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# In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look

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# In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look

ALAN J. MEESE\*

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## INTRODUCTION

All contracts “restrain trade” in some sense, but section 1 of the Sherman Act bans only those that restrain trade “unreasonably.”<sup>1</sup> Restraints are unreasonable, in turn, if they create or maintain market power without producing offsetting efficiencies.<sup>2</sup> Such agreements divert resources to less valuable uses and thus reduce society’s wealth.

If enforcement and adjudication were costless, agencies and courts could apply this “rule of reason” on a case-by-case basis, effortlessly distinguishing agreements that produce net harm from those that are harmless or create wealth. In the real world, however, contracts and the markets they inhabit are complex phenomena, the ultimate economic effects of which are not always apparent. Plaintiffs and enforcement agencies bear the burden of convincing tribunals that

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1. *Standard Oil Co. v. United States*, 221 U.S. 1, 58–60 (1911).

2. *See infra* notes 20–22, 81–89 and accompanying text.

such agreements produce harm, and proponents of challenged agreements may invest significant resources defending them. Therefore, case-by-case application of a “full-blown rule of reason” consumes resources that could produce economic value elsewhere. Indeed, the full-blown rule of reason can generate other social costs as well. For instance, the prospect of spending resources to defend challenged agreements—even those that ultimately survive scrutiny—can induce firms to adopt practices that forestall such challenges but create less wealth.<sup>3</sup> Moreover, placing onerous burdens on plaintiffs can discourage challenges to harmful restraints, undermining antitrust’s regulatory mission. A society that hopes to maximize its wealth will consider these various costs when choosing between the full-blown rule of reason and other possible methodologies for analyzing challenged restraints.

Not surprisingly, courts and enforcement agencies applying the rule of reason have developed shortcuts that sometimes reduce the cost of such analysis, albeit at the potential cost of less accurate determinations. Perhaps most famously, courts and agencies declare certain categories of agreement “unreasonable per se,” thus mandating condemnation of such restraints without proof that they cause economic harm in a given case. In particular, applying the test announced in *Northern Pacific Railway Co. v. United States*, courts condemn as unlawful per se categories of agreement that both reduce rivalry between the parties and always lack any redeeming virtue.<sup>4</sup> Because nearly all challenged agreements reduce rivalry in some sense, the outcome of this test depends on whether some agreements in a given category may nonetheless produce one or more virtues by creating technological efficiencies or mitigating a market failure. Like all rules, per se rules are overinclusive, but they also conserve administrative, judicial, and private resources that society can use elsewhere, potentially increasing the nation’s wealth. Moreover, by reducing the costs that private plaintiffs and enforcement agencies must incur to challenge harmful restraints, such rules can enhance deterrence of wealth-destroying conduct.

Naked horizontal price fixing and market division are quintessential examples of conduct deemed unlawful per se. During antitrust’s “inhospitality era,” courts declared other agreements unlawful per se, drawing upon economic theory hostile to various contracts that, although not naked, thwarted atomistic competition by restraining the conduct of trading partners.<sup>5</sup> By the mid-1970s, courts had declared an increasing number of restraints unlawful per se,<sup>6</sup> leaving

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3. See *infra* notes 193–95, 213–15 and accompanying text (collecting judicial and academic authorities to this effect).

4. 356 U.S. 1, 5 (1958).

5. See *infra* notes 71–73 and accompanying text (describing the inhospitality tradition).

6. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 601–02, 608 (1972) (banning horizontal territorial allocations ancillary to otherwise legitimate joint venture); *Fortner Enters., Inc. v. U.S. Steel Co.*, 394 U.S. 495, 499 (1969) (banning ties by firms with “economic power”); *Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1968) (banning vertical maximum resale price maintenance), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967) (banning nonprice vertical restraints, including exclusive territories, location clauses, and customer

remaining agreements subject to the full-blown rule of reason.<sup>7</sup>

Over the past few decades, developments in economic theory have convinced courts to abandon various per se rules, with the result that many agreements once deemed unlawful per se now merit full-blown rule of reason scrutiny. This test requires plaintiffs to prove economic harm to establish a prima facie case. Because plaintiffs fail to satisfy this requirement ninety-seven percent of the time, judicial refusal to declare a category of restraint unlawful per se is effectively a declaration that such restraints are lawful.<sup>8</sup>

Courts, agencies, and scholars have rightly concluded that recognition of just two categories of section 1 analysis—full-blown rule of reason scrutiny and a dwindling number of per se rules—would force tribunals to choose between outright condemnation of challenged restraints on the one hand, and de facto legality disguised as full-blown rule of reason analysis on the other. The “all or nothing” character of this approach, which many describe as “dichotomous,” led some to explore possible modifications of this methodology.<sup>9</sup> This exploration began with the premise that restraints that avoid per se treatment are not all created equal; some are usually beneficial, whereas others pose a significant risk of competitive harm.

This Article examines one modification of the traditional dichotomous approach, the “quick look,” which courts and enforcement agencies embraced nearly three decades ago. This modification recognizes a third category of restraints subject to section 1: those that are “inherently suspect.” Such restraints properly escape per se condemnation but supposedly pose a greater risk of economic harm than most restraints. The quick look streamlines the process for evaluating inherently suspect restraints by dispensing with the ordinary requirement that plaintiffs prove that the restraint produces harm. Proponents of this approach claim that the quick look reduces enforcement and adjudication costs while ensuring more accurate assessment of challenged restraints and enhancing deterrence of those that create harm.<sup>10</sup>

To implement the quick look, courts and agencies must make a threshold determination whether restraints that avoid per se condemnation are nonetheless inherently suspect.<sup>11</sup> If the answer is “no,” quick look analysis is over and

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assignment clauses, whenever title had passed from the manufacturer to a wholesaler or dealer), *overruled by* *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) (banning horizontal maximum resale price maintenance), *overruled by* *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

7. *See, e.g., Schwinn*, 388 U.S. at 380–82 (evaluating nonprice vertical restraints before the Court under the rule of reason because the manufacturer retained title to products distributed by its dealers). *Schwinn* is a complicated case; the Court also condemned, as unlawful per se, nonprice vertical restraints when title had passed, but here I am invoking a different portion of the opinion.

8. *See infra* notes 93–96 and accompanying text (discussing empirical evidence to this effect).

9. *See infra* note 99 and accompanying text (collecting examples of scholars who characterize the traditional regime as dichotomous and advocate modification).

10. *See infra* notes 104–06, 139–46 and accompanying text (recounting proponents’ arguments in favor of the quick look).

11. *See infra* Part III (detailing quick look methodology as implemented by agencies and courts).

tribunals examine the restraint under the full-blown rule of reason. If the restraint is inherently suspect, tribunals presume the agreement unlawful. Defendants must then explain how the restraint might produce “cognizable” benefits, a standard indistinguishable from that for determining whether a proffered virtue is redeeming in the *per se* context. This burden is one of articulation; defendants need not offer evidence of such benefits. Failure to discharge this burden results in condemnation of the restraint.

If defendants do articulate such benefits, tribunals move on to assess the overall impact of the restraint. The methodology for assessment, however, varies critically from that employed under the full-blown rule of reason. In particular, tribunals evaluating inherently suspect restraints dispense with the usual requirement that plaintiffs prove that a restraint produces harm, holding instead that the mere existence of such a restraint establishes a *prima facie* case. Thus, if a defendant offers no evidence that the restraint produces benefits, the restraint is doomed, even though the plaintiff has not proved harm. If defendants do adduce evidence of benefits, tribunals compare the benefits with any harm, asking whether the defendant could achieve such benefits by less restrictive means.

Courts and enforcement agencies have been employing the quick look for nearly three decades, gaining substantial experience with how this modification to the traditional dichotomous approach operates in practice. This experience establishes that, if a restraint survives *per se* condemnation, the threshold determination whether the agreement is inherently suspect is almost always outcome determinative.<sup>12</sup> If a tribunal determines that a restraint is not inherently suspect, it evaluates the agreement under the full-blown rule of reason, which nearly all restraints survive. If a restraint is inherently suspect, tribunals always condemn the restraint.

Support for the quick look is universal within the antitrust community:<sup>13</sup> courts, enforcement agencies, and numerous scholars have endorsed the approach. Indeed, scholars with strong disagreements about important questions of antitrust law and policy nonetheless come together to embrace the quick look. These proponents claim that this revision of the traditional dichotomous approach is a win-win for antitrust regulation for three interrelated reasons. First, the quick look supposedly reduces the costs that private plaintiffs, enforcement agencies, and courts must incur when challenging and evaluating particularly harmful restraints, thereby freeing up resources for use elsewhere. Second, this approach allegedly encourages challenges by plaintiffs who might otherwise be discouraged by the difficulty of prevailing under the full-blown rule of reason, thus enhancing deterrence of harmful restraints. Third, by reducing the cost of evaluating such restraints while still allowing defendants to offer justifications,

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12. See *infra* notes 156–57 and accompanying text.

13. See *infra* notes 104–06 and accompanying text (identifying judicial, executive, and scholarly support for the quick look).

the quick look purportedly enhances the accuracy of judicial and administrative assessments of challenged restraints, furthering antitrust's regulatory mission.

This Article takes issue with this consensus. Support for the quick look reflects a fundamental misunderstanding of the cost of implementing this approach and the link between the standard for per se liability and quick look analysis. Far from reducing enforcement and adjudication costs, the quick look imposes an additional—and often costly—step on the traditional dichotomous approach without producing any of the offsetting benefits touted by its proponents.

Restraints do not announce themselves as inherently suspect. Instead, tribunals implementing the quick look must examine all restraints that survive per se condemnation as an initial matter to determine whether such restraints are inherently suspect or, instead, subject to full-blown analysis. Because the result of this threshold evaluation is generally outcome determinative, plaintiffs and defendants will rationally expend significant resources attempting to influence the tribunal. In turn, tribunals will themselves often incur substantial costs determining whether restraints are inherently suspect. To be sure, such examination is sometimes inexpensive, as courts draw upon experience teaching that certain restraints merit full-blown scrutiny. However, the current definition of inherently suspect is far from precise, leaving parties to speculate about the status of many restraints. Such ambiguity increases the cost of this threshold analysis in many cases because plaintiffs vigorously contend that a restraint is inherently suspect while defendants vigorously contest this claim.

Of course, society should be willing to incur the additional costs required to implement the quick look if such costs produce offsetting benefits, as its proponents claim. This Article demonstrates that the private, administrative, and judicial investments necessary to implement the quick look produce no offsetting benefits compared to the traditional dichotomous regime. To be precise, no outcome of quick look analysis as currently practiced by courts and the enforcement agencies produces any of the benefits its proponents ascribe to it.

Plaintiffs' diligent and perfectly rational efforts to convince courts that restraints are inherently suspect can produce one of two preliminary results. First, tribunals can reject this argument, thereby ensuring that the challenged restraint merits the same full-blown rule of reason treatment employed under the traditional dichotomous approach. Second, tribunals can conclude that a restraint is inherently suspect, casting on defendants the burden of articulating some cognizable benefit the restraint might produce.

Neither result produces any benefits when compared to the traditional dichotomous approach. Experience shows that courts generally reject contentions that a restraint is inherently suspect. In such cases, the investments necessary to determine whether a restraint is inherently suspect are a waste, as such expenditures do not alter the ultimate methodology—full-blown analysis—for scrutinizing such restraints.

When tribunals do declare restraints inherently suspect, they cast upon defendants a burden to articulate cognizable benefits the restraint might create, and failure to carry this burden dooms the restraint. Proponents of the quick look emphasize that such condemnation consumes fewer resources than would full-blown rule of reason scrutiny. However, any such benefits are entirely illusory, insofar as a proper application of the *per se* rule would have condemned the restraint anyway. After all, a restraint that is inherently suspect will reduce rivalry between the parties and thus be “pernicious” within the meaning of the *per se* test. Moreover, a defendant’s inability to articulate a cognizable benefit for the restraint necessarily establishes the absence of any redeeming virtues, thereby requiring *per se* condemnation. Put another way, if courts conduct *per se* analysis properly, the set of restraints that are both inherently suspect and cannot produce cognizable benefits will be empty. Thus, the quick look’s condemnation of such restraints does not reflect any improvement over the traditional dichotomous approach.

What, though, about the second possible fate of restraints declared inherently suspect—that is, cases in which defendants do satisfy their burden of articulating cognizable benefits the restraint might produce? In such cases, tribunals assess the overall impact of the restraint, albeit without requiring the plaintiff to offer any evidence of harm. This truncated approach reduces the cost of condemning harmful restraints—conserving resources, enhancing accuracy, and increasing deterrence—compared to a full-blown analysis.

In practice, however, any such benefits are again completely illusory. No defendant has ever satisfied the burden of convincing a tribunal that an inherently suspect restraint may create cognizable benefits. Thus, courts and agencies invariably condemn inherently suspect restraints without incurring any additional costs to assess their overall impact. Therefore, the supposed propensity of the quick look to reduce the cost of such overall assessment produces no actual benefits in the real world.

Engrafting the quick look onto the traditional dichotomous approach thus increases the costs of enforcement and adjudication without producing any offsetting benefits, whether in the form of reduced costs of enforcement and adjudication, enhanced accuracy, or increased deterrence. These costs are themselves a deadweight social loss, consuming resources that could produce social value elsewhere. Because defendants will bear some of these costs, the quick look also functions as a tax on numerous forms of concerted action that survive *per se* condemnation. This tax will induce some firms, at the margin, to abandon agreements that tribunals might conceivably deem inherently suspect, even if such agreements produce benefits for the parties and consumers compared to alternatives. In other words, the quick look is currently a lose-lose that imposes deadweight social losses and distorts underlying economic activity.

That the quick look distorts economic activity while it wastes private, administrative, and judicial resources does not thereby establish that the traditional dichotomous system is the best we can construct. One can imagine two ways



courts and agencies can alter the quick look so as to achieve its putative goals. First, courts and agencies can better integrate per se and quick look analysis. In particular, tribunals can defer any application of the quick look until they have actually applied the *Northern Pacific Railway* test to a restraint—a step many tribunals often skip. Rigorous application of this test will weed out restraints that cannot produce redeeming virtues in the first place, thereby obviating the need to determine if such restraints are inherently suspect. By deferring application of the inherently suspect test until after defendants have articulated plausible redeeming virtues, courts and agencies would avoid altogether the cost of determining whether restraints that cannot create such virtues are inherently suspect, when a cheaper determination that they are pernicious within the meaning of the *Northern Pacific Railway* test would justify per se condemnation.<sup>14</sup>

More rigorous application of the *Northern Pacific Railway* test would not, however, improve upon the quick look as courts and agencies currently implement it. After all, if tribunals conduct per se analysis with greater care, courts and agencies will only apply the inherently suspect inquiry to restraints that, by definition, may produce redeeming virtues. However, as noted above, courts have never identified any category of restraints that both may produce redeeming virtues and are inherently suspect. Thus, a quick look reformed in the way described above would still require tribunals to incur the cost of discerning whether certain restraints are inherently suspect without the prospect of discovering any such restraints.

The definition of inherently suspect is not immutable, however. This suggests a second reform that, when combined with the first, may render the quick look a useful modification of the dichotomous approach. That is, courts and agencies could expand the definition of inherently suspect (as some have advocated) to capture some restraints that properly survive per se condemnation because they may produce redeeming virtues. Although deemed inherently suspect, such restraints would avoid summary condemnation and merit additional consideration. Modified in this manner, the quick look could produce some benefits by reducing the cost of establishing a prima facie case against such restraints.

Although theoretically attractive, this second modification appears unworkable. For one, the definition of inherently suspect articulated by courts and agencies is vague at best, leaving firms and reformers alike to guess about the definition's current scope. Moreover, whereas scholars universally agree about the desirability of the quick look, there is far less agreement about just how to redefine the category of inherently suspect restraints. More to the point, no scholar, jurist, or enforcement official has offered a more expansive definition of inherently suspect that withstands scrutiny in light of basic antitrust principles and modern economic theory.

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14. Of course, if a restraint survives the per se test because it does not reduce rivalry and is thus not pernicious, it cannot be inherently suspect.



Part I of this Article describes the contours of the Sherman Act's rule of reason and the methodology of per se analysis. Part II describes how courts and enforcement agencies conduct full-blown rule of reason analysis. Part III explains how the quick look alters the traditional dichotomous approach and explores the rationale that the quick look's proponents have offered in support of this reform. Part IV critiques the quick look, demonstrating that engrafting this methodology onto the traditional dichotomous approach increases the cost of section 1 analysis without producing any offsetting benefits. Part IV also explains how the quick look increases the expected costs of entering certain beneficial agreements, thereby inducing some potential defendants to adopt less efficient restraints. Part V explores possible adjustments to the quick look and concludes that no such adjustments can improve upon the traditional dichotomous approach, if properly applied.

### I. SECTION 1'S RULE OF REASON AND PER SE RULES

Section 1 of the Sherman Act forbids “[e]very contract, combination . . . , [and] conspiracy . . . in restraint of trade.”<sup>15</sup> All contracts, however, restrain the parties involved and thus operate to restrain trade—after all, that is the point of contracts.<sup>16</sup> Banning all agreements that literally “restrain trade” would grind the economy to a halt, restraining trade more than any private agreement.<sup>17</sup>

From the beginning, then, the Supreme Court has tempered the statute's plain language to avoid these wealth-destroying effects. At first, the Court invoked its Commerce Clause jurisprudence and distinguished “direct” from “indirect” restraints, holding that only the former violated the Act.<sup>18</sup> In the landmark *Standard Oil* decision, however, the Court embraced a different formulation that survives to this day, holding that section 1 bans only unreasonable restraints, leaving reasonable restraints outside of its scope.<sup>19</sup> The Court emphasized the common law origins of the term “restraint of trade” and that a broader construction of the Act would interfere with wealth-creating commerce and liberty of

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15. 15 U.S.C. § 1 (2012).

16. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”); see also CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 13–14 (1981) (explaining how enforcement of promises enhances private autonomy by facilitating cooperation); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 140–41 (China Soc. Scis. Publ'g 1978) (1960).

17. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (“[R]ead literally, [section] 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.”).

18. See *United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 568 (1898) (explaining that the Sherman Act bans only direct restraints of interstate commerce and leaves “indirect” restraints, such as agreements “entered into for the purpose of promoting the legitimate business of an individual or corporation,” unscathed).

19. See *Standard Oil Co. v. United States*, 221 U.S. 1, 58–60 (1911); see also *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179–81 (1911) (approving *Standard Oil* and extending rule of reason to section 2 of the Sherman Act).

contract.<sup>20</sup> Thus, the Court said, judges should examine restraints with “the light of reason” to determine if they restrict competition “unduly”; that is, if they result in higher prices, reduced output, or lower quality.<sup>21</sup> This exclusive focus on these economic variables and the invocation of reason implied that judicial assessment of restraints could change over time as economic theory evolved.<sup>22</sup> In fact, courts applying the rule of reason have often done just that: abandon previous decisions because changed economic theory undermined the factual premises of such rulings.<sup>23</sup>

Some early articulations of the rule of reason seemed to require wide-ranging and fact-intensive analysis of every challenged restraint.<sup>24</sup> However, courts have never taken such an approach. Indeed, *Standard Oil* itself opined that courts could condemn some restraints as unreasonable whenever “the nature or character of the contract” established that the restraint was “unreasonably restrictive of competitive conditions,” without any additional examination of the restraint’s actual economic impact.<sup>25</sup> A little reflection reveals the rationale of such an approach. Litigation is expensive, in part because parties will invest significant resources attempting to impose or avoid liability—resources that could produce social value elsewhere.<sup>26</sup> Moreover, judges, litigators, and juries are not omniscient planners capable of making low-cost case-by-case assess-

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20. See *Standard Oil*, 221 U.S. at 51, 63 (opining that literal application of the Act banning every contract restraining trade “would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce”); see also Alan J. Meese, *Standard Oil as Lochner’s Trojan Horse*, 85 S. CAL. L. REV. 783, 787–90 (2012).

21. See *Standard Oil*, 221 U.S. at 63–64; *id.* at 57 (explaining that the prohibition on restraints of trade was aimed at conduct “producing or tending to produce the consequences of monopoly”); *id.* at 52 (listing the “evils” of monopoly as the power to fix prices, the power to limit output, and the danger of deterioration in the quality of the monopolized product).

22. Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 89–92 (2003).

23. See *infra* note 210 and accompanying text (collecting various cases overruling prior decisions because of evolving economic theory).

24. See also HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 275 (4th ed. 2011) (“The problem with [*Board of Trade of Chicago*] is that it identifies the haystack but not the needle.”); *cf.* *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (stating that, to conduct rule of reason analysis, “the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable”; and that “[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts”).

25. *Standard Oil*, 221 U.S. at 58; see also *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) (“[*Standard Oil*] emphasized, however, that there were classes of restraints which from their ‘nature or character’ were unduly restrictive, and hence forbidden by both the common law and the statute.”).

26. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400–01 (1973) (recognizing that “direct costs” of litigation, such as the time of “lawyers, litigants, witnesses, jurors, [and] judges,” as well as “paper and ink, law office and court house maintenance, [and] telephone service,” are social costs); *cf. infra* notes 155–57 and accompanying text (explaining how rules assigning restraints to outcome-determinative categories will induce both parties to invest resources to influence the tribunal).

ments of the exact welfare consequences of a challenged restraint.<sup>27</sup> As then-Judge Breyer once explained, antitrust rules are necessarily imperfect, given the prohibitive administrative costs of perfection.<sup>28</sup> In some cases, then, inflexible rules that occasionally condemn some harmless restraints may nonetheless improve society's welfare by avoiding the social costs that parties, enforcers, and courts would otherwise incur in a regime characterized by flexible case-by-case pursuit of perfection.<sup>29</sup>

During the 1950s, the Supreme Court implemented this logic by declaring certain types or categories of agreements to be unreasonable per se, and thus contrary to section 1, without regard to the actual economic impact of any particular restraint in the category.<sup>30</sup> Although sometimes attributed to Congress,<sup>31</sup> the per se rule is better understood as an exercise of the Court's long-recognized authority to fashion common law rules that implement the Sherman Act's ban on restraints that, given their "nature or character," produce net economic harm.<sup>32</sup> Courts exercised similar authority under the common law that *Standard Oil* invoked, declining to enforce certain categories of restraints

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27. See 11 HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1909a, at 308 (3d ed. 2011) (noting that restraints subject to a full-blown rule of reason analysis "are the most difficult and expensive to evaluate").

28. See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) ("[W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views . . . . Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.").

29. See HOVENKAMP, *supra* note 27, ¶¶ 1910a–1910b, at 310–12 (explaining that per se rules reflect a judgment that the costs of a full-blown rule of reason analysis often outweigh any corresponding benefits); Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 83 (2007) (describing a "dilemma" between "[p]er se rules of illegality" that can be "vastly overbroad" on the one hand, and "an open-ended rule of reason approach [that] would create excessive litigation costs and uncertainty" on the other); see also Posner, *supra* note 26, at 401 (proceeding on the assumption that legal systems should seek to minimize the sum of "direct costs" of enforcement and litigation and the costs of adjudicatory error).

30. See *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused . . . ."); see also *Klor's, Inc.*, 359 U.S. at 211–12 (explaining that there "were classes of restraints which from their 'nature or character' were unduly restrictive, and hence forbidden" even when there were "allegations that they were reasonable in the specific circumstances" (quoting *Standard Oil*, 221 U.S. at 65)).

31. See *United States v. Topco Assocs.*, 405 U.S. 596, 606 (1972).

32. See *State Oil Co. v. Khan*, 522 U.S. 3, 20–22 (1997) (discussing how the Sherman Act empowers courts to revise the scope of per se rules in light of changed economic understandings); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (same); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (explaining that per se and rule of reason analysis are "two complementary categories of antitrust analysis," with each seeking "to form a judgment about the competitive significance of the restraint"); see also *Standard Oil*, 221 U.S. at 55–58 (noting with approval the evolution of common law banning restraints that were unreasonable because of their "nature or character" regardless of economic impact).

as unreasonable, without inquiring into their actual economic impact.<sup>33</sup>

The classic statement of the *per se* rule appeared in *Northern Pacific Railway Co. v. United States* more than half a century ago:

Although [section 1's ban on restraints of trade] is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition. However, there are certain agreements or practices which *because of their pernicious effect on competition and lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.<sup>34</sup>

As the Supreme Court would confirm in subsequent cases, this language created a two-part test pursuant to which courts will summarily condemn a category of restraint if agreements in that category have a pernicious effect on competition and, additionally, lack any redeeming virtue.<sup>35</sup> Over the past several decades, the Court has repeatedly reiterated this test, sometimes employing slightly different language when doing so.<sup>36</sup> Thus, some opinions have substituted "manifestly anticompetitive" for "pernicious" in the first part of the test, while retaining the requirement that a category of restraints that is "manifestly anticompetitive" must also "lack . . . any redeeming virtues" before *per se* condemnation is appropriate.<sup>37</sup>

*Per se* rules are not exceptions to the rule of reason but instead categorical predictions, based on theory and experience, that full-blown rule of reason

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33. For instance, courts refused to enforce "general" restraints—namely, covenants ancillary to the sale of a business preventing the seller from subsequently doing business anywhere in the jurisdiction. *See Or. Steam Navigation Co. v. Winsor*, 87 U.S. 64, 66–69 (1873) (describing and applying this rule); *Union Strawboard Co. v. Bonfield*, 61 N.E. 1038, 1039–40 (Ill. 1901) (same). Courts also declined to enforce restraints entered by utilities operating under state-granted franchises, regardless of the reasonableness of the agreement. *See Gibbs v. Consol. Gas Co. of Balt. City*, 130 U.S. 396, 408–12 (1889).

34. 356 U.S. at 5 (emphasis added) (first citing *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918); then citing *Standard Oil*, 221 U.S. at 1).

35. *See infra* note 36 (collecting numerous cases).

36. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects, and 'lack . . . any redeeming virtue.'" (alteration in original) (first quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); then quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)); *Khan*, 522 U.S. at 10 ("Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." (citing *N. Pac. Ry.*, 356 U.S. at 5)); *Nw. Wholesale Stationers*, 472 U.S. at 289 (certain agreements are unlawful *per se* "because of their pernicious effect on competition and lack of any redeeming virtue" (quoting *N. Pac. Ry.*, 356 U.S. at 5)); *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 646 n.9 (1980) (same); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (describing agreements or practices as being so "plainly anticompetitive" and so often "lack[ing] . . . any redeeming virtue" as to merit *per se* condemnation (quoting *N. Pac. Ry.*, 356 U.S. at 5)); *Sylvania*, 433 U.S. at 50 (same); *Topco*, 405 U.S. at 607 (1972) (quoting the *Northern Pacific Railway* test in its entirety with approval).

37. *See, e.g., Leegin*, 551 U.S. at 886–87 (first quoting *Sylvania*, 433 U.S. at 50; then quoting *Nw. Wholesale Stationers*, 472 U.S. at 289).

scrutiny of restraints in a particular class will always or almost always result in a finding that such restraints are unreasonable.<sup>38</sup> To be sure, like all rules, per se rules are overinclusive, banning some harmless conduct.<sup>39</sup> Fact-intensive rule of reason scrutiny, if error free, would produce more accurate results, validating some agreements categorized as unlawful per se either because they produce no harm or result in virtues overlooked when conducting the more cursory per se analysis. However, as noted earlier, courts are not omniscient, and such case-by-case consideration is not costless.<sup>40</sup> According to the Supreme Court, per se rules, although imperfect, conserve administrative costs and provide certainty to regulated entities.<sup>41</sup>

Despite the Court's repeated embrace of the *Northern Pacific Railway* test to implement section 1, the second part of the test seems superfluous, or worse, in light of the overall structure of *Standard Oil's* rule of reason. After all, the Court has repeatedly said that the rule of reason bans restraints that "destroy" competition, "unduly restrain" competition, "suppress" competition, or are "anticompetitive."<sup>42</sup> Moreover, *Standard Oil* held that courts must condemn any and all contracts that unduly restrain competition by producing the sort of injury condemned by the statute—reduced output or higher prices—without inquiring into the "expediency or nonexpediency" of a contract producing such results or

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38. See *Khan*, 522 U.S. at 10 ("Per se treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" (alteration in original) (quoting *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 344 (1982)); *Nw. Wholesale Stationers*, 472 U.S. at 289 ("[The] per se approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive."); see also *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978) (explaining that previous decisions had "unequivocally foreclose[d] an interpretation of the [r]ule [of reason] as permitting an inquiry into the reasonableness of the prices set by private agreement"); 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1509, at 440–48 (3d ed. 2011) (describing per se rules as reflecting determination of "class unreasonableness").

39. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 442–44 (1990); *Nw. Wholesale Stationers*, 472 U.S. at 289 (noting that per se rules can be overinclusive); *Catalano*, 446 U.S. at 649 ("[W]hen a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its [sic] being declared unlawful per se.").

40. See *supra* notes 27–28 and accompanying text.

41. See *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 432 n.15 (explaining how the desire to conserve administrative costs can justify per se rules despite their overinclusive nature); *Sylvania*, 433 U.S. at 50 n.16 ("[P]er se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system . . ."); see also *Khan*, 522 U.S. at 10 (holding that per se treatment is appropriate "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it" (alteration in original) (quoting *Maricopa Cty. Med. Soc'y*, 457 U.S. at 344)).

42. See *Nw. Wholesale Stationers*, 472 U.S. at 289–90 (stating that a category of restraints is unlawful per se if contracts within the category are "predominantly anticompetitive"); *Prof'l Eng'rs*, 435 U.S. at 691 (explaining that a restraint that "suppresses competition" contravenes the rule of reason); *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (describing restraints that "suppress or even destroy competition" as violating the rule of reason).



the wisdom of Congress's decision to condemn it.<sup>43</sup> How is it, then, that a category of restraint that has a pernicious effect on competition or is manifestly anticompetitive, thus satisfying the first part of *Northern Pacific Railway* test, can ever survive per se condemnation, as the test seems to contemplate? What type of virtue could possibly redeem restraints that are, by hypothesis, pernicious or anticompetitive?

The solution to this quandary, which has important implications for the interaction between per se analysis and the quick look, lies in the special meaning of the term "competition" implicit in part one of *Northern Pacific Railway*'s two-part test. To be sure, when antitrust courts or scholars refer to competition they usually invoke a particular process of economic rivalry that tends to maximize economic welfare by allocating resources to their highest and best use.<sup>44</sup> Defined in this way, real-world and socially useful competition includes some contracts and other practices that restrain moment-by-moment rivalry but enhance overall competition and economic welfare.<sup>45</sup> As Justice Brandeis put it nearly a century ago, contracts that "merely regulate" competition can further useful competition and economic welfare even though they reduce rivalry between the parties to them.<sup>46</sup> Other contracts, he said, can "destroy" competition and thus reduce welfare.<sup>47</sup> If by "pernicious effect on competition" the *Northern Pacific Railway* Court meant "destructive of overall competition," then the second part of the decision's per se test really would be redundant.

There is, however, no such redundancy. Instead, any apparent inconsistency between the *Northern Pacific Railway* test—which declines to condemn most pernicious or manifestly anticompetitive restraints—and the rule of reason's

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43. See *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911); see also *Maricopa Cty. Med. Soc'y*, 457 U.S. at 354–55 (asserting that the argument that "competition" produces unreasonable results should be directed to Congress); *Prof'l Eng'rs*, 435 U.S. at 690 (quoting *Standard Oil*, 221 U.S. at 65).

44. See *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 605 (1953) (explaining that the Sherman Act assumes that a free economy "best promotes the public weal" because "goods must stand the cold test of competition [and] the public, acting through the market's impersonal judgment, shall allocate the Nation's resources, and thus direct the course its economic development will take"); AREEDA & HOVENKAMP, *supra* note 38, ¶ 1502, at 387–90 (discussing definition of competition relevant for section 1's rule of reason); see also CARL KAYSER & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 44 (1959) (articulating and describing the goal of antitrust policy as the "protection of competitive processes by limiting market power").

45. See FRIEDRICH A. HAYEK, *The Meaning of Competition*, in *INDIVIDUALISM AND ECONOMIC ORDER* 92, 96–99 (3d ed. 1958) (suggesting that many activities that depart from atomistic competition are in fact methods of achieving a more "competitive" result); see also *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984) (explaining how "a restraint [on competition] in a limited aspect of a market may actually enhance marketwide competition"); *Prof'l Eng'rs*, 435 U.S. at 688 (explaining how the enforceability of private agreements "enables competitive markets—indeed, a competitive economy—to function effectively"); *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985) ("Cooperation is the basis of productivity. . . . Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.").

46. See *Bd. of Trade of Chi.*, 246 U.S. at 238.

47. *Id.*

well-established focus on competition is illusory and reflects the poverty of antitrust language.<sup>48</sup> To be precise, for purposes of the first part of the *Northern Pacific Railway* test, the term “competition” does not refer to any well-defined economic process or the overall impact of a restraint on market price or output.<sup>49</sup> Instead, competition in this context refers to atomistic rivalry between two or more firms, unrestrained by any agreement between them and without regard to the economic impact of such rivalry. Under the first part of the *Northern Pacific Railway* test, then, a restraint has a pernicious effect on competition if it restricts or eliminates unbridled rivalry on price, output, or some other economic variable.<sup>50</sup> Thus, the Supreme Court has repeatedly held that agreements restricting rivalry on one or more terms of trade have the requisite effect on competition to merit per se condemnation regardless of market structure or any other indicator that the restriction can produce harm.<sup>51</sup>

Therefore, when applying the first part of the per se test, courts do not assess whether restraints in the category in question are “anticompetitive” as a whole. Instead, courts must focus only on the rivalry-reducing properties of the class of restraints, ignoring any consideration of possible efficiency impacts. Application of this part of the per se test is quite simple and relatively cheap. Given this expansive and literalistic definition of competition, many beneficial restraints could have a pernicious effect on competition and thus fail the first part of the *Northern Pacific Railway* test. The formation of a partnership, for instance, eliminates actual or potential rivalry between previously independent firms.<sup>52</sup> So do restraints ancillary to such partnerships, such as provisions that prevent partners from “moonlighting” in competition with the enterprise.<sup>53</sup> The same applies for horizontal mergers, many joint ventures, covenants ancillary to the sale of a business, vertical restraints, or restraints ancillary to a legitimate joint venture, all of which eliminate rivalry that would otherwise occur.<sup>54</sup> In short,

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48. See HOVENKAMP, *supra* note 24, at 277 (“[C]ompetition’ has been used in antitrust cases to mean several different things.”).

49. Cf. *Standard Oil Co. v. United States*, 221 U.S. 1, 57–59 (1911) (holding that restraints are unreasonable if they unduly restrain competition by reducing market output or increasing market price).

50. See Meese, *supra* note 22, at 94–95 (describing case law defining “anticompetitive” within the meaning of the first part of the per se test in this way).

51. See, e.g., *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 343–44 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (declaring restraint unlawful per se despite uncontradicted proof that it did not impact price, output, or quality).

52. See *Maricopa Cnty. Med. Soc’y*, 457 U.S. at 356–57 (explaining that price fixing between partners is “perfectly proper”); *Broad. Music, Inc. v. Columbia Broad. System, Inc.*, 441 U.S. 1, 9 (1979) (“When two partners set the price of their goods or services they are literally ‘price fixing’ . . .”).

53. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281–82 (6th Cir. 1898) (endorsing the common law’s favorable treatment of such restraints).

54. *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (noting that price setting by a joint venture may be “price fixing in a literal sense” but not unlawful per se); *Broad. Music, Inc.*, 441 U.S. at 23 (“Mergers among competitors eliminate competition, including price competition . . .”); *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (describing how nonprice vertical restraints reduce intrabrand



parties challenging the validity of restraints can generally satisfy the first part of the *Northern Pacific Railway* test with ease.

How, then, can any rational test that purports to implement the rule of reason treat these transactions or restraints as pernicious? The answer lies in the second part of the *Northern Pacific Railway* test. Far from being superfluous, the second part of the test does most of the work.<sup>55</sup> That is, once a tribunal determines that a restraint has a pernicious effect on competition so defined, as so many restraints do, it must then move to the second part of the test and evaluate any possible redeeming virtues that defendants offer in favor of such restraints.<sup>56</sup> Put another way, courts must ask whether the potential benefits that defendants identify are cognizable or redeeming, in light of policies inherent in the rule of reason. More precisely, courts ask whether the restraint may “fructify” or “develop” trade by creating technological efficiencies or overcoming a market failure.<sup>57</sup> If the defendants do identify such cognizable benefits, then the restraint, no matter how pernicious, survives per se condemnation and merits rule of reason scrutiny.<sup>58</sup> If the defendants do not identify such benefits, then it makes sense to interpret the rivalry-reducing arrangement—which the defendants spent time and other resources adopting, enforcing, and defending—as an effort to acquire or exercise market power.<sup>59</sup>

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competition); *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (explaining that restraints ancillary to joint ventures reduce horizontal rivalry as much as naked restraints subject to per se condemnation).

55. See Thomas G. Krattenmaker, Commentary, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165, 172–73 (1988); Meese, *supra* note 22, at 97; see also HOVENKAMP, *supra* note 24, at 277 (“[T]he label ‘illegal per se’ entails that certain justifications or defenses will not be permitted.”); Richard A. Givens, *Affirmative Benefits of Industrial Mergers and Section 7 of the Clayton Act*, 36 IND. L.J. 51, 52 (1960) (concluding that mergers are “far more competition-destroying” than other restraints that reduce competition but nonetheless avoid per se condemnation because they may produce redeeming virtues).

56. See Krattenmaker, *supra* note 55, at 172–73 (“What the Court means to say [when it declares a practice unlawful per se] is that certain defenses or justifications frequently offered for price fixing (or group boycotts, or tying arrangements) are to be summarily rejected, without factual inquiry, either as a matter of principle or because experience teaches us that the costs of the inquiry will exceed any potential gains. No conduct is per se (that is, ‘by itself’ or ‘intrinsically’) a violation of the antitrust laws. However, certain defenses to such conduct are per se inadmissible or impermissible.” (citations omitted)).

57. See *Standard Oil Co. v. United States*, 221 U.S. 1, 55–56 (1911) (explaining that acts that “tended to fructify and develop trade” were, for that reason, reasonable); Meese, *supra* note 22, at 95–98.

58. See Krattenmaker, *supra* note 55, at 171–72 (explaining how identification of a valid redeeming virtue that restraint might produce obviates per se condemnation).

59. See *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 435 n.18 (1990) (“Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market.” (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 269 (1978))); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 693 (1978) (holding that the defendant’s claim that restraint would reduce price competition and thereby enhance public safety did not describe a cognizable benefit but instead depended upon the assumption that the restraint would raise prices and thus have an anticompetitive effect); Meese, *supra* note 22, at 98 n.100 (collecting cases and scholarly authorities endorsing per se condemnation of such restraints on this basis); see also

Partnerships, mergers, and ancillary restraints all reduce or eliminate competition, defined as rivalry between the parties to such agreements, and thus have the pernicious effect that satisfies the first part of the *Northern Pacific Railway* test.<sup>60</sup> Still, courts have never treated any such restraints as unlawful per se, recognizing that each might also produce redeeming virtues by producing technological efficiencies or overcoming a market failure.<sup>61</sup> Partnerships, joint ventures, or mergers, for instance, integrate previously separate assets and human capital and may lead to more efficient production or product improvement.<sup>62</sup> Restraints ancillary to such ventures can help magnify these efficiencies by preventing the sort of market failures that would result if venture participants were free to compete in any way they wished with the venture.<sup>63</sup> Finally, the classic ancillary restraint, the covenant ancillary to the sale of a business, allows

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Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648–49 (1980) (rejecting virtues proffered by the defendants as noncognizable and thus declaring challenged practice unlawful per se).

60. See *supra* notes 48–53 and accompanying text; see also Krattenmaker, *supra* note 55, at 172 (noting that formation of a law firm is literally “price fixing”). It should be noted that some restraints survive per se condemnation at least in part because they do not produce pernicious effects on the sort of “competition” relevant under the *Northern Pacific Railway* test. See *State Oil Co. v. Khan*, 522 U.S. 3, 18 (1997) (rejecting per se ban on maximum price fixing because such agreements often reduce prices with the result that “the potential injuries [attributed to such restraints are] less serious than the Court [previously] imagined”); *Broad. Music, Inc. v. Columbia Broad. System, Inc.*, 441 U.S. 1, 23–24 (1979) (finding that restraint was not pernicious in part because it left sellers free to bargain separately with buyers); *Broad. Music, Inc.*, 441 U.S. at 20–23 (explaining that the challenged practice also might produce significant cognizable benefits).

61. See *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 & n.1 (2006); *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 356–57 (1982) (explaining that price fixing between partners is “perfectly proper” despite the resulting elimination of price competition); *Broad. Music, Inc.*, 441 U.S. at 9 (price fixing by two partners is not a per se violation of the Sherman Act); *Broad. Music, Inc.*, 441 U.S. at 23 (“Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not per se illegal . . .”); *Broad. Music, Inc.*, 441 U.S. at 20–23 (rejecting application of per se rule to a practice that was literally price fixing because the practice accompanied other forms of integration and “substantial lowering of costs” of distributing products governed by the arrangement); see also *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (refusing to declare vertically imposed exclusive territories that reduce competition unlawful per se because of lack of information about possible redeeming virtues); Krattenmaker, *supra* note 55, at 172 (“[W]hen [the Supreme Court says] that not all literal price fixing is illegal per se, [it] mean[s] that once a plaintiff has proved that price fixing has occurred, the defendant nevertheless may escape liability by proving certain facts . . . Thus, lawyers do not necessarily violate the Sherman Act when they form a law firm and doctors who cooperate to establish clinics are not necessarily antitrust felons.” (citations omitted)); *supra* text accompanying notes 57–58 (detailing standards courts apply when determining whether purported virtues are cognizable).

62. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898); see also *Dagher*, 547 U.S. at 6–8; Givens, *supra* note 55, at 52–53 (explaining that mergers, while eliminating competition, avoid per se condemnation because they may produce cognizable benefits).

63. See *Addyston Pipe*, 85 F. at 280 (“Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise . . . were [at common law] to be encouraged.”); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 381–84 (1966) (explaining how such agreements can prevent individual partners from free riding on the partnership’s efforts and thus encourage investments and specialization by the enterprise); see also *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (explaining how a covenant ancillary to the formation of a shopping center

sellers of a business to convey the entire goodwill associated with it to a purchaser, thereby ensuring that the original owner of the business can realize, via a high sale price, the full benefits of his or her efforts to expand and improve the business.<sup>64</sup>

At the same time, many restraints with the same pernicious effect—complete elimination of rivalry—fall prey to the per se test because tribunals reject purported virtues adduced by defendants as not redeeming.<sup>65</sup> For instance, courts and agencies will condemn as unlawful per se horizontal price fixing if proponents of the restraint merely claim that the agreement will set a reasonable price because the propensity to set such a price is not a redeeming virtue.<sup>66</sup> Similar logic applies to horizontal agreements on nonprice terms of trade.<sup>67</sup> Courts have also rejected an effort to justify horizontal price fixing as a means of encouraging nonprice competition.<sup>68</sup> The outcome of per se analysis, then, almost always turns on the application of the second part of the *Northern Pacific Railway* test, as courts and agencies determine whether potential virtues that defendants ascribe to a given category of restraint are in fact redeeming.<sup>69</sup>

The list of restraints deemed unlawful per se has not been static. Initially, courts condemned few restraints outright, subjecting even some price fixing to something like rule of reason scrutiny.<sup>70</sup> Subsequently, during antitrust's inhospit-

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could encourage venture partners to engage in promotion and thus enhance the productivity of the venture).

64. See *Prof'l Eng'rs*, 435 U.S. at 689 (explaining that courts will sustain such covenants even though they reduce competition because “[t]he long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition”); MICHAEL J. TREBILCOCK, *THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS* 252 (1986); Alan J. Meese, *Property Rights and Intra-brand Restraints*, 89 CORNELL L. REV. 553, 600–01 (2004).

65. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) (rejecting proffered redeeming virtues and therefore declaring horizontal agreement on credit terms unlawful per se); *Prof'l Eng'rs*, 435 U.S. at 692–96 (rejecting proffered redeeming virtues and declaring collective ban on competitive bidding unlawful); *Maricopa Cty. Med. Soc'y*, 457 U.S. at 352–55; *United States v. Topco Assocs.*, 405 U.S. 596, 610–12 (1972) (condemning horizontal agreement between rivals as unlawful per se after rejecting defendants' assertion that the restraint's propensity to enhance interbrand competition was a redeeming virtue); *Polk Bros.*, 776 F.2d at 189 (explaining that both naked and ancillary restraints can equally restrain competition but that the latter avoid per se condemnation because they may produce significant benefits).

66. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (“[I]t is no excuse that the prices fixed are themselves reasonable.”); *Prof'l Eng'rs*, 435 U.S. at 689 (“[*Addyston Pipe*], and subsequent decisions by this Court, unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement.”); see also Krattenmaker, *supra* note 55, at 172–73 (explaining how rejection of reasonable price defense leads to per se condemnation of price fixing not supported by other redeeming virtues).

67. See *Catalano*, 446 U.S. at 648–50 (rejecting the contention that propensity of agreement on credit terms to enhance visibility of price competition was a redeeming virtue).

68. See *United States v. Brown Univ.*, 5 F.3d 658, 675 (3d Cir. 1993).

69. See Meese, *supra* note 22, at 95–96.

70. *FTC v. Gratz*, 253 U.S. 421, 428–29 (1920) (subjecting tying agreements to a forgiving rule of reason), *overruled in part by* *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Addyston Pipe & Steel Co.*

tality era<sup>71</sup>—roughly 1950 through 1977—the Supreme Court continually expanded the number of per se rules, banning practices like nonprice vertical restraints that were previously analyzed under the rule of reason.<sup>72</sup> Although often attributed to populist impulses, such decisions also reflected the era’s mainstream economic theory, which simply excluded the possibility that such restraints could, despite reducing competition, actually enhance economic welfare.<sup>73</sup>

More recently, the Supreme Court, bound to evaluate restraints with the light of reason and thus according to evolving economic theory, has reversed itself.<sup>74</sup> This reversal followed a paradigm shift in economic theory, known as “transaction cost economics,” which concluded that nonstandard agreements could sometimes overcome market failures, increase economic output, and thus produce redeeming virtues that courts previously overlooked.<sup>75</sup> As a result, numerous restraints once deemed unlawful per se because they reduce rivalry without possible benefits are now analyzed under the rule of reason.<sup>76</sup> Today the vast

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v. United States, 175 U.S. 211, 245 (1899) (condemning horizontal price fixing as a “direct restraint” after determining that cartel set unreasonable prices).

71. See Meese, *supra* note 22, at 124–25 (describing antitrust’s inhospitality era); Meese, *supra* note 22, at 119–24 (describing neoclassical price theory’s strong preference for atomistic competition during this period); see also Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 715 (1982) (“[The] ‘inhospitality tradition of antitrust’ . . . called for courts to strike down business practices that were not clearly procompetitive. In this tradition an inference of monopolization followed from the courts’ inability to grasp how a practice might be consistent with substantial competition.”). The phrase “inhospitality tradition” was apparently coined by Professor Donald Turner, an economist who headed the Antitrust Division of the Department of Justice in the 1960s. According to Turner, “I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust law.” Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B.A. ANTITRUST L. SYMP. 1, 1–2.

72. See Meese, *supra* note 22, at 124–34 (describing doctrinal developments during the inhospitality era); *supra* note 6, at 103. *But see, e.g.*, *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (rejecting application of per se rule to nonprice vertical restraints); *Sandura Co. v. FTC*, 339 F.2d 847, 849 (6th Cir. 1964) (analyzing vertically imposed exclusive territories under a full-blown rule of reason). Although the Court confined the per se rule against tying to agreements by firms with “economic power,” it found such power in any departure from perfect competition. See *Fortner*, 394 U.S. at 502–03 (the mere existence of a tie is itself evidence that the defendant possesses sufficient “economic power”); *United States v. Loew’s, Inc.*, 371 U.S. 38 (1962) (possession of a copyright creates a presumption of economic power), *abrogated by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

73. See Meese, *supra* note 22, at 115–23; see also Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMPETITION L. & ECON. 22 (2005) (explaining how the foundational perfect competition model precluded recognition of beneficial explanations for various non-standard agreements).

74. See Meese, *supra* note 22, at 141–44 (discussing various Supreme Court decisions repudiating case law from the inhospitality era); see also *infra* note 76.

75. See Alan J. Meese, *Reframing Antitrust in Light of Scientific Revolution: Accounting for Transaction Costs in Rule of Reason Analysis*, 62 HASTINGS L.J. 457, 472, 475–76 (2010); Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 273–74 (1987) (describing transaction cost economics as a “paradigm shift” in thinking about both complete and partial contractual integration).

76. See Meese, *supra* note 22, at 134–41; see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887–907 (2007) (overturning a ninety-five-year ban on minimum resale price maintenance because developments in economic theory established that such restraints may in some

majority of trade restraints avoid per se condemnation and are thus subject to analysis under a more fact-intensive rule of reason.<sup>77</sup>

## II. THE “FULL-BLOWN” RULE OF REASON

As noted above, courts banned numerous restraints as unlawful per se during antitrust’s three decade inhospitality era.<sup>78</sup> During this period, the standards governing rule of reason analysis received short shrift; no Supreme Court decision discussed how to conduct such analysis.<sup>79</sup> Beginning in 1977, however, numerous practices once deemed unlawful per se became subject to full-blown rule of reason scrutiny.<sup>80</sup>

The Supreme Court has declined to articulate a comprehensive methodology for conducting full-blown rule of reason analysis, leaving lower courts and enforcement agencies to fill in the gaps and articulate the precise standards governing this analysis.<sup>81</sup> Under the consensus approach, plaintiffs challenging such restraints can only prevail if they establish that an agreement produces actual economic harm that outweighs any benefits the restraint produces.<sup>82</sup> The basic contours of this test are uncontroversial. First, the plaintiff must establish a prima facie case of harm.<sup>83</sup> If the plaintiff fails to adduce such evidence, the case is over.<sup>84</sup> Second, if the plaintiff establishes such a case, the defendant

cases produce redeeming virtues); *State Oil Co. v. Khan*, 522 U.S. 3, 15–22 (1997) (overruling prior decision banning maximum resale price maintenance as unlawful per se); *Broad. Music, Inc. v. Columbia Broad. System, Inc.*, 441 U.S. 1, 8 (1979) (holding that horizontal price restraint was properly analyzed under the rule of reason); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 *passim* (1977) (reversing ban on nonprice vertical restraints because of revised economic understanding of such agreements). See generally Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 749 (2012) (stating that, taken together, *Broad. Music, Inc.* and *Sylvania* “restored comprehensive rule of reason analysis as the default setting for antitrust analysis and repositioned the per se rule as an exception”).

77. See *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006) (referring to the “narrow category of activity that is *per se* unlawful”).

78. See Meese, *supra* note 22, at 124–34 (describing doctrinal developments during the inhospitality era); see also *supra* note 72 and accompanying text (collecting various decisions).

79. See *Fortner Enters., Inc. v. U.S. Steel Co.*, 394 U.S. 495, 500–01 (1969) (declining to consider whether plaintiff could prevail under the rule of reason, given the possibility of per se liability).

80. See *supra* note 76 (collecting authorities).

81. See, e.g., *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506–07 (2d Cir. 2004) (articulating comprehensive rule of reason methodology); see also Meese, *supra* note 22, at 98–99 (discussing Supreme Court precedent determining certain aspects of rule of reason analysis and hinting at others).

82. Meese, *supra* note 22, at 98–99.

83. See *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 827 (6th Cir. 2011) (“Applying the rule of reason, we first look to see ‘whether [the] FTC has demonstrated ‘actual detrimental effects’ or ‘the potential for genuine adverse effects on competition [via proof of market power].’” (first alteration in original) (quoting *In re Detroit Auto Dealers Ass’n*, 955 F.2d 457, 469 (1992))); *Geneva Pharm.*, 386 F.3d at 506–07 (“[T]he plaintiffs bear an initial burden to demonstrate the defendants’ challenged behavior ‘had an *actual* adverse effect on competition as a whole in the relevant market.’” (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537 (1993))).

84. See *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23 (2d Cir. 2006) (affirming dismissal of section 1 complaint because the plaintiff did not allege market-wide harm).



must come forward with actual evidence, and not just argument, that the restraint produces redeeming virtues.<sup>85</sup> Failure to produce such evidence at this stage dooms the restraint, given the plaintiff's proof of harm.<sup>86</sup> Third, if the defendant does produce such evidence, the burden shifts back to the plaintiff. At this point, the plaintiff may simply rest on the evidence it has presented, leaving the trier of fact to compare any evidence of harm with the defendant's evidence of benefits and to determine which predominates.<sup>87</sup> The plaintiff may also attempt to establish that there is a less restrictive means of achieving the same benefits produced by the restraint.<sup>88</sup> These two approaches are not, it should be noted, mutually exclusive: a plaintiff may argue that there is a less restrictive means of achieving such benefits and that, in any event, the restraint produces harms that outweigh any benefits.<sup>89</sup>

There is less consensus, however, about how to implement this test, particularly the first stage. All courts agree that a plaintiff can establish a prima facie case if it proves that the defendant possesses market power of the sort necessary to produce the type of harm the plaintiff alleges.<sup>90</sup> Most also hold that, failing such proof, plaintiffs may also prevail by establishing that the restraint produces "actual detrimental effects," that is, prices that are higher or output that is lower than would have prevailed without the restraint.<sup>91</sup> Some courts, however, reject this "actual detrimental effects" test, holding that definition of a relevant market and proof of market power is necessary for a plaintiff to establish a prima facie case.<sup>92</sup>

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85. See *Realcomp II*, 635 F.3d at 834 (explaining that defendant can prevail despite showing of actual adverse effect by offering evidence of some offsetting procompetitive benefits); *Geneva Pharm.*, 386 F.3d at 507 ("If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement.").

86. See *Realcomp II*, 635 F.3d at 834–36 (explaining that failure to produce evidence of such benefits after plaintiff established prima facie case resulted in judgment for the plaintiff).

87. See *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("[T]he harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.").

88. See *Geneva Pharm.*, 386 F.3d at 507 ("Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means.").

89. See Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268–69.

90. *Realcomp II*, 635 F.3d at 826–29 (proof of market power or actual detrimental effects are alternative means of establishing a prima facie case); *Law*, 134 F.3d at 1019–20 (same).

91. See *Realcomp II*, 635 F.3d at 831–34; *Law*, 134 F.3d at 1019–20; see also *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986) (rejecting defendants' contention that proof of market power was necessary to establish prima facie case given the FTC's findings that the restraint produced anti-competitive harm); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) (holding that the plaintiff had established a prima facie case given the district court's finding that price was higher and output lower than it would have been absent the restraint).

92. See *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004) ("The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 217 (D.C.

Plaintiffs almost never prevail in a full-blown rule of reason case. Most importantly, proof of a prima facie case, whether through proof of market power or actual detrimental effects, is difficult. Indeed, one recent study of all rule of reason cases decided between early 1999 and mid-2009 concluded that ninety-seven percent of such cases fail at this first stage because plaintiffs cannot establish a prima facie case of harm.<sup>93</sup> This result was consistent with the result the same author obtained after studying several hundred rule of reason cases decided between 1977 and 1998.<sup>94</sup> Also, in that small subset of cases in which plaintiffs do establish harm and thus a prima facie case, defendants nonetheless prove benefits that outweigh harms in most such cases.<sup>95</sup> The more recent of these two studies found that plaintiffs prevailed in about one percent of full-blown rule of reason cases.<sup>96</sup>

### III. A “QUICK LOOK” FOR INHERENTLY SUSPECT RESTRAINTS

As described thus far, section 1 analysis has an “all or nothing” quality to it. In short, the determination of whether a restraint is unlawful per se is generally outcome determinative. After all, restraints falling into the per se category are automatically unlawful regardless of actual harm. By contrast, restraints subject to the full-blown rule of reason almost always survive scrutiny. Moreover, because the Supreme Court has significantly contracted the number of per se rules, the vast majority of agreements subject to section 1 fall into the second category.<sup>97</sup>

It is perhaps no surprise, then, that enforcement agencies, courts, and scholars have all proposed what they characterize as a middle ground between per se condemnation on the one hand, and full-blown rule of reason scrutiny on the other.<sup>98</sup> Proponents of the middle ground approach seek to improve upon

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Cir. 1986) (“A monopolist . . . enhances its revenues by raising the market price. It can do that only if its share of the market is so large that by reducing its output of goods or services the amount offered by the industry is substantially reduced so that the price is bid up.”); *see also* United States v. VISA U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003) (suggesting that proof of a relevant market and market power are necessary to establish a prima facie case under the rule of reason).

93. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009). It should be noted that this study excluded applications of the quick look, limiting itself to instances in which the “full-blown” rule of reason applied. *See id.* at 828 (noting this limitation).

94. *See* Carrier, *supra* note 89, at 1293 (finding that eighty-four percent of full-blown rule of reason cases failed during this prior period because plaintiffs could not establish a prima facie case); *id.* (reproducing data suggesting that defendants prevailed in more than ninety percent of full-blown rule of reason cases).

95. *See* Carrier, *supra* note 93, at 831–32 (finding that defendants prevailed in most cases in which they adduced proof of benefits).

96. *See id.* at 830 (“In 221 of 222 cases (all except a single balancing case), the defendant won.”).

97. *See id.*; *see also* Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 305 (1987) (opining that rejection of per se condemnation in favor of full-blown rule of reason treatment “as a practical matter meant that [the challenged restraints] were declared lawful per se”).

98. HOVENKAMP, *supra* note 27, ¶ 1909a, at 308 (describing restraints that are “in the middle” between those deemed unlawful per se and those meriting full-blown rule of reason scrutiny).



traditional section 1 analysis, which many unflatteringly characterize as “dichotomous” or “bipolar.”<sup>99</sup> In particular, these scholars, jurists, and enforcement officials advocate a third category of section 1 analysis reserved for restraints that, though not unlawful per se, are inherently suspect.<sup>100</sup> Whether dubbed “quick look,”<sup>101</sup> the “truncated rule of reason,”<sup>102</sup> or “stepwise analysis,”<sup>103</sup> this alternative seeks to reduce the cost and increase the accuracy of the analysis for those restraints that escape per se condemnation but nonetheless pose a significant risk of competitive harm.

Although first employed by the Federal Trade Commission (FTC), several courts of appeals have endorsed the approach, and the Supreme Court has agreed, albeit in dicta.<sup>104</sup> The Department of Justice has, in joint guidelines with

99. *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 33–34 (D.C. Cir. 2005) (referring to the traditional approach as “a dichotomous categorical approach”); Peter C. Carstensen & Bette Roth, *The Per Se Legality of Some Naked Restraints: A [Re]conceptualization of the Antitrust Analysis of Cartelistic Organizations*, 45 ANTITRUST BULL. 349, 420 (2000) (referring to the “dichotomous structure required by a formal doctrine” governing section 1 analysis); Gavil, *supra* note 76, at 762 (referring to the traditional approach as “bipolar”); Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1217 (2008) (referring to “the strict dichotomous categories of per se and Rule of Reason analysis”); Timothy J. Muris, *The Rule of Reason After California Dental*, 68 ANTITRUST L.J. 527, 531 (2001) (referring to the traditional “rigid, bipolar approach”); Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 295 n.52 (2001) (noting the tension between treating per se unlawful and full-blown rule of reason categories as “dichotomous choices” and a “sliding scale” approach).

100. HOVENKAMP, *supra* note 27, ¶ 1909a, at 307–08 (describing with approval so-called tripartite analysis under which restraints “are subjected to three modes of analysis” under section 1).

101. See Gavil, *supra* note 76, at 753–59 (discussing evolution of the so-called quick look rule of reason).

102. See HOVENKAMP, *supra* note 24, at 285 (referring to “[t]he Truncated or ‘Quick Look,’ Rule of Reason”).

103. See Joel I. Klein, Acting Assistant Att’y Gen., Dep’t of Justice, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address Before the American Bar Association’s Antitrust Section Semi-Annual Fall Policy Program 4–5 (Nov. 7, 1996) (transcript available at <http://www.justice.gov/atr/file/518656/download>).

104. See *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237–38 (2013). Some, including the enforcement agencies and the Supreme Court, have attributed the quick look to *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). See *Cal. Dental Assoc’n v. FTC*, 526 U.S. 756, 770 (1999) (claiming that the Supreme Court employed a quick look approach in both *Indiana Federation of Dentists* and *NCAA*); *Polygram*, 416 F.3d at 35 (same); U.S. DEP’T OF JUSTICE & U.S. FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS § 3.3, at 10–11 nn.27–28 (2000).

In my view, these scholars, jurists, and enforcement officials have misread both *Indiana Federation of Dentists* and *NCAA*. In *NCAA*, for instance, the Court began its rule of reason analysis by recounting and affirming the district court’s findings that the challenged restraint produced significant anticompetitive harm in the form of higher prices and reduced output. 468 U.S. at 104–08. I therefore agree with the late Professor Areeda that *NCAA* rested upon the Court’s belief that the challenged restraint produced actual anticompetitive harm and thus does not stand for the proposition that the mere existence of a restraint can suffice to establish a prima facie case. See 7 PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1511, at 430–33 (1986). In *Indiana Federation of Dentists*, the Court invoked the FTC’s findings that the challenged restraint had produced actual anticompetitive effects. See 476 U.S. at 461 (“In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to

the FTC, also endorsed this methodology.<sup>105</sup> Numerous leading antitrust scholars have as well, although there is disagreement about how to apply the approach.<sup>106</sup>

The quick look framework is easy to explain, if sometimes difficult to apply. Of course, the framework only applies as a logical matter to restraints that survive *per se* condemnation, presumably after application of the *Northern Pacific Railway* test and a determination that a restraint might produce redeeming virtues.<sup>107</sup> In its most rigorous form, the quick look entails up to four steps for analyzing such restraints.<sup>108</sup>

First, the tribunal decides whether the agreement, although not unlawful *per se*, is nonetheless “inherently suspect.”<sup>109</sup> This determination is purely theoretical—a question of law for the tribunal—and does not require any proof that the restraint actually produces harm.<sup>110</sup> If the tribunal determines that the restraint is not inherently suspect, then quick look analysis is over and the tribunal subjects the restraint to the sort of full-blown rule of reason analysis described earlier.<sup>111</sup> This default to the full-blown rule of reason follows naturally from the fact that such restraints avoided *per se* condemnation, presumably because they might produce redeeming virtues.<sup>112</sup>

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support a finding that the challenged restraint was unreasonable . . .” (emphasis added)). Hence, both *NCAA* and *Indiana Federation of Dentists* were straightforward applications of the full-blown rule of reason.

105. See U.S. DEP’T OF JUSTICE & U.S. FED. TRADE COMM’N, *supra* note 104, § 3.3, at 10–11.

106. See HOVENKAMP, *supra* note 27, ¶ 1911, at 324–31 (discussing “truncated” rule of reason inquiry and quick look with approval); HOVENKAMP, *supra* note 24, at 285–87; LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST* 248–49 (2d ed. 2006) (endorsing position that “truncated analysis is still appropriate when conduct is presumptively anticompetitive”); Edward D. Cavanagh, *The Rule of Reason Re-examined*, 67 *BUS. LAW.* 435, 466–67 (2012); Gavil, *supra* note 76, at 766–73; Timothy J. Muris & Brady P.P. Cummins, *Tools of Reason: Truncation Through Judicial Experience and Economic Learning*, *ANTITRUST*, Summer 2014, at 46, 46; see also *supra* note 99 (citing other authors endorsing quick look in various contexts).

107. See *supra* notes 55–69 and accompanying text (explaining that application of *Northern Pacific Railway* test turns on possible presence (or not) of redeeming virtues).

108. Cavanagh, *supra* note 106, at 466–67 (describing four-step approach); Crane, *supra* note 29, at 63 (same); *Polygram*, 416 F.3d at 35–36 (describing and endorsing four-step approach (citing *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 604 (1988))); *Mass. Bd.*, 110 F.T.C. at 604 (“This structure is readily described as a series of questions to be answered in turn.”); see also *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 358–61 (5th Cir. 2008) (describing the FTC’s framework).

109. See *Polygram*, 416 F.3d at 35–36; *Mass. Bd.*, 110 F.T.C. at 604.

110. See *N. Tex. Specialty Physicians*, 528 F.3d at 363–67 (affirming FTC’s finding that restraint was inherently suspect despite absence of evidence that restraint impacted price or output); *Polygram*, 416 F.3d at 35–36 (same); *Mass. Bd.*, 110 F. T. C. at 604 (same); see also HOVENKAMP, *supra* note 27, ¶ 1909b (explaining that the determination whether a restraint is unlawful *per se* or inherently suspect is a question of law for the tribunal).

111. *Mass. Bd.*, 110 F.T.C. at 604 (“If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed.”); see also HOVENKAMP, *supra* note 27, ¶ 1911, at 326–27 (determination that restraint is not inherently suspect results in full-blown rule of reason inquiry).

112. See *supra* notes 55–64 and accompanying text.

Second, if the restraint is inherently suspect, the defendant must articulate a plausible and legally cognizable competitive justification for the agreement.<sup>113</sup> The standards governing cognizability, it should be noted, are the same as those governing whether a purported virtue is redeeming for purposes of applying the *Northern Pacific Railway* test for per se illegality.<sup>114</sup> Here again, the analysis is purely theoretical, with the tribunal assuming for the sake of argument that the restraint will produce the benefits in question and asking whether, as a matter of law, such benefits are cognizable.<sup>115</sup> If the defendant fails to satisfy this burden of articulation, the tribunal condemns the restraint, without moving to the third step and without any proof of actual harm.<sup>116</sup>

Third, if the defendant does explain how the restraint might produce cognizable benefits, the burden shifts back to the plaintiff, who may discharge the resulting burden in one of two ways.<sup>117</sup> First, the plaintiff can decline to introduce additional evidence, relying instead upon a purely theoretical explanation of how the restraint “very likely harmed consumers.”<sup>118</sup> Second, the plaintiff may adduce actual evidence that the restraint likely produces harm, that is, the same sort of evidence necessary to make out a prima facie case under the full-blown rule of reason.<sup>119</sup> Indeed, the FTC’s initial formulation of the test treated the first avenue as the exclusive means of discharging the plaintiff’s

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113. See *Polygram*, 416 F.3d at 36 (explaining that at step two, the defendant must come “forward with some plausible (and legally cognizable) competitive justification for the restraint”); *Mass. Bd.*, 110 F.T.C. at 604 (“[W]e must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market?)”); see also Cavanagh, *supra* note 106, at 466–67.

114. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (explaining that per se and rule of reason analyses are “complementary categories,” both of which require tribunals to form a judgment “about the competitive significance of the restraint”); *Law v. NCAA*, 134 F.3d 1010, 1021–22 (1998) (citing *FTC v. Superior Court Trial Lawyers*, 493 U.S. 411, 423–24 (1990)) (rejecting as noncognizable the social welfare benefits that the defendant offered to prove during rule of reason analysis); see also *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977) (holding that the presence of “redeeming virtues” is implicit in judicial decisions sustaining challenged restraints under the full-blown rule of reason); HOVENKAMP, *supra* note 24, at 286 (“The purpose [of the quick look] is not to broaden the range of defenses for a restraint that is conceded to reduce output or increase price.”).

115. See HOVENKAMP, *supra* note 27, ¶ 1909b, at 308–09; cf. *Prof’l Eng’rs*, 435 U.S. at 693–96 (assuming, for the sake of argument, that the challenged restraint would enhance public safety as defendants claimed but holding that such benefits were not cognizable); *Polygram*, 416 F.3d at 37–38 (assuming that the challenged restraint would reduce interbrand free riding but holding that this effect was not a cognizable benefit under step two of quick look analysis).

116. See *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 368–70 (5th Cir. 2008) (holding that justification offered by the defendant was not cognizable and thus condemning the restraint at step two); *Polygram*, 416 F.3d at 37–38 (same); *Mass. Bd.*, 110 F.T.C. at 606–08 (same).

117. See *Polygram*, 416 F.3d at 35–36 (articulating this portion of the test); see also *Mass. Bd.*, 110 F.T.C. at 604 (same).

118. *Polygram*, 416 F.3d at 36.

119. See *id.*

burden at this third stage.<sup>120</sup> The first approach follows naturally from the rationale of the quick look in that it dispenses with costly proof that is superfluous, given the threshold determination that the restraint is such that it most likely produces harm.<sup>121</sup> Moreover, as explained below, courts and the enforcement agencies define restraints as inherently suspect because they pose exceptional risks of anticompetitive harm.<sup>122</sup> As a result, all restraints deemed inherently suspect will also appear likely to have harmed consumers and thus establish a prima facie case based upon the mere existence of the (inherently suspect) restraint.<sup>123</sup> Indeed, one scholar has aptly opined that “[t]he defining characteristic of the quick look . . . is its ability to shift a burden from the plaintiffs to the defendants without ‘elaborate industry analysis.’”<sup>124</sup>

Fourth, if the plaintiff satisfies this (light) burden, the burden shifts to the defendant, who may discharge it by proving either that the restraint does not in fact produce harm or, in the alternative, that the restraint produces benefits that outweigh any harm.<sup>125</sup> This latter showing is subject to the plaintiff’s ability to offer a less restrictive alternative, as is the case with full-blown rule of reason analysis.<sup>126</sup>

There is significant overlap between the quick look methodology and traditional full-blown rule of reason analysis. Under both methodologies, for instance, courts balance any benefits against harms if plaintiffs establish a prima facie case.<sup>127</sup> Moreover, such balancing is subject to a less restrictive alternative test under both approaches.<sup>128</sup>

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120. See *Mass. Bd.*, 110 F.T.C. at 604. Thus, the government would only have to establish actual harm after the defendant proved that the restraint produces benefits because “if . . . the justification is really valid . . . it must be assessed under the full balancing test of the Rule of Reason.” *Id.*

121. See U.S. DEP’T OF JUSTICE & U.S. FED. TRADE COMM’N, *supra* note 104, § 3.1 (“Rule of reason analysis focuses on only those factors, and undertakes only the degree of factual inquiry, necessary to assess accurately the overall competitive effect of the relevant agreement.” (first citing *Cal. Dental Assoc’n v. FTC*, 526 U.S. 756, 778–81 (1999); then citing *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459–61 (1986); and then citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104–13 (1984))).

122. See *infra* notes 130–38 and accompanying text.

123. See *Muris & Cummins*, *supra* note 106, at 46 (describing and endorsing truncated analysis whereby “the plaintiff seeks to avoid pleading and proving market power” (quoting *In re Polygram*, 136 F.T.C. 310, 344 n.37 (2003) (Muris, Chairman))).

124. See *Gavil*, *supra* note 76, at 777 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

125. See *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 362–63 (5th Cir. 2008) (finding that tribunal must assess the “net procompetitive effect[s]” of an inherently suspect restraint if the defendant proves that the restraint produces cognizable benefits); *Polygram*, 416 F.3d at 36 (“[T]he evidentiary burden shifts to the defendant to show the restraint in fact does not harm consumers or has ‘procompetitive virtues’ that outweigh its burden upon consumers.”); *Mass. Bd.*, 110 F.T.C. at 604 (explaining that, once defendant shows that an inherently suspect restraint produces benefits, the tribunal must apply the “full balancing test of the rule of reason”).

126. See *HOVENKAMP*, *supra* note 24, at 287; *Cavanagh*, *supra* note 106, at 467; *cf.* *HOVENKAMP*, *supra* note 24, at 280 (explaining the role of less restrictive alternatives in ordinary rule of reason analysis).

127. See *Cavanagh*, *supra* note 106, at 467.

128. See *HOVENKAMP*, *supra* note 24, at 280, 287.

There are, however, two main distinctions between the two methodologies. First, the quick look adds an additional layer of analysis—a “filter”—by asking whether each restraint that survives *per se* condemnation is nonetheless inherently suspect before proceeding to further analysis. Second, if a tribunal does determine that a restraint is inherently suspect, then the plaintiff may establish a *prima facie* case without adducing the slightest evidence of harm. Put another way, adoption and implementation of the quick look methodology necessarily divides those restraints that escape *per se* condemnation because they may create redeeming virtues into two categories: those that presumptively create the sort of harm that gives rise to a *prima facie* case and those that do not. The latter restraints are beyond meaningful antitrust scrutiny and are essentially lawful, given that plaintiffs only prevail in one percent of ordinary rule of reason cases.<sup>129</sup>

What is it, then, that distinguishes inherently suspect restraints from that larger category of restraints that are merely pernicious within the meaning of the *Northern Pacific Railway* test, but that nonetheless survive *per se* condemnation? Courts and the FTC both have offered various definitions. Initially, the FTC asked whether the restraint is “the kind that appears likely, absent an efficiency justification, to ‘restrict competition and decrease output.’”<sup>130</sup> This definition sweeps too broadly, however. Even a merger would be inherently suspect, because absent an efficiency justification, such transactions merely eliminate competition between the parties to them and thus presumably do harm.<sup>131</sup> Still, the FTC repeated the definition over a decade later.<sup>132</sup> Eleven years after the FTC first articulated this test, the Supreme Court chimed in, offering *dicta* opining that a practice is subject to the quick look when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”<sup>133</sup> The D.C. Circuit has quoted the FTC’s initial definition with approval<sup>134</sup> but also suggested that a restraint is inherently suspect if “it is obvious from the nature of the challenged conduct that it will likely harm consumers,”<sup>135</sup> “judicial experience and economic learning have

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129. See *supra* notes 93–96 and accompanying text (reporting that ninety-nine percent of restraints evaluated under the ordinary rule of reason survive unscathed).

130. See *Mass. Bd.*, 110 F.T.C. at 604.

131. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221 (D.C. Cir. 1986) (indicating that agreements analyzed under the rule of reason result in either anticompetitive harm or efficiencies and that “[n]o third possibility suggests itself”); Meese, *supra* note 22, at 98 n.100 (collecting authorities concluding that the absence of possible redeeming virtues establishes that horizontal agreement likely exercises market power and produces harm).

132. See *In re Polygram*, 136 F.T.C. 310, 331–32 (2003).

133. See *Cal. Dental Assoc’n v. FTC*, 526 U.S. 756, 770 (1999).

134. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32–33 (D.C. Cir. 2005) (invoking the FTC’s decision for the proposition that conduct is inherently suspect if the conduct “appears likely, absent an efficiency justification, to restrict competition and decrease output” (quoting *In re Polygram*, 136 F.T.C. at 337)).

135. See *Polygram*, 416 F.3d at 35.



shown [such restraints] to be likely to harm consumers,”<sup>136</sup> or there is a “close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare”<sup>137</sup>—that is, one that is unlawful per se. Unlike the definition of restraints that are pernicious for purposes of the traditional per se test, which focuses solely on the reduction of rivalry as such, inherently suspect analysis attempts to identify that narrower class of restraints that, in addition to reducing rivalry, also threatens to produce actual economic harm.<sup>138</sup>

Proponents of the quick look treat the framework as an alternative method of rule of reason scrutiny that lightens the plaintiff’s burden of proving harm in appropriate cases and thereby streamlines the adjudicatory process.<sup>139</sup> These advocates, including apparently the Supreme Court itself, assert that all restraints that avoid per se condemnation are not created equal; some pose a greater risk of harm or are less likely to produce benefits than others.<sup>140</sup> As a result, it is said, tribunals should reject a one-size-fits-all approach to restraints that avoid per se condemnation and instead adopt a more flexible methodology.<sup>141</sup> Indeed, both enforcement agencies have opined that, when conducting rule of reason analysis, the agencies will only gather that information necessary to form a judgment about the competitive significance of the restraint.<sup>142</sup> Thus,

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136. *See id.* at 36–37.

137. *See id.* at 37.

138. *See* N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 367 (5th Cir. 2008) (affirming conclusion that restraint was inherently suspect because it likely produced actual harm, despite absence of evidence that restraint affected price or output); Muris & Cummins, *supra* note 106, at 47–49 (contending that best version of the quick look relies on judicial experience and economic learning to ascertain whether restraint is inherently suspect).

139. *See* HOVENKAMP, *supra* note 27, ¶ 1911a, at 326 (explaining that the quick look’s “purpose is to enable the tribunal to reach a confident judgment about reasonableness without having to undergo the costs of full rule of reason proof”); Cavanagh, *supra* note 106, at 466–67; Gavil, *supra* note 76, at 777–81; *see also* Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 ANTITRUST L.J. 391, 424–27 (2000) (treating quick look as the appropriate response to the significant costs of full-blown rule of reason scrutiny).

140. *See* Cal. Dental Assoc’n v. FTC, 526 U.S. 756, 779–81 (1999); *Polygram*, 416 F.3d at 34–35; Gavil, *supra* note 76, at 766–73 (endorsing *Polygram*’s conclusion that certain restraints that survive per se condemnation nonetheless pose a greater risk of anticompetitive harm and are thus properly treated as inherently suspect).

141. *See* Cal. Dental Assoc’n, 526 U.S. at 780–81 (“[T]here is generally no categorical line . . . between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”); HOVENKAMP, *supra* note 27, at 326 (“[T]he amount and range of information needed to make a conclusion of unreasonableness, or illegality, cannot be pigeonholed into two forms of inquiry: per se and rule of reason.”); Thomas A. Piraino, Jr., *An Antitrust Common Law for the Twenty-First Century*, 2009 UTAH L. REV. 635, 643 (2009) (“[F]ederal courts should not view each of these approaches as fixed categories of antitrust analysis, but as points along a continuum.”); Tom & Pak, *supra* note 139, *passim*.

142. *See* U.S. DEP’T OF JUSTICE & U.S. FED. TRADE COMM’N, *supra* note 104, § 3.1, at 7–8 (“Rule of reason analysis focuses on only those factors, and undertakes only the degree of factual inquiry, necessary to assess accurately the overall competitive effect of the relevant agreement.” (first citing *Cal. Dental Assoc’n*, 526 U.S. at 778–81; then citing *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447,

they continue, there is no need to determine whether a restraint produces actual competitive harm if the nature of the restraint itself establishes such harm as a matter of theory and experience.<sup>143</sup> In the same way, the Supreme Court has opined that rule of reason analysis is properly characterized as a “sliding scale,” whereby the nature and quantum of proof required to establish anticompetitive harm varies depending upon the type of restraint involved.<sup>144</sup> Within this template, it is said, the quick look improves upon the traditional dichotomous approach in three interrelated ways. First, the quick look reduces the costs that plaintiffs and enforcement agencies must incur when challenging particularly harmful restraints.<sup>145</sup> Second, by encouraging such challenges, while still allowing defendants to offer justifications for such agreements, the quick look deters harmful restraints.<sup>146</sup> Third, by reducing the cost of evaluating such restraints, while still allowing defendants to offer justifications, the quick look purportedly enhances the accuracy of judicial and administrative assessments of challenged restraints, thus furthering the Sherman Act’s regulatory objectives.<sup>147</sup>

#### IV. THE QUICK LOOK CRITIQUED: WHY STEP ONE WASTES RESOURCES AND DETERS BENEFICIAL ACTIVITY

A remarkable consensus among scholars, jurists, and enforcement officials contends that addition of the quick look can improve upon the traditional

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459–61 (1986); and then citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104–13 (1984)); see also HOVENKAMP, *supra* note 24, at 287 (describing that the quick look rests on the assumption that “the fact finder collects information up to the point that its incremental value is no longer worth the costs of obtaining it”).

143. See U.S. DEP’T OF JUSTICE & U.S. FED. TRADE COMM’N, *supra* note 104, § 3.3, at 10–11 (“Alternatively, where the likelihood of anticompetitive harm is *evident from the nature of the agreement*, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.” (emphasis added)); *N. Tex. Specialty Physicians*, 528 F.3d at 363–67; *Polygram*, 416 F.3d at 35–37.

144. See, e.g., *Cal. Dental Assoc’n*, 526 U.S. at 780 & n.15 (“There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for. . . . Nevertheless, the quality of proof required should vary with the circumstances.” (quoting AREEDA, *supra* note 104, ¶ 1507, at 402)); *Cal. Dental Assoc’n*, 526 U.S. at 780 n.15 (citing other scholars to the same effect); see also Gavil, *supra* note 76, at 777–80 (discussing with approval the application of a “sliding scale” approach).

145. HOVENKAMP, *supra* note 27, ¶ 1911a, at 326 (stating that the purpose of truncated analysis is to “enable the tribunal to reach a confident judgment about reasonableness without having to undergo the costs of full rule of reason proof”); Cavanagh, *supra* note 106, at 465–69 (advocating the quick look approach over a full-blown rule of reason because the former incurs fewer litigation costs).

146. Gavil, *supra* note 76, at 739 (contending that the imposition of normal burdens of proof upon plaintiffs challenging inherently suspect restraints is “irrationally demanding” and results in underdeterrence of such restraints).

147. See, e.g., Tom & Pak, *supra* note 139, at 424–27 (treating quick look as the proper response to the risk of erroneous failure to condemn harmful restraints); Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of Massachusetts Board*, 66 ANTITRUST L.J. 773, 773–74, 797–98 (1998) (contending that FTC’s four-step quick look test “reduc[es] error costs and the costs of using the judicial system”).



dichotomous approach for section 1 analysis by reducing enforcement and adjudication costs and enhancing deterrence of harmful restraints.<sup>148</sup> Indeed, support for the quick look transcends traditional boundaries in the antitrust community. Thus, members of the Harvard, Chicago, and Populist Schools of antitrust thought all embrace this alternative to the traditional dichotomous approach.<sup>149</sup>

Ordinarily, evaluation of this claim would require the application of decision theory and concomitant nuanced consideration of the costs and benefits of this proposed modification.<sup>150</sup> However, when it comes to evaluation of the quick look, the application of such decision theory would be overkill. Simply put, careful analysis demonstrates that, as currently structured, the quick look methodology increases the cost of section 1 analysis with no countervailing benefits of any sort. More precisely, application of the quick look requires tribunals to assess whether each restraint that survives per se analysis is nonetheless inherently suspect. This requirement often requires significant investments of real resources by tribunals, plaintiffs, and defendants. Theory and experience establish that such expenditures produce no corresponding cost reduction, enhanced accuracy, or increased deterrence compared to the traditional dichotomous regime. Moreover, the prospect of incurring such costs under a regime that recognizes the quick look will induce some firms to adopt less efficient practices to avoid the cost of defending some more efficient restraints against claims that the latter are inherently suspect.

To understand why the quick look is all pain and no gain, let us begin by examining step one of the quick look. Under the traditional dichotomous approach, courts evaluate all restraints not condemned as unlawful per se under a full-blown rule of reason. By contrast, under a regime that recognizes the quick look, tribunals cannot conduct ordinary rule of reason analysis of such restraints without first determining whether a restraint is inherently suspect. Unlike the first part of per se analysis, which merely requires a determination whether a restraint reduces rivalry in some way, step one of the quick look requires a prediction of actual economic effect based upon economic theory and

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148. See *supra* notes 104–06 (identifying scholars, jurists, and enforcement agencies supporting the quick look).

149. See HOVENKAMP, *supra* note 27, ¶ 1912; SULLIVAN & GRIMES, *supra* note 106, at 248–49 (2006); Muris, *supra* note 99, 531–39. Professors Areeda and Hovenkamp represent the Harvard School of antitrust analysis, and Professor Muris is a member of the Chicago School. Professor Grimes is a member of the Populist School. See generally Herbert Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 109 (Robert Pitofsky ed., 2008); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, COMPETITION POL'Y INT'L., Autumn 2007, at 59; Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 668, 686–89 (2010) (describing the Populist school of antitrust thought).

150. See generally C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999) (describing the implications of decision theory for the content of a multi-stage decision process for evaluating challenged restraints).

judicial experience.<sup>151</sup> Generating such a prediction can thus require significant work over and above that necessary to accomplish the comparatively simple task of determining whether a restraint is pernicious within the meaning of the *per se* test.<sup>152</sup>

To be sure, tribunals can easily reject the inherently suspect label for certain categories of restraints. Thus, mergers, partnerships, and certain ancillary restraints will avoid the inherently suspect label with little ado.<sup>153</sup> Many other restraints will not be so lucky, however; as *Standard Oil* explained, evolving competitive conditions can cause economic actors to adopt “many new forms of contracts and combinations.”<sup>154</sup> In many cases, then, tribunals, particularly those staffed by generalist judges, will have little or no expertise with a challenged restraint. Indeed, even expert enforcement agencies sometimes misinterpret the purposes and effects of certain agreements.<sup>155</sup> Moreover, step one of the quick look is generally outcome determinative. After all, a determination that a restraint is not inherently suspect results in full-blown rule of reason scrutiny of the restraint and near-certain victory for the defendant.<sup>156</sup> However, as explained below, a holding that a restraint is inherently suspect always results in condemnation of the restraint, given that courts repeatedly reject defendants’ arguments that such restraints can produce cognizable benefits and thus always

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151. See *Cal. Dental Assoc’n v. FTC*, 526 U.S. 756, 781 (1999) (“The object [of the quick look analysis] is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look in place of a more sedulous one.”); *id.* (explaining that the results of the assessment of whether restraint should be subject to truncated quick look analysis “may vary over time, if rule-of-reason analyses in case after case reach identical conclusions”); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (explaining that a restraint is inherently suspect and presumptively unlawful “[i]f, based upon economic learning and the experience of the market, it is obvious that [it] likely impairs competition”).

152. See *supra* notes 52–54 and accompanying text (explaining the ease of determining whether a restraint is pernicious within the meaning of the *Northern Pacific Railway* test).

153. See *Muris & Cummins, supra* note 106, at 47 (explaining why mergers are not inherently suspect despite resulting in elimination of competition). Both enforcement agencies have implicitly recognized that mergers, for instance, are not inherently suspect by excluding such transactions from analysis under their enforcement guidelines that articulate the quick look and requiring actual proof that mergers might produce harm before challenging such transactions. See U.S. DEP’T OF JUSTICE & U.S. FED. TRADE COMM’N, *supra* note 104, § 1.1, at 2 (defining “competitor collaboration” to exclude mergers); U.S. DEP’T OF JUSTICE & U.S. FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* § 4, at 7–15 (2010) (describing process of market definition to determine whether mergers produce sufficient concentration to generate competitive concern).

154. *Standard Oil Co. v. United States*, 221 U.S. 1, 59–60 (1911).

155. See Alan J. Meese, *Raising Rivals’ Costs: Can the Agencies Do More Good than Harm?*, 12 *GEO. MASON L. REV.* 241, 271–72 (2003) (documenting how expert enforcement agencies condemned various agreements despite advances in economic theory establishing that such contracts often produced benefits).

156. See *supra* notes 111–12 and accompanying text (explaining that restraints not deemed inherently suspect undergo full-blown rule of reason scrutiny); *supra* notes 93–96 and accompanying text (discussing empirical findings that restraints almost always survive full-blown rule of reason scrutiny).

condemn such restraints at step two.<sup>157</sup> As a result, a plaintiff will rationally invest significant resources in attempting to convince a tribunal that a given restraint is inherently suspect.<sup>158</sup> Defendants will predictably respond with investments of their own, hoping to counter the plaintiff's argument and convince the tribunal that full-blown rule of reason analysis is appropriate, in which case the chance of liability will fall to almost zero.<sup>159</sup> It should thus come as no surprise that tribunals themselves expend resources evaluating such competing claims.<sup>160</sup> These theoretical considerations strongly suggest that adjudication over whether various restraints are inherently suspect will consume significant private and public resources.<sup>161</sup>

The actual experience with administration of the quick look suggests that these costs will be significant. Under a quick look regime, private plaintiffs make substantial arguments before trial and then appellate courts claiming that challenged restraints are inherently suspect.<sup>162</sup> Enforcement agencies make similar arguments before administrative law judges, the FTC, and courts that review the FTC's decisions.<sup>163</sup> Defendants naturally respond in an effort to convince the tribunal that the restraint instead merits full-blown rule of reason scrutiny. In some cases, amici curiae also weigh in on one or both sides.<sup>164</sup> Tribunals must evaluate these contentions, and members of the same tribunal

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157. See *infra* notes 190–91 and accompanying text (explaining that tribunals repeatedly reject defendants' contentions that inherently suspect restraints may produce cognizable benefits and thus invariably condemn such restraints).

158. See generally Avery Katz, *Judicial Decisionmaking and Litigation Expenditure*, 8 INT'L REV. L. & ECON. 127 (1988) (assuming that parties will invest resources in making legal arguments when expected payoff—in light of the background probability of success and expected opponent's arguments—exceeds the cost of making such arguments).

159. See *id.*; see also *supra* notes 93–96 and accompanying text.

160. See *infra* note 165 and accompanying text (describing various decisions in which tribunals consumed significant resources determining whether agreement was inherently suspect).

161. One proponent of the quick look has recognized this fact:

Because the choice of approach to the rule of reason can be outcome determinative, as was true in the bipolar days, parties and lower courts continue to invest sizeable resources into litigating whether a given restraint should be evaluated under the per se, quick look, or rule of reason analysis, as if they represented three discrete and alternate choices—even as the courts take note of *California Dental's* direction that they apply a sliding scale enquiry meet [sic] for the case.

Gavil, *supra* note 76, at 769. Professor Gavil does not, however, recognize the link between this insight and the cost of conducting step one of the quick look.

162. See *infra* note 165 (collecting various cases, including several initiated by private plaintiffs, claiming that challenged restraints were inherently suspect).

163. See *infra* note 165 (collecting various cases, including several initiated by enforcement agencies, claiming that challenged restraints were inherently suspect).

164. See, e.g., Brief for 118 Law, Economics, and Business Professors & the American Antitrust Institute as Amici Curiae in Support of Petitioners at 5, *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (No. 12-416) (contending that the challenged restraint was inherently suspect, in so far as it was “facially anticompetitive,” and should thus be considered “presumptively unlawful”); Brief for Louisiana Wholesale Drug Co. et al. as Amici Curiae in Support of Petitioner at 12, *Actavis*, 133 S. Ct. 2223 (arguing that the challenged restraint should be treated as prima facie anticompetitive).

sometimes disagree, further increasing the cost of step one analysis. Since the FTC first proposed the quick look nearly three decades ago, enforcement agencies, parties, and courts have repeatedly wrestled with step one of the quick look, devoting considerable private, administrative, and judicial resources to adjudicating whether, in fact, a challenged restraint is inherently suspect.<sup>165</sup> Indeed, one opinion by the FTC located, reviewed, and cited nineteen different academic studies when determining whether horizontal restrictions on advertising generally have anticompetitive effects of the sort that would render such restraints inherently suspect.<sup>166</sup> In another case, an appellate court declared a restraint presumptively unlawful early in the litigation and then changed its mind four years later.<sup>167</sup>

Thus, the quick look's step one entails significant enforcement and adjudication costs. These are real social costs—the same sort of costs that proponents of

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165. See *Actavis*, 133 S. Ct. at 2237–38 (rejecting the contention by the FTC and several amici curiae briefs that reverse-patent settlements are inherently suspect); *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006) (rejecting plaintiff's argument that restraint was properly subject to a quick look analysis); *Cal. Dental Assoc'n v. FTC*, 526 U.S. 756, 769–81 (1999) (rejecting contention that challenged restraint was inherently suspect and therefore subject to quick look analysis); *Cal. Dental Assoc'n*, 526 U.S. at 782–94 (Breyer, J., dissenting) (contending that the restraints in question were inherently suspect); *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137–39 (9th Cir. 2011) (en banc) (rejecting plaintiff's argument that restraint was properly subject to quick look); *California ex rel. Harris*, 651 F.3d at 1144–62 (Reinhardt, J., dissenting) (taking issue with the majority's determination); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829–32 (3d Cir. 2010) (affirming district court's refusal to instruct the jury on plaintiff's quick look theory); *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 332 (2d Cir. 2008) (rejecting plaintiff's contention that challenged restraints were properly subject to quick look); *MLB Props., Inc.*, 542 F.3d at 337 (Sotomayor, J., concurring) (rejecting plaintiff's quick look argument on different grounds); *N. Tex. Physicians Specialty v. FTC*, 528 F.3d 346, 360–62 (5th Cir. 2008) (articulating standards governing quick look analysis); *N. Tex. Physicians Specialty*, 528 F.3d at 363–68 (examining challenged restraint and finding it inherently suspect); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (declining to subject exclusive dealing arrangement to quick look); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959–61 (6th Cir. 2004) (rejecting plaintiff's claim that challenged restraint was subject to quick look analysis); *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 511 (4th Cir. 2002) (rejecting lower court's determination that challenged restraint was subject to quick look); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996) (declining to subject exclusive dealing arrangement to a quick look analysis); *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (rejecting previous determination that quick look applied and instead holding that proof of market power was necessary to establish a prima facie case); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) (same); *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 337 F. Supp. 2d 563, 571–73 (S.D.N.Y. 2004) (rejecting plaintiff's contention that sports league restraint should be subject to a quick look); *Holmes Prods. Corp. v. Dana Lighting, Inc.*, 958 F. Supp. 27, 33–34 (D. Mass. 1997) (declining to subject exclusive distribution agreement to quick look analysis); see also *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824–27 (6th Cir. 2011) (declining to determine, after briefing and argument, whether to subject challenged restraints to a quick look).

166. See *In re Polygram*, 136 F.T.C. 310, 353–58 & n.52 (2003).

167. See *Chi. Prof'l Sports*, 95 F.3d at 599–602 (rejecting previous determination that quick look applied and instead holding that proof of market power was necessary to establish a prima facie case); *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 676–77 (7th Cir. 1992) (affirming preliminary injunction after determining that challenged restraint was presumptively unlawful under a quick look analysis).

the quick look seek to reduce.<sup>168</sup> Society should gladly incur such costs if doing so produced offsetting benefits in the form of reduced costs, enhanced accuracy, or increased deterrence compared to application of the traditional dichotomous regime. As shown below, however, there are no such benefits and the absence of such benefits dooms the case for the quick look.

Adjudication of whether a restraint is inherently suspect at step one of the quick look can produce one of two results: either rejection of the inherently suspect label, or a finding that a restraint is, in fact, inherently suspect and thus subject to analysis at step two. The first result is the most prevalent, and the second is relatively rare.<sup>169</sup> Neither outcome can generate any of the benefits that proponents of the quick look invoke. Let us consider the implications of each possible result in turn.

Step one adjudications that yield the first and more prevalent result produce no offsetting benefits relative to the traditional dichotomous approach. After all, if a restraint is not inherently suspect, the tribunal must proceed to analyze the agreement under the full-blown rule of reason. This, of course, is the exact same result the traditional dichotomous approach would have produced absent modification by the quick look. In such cases, which are many, the quick look unambiguously raises the cost of section 1 adjudication with no offsetting benefit.

What, though, about the second and less likely result of step one adjudication—namely, those instances in which a tribunal declares that a restraint is inherently suspect? Surely these outcomes, and the streamlined analysis of such restraints at steps two through four, produce benefits when compared to implementation of the traditional dichotomous regime, which would subject such restraints to a more expensive full-blown rule of reason.<sup>170</sup> They do not—let us explain why.

Analysis of inherently suspect restraints at step two can, in turn, produce two distinct outcomes. First, courts can condemn such restraints because defendants fail to articulate any cognizable benefits they might create.<sup>171</sup> Second, tribunals can accept the articulated benefits as cognizable and proceed to analyze the restraint at step three, relying upon the mere existence of the restraint to establish a *prima facie* case and cast upon the defendant the initial burden of

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168. See Posner, *supra* note 26, at 400 (treating such “direct costs” of litigation as social costs that courts should consider when developing alternative legal standards); *id.* at 401–02 (proceeding on the assumption that the legal system should seek to minimize the sum of “direct costs” and costs of judicial error); *supra* notes 26–28, 140–46 and accompanying text (describing claims by proponents of the quick look that full-blown rule of reason analysis is excessively costly in some cases).

169. See *supra* note 165 and accompanying text (citing numerous decisions rejecting the contention that challenged restraint was inherently suspect).

170. Cf. HOVENKAMP, *supra* note 27, ¶ 1909a, at 308 (observing that restraints subject to full-blown rule of reason “are the most difficult and expensive to evaluate”); *id.* ¶ 1911a, at 326 (noting that the quick look allows a tribunal “to reach a confident judgment about reasonableness without having to undergo the costs of full rule of reason proof”).

171. See *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 368–70 (5th Cir. 2008); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37–38 (D.C. Cir. 2005); *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 604–08 (1988).

adducing evidence that the restraint produces such benefits.<sup>172</sup> Both results appear to entail lower adjudication costs than full-blown rule of reason analysis because both absolve the plaintiff of any burden of proving that a restraint in fact produces harm.<sup>173</sup> Such reduced costs could, in turn, encourage meritorious challenges and enhance the accuracy of resulting adjudication. Proponents of the quick look invoke these benefits to justify this departure from the traditional approach.<sup>174</sup>

However, closer inspection reveals that any such benefits compared to the traditional dichotomous approach are illusory, at least in a regime where tribunals understand and properly apply the per se test at the outset of section 1 analysis. To see why, let us consider the two possible outcomes of adjudication at step two. Consider first the inherently suspect restraints that fail at step two because defendants cannot articulate any cognizable benefits that such restraints might create. As applied to such restraints, analysis and resulting condemnation at step two certainly appear cheaper than a full-blown rule of reason analysis, which might also be more prone to error. However, this realization ignores the fact that restraints condemned in this fashion satisfy the test for per se illegality and should not have made it to step two or, for that matter, step one in the first place. After all, restraints that are inherently suspect will reduce rivalry between the parties and thus have a pernicious effect on competition within the meaning of the *Northern Pacific Railway* test.<sup>175</sup> Moreover, by stipulation, such restraints cannot produce redeeming virtues—that is why they fail at the quick look’s step two.<sup>176</sup> Thus, application of traditional per se analysis should result in per se condemnation of each and every restraint that the quick look condemns at step two. Indeed, the cost of per se condemnation will be lower, and such condemnation will be more certain, given the ease of determining that restraints reduce rivalry and thus produce a pernicious effect on competition.<sup>177</sup> To reiterate, if tribunals have properly applied per se analysis as an initial matter, the set of contracts that are both inherently suspect and lack redeeming virtues and thereby fail at step two should be empty.<sup>178</sup> Thus, the tendency of quick look

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172. See *supra* notes 117–24 and accompanying text (describing this step of the quick look).

173. See *supra* notes 113–24 and accompanying text.

174. See *supra* notes 140–47 and accompanying text.

175. See *supra* notes 50–51 and accompanying text.

176. See *supra* note 114 and accompanying text (explaining that courts and agencies equate cognizable benefits with redeeming virtues and vice versa).

177. For instance, a tribunal need not review and cite nineteen scholarly articles and hear the testimony of two economists to determine that a horizontal agreement to eliminate advertising has a pernicious effect on competition within the meaning of the *Northern Pacific Railway* test. See *supra* note 166 and accompanying text (detailing the FTC’s invocation of such support for its determination that a restraint was inherently suspect).

178. Some courts have glimpsed such redundancy but nonetheless continued to conduct per se and quick look analysis seriatim. See *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137 (9th Cir. 2011) (en banc) (“We conclude that a ‘quick look’ conclusion of antitrust illegality is here inappropriate. This is so for many of the same reasons that per se treatment is not correct.”); *MLB Props., Inc. v.*



analysis to condemn such restraints is not a “benefit” that offsets the considerable cost of step one analysis.

The D.C. Circuit’s decision in *Polygram Holding, Inc. v. FTC*, which some have invoked as a quintessential articulation of the quick look, exemplifies how proper application of traditional per se analysis would have condemned restraints also condemned at step two.<sup>179</sup> There, parties to an otherwise legitimate joint venture adopted a temporary ban on advertising and discounting with respect to products that were not part of the venture.<sup>180</sup> On appeal, the D.C. Circuit—like the FTC below—did not apply the *Northern Pacific Railway* test for per se illegality or otherwise explain why the horizontal restraints between rivals survived per se condemnation.<sup>181</sup> Instead, the court proceeded to apply the four-step quick look test.<sup>182</sup> The court found the restraint inherently suspect because it “look[ed] suspiciously like a naked price fixing agreement between competitors.”<sup>183</sup> In so doing, the court affirmed the judgment of the FTC, which had reached the same conclusion after reviewing testimony by two experts as well as nineteen economic studies regarding the impact of restrictions on advertising.<sup>184</sup> Having found the restraint inherently suspect, the court moved on to step two of the quick look, where it rejected the defendant’s claim that the restraint could produce cognizable benefits and held that the reduction of interbrand freeriding—although a plausible impact of the restraint—was not cognizable for antitrust purposes.<sup>185</sup>

Two years after *Polygram*, the Supreme Court reiterated the *Northern Pacific Railway* per se test.<sup>186</sup> Proper application of this test in *Polygram* would have resulted in condemnation of the restraint. The restraint plainly had a pernicious impact on competition, as it eliminated discounting and advertising by horizon-

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Salvino, Inc., 542 F.3d 290, 323 (2d Cir. 2008) (rejecting plaintiff’s per se and quick look arguments for the same reasons).

179. 416 F.3d 29 (D.C. Cir. 2005); Cavanagh, *supra* note 106, at 465–67 (invoking and discussing *Polygram* as the template for quick look analysis); Crane, *supra* note 29, at 61–63 (treating the *Polygram* decision as a recent example rejecting “dualistic” section 1 categories in favor of flexible quick look); Gavil, *supra* note 76, at 766–68 (discussing “groundbreaking” *Polygram* decision with approval).

180. *See Polygram*, 416 F.3d at 32.

181. *See id.* at 36.

182. *Id.* at 35–38.

183. *Id.* at 37.

184. *See In re Polygram Holding, Inc.*, 136 F.T.C. 310, 353–58 & n.52 (2003).

185. *See Polygram*, 416 F.3d at 37–38. Some have argued persuasively that the D.C. Circuit and the FTC erred in holding that the elimination of interbrand freeriding is not a cognizable benefit. *See, e.g.*, Joshua D. Wright, *Singing Along: A Comment on Goldberg & Muris on the Three Tenors*, 1 REV. L. & ECON. 399, 399–401 (2005); William Kolasky & Richard Elliott, *The Federal Trade Commission’s Three Tenors Decision: “Qual due fiori a un solo stello,”* 18 ANTITRUST, Spring 2004, at 50, 50. If so, then economic logic suggests that such a restraint should receive full-blown rule of reason scrutiny. *See infra* notes 222–40 and accompanying text.

186. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).



tal rivals.<sup>187</sup> No additional analysis at this stage is necessary. Moreover, because the defendant could not articulate a benefit that the court deemed cognizable, such restraints could not produce redeeming virtues.<sup>188</sup> Thus, the challenged restraints were unlawful per se. Application of the quick look achieved the same result as the traditional dichotomous approach, albeit at the higher cost of determining whether the restraint was inherently suspect.

As a result, those who seek to justify the additional costs of determining whether a restraint is inherently suspect must locate some other cost-reducing feature of quick look analysis. This brings us to the second possible outcome of adjudication at step two of the quick look: determination that the defendant has articulated one or more cognizable benefits that the challenged restraint might produce, thereby warranting consideration at step three. If the full-blown rule of reason controlled the analysis of such restraints, plaintiffs would have to demonstrate actual economic harm to establish a prima facie case, a demonstration that defendants would be free to contest before shouldering any burden of proving that the restraint produces benefits.<sup>189</sup> Under step three, by contrast, plaintiffs can simply rest upon the determination that the restraint is inherently suspect to establish a prima facie case, thereby shifting the burden of producing evidence of benefits to the defendants.<sup>190</sup>

It is theoretically possible that the reduced cost of analyzing inherently suspect restraints that survive step two could offset the increased cost imposed by the addition of step one to the analysis of restraints that survive per se condemnation. At the same time, a review of case law reveals that the argument is just that—theoretical. That is, tribunals applying step two repeatedly reject defendants' contentions that the restraint in question could produce cognizable benefits.<sup>191</sup> More bluntly, restraints that make it to step two never survive to step three. Time and again, a determination that a restraint is inherently suspect goes hand-in-hand with a subsequent determination that the benefits that defendants articulate, if any, are not cognizable.<sup>192</sup> Thus, despite its possible theoretic-

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187. See *Catalano Sales, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648–50 (1980) (finding that horizontal agreement on credit terms was the functional equivalent of a ban on discounting and thus unlawful per se under the *Northern Pacific Railway* test); see also *Crane*, *supra* note 29, at 62 (explaining that the “rule-based system” that predated the quick look would have condemned the *Polygram* restraint, assuming the restraint could produce no redeeming virtues).

188. See *Crane*, *supra* note 29, at 62; see also *supra* note 114 and accompanying text (explaining that the standards governing whether purported benefits are redeeming virtues, when applying the per se rule or cognizable benefits under step two of the quick look, are identical).

189. See *supra* notes 83–84, 90–92 and accompanying text (articulating this aspect of full-blown rule of reason analysis).

190. See *supra* notes 117–24 and accompanying text.

191. See *infra* note 192 (collecting various decisions rejecting contentions that inherently suspect restraints produce cognizable benefits).

192. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010) (finding that the challenged practice was either unlawful per se or inherently suspect and rejecting defendants' proffered justifications); *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 360–71 (5th Cir. 2008) (affirming the FTC's determination that the challenged restraint was inherently suspect and rejecting the defendant's argu-

cal appeal, step three's lightened prima facie case for inherently suspect restraints has played no role in actual antitrust analysis for the simple reason that, so far as this author is aware, no restraint ever survives that long in quick look analysis. In sum, step one of the quick look increases the costs of conducting section 1 analysis without producing any offsetting benefits in the form of lower costs, enhanced accuracy, or increased deterrence.

Engrafting the quick look onto the traditional dichotomous approach will do more than needlessly consume private, administrative, and judicial resources. The quick look will also deter some wealth-creating restraints. After all, defendants will bear a portion of the needless costs of performing the quick look. In particular, defendants will expend resources at step one, attempting to convince the tribunal that the challenged restraint is not inherently suspect. Moreover, in those rare cases where tribunals do declare restraints suspect, defendants will expend resources attempting to articulate cognizable benefits that the restraint might create. Although defendants almost always prevail at step one, such victories are not free and the prospect of expending resources to prevail in such cases will presumably induce some potential defendants to adopt practices less likely to be challenged, even though they will produce fewer benefits.<sup>193</sup> For instance, parties to a joint venture who fear that collateral restraints might be declared inherently suspect may simply merge outright, thereby taking advantage of the defendant-friendly standards governing merger analysis.<sup>194</sup> Thus, in

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ment that the restraint could produce cognizable benefits); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35–39 (D.C. Cir. 2005) (affirming the FTC's determination that the challenged restraint was inherently suspect and that the defendants had not articulated redeeming virtues); *In re Detroit Auto Dealers Ass'n*, 111 F.T.C. 417, 498–99 (1989) (finding the challenged practice inherently suspect and rejecting defendants' claim that the restraint could produce redeeming virtues), *aff'd in part and remanded*, 955 F.2d 457 (6th Cir. 1992); *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 606–08 (1988) (finding that the challenged restraint was inherently suspect and rejecting defendants' argument that the restraint could plausibly produce cognizable benefits); see also *In re Realcomp II, Ltd.*, No. 9320, 2009 FTC Lexis 250, at \*38 (F.T.C. Oct. 30, 2009) (holding that the challenged restraint was inherently suspect and rejecting defendant's argument that the restraint could plausibly produce redeeming virtues), *petition for review denied*, *Realcomp II Ltd. v. FTC*, 635 F.3d 815, 824–27 (6th Cir. 2011); *In re Tigor Title Ins. Co.*, 112 F.T.C. 344 (1989) (finding that the challenged practice was inherently suspect and that there were no possible redeeming virtues for such conduct), *rev'd on other grounds*, 922 F.2d 1122 (3d Cir. 1991); *In re New Eng. Motor Carrier Rate Bureau, Inc.*, No. 9170, 1989 WL 1126783, at \*56 (F.T.C. August 18, 1989) (same).

193. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836–1937*, at 244 (1991) (“[A] firm maximizes its profits by discovering the least costly method of organization within its legal environment. The cost of litigating and losing lawsuits . . . can be as high as the cost of inefficiencies in technology or organization. A less efficient form of organization might even be preferable, if the more efficient form is illegal or poses significant legal risks.” (emphasis added)); Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5, 30–31 (2004) (explaining how poorly crafted antitrust doctrine and resulting litigation risk can encourage firms to adopt suboptimal practices).

194. Victor P. Goldberg, *Featuring the Three Tenors in La Triviata*, 1 REV. L. & ECON. 55, 56 (2005) (noting the irony in the D.C. Circuit's summary condemnation of restraint in *Polygram* given that complete merger between the parties would have survived scrutiny absent market power); see also U.S. DEP'T OF JUSTICE & U.S. FED. TRADE COMM'N, *supra* note 153, at §§ 4, 5 (describing process of scrutinizing proposed mergers, including required definition of the relevant market and calculation of market concentration).

addition to imposing unnecessary social costs of enforcement and adjudication, the quick look also functions as a tax on productive activity that plaintiffs might plausibly characterize as inherently suspect, thereby inducing parties to adopt less efficient restraints. The Supreme Court has repeatedly recognized that antitrust standards that treat some forms of economic integration more harshly than others can induce market actors to select less efficient practices that pose less legal risk, contrary to the objectives of the Sherman Act.<sup>195</sup>

## V. POSSIBLE REFORMS OF THE QUICK LOOK

The mere fact that the quick look, as currently structured, consumes agency, private, and judicial resources with no offsetting benefits does not thereby establish that the traditional dichotomous approach is the best we can construct. This Part raises and explores two ways courts and agencies could alter the quick look so as to achieve its putative goals. First, courts and agencies could better integrate per se and quick look analysis. Second, these actors could expand the definition of inherently suspect, thereby expanding the quick look to reach more restraints. Neither approach, it will be seen, promises any improvement over the traditional dichotomous approach.

### A. BETTER INTEGRATION OF PER SE AND QUICK LOOK ANALYSIS AND ELIMINATION OF STEP TWO

As explained above, the quick look imposes significant and unnecessary costs on private actors and agencies while deterring some beneficial restraints. Courts and agencies could eliminate many of these unnecessary costs by employing their common law and administrative discretion to better integrate per se and quick look analysis.<sup>196</sup> In particular, tribunals can defer any application of the quick look until they have actually applied the *Northern Pacific Railway* test to the restraint. Rigorous application of this test will weed out every restraint that step two of the quick look would condemn, eliminating the need for that portion of the quick look test. By deferring the inherently suspect inquiry until after defendants have articulated plausible redeeming virtues, courts and agencies would avoid altogether the wasteful cost identified earlier of determining whether restraints that cannot create such virtues are inherently suspect, when a cheaper determination that they are pernicious would suffice to justify per se

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195. See *State Oil Co. v. Khan*, 522 U.S. 3, 16–17 (1997) (observing that per se ban on maximum resale price maintenance had induced some manufacturers to integrate forward so as to obtain absolute control over resale prices free of Sherman Act scrutiny); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 728 (1988) (recognizing that hostile treatment of certain forms of contractual integration could induce firms to opt for other less efficient methods); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 n.26 (1977) (recognizing that hostile treatment of nonprice vertical restraints could induce manufacturers to integrate forward into distribution).

196. See generally *supra* notes 32–33 and accompanying text (explaining that courts possess common law discretion to create subsidiary rules, such as the per se rule, that implement *Standard Oil's* rule of reason).

condemnation.<sup>197</sup>

Such integration is long overdue. To put it bluntly, both lower courts and the FTC have sometimes ignored or misstated the per se rule. As noted earlier, for instance, neither the FTC nor the D.C. Circuit applied the *Northern Pacific Railway* test in *Polygram*, moving immediately to apply the four-step quick look.<sup>198</sup> Although the decision that first articulated the quick look as a four-step test did discuss the per se rule, it did not mention the *Northern Pacific Railway* test for establishing liability.<sup>199</sup> Instead, the FTC claimed that the per se rule required a restraint to be “condemned automatically, without regard for any redeeming competitive virtues, if it can be categorized as falling into a *per se* category.”<sup>200</sup> The FTC invoked the putative per se rule against group boycotts as an example of such an overinclusive and inflexible per se rule.<sup>201</sup>

It cannot be denied that, during antitrust’s inhospitality era, some decisions misapplied the *Northern Pacific Railway* test, overlooking redeeming virtues that are obvious to modern eyes and declaring apparently beneficial restraints unlawful per se.<sup>202</sup> In a regime characterized by such overbroad per se rules, the quick look, as employed by decisions like *Polygram*, could function as a sort of “safety valve,” allowing defendants to avoid summary condemnation of otherwise unlawful restraints by invoking redeeming virtues that tribunals previously ignored. Indeed, some scholars have characterized certain applications of the quick look in exactly this manner.<sup>203</sup>

However, misapplications of the per se rule two generations ago do not justify skipping per se analysis altogether as some tribunals have done in the

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197. See *supra* notes 168–88 and accompanying text (explaining how the traditional *Northern Pacific Railway* test would condemn restraints that cannot produce redeeming virtues, thereby obviating the need for determining whether such restraints are inherently suspect). Of course, if a restraint survives the per se test because it does not reduce rivalry and is therefore not pernicious, it cannot be inherently suspect. See *supra* notes 130–38 and accompanying text (detailing how the test for determining whether a restraint is inherently suspect is more stringent than the *Northern Pacific Railway* test for determining whether a restraint is “pernicious”).

198. See *supra* notes 179–82; see also *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 360–61 (5th Cir. 2008) (proceeding to quick look analysis without explaining why the restraint survived per se condemnation).

199. See *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 602–04 (1988).

200. *Id.* at 603.

201. The FTC discussed *Blalock v. Ladies Professional Golf Association*, 359 F. Supp. 1260 (N.D. Ga. 1973), as exemplifying the overinclusive per se rule against group boycotts that did not recognize the possibility that such boycotts could produce redeeming virtues. See *Mass Bd.*, 110 F.T.C. at 603 n.11.

202. *United States v. Topco Associates*, 405 U.S. 596 (1972), is a classic example. There, the Court, after quoting the *Northern Pacific Railway* test, condemned as unlawful per se restraints that plainly had the potential to create redeeming virtues: encouraging promotion of the venture’s product by individual members. Indeed, the district court had found that the restraints had exactly this effect. See *id.* at 604–06 (summarizing district court’s factual findings and conclusion that the challenged restraints were procompetitive); see also *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (banning nonprice vertical restraints whenever title passed from manufacturer to a wholesaler or dealer), *overruled by Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

203. See HOVENKAMP, *supra* note 27, ¶ 1911a, at 325–26.

modern era. Indeed, the Supreme Court has been correcting these mistakes for nearly four decades now, holding that restraints once deemed unlawful per se may produce redeeming virtues and, thus, deserve rule of reason scrutiny.<sup>204</sup> For instance, the Court jettisoned the per se rule against group boycotts three years before the FTC invoked this (nonexistent) rule as the sort of overinclusive per se rule the quick look could remedy.<sup>205</sup> Nor would one expect tribunals that misapplied the per se rule by ignoring possible redeeming virtues in the per se context to suddenly recognize such virtues when applying the quick look. Courts and enforcement agencies serious about reforming the traditional dichotomous approach would do well to refresh their understanding of the *Northern Pacific Railway* test and adjust any proposed reforms accordingly.

By focusing the quick look on those restraints that may produce redeeming virtues, courts and enforcement agencies could eliminate step two altogether.<sup>206</sup> This revised approach would also reserve step one for those restraints that avoid per se condemnation because they may produce redeeming virtues, thereby reducing the number of step one adjudications and thus the cost of implementing this stage of the quick look. Determination at this stage that such a restraint is inherently suspect would (properly) lighten the plaintiff's burden of establishing a prima facie case, leaving restraints not deemed inherently suspect to full-blown rule of reason analysis with its correspondingly heavier burden on plaintiffs. The result would be a return to the "traditional dichotomous regime" modified to lighten a plaintiff's burden for establishing a prima facie case against those restraints that avoid per se condemnation but are nonetheless inherently suspect. In this way, courts and agencies could still distinguish between restraints that truly deserve full-blown rule of reason treatment, and those that, because of their more apparent anti-competitive potential, merit truncated scrutiny and thus a relaxed burden of establishing a prima facie case.<sup>207</sup>

Improved integration of per se and quick look analysis combined with the elimination of step two would not, however, be a panacea for the quick look. After all, if step two is eliminated and per se analysis is conducted with greater care, courts will only apply the inherently suspect inquiry to restraints that, by

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204. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (rejecting per se ban on minimum resale price maintenance); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977) (rejecting per se ban on nonprice vertical restraints).

205. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) (rejecting per se rule for group boycotts).

206. Under the current version of the quick look, step two entails assessing whether a challenged restraint may produce redeeming virtues. Reserving the quick look for those restraints that have survived per se scrutiny would thus render any step two inquiry redundant.

207. *See supra* notes 127–29 and accompanying text (explaining that the only difference between full-blown rule of reason scrutiny and scrutiny of restraints that survive step two of the quick look is the lighter burden plaintiffs bear in establishing a prima facie case). Although courts will have to spend resources conducting the second part of the per se test to determine if a restraint might produce redeeming virtues, they would have to conduct a similar analysis under step two of the quick look.

definition, may produce redeeming virtues. However, as explained previously, despite nearly three decades of experience with the quick look, neither courts nor agencies have identified any restraint that is inherently suspect but may also produce redeeming virtues.<sup>208</sup> Absent some reason to believe that courts or agencies will reverse course and decide that some inherently suspect restraints can produce redeeming virtues, a quick look reformed in the way described thus far would still require tribunals to incur the cost of discerning whether certain restraints are inherently suspect without the prospect of discovering any such restraints. Here again, this exercise would needlessly consume judicial, agency, and private resources and deter some beneficial restraints.

#### B. EXPANSION OF THE CATEGORY OF RESTRAINTS DEEMED INHERENTLY SUSPECT

Perhaps the absence of restraints that are both inherently suspect but that might still produce redeeming virtues reflects a more fundamental problem—namely, that agencