997 WL 88399, at *7 (N.D. Cal. Feb. 20, 1997); Bogan v. Northwestern Mut. Life Ins. Co., 953 F. Supp. 532, 549-50 (S.D.N.Y. 1997); Patel v. Scotland Mem'l Hosp., No. 3:94CV00284, 1995 WL 319213, at *6 (M.D.N.C. Mar. 31, 1995).

72. *See Capital Imaging Assocs.*, 996 F.2d at 547 (stating that a demonstration of procompetitive justifications is unnecessary where plaintiff has not carried initial burden of showing anticompetitive effect: "[o]nly after a plaintiff has successfully met its initial burden under the rule of reason must an antitrust defendant offer evidence to exonerate its conduct."); *Patel*, 1995 WL 319213, at *1 n.4 (dismissing plaintiff's argu-

1280 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

3. Exclusive dealing

An exclusive dealing agreement typically requires a buyer to purchase products or services from a particular seller for an extended period of time.⁷³ One type of exclusive dealing arrangement, a requirements contract, provides that the buyer will purchase all of its requirements from the seller.⁷⁴ Under another type of arrangement, an output contract, a seller supplies all of its output to the buyer.⁷⁵ The concern with exclusive dealing agreements is that they foreclose a segment of the market from competing purchasers.⁷⁶ On the other hand, such agreements can have procompetitive benefits, such as enlisting dealers to promote a seller's product and discouraging free riding.⁷⁷

a. The results. Courts dismissed 62 out of 70, or 89% of, exclusive dealing cases on account of the plaintiffs' failure to demonstrate a significant anticompetitive effect. One case was dismissed for the defendant's failure to show a procompetitive effect.⁷⁸ Six of the cases do not fit into any category, as courts summarily found that the agreement was an unreasonable restraint of trade,⁷⁹ was not an unreasonable restraint,⁸⁰ was rea-

ment that defendants "have failed to set forth any pro-competitive justifications for their actions" because these explanations are required only where plaintiff satisfies initial burden of showing anticompetitive effect).

73. See XI HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1800, at 3 (1998); 1 VON KALINOWSKI, *supra* note 27, § 23.01[1] at 23-2.

74. See, e.g., *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992), *overruled on other grounds by Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137 (10th Cir. 1997); *TCA Bldg. Co. v. Northwestern Resources Co.*, 873 F. Supp. 29 (S.D. Tex. 1995); *Taggart v. Rutledge*, 657 F. Supp. 1420 (D. Mont. 1987); XI HOVENKAMP, *supra* note 73, ¶ 1800, at 4.

75. See, e.g., *Garshman v. Universal Resources Holding Inc.*, 824 F.2d 223 (3d Cir. 1987); XI HOVENKAMP, *supra* note 73, ¶ 1800, at 4.

76. This foreclosure is a type of adverse effect on competition. See, e.g., *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 987 (1st Cir. 1984); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision, Inc.*, 714 F.2d 351, 357-58 (4th Cir. 1983); *Contractor Util. Sales Co. v. Certain-Teed Prods. Corp.*, 638 F.2d 1061, 1078-79 (7th Cir. 1981).

77. See, e.g., *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234 & n.17 (8th Cir. 1987); XI HOVENKAMP, *supra* note 73, ¶ 1812, at 130-36.

78. See *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304-05 (9th Cir. 1982).

79. See *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988); *Fishman v. Wirtz*, Nos. 74-C-2814, 78-C-3621, 1981 WL 2153, at *56 (N.D. Ill. Oct. 28, 1981).

80. See *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 150-51 (3d Cir.

sonable,⁸¹ or promoted competition.⁸² In only 1 of the 70 cases (1.4%) did a court conduct any inquiry akin to balancing.

b. One instance of balancing. In *Servicetrends, Inc. v. Siemens Medical Systems, Inc.*,⁸³ the court upheld an exclusive dealing agreement. It found that the foreclosure of 32 to 38% of the market, together with the longstanding practice at issue and the asserted business justifications for the agreement, led to the conclusion that the agreements did not “substantially foreclose”⁸⁴ competition. The court’s consideration of foreclosure and the defendant’s justifications can be viewed, most broadly, as a form of balancing.

c. Instance of burden-shifting. The case of *Calculators Hawaii, Inc. v. Brandt, Inc.*⁸⁵ illustrates the benefits of the burden-shifting approach. In particular, the case is an example of the paradigm operating to prevent courts from being distracted by an alleged absence of procompetitive benefit when they should (at least initially) be focusing on anticompetitive effect. The court in *Brandt* reversed a lower court’s judgment for the plaintiff that had been based on the insufficiency of the defendant’s justification. The appellate court observed that the manufacturer’s refusal to sell repair parts to a dealer, on account of an exclusive dealing agreement into which it had entered with another dealer, was “simply insufficient”⁸⁶ to prove anticompetitive effect.

4. Tying

In a tying arrangement, a seller agrees to sell a product to a buyer only on the condition that the buyer purchases a second product from it, or agrees not to purchase a product from another supplier.⁸⁷ Courts have found tying agreements to be *per se* unlawful if four factors are present: (1) two separate prod-

1981).

81. See *National Bank of Canada v. Interbank Card Ass’n*, 507 F. Supp. 1113, 1123 (S.D.N.Y. 1980), *aff’d*, 666 F.2d 6 (2d Cir. 1981).

82. See *Gemini Concerts, Inc. v. Triple-A Baseball Club Assocs.*, 664 F. Supp. 24, 27 (D. Me. 1987); *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Serv.*, 616 F. Supp. 502, 511 (D.N.J. 1985).

83. 870 F. Supp. 1042 (N.D. Ga. 1994).

84. *Id.* at 1066.

85. 724 F.2d 1332 (9th Cir. 1983).

86. *Id.* at 1337.

87. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

1282 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

ucts or services; (2) an agreement to sell one product conditioned on the sale of another; (3) economic power in the tying product market; and (4) a not insubstantial amount of interstate commerce in the tied product market.⁸⁸ Courts also have examined such agreements under the Rule of Reason. In doing so, they require a showing of an anticompetitive effect in the tied product market.⁸⁹ Tying agreements include more subtle forms of conditioning such as "line forcing" agreements, by which a manufacturer agrees to license a dealer to sell its products, but only on the condition that the dealer sells a full or a representative line of the products.⁹⁰ The concern with tying arrangements is that a supplier can enhance its market power by forcing a purchaser to buy a product that it may not wish to purchase.⁹¹

a. The results. In the tying cases in which courts applied the Rule of Reason, 29 out of 33, or 88%, were dismissed because the plaintiff failed to show a significant anticompetitive effect. One case was dismissed because the defendant failed to offer a procompetitive justification.⁹² Two cases did not fall into any category, as the courts found the agreement to be reasonable⁹³ or affirmed a jury verdict of unreasonableness.⁹⁴ Only one case (3%) involved balancing.

88. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-64 (1992).

89. See, e.g., *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 761-63 (7th Cir. 1996); *L.A.P.D., Inc. v. General Elec. Corp.*, No. 94-C-664, 1994 WL 424120, at *4 (N.D. Ill. Aug. 11, 1994); *Reisner v. General Motors Corp.*, 511 F. Supp. 1167, 1178-79 (S.D.N.Y. 1981).

90. See, e.g., *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869 (11th Cir. 1998); *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290 (10th Cir. 1989); *Ransomes Am. Corp. v. Spartan Distribs., Inc.*, 914 F. Supp. 183 (W.D. Mich. 1996).

91. For an argument that tying cannot increase market power in the tied product market, because "an increase in the price charged for the tied product will . . . reduce the price that the purchaser is willing to pay for the tying product," see Posner, *Chicago School*, *supra* note 27, at 926; see also Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 143-44 (1984) [hereinafter Easterbrook, *Vertical Arrangements*]; Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1 (1997) (contending that tying arrangements are not the result of coercion).

92. See *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 (4th Cir. 1987) (noting that plaintiff produced sufficient evidence to support finding that defendant's justification was pretext).

93. See *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998).

94. See *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 721 (7th Cir. 1987).

b. One instance of balancing. In *Grappone, Inc. v. Subaru, Inc.*,⁹⁵ the court reversed a judgment for a plaintiff car dealer who was required, in purchasing cars from a regional distributor, to purchase spare parts kits. It concluded that the plaintiff failed to show that the anticompetitive effects outweighed “legitimate . . . business justifications”⁹⁶ such as making certain that dealers had enough spare parts on hand to make repairs.⁹⁷ Balancing was unnecessary: the court found that the defendants had a “miniscule”⁹⁸ market share in the tying product, that there was no actual anticompetitive effect in the tied product market,⁹⁹ and that the tie had, at most, “trivial effects.”¹⁰⁰

B. Horizontal Arrangements

Courts have examined horizontal arrangements, or arrangements between competitors,¹⁰¹ under both the *per se* rule and the Rule of Reason. Because many of these arrangements do not typically have any procompetitive benefits, courts have applied *per se* treatment to such horizontal activities as price fixing,¹⁰² agreements to limit output,¹⁰³ and agreements to allocate markets.¹⁰⁴ Nonetheless, some horizontal arrangements have received treatment under the Rule of Reason as well.

1. Unfair competition

Certain types of horizontal arrangements can broadly be grouped under the heading “unfair competition.” For example, plaintiffs have challenged the appropriation of confidential records and customer lists by former employees,¹⁰⁵ the appropria-

95. 858 F.2d 792 (1st Cir. 1988).

96. *Id.* at 799.

97. *See id.* at 793.

98. *Id.* at 797.

99. *See id.* at 799.

100. *Id.*

101. *See, e.g.,* *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988); 1 VON KALINOWSKI, *supra* note 27, § 8.03[4], at 8-30.

102. *See, e.g.,* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

103. *See, e.g.,* *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

104. *See, e.g.,* *Palmer v. BRG, Inc.*, 498 U.S. 46 (1990); *Topco Assocs.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

105. *See, e.g.,* *Military Servs. Realty, Inc. v. Realty Consultants, Ltd.*, 823 F.2d 829 (4th Cir. 1987); *H.J. Hodes & Co. v. Triangle Brass & Specialties Co.*, No. 79-0673-

1284 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

tion of more general opportunities,¹⁰⁶ and verbal attacks or defamation.¹⁰⁷ Additionally, plaintiffs have challenged particular agreements, such as restrictive covenants,¹⁰⁸ covenants not to compete,¹⁰⁹ and blanket licenses.¹¹⁰ Although many of these actions may constitute, for example, state-law business torts, they typically do not present an injury to competition.

a. The results. Of the 69 unfair competition cases courts have examined under the Rule of Reason, 58, or 84%, were dismissed on account of the plaintiff's failure to show a significant anticompetitive effect. Three cases did not fall into any category, as the court summarily found the challenged activity to be a reasonable¹¹¹ or an unreasonable¹¹² restraint, or it affirmed a verdict that a restraint was anticompetitive.¹¹³ Courts in three cases (4.5%) found that the defendant failed to show a legitimate procompetitive justification.¹¹⁴ One court disposed of a case by finding that the restraint was reasonably necessary.¹¹⁵ In four cases (6%), the courts balanced anticompetitive and procompetitive effects.

b. Four instances of balancing. In two of the balancing cases, the courts could have disposed of the case on the ground

CV-W-3, 1979 WL 1804 (W.D. Mo. Oct. 11, 1979).

106. See, e.g., *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90 (2d Cir. 1998).

107. See, e.g., *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Bushnell Corp. v. ITT Corp.*, 973 F. Supp. 1276 (D. Kan. 1997).

108. See, e.g., *Goodman v. Acme Mkts., Inc.*, Civ.A.No.88-6447, 1989 WL 42484 (E.D. Pa. Apr. 21, 1989); *Coleman v. General Elec. Co.*, 643 F. Supp. 1229 (E.D. Tenn. 1986).

109. See, e.g., *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Caremark Homecare, Inc. v. New England Critical Care, Inc.*, 700 F. Supp. 1033 (D. Minn. 1988); *Westgo Indus., Inc. v. W.J. King Co.*, Civ. No. A3-75-82, 1981 WL 2064 (D.N.D. Mar. 31, 1981).

110. See, e.g., *F.E.L. Publications, Ltd. v. Catholic Bishop*, No. 81-1333, 1982 WL 19198 (7th Cir. Mar. 25, 1982); *Columbia Broad. Sys., Inc. v. American Soc'y of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980); *National Cable Television Ass'n v. Broadcast Music, Inc.*, 772 F. Supp. 614 (D.D.C. 1991).

111. See *Burchett v. General Tel. Co.*, 699 F. Supp. 114, 119 (E.D. Ky. 1988).

112. See *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1268 (8th Cir. 1980).

113. See *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1353 (5th Cir. 1980).

114. See *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 471-72 (6th Cir. 1992); *United States v. Capitol Serv., Inc.*, 568 F. Supp. 134, 153-54 (E.D. Wis. 1983), *aff'd*, 756 F.2d 502 (7th Cir. 1985); *Countrie Butcher Shoppe, Inc. v. Foodarama Supermarkets, Inc.*, No. 81-5336, 1982 WL 1909, at *3-4 (E.D. Pa. Oct. 14, 1982).

115. See *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 767-72 (D. Del. 1981), *aff'd*, 691 F.2d 400 (3d Cir. 1982).

that the plaintiff failed to allege a significant anticompetitive effect. In *Jetro Cash & Carry Enterprises, Inc. v. Food Distribution Center*,¹¹⁶ the court upheld a restrictive covenant that allowed vendors to sell their products in only 18 acres of a 400-acre section of a market and prescribed the hours during which such products could be sold.¹¹⁷ The court found that, in light of the large geographic market and close proximity of other markets, “the covenant simply [did] not have a significant adverse effect on competition.”¹¹⁸ Rather than dismiss the case on this showing, however, the court found it “more important[.]”¹¹⁹ that the restraints, by creating a “segregated market,”¹²⁰ had procompetitive benefits: bringing together buyers and sellers and facilitating quality and price comparison.¹²¹ The court concluded that “the insignificant adverse impact on trade is outweighed by the benefits.”¹²²

Similarly, in *Net Realty Holding Trust v. Franconia Properties, Inc.*,¹²³ the court upheld a restrictive covenant requiring certain stores in a mall to operate as department stores for particular periods of time.¹²⁴ The court found that the covenant had a “very slight” anticompetitive effect as it affected only a fraction of 1% of the market.¹²⁵ It nonetheless considered the “many” procompetitive effects of the covenant: facilitating cost comparison and combating the free-rider problem by allowing “anchor” stores to recoup the benefit of contributing to the success of the mall.¹²⁶ The court concluded that the “minimal anticompetitive impact”¹²⁷ of the covenant is “far outweighed by [its] procompetitive effects.”¹²⁸

The other two balancing cases, in which the courts found the anticompetitive effects to predominate, reveal some of the dangers of balancing. In *United States v. North Dakota Hospi-*

116. 569 F. Supp. 1404 (E.D. Pa. 1983).

117. *See id.* at 1407-08.

118. *Id.* at 1416.

119. *Id.*

120. *Id.*

121. *See id.*

122. *Id.*

123. No. 82-0318-A, 1983 WL 1786 (E.D. Va. Jan. 20, 1983).

124. *See id.* at *1.

125. *Id.* at *7.

126. *See id.* at *7-*8.

127. *Id.* at *8.

128. *Id.*

1286 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

tal Ass'n,¹²⁹ nonprofit hospitals (with operating margins 2 to 3% above cost) and a hospital association billed customers based on their actual costs rather than granting discounts.¹³⁰ The Indian Health Service ("IHS"), an agency of the United States Department of Health and Human Services, entered into contracts with the hospitals for the treatment of eligible Native Americans.¹³¹ The local IHS then sought new contracts that would provide for payment based on a discounted Medicaid rate.¹³² The hospitals ultimately declined the reimbursement rate but temporarily agreed to an "open market limitation" of \$10,000 per patient.¹³³ The court's treatment of anticompetitive effect was flawed because it failed to define a market in which IHS had market power, failed to credit properly the discounts in fact applied by the \$10,000 limit per patient,¹³⁴ and recognized that the reimbursement method proposed by IHS was "inherently anticompetitive"¹³⁵ because it "remove[d] the financial incentive for price competition and cost containment."¹³⁶ The court also noted that the purpose of the restraint "was not to maximize . . . profits, but to protect other patients and payers from having to absorb the cost of granting discounts to the IHS."¹³⁷ Further, the procompetitive effects of the actions in creating a "single standardized reimbursement methodology"¹³⁸ facilitated price comparisons by purchasers. The court nonetheless concluded that "the anticompetitive harm of [the actions] outweigh[ed] the procompetitive benefits."¹³⁹

In *TV Signal Co. v. AT&T*,¹⁴⁰ the defendant telephone company enforced a policy of attaching a maximum of one cable per

129. 640 F. Supp. 1028 (D.N.D. 1986).

130. *See id.* at 1030-31, 1039.

131. *See id.* at 1030.

132. *See id.* at 1031.

133. *Id.* at 1032-34.

134. *See id.* at 1039 (conceding that the restraint "did not actually have [an] adverse effect on the price IHS paid for services").

135. *Id.*

136. *Id.*

137. *Id.* at 1038. *See also id.* at 1038-39 (explaining that the hospitals had endeavored to prevent shifting the cost of the Medicaid discount onto other patients and payers; moreover, IHS had "repeatedly run out of funds before the end of the fiscal year, resulting in large sums of money for which the hospitals were never paid for services rendered to IHS patients").

138. *Id.* at 1039.

139. *Id.*

140. No. Civ.70-6N, 1981 WL 2049 (D.S.D. Mar. 13, 1981).

telephone pole to the detriment of the plaintiff cable television company.¹⁴¹ The court conceded that, even “in spite of [d]efendants’ [p]olicy,”¹⁴² the plaintiff was able to enter the market. Not only did the court fail to examine any effect on competition, but it also neglected to review defendants’ claimed justifications for the policy: “[s]uch legitimate reasons may well exist, but when they travel in company with a significant anti-competitive purpose and effect, they cannot sanitize the [d]efendants’ [p]olicy.”¹⁴³

c. Instances of burden-shifting. In *Clorox Co. v. Sterling Winthrop, Inc.*,¹⁴⁴ the court articulated the burden-shifting paradigm and found no anticompetitive effect.¹⁴⁵ The court recognized that its discussion of procompetitive effects was “immaterial” since the plaintiff did not meet its initial burden of showing a significant anticompetitive effect.¹⁴⁶

The court in *Jim Forno’s Continental Motors, Inc. v. Subaru Distributors Corp.*¹⁴⁷ illustrated the dangers of not following the construct. In this case, the court found no anticompetitive effect but nonetheless accepted the argument by the plaintiff—who was seeking “to resurrect his complaint”¹⁴⁸—that proof of anticompetitive effect is not necessary if the restraint does not have a procompetitive justification.¹⁴⁹ Even though the court in *Jim Forno’s* indicated that the plaintiff was stretching the case law,¹⁵⁰ it addressed the plaintiff’s radical theory on its own terms: “[W]e do not believe that the challenged action, as a matter of law, could have no procompetitive effect.”¹⁵¹ Adherence to the burden-shifting approach would prevent such errors.

141. See *id.* at *2; see also *TV Signal Co. v. AT&T*, 617 F.2d 1302, 1305 (8th Cir. 1980).

142. *T.V. Signal Co. v. AT&T*, 1981 WL 2049, at *5.

143. *Id.*

144. 117 F.3d 50 (2d Cir. 1997).

145. See *id.* at 56-57.

146. See *id.* at 59-60. Another Second Circuit decision recognized the benefits of the initial requirement of anticompetitive effect, which “ensures that otherwise routine disputes between business competitors do not escalate to the status of an antitrust action.” *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998).

147. 649 F. Supp. 746 (N.D.N.Y. 1986).

148. *Id.* at 754.

149. See *id.*

150. See *id.*

151. *Id.*

1288 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

2. Trade association rules and activities

Trade associations typically consist of companies sharing a common interest in an industry.¹⁵² Although such associations often promote competition, they have the potential to harm competition, in particular, by promulgating certain rules,¹⁵³ excluding prospective members,¹⁵⁴ and disciplining current members.¹⁵⁵ Because courts have recognized that associations need certain criteria and rules to exist and function,¹⁵⁶ the question addressed by courts often is whether the restraint is reasonably necessary to attain the desired objective.¹⁵⁷ By necessity, then, the instances of balancing and inquiries of reasonable necessity promise to be higher in this area.

a. The results. The results bear out this prediction. In 31 out of 63 association cases (49%), the court disposed of the case because the plaintiff failed to demonstrate a significant anti-competitive effect. In 7 of the 63 cases (11%), the court found that the defendant did not offer a legitimate procompetitive justification.¹⁵⁸ In 4 of the 63 cases (6%), the court found for the defendant because the restraint was reasonably necessary¹⁵⁹ or

152. See, e.g., 1 VON KALINOWSKI, *supra* note 27, § 15.03, at 15-17.

153. See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (rule for televising product); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (canon of ethics); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988) (product standard); *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126 (6th Cir. 1980) (same); *Weight-Rite Golf Corp. v. United States Golf Ass'n*, 766 F. Supp. 1104 (M.D. Fla. 1991) (prohibiting use of certain equipment).

154. See, e.g., *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994); *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983); *In re Appraiser Found. Antitrust Litig.*, 867 F. Supp. 1407 (D. Minn. 1994); *Marrese v. American Academy of Orthopaedic Surgeons*, No. 80C1405, 1991 WL 5827 (N.D. Ill. Jan. 15, 1991).

155. See, e.g., *Hairston v. Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996); *Wigod v. Chicago Mercantile Exch.*, No. 87C3743, 1989 WL 76865 (N.D. Ill. June 30, 1989); *Martin v. American Kennel Club, Inc.*, 697 F. Supp. 997 (N.D. Ill. 1988); *Catrone v. Ogdan Suffolk Downs, Inc.*, 683 F. Supp. 302 (D. Mass. 1988).

156. See, e.g., *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 598-99 (7th Cir. 1996); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580-81 (11th Cir. 1991); *Brenner v. World Boxing Council*, 675 F.2d 445, 454-55 (2d Cir. 1982).

157. See, e.g., *SCFC ILC, Inc.*, 36 F.3d at 970; *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir. 1986).

158. See *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459, 462-64 (1986); *Board of Regents*, 468 U.S. at 113-20; *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 693-96; *Law v. NCAA*, 134 F.3d 1010, 1021-24 (10th Cir.), *cert. denied*, 119 S. Ct. 65 (1998); *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 674-76 (7th Cir. 1992); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186-87 (D.C. Cir. 1978); *Mardrosian v. American Inst. of Architects*, 474 F. Supp. 628, 648-51 (D.D.C. 1979).

159. See *SCFC ILC, Inc.*, 36 F.3d at 971-72 (association bylaw reasonably neces-

the plaintiff was not able to prove a less restrictive alternative.¹⁶⁰ Twelve of the cases did not fall into any category, as the courts found the activity to be reasonable,¹⁶¹ procompetitive,¹⁶² or not an unreasonable restraint of trade.¹⁶³ Finally, courts in nine of the cases (14%) balanced the anticompetitive and procompetitive effects of the restraint.

b. Nine instances of balancing. In 2 of the 9 balancing cases, the court found not only that the procompetitive effects outweighed the anticompetitive effects but also that the plaintiff failed to show an anticompetitive effect. In *National Bancard Corp. v. Visa U.S.A., Inc.*,¹⁶⁴ the court upheld an interchange fee imposed by the financial institutions processing transactions in a credit card system.¹⁶⁵ The court held that the procompetitive effects of the fee—attaining widespread acceptance of the credit card system and allowing the creation of a product that member banks could not produce by themselves—outweighed any anticompetitive effects.¹⁶⁶ The court also found that the defendant, which possessed, at most, 5% of the rele-

sary to prevent free riding in competitive market); *Justice v. NCAA*, 577 F. Supp. 356, 382-83 (D. Ariz. 1983) (sanctions reasonably related to objectives and not overbroad); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 511 F. Supp. 1103, 1117-21, 1124 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981) (association guideline reasonably related to legitimate goals and no more extensive than necessary). Although the holdings of these cases were based on reasonable necessity, the courts did not apply the burden-shifting construct.

160. *See Hairston*, 101 F.3d at 1319 (finding that association sanctions had anti-competitive and procompetitive effects but that plaintiff failed to show that association's objectives could be achieved "in a substantially less restrictive manner").

161. *See McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988); *Independent Entertainment Group, Inc. v. NBA*, 853 F. Supp. 333, 338-39 (C.D. Cal. 1994); *Bishara v. American Bd. of Orthopaedic Surgery, Inc.*, No. 85C3400, 1986 WL 15265, at *1 (N.D. Ill. Dec. 30, 1986); *Cooney v. American Horse Shows Ass'n*, 495 F. Supp. 424, 431-32 (S.D.N.Y. 1980); *Paralegal Inst., Inc. v. American Bar Ass'n*, 475 F. Supp. 1123, 1130-31 (E.D.N.Y. 1979), *aff'd*, 622 F.2d 575 (2d Cir. 1980).

162. *See Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1407 (9th Cir. 1986); *Southtrust Corp. v. Plus Sys., Inc.*, 913 F. Supp. 1517, 1524-25 (N.D. Ala. 1995).

163. *See Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n*, No. 79-2260, 1980 WL 4691, at *2 (10th Cir. July 24, 1980); *Ackerman-Chillingworth v. Pacific Elec. Contractors Ass'n*, 579 F.2d 484, 491-92 (9th Cir. 1978); *Hennessey v. NCAA*, 564 F.2d 1136, 1140, 1153-54 (5th Cir. 1977); *Western Trails, Inc. v. Camp Coast to Coast, Inc.*, Civ.A.No. 90-2063, 1994 WL 773361, at *2 (D.D.C. June 16, 1994); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 437 F. Supp. 1268, 1294-95 (D. Neb. 1977), *modified*, 585 F.2d 877 (8th Cir. 1978).

164. 779 F.2d 592 (11th Cir. 1986).

165. *See id.* at 594-95.

166. *See id.* at 605.

1290 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

vant market, did not have market power.¹⁶⁷ In *Plueckhahn v. Farmers Insurance Exchange*,¹⁶⁸ the court considered an employment policy of a group of insurance companies that limited conflicts of interest by preventing managerial employees in a supervisory regional office from working for those they had previously supervised.¹⁶⁹ The court held that the procompetitive effects of preventing impropriety “clearly outweigh the hypothetical anticompetitive effects.”¹⁷⁰ Again, the court could have dismissed the case because the plaintiff failed to demonstrate anticompetitive effect, making balancing unnecessary.¹⁷¹

In *Cantor v. Multiple Listing Service, Inc.*,¹⁷² a finding of no anticompetitive effect could have been made and would have changed the outcome. The court invalidated a real estate multiple listing service bylaw that allowed only one type of sign—that of the multiple listing service—to be posted on the property for sale.¹⁷³ The court found that the anticompetitive effects of the bylaw outweighed the justifications of distributing commissions among members of the service.¹⁷⁴ But the anticompetitive effect alleged was only “a substantial adverse impact on plaintiffs’ businesses.”¹⁷⁵ Considering that the plaintiffs were 2 of over 600 licensed real estate brokers in the local market,¹⁷⁶ the adverse effect appeared to be on a competitor rather than on competition.¹⁷⁷ With no adverse effect on competition, the restraint should have been upheld.

In two cases, the court found that the procompetitive effects outweighed anticompetitive effects. In *Eureka Urethane, Inc. v. Professional Bowling Ass’n, Inc.*,¹⁷⁸ the court upheld a bowling association’s product standards and certification that precluded

167. *See id.* at 604-05.

168. 749 F.2d 241 (5th Cir. 1985).

169. *See id.* at 244.

170. *Id.* at 247.

171. *See id.*

172. 568 F. Supp. 424 (S.D.N.Y. 1983).

173. *See id.* at 426-27.

174. *See id.* at 431.

175. *Id.* at 430.

176. *See id.* at 426.

177. The court’s discussion of anticompetitive effect confirms this conclusion. The court noted that plaintiffs’ compliance with the bylaw led to a decrease in business and “vitiated any competitive advantage” that plaintiffs sought to obtain in entering into an agreement with another real estate organization. *Id.* at 430.

178. 746 F. Supp. 915 (E.D. Mo. 1990).

the use in televised tournaments of a bowling ball manufactured by the plaintiff.¹⁷⁹ The court found that the association's right "to administer the sport of professional bowling"¹⁸⁰ outweighed the anticompetitive effects of foreclosure of the bowling ball from the defined market.¹⁸¹ In *NBA v. Williams*,¹⁸² the court addressed the NBA's collegiate draft, right of first refusal, and salary cap.¹⁸³ The court found that, because of the existence of a collective bargaining agreement between the players and the NBA, the restraints fell within the nonstatutory labor exemption to the antitrust laws.¹⁸⁴ In dicta, the court summarily found that the players "have failed to show that the alleged restraints of trade are on balance unreasonably anticompetitive,"¹⁸⁵ and the procompetitive effects, such as maintaining competitive balance, "may outweigh their restrictive consequences."¹⁸⁶

The majority of cases finding that the anticompetitive effects of an association rule outweigh the procompetitive effects have occurred in the context of sports leagues. In *Los Angeles Memorial Coliseum Commission v. NFL ("Raiders")*,¹⁸⁷ the court invalidated the NFL's rules concerning the relocation of franchises. After finding that the rules had anticompetitive and procompetitive effects, the court concluded that less restrictive alternatives could have achieved the NFL's objectives of achieving financial stability, recovering expenditures invested in stadiums and other facilities, and promoting fan loyalty.¹⁸⁸ In particular, the court recommended that the NFL adopt relocation rules that incorporated objective factors.¹⁸⁹

In *North American Soccer League v. NFL*,¹⁹⁰ the court invalidated a proposed amendment to the NFL Constitution and By-laws that would have prevented NFL owners from "pos-

179. *See id.* at 920-21.

180. *Id.* at 933.

181. *See id.*

182. 857 F. Supp. 1069 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

183. *See id.* at 1071.

184. *See id.* at 1078.

185. *Id.* at 1079.

186. *Id.*

187. 726 F.2d 1381 (9th Cir. 1984).

188. *See id.* at 1396.

189. *See id.* at 1397.

190. 670 F.2d 1249 (2d Cir. 1982).

1292 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

sess[ing] any interest in another major team sport.”¹⁹¹ The court found a limited market of “sports capital and skill”¹⁹² composed in large part of owners of major professional sports teams.¹⁹³ It further found that the foreclosure of this market by the cross-ownership rule outweighed procompetitive effects proffered by the NFL: ensuring the undivided loyalty of team owners, preventing disclosure of confidential information, preventing the dilution of goodwill, avoiding a potential source of disruption of NFL operations, and preventing collusion between the leagues.¹⁹⁴ Although the court credited the latter three of these rationales, it found the procompetitive effects to be “clearly outweighed” by anticompetitive effects.¹⁹⁵

In *Eleven Line, Inc. v. North Texas State Soccer Ass’n*,¹⁹⁶ the court found unreasonable a soccer association’s rules on player registration that decreased options for consumers and that had the result of limiting indoor soccer contests.¹⁹⁷ Finally, in *Rosebrough Monument Co. v. Memorial Park Cemetery Ass’n*,¹⁹⁸ the court struck down a rule adopted by a trade association of cemetery owners that limited the preparation of foundations for grave markers and monuments to the cemetery owning the lot.¹⁹⁹ The court found that the rule reduced competition and that the anticompetitive effect was “obvious”²⁰⁰ and outweighed any procompetitive effects.²⁰¹

c. Instance of burden-shifting. The association cases also offer one instance in which the court applied the burden-shifting approach to the benefit of the plaintiff. In *Law v. NCAA*,²⁰² the court applied this approach to an NCAA rule that limited compensation to entry-level college coaches known as “restricted-

191. *Id.* at 1255.

192. *Id.* at 1259-60.

193. *See id.* at 1260.

194. *See id.* at 1261.

195. *Id.* For criticism of the *Raiders* and *North American Soccer League* cases, see *infra* notes 494-503, 591-602 and accompanying text.

196. No. CA-3-95-CV-3120-R, 1998 WL 574893 (N.D. Tex. Aug. 26, 1998).

197. *See id.* at *3-5; *Eleven Line, Inc. v. North Texas State Soccer Ass’n*, No. CA-3:95-CV-3120-R, 1997 WL 135684, at *1-3 (N.D. Tex. Mar. 12, 1997).

198. 666 F.2d 1130 (8th Cir. 1981).

199. *See id.* at 1136, 1140.

200. *Id.*

201. *See id.*

202. 134 F.3d 1010 (10th Cir.), *cert. denied*, 119 S. Ct. 65 (1998).

earnings” coaches.²⁰³ Under a “quick look” Rule of Reason analysis, the court found that the “artificial[] lowering [of] the price of coaching services”²⁰⁴ constituted an anticompetitive effect. The court then considered, and rejected, the three procompetitive justifications offered by the defendant, finding that (1) there was no evidence that the restraint allowed entry-level coaches to retain their positions; (2) the reduction of costs, standing alone, was not “a valid procompetitive justification”,²⁰⁵ and (3) the restraint was not designed to achieve competitive balance.²⁰⁶ The court appropriately recognized that it did not need to address the issue of less restrictive alternatives,²⁰⁷ nor did it pursue balancing. In short, the burden-shifting approach, in addition to benefitting defendants by dismissing cases with no anticompetitive effect, can also benefit plaintiffs.

C. Survey Results

Summing up the results of Part I reveals that most courts have disposed of Rule of Reason cases on the ground that the plaintiff failed to prove a significant anticompetitive effect, and few courts have balanced anticompetitive and procompetitive effects. Specifically, cases were resolved at the following stages:²⁰⁸

No anticompetitive effect:	418 out of 495 cases (84%)
No procompetitive justification:	14 out of 495 cases (3%)
Reasonable necessity/Less restrictive alternatives:	6 out of 495 cases (1%)
Balancing:	20 out of 495 cases (4%)

This Article will now explore the normative consequences of these figures. Is it beneficial that courts dispose of most anti-

203. *Id.* at 1013-14.

204. *Id.* at 1020.

205. *Id.* at 1022.

206. *See id.* at 1021-24.

207. *See id.* at 1024 n.16.

208. Again, the figures add up to less than 100% because some courts summarily found restraints to be, for example, reasonable or unreasonable. *See supra* note 32.

1294 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

trust cases because the plaintiff has failed to prove a significant anticompetitive effect? Is balancing justified? Are the other factors that courts examine justified?

II. THE PROPRIETY OF THE RULE OF REASON FACTORS

Part II draws on historical and contemporary sources to determine whether courts should consider the factors utilized in a Rule of Reason analysis. In particular, it looks to the legislative history of the Sherman Antitrust Act, the common law that predated the Sherman Act, and two contemporary schools of antitrust philosophy—the “Chicago School of Economics” and the “Post-Chicago School.”²⁰⁹ Section A will introduce the four guideposts, and the four succeeding sections will apply each of the sources to the factors of anticompetitive effect, procompetitive justifications, reasonable necessity, less restrictive alternatives, and balancing.

A. The Sources

1. The legislative history of the Sherman Act

Analysis of a statute normally begins with its text.²¹⁰ In this instance, however, the text provides no assistance in our search for support for the factors of a Rule of Reason analysis. Section 1 of the Sherman Act, the applicable statutory provision, provides, in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.²¹¹

The text thus provides that *every* contract, combination, or conspiracy in restraint of trade is illegal. The courts, appropriately, have not interpreted the statute literally. Instead, they have found that only *unreasonable* restraints are illegal. In any

209. Utilizing the legislative history and common law preceding the Sherman Act as interpretive tools should not be controversial. The deference accorded to the two contemporary schools will vary based on the reader's outlook, but the schools nonetheless offer insights on the propriety of the factors. See *infra* text succeeding note 323.

210. See, e.g., *Bankamerica Corp. v. United States*, 462 U.S. 122, 128 (1983); *Bread Political Action Comm. v. Federal Election Comm.*, 455 U.S. 577, 580 (1982).

211. 15 U.S.C. § 1 (1997).

event, the text of the Sherman Act does not offer any clues upon which we can rely in analyzing the propriety of particular factors in a Rule of Reason analysis. We turn, therefore, to the legislative history of the Sherman Act.

The Sherman Act was a consequence of the post-Civil-War era. The period between 1865 and 1890 witnessed remarkable developments and innovations in manufacturing, agriculture, transportation, and communication.²¹² These changes were fueled by a laissez-faire governmental policy, along with increases in investment, speculation, and private banking.²¹³ In response to these changes, new forms of business organization developed, such as corporations, pools,²¹⁴ and trusts.²¹⁵ Trusts became the combination of choice for many businessmen because they were exempt from the restrictions that states imposed on corporations and they had the enforcement capabilities that pools lacked.²¹⁶ Consequently, trusts amassed significant power and came to dominate various industries.

By the late 1880s, the accumulation of power by trusts had engendered public hostility.²¹⁷ Farmers had suffered from the discriminatory railroad rebate system and small independent businessmen had often been harmed by their larger competitors' economic power.²¹⁸ The public was dismayed that trusts were supported by tariffs, which limited foreign competition, and by instances of graft and political corruption.²¹⁹ States could not effectively control the trusts because each state's ju-

212. See 1 VON KALINOWSKI, *supra* note 27, § 9.02[1], at 9-4; 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 9 (Earl W. Kintner ed., 1978) [hereinafter 1 Kintner].

213. See 1 Kintner, *supra* note 212, at 9.

214. Pools were formed by competitors that jointly agreed to wield their economic power through methods such as dividing markets, sharing profits, and discriminating against other entities. See *id.* at 10.

215. Trusts were "characterized by two or more corporations . . . secur[ing] centralized control over the businesses of the trust members." 1 VON KALINOWSKI, *supra* note 27, § 9.02[2][a], at 9-5 n.10. Such centralization would be achieved when shareholders of the member corporations transferred their shares to a single trustee or board of trustees, who would receive full control over the management of the trust. See *id.*

216. See 1 Kintner, *supra* note 212, at 10.

217. See *id.* at 11; William T. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 222-25 (1956) (public sentiment was "sufficient . . . to persuade Congress that something had to be done").

218. See HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 58-62 (1955); 1 Kintner, *supra* note 212, at 11.

219. See THORELLI, *supra* note 218, at 62; 1 Kintner, *supra* note 212, at 11; Letwin, *supra* note 217, at 235.

1296 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

risdiction was limited to conduct occurring within its borders and the states lacked sufficient resources for enforcement.²²⁰ In short, the opportunity to address trusts was placed squarely before Congress.

Congress realized the problem before it. The legislators invoked a menagerie of metaphors to describe the trusts: “tyrannies”;²²¹ “commercial monsters”;²²² entities that “devour the substance of the people and grind the faces of the poor.”²²³ The “oppressive and merciless character of the evils”²²⁴ that trusts inflicted upon consumers was “known and admitted everywhere.”²²⁵ Members of Congress felt that trusts presented the “gigantic commercial sin”²²⁶ of the era and were a “menace to republican institutions.”²²⁷

On July 10, 1888, Senator John Sherman (R-Ohio) introduced a resolution directing the Finance Committee to “inquire into . . . [the] control . . . [of] trusts.”²²⁸ On August 14, 1888, Senator Sherman introduced his initial antitrust bill, which declared unlawful

all arrangements, contracts, agreements, trusts, or combinations . . . made with a view, or which tend, to prevent full and free competition in the production, manufacture, or sale of articles . . . and all arrangements, contracts, agreements, trusts, or combinations . . . designed, or which tend, to advance the cost to the consumer of any of such articles.²²⁹

Thus began debate on the Sherman Act. Most of the debate focused on issues not relevant here, such as the constitutional-

220. See I EARL W. KINTNER, FEDERAL ANTITRUST LAW § 4.1, at 128 (1980) [hereinafter I KINTNER, FEDERAL ANTITRUST LAW].

221. 21 CONG. REC. 2726 (1890) (statement of Sen. Edmunds (R-Vt.)).

222. 20 *id.* at 1457 (1889) (statement of Sen. Jones (D-Ark.)). Senator Jones continued the theme: “[H]aving been allowed to grow and fatten upon the public, their success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry . . .” *Id.*

223. 21 *id.* at 2647 (1890) (statement of Sen. Vance (D-N.C.)).

224. *Id.* at 2558 (statement of Sen. Pugh (D-Ala.)).

225. *Id.*

226. *Id.* at 140 (statement of Sen. Turpie (D-Ind.)); see also *id.* at 2598 (statement of Sen. George (D-Miss.)) (there was “no subject likely to engage the attention of the present Congress in which the people of this country are more deeply interested than in the subject of trusts and combinations”).

227. *Id.* at 3146 (statement of Sen. Hoar (R-Mass.)).

228. 19 *id.* at 6041 (1888).

229. S. 3445, 50th Cong. (1888).

ity of the Act,²³⁰ its potential efficacy,²³¹ and an amendment covering options and futures.²³² But the debate nonetheless covered ground that offers assistance in examining factors in today's Rule of Reason analysis. Draft bills and legislators' comments touched upon issues relating to a restraint's anti-competitive effects²³³ and procompetitive justifications.²³⁴ Significantly, the Senators and Representatives debated the crucial role that the common law was to play in courts' analysis of antitrust cases.

The legislators realized that they could not define "the precise line"²³⁵ between "lawful combinations in aid of production"²³⁶ and "unlawful combinations to prevent competition and in restraint of trade."²³⁷ That task was "left for the courts to determine in each particular case."²³⁸ But the courts were not without guidance; in particular, they were to turn to the "old and well recognized principles of the common law."²³⁹

230. See, e.g., 21 CONG. REC. 2727-28 (1890) (statement of Sen. Edmunds); *id.* at 2607-08 (statement of Sen. Platt (R-Ct.)); *id.* at 2601-02 (statement of Sen. Reagan (D-Tex.)); *id.* at 2597-600 (statement of Sen. George); *id.* at 2570-71 (statement of Sen. Vest (D-Mo.)); *id.* at 2558-59 (statement of Sen. Pugh); *id.* at 2556-58 (statement of Sen. Turpie); *id.* at 2467-68 (statement of Sen. Hiscock (R-N.Y.)); *id.* at 2463-67 (statement of Sen. Vest); *id.* at 2460-62 (statement of Sen. Sherman); *id.* at 1768-71 (statement of Sen. George).

231. See, e.g., *id.* at 2645-46 (1890) (statement of Sen. Eustis (D-La.)); *id.* at 2571 (statement of Sen. Hiscock); *id.* at 2570-71 (statement of Sen. Vest); *id.* at 2568-69 (statement of Sen. Sherman); *id.* at 1765-68 (statement of Sen. George); 20 *id.* at 1459-62 (1889) (statement of Sen. George).

232. See, e.g., 21 *id.* at 2651-57 (statements of various Senators); *id.* at 2648-51 (statement of Sen. Ingalls); *id.* at 2648 (statement of Sen. Pugh); *id.* at 2646 (statement of Sen. Eustis); *id.* at 2566 (statement of Sen. Blair (R-N.H.)); *id.* at 2562-63 (statement of Sen. Sherman); *id.* at 2560 (statement of Sen. Reagan); *id.* at 2559-60 (statement of Sen. Sherman); *id.* at 2462-63 (statement of Sen. Ingalls).

233. See *infra* Section II.B.1.

234. See *infra* Section II.C.1.

235. 21 CONG. REC. 2460 (1890) (statement of Sen. Sherman).

236. *Id.* at 2456.

237. *Id.*

238. *Id.* at 2460 ("All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries."); *id.* at 4089 (statement of Rep. Culberson (D-Tex.)) ("Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill will not be known until the courts have construed and interpreted this provision.")

239. *Id.* at 2456 (statement of Sen. Sherman); see also *id.* at 2457 ("It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination."); *id.* at 3152 (statement of Sen. Hoar) ("The great thing that this bill does . . . is to extend the common-law

1298 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

Throughout the debate, Senators added numerous amendments to the bill, creating an unwieldy amalgam that eventually contained 16 sections and 309 lines.²⁴⁰ Because of concerns about the size²⁴¹ and the constitutionality²⁴² of the bill, it was referred to the Senate Judiciary Committee,²⁴³ which returned a simplified version of the bill.²⁴⁴ After limited debate, the Senate approved the bill by a vote of 52-1, with twenty-nine Senators not voting.²⁴⁵ The House approved the bill by a vote of 242-0, with eighty-five not voting.²⁴⁶ President Benjamin Harrison signed the Sherman Act into law on July 2, 1890.²⁴⁷

2. Common law

As already mentioned, the Sherman Act framers intended that courts would draw the dividing line between reasonable and unreasonable restraints of trade by applying the common law. Even though the common law was not as fixed or lucid as the framers believed,²⁴⁸ it fills in some of the gaps in the text

principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."); *id.* at 3149 (statement of Sen. Morgan (D-Ala.)) (noting the use in the debate of "common-law terms" and "common-law definitions"); *id.* at 3146 (statement of Sen. Hoar) ("We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions . . ."); *id.* at 2456 ("The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States . . .").

240. See S. 1, 51st Cong. (as amended, Mar. 26, 1890).

241. See 21 CONG. REC. 2651-61 (1890).

242. See *id.* at 2597-611.

243. See *id.* at 2731.

244. See *id.* at 3152-53 (1890).

245. See *id.* at 3153.

246. See *id.* at 6314. Prior to the vote of the House of Representatives, the House had added an amendment to the bill, *id.* at 4104; the Senate had added an amendment to the amendment of the House, *id.* at 4753; and both houses then had withdrawn the amendments, *id.* at 6208.

247. See 1 Kintner, *supra* note 212, at 30.

248. See, e.g., I PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 104a, at 64 (rev. ed. 1997) (noting variations among the states and that the common law of competition was in "a state of flux") [hereinafter I AREEDA]; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, IX JOURNAL OF LAW AND ECONOMICS 7, 37 (1966) [hereinafter Bork, *Legislative Intent*] (characterizing the "common law" as "an artificial construct, made up for the occasion out of a careful selection of recent decisions from a variety of jurisdictions plus a liberal admixture of the senators' own policy prescriptions" and contending that "[i]t is to this 'common law,' holding full sway nowhere but in the debates of the Fifty-first Congress, that one must look to understand the Sherman Act").

and legislative history of the Sherman Act. This Section will provide a brief overview of the English and American common law predating the passage of the Sherman Act.

a. English common law. Between the fifteenth and the seventeenth centuries, English courts held all covenants in restraint of trade to be unlawful.²⁴⁹ The term “restraint of trade” initially did not have the broad meaning it has today; it referred only to agreements by which one of the parties to a contract was prevented from pursuing a particular occupation or trade, or was restricted in the means by which he could carry on his trade.²⁵⁰ Typically, such contracts would be incidental (or “ancillary”²⁵¹) to the principal contract for the sale or lease of a business, or to employment contracts, partnership agreements, or contracts for the sale of goods.²⁵² Such restraints were condemned because of the harm caused to the public by being deprived of the restrained party’s work and the harm to the party himself, who would lose his livelihood and would not be able to support himself.²⁵³ The historic setting explains this treatment—one who could not pursue his trade likely would not work at all.²⁵⁴

With the change in economic conditions in seventeenth-century England, and with the recognition that the refusal to enforce restraints prevented everyday business transactions, the courts began to uphold certain types of restraints.²⁵⁵ The

249. See, e.g., *Dyer’s Case*, Y.B. 2 Hen. V Pasch. f. 5, pl. 26 (1415); THORELLI, *supra* note 218, at 17.

250. See, e.g., I KINTNER, FEDERAL ANTITRUST LAW, *supra* note 220, § 2.4, at 49.

251. See *id.* § 2.6, at 54.

252. See *id.* § 2.4, at 49; THORELLI, *supra* note 218, at 17.

253. See, e.g., *Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64, 68 (1873); *Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535, 565; *Leather Cloth Co. v. Lhorsont*, 9 L.R.-Eq. 345, 354 (1869); *Mitchel v. Reynolds*, 1 P. Wms. 181, 190, 24 Eng. Rep. 347, 350 (K.B. 1711) (noting the dangers of the restraints “to the party, by the loss of his livelihood, and the subsistence of his family” and “to the public, by depriving it of an useful member”); *Case of Tailors of Ipswich*, 11 Coke 53a, 53b, 77 Eng. Rep. 1218, 1219 (K.B. 1614) (“The law abhors idleness, the mother of all evil . . . and especially in young men, who ought in their youth . . . to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age . . .”).

254. See *Herreshoff v. Boutineau*, 17 R.I. 3, 6, 19 A. 712, 713 (1890) (“In the days of the early English cases, one who could not work at his trade could hardly work at all. . . . Contracting not to follow one’s trade was about the same as contracting to be idle . . .”).

255. See, e.g., I KINTNER, FEDERAL ANTITRUST LAW, *supra* note 220, § 3.3, at 84; I VON KALINOWSKI, *supra* note 27, § 8.02[1], at 8-15.

1300 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

courts drew one distinction between general restraints, which were not restricted as to time or space,²⁵⁶ and partial restraints, which were so limited.²⁵⁷ While the courts condemned general restraints,²⁵⁸ they upheld partial restraints that were reasonable.²⁵⁹ In *Mitchel v. Reynolds*,²⁶⁰ for example, the court upheld a promise by the seller of a bakery that he would not compete with the buyer of the business for five years in a limited area.²⁶¹ The court sustained the partial restraint because it was based on “good and adequate consideration.”²⁶² In the wake of *Mitchel*, courts compared the values of the consideration granted and the right given up,²⁶³ a project that some courts believed they had “no means whatever to execute.”²⁶⁴

A test based on reasonableness replaced the emphasis on consideration in *Horner v. Graves*.²⁶⁵ In *Horner*, the court upheld a covenant by which a dentist agreed not to practice within a certain location and determined whether such a restraint was reasonable 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.”²⁶⁶ So too, the term “restraint of trade” gradually expanded throughout the nineteenth century to encompass agreements designed to limit competition or to gain control of the market.²⁶⁷

256. See 1 VON KALINOWSKI, *supra* note 27, § 8.03[4], at 8-33.

257. See *id.*; see also *Broad v. Jollyfe*, Cro. Jac. 596, 79 Eng. Rep. 509 (K.B. 1619); *Rogers v. Parrey*, 2 Bulst. 136, 80 Eng. Rep. 1012 (K.B. 1613).

258. See *Davies v. Davies*, [1887] L.R. 36 Ch.D. 359; *Mallan v. May*, 11 M. & W. 653, 152 Eng. Rep. 967 (Ex. 1843).

259. See, e.g., I KINTNER, FEDERAL ANTITRUST LAW, *supra* note 220, § 3.3, at 84-85; 1 VON KALINOWSKI, *supra* note 27, § 8.02[1], at 8-15 to 8-16.

260. 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711).

261. See 24 Eng. Rep. at 352.

262. *Id.* at 349.

263. See, e.g., THORELLI, *supra* note 218, at 19.

264. *Hitchcock v. Coker*, 6 Ad. & E. 438, 457, 112 Eng. Rep. 167, 175 (1837). In *Hitchcock*, the court relaxed the analysis of the value of consideration: “It is enough, as it appears to us, that there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value.” *Hitchcock*, 112 Eng. Rep. at 175.

265. 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831).

266. *Horner*, 131 Eng. Rep. at 287.

267. See, e.g., I KINTNER, FEDERAL ANTITRUST LAW, *supra* note 220, § 2.4, at 50; THORELLI, *supra* note 218, at 52-53. By the end of the nineteenth century, the original “restraints of trade”—noncompetition agreements—were upheld since they did not restrict competition or lead to monopoly. Cartels, or combinations designed to restrict

The final step in the transition to an analysis based solely on the reasonableness of the restraint came in *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Co.*²⁶⁸ After various courts had laid the foundation for the emphasis on reasonableness rather than the scope of the restraint,²⁶⁹ the court in *Nordenfelt* upheld a covenant that prevented the seller of a business from participating in that business in any part of the world for a twenty-five year period. The court looked solely to the reasonableness of the restraint and dispensed with the requirement that the restraint be limited in time and space.²⁷⁰

b. American common law. Many of the factors traced by the English common law found their way across the Atlantic. The American courts tended to uphold, for example, partial (as opposed to general) restraints;²⁷¹ internal restraints (affecting only the parties to the agreement) but not external restraints (directed at competitors);²⁷² arrangements that did not control the market or constitute a monopoly;²⁷³ and agreements that did not address articles of "prime necessity."²⁷⁴ Moreover, American courts were less affected than their English counterparts by the laissez-faire philosophy that counseled courts to refrain from interfering with the freedom of traders even if

competition, on the other hand, were more readily condemned. See I AREEDA, *supra* note 248, ¶ 104, at 73.

268. [1894] A.C. 535.

269. See *Watertown Thermometer Co. v. Pool*, 4 N.Y.S. 861 (Sup. Ct. 1889); *Diamond Match Co. v. Roeber*, 13 N.E. 419 (N.Y. 1887); *Hodge v. Sloan*, 17 N.E. 335 (N.Y. 1887).

270. See *Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535; I KINTNER, *FEDERAL ANTITRUST LAW*, *supra* note 220, § 3.3, at 85; THORELLI, *supra* note 218, at 20. Whether a Rule of Reason applied to all, or only to ancillary, restraints is an inquiry that has never definitively been settled. Some have argued that common law courts did not distinguish between restraints. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911); see also *Wickens v. Evans*, 3 Y. & J. 318, 148 Eng. Rep. 1201 (Ex. 1829); *Jones v. North*, 19 Eq. 426 (1875); *Collins v. Locks*, [1879] 4 App. Cas. 674 (P.C.). Others have argued that the Rule applied only to ancillary restraints. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-82 (6th Cir. 1898).

271. See, e.g., *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 527 (1880); *Kellogg v. Larkin*, 3 Pin. 123, 133, 56 Am. Dec. 164, 173 (Wis. 1851).

272. See, e.g., *Central Shade-Roller Co. v. Cushman*, 9 N.E. 629, 631 (Mass. 1887); *Dolph v. Troy Laundry Mach. Co.*, 28 F. 553, 555-56 (C.C.N.D.N.Y. 1886); *Jones v. North*, 19 L. R.-Eq. 426, 430 (1875); see generally THORELLI, *supra* note 218, at 31 ("[W]hen the parties only restrain their own trade and leave more or less ample leeway for outsiders to enter or carry on the same trade the restriction is not unlawful . . .").

273. See *Dolph*, 28 F. at 555-56; *Larkin*, 56 Am. Dec. at 176.

274. See, e.g., *Cushman*, 9 N.E. at 631; *Dolph*, 28 F. at 555.

1302 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

their actions raised prices.²⁷⁵

Drawing broad generalizations about the treatment of various types of arrangements, American common law courts generally viewed vertical nonprice restraints as ancillary to transactions such as the sale of goods,²⁷⁶ and upheld the restraints.²⁷⁷ Horizontal arrangements encountered more hostile treatment. Agreements to control supply or production, for example, were usually held to be unenforceable.²⁷⁸ Thus, a court held unenforceable arrangements by which all the suppliers in an area separately agreed to sell only to one purchaser,²⁷⁹ by which eight firms agreed not to engage in cotton bagging for a period of time without the consent of the majority,²⁸⁰ and by which firms established a common marketing agency to fix prices, divide profits, and restrict output.²⁸¹ Attempts to corner a market also were held to be unenforceable.²⁸² Finally, the courts refused to enforce agreements to divide territories—*e.g.*, where companies refrained from supplying a product to certain areas²⁸³ or where they established a committee that divided the market and fixed prices.²⁸⁴

The courts also examined the activities of the trusts. In cases referenced by Senator Sherman in the debate over the

275. *See, e.g.*, ELEANOR M. FOX & LAWRENCE A. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* 16 (1989).

276. *See, e.g.*, I KINTNER, *FEDERAL ANTITRUST LAW*, *supra* note 220, § 3.9, at 99; Stanley D. Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 *CORNELL L.Q.* 254 (1960).

277. *See, e.g.*, *Brown v. Rounsavell*, 78 Ill. 589 (1875); *Palmer v. Stebbins*, 20 Mass. (3 Pick.) 188 (1826); *Newell v. Meyendorff*, 23 P. 333 (Mont. 1890); *Live Stock Ass'n v. Levy*, 54 N.Y. Super. 32 (1886); *Matthews v. Associated Press*, 32 N.E. 981 (N.Y. 1883).

278. *See, e.g.*, I KINTNER, *FEDERAL ANTITRUST LAW*, *supra* note 220, § 3.6, at 92 (citing sources).

279. *See Arnot v. Pittston & Elmira Coal Co.*, 68 N.Y. 558 (1877); *see also Santa Clara Valley Mill & Lumber Co. v. Hayes*, 18 P. 391 (Cal. 1888) (similar scheme).

280. *See India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168 (1859); *see also, e.g., Emery v. Ohio Candle Co.*, 24 N.E. 660 (Ohio 1890); *McBirney & Johnston White Lead Co. v. Consol. Lead Co.*, 8 Ohio Dec. Reprint 762 (Super Ct. 1883).

281. *See Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880).

282. *See, e.g., Pacific Factor Co. v. Adler*, 27 P. 36 (Cal. 1891) (refusing to enforce option because party had entered into similar agreements in the goal of monopolizing the market); *Samuel v. Oliver*, 22 N.E. 499 (Ill. 1889) (holding that broker employed to corner the market cannot recover money advanced, nor could employer recover money received by broker).

283. *See Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co.*, 13 N.E. 169 (Ill. 1887).

284. *See Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173 (1871).

Sherman Act, the courts struck down trusts that controlled price²⁸⁵ or divided the market²⁸⁶ or profits.²⁸⁷ Generally, courts struck down trusts that restricted competition²⁸⁸ or injured the public.²⁸⁹

3. *Chicago School of Economics*

The Chicago School of Economics²⁹⁰ champions the use of economics, in particular neoclassical price theory, in antitrust analysis.²⁹¹ Proponents of the Chicago School contend that efficiency (sometimes phrased in terms of “consumer welfare”)²⁹² is the sole purpose of the antitrust laws.²⁹³ Only efficiency, claim the proponents, conforms to the legislative history of the

285. See *Handy v. Cleveland & Marietta R.R. Co.*, 31 F. 689, 692 (C.C.S.D. Ohio 1887); *Craft v. McConoughy*, 79 Ill. 346 (1875); 21 CONG. REC. 2458 (1890) (citing *Pennsylvania v. Pennsylvania R.R. Co.* (Pa. 1879)).

286. See *Chicago Gas-Light & Coke Co.*, 13 N.E. at 174-75.

287. See *New York v. North River Sugar-Refining Co.*, 7 N.Y.S. 406, 415 (Sup. Ct. 1889).

288. See *McConoughy*, 79 Ill. at 350; *Nebraska v. Nebraska Distilling Co.*, 46 N.W. 155, 161 (Neb. 1890).

289. See *Chicago Gas-Light & Coke Co.*, 13 N.E. at 174-75; *North River Sugar-Refining Co.*, 7 N.Y.S. at 415; *Pennsylvania v. Carlisle*, Brightly's N.P. 36, 40 (Ct. of Nisi Prius 1821).

290. This Article speaks of the Chicago School as a monolithic force, and for purposes of the Article, differences within the school are not relevant. But like most movements, Chicago School adherents sometimes disagree. See, e.g., Jerome Ellig, *Untwisting the Strands of Chicago Antitrust*, XXXVII THE ANTITRUST BULLETIN 863, 864, 877 (1992) (distinguishing between “new Chicago” school believing in perfectly competitive equilibrium and “market rivalry” school viewing competition as process of rivalry).

291. See, e.g., ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 8, 84 (1978) [hereinafter BORK, ANTITRUST PARADOX]; Posner, *Chicago School*, *supra* note 27, at 928, 933-34.

292. BORK, ANTITRUST PARADOX, *supra* note 291, at 51. For a claim that the term “consumer welfare” deceptively implies a concern with the welfare of consumers rather than total welfare, see Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST LAW J. 631, 638 (1989) [hereinafter Lande, *Chicago's False Foundation*]. For a distinction between the terms “efficiency” and “consumer welfare,” see Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987).

293. See, e.g., BORK, ANTITRUST PARADOX, *supra* note 291, at 81-89; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3-4 (1984) [hereinafter Easterbrook, *Limits of Antitrust*]; Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 716 (1982); Richard A. Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 507 (1974) [hereinafter Posner, *Exclusionary Practices*].

1304 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

Sherman Act,²⁹⁴ offers the courts a workable standard to apply,²⁹⁵ and promotes “fair warning” for the parties.²⁹⁶ Chicago School proponents contend that courts’ consideration of any standard besides efficiency is a recipe for disaster.²⁹⁷ Adherents of the School put their faith in the market, believing that it can solve problems better than the government.²⁹⁸

The Chicago School would significantly confine the range of restraints that courts could consider under a Rule of Reason analysis. Vertical restraints, for starters, would not threaten an adverse effect on competition, and so should be outside the realm of antitrust analysis.²⁹⁹ Some in the School would include within the antitrust laws only cartels, horizontal mergers that are large enough to create a monopoly or to facilitate cartelization by significantly reducing the number of sellers in a market, and perhaps “[d]eliberate predation.”³⁰⁰ So in one sense, the Chicago School would treat application of the Rule of Rea-

294. See, e.g., BORK, ANTITRUST PARADOX, *supra* note 291, at 61, 71, 89 (“The legislative history of the Sherman Act . . . displays the clear and exclusive policy intention of promoting consumer welfare.”); Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1223-24 (1988); Bork, *Legislative Intent*, *supra* note 248, at 7, 11.

295. See, e.g., BORK, ANTITRUST PARADOX, *supra* note 291, at 71 (“Should consistency be sought by introducing values other than consumer welfare into the law about cartels, antitrust would lose much in ease of administration and therefore in effectiveness.”).

296. See, e.g., *id.* at 81-82.

297. See *id.* at 85 (“Where the common denominator of consumer welfare is abandoned, an antitrust court that attempts to avoid the appearance of complete subjectivism, that tries to explain its decision, will be driven to distinctions without any reality.”); Posner, *Chicago School*, *supra* note 27, at 944-45 (explaining that the goal of dispersing concentration is not significant because excessive profitability would lead to new entry that would cause prices to fall to competitive levels).

298. See, e.g., Easterbrook, *Limits of Antitrust*, *supra* note 293, at 15-16; Posner, *Exclusionary Practices*, *supra* note 293, at 534-35.

299. See BORK, ANTITRUST PARADOX, *supra* note 291, at 288, 290, 297 (“[A]ll vertical restraints are beneficial to consumers and should for that reason be completely lawful.”); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 697 (1982); Posner, *Exclusionary Practices*, *supra* note 293, at 534-35 (arguing that practices by which firms attempt to exclude a rival by means other than lower costs and lower prices—such as predatory pricing, tying arrangements, vertical integration, exclusive dealing, and group boycotts—are not sufficiently dangerous to justify enforcement).

300. BORK, ANTITRUST PARADOX, *supra* note 291, at 406; see also, e.g., Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986); Posner, *Chicago School*, *supra* note 27, at 928; Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 24 (1981) [hereinafter Posner, *Per Se Legality*].

son by courts today as overbroad, encompassing far more restraints than it should. But as far as the *type* of analysis that courts conduct pursuant to the Rule of Reason—an inquiry focused on *competition*—the Chicago School would voice its support.

4. *Post-Chicago School*

A look to the Post-Chicago School reveals the influence of the Chicago School, particularly since many in the Post-Chicago School recognize efficiency as a legitimate goal of the antitrust laws.³⁰¹ Yet the many strands of the Post-Chicago School³⁰² overlap in the belief that efficiency is not the *sole* objective of the antitrust laws.³⁰³ These criticisms, from “outside” the Chicago School model, posit alternate goals that courts should consider: dispersing concentrated economic power,³⁰⁴ preventing transfers of wealth from consumers to firms with market power,³⁰⁵ maintaining the process of competition,³⁰⁶ and promoting individual liberty.³⁰⁷ Some in the School have al-

301. See, e.g., Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1140, 1191 (1981); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1075 (1979).

302. See, e.g., Lande, *Chicago's False Foundation*, *supra* note 292; Fox, *supra* note 301; Pitofsky, *supra* note 301; Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World*, 63 ANTITRUST LAW J. 669 (1995) [hereinafter Sullivan, *Post-Chicago Economics*].

303. See, e.g., Fox, *supra* note 301, at 1146, 1152, 1154, 1178-79; Lande, *Chicago's False Foundation*, *supra* note 292, at 631. In addition, members of the School may contemplate lower thresholds for demonstrating anticompetitive conduct.

304. See Fox, *supra* note 301, at 1153, 1182, 1185-88 (positing “dispersion of economic power” as goal of antitrust laws); Pitofsky, *supra* note 301, at 1053-55 (contending that antitrust policy should take into account “[f]ear of [c]oncentrated [e]conomic [p]ower” and stating that “historical and contemporaneous democracies are almost invariably associated with market systems, while totalitarian regimes (fascist and communist) almost always are not”).

305. See Lande, *Beyond Chicago*, *supra* note 13, at 5-6; Lande, *Chicago's False Foundation*, *supra* note 292, at 631 (“The main purpose of the antitrust laws is to prevent firms from acquiring and using market power to force consumers to pay more for their goods and services.”).

306. See Fox, *supra* note 301, at 1169, 1174-76, 1191 (contending that the notion of “competition as process” promotes “vigorous rivalry” that leads to “efficiency and progressiveness”; proponents of the idea “place value on diversity and pluralism” and endeavor to preserve “lower barriers to entry and greater opportunity for entry and success of unestablished firms” rather than to promote “productive efficiency of established firms”); Pitofsky, *supra* note 301, at 1063-64.

307. See, e.g., Pitofsky, *supra* note 301, at 1056-57.

1306 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

leged a potential conflict between general government policy undertaking wealth-distribution activities and antitrust policy pursuing only the goal of efficiency.³⁰⁸

Post-Chicago School theorists also voice criticisms from “inside” the model; in particular, they criticize the Chicago School’s conception of efficiency. They argue that efficiency is not as neutral³⁰⁹ or as easily applied³¹⁰ as its proponents contend. Post-Chicago adherents also charge that it relies on a static rather than dynamic market,³¹¹ it focuses excessively on the long-run effects of practices,³¹² it fails to incorporate non-quantifiable goals,³¹³ and it ignores the problem of consumer free-riding.³¹⁴ Finally, proponents contend that the Chicago School does not adequately consider such concepts as market imperfections,³¹⁵ externalities,³¹⁶ and the problem of the “second best.”³¹⁷

308. See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 247 (1985).

309. See, e.g., Edward O. Correia, *Antitrust and Liberalism*, XL ANTITRUST BULLETIN 99, 122 n.76 (1995) (noting the political value judgments underlying neutrality and the maximization of allocative efficiency); Fox, *supra* note 301, at 1158, 1168; Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 579-80 (1986) (assumptions underlie “simplicity” of economic models); Hovenkamp, *supra* note 308, at 235-36 (questioning “constant dollar welfare assumption” that the transfer of a dollar from a consumer to a monopolist has no welfare implications); Lawrence A. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 12 (1980) [hereinafter Sullivan, *Antitrust, Microeconomics, and Politics*].

310. See, e.g., Fox, *supra* note 301, at 1158; Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 27 (1982); Pitofsky, *supra* note 301, at 1065-66.

311. See *Symposium: Post-Chicago Economics*, 63 ANTITRUST LAW J. 445, 445 (1995) [hereinafter *Symposium*]; Hovenkamp, *supra* note 308, at 256-60. Hovenkamp notes that this weakness leads to a failure to adequately recognize strategic behavior, or behavior designed to injure competitors. See *id.* at 256, 260-83.

312. See, e.g., Hovenkamp, *supra* note 308, at 247, 264-84.

313. See, e.g., John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1133 (1987).

314. See, e.g., Hovenkamp, *supra* note 308, at 244.

315. See, e.g., Fox, *supra* note 301, at 1160 & n.88 (noting “malfunctions” caused by “monopoly, the absence of information, and government regulation”).

316. See, e.g., *id.* at 1160 n.88 (noting that externalities are costs imposed but not borne by a company, such as pollution, and that they lead to “inefficiently high” output because consumers buy too much of a product whose price does not reflect its full cost); Hovenkamp, *supra* note 308, at 244.

317. See, e.g., Fox, *supra* note 301, at 1160 n.88 (observing that “an apparently second best solution may be no solution at all” because corrective action in one market does not necessarily improve resource allocation); Lawrence A. Sullivan, *Book Review:*

Post-Chicago School analysis is heavily fact-oriented, with less deference to economic theory.³¹⁸ Advocates from the School also are skeptical that the market will correct imperfections and thus see a greater need for judicial intervention.³¹⁹ Imperfect information is one reason for this skepticism.³²⁰ Some Post-Chicago commentators also have emphasized the danger to competition from a firm's raising its rivals' costs.³²¹

Presenting the mirror image of the Chicago School, the Post-Chicago School would defend the range of restraints considered under the Rule of Reason. Commentators in the School would, however, take issue with the overriding emphasis on competition encompassed in the factors of the Rule, and would contend that other goals should be taken into account.³²²

5. Applying the sources

By reference to these four sources, this Article will determine whether courts should consider various factors in a Rule of Reason analysis. How are the sources to be weighed? A consistent conclusion (for or against the inclusion of a factor) resulting from the application of the sources will lead to an easy answer. Divergent conclusions will be more difficult, and will

Trade Regulation, Cases and Materials, 75 COLUM. L. REV. 1214, 1220-21 (1975) ("Given the persistence of other deviations (other monopolies, cartels, tariffs, and distorting taxes), there is no basis for assuming that doing away with any one or more deviations from optimality would improve efficiency at all. A priori, it is just as likely to do the opposite . . .").

318. See, e.g., Sullivan, *Post-Chicago Economics*, *supra* note 302, at 672.

319. See, e.g., Robert H. Lande, *Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 ANTITRUST LAW J. 193, 193 (1993) [hereinafter Lande, *Chicago Takes It on the Chin*]; Steven C. Salop, *Kodak as Post-Chicago Law and Economics*, C847 ALI-ABA 27, 30 (1993); *Symposium*, *supra* note 311, at 446.

320. See, e.g., Lande, *Beyond Chicago*, *supra* note 13, at 6-9; Lande, *Chicago Takes It on the Chin*, *supra* note 319, at 193, 197-98 (noting that imperfect information can create market power and can affect competition in "entire markets").

321. See, e.g., Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST LAW J. 645, 647-48 (1989); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L.J. 209 (1986) (introducing two-step analysis to determine existence of anticompetitive effects: whether conduct of challenged firm increases costs of competitors and whether this enables the firm to exercise monopoly power); Lande, *Beyond Chicago*, *supra* note 13, at 3-5.

322. See, e.g., Sullivan, *Antitrust, Microeconomics, and Politics*, *supra* note 309, at 2-3 (noting that "only competitive effects" (which "usually means efficiency effects") are relevant under the Rule of Reason and that consequently "Reason" is "becoming blind to other social consequences").

1308 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

be resolved by analyzing the relative significance of the sources and the capacities of courts.³²³

The legislative history, as supplemented by the common law, is the most important source. Regardless of what philosophical school one adheres to, proper interpretation begins (though it obviously does not end) at the beginning—with the framers of the Sherman Act. So if the legislative history and common law disapprove of a factor, the odds are against its inclusion. Where these sources are neutral (*i.e.*, where the actors did not consider a particular factor), strong support must come from the other sources and the capacities of courts. For if the sources provide only lukewarm support for, and courts cannot analyze, a particular factor, then the inclusion of the factor in a Rule of Reason analysis would not elicit confidence in the analysis undertaken by antitrust courts. This Article now turns to the application of the sources.

B. Anticompetitive Effect

Each of the four sources provides support for the courts' consideration of anticompetitive effect as an element of a Rule of Reason analysis.

1. Legislative history

Achieving “full and free competition”³²⁴ was the primary goal of the framers of the Sherman Act.³²⁵ This focus on competition pervaded the draft bills and amendments that the framers considered. For example, Senator Sherman's first bill declared invalid all agreements that tend to prevent “full and free competition.”³²⁶ Additionally, an amendment introduced by Senator Reagan defined a trust, in part, as a combination “[t]o prevent competition.”³²⁷ The framers' debate returned repeat-

323. The capacities of courts are discussed below. *See infra* Part III.

324. S. 3445, 50th Cong. (1888).

325. The Sherman Act framers proclaimed the norm of free competition “too self-evident to be debated, too obvious to be asserted.” THORELLI, *supra* note 218, at 226 (citation omitted).

326. S. 3445, 50th Cong. (1888). Similar language appears in the resolution by which Senator Sherman directed the Finance Committee “to inquire into . . . control . . . [of] trusts.” *See* 19 CONG. REC. 6041 (1888).

327. 21 CONG. REC. 1772 (1890); *see also* S. 3510, 50th Cong. (1888) (bill introduced by Sen. Cullom (R-Ill.)) (directed against combinations “to prevent full and free competition,” to limit trade, or to “increase or reduce the price” of goods).

edly to the theme of allowing the unfettered operation of competition. They bemoaned that trusts “prevent competition and . . . restrain trade,”³²⁸ “destroy[] legitimate competition,”³²⁹ “interfer[e] with competition,”³³⁰ and “hinder, interrupt, and impair the freedom and fairness of commerce.”³³¹

Executive speeches mirrored legislative pronouncements on competition. President Grover Cleveland, in his third annual message to Congress on December 6, 1887, lamented the “strangl[ing]”³³² of competition by trusts, “which have for their object the regulation of the supply and price of commodities.”³³³ President Benjamin Harrison, in his first annual message on December 3, 1889, decried trusts to be “dangerous conspiracies against the public good”³³⁴ because they were organized “to crush out all healthy competition.”³³⁵ In fact, the antitrust plank of the Democratic Party Platform in 1888 railed against trusts that “rob the body of our citizens by depriving them of the benefits of natural competition.”³³⁶

To be sure, the competition of 1890 is not the competition of 1999. In particular, the Sherman Act framers’ views of competition were not infused with the neoclassical conceptions that underlie today’s notions of efficiency.³³⁷ In addition to an emphasis on increased output and lowered price resulting from competition, the Sherman Act framers’ conception included a concern for protecting small businesses against mammoth

328. 21 CONG. REC. 2460 (1890) (statement of Sen. Sherman); *see also* 21 CONG. REC. 2459 (1890) (statement of Sen. Sherman) (noting the courts’ “vigorous[]” use of judicial power to “subvert[]” trusts whose “plain tendency is to prevent competition”).

329. *Id.* at 4100 (statement of Rep. Mason (R-Ill.)).

330. *Id.* at 4102 (statement of Rep. Fithian (D-Ill.)).

331. *Id.* at 2558 (statement of Sen. Pugh).

332. 19 CONG. REC. 9 (1887).

333. *Id.*

334. 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966, at 1639 (F. Israel ed., 1966).

335. *Id.*

336. T. MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 1789-1905, at 235 (1906). The Republican Party platform also addressed trusts, declaring its opposition to combinations that “control arbitrarily the condition of trade” and recommending the enactment of legislation that would “prevent the execution of all schemes to oppress the people by undue charges on their supplies.” *Id.* at 241.

337. *See* John J. Flynn, *The Reagan Administration’s Antitrust Policy, “Original Intent” and the Legislative History of the Sherman Act*, 33 THE ANTITRUST BULL. 259, 272-73 (1988).

1310 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

trusts.³³⁸ Indeed, one can even conceive of the framers viewing the process of competition itself as being significant.³³⁹ Further complicating the mapping to today's environment, the framers generally did not distinguish between injuries to competitors and injuries to consumers.³⁴⁰

Despite the inexact congruity between conceptions of competition a century apart, the initial threshold of anticompetitive effect examined by courts today is a logical extrapolation from the framers' discussions of competition. That other economic constructs could have developed similarly consistent with the debates does not lessen the support today's analysis of anticompetitive effect garners from the legislative history. Cementing the consonance between the two competitions are the overlapping building blocks of price and output. At the foundation of microeconomic inquiry today, the blocks were also central to the framers' debate. Of the two, the framers tended to focus on price.³⁴¹

Draft bills explicitly accentuated the factor of price. Senator Sherman's original bill invalidated "all arrangements, contracts, agreements, trusts, or combinations . . . designed, or which tend, to advance the cost to the consumer"³⁴² of imported or domestic goods. An amended version of the bill contained a clause allowing consumers who were "put to additional cost by the advancing of the price"³⁴³ of goods to recover their damages. Another amendment to the bill defined a trust, in part, as a combination "to increase or reduce the price of merchandise or

338. See 21 CONG. REC. 3147 (1890) (statement of Sen. George) (explaining that the "great evil" at which the Act was directed was the "crush[ing]" of "small men engaged in competition with [trusts]"); *id.* at 2460 (statement of Sen. Sherman) (promoting rights of individuals "as against associated and corporate wealth and power"); 20 CONG. REC. 1458 (1889) (statement of Sen. George) (contending that defensive alliances of farmers and laborers should not be covered by bill).

339. See Fox, *supra* note 301, at 1169, 1174-76, 1191.

340. See I AREEDA, *supra* note 248, ¶ 103c, at 52-53 (noting that contemporary distinctions between the two types of injury are "the product of a century of economic analysis that had not yet occurred when the Sherman Act was passed"; moreover, the divisions between competitors and consumers were more blurred a century ago than they are today).

341. Some Sherman Act framers recognized that a reduction in output affects price. See 21 CONG. REC. 2460 (1890) (statement by Sen. Sherman) ("The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination.").

342. S. 3445, 50th Cong. § 1 (1888).

343. S. 3445, 50th Cong. (as amended, Jan. 25, 1889).

commodities”³⁴⁴ or to enter into an agreement by which the price of a good could be “establish[ed] or settle[d].”³⁴⁵

Debate also focused on the trusts’ power to affect price. Senator Sherman referenced pricing in explaining its scope: “All [the bill] says is that the people producing or selling a particular article shall not make combinations to advance the price of the necessaries of life.”³⁴⁶ The Senator honed in on the powers of trusts to affect price:

[the trust] can control the market, raise or lower prices, as will best promote its selfish interests, *reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. . . .* Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, *it tends to advance the price to the consumer of any article produced.*³⁴⁷

Other framers lamented the trusts’ control over prices. They emphasized that the trusts “increase beyond reason the cost of the necessaries of life and business. . . . They regulate prices at their will, depress the price of what they buy and increase the price of what they sell.”³⁴⁸ Trusts “enhance the price of commodities to the people beyond an honest profit.”³⁴⁹ The universal reach of the trusts was deplored: “There is scarcely any article of prime necessity in this country as to which the people do not complain that its price has been enhanced by these combinations.”³⁵⁰ And again: “the trusts which control the markets on sugar, nails, oils, lead, and almost every other article of use in the commerce of this country have advanced the

344. S. 1, 51st Cong. (as amended, Mar. 25, 1890).

345. *Id.*; *see also id.* (other definitions include “[t]o fix a standard or figure whereby the price to the public shall be in any manner controlled or established” and to agree to keep the price of a good at a “fixed or graduated figure”).

346. 20 CONG. REC. 1458 (1889).

347. 21 CONG. REC. 2457 (1890) (emphasis added).

348. *Id.* at 1768 (statement of Sen. George); *see also id.* at 3147-48 (statement of Sen. George).

349. *Id.* at 4102 (statement of Rep. Fithian).

350. *Id.* at 2647 (statement of Sen. Vance). Even the few Senators who were not convinced of the benefits of competition and low prices recognized the goals of the bill. *See id.* at 2729 (statement of Sen. Platt) (“[T]his bill proceeds upon the false assumption that all competition is beneficent to the country, and that every advance of price is an injury to the country.”)

1312 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

cost of such articles to every consumer.”³⁵¹

Although discussed less frequently than price, output—in particular, the trusts’ reduction of it—also occupied the framers’ attention. An amendment to the bill under debate defined a trust, in part, as a combination “[t]o limit or reduce the production . . . of merchandise or commodities,”³⁵² or to enter into an agreement “not to manufacture, sell, dispose of, or transport”³⁵³ any good. A House bill defined a trust as a combination “for the purpose of . . . limiting the production, increasing or reducing the price of merchandise or commodities, or preventing competition.”³⁵⁴ Debate among the congressmen continued this theme. Senator Sherman bemoaned that trusts could reduce, “at pleasure,”³⁵⁵ the supply of a product. A member of the House of Representatives protested that trusts aim “to repress, reduce, and control the volume of every article that they touch, so that the cost to consumers is increased while the expenditure for production is lessened.”³⁵⁶ Trusts were viewed as “the latest and most perfect form of combination among competing producers to control the supply of their product, in order that they may dictate the terms on which they shall sell in the market.”³⁵⁷

In short, the framers recognized the adverse effects on price and output brought about by trusts and sought to promote unbridled competition. Today’s courts, by requiring plaintiffs to demonstrate an anticompetitive effect, preserve the framers’ focus on competition. More specifically, contemporary courts’ focus on price and output as indicators of anticompetitive effect draws direct support from the framers’ intent. The initial threshold of anticompetitive effect is firmly ensconced in the

351. *Id.* at 4101 (statement of Rep. Heard (D-Mo.)). The beef industry in particular drew the wrath of several Representatives. *See id.* at 4098 (statement of Rep. Taylor (R-Ohio)) (“The beef trust fixes arbitrarily the daily price of cattle, from which there is no appeal, for there is no other market. The farmers [are able to save] from one-third to half of the former value of their cattle and yet beef is as costly as ever.”); *id.* at 4091 (statement by Rep. Henderson (R-Iowa)) (same); *id.* at 2640 (statement of Sen. Spooner (R-Wis.)) (lamenting the sugar trust, whose object “is to keep up to consumers the price of sugar” and the beef trust, which has maintained at the “war rate” the price of beef to consumers).

352. S. 1, 51st Cong. (as amended Mar. 25, 1890).

353. *Id.*

354. H.R. 11401, 50th Cong. (1888).

355. 21 CONG. REC. 2460 (1890).

356. *Id.* at 4101 (statement of Rep. Heard (D-Mo.)).

357. *Id.* at 4092 (statement of Rep. Wilson (D-W.Va.)).

legislative history.

2. Common law

A bit further removed from contemporary understandings of competition were the common law courts. These courts typically focused on the effect of agreements on the contracting parties and emphasized the *tendency* of an agreement to limit competition rather than an actual *effect* on competition.³⁵⁸ So even if a combination reduced prices, the combination's ability to raise prices would lead courts to invalidate the arrangement.³⁵⁹ The reverse also held true: courts upheld price-fixing by parties that could not affect the market as a whole.³⁶⁰ Moreover, common law decisions often depended on the facts of the cases.³⁶¹ Consequently, the common law "present[ed] a picture of great confusion and intermingling of ideas."³⁶²

Despite these caveats, common law courts invalidated trusts that restricted competition³⁶³ or injured the public.³⁶⁴ Agreements to control supply or production, for example, were usually held to be unenforceable,³⁶⁵ as were agreements to divide territories.³⁶⁶ Courts also linked the concepts of competi-

358. See, e.g., *Richardson v. Buhl*, 43 N.W. 1102, 1111 (Mich. 1889); *Atcheson v. Mallon*, 43 N.Y. 147, 149 (1870); *Stanton v. Allen*, 5 Denio 434 (N.Y. 1848); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672 (1880).

359. See, e.g., *Buhl*, 43 N.W. at 1111 (Champlin, J., concurring) (discounting a combination's reduction of the price of an article and stating that "[t]he fact exists that it rests in the discretion of th[e] [combination] at any time to raise the price to an exorbitant degree").

360. See *Hearn v. Griffin*, 2 Chitty 407, 408 (1815).

361. See 1 A. EDDY, *THE LAW OF COMBINATIONS* §§ 301-03, at 207 (1901).

362. THORELLI, *supra* note 218, at 50; see also *id.* at 36.

363. See *Craft v. McConoughy*, 79 Ill. 346, 350 (1875); *Nebraska v. Nebraska Ditching Co.*, 46 N.W. 155, 161 (Neb. 1890).

364. See *Chicago Gas-Light and Coke Co. v. People's Gas-Light and Coke Co.*, 13 N.E. 169, 174-75 (Ill. 1889); *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 527 (1880); *Leslie v. Lorillard*, 18 N.E. 363, 366 (N.Y. 1888); *New York v. North River Sugar-Refining Co.*, 7 N.Y.S. 406, 415 (Sup. Ct. 1889); *Commonwealth of Pennsylvania v. Carlisle*, *Brightly's N.P.* 36, 40 (Ct. of Nisi Prius 1821); see generally THORELLI, *supra* note 218, at 18.

365. See, e.g., I KINTNER, *FEDERAL ANTITRUST LAW*, *supra* note 220, § 3.6, at 92 (citing sources); *Santa Clara Valley Mill and Lumber Co. v. Hayes*, 76 Cal. 387 (1888); *India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168 (1859); *Arnot v. Pittston & Elmira Coal Co.*, 68 N.Y. 558 (1877); *Emery v. Ohio Candle Co.*, 24 N.E. 660 (Ohio 1890); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880); *McBirney & Johnston White Lead Co. v. Consolidated Lead Co.*, 8 Ohio Dec. Reprint 762 (Super. Ct. 1883); *Cousins v. Smith*, 33 Eng. Rep. 397 (Ch. 1807).

366. See *Chicago Gas Light & Coke Co.*, 13 N.E. 169; *Morris Run Coal Co. v. Bar-*

1314 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

tion and monopoly, refusing to enforce restraints that “destroyed all competition and created a monopoly.”³⁶⁷

Other distinctions drawn by common law courts, although phrased differently from their present-day counterparts, may be viewed as consistent with today’s emphasis on an adverse effect on competition. For example, early common law courts invalidated general restraints, which affected the market as a whole, but upheld a subset of partial restraints (those that were reasonable). That the general/partial divide did not precisely trace a contemporary notion of anticompetitive effect (a few general restraints eventually were upheld and some partial restraints were found unenforceable) does not negate a substantial overlap with contemporary notions of anticompetitive effect.

Yet another distinction that laid a foundation for anticompetitive effect was that between internal restraints (affecting only the parties to the agreement) and external restraints (affecting third parties). Courts tended to uphold internal restraints that did not affect competition as a whole, but refused to enforce external restraints.³⁶⁸

Because of the common law courts’ concern with the contracting parties to an agreement, the courts’ emphasis on the tendency of an agreement rather than its effect, and the absence of a consistent common law rule,³⁶⁹ any attempts to map the common law onto contemporary notions of competition must be made with caution. Nonetheless, the courts’ refusal to enforce general restraints, external restraints, and agreements that adversely affected competition or the public provides support for contemporary courts’ consideration of anticompetitive effect as an element of today’s Rule of Reason analysis.

3. *Chicago School*

The Chicago School would support a court’s consideration of

clay Coal Co., 68 Pa. 173 (1871).

367. *Craft v. McConoughy*, 79 Ill. 346, 350 (1875); *see also Guthrie*, 35 Ohio St. at 672 (because the clear tendency of the agreement at issue was “to establish a monopoly, and to destroy competition, . . . courts will not aid in its enforcement”); *see generally* THORELLI, *supra* note 218, at 30, 39.

368. *See supra* note 272 and accompanying text.

369. *See, e.g.,* I AREEDA, *supra* note 248, ¶ 302, at 3; S. CHESTERFIELD OPPENHEIM ET AL., *FEDERAL ANTITRUST LAWS: CASES, TEXT, AND COMMENTARY* 4-5 (4th ed. 1981); I VON KALINOWSKI, *supra* note 27, § 8.01[2], at 8-9.

anticompetitive effects. Chicago School proponents champion efficiency, defined in terms of competition, as the sole goal of the antitrust laws. Accordingly, a practice that does not have an adverse effect on competition or efficiency obviously should lie outside the realm of antitrust analysis. This conclusion is buttressed by the range of restraints the Chicago School removes—because they arguably cannot have an anticompetitive effect—from the realm of Rule of Reason analysis: tying arrangements, exclusive dealing agreements, and territorial, customer, and other vertical restrictions.³⁷⁰ Similarly, those restraints left standing for review—mergers to a high market share and cartel-facilitating restraints—have obvious anticompetitive effects.³⁷¹ The Chicago School's overriding focus on competition renders anticompetitive effect a vital element of a Rule of Reason analysis.

4. *Post-Chicago School*

The Post-Chicago School differs from the Chicago School in treating efficiency as only one goal, rather than the sole goal, of the antitrust laws. Most Post-Chicagoans do not claim that there is *no* role for efficiency;³⁷² rather, they posit other roles besides efficiency.³⁷³ Therefore, the School would view the threshold of anticompetitive effect (a prerequisite to a finding of inefficiency) as a sufficient but not necessary factor in the continuation of the Rule of Reason analysis.³⁷⁴ That is, where an anticompetitive effect is present, the School would encourage the court to proceed to analyze other factors. But where an anticompetitive effect is absent, the School would not necessarily shut down the inquiry, because other goals could be threatened even in the absence of an anticompetitive effect. There-

370. See Easterbrook, *Vertical Arrangements*, *supra* note 91, at 135, 151-52, 168-69; Posner, *Chicago School*, *supra* note 27, at 929; Posner, *Exclusionary Practices*, *supra* note 293, at 508.

371. See Easterbrook, *Vertical Arrangements*, *supra* note 91, at 153, 168. Further supporting this conclusion, the "filters" developed by Judge Easterbrook to limit the instances of a full-fledged Rule of Reason analysis include standard indicators of anticompetitive effect: market power, harm to consumers (tied to a defendant's profits), and whether the evidence is consistent with a reduction in output. See Easterbrook, *Limits of Antitrust*, *supra* note 293, at 17-35.

372. See Fox, *supra* note 301, at 1140, 1174-75; Pitofsky, *supra* note 301, at 1075.

373. See *supra* notes 3034-307 and accompanying text.

374. See Krattenmaker & Salop, *supra* note 321, at 214, 250-51, 253-66 (setting forth test to determine likelihood of anticompetitive effects).

1316 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

fore, within a Rule of Reason inquiry, the Post-Chicago School would support the use of the factor of anticompetitive effect. That they would envision a broader Rule of Reason analysis that would be triggered by predicates other than anticompetitive effect does not negate the useful role played by anticompetitive effect.

C. Procompetitive Justifications

The sources also support courts' consideration of a defendant's procompetitive justifications as an element of the Rule of Reason analysis. The legislative history, Chicago School, and Post-Chicago School all would endorse the factor, and the common law would be neutral.

1. Legislative history

Throughout the debates on the Sherman Act, the framers made it clear that they did not wish to penalize all restraints of trade. Senator Sherman emphasized that the Act would cover "unlawful combinations to prevent competition"³⁷⁵ but not "lawful combinations in aid of production."³⁷⁶ The bill would "not in the least affect combinations in aid of production where there is free and fair competition."³⁷⁷ Senator Sherman explained that the Act would not apply to partnerships, which were "an aid to production."³⁷⁸ Similarly, corporations were "the most useful agencies of modern civilization"³⁷⁹ that "have enabled individuals to unite to undertake great enterprises only attempted in former times by powerful governments."³⁸⁰ The Act also would not "interfere in the slightest degree" with "voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation"³⁸¹ such as farmers' associa-

375. 21 CONG. REC. 2456 (1890).

376. *Id.*

377. *Id.* at 2457.

378. *Id.* Senator Sherman elaborated:

The right to combine the capital and labor of two or more persons in a given pursuit with a community of profit and loss under the name of a partnership is open to all and is not an infringement of industrial liberty, but is an aid to production. . . . [W]hile [a partnership] is a combination, it does not in the slightest degree prevent competition.

Id.

379. *Id.*

380. *Id.*

381. *Id.* at 2562 (statement of Sen. Sherman).

tions³⁸² or laborers.³⁸³ The House also engaged in limited debate regarding a defendant's quality justifications.³⁸⁴

Restraints today do not fall neatly into the bifurcated categories contemplated by the framers—restrictions imposed by mammoth trusts, on the one hand, and defensive combinations by small businesses struggling to compete, on the other. For example, in which category would vertical restraints by mid-sized companies, which often limit intrabrand competition in the hopes of increasing interbrand competition, belong? In which category would a local hospital's refusal to deal with a doctor fall? An unfair competition claim between two rivals? An association standard? Today's antitrust restraints are more nuanced than the dichotomy envisioned by the Sherman Act framers. That said, the framers' desire not to punish parties who took actions promoting (the framers' conception of) competition must be considered in any analysis of competitive effects.³⁸⁵ In order to know, then, if the anticompetitive effect of a restraint is justified, a court following the guidance of the legislative history must allow the defendant to introduce its procompetitive justifications.

2. *Common law*

The common law preceding the Sherman Act did not examine a defendant's procompetitive justifications. The focus of the common law courts was on the contracting parties *themselves* and the benefits that would inhere to these parties by the enforcement of agreements. As one court explained: "The only reason ever assigned in support of . . . restrictions [not to compete] is, that they are necessary or useful to the party with

382. "Farmers' Alliances and farmers' associations . . . are not business combinations. They do not deal with contracts, agreements, etc., . . . And so the combinations of workingmen to . . . get their fair share in the division of production, are not . . . included in the words or intent of the bill . . ." *Id.*

383. *See id.* at 2561 (statement of Sen. Teller) ("[W]e can not deny to the laborers of the country the opportunity to combine either for the purpose of putting up the price of their labor or securing to themselves a better position in the world.").

384. *See id.* at 5954 (statement of Rep. Morse (D-Mass.)) (manufacturers should have the right to set the price of their goods to ensure "a high grade and uniform quality of goods" which would help the purchaser determine "what he is buying and what to depend upon").

385. The dichotomy considered by the framers also could be viewed as supporting exemptions from the antitrust laws for certain categories of restraints. This conclusion does not diminish the support for considering procompetitive justifications under the Rule of Reason.

1318 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

whom the contract is made as a protection to him in the prosecution of his business.”³⁸⁶ Similarly, a partial restraint not interfering with the interests of the public at large would be upheld where it “affords a fair protection to those in whose favor it is made.”³⁸⁷ Again, contracting parties that pursued their own interests provided the “just cause or excuse”³⁸⁸ necessary to protect their behavior.³⁸⁹ As one commentator put it, where the public was not “serious[ly] inconvenience[d]”³⁹⁰ by the parties’ control of the market, the combination would be sustained as long as “the advantages of the combination to the parties thereto seemed to be of a legitimate character.”³⁹¹

Common law courts did not focus on the benefits of agreements for the public as a whole, nor did they hint at contemporary indicators of procompetitive effect, such as increased output or decreased price. Even analyzing common law decisions on their own terms does not alter the analysis. The courts, for example, did not examine an agreement’s tendency to produce procompetitive effects. Although they examined a tendency toward anticompetitive effects, the absence of such a tendency did not equate with a finding of procompetitive effects. In short, the focus of common law courts on the parties themselves neither supports nor proscribes the consideration of procompetitive justifications in today’s Rule of Reason analysis.

3. *Chicago School*

Just as the Chicago School’s focus on efficiency and competition requires the plaintiff to show anticompetitive effects, it also allows the defendant an opportunity to offer procompetitive justifications for the restraint.³⁹² On its most fundamental level, consideration of the justifications for an agreement is consistent with a focus on allocative efficiency.³⁹³ That is, courts can best judge whether a restraint will contribute to the opti-

386. *Kellogg v. Larkin*, 3 Pin. 123, 132 (Wis. 1851); see THORELLI, *supra* note 218, at 48 n.144.

387. *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 527 (1880).

388. *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598, 613 (1889), *aff’d*, A.C. 25 (1892).

389. See THORELLI, *supra* note 218, at 34.

390. 1 EDDY, *supra* note 361, § 303, at 207.

391. *Id.*

392. See Easterbrook, *Limits of Antitrust*, *supra* note 293, at 17.

393. See BORK, *ANTITRUST PARADOX*, *supra* note 291, at 91-104.

mal allocation of resources in society by taking into account justifications designed to show a positive effect on competition in the market as a whole.

The Chicago School also would offer substantial deference to the proffered justifications. The “incommensurability of the stakes,”³⁹⁴ as Judge Easterbrook has put it, is one explanation for such deference. If a court errs by invalidating an act that promotes competition, the argument goes, “the benefits may be lost for good.”³⁹⁵ But, if the court errs by allowing a practice harmful to competition, “the welfare loss decreases over time”³⁹⁶ since monopoly prices eventually attract entry by other firms.³⁹⁷ Another rationale for the Chicago School’s deference to a defendant’s procompetitive justifications is the beneficial nature of most forms of cooperation.³⁹⁸ In short, the Chicago School would welcome the defendant’s procompetitive justifications in determining the effect of a restraint on competition.

4. *Post-Chicago School*

As in the discussion of the Post-Chicago School’s view on anticompetitive effects, the discussion of procompetitive effects is similarly constrained. The School would consider more than just competitive effects. But within an efficiency analysis, and after the showing of an anticompetitive effect, the School would allow the defendant to offer procompetitive justifications.³⁹⁹ Similar to the analysis for anticompetitive effect, the defen-

394. Easterbrook, *Limits of Antitrust*, *supra* note 293, at 2.

395. *Id.*

396. *Id.*

397. See BORK, *ANTITRUST PARADOX*, *supra* note 291, at 133 (noting that “mistaken rules of law” may prevent efficiency where, for example, other paths to efficiency “are too expensive, but a market position that creates output restriction and higher prices will always be eroded if it is not based upon superior efficiency”); Easterbrook, *Limits of Antitrust*, *supra* note 293, at 15-16 (“A beneficial practice may reduce the costs of production for every unit of output; a monopolistic practice imposes loss only to the extent it leads to a reduction of output.”).

398. See Easterbrook, *Limits of Antitrust*, *supra* note 293, at 15.

399. See Krattenmaker & Salop, *supra* note 321, at 277-82 (“[W]e think it would not be unreasonable to leave defendants with the burden of proving measurable, specific, countervailing efficiency justifications in specific exclusionary rights cases in which plaintiffs have proved actual or probable competitive injury.”). See also Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163, 1196 (1996) (citing ABA Antitrust Section, Monograph No. 18 (Nonprice Predation Under Section 2 of the Sherman Act) (1991)) (recommending assessment of efficiencies as factor in determining whether certain nonprice behavior is predatory).

1320 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

dant's showing of procompetitive justifications would be a sufficient, but not necessary, condition for the Rule of Reason analysis to continue to the next step. That is, the presence of a legitimate justification would allow the court to continue the inquiry. But even if a legitimate justification is offered, that may not save the restraint if it infringes other, nonefficiency goals. For example, Robert Pitofsky has contended, in discussing the exclusion of efficiencies in merger litigation, that an "occasional loss of efficiency as a result of antitrust enforcement can be tolerated and is to be expected if antitrust is to serve other legitimate values."⁴⁰⁰ The sufficiency of procompetitive justifications in the Rule of Reason analysis—particularly in the strand focused on competitive effects—counsels in favor of its inclusion.

D. Reasonable Necessity or Less Restrictive Alternatives

The sources provide only precarious support for the factors of reasonable necessity and less restrictive alternatives. Of the two sources that provide the most direct feedback on the factors, one (the common law) would support both factors and the other (the Chicago School) would not support either. The other two sources would be relevant only at the margins: the legislative history is neutral on the issue, and the Post-Chicago School would provide, at most, limited support for the factors.

1. Legislative history

Because the Sherman Act framers envisioned only two types of combinations—trusts preventing competition and small businessmen defending themselves—they never addressed (or implicitly provided fodder for or against) the issues of reasonable necessity or less restrictive alternatives. Stepping back to the framers' era and confronting them with the issue still would not provide guidance. The framers likely would say that the competition-limiting trusts were not pursuing legitimate objectives, thus making the inquiry of reasonable necessity irrelevant. The framers also would presume that the restraints adopted by combinations of small businessmen to counteract the trusts were reasonably necessary.

The same would hold true for the less restrictive alternative

400. Pitofsky, *supra* note 301, at 1074.

analysis. Again, because the trusts were not pursuing a legitimate objective, the framers would find that the inquiry into less restrictive alternatives was irrelevant. On the other hand, they would not second-guess restraints adopted by combinations of farmers or laborers that would foster competition and allow them to compete more effectively against the trusts. In short, the legislative history of the Sherman Act is neutral on the factors of reasonable necessity and less restrictive alternatives.

2. Common law

The common law would support the factors of reasonable necessity and less restrictive alternatives. Whether or not common law courts enforced a restraint depended in large part upon whether the restraint was reasonably necessary.⁴⁰¹ This test was articulated most explicitly in *Horner v. Graves*,⁴⁰² which advised courts to focus on “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.”⁴⁰³ The *Horner* court continued: “*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.*”⁴⁰⁴

Other cases confirm the common law courts’ emphasis on reasonable necessity. The seminal case of *Nordenfelt* emphasized the reasonableness of the restraint.⁴⁰⁵ Even an arrangement designed to prevent competition among the contracting parties was upheld because the parties used “proper means,”⁴⁰⁶ or, more particularly, “provisions reasonably necessary for [their] purpose.”⁴⁰⁷ Courts applied an initial version of the Rule

401. See, e.g., *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535.

402. 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831).

403. 131 Eng. Rep. at 287.

404. *Id.* (emphasis added). Even if the common law courts focused on the reasonable necessity of a restraint for parties (rather than competition), the analysis still provides support for use of the factor in today’s Rule of Reason analysis.

405. See *Nordenfelt*, [1894] A.C. at 565 (holding that a restraint is reasonable if it “afford[s] adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public”); see also *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 527 (1880).

406. *Collins v. Locke*, 4 A.C. 674, 685 (1879).

407. *Id.*

1322 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

of Reason by finding a restraint reasonable “if it is not larger—more extensive—than the necessary protection of the parties requires.”⁴⁰⁸

The above discussion also reveals support for the factor of less restrictive alternatives. 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. Stated positively, a restraint that is broader than necessary, by definition, has less restrictive alternatives.⁴⁰⁹ In conclusion, the common law would support the factors of reasonable necessity and less restrictive alternatives.

3. *Chicago School*

The Chicago School would not support an inquiry into whether a restraint is reasonably necessary or whether there are alternatives less restrictive of competition. The School would withhold its support because of the administrative difficulties of examining these factors and the “inhospitality tradition of antitrust.”⁴¹⁰

In contrast to a targeted inquiry into price or output, determining a restraint’s reasonable necessity or less restrictive alternatives threatens to bog down a court with unknowable and fact-intensive matters. These matters include whether hypothetical substitute restraints could achieve the defendant’s objectives, whether to second-guess the defendant’s intentions and rationales for business decisions, and the necessity of particular restraints. Therefore, inquiries as to reasonable necessity and less restrictive alternatives could be resolved only on a case-by-case basis, with little guidance provided to businesses, future potential defendants, and antitrust courts.

The “inhospitality tradition” articulated by the Chicago School supports this conclusion. According to this tradition, judges cast a wary eye on defendants’ business practices, “always wondering how firms are using [them] to harm consumers.”⁴¹¹ If the defendant cannot convince the judge that its practices are an essential feature of competition—and often, it will

408. THORELLI, *supra* note 218, at 52 (noting also that the restraint must not be “obviously injurious to the interests of the public”).

409. This assumes, of course, that the less restrictive alternatives would protect the parties as effectively as the restraint at issue.

410. Easterbrook, *Limits of Antitrust*, *supra* note 293, at 4.

411. *Id.*

not, as the “gale of creative destruction”⁴¹² known as competition “produces victims before it produces economic theories and proof of what is beneficial”⁴¹³—the judge prohibits the practice.

A judge knowingly or unknowingly following this tradition will inquire suspiciously whether a restraint is reasonably necessary. The court will second-guess the means of attaining the objectives, and often find that the restraint really was not necessary. The analysis based on less restrictive alternatives would be even worse. After the fact, a judge can always unearth such an alternative, and this project would take precedence over the inquiry as to whether the alternative would as effectively achieve the defendant’s goals.⁴¹⁴ Because the third prong of the Rule of Reason analysis would give courts unbridled discretion to invalidate practices that they mistrusted and because of the indeterminacy of the inquiries introduced by the factors, the Chicago School would proscribe examination of the inquiries of reasonable necessity and less restrictive alternatives.

4. *Post-Chicago School*

The Post-Chicago School would provide a modicum of support for the factors of reasonable necessity and less restrictive alternatives. Generally speaking, the School would support such fact intensive inquiries.⁴¹⁵ Whether a restraint is reasonably necessary would be a factor the court would utilize in determining the sufficiency of the defendant’s procompetitive justifications. Similarly, the presence of less restrictive alternatives would be a factor providing information on the inquiry regarding competition. On the other hand, the two inquiries are little more than sideshows. For competition is only one of multiple goals the School would champion. For example, in the pursuit of goals such as the dispersion of power or the promotion of competition as process, the factors are besides the

412. JOSEPH SCHUMPETER, CAN CAPITALISM SURVIVE? 24 (1978), *quoted in* Easterbrook, *Limits of Antitrust*, *supra* note 293, at 5.

413. Easterbrook, *Limits of Antitrust*, *supra* note 293, at 5.

414. *See id.* at 9 (“The alternatives may be more costly, but the defendant will not be able to show the amount of the difference. Because alternatives exist, the explanation for a particular practice may appear a too-clever effort to avoid the customary legal rules.”).

415. *See supra* note 318 and accompanying text.

1324 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

point.⁴¹⁶ And even within the competition inquiry, the goals would play a more tangential role than the key factors of anti-competitive and procompetitive effects. In short, the Post-Chicago School would provide, at most, limited support for the factors.

E. Balancing

The sources provide slightly stronger support for balancing. The Chicago School would endorse a very limited type of balancing, and the Post-Chicago School would approve of broader balancing. The legislative history and the common law appear neutral on the factor. Altogether, then, the sources would provide more support for balancing than for the factors of reasonable necessity and less restrictive alternatives, but less support than was accorded to anticompetitive and procompetitive effects.

1. Legislative history

Similar to the reasonably-necessity or less-restrictive-alternative analysis, balancing finds neither support nor opposition in the legislative history. According to the Sherman Act framers, the association at issue was *either* an “unlawful combination[] to prevent competition”⁴¹⁷ or a “lawful combination[] in aid of production.”⁴¹⁸ It was not a mixture of the two. It did not lean toward one more than the other. It was one *or* the other. The association was either a trust that prevented competition or a combination of small businesses or farmers not covered by the Act. It simply did not cross the minds of the framers that a restraint could have *both* anticompetitive and procompetitive effects. Therefore, a contemporary court’s balancing of anticompetitive and procompetitive effects garners neither support nor opposition from the legislative history.

The conclusions relating to balancing and the factors of rea-

416. One could imagine an inquiry as to whether there are alternatives less restrictive of these other noncompetition goals, but such explorations are outside the realm of today’s (most broadly conceived) Rule of Reason analysis, and threaten to impose additional layers of complexity that lie beyond the scope of this Article.

417. 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman).

418. *Id.* (statement of Sen. Sherman); *see also id.* at 2457 (statement of Sen. Sherman) (“It is said that this bill will interfere with lawful trade, with the customary business of life. I deny it. It aims only at unlawful combinations. It does not in the least affect combinations in aid of production where there is free and fair competition.”).

sonable necessity and less restrictive alternatives are not surprising given the task that confronted the framers. The framers focused primarily on issues such as the constitutionality of the Sherman Act.⁴¹⁹ To the extent they explored the reasonableness of restraints, they endeavored to delimit the types of restraints that would fall within, or outside of, the Act.⁴²⁰ Their canvas contained but two water colors—the evil trusts and the defensive alliances of small businessmen. Exploring gradations between the two polarities was thus not only useless, it was beyond contemplation. Moreover, the framers understood that the courts would play a significant role—as they already had in developing the common law—in distinguishing between reasonable and unreasonable restraints.

2. *Common law*

Common law courts did not balance the anticompetitive and procompetitive effects of restraints. Because they focused on classifying the restraint in certain categories—general or partial, external or internal, unreasonable or reasonable⁴²¹—they did not contemplate that restraints could contain elements of the contrasting categories. Just to pick one example, a restraint could not be both general and partial. The emphasis by common law courts on the *tendency* of a combination to restrict competition, as opposed to its effect, confirms this observation. This tendency, to the extent it existed, weighed in the direction of a restriction of competition. To the extent it did not exist, it leaned toward no such restriction. That is, the absence of such a tendency did *not* lean in the direction of a beneficial effect on competition. So the focus on tendency, in reality, replaced the competing paradigm of balancing. In the common law setting, where courts discounted actual beneficial effects, such as a lowering of price, and treated as dispositive the *potential* to harm competition, balancing was beyond the realm of possibilities.

419. *See supra* note 230.

420. *See* 21 CONG. REC. 2562 (1890) (statement of Sen. Sherman) (noting that Act does not interfere with farmers' organizations, which "are not business combinations" and "are not affected in the slightest degree [by the Act], nor [are] they included in the words or intent of the [Act]").

421. *See supra* notes 271-274 and accompanying text.

1326 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

3. Chicago School

Expansive balancing, requiring a consideration of efficiency and nonefficiency factors, would be anathema to the Chicago School. In contrast to their esteemed efficiency formulas, which Chicago School proponents contend are as uncontroversial as they are easy to apply, balancing introduces everything the Chicago School deplors—judicial discretion, indeterminacy, and a lack of guidance for businesses and future defendants. Judge Bork, for example, has argued that courts should not consider goals other than consumer welfare because the adoption of non-economic approaches “would create uncertainties that the courts would not long tolerate”⁴²² and that would be replaced by rigid rules.⁴²³

Judge Easterbrook has gone further, criticizing the balancing called for by the contemporary Rule of Reason. Easterbrook has contended that the formulations articulated by Justice Brandeis in *Chicago Board of Trade*⁴²⁴ are “empty.”⁴²⁵ Judges “cannot do what such open-ended formulas require [because w]hen everything is relevant, nothing is dispositive.”⁴²⁶ Easterbrook laments that the formulation fails to assist businesses in planning their conduct and results in costly litigation burdened by endless discovery.⁴²⁷

With regard to vertical restraints, in particular, Easterbrook deems “pointless”⁴²⁸ the balancing of interbrand and intrabrand competition: “There is no ‘loss’ in one column to ‘balance’ against a ‘gain’ in the other”⁴²⁹ because a reduction in rivalry among a manufacturer’s dealers on price is only the “tool” employed by the manufacturer to attain enhanced com-

422. BORK, ANTITRUST PARADOX, *supra* note 291, at 87.

423. *See id.* (“Area after area has been taken over by harsh rules, and sometimes, as in the law of requirements contracts, the Court has pointed to the need for certainty as justifying a rigid rule that was, admittedly, not the best resolution of the economic considerations.”) (citation omitted).

424. *Board of Trade v. United States*, 246 U.S. 231 (1918); *see supra* note 17 and accompanying text.

425. Easterbrook, *Limits of Antitrust*, *supra* note 293, at 12.

426. *Id.*

427. *See id.* at 12-13 (“Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.”). The same point is made by Judge Posner. *See Posner, Per Se Legality*, *supra* note 300, at 14-18.

428. Easterbrook, *Limits of Antitrust*, *supra* note 293, at 13.

429. *Id.* at 14.

petition on service.⁴³⁰ He further notes that courts cannot determine the level of increased interbrand competition that will justify various levels of reduction in intrabrand competition.⁴³¹

However, even given all of the above, there is room for a limited type of balancing in the Chicago world—balancing along the lines of the net effect of a restraint on output, for example. Certain restraints will fall “on a continuum between efficiency and restriction of output”⁴³² and the court must determine “which is the more probable effect.”⁴³³ Determining a net effect on competition is the type of inquiry “familiar to courts.”⁴³⁴ This type of balancing accords with today’s Rule of Reason analysis, where the restraint’s anticompetitive and procompetitive effects constitute the first two steps of the analysis. Therefore, the Chicago School would support a limited type of balancing, but only in those (few) cases in which there is an anticompetitive effect and balancing could take place along a narrow continuum such as output.

4. *Post-Chicago School*

The Post-Chicago School would embrace balancing; it would consider anticompetitive and procompetitive effects in determining an outcome on an axis of efficiency or competition, while also considering other factors in the equation.⁴³⁵ In “tie-breaker” situations, nonefficiency factors could make the difference.⁴³⁶ Thus, proponents of the School would examine the effect of the restraint on, for example, concentration in the market, a competitive process, or individual freedom. While

430. See BORK, ANTITRUST PARADOX, *supra* note 291, at 290 (“The manufacturer shares with the consumer the desire to have distribution done at the lowest possible cost consistent with effectiveness. That is why courts need never weigh the opposing forces of lessened intrabrand and heightened interbrand competition.”); Easterbrook, *Limits of Antitrust*, *supra* note 293, at 13-14; Lopatka, *supra* note 13, at 58 (“[A] vertical restraint imposed by a single manufacturer does not impede *competition* in a relevant antitrust sense when a brand is not a market. . . . A restraint on rivalry among dealers is not a reduction in intrabrand competition that needs to be offset by an increase in interbrand competition.”); Posner, *Per Se Legality*, *supra* note 300, at 18-21.

431. See Easterbrook, *Limits of Antitrust*, *supra* note 293, at 14.

432. BORK, ANTITRUST PARADOX, *supra* note 291, at 85.

433. *Id.* Similarly, when courts decide whether to interfere with a monopoly, they are to weigh “gains in destruction of monopoly power” against “losses in efficiency.” *Id.* at 79.

434. *Id.* at 85.

435. See, e.g., Pitofsky, *supra* note 301, at 1073.

436. See *id.* at 1067 n.44.

1328 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

recognizing that a multifaceted morass helps neither the courts nor the parties, the School nonetheless would support balancing that considers at least a restraint's anticompetitive and procompetitive effects.

III. THE CAPACITIES OF COURTS

Naturally following Part II, which explored what courts *should* do, comes Part III, which looks to what courts *can* do. This Part supplements Part II, particularly for those factors of the Rule of Reason analysis for which the sources provide only lukewarm support. Part III determines the capacities of courts as a matter of both hypothesis and practice. The underlying focus of this Part, like the focus of the Rule of Reason itself, is competition.⁴³⁷

Before getting into the details of each of the factors, a brief comment on the burden-shifting concept. As a matter of procedure, the delineation and application of predictable and orderly burdens, shifting between the parties, is a task that courts can perform. Further, it is a task that courts can do better than the competing alternative: general balancing from the outset of each case. A shifting of burdens, in contrast, puts the parties on notice as to the most significant factors and the order in which they will be considered. And it assists the courts for similar reasons: predictability, consistency, and legitimacy.⁴³⁸

The application of the burden-shifting concept has had benefits in practice. It fosters judicial efficiency: the courts can

437. See *NCAA v. Board of Regents*, 468 U.S. 85, 104 (1984); see also, e.g., *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [T]he policy unequivocally laid down by the Act is competition."). Although the term "competition" does not have one precise meaning, courts typically have looked to the effect of a restraint on output, price, and, to a lesser extent, quality. See, e.g., *NCAA*, 468 U.S. at 99, 109 n.38; *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979); *United States v. Topco Assocs.*, 405 U.S. 596, 607-08 (1972); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991); *Wilk v. American Med. Ass'n*, 895 F.2d 352, 359 (7th Cir. 1990).

438. The Supreme Court's decision in *California Dental Ass'n v. Federal Trade Commission*, 119 S.Ct. 1604 (1999), renders the burden-shifting approach even more compelling. In that case, the Court found that an association's restrictions on certain types of advertising were subject to more than "quick look" scrutiny but less than the "fullest market analysis" of the Rule of Reason. *California Dental*, 119 S.Ct. at 1617. In calling for "an enquiry meet for the case," *id.* at 1618, the Court provided no guidance on the level of scrutiny to be applied or the order in which the analysis would proceed.

dispose of those cases with no anticompetitive effect or procompetitive justification before engaging in the time-consuming and costly balancing analysis. In addition, it reduces errors by preventing courts from being swayed by plaintiffs who cannot demonstrate an anticompetitive effect but who nonetheless focus on the defendant's alleged lack of procompetitive justifications.⁴³⁹ Of course, a burden-shifting approach is only as defensible as the factors composing the construct. It is to these inquiries that this Article now turns.

A. Anticompetitive Effect

As much as any inquiry in the field of antitrust law, courts can analyze the building blocks of anticompetitive effect.

1. Output

Courts can determine a restraint's effect on output. Whether a restraint has resulted in an increase or a decrease of (or has had no effect on) output is a matter that a court can analyze. With the benefit of a developed record, a court can determine if the number of suppliers or products in a market has risen,⁴⁴⁰ remained unchanged,⁴⁴¹ or decreased.⁴⁴² The court also

439. See *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 547 (2d Cir. 1993) (holding procompetitive justifications "unnecessary" where plaintiff "has not carried its own initial burden" of showing anticompetitive effect); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1338-39 (9th Cir. 1983) (reversing court that "addressed and disconnected [the defendant's] business justification for the [challenged practice] without ever having assessed the impact upon competition"); *Patel v. Scotland Mem'l Hosp.*, No. 3:94CV00284, 1995 WL 319213, at *1 n.4 (M.D.N.C. Mar. 31, 1995) (finding plaintiff's argument that defendants "have failed to set forth any procompetitive justifications for their actions" to be "without merit" because plaintiff failed to carry its initial burden of showing anticompetitive effect); *Jim Forno's Continental Motors, Inc. v. Subaru Distribs. Corp.*, 649 F. Supp. 746, 754 (N.D.N.Y. 1986) (rejecting argument that "no allegation of anticompetitive effect is necessary if the challenged action has no 'procompetitive' effect").

440. See, e.g., *Kumar v. National Med. Enters., Inc.*, No. 93-16841, 1994 WL 659031, at *2 (9th Cir. Nov. 22, 1994); *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992); *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991); *Guyon v. Chinese Shar-Pei Club*, No. 89-15483, 1990 WL 121080, at *2 (9th Cir. Aug. 21, 1990); *Registered Physical Therapists, Inc. v. Intermountain Health Care, Inc.*, No. 86-C-0076J, 1988 WL 125788, at *7 (D. Utah Sept. 6, 1988); *Mays v. Hosp. Auth.*, 596 F. Supp. 120, 122 (N.D. Ga. 1984); *Merkle Press Inc. v. Merkle*, 519 F. Supp. 50, 53 (D. Md. 1981).

441. See, e.g., *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 447 (3d Cir. 1978); *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 5 F. Supp. 2d 694, 707 (D. Minn. 1998); *Miller v. Indiana Hosp.*, 814 F. Supp. 1254, 1265 (W.D. Pa. 1992).

442. See, e.g., *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447,

1330 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

can determine if the defendant's market share increased after implementing the restraint.⁴⁴³ The manifestations of output are readily observable and calculable.

This conclusion comes with two caveats. First, a court might not be able to measure output in every case. For example, the restraint may not have had time to take effect. Or the plaintiff may not have been able to discover such information. Or such information is not readily ascertainable. Granted. That the effect on output cannot always be calculated does not diminish the significance of the many instances in which it can be determined and in which it provides crucial information on the effects of a restraint.

Second, it is not possible for economists, let alone courts, to distinguish precisely between the effects of a restraint and the effects of a number of other potential causes for observed results: macroeconomic factors, developments in the market unrelated to the defendant, or changes made by the defendant unrelated to the restraint, just to name a few. And not knowing which factors are responsible for a change in output could lead to deceptive conclusions. At a minimum, it will often lead only to guarded conclusions. In the end, however, even if the tracing of precise lines of causation is not possible, the examination of the effect on output is helpful and usually will be consistent with other indicators of competitive effect, such as price.

2. Price

Like output, courts can examine the price of a good affected by a restraint. Whether the price has risen or fallen is an uncomplicated matter of reading the (developed) record. Consequently, courts have had no trouble in observing a restraint's lack of effect on price⁴⁴⁴ or noting its effect either in raising⁴⁴⁵ or

459 (1986); *NCAA v. Board of Regents*, 468 U.S. 85, 113 (1984); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-95 (1978); *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992).

443. See *New York v. Anheuser-Busch*, 811 F. Supp. 848, 859 (E.D.N.Y. 1993) (increased market share after implementation of territorial restraints "is evidence of the procompetitive effects of the restraint and the resulting increase in consumer preference for the product"); Posner, *Per Se Legality*, *supra* note 300, at 26 ("[I]f the defendant's output or market share rises as a result of the restraint, then, on balance, the restraint must promote consumer welfare and economic efficiency.").

444. See, e.g., *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991); *Guyon v. Chinese Shar-Pei Club*, No. 89-15483, 1990 WL 121080, at *2 (9th Cir. Aug. 21, 1990); *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 447 (3d Cir. 1978);

lowering⁴⁴⁶ price.

But again, like the inquiry regarding output, the examination of price may not be measurable in certain settings. Moreover, the effects of the restraint—as opposed to other, unrelated factors—on price may not be precisely traceable. Nonetheless, the courts can make, and have made, efforts to distinguish the effects of the restraint from other factors. As an initial matter, courts have appropriately required plaintiffs to show market power by focusing on increased pricing not in the defendant's products, but in the overall context of the market or with reference to competitors' pricing.⁴⁴⁷ They also have distinguished the effect of the restraint at issue from extraneous factors such as legislation, investment, costs, inflation, and advertising expenditures.⁴⁴⁸ And again the caveats, in the end, do not overcome the conclusion that courts can analyze the effect of a restraint on price.

3. *Other factors*

Courts may find other factors indicative of anticompetitive effect more difficult to measure than output or price. For example, quality is not as readily ascertainable. Nonetheless, the courts have been able to determine whether a restraint adversely affected quality.⁴⁴⁹ Whether more consumers buy a

Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp., 846 F. Supp. 488, 493 (W.D. Va. 1994); Miller v. Indiana Hosp., 814 F. Supp. 1254, 1265 (W.D. Pa. 1992); Mays v. Hospital Auth., 596 F. Supp. 120, 122 (N.D. Ga. 1984).

445. See, e.g., NCAA v. Board of Regents, 468 U.S. 85, 113 (1984); Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1353 (5th Cir. 1980).

446. See, e.g., Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir.), cert. denied, 119 S. Ct. 65 (1998); Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 375 (3d Cir. 1985).

447. See, e.g., Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc., 138 F.3d 869, 877 (11th Cir. 1998); Doctor's Hosp. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 310 (5th Cir. 1997); Levine v. Central Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1552 (11th Cir. 1996); Godix Equip. Export Corp. v. Caterpillar, Inc., 948 F. Supp. 1570, 1582 (S.D. Fla. 1996).

448. See *Levine*, 72 F.3d at 1552 (noting insufficiency of increased prices in managed care plan without information on fees charged by providers not in the plan, resource costs, and inflation); *Anheuser-Busch*, 811 F. Supp. at 865-66 (the "cumulative effect" of legislation, inflation, and investment "diminish the portion of any price increase" attributable to the restraint; moreover, the increase in the defendant's sales confirmed the reasonableness of price increases).

449. See, e.g., *Southern Card*, 138 F.3d at 877; *Sitkin Smelting & Ref. Co.*, 575 F.2d at 447; *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 5 F. Supp. 2d 694, 707 (D. Minn. 1998); *Advanced Health-Care Servs.*, 846 F. Supp. at 493 & n.7; *Miller*,

1332 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

product is one way of making this determination, though, again, differentiation of causation is inexact. In general, even if less objective manifestations of anticompetitive effect present slightly greater difficulty for courts, the conclusion still holds that courts can analyze anticompetitive effect, in particular, the primary building blocks of price and output.⁴⁵⁰

An examination of the cases supports this conclusion. Of the cases in which courts found that there was no anticompetitive effect, the overwhelming majority correctly analyzed this factor.⁴⁵¹ Of 427 such cases, only 3—less than 1%—should have, most deferentially considered, found an anticompetitive effect.⁴⁵² The courts in these three cases failed to recognize (at least for purposes of motions to dismiss) the potential anticompetitive effect presented by an increase in costs⁴⁵³ or a decrease in supply.⁴⁵⁴ Of the 28 cases in which courts discovered an anticompetitive effect, 9 (32%) should not have done so.⁴⁵⁵ The uni-

814 F. Supp. at 1265.

450. In addition to measuring actual anticompetitive effect, courts can measure potential anticompetitive effect as revealed through market power. Courts can determine the markets in which products compete and calculate market share and other indicators of market power, such as barriers to entry. *See, e.g.*, *Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 499 (10th Cir. 1983); *Godix Equip. Export Corp. v. Caterpillar, Inc.*, 948 F.Supp. 1570, 1580-82 (S.D. Fla. 1996).

451. This Article deferentially examines the courts' holdings. Where the result could legitimately go either way, the decision is regarded as correct. In addition, the determination of correctness does not presuppose a particular philosophy; that is, as long as the court articulates the basis for its decision—be it a focus on competition or on noneconomic factors (à la Post-Chicago School)—correctness is determined with reference to the paradigm selected. Because no courts, in applying the Rule of Reason, have explicitly invoked noneconomic rationales for their decisions, the Article looks to competition and treats decisions as incorrect only where the court flagrantly miscalculates the net effect on competition or on consumer welfare.

452. *See Health First, Inc. v. Bronson Methodist Hosp.*, No. 1:89-CV-1191, 1990 WL 157372 (W.D. Mich. Aug. 20, 1990); *Kling v. St. Paul Fire & Marine Ins. Co.*, 626 F. Supp. 1285 (C.D. Ill. 1986); *Alpha-Sentura Bus. Servs., Inc. v. Interbank Card Ass'n*, No. HM 78-1549, 1979 WL 1706 (D. Md. Sept. 11, 1979).

453. *See Health First*, 1990 WL 157372, at *1, *4 (allegation that defendants' conduct "tended to increase health care costs" could be broadly construed to allege anticompetitive effect in market of hospital services); *Kling*, 626 F. Supp. at 1291 (allegation by plaintiff that restraint would increase cost and decrease quality of health care services).

454. *See Alpha-Sentura Bus. Servs.*, 1979 WL 1706, at *3 (banking associations denied credit card services to entire market of adult bookstores).

455. *See Hairston v. Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996); *Los Angeles Mem'l Coliseum Comm. v. NFL*, 726 F.2d 1381 (9th Cir. 1984); *NASL v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *Eiberger v. Sony Corp.*, 622 F.2d 1068 (2d Cir. 1980); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *United States v. North Dakota Hosp. Ass'n*, 640 F. Supp. 1028 (D.N.D. 1986); *Cantor v. Multiple Listing Serv.*, 568 F. Supp.

fyng factor of these nine cases was the court's focus on the effect of the restraint on a competitor—be it by focusing exclusively on the effect on the competitor⁴⁵⁶ or on intrabrand competition,⁴⁵⁷ or by emphasizing an overly narrow market.⁴⁵⁸ All together, of the 455 cases examining anticompetitive effect, courts correctly interpreted the factor in an impressive 443 cases (97%). Since 1990, only one court incorrectly examined the factor.⁴⁵⁹ These incontrovertible figures support the hypothesis that courts can examine anticompetitive effect.

B. Procompetitive Justifications

The courts also can consider a defendant's procompetitive justifications. They can determine (1) whether the proffered justification, if true, would promote competition, and (2) whether there is evidence in the record to support the justification. First, courts can recognize justifications that limit free-riding,⁴⁶⁰ encourage dealer investment,⁴⁶¹ foster market penetration,⁴⁶² allow a new product to be developed,⁴⁶³ foster qual-

424 (S.D.N.Y. 1983); *Countrie Butcher Shoppe, Inc. v. Foodarama Supermarkets, Inc.*, No. 81-5336, 1982 WL 1909 (E.D. Pa. Oct. 14, 1982); *TV Signal Co. v. AT&T*, No. CIV 70-6N, 1981 WL 2049 (D.S.D. Mar. 13, 1981).

456. See *Hairston*, 101 F.3d at 1319 (discussing effect of sanctions imposed by athletic conference on university); *North Dakota Hosp. Ass'n*, 640 F. Supp. at 1039 (purchaser harmed by hospital association's rates); *Cantor*, 568 F. Supp. at 430 (association rule had adverse impact on business of plaintiffs—2 out of 600 licensed real estate brokers in the market); *Foodarama Supermarkets*, 1982 WL 1909, at *3 (restrictive covenant had adverse effect on competitor); *AT&T*, 1981 WL 2049, at *5 (focusing on effect of policy on plaintiff, who, incidentally, succeeded in competing in the market).

457. See *Eiberger*, 622 F.2d at 1081 (invalidating restraint by which party charged fees for sales outside territories that had effect only on intrabrand competition).

458. See *Los Angeles Mem'l Coliseum Comm. v. NFL*, 726 F.2d at 1392-95 (focusing on effect of NFL rule in local market); *NASL*, 670 F.2d at 1259-61 (finding market of "sports capital and skill"); *Smith*, 593 F.2d at 1183 ("market for players' services").

459. See *Hairston*, 101 F.3d 1315.

460. See, e.g., *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969, 972 (10th Cir. 1994); *Western Trails, Inc. v. Camp Coast to Coast, Inc.*, Civ. A. No. 90-2063 (HHG), 1994 WL 773361 (D.D.C. Jun. 16, 1994); *Gemini Concerts, Inc. v. Triple-A Baseball Club Assocs.*, 664 F. Supp. 24, 27 (D. Me. 1987); *Net Realty Holding Trust v. Franconia Properties, Inc.*, No. 82-0318-A, 1983 WL 1786, at *7 (E.D. Va. Jan. 20, 1983).

461. See, e.g., *New York v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 876 (E.D.N.Y. 1993).

462. See, e.g., *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 475 (D.D.C. 1977).

463. See, e.g., *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 605 (11th Cir. 1986); *Southtrust Corp. v. Plus Sys., Inc.*, 913 F. Supp. 1517, 1524 (N.D. Ala. 1995); *National Bank of Canada v. Interbank Card Ass'n*, 507 F. Supp. 1113, 1123 (S.D.N.Y. 1980).

1334 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

ity,⁴⁶⁴ and advance other procompetitive objectives.⁴⁶⁵ Second, they can comb the record to find evidence of the justification—documentation to that effect, for example. They also can locate evidence of procompetitive effects. For the same reasons mentioned above, courts can observe a reduction in price or an expansion in output. Courts also can recognize the flip sides of these propositions—that certain alleged justifications really are not procompetitive or that there is no evidence that supports the justifications.⁴⁶⁶

Courts must be careful. The key to the determination, of course, is whether the proffered justification has a beneficial effect on competition. The dangers here are that a court either does not credit a defendant's legitimate justification or approves an explanation that does not promote competition. The likelihood of either danger occurring should be rare. As long as it is plausible that the restraint will promote competition, courts should not dismiss the justification. Even if courts view antitrust defendants askance, and consider justifications to be nothing more than post-hoc rationalizations, that does not mean that these courts will find that there is no procompetitive justification. Nor should the reverse hold: courts typically will not be blinded by an explanation that does not really benefit competition since they can distinguish between a benefit to competition and one inhering solely to the defendant.

Courts' consideration of procompetitive effects conforms to these conclusions. The courts found that the restraint in question had a procompetitive effect in 34 cases. Although the context varied—in 20 cases, the courts conducted balancing;⁴⁶⁷ in

464. See, e.g., *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998); *Servicetrends, Inc. v. Siemens Med. Sys., Inc.*, 870 F. Supp. 1042, 1066 (N.D. Ga. 1994); *Robinson v. Magovern*, 521 F. Supp. 842, 919 (W.D. Pa. 1981).

465. See, e.g., *Grappone, Inc. v. Subaru*, 858 F.2d 792, 799 (1st Cir. 1998) (preventing parts shortages); *Northeastern Educ. Television v. Educational Television Ass'n*, 758 F. Supp. 1568, 1578 (N.D. Ohio 1990) (increasing diversity of output); *Net Realty Holding Trust v. Franconia Properties, Inc.*, No. 82-0318-A, 1983 WL 1786, at *8 (E.D. Va. Jan. 20, 1983) (promoting comparison shopping); *Jetro Cash and Carry Enters., Inc. v. Food Distrib. Ctr.*, 569 F. Supp. 1404, 1416 (E.D. Pa. 1983) (same); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 511 F. Supp. 1103, 1117 (D. Neb. 1981) (preserving integrity of game).

466. See *infra* notes 467-474 and accompanying text.

467. Three of the balancing cases barely found a procompetitive justification to weigh against an anticompetitive effect. See *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1140 (8th Cir. 1981); *Cantor v. Multiple Listing Serv.*, 568 F. Supp. 424 (S.D.N.Y. 1983); *TV Signal Co. v. AT&T*, No. Civ.70-6N, 1981 WL 2049 (D.S.D. Mar. 13, 1981).

3, they determined whether the restraint was reasonably necessary; and in 11, they summarily found the restraint to be reasonable or unreasonable—the result was the same. In every one of these 34 cases, the court reached the correct conclusion on the factor and was not blinded by the defendant's explanation. Even if the court ultimately struck down the restraint, it first found that the restraint had a procompetitive effect.

Consideration of cases in which courts found no procompetitive effect—and therefore invalidated the restraint—confirms that courts can analyze this factor and that they do not improperly ignore procompetitive justifications. Of the 14 cases in which courts found no procompetitive effect, this finding—again, most deferentially considered—was correct in 13 cases. The courts correctly found that there was no evidence to support the procompetitive effect;⁴⁶⁸ that the proffered justification was not legitimate because it questioned the necessity of competition;⁴⁶⁹ that there was no viable free-riding justification;⁴⁷⁰ or that the defendant explained its justification in the wrong market.⁴⁷¹ The only case that misconstrued this factor was *Smith v. Pro Football, Inc.*,⁴⁷² which found that the NFL draft of college players was procompetitive only “in its effect on the playing field.”⁴⁷³ The *Smith* court thus ignored a fundamental goal to which the draft contributed—competitive balance. This goal allows the NFL to put out a better product that competes

468. See *Law v. NCAA*, 134 F.3d 1010, 1022, 1024 (10th Cir.), cert. denied, 119 S. Ct. 65 (1998); *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 471-72 (6th Cir. 1992); *Wilk v. American Med. Ass'n*, 895 F.2d 352, 361 (7th Cir. 1990); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 (4th Cir. 1987); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 (9th Cir. 1982); *Countrie Butcher Shoppe, Inc. v. Foodarama Supermarkets, Inc.*, No. 81-5336, 1982 WL 1909, at *4 (E.D. Pa. Oct. 14, 1982).

469. See *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462-64 (1986); *NCAA v. Board of Regents*, 468 U.S. 85, 114-20 (1984); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-95 (1978); *United States v. Capitol Serv., Inc.*, 568 F. Supp. 134, 153 (E.D. Wisc. 1983), *aff'd*, 756 F.2d 502 (7th Cir. 1985); *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628, 648-49 (D.D.C. 1979).

470. See *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (7th Cir. 1992).

471. See *International Wood Processors v. Power Dry, Inc.* 593 F. Supp. 710, 722 (D.S.C. 1984).

472. 593 F.2d 1173 (D.C. Cir. 1978).

473. *Id.* at 1186. Earlier in its opinion, the court had conceded that “[s]ome form of player selection system may serve to regulate and thereby promote competition in what would otherwise be a chaotic bidding market for the services of college players.” *Id.* at 1181.

1336 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

more effectively against other forms of entertainment; in short, to enhance interbrand competition.⁴⁷⁴ The *Smith* case aside, courts' consideration of procompetitive effect, in particular their correct analysis of the factor in 47 out of 48 cases (98%), provides cogent support for the conclusion that courts can analyze procompetitive effects.

C. Reasonable Necessity or Less Restrictive Alternative

The third stage of the Rule of Reason analysis calls for at least one of two determinations. This Section concludes that the courts cannot do one: the search for less restrictive alternatives to the restraint.⁴⁷⁵ The Section further concludes that the other—examining whether the restraint is reasonably necessary—would benefit from a shift in the burden of production from plaintiffs having to show that the restraint is not reasonably necessary to defendants being required to show that it is reasonably necessary. Given the sources' lukewarm support of the factors, these conclusions tilt the balance as to the propriety of the factors.

1. Less restrictive alternatives

Courts cannot determine whether a restraint has alternatives that are less restrictive of competition for three reasons. First, in conducting such an examination, the courts' focus shifts naturally to whether an alternative restraint *exists* and whether this restraint is less restrictive of competition. The court does not focus on whether such a restraint would achieve the defendant's objectives *as well as* the current restraint or whether it would attain *all*—as opposed to some—of the objectives. The neglect of the link between the alternative restraint and the defendant's objectives is an ominous sign.⁴⁷⁶

474. See *NCAA v. Board of Regents*, 468 U.S. 85, 119-20 (1984) ("The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product.").

475. Of course, courts perform an analysis based on less restrictive alternatives in other fields, such as constitutional law. In antitrust law, however, it is difficult enough to determine whether an *actual* restraint promotes the defendant's goals. Determining whether a *hypothetical* restraint would achieve the goals is a not workable test. Moreover, it is arguably more defensible to allow a more activist judicial role to protect constitutional norms such as freedom of speech than to second-guess business judgments and intervene in the marketplace.

476. See *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1396-97

Second, and compounding this problem, courts can *always* find a less restrictive alternative. Unlike the defendant, who presumably decides in advance whether a particular restraint will achieve its objectives, a court looks post hoc at the restraint and its effects, and can always tinker at the margins. It can opine that a manufacturer should have had a few more dealers, that an exclusive dealing agreement should have foreclosed a little less of the market, that an association's rule should have had a little less of an effect on a competitor. The "imagination of lawyers could [always] conjure up some method"⁴⁷⁷ of achieving the defendant's objectives that would have a marginally lesser effect on competition.⁴⁷⁸ As a result, courts would second-guess legitimate business judgments made by defendants.⁴⁷⁹

Third, and relatedly, courts looking for a *less* restrictive restraint will, in effect, conduct a *least*-restrictive-alternative analysis.⁴⁸⁰ The only type of restraint that will not have a less restrictive alternative is the least restrictive alternative. Any other restraint, by definition, will have a less restrictive alternative. So in looking for less restrictive alternatives, the courts actually are penalizing the defendants for not using the least restrictive alternative.⁴⁸¹ Courts that promise that they are searching only for less (and not least) restrictive alternatives are only deceiving themselves. This is not constitutional law;⁴⁸² whether a restraint is the least restrictive alternative leads the court on a wild goose chase not appropriate in antitrust law.⁴⁸³

(9th Cir. 1984); Cantor v. Multiple Listing Serv., 568 F. Supp. 424, 431 (S.D.N.Y. 1983).

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

478. See *id.*; see also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979).

479. See *American Motor Inns*, 521 F.2d at 1249-50.

480. On remand from the Supreme Court, the *Sylvania* court explained the dangers of an analysis based on least restrictive alternatives: such a rule "would place an unreasonable and impractical burden on a manufacturer desiring to impose some vertical restraint in order to promote its position vis-à-vis its competitors." Continental T.V., Inc. v. GTE Sylvania, Inc., 694 F.2d 1132, 1138 n.11 (9th Cir. 1982).

481. The only conceivable difference between the terms results when there exists a range of alternatives less restrictive than the restraint at issue. Then, the least restrictive alternative would be different from marginally-more-restrictive "less restrictive alternatives." Stating this distinction demonstrates its irrelevance.

482. See *NFL v. NASL*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of cert.) ("The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity.").

483. This Article does not dispute that, properly applied, the less restrictive alter-

1338 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

In practice, the courts' consideration of the factor confirms that they should abandon all inquiry—as a separate step in the burden-shifting analysis or as a factor in balancing—as to whether the restraint at issue has less restrictive alternatives. Only one court has disposed of a case because no less restrictive alternative could be shown.⁴⁸⁴ Three courts considered the factor in their balancing analysis,⁴⁸⁵ and three did so in concluding that a restraint was not unreasonable.⁴⁸⁶ Of the seven cases, the court in the case for which the factor was dispositive and the courts in the three balancing cases misanalyzed the factor. Thus, courts in only 3 out of 7 cases (43%) correctly determined whether there were less restrictive alternatives.

The one case in which the factor was dispositive illustrates the danger of the analysis. The court in *Hairston v. Pacific 10 Conference*⁴⁸⁷ relied on the absence of less restrictive alternatives in addressing an athletic association's imposition of sanctions on a university that committed violations in recruiting football players.⁴⁸⁸ The court found that the university's inability to participate in bowl games satisfied the threshold of anti-competitive effect, and that the punishment of football programs that violate the conference's amateurism rules had procompetitive effects.⁴⁸⁹ The court concluded that the plaintiffs failed to show "that the [association's] procompetitive objectives could be achieved in a substantially less restrictive manner."⁴⁹⁰ The court's opinion was flawed.

First, the court never should have reached the third stage of the burden-shifting analysis. There was no anticompetitive effect. The court cursorily found such an effect despite its fail-

native analysis would be useful. After all, who could be against a test that allows the defendant to achieve all of its procompetitive objectives while having a less restrictive effect on competition? The recommendations of this Article, however, take into account courts' capacities. The Article draws conclusions based not on best-case-keep-our-fingers-crossed scenarios but on today's courts, warts and all.

484. See *Hairston v. Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996).

485. See *Los Angeles Mem'l Coliseum Comm. v. NFL*, 726 F.2d 1381 (9th Cir. 1984); *NASL v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *Cantor v. Multiple Listing Serv.*, 568 F. Supp. 424 (S.D.N.Y. 1983).

486. See *Barry v. Blue Cross of California*, 805 F.2d 866 (9th Cir. 1986); *Foster v. Maryland State Sav. and Loan Ass'n*, 590 F.2d 928 (D.C. Cir. 1978); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977).

487. 101 F.3d 1315 (9th Cir. 1996).

488. See *id.* at 1317.

489. See *id.* at 1319.

490. *Id.*

ure to define the scope of the relevant market in which the restraint had an effect and to cite any adverse effect on competition, as opposed to one competitor.⁴⁹¹ But it is the court's discussion of less restrictive alternatives that raises a red flag. Most fundamentally, the court never examined whether a less restrictive alternative would promote the defendant's goals. It rested its conclusion on the plaintiffs' failure to provide evidence supporting their claim that the penalties imposed were disproportionate.⁴⁹² Even most broadly considered, this inquiry addresses only a range of penalties related to the actual restraint; it does not implicate other alternatives. As for the objectives themselves, the court graced them with only one sentence.⁴⁹³ As an example of a court conducting a less restrictive alternative analysis without analyzing other alternatives and without examining the link between the restraint and the defendant's objectives, *Hairston* warns of the difficulties of the less restrictive alternative analysis.

The three courts that examined the factor of less restrictive alternatives in their balancing analysis did not fare any better. In *Los Angeles Memorial Coliseum Commission v. NFL* ("Raiders"),⁴⁹⁴ a central factor in the court's affirmance of a jury verdict that the NFL's relocation rules were unreasonable was the contention that the NFL's "goals can be achieved in a variety of ways which are less harmful to competition."⁴⁹⁵ The court concluded that the League's consideration of objective factors in determining whether franchises could relocate would be more "closely tailored" to its goals.⁴⁹⁶ It never explained, however, how the consideration of objective factors would have a less restrictive effect on competition. In fact, after lauding the benefits of a less restrictive alternative analysis,⁴⁹⁷ the court never actually admitted that the consideration of objective factors was a less restrictive alternative at all.

In *NASL v. NFL*,⁴⁹⁸ the court invalidated the NFL's cross-

491. See *Hairston*, 101 F.3d at 1319. Moreover, the court had stated, earlier in its opinion, that the plaintiffs had failed to show an anticompetitive effect. See *id.* at 1318.

492. See *id.* at 1319.

493. See *id.*

494. 726 F.2d 1381 (9th Cir. 1984).

495. *Id.* at 1396.

496. *Id.* at 1397. The factors the court mentioned were population, economic projections, facilities, regional balance, fan loyalty, and location continuity. See *id.*

497. See *id.* at 1395.

498. 670 F.2d 1249 (2d Cir. 1982).

1340 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

ownership rules based in part on the existence of less restrictive alternatives. The court found, for example, that any conflict of interest between the sports leagues in selling broadcast rights could be remedied “by removing cross-owners from [the NFL’s] broadcast rights negotiating committee.”⁴⁹⁹ Similarly, the court rejected the NFL’s argument that the rules were necessary to prevent the disclosure of confidential information to the rival league because there were “less restrictive means”⁵⁰⁰ of attaining the goal. Yet the court incorrectly focused on the *existence* of less restrictive alternatives rather than whether the alternatives would achieve the NFL’s objectives.⁵⁰¹ It did not show how removing owners from the broadcast rights committee achieved, at a minimum, the proffered goals outside this sphere—such as preventing conflict in the sale of game tickets.⁵⁰² Nor did the court explain how preventing the disclosure of confidential information could be achieved by “less restrictive means” that it did not even describe.⁵⁰³

In *Cantor v. Multiple Listing Service*,⁵⁰⁴ the court invalidated a real estate association bylaw that prevented members from posting signs from other organizations on property that was for sale. The court devoted one sentence of its opinion to the defendant’s objectives, and summarily noted that the objectives could be achieved by requiring the posting of association signs “no less conspicuously” than other signs.⁵⁰⁵ The court never explained how its alternative was less restrictive of competition as a whole or how such an alternative would promote the defendant’s objectives.

Three courts did not botch the less restrictive alternative analysis, but the role of the analysis in their opinions is not clear. In *Hennessey v. NCAA*,⁵⁰⁶ the court upheld a bylaw of the NCAA that limited the number of assistant football and basketball coaches that institutions could employ.⁵⁰⁷ The court did

499. *Id.* at 1261.

500. *Id.*

501. The court also misstated the governing law on the burden of production by requiring the NFL to “come forward with proof” of such alternatives. *Id.*

502. *See id.*

503. *See id.*

504. 568 F. Supp. 424 (S.D.N.Y. 1983).

505. *Id.* at 431.

506. 564 F.2d 1136 (5th Cir. 1977).

507. *See id.* at 1141.

not discern any effects of the bylaw, given its recent enactment, but it concluded that the restraint would achieve the NCAA's objectives.⁵⁰⁸ The court correctly rejected plaintiffs' proffered less restrictive alternatives (a longer grace period before the application of the bylaw and a compensation limit for coaches).⁵⁰⁹ In *Barry v. Blue Cross of California*,⁵¹⁰ the court upheld an arrangement by which the Blue Cross reimbursed physicians that participated in a particular insurance package at a higher rate.⁵¹¹ The court found that the restraint had no anticompetitive effects, that it had procompetitive effects in lowering prices, and that a less restrictive alternative suggested by the plaintiff—reimbursing nonparticipating doctors at the same rate that participating doctors received—was not a viable alternative since it would not have achieved the objective of encouraging doctors to join the insurance package.⁵¹² Finally, in *Foster v. Maryland State Savings and Loan Ass'n*,⁵¹³ the court upheld a practice of a savings and loan association to charge lenders a fee if they employed attorneys other than the association's own counsel. After finding the restraint to be, at most, "de minimis"⁵¹⁴ and reasonable, the court rejected plaintiffs' claimed less restrictive alternatives. In particular, the court noted that the association had already—unsuccessfully—tried the suggested alternative of relying on borrowers' counsel.⁵¹⁵

2. Reasonable necessity

A court can, on the other hand, examine whether a restraint is reasonably necessary to achieve the defendant's objectives. And it must make this assessment, as irrelevant procompetitive justifications having nothing to do with the restraint cannot be permitted to blind the court.⁵¹⁶ Even so, the

508. *See id.* at 1153-54.

509. *See id.* at 1154. The grace period did not "support[] the objective" of the bylaw and the compensation limit was not "less [of] a restraint" than the bylaw at issue. *Id.*

510. 805 F.2d 866 (9th Cir. 1986).

511. *See id.* at 867.

512. *See id.* at 872-73.

513. 590 F.2d 928 (D.C. Cir. 1978).

514. *Id.* at 933.

515. The court explained that many attorneys employed by the borrowers were inexperienced, unqualified in the field at issue, and overly concerned with completing the sale. *See id.* at 934.

516. *See Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1577 n.31

1342 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

analysis of reasonable necessity would benefit from a shift in the burden of production. Better to let the *defendant* prove that the restraint *is* reasonably necessary than to have the *plaintiff* prove it is *not*.

The standard of "reasonable necessity" ensures that courts can analyze this factor. For starters, courts can determine whether a defendant is pursuing legitimate procompetitive objectives.⁵¹⁷ They also can determine whether a particular restraint is sufficiently connected to the goal to be "reasonably necessary." They need not decide whether the restraint is the most effective means to achieve the objective. They need not examine whether there are less restrictive alternatives to the restraint. Nor do they have to prove that a restraint is, a priori, a logical predicate without which the objective could not be achieved. They only have to decide the easier inquiry of whether the restraint is reasonably required to attain the objective. Courts can do this. And they have. For example, courts have found to be reasonably necessary restraints that had the tendency to (and that did) create a product that would not otherwise have been available and that improved service to customers.⁵¹⁸ Further, a court invalidated a restraint that did not appear necessary to promote servicing coverage for customers.⁵¹⁹ Despite courts' capacity on this issue, they would benefit from a shift in the burden of production.

A restraint's necessity can best be addressed by the defendant. The defendant is most familiar with its chosen objectives, its capacities, the types of (successful and unsuccessful) restraints that it has used in the past, and the market in which the restraint is applied.⁵²⁰ In contrast, plaintiffs' knowledge of

(11th Cir. 1983) (the standard of reasonable necessity "helps to illuminate both the manufacturer's motive in imposing the restrictions and the effects of the restriction on competition overall"); Donald B. Rice Tire Co. v. Michelin Tire Corp., 483 F. Supp. 750, 758 (D. Md. 1980) ("A poor fit between means and ends suggests that the avowed purpose is merely a pretext."), *aff'd*, 638 F.2d 15 (4th Cir. 1981).

517. See *supra* notes 460-465 and accompanying text.

518. See *infra* notes 526-529 and accompanying text.

519. See *infra* note 530 and accompanying text.

520. See SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 961, 969 (10th Cir. 1994) (describing association's reason for adopting and maintaining restraint); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983) (noting reason for restraint and link to objectives); Broadcast Music, Inc. v. Moor-Law, Inc., 527 F. Supp. 758, 767 (D. Del. 1981) (explaining reason for restraint), *aff'd*, 691 F.2d 400 (3d Cir. 1982); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F. Supp. 1103, 1117-21 (D. Neb. 1981) (noting relationship between restraint and objectives); Newberry v. Washington Post

such information is at best secondhand. Shifting the burden to the defendant thereby benefits the courts, which obtain better and more reliable information.⁵²¹

Shifting the burden to the defendant has three other benefits. First, it emphasizes whether the restraint is necessary to achieve the defendant's objectives, rather than necessary in comparison with other alternatives. The defendant would be more likely than the plaintiff to explain the link between the restraint and the objectives (or be unable to persuasively justify the link)⁵²² and less likely to examine other alternatives.⁵²³

Second, allowing the defendant to prove a positive makes more sense than requiring the plaintiff to prove a negative. It is an easier project to determine what *is* reasonably necessary than to prove what is *not*. How could a party ever prove this negative? Naturally, by putting forward alternatives that are necessary. And, chances are, those alternatives would supposedly be less restrictive of competition. It is much more straightforward and reasonable to allow the defendant to show what *is* reasonably necessary than to set the plaintiff off on a hunt of no finite duration to show what is not reasonably necessary.

Third (and relatedly), courts' misapplication of this factor supports the burden shift and reveals the difficulty courts have had with proving the negative. Stated bluntly, *no court has accurately observed the effect of the plaintiff's satisfaction of the factor.*⁵²⁴ The courts seem not to have noticed that proving this

Co., 438 F. Supp. 470, 475 (D.D.C. 1977) (describing purpose of objective and market in which restraint operated).

521. Because the plaintiff's proof of anticompetitive effect precedes the defendant's showing, the burden shift would be less consequential than the one proposed by Assistant Attorney General Joel Klein as part of a "stepwise" approach. See Joel I. Klein, *Point: A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST 41, 42 (Spring 1998) (if agreement directly limits competition, "the burden shifts to the defendant to proffer a procompetitive justification").

522. See *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1578 (11th Cir. 1983) (finding that defendant presented "no evidence" demonstrating that use of restraint was "important to the goal of improved service coverage").

523. See, e.g., *SCFC*, 36 F.3d at 969; *Broadcast Music*, 527 F. Supp. at 769-72; *Gunter Harz*, 511 F. Supp. at 1117-21; *Newberry*, 438 F. Supp. at 475. For an argument that assigning the burden to the party with lower costs of proof "economizes on both direct costs and error costs," see Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 B.Y.U. L. REV. 1, 17.

524. The court in *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir.), *cert. denied*, 119 S. Ct. 65 (1998), explained that "if [the] steps [of the burden-shifting construct]," including the plaintiff's burden to show that the restraint was not reasonably necessary,

1344 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

factor leads to the opposite result of proving either of the prior two factors. That is, if the plaintiff cannot meet the initial burden of demonstrating an anticompetitive effect, he loses; and if the defendant cannot meet the second burden of showing procompetitive justifications, then she loses. But if the plaintiff cannot prove the third factor—that the restraint is not reasonably necessary—then he does not *lose*. Rather, the case proceeds to balancing.⁵²⁵ The case is only disposed of at the third stage if the plaintiff *can* show that the restraint is not reasonably necessary. Then, the plaintiff *wins*.

Although six courts have considered the reasonable necessity of restraints, none disposed of them in the context presented in this Article and recently articulated by some courts—the third stage of the burden-shifting analysis. As a result, the courts that explained incorrectly the effect of the plaintiff's demonstration of the third factor did not actually apply the factor. In any event, the conclusion that courts can determine reasonable necessity is confirmed by reference to the cases. Each of the six courts (100%) correctly analyzed the factor. Courts correctly found restraints to be reasonably necessary where they created a product that would not otherwise have been available,⁵²⁶ where they increased market penetration and improved service to customers,⁵²⁷ and where they furthered professional⁵²⁸ or amateur⁵²⁹ athletic endeavors. A court also found, as part of a balancing analysis, that a defendant failed to show that its territorial restraints were reasonably neces-

are met, then the court proceeds to balancing. To the contrary, if the plaintiff satisfies its burden at the third stage, it wins.

Similarly, the court in *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), was misguided in finding that in order “[t]o rebut” the defendant’s demonstration of procompetitive justifications, the plaintiff “must demonstrate that the restraint is not reasonably necessary.” *Id.* at 669. But again, the plaintiff need not demonstrate such; if it does not make this showing, then the court balances. Two other courts veered off track in following the court in *Brown*. See, e.g., *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996); *Yeager’s Fuel, Inc. v. Pennsylvania Power & Light Co.*, 953 F. Supp. 617, 657 (E.D. Pa. 1997).

525. See VII AREEDA, *supra* note 3, ¶ 1507, at 397.

526. See *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994); *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981).

527. See *Newberry v. Washington Post Co.*, 438 F. Supp. 470 (D.D.C. 1977).

528. See *Gunter Harz Sports, Inc. v. United States Tennis Ass’n*, 511 F. Supp. 1103 (D. Neb. 1981).

529. See *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983).

sary to promote servicing of its product.⁵³⁰

Despite the failure to consider the restraints in the context of the third stage of the Rule of Reason analysis, the cases still confirm the benefits of shifting the burden to the defendants to show reasonable necessity. The courts benefitted from defendants' explanations of how various restraints would be effective means of serving consumers,⁵³¹ preventing free-riding,⁵³² and preserving amateurism⁵³³ and the integrity of a sport.⁵³⁴ For example, the court in *Gunter Harz*, in upholding a restraint prohibiting the use of particular equipment, considered expert testimony proffered by the defendants that revealed the necessity of the restraint and adverse consequences that had already resulted from the use of the equipment to be prohibited.⁵³⁵ Such evidence naturally is revealed more by the defendant showing the necessity of the restraint than the plaintiff demonstrating the opposite. It is noteworthy that many of the courts that have required a restraint to be reasonably necessary have explicitly rejected the analysis of whether the restraint was the least restrictive alternative.⁵³⁶

Thus, courts can examine whether a restraint is reasonably necessary, but they would benefit from a shift in the burden of production from the plaintiff proving it is not necessary to the defendant proving it is. Taken with the elimination of the less restrictive alternative analysis as a factor in the Rule of Reason, this Article proposes that the third stage be merged into the second. The new second stage would require the defendant to prove that the restraint is reasonably necessary to achieve a

530. See *Graphic Products Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir. 1983).

531. See *Broadcast Music*, 527 F. Supp. at 767.

532. See *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969 (10th Cir. 1994).

533. See *Justice*, 577 F. Supp. at 382.

534. See *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 511 F. Supp. 1103, 1117-21 (D. Neb. 1981).

535. See *id.* at 1118-21.

536. See *Broadcast Music*, 527 F. Supp. at 769 (“[T]he test is not whether the defendant deployed the least restrictive alternative. Rather the issue is whether the restriction actually implemented is ‘fairly necessary’”) (quoting *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49 (3d Cir. 1975)); *Consolidated Farmers Mutual Ins. Co. v. Anchor Sav. Ass'n*, 480 F. Supp. 640, 653 (D. Kan. 1979) (“So long as the defendants’ actions are reasonable, they need not constitute the ‘least restrictive alternative’ available.”) (citation omitted); *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 475 (D.D.C. 1977) (citation omitted) (restraint was not “the least restrictive alternative imaginable, but such a showing need not be made”).

legitimate procompetitive objective.

D. Balancing

1. Theory

Can the courts balance anticompetitive and procompetitive effects? The odds are against them. For courts rarely will be able to sum up a restraint's net effect on output or price. By no stretch can we be assured of the results of balancing with mathematical exactitude. It is no surprise, then, that courts are not confident that they can tackle balancing under the Rule of Reason, calling it a task that is "extremely awkward to apply,"⁵³⁷ that lacks an analytical framework,⁵³⁸ and that is "beyond judicial capabilities."⁵³⁹

But that is not to say it cannot be done. Or that the checklist of factors cited by courts from the landmark case of *Board of Trade of Chicago v. United States*,⁵⁴⁰ often cited by courts to show their incapacity, cannot be ordered to comport with today's Rule of Reason analysis. The Court in *Board of Trade* recommended that courts 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[, as well as] [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained.⁵⁴¹

537. *New York v. Anheuser Busch*, 811 F. Supp. 848, 872 (E.D.N.Y. 1993) ("Competitive effects are not susceptible to any kind of numerical valuation, making the Court's task a daunting one."); see also *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 597 (11th Cir. 1986) (the Rule of Reason is "a time-consuming process that entails significant costs" and is hampered by "the general lack of judicial expertise in sophisticated economic analysis as well as the lack of certainty that such case law produces").

538. See *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1568 n.10 (11th Cir. 1983) (also noting the "exceedingly general nature" of the factors cited in the *Chicago Board of Trade* analysis).

539. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 230 n.11 (D.C. Cir. 1986); see also *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 343 (1982) (citation omitted) ("Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition.").

540. 246 U.S. 231 (1918).

541. *Id.* at 238.

Although courts throw up their hands in despair when confronted with such a seemingly orderless litany,⁵⁴² the checklist, on closer analysis, is not so intimidating.

Most of the factors in the *Board of Trade* checklist are consistent with an examination of the effect of a restraint on interbrand competition. Several factors conform with the initial burden in today's Rule of Reason analysis of demonstrating anticompetitive effect: the actual effect of the restraint (akin to actual adverse effect in today's analysis), the probable effect (akin to market power), and the condition before and after the imposition of the restraint (generally corresponding with anticompetitive effect). The defendant's proof of procompetitive justifications is mirrored most closely in the factor of the *Board of Trade* checklist addressing the "purpose or end sought to be attained," and it also encompasses the reason for adopting the restraint and the evil believed to exist.

Having addressed the first two factors of today's Rule of Reason analysis, what factors from the *Board of Trade* test are left? First, the nature of the restraint, which today's courts consider in placing the restraint into a particular category that governs, among other things, whether they will apply the Rule of Reason or *per se* treatment. Second, courts consider the "facts peculiar to the business to which the restraint is applied" in their examinations of the relevant market. Third, the history of the restraint and "facts peculiar to the business" that are unrelated to the market are relevant in determining the reasonable necessity of the restraint. Thus, the impenetrable *Board of Trade* checklist is brought down to size.

But we are still left with balancing. How can courts do it? Doesn't it require the comparing of apples (*e.g.*, an increase in interbrand competition) and oranges (*e.g.*, a decrease in intrabrand competition)? This Article does not pretend to offer the secret to successful balancing. Rather, it offers only a modest reminder that, in analyzing the effects of a restraint, courts should be riveted on the effects on consumers and interbrand competition. While the legislative history may be consistent with other—namely, noncompetition—goals for the antitrust laws, and while some (in particular, members of the Post-Chicago School) have argued that such goals should be in-

542. See, *e.g.*, *Visa*, 779 F.2d at 597; *Itek*, 717 F.2d at 1568 n.10.

1348 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

cluded in the Rule of Reason analysis,⁵⁴³ even these proponents must recognize the significance of the consumer in the analysis. Relatedly, there can be no doubt that the consumer benefits from an increase in interbrand competition. Remembering and applying these simple maxims will add substantial credibility to courts' balancing. There will, of course, always be cases at the margins where it will not be self-evident whether a restraint would increase consumer welfare or interbrand competition. But judging from the nearly five hundred Rule of Reason cases in the modern era, in which the overwhelming majority of courts found no restraint on competition, let alone an unreasonable restraint, such cases should be few and far between.

Moreover, not all cases in which courts utilize balancing will be difficult. Courts should have no problem, for example, invalidating an association standard that provides, at most, a marginal benefit for consumers while substantially raising price or restricting output. Nor should they have difficulty with an exclusive dealing arrangement that forecloses nearly all of the relevant market. On the other hand, courts should uphold such an arrangement that forecloses a small percentage of the market but that reduces free-riding. They also should uphold a vertical restraint that enhances investment, quality, or output.⁵⁴⁴

And any concerns about balancing should be diminished by the paucity of such cases. Only 4% of cases in the modern era have balanced, with only 6 cases in the past 10 years,⁵⁴⁵ and 1 case in the past 4 years.⁵⁴⁶

As an aside, it should be noted that there must be *some* method for the court to consider anticompetitive and procompetitive effects when both are present. Now, other types of balancing can be postulated. A narrower test than the current balancing, for example, may look only to the net effect of the restraint on output. But such an approach will not solve most cases since the competitive effects of restraints do not usually

543. See *supra* notes 304-07 and accompanying text.

544. The 1997 revisions to the Horizontal Merger Guidelines provide support for the conclusion that courts can balance, particularly in their consideration of both efficiencies and adverse competitive effects resulting from mergers. See Department of Justice & Federal Trade Commission Horizontal Merger Guidelines ("4. Efficiencies") (1997 Revision).

545. See *infra* note 548 and accompanying text.

546. See *infra* note 549 and accompanying text.

manifest themselves so clearly as to lead to a “net result.” Additionally, other, broader tests can be imagined by which the parties are free to introduce any concerns they feel relevant. Yet such tests would be characterized by administrative unworkability and a lack of guidance for the parties, courts, scholars, and future defendants. There also could be broader tests that focus primarily on other delineated goals—such as the dispersal of power or the promotion of competition as process. But it is still not clear how such tests would mesh with the goal of consumer welfare. Could a little consumer welfare be sacrificed for other objectives? How much? What if consumer welfare and the other goals tilt in different directions? Although such a construct is not inconceivable, this Article would not recommend such an approach unless and until it becomes clear what role and significance would be accorded to each of the goals in the analysis and how the various goals would interrelate.⁵⁴⁷ Even beneficial ends would do more harm than good without direction to the courts as to how they are to be weighed.

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. It is essential, however, that the stages preceding balancing be faithfully applied. No skipping to balancing because of some overriding political goals. Or because we want the court to have discretion to rely on its “gut feeling” to arrive at the right result. Balancing should occur only in the rarest of cases. And when it does occur, the brooding omnipresence of consumers and interbrand competition should serve as a beacon to courts, guiding them in the right direction.

2. *The cases*

Before exploring the instances in which courts have conducted balancing, it is worth pausing to reflect on the infrequency with which courts in the 1990s have decided Rule of Reason cases by balancing anticompetitive and procompetitive effects. Of the 20 cases in the modern era in which courts con-

547. In addition, pursuing the goal of consumer welfare often will promote nonefficiency goals. See, e.g., Phillip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 534-35 (1983); Brodley, *supra* note 292, at 1021.

1350 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

ducted balancing, only 6 were decided in the last 10 years,⁵⁴⁸ and only 1 of these was decided in the last 4 years.⁵⁴⁹ In short, as we enter the twenty-first century, courts almost never balance.

Further diminishing the significance of balancing, the courts could have disposed of 10 of the 20 cases in which they balanced simply by finding that the plaintiff had failed to demonstrate a significant anticompetitive effect. In seven cases, the courts explicitly found that there was no adverse effect on competition.⁵⁵⁰ In three other cases, they could have found a lack of anticompetitive effect.⁵⁵¹ For the 10 cases in which balancing was unnecessary, the courts in 9 cases concluded, consistent with the absence of anticompetitive effect, that the procompetitive effects outweighed the anticompetitive effects.⁵⁵² In one

548. See *Eleven Line, Inc. v. North Tex. State Soccer Ass'n*, No. CA-3-95-CV-3120-R, 1998 WL 574893 (N.D. Tex. Aug. 26, 1998); *NBA v. Williams*, 857 F. Supp. 1069 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995); *Servicetrends, Inc. v. Siemens Med. Sys., Inc.*, 870 F. Supp. 1042, 1066 (N.D. Ga. 1994); *New York v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 873 (E.D.N.Y. 1993); *Williamson v. Sacred Heart Hosp.*, No. 89-30084-RV, 1993 WL 543002, at *50 (N.D. Fla. May 28, 1993); *Eureka Urethane, Inc. v. PBA, Inc.*, 746 F. Supp. 915 (E.D. Mo. 1990).

549. See *Eleven Line, Inc.*, 1998 WL 574893.

550. See *Grappone, Inc. v. Subaru*, 858 F.2d 792, 797, 799 (1st Cir. 1988) (finding defendant's market share was "miniscule," there was no demonstrated "actual anticompetitive effect" in the tied product market, and "the tie shows no more than trivial effects"); *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 605 (11th Cir. 1986) (defendant "does not possess market power"); *Plueckhahn v. Farmers Ins. Exch.*, 749 F.2d 241, 247 (5th Cir. 1985) (plaintiff failed to demonstrate "substantial adverse effect"); *Anheuser-Busch, Inc.*, 811 F. Supp. at 873 (defendant lacks market power because of its "relatively small market share, [the] lack of entry barriers and the intense price competition"); *Sacred Heart Hosp.*, 1993 WL 543002 at *50 (noting defendant's "small share" of market and the absence of any "detriment to competition"); *Net Realty Holding Trust v. Franconia Properties, Inc.*, No. 82-0318-A, 1983 WL 1786, at *7 (E.D. Va. Jan. 20, 1983) (noting "very slight" anticompetitive effect because only a fraction of 1% of the relevant market was affected); *Jetro Cash and Carry Enters., Inc. v. Food Distrib. Ctr.*, 569 F. Supp. 1404, 1416 (E.D. Pa. 1983) (noting restraint "simply does not have a significant adverse effect on competition").

551. See *Servicetrends, Inc. v. Siemens Med. Sys., Inc.*, 870 F. Supp. 1042, 1065 (N.D. Ga. 1994) (exclusive dealing arrangement foreclosed only 32 to 38% of relevant market); *Cantor v. Multiple Listing Serv.*, 568 F. Supp. 424, 430-31 (S.D.N.Y. 1983) (finding anticompetitive effect because of "substantial adverse impact on plaintiffs' businesses" where plaintiffs were two out of more than six hundred licensed real estate brokers in the market); *Robinson v. Magovern*, 521 F. Supp. 842, 919 (W.D. Pa. 1981) (anticompetitive effects were "not severe" and the affected doctors "almost certainly [would] have access" to facilities in relevant market).

552. See *Grappone*, 858 F.2d 792; *National Bancard*, 779 F.2d 592; *Plueckhahn*, 749 F.2d 241; *Siemens*, 870 F. Supp. 1042; *Anheuser-Busch*, 811 F. Supp. 848; *Sacred Heart Hosp.*, 1993 WL 543002; *Net Realty Holding Trust*, 1983 WL 1786; *Jetro Cash and Carry Enters.*, 569 F. Supp. 1404; *Robinson*, 521 F. Supp. 842.

case, however, the court concluded that the anticompetitive effects predominated even though it should have found that there was no anticompetitive effect at all.⁵⁵³

The courts' success in balancing was related to the type of restraint at issue. The courts correctly decided cases involving vertical nonprice restraints. However, they often did not reach the right result when addressing rules of associations or restraints imposed by a supplier on a purchaser.

In addressing vertical restraints, courts generally arrived at the correct result. They appropriately found that vertical integration in the newspaper industry—an industry in which a defendant likely would not restrict output because of its dependence on advertising revenues, which benefit from high circulation resulting from low prices—had procompetitive efficiencies that outweighed any anticompetitive effect resulting from the elimination of a potential competitor;⁵⁵⁴ that territorial restraints that encourage investment, promotion, and improved servicing outweighed limited intrabrand effects caused by territorial restrictions;⁵⁵⁵ and that a defendant with a seventy percent market share failed to show that territorial restraints were sufficiently justified and reasonably necessary to achieve objectives of servicing and market penetration that would outweigh its anticompetitive effects.⁵⁵⁶ Fact scenarios falling most broadly in the realm of vertical restraints confirm this conclusion, as courts correctly analyzed cases involving exclusive dealing agreements,⁵⁵⁷ tying arrangements,⁵⁵⁸ and refusals to deal.⁵⁵⁹

553. See *Cantor*, 568 F. Supp. 424.

554. See *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 701, 704 (8th Cir. 1984).

555. See *Anheuser-Busch*, 811 F. Supp. at 875-77.

556. See *Graphic Products Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1577-78 (11th Cir. 1983). Although the court in *Itek* found that there was no evidence in the record demonstrating that the restraint was reasonably necessary to achieve the defendant's objectives, another record could have revealed the defendant's need for territorial restrictions to ensure that servicers were spread out, thereby enhancing servicing and increasing market penetration.

557. See *Servicetrends, Inc. v. Siemens Med. Sys., Inc.*, 870 F. Supp. 1042, 1066 (N.D. Ga. 1994) (finding no substantial foreclosure based on foreclosure of less than 38% of market and justifications for restraint).

558. See *Grappone, Inc. v. Subaru*, 858 F.2d 792, 799 (1st Cir. 1988) (procompetitive justifications of tying arrangement by which automobile distributor required dealers to take relatively inexpensive spare parts kits outweighed "trivial" anticompetitive effects).

559. See *Williamson v. Sacred Heart Hosp.*, No. 89-30084-RV, 1993 WL 543002, at *50 (N.D. Fla. May 28, 1993); (procompetitive benefit of allowing consumers the choice

1352 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

Cases under the expansive heading “unfair competition” presented a problem for courts. Two of these cases, dealing with restrictive covenants, were correctly analyzed. One court found that the procompetitive benefits of enhanced comparison shopping resulting from a market limited in location and hours outweighed an “insignificant” anticompetitive effect.⁵⁶⁰ A second court held that a restrictive covenant requiring certain occupants in a mall to operate as department stores served legitimate purposes such as preventing free riding⁵⁶¹ that outweighed the minimal anticompetitive effect in a fraction of one percent of the relevant market.⁵⁶²

The courts in the other two cases in the category, those in which purchasers complained of actions taken by suppliers,⁵⁶³ both balanced incorrectly. In *United States v. North Dakota Hospital Ass'n*,⁵⁶⁴ a purchaser challenged the actions of non-profit hospitals and a hospital association in billing customers based on their actual costs rather than granting discounts.⁵⁶⁵ The hospitals, with average operating margins 2 to 3% above cost, refused to grant discounts, which did not cover the hospitals' costs, and which required patients to absorb the costs of the discounts when the plaintiff, a governmental agency, ran out of money, as it repeatedly had in past years.⁵⁶⁶ The court's balancing under the Rule of Reason was flawed in a number of respects: (1) it failed to define a market; (2) it found anticompetitive harm even where the plaintiff actually received discounts and did not suffer an “adverse effect on . . . price”;⁵⁶⁷ and

of an additional HMO outweighed effect of exclusion of doctor, who, in any event, “was a highly effective competitor”); *Robinson v. Magovern*, 521 F. Supp. 842, 919 (W.D. Pa. 1981) (by creating a high-quality staff, hospital contributed to “[v]igorous competition” among hospitals, thereby raising level of care for the public, and outweighing any anticompetitive effects suffered by doctor who was denied staff privileges at hospital).

560. *Jetro Cash and Carry Enters., Inc. v. Food Distrib. Ctr.*, 569 F. Supp. 1404, 1415-16 (E.D. Pa. 1983).

561. The free riding concern was that, once the mall was operating, a department store could be tempted to subdivide and survive because of consumer traffic generated by other department stores in the mall.

562. *See Net Realty Holding Trust v. Franconia Properties, Inc.*, No. 82-0318-A, 1983 WL 1786, at *7-*8 (E.D. Va. Jan. 20, 1983).

563. This Article groups the cases with horizontal restraints because of the adverse impact on competitors; the cases could also be viewed as refusals to deal.

564. 640 F. Supp. 1028 (D.N.D. 1986).

565. *See id.* at 1030-31, 1039.

566. *See id.* at 1031, 1038.

567. *Id.* at 1039.

(3) it failed to adequately consider the restraint's procompetitive effects in creating a standardized reimbursement system, thereby facilitating cost comparison and protecting other patients and buyers "from having to absorb the costs of granting discounts"⁵⁶⁸ to the plaintiff.⁵⁶⁹ The court summarily concluded that the "anticompetitive harm of [the restraint] outweigh[ed] the procompetitive benefits."⁵⁷⁰ The court should have come to the opposite conclusion based on the presumed lack of market power, absence of harm suffered by the plaintiff, and significant procompetitive benefits.⁵⁷¹

In the second case, *TV Signal Co. of Aberdeen v. AT&T*,⁵⁷² the defendant telephone company enforced a policy of attaching a maximum of one cable per telephone pole to the detriment of the plaintiff cable television company.⁵⁷³ The court's opinion invalidating the restraint is flawed for three reasons. First, the court provided no support for its conclusory definitions of product and geographic markets and failed to examine the restraint's effect on competition. Second, it misconstrued injury to the plaintiff—even assuming that harm suffered by the plaintiff could demonstrate anticompetitive effect—by downplaying the plaintiff's success in entering the market and extraneously claiming that its success came "in spite of"⁵⁷⁴ defendant's policy. Third, the court ignored the defendant's justifications, cryptically claiming that the justifications "cannot sanitize"⁵⁷⁵ the restraint "when they travel in company with a significant anti-competitive purpose and effect."⁵⁷⁶ The *AT&T* court should have decided the case either by finding no anti-competitive effect or at least considering the procompetitive justifications, which would have outweighed any perceived anticompetitive effect.

Association rules presented the context in which courts bal-

568. *Id.* at 1038.

569. *See id.* at 1039.

570. *Id.*

571. The court also noted that the reimbursement method proposed by IHS "is inherently anticompetitive" because it "removes the financial incentive for price competition and cost containment." *See id.* at 1039.

572. No. Civ.70-6N, 1981 WL 2049 (D.S.D. Mar. 13, 1981).

573. *See id.* at *2; *see also* *TV Signal Co. v. AT&T*, 617 F.2d 1302, 1305 (8th Cir. 1980).

574. *AT&T*, 1981 WL 2049, at *5.

575. *Id.*

576. *Id.*

1354 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

anced most frequently. In such cases, the courts correctly found that two association restraints did not violate the antitrust laws. One court upheld an interchange fee imposed by an association of financial institutions that allowed the operation of a credit card system that would not otherwise have been possible.⁵⁷⁷ A second court sustained an employment policy of an insurance company group that limited conflicts of interest and did not have a substantial adverse effect on competition.⁵⁷⁸ A court also correctly struck down a rule adopted by an association of cemetery owners that limited the preparation of the foundation for grave markers and monuments to the cemetery owning the lot.⁵⁷⁹ This court based its decision upon a finding that the policy prevented grave memorial companies and neighboring cemeteries from competing in the foundation preparation market, thereby "limit[ing] consumer choice."⁵⁸⁰

On the other hand, a court incorrectly invalidated a bylaw of a real estate multiple listing service that allowed only one type of sign to be posted on a property for sale.⁵⁸¹ The court found that the "adverse impact on plaintiffs' businesses"⁵⁸² outweighed the justifications of distributing commissions among members of a service that benefitted home buyers.⁵⁸³ Given that the plaintiffs were only two of over six hundred licensed real estate brokers in the market, it is difficult to see how there was any adverse effect on *competition*, let alone an effect sufficient to outweigh procompetitive justifications.⁵⁸⁴ The court's decision also was plagued by the less restrictive alternative analysis.⁵⁸⁵

Rules of sports leagues seem to have presented unparal-

577. See *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 601-02, 605 (11th Cir. 1986).

578. See *Plueckhahn v. Farmers Ins. Exch.*, 749 F.2d 241, 247 (5th Cir. 1985).

579. See *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1136, 1140 (8th Cir. 1981).

580. *Id.* at 1138, 1139.

581. See *Cantor v. Multiple Listing Serv.*, 568 F. Supp. 424, 427-28 (S.D.N.Y. 1983).

582. *Id.* at 430.

583. See *id.* at 426, 431 (association compilation of home listings provides purchasers with "a ready source of information").

584. Even if injury to a competitor were the relevant inquiry, there would be no anticompetitive effect here: the plaintiffs were not excluded from the association, they only were restricted in the type of sign they could post.

585. See *Cantor*, 568 F. Supp. at 431 (opining that association could have required brokers to display their association signs "no less conspicuously" than other signs).

leed difficulties for the courts. Such rules occur in a unique setting. Unlike most associations, which are made up of competitors, individual sports teams generally are not economic competitors.⁵⁸⁶ Rather, the competition that takes place on the playing field is of a contrary variety—no team has an economic interest in vanquishing all the other teams. Rather, teams benefit when the league has competitive balance and the sporting contests are close, thereby maximizing fan interest. Restraints such as the draft, the salary cap, cross-ownership rules, and relocation guidelines thus help the leagues compete in a sports and entertainment market by putting out the best product possible.

Treating sports leagues as associations of competitors often leads to undesirable results. Admittedly, some courts arrive at the correct result. One court correctly found that a sports league's tools for competitive balance (the draft, right of first refusal, and salary cap) have procompetitive effects that outweigh any anticompetitive effects.⁵⁸⁷ Another court found that a bowling association's ability "to administer the sport of professional bowling"⁵⁸⁸ by adopting and enforcing product standards outweighs any anticompetitive effect on a particular product adversely affected by application of the standards.⁵⁸⁹ Another court correctly held that a soccer association's strict rules on player registration—which led to an 80% decrease in the number of teams playing indoor soccer in a particular area—decreased options for consumers and was an unreasonable restraint.⁵⁹⁰

But other courts treated league rules with excessive hostility. In *Los Angeles Memorial Coliseum v. NFL*

586. Courts have recognized this reality. *See, e.g.*, *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984); *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 598-99 (7th Cir. 1996) ("cooperation is essential" for a sports league: "a league with one team would be like one hand clapping"); *Los Angeles Mem'l Coliseum Comm. v. NFL* ("Raiders"), 726 F.2d 1381, 1391 (9th Cir. 1984) ("the NFL teams are not true competitors, nor can they be").

587. *See NBA v. Williams*, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995). Because the *NBA* court held that the nonstatutory labor exemption covered the restraints at issue, the court's cursory Rule of Reason analysis was dicta.

588. *Eureka Urethane, Inc. v. PBA, Inc.*, 746 F. Supp. 915, 933 (E.D. Mo. 1990).

589. *See id.* at 933.

590. *See Eleven Line, Inc. v. North Tex. State Soccer Ass'n*, No. CA-3-95-CV-3120-R, 1998 WL 574893, at *3, *4-*5 (N.D. Tex. Aug. 26, 1998); *Eleven Line, Inc. v. North Tex. State Soccer Ass'n*, No. CA-3-95-CV-3120-R, 1997 WL 135684, at *1-*3 (N.D. Tex. Mar. 12, 1997).

1356 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

(“*Raiders*”),⁵⁹¹ the Ninth Circuit invalidated the NFL’s relocation rules that required approval by three-fourths of the member clubs before a franchise could relocate to another team’s home territory.⁵⁹² The court hypothesized that less restrictive alternatives could have achieved the League’s objectives of achieving financial stability, recovering expenditures invested in stadiums and other facilities, and promoting fan loyalty.⁵⁹³ The court thus recommended the incorporation of objective factors into the relocation decision.⁵⁹⁴ The *Raiders* decision is flawed. First, the court trumpeted the effect of the relocation rules on intrabrand competition while downplaying the crucial benefits for interbrand competition. League rules that prevent teams from moving at will into each other’s territory and that increase fan loyalty and financial stability promote consumer welfare.⁵⁹⁵ The court failed to recognize the undeniable net benefit of the rules for consumers. Second, the court unwittingly illustrated the dangers of a less restrictive alternative analysis in showing that a court, post hoc, can always come up with a restraint that appears *a little* less restrictive even as it fails to link the alternative to the defendant’s objectives.

In *NASL v. NFL*,⁵⁹⁶ the court invalidated the NFL’s “cross-ownership” rule that was designed to prevent owners of NFL franchises from holding an ownership interest in another “major team sport” such as baseball, basketball, hockey, or soccer.⁵⁹⁷ The court found that this rule had an anticompetitive effect in what it found to be a market of “sports capital and skill.”⁵⁹⁸ Although the court recognized various procompetitive benefits of the rule—preventing dilution of goodwill, avoiding disruption of NFL operations, and preventing inter-league collusion—it summarily found that these were “not substantial”⁵⁹⁹ and that they were “clearly outweighed by [the rule’s] anticompetitive purpose and effect.”⁶⁰⁰ The court’s conclusion that the

591. 726 F.2d 1381 (9th Cir. 1984).

592. *See id.* at 1384-85.

593. *See id.* at 1396-97.

594. *See id.* at 1397.

595. *See id.* at 1394 (“In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success.”).

596. 670 F.2d 1249 (2d Cir. 1982).

597. *Id.* at 1255.

598. *Id.* at 1259.

599. *Id.* at 1261.

600. *Id.*

rule's "net effect is substantially to restrain competition, not merely competitors"⁶⁰¹ was more a blanket assertion than a reasoned conclusion. Again, the court took its eye off the ball of enhancing interbrand competition: the court never even considered whether the consumer would benefit from the rule. The court also demonstrated the pitfalls of a less restrictive alternative analysis. In rejecting the NFL's proffered justifications of maintaining undivided loyalty and preventing the disclosure of confidential information, the court erroneously put the burden on the NFL to show the absence of less restrictive alternatives and failed to connect the alternatives it hypothecated with the defendant's goals.⁶⁰²

Summing up, in five out of twenty balancing cases—or 25%—the courts came to the wrong result. But a simple reminder to focus on consumers and interbrand competition would have led to correct balancing by the courts. First, an emphasis on interbrand competition would ensure that courts uphold arrangements that do not have an anticompetitive effect. By following this simple reminder, the *Cantor*, *North Dakota Hospital Ass'n*, and *AT&T* cases would have come out the other way. Second, by also eliminating the less restrictive alternative test, the *Raiders* and *NASL* cases likely would have come out differently, as the NFL's rules appeared to be reasonably necessary to achieve the recognized procompetitive objectives.

Despite a few mistakes, courts can balance. They generally can weigh the anticompetitive and procompetitive effects of a restraint and arrive at a defensible result. Keeping the focus on interbrand competition and the effect on the consumer will provide even greater legitimacy for the balancing analysis.⁶⁰³

E. Taking Stock

It is time to synthesize the results of what courts should do and what they can do. The first inquiry necessarily comes first. For if the courts should not (according to whatever criteria we deem sufficient to make the determination) examine a particular factor, then it is simply irrelevant whether they can exam-

601. *Id.*

602. *See id.*

603. That the conclusion as to balancing is strengthened by the heeding of the reminder distinguishes the inquiry as to less restrictive alternatives. For there is no modest hint that can be offered that would have led the *Raiders* and *NASL* courts, for example, to conduct a correct less restrictive alternative analysis.

1358 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

ine the factor. Stated differently, a court's mandate precedes its capacity.

1. Anticompetitive effect

Each of the inquiries converges in the conclusion that courts should and can examine anticompetitive effect. The four sources—the legislative history, common law, Chicago School, and Post-Chicago School—all support consideration of the factor. Moreover, as a matter of theory, courts can assess the factor, and in practice, they correctly analyzed it in 97% of the cases. This obviously is a beneficial result: there cannot be a viable Rule of Reason case today without an adverse effect on competition. In short, it is beyond debate that anticompetitive effect should be a factor in the Rule of Reason analysis.

2. Procompetitive justifications

It is also clear that courts should consider a defendant's procompetitive justifications. Three of the sources—the legislative history, Chicago School, and Post-Chicago School—support its consideration, and the fourth, the common law, is neutral. In addition, as a matter of hypothesis, courts can examine procompetitive justifications, and they have done so correctly in 98% of the cases. Courts should consider a defendant's procompetitive justifications as an element of the Rule of Reason.

3. Reasonable necessity/less restrictive alternatives

The factors of reasonable necessity and less restrictive alternatives bear tenuous support in the sources. Only one source—the common law—would provide substantial support for consideration of the factors, while one—the Chicago School—would proscribe such consideration. The other two factors would be of marginal significance: the legislative history is neutral, and the Post-Chicago School would provide, at most, a limited endorsement.

Given this indeterminacy, we must look to the capacities of courts to resolve the issue. As a matter of theory, courts can determine whether a restraint is reasonably necessary, and in practice, 100% of the courts correctly analyzed this factor. Further supporting the inclusion of this factor is its critical role in ensuring a link between the restraint and the defendant's proffered justification. There must be some way to dismiss the

loftiest of objectives that are not connected with the restraint at issue, and demonstrating reasonable necessity is a compelling way to do so.

The factor of less restrictive alternatives suffers a different fate. As a matter of theory, courts cannot examine the factor. And in practice, they have not accurately examined it, reaching the correct conclusion in only 43% of the cases. Because courts cannot examine the factor of less restrictive alternatives, and because the sources provide, at most, limited support, the factor should be eliminated from the Rule of Reason analysis. Such an omission would not have significant consequences, in particular because the inquiry into reasonable necessity forges the link between the restraint and the defendant's justifications.

4. Balancing

The sources provide some support for balancing as a factor in the Rule of Reason analysis. While the legislative history and common law are neutral, the contemporary schools would endorse (very different types of) balancing. The Chicago School would promote a limited type of balancing—akin to a calculation of the net effect of the restraint on output. The Post-Chicago School, in contrast, would carve out a significant role for balancing that would incorporate the myriad goals championed by the members of the Post-Chicago School. With the key building blocks of legislative history and common law neutral on the issue, the sources provide only limited support for balancing.

Although the confidence level on this factor is not as high as with others, courts can conduct balancing. They are capable of weighing a restraint's anticompetitive and procompetitive effects, and as long as precision is not expected, they generally can balance. The results of the cases provide some support, as courts in 75% of the cases correctly balanced. Keeping the focus on the consumer and interbrand competition would increase the rate of success. (In fact, all of the cases would have been decided correctly if the courts had adequately heeded these guideposts.) In short, courts should continue to balance in the finite subset of cases in which it is necessary, but they must do so cautiously and continually focus on the effect of the restraint on the consumer and on interbrand competition.

IV. CONSEQUENCES OF THE DISCONNECT AND THE MODIFICATION

A large divide, or “disconnect,” separates courts’ and parties’ conceptions of a Rule of Reason analysis, on the one hand, from what courts actually do, on the other. Everyone assumes that the Rule of Reason calls for balancing. But courts typically dispose of a case under the Rule at a prior stage, typically when the plaintiff fails to demonstrate a significant anticompetitive effect. In addition to discovering the disconnect, this Article recommends a modification in the current Rule of Reason analysis, eliminating courts’ consideration of less restrictive alternatives and shifting the burden of production on a restraint’s reasonable necessity from the plaintiff to the defendant. What consequences would result from the recognition of the disconnect and the proposed modifications? For the parties, the consequences would include fewer cases and more focused litigation. For the courts, the consequences would be judicial opinions more consistent with the outcomes of cases and less post hoc second-guessing of legitimate business judgments.

A. Parties

1. Fewer cases

First and foremost, plaintiffs would be most affected by discovering the disconnect. In the modern era, courts dismissed 84% of Rule of Reason cases because plaintiffs failed to demonstrate a significant anticompetitive effect. Plaintiffs’ realization of this reality should counsel caution and decrease the number of antitrust lawsuits.⁶⁰⁴ If plaintiffs knew the importance of the initial threshold of demonstrating a significant anticompetitive effect, and if they realized the frequency with which courts have found that an injury to a competitor is not an injury to

604. Admittedly, the number of Rule of Reason cases currently brought is cabined by the expense of such a lawsuit and by the plaintiffs’ limited chances of success. See, e.g., Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1755, 1761-63 (1994). To the extent the plaintiff under the construct advocated by this Article has to prove anticompetitive effect (which will in most instances require a showing of market power), the expense will continue to dissuade some potential plaintiffs. And to the extent that plaintiffs bring cases alleging a *per se* violation in addition to a claim under the Rule of Reason, the discovery of the disconnect would have marginally less profound consequences.

competition, then they might conclude that an antitrust lawsuit is not the wisest course of action. Similarly, their recognition of the infrequency of balancing would remove from their calculations their visions—in sprinting to the courthouse—of balancing their concrete injury against the defendant's supposedly pretextual justification. In some cases, plaintiffs could pursue other litigation, alleging, for example, state-law claims of breach of contract, unfair competition, or business torts. In other cases, they could devote their resources to competition rather than litigation. The realization of the disconnect would, in effect, eliminate from plaintiffs' decisionmaking calculus the tool of balancing.⁶⁰⁵

Supporting this result, the proposed modification of eliminating courts' consideration of less restrictive alternatives would remove another instrument from the plaintiff's arsenal. No longer could a plaintiff pontificate on hypothetical alternatives that a defendant could have implemented that would have affected them less directly.⁶⁰⁶ This modification, combined with the removal of the incentive for plaintiffs to ponder the benefits of balancing from the start of the case, could reduce the number of antitrust lawsuits.

Skeptics would argue that the plaintiff would not be affected by the disconnect. Every plaintiff would believe that, despite the early dismissal of most of their compatriots' lawsuits, *their* suit is different. *They* can demonstrate an unreasonable restraint. Although this may be true for a small subset of plaintiffs, rational-actor plaintiffs should vary their conduct according to their recognition of what courts actually do. For these plaintiffs—presumably a larger category—the disconnect would matter and could change their conduct. Moreover, rational actors recognizing the disconnect would continue to bring plausible antitrust cases.⁶⁰⁷ But it would primarily be the cases in which there is obviously no adverse effect on competition that would not be pursued.

605. Such a recognition also could increase the likelihood (and decrease the magnitude) of settlement.

606. Shifting the burden of proving reasonable necessity from the plaintiff to the defendant should not have a marked effect on the plaintiff's decision to file suit.

607. There is always the chance that the recognition of the disconnect will have an overbroad impact, with plaintiffs not bringing potentially meritorious antitrust cases. Yet because of the relative paucity of cases that are meritorious and because plaintiffs presumably have a general idea as to the merits of their case, this effect should not be substantial.

1362 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

If this hypothesis is correct, substantial benefits would follow. Courts would face fewer potentially-complex-but-frivolous antitrust lawsuits and thus be able to devote needed resources where they would be more useful. They might even be able to spend more time on the more legitimate antitrust cases they do consider. In addition, defendants would not be confronted with as many onerous lawsuits, thereby reducing their legal expenditures (the benefit of which, at some point, could filter down to the consumer), and, more significantly, encouraging them to take actions that could benefit competition.⁶⁰⁸ In short, to the extent that litigation concerning practices that clearly do not have an anticompetitive effect is diminished, courts, defendants, and consumers would benefit.

2. More focused litigation

In addition to fewer antitrust lawsuits, those brought would be better litigated. As the parties' knowledge of the type of analysis actually used by courts increases, so does the likelihood that all of the participants will speak the same language and address the same tests from opposite perspectives. Although parties might address balancing issues, they would start at the beginning. Anticompetitive effect comes first in order and importance. A summary judgment brief or a jury instruction would start by examining the effect of the restraint on the market. And the opposing party would address the same issue from the diametric perspective. The court (or jury) would then benefit from having two presentations focused directly on the relevant issues. The same would hold for demonstrating a procompetitive objective and a reasonably necessary restraint. Assuming such showings could be made in a particular case, courts would no longer have to divine actual adverse effect, market impact, or procompetitive justifications without the input of the parties. In short, the most significant issues in litigation under the Rule of Reason would be addressed in an efficient and effective manner.

608. If a reduction in the number of suits would lead defendants to pursue competition-preventing acts, they still would remain subject to challenge, and the plaintiffs presumably would clear the initial threshold when challenging anticompetitive restraints.

B. Courts

The benefits anticipated for the parties will carry over to the courts. As discussed above, a decrease in the number of suits would benefit the courts, as would a more direct focus by the parties on the factors most relevant to the Rule of Reason analysis.

The effect of recognizing the disconnect admittedly would be less profound for the courts than for the parties. Although courts are fond of reciting the language of balancing whenever they are confronted with a case under the Rule of Reason, they do not proceed directly to such balancing. In the overwhelming majority of cases, the courts begin their Rule of Reason analysis by examining the plaintiff's initial burden of demonstrating a significant anticompetitive effect. They generally reach balancing only at the end of a process that ensures that there are competitive effects to be weighed on both sides of the scale.

But even if the bridging of the disconnect does not have significant consequences in the *results* of Rule of Reason cases, it should increase the clarity (and perhaps legitimacy) of antitrust courts by bringing their actions into conformity with their language. Courts that discuss balancing as the intended course of action but then do not conduct balancing invite questions by the plaintiff who never gets to present her arguments relating to balancing; by attorneys for the parties, who are not certain if the courts will practice what they say or what they do; and by all who have an interest in the courts' legitimacy that results in part from the expectations created by their language.

Articulating the burden-shifting approach, as recent courts have done more frequently,⁶⁰⁹ has a number of benefits, from implicitly nudging the court to the correct application of the Rule of Reason, to sharing with the parties the construct the court will in fact apply, to inviting argument on the relevant factors. Additionally, such an approach fosters judicial efficiency, as courts often will be able to dispose of a case before it is faced with the consuming and costly process of balancing.⁶¹⁰

609. See, e.g., *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *K.M.B. Warehouse Distributions, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995); *Flegel v. Christian Hosp.*, 4 F.3d 682, 688 (8th Cir. 1993); *Nationwide R.A.C. Sales, Inc. v. Ford Motor Co.*, No. C 96-2877 FMS, 1997 WL 88399, at *4 (N.D. Cal. Feb. 20, 1997); *Ginzburg v. Memorial Healthcare Sys., Inc.*, 993 F. Supp. 998 (S.D. Tex. 1997).

610. As Justice Breyer noted in his dissent in *California Dental Ass'n v. Federal Trade Commission*, 119 S.Ct. 1604, 1624 (1999), a burden-shifting approach

1364 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

Following the burden-shifting approach recommended by this Article would provide even greater assistance to courts, which would amass more helpful information on the link between the restraint and the justification, and which would withdraw from the distracting goose chase of less restrictive alternatives.

Finally, modifying the Rule of Reason construct would bring the courts further into line with the history and theory underlying the antitrust laws. Requiring the plaintiff first to show a significant anticompetitive effect, then the defendant to show that the restraint is reasonably necessary to achieve legitimate procompetitive objectives, and then to balance is a logical, supportable, and legitimate analysis. In particular, the collapsing of the second and third stages of the current Rule of Reason analysis minimizes confusion and second-guessing. In short, recognizing the disconnect and making a couple of modifications to the Rule of Reason promises benefits for courts and parties alike.

V. CONCLUSION

This Article has surveyed the universe of Rule of Reason cases in the modern era to determine what courts presently do. It has explored the legislative history, common law, and contemporary schools of antitrust philosophy to determine what courts should do. It has examined what courts can do. Finally, it has identified some of the benefits that would flow from the recognition of the disconnect and a modification to the Rule of Reason analysis.

First, the Article has found that courts rarely conduct the balancing that everyone thinks they do. Out of the 495 cases decided in the modern era under the Rule of Reason, courts in only 20 (4%) of the cases balanced the anticompetitive and procompetitive effects. Most of the cases (84%) were disposed of on the ground that the plaintiff failed to demonstrate a significant anticompetitive effect.

Second, the Article has concluded that most of the factors in today's Rule of Reason analysis are supported by the legislative

reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the [Federal Trade] Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis.

history of the Sherman Act, the common law preceding the Act, and contemporary schools of antitrust philosophy—the Chicago School and Post-Chicago School. These sources provide potent support for courts’ consideration of anticompetitive effect and procompetitive justifications. On the other hand, the remaining factors—balancing, reasonable necessity, and less restrictive alternatives—have more tenuous support, magnifying the significance of the inquiry into the capacities of courts.

Third, confirming the results from the application of the sources, courts, as a matter of theory and practice, can examine anticompetitive effect and procompetitive justifications. Distinguishing among factors for which the sources provide only attenuated support, the capacities of courts (1) recommend the inclusion of the inquiry as to whether a restraint is reasonably necessary, (2) cautiously endorse balancing, and (3) reject an analysis based on less restrictive alternatives. Further, the capacities of courts recommend shifting the burden of producing evidence of reasonable necessity from the plaintiff (to show its absence) to the defendant (to show its presence). The Article thus proposes collapsing the second and third stages of the current Rule of Reason analysis, requiring the defendant to prove that a restraint is reasonably necessary to achieve a legitimate procompetitive objective.

Finally, a recognition of the disconnect between what courts actually do and what everyone thinks they do promises benefits for parties and for the courts: fewer meritless antitrust lawsuits, increased settlements, more effective litigation, and enhanced judicial legitimacy. Turning to the prescriptive recommendations, abandoning the analysis based on less restrictive alternatives and shifting the burden on reasonable necessity would only amplify these trends.

In conclusion, the Rule of Reason generally works. But it can work better. It can be brought more into line with the legislative history, common law, contemporary schools of antitrust thought, and capacities of courts. It can be reconciled with what courts applying it actually do. Then, the Rule of Reason would be even stronger. It would enhance judicial legitimacy and would focus the parties’ attention on the relevant issues. Finally, it would allow parties, scholars, and courts all to talk the same language and to pursue the goals of antitrust law together, rather than from opposite sides of the disconnect.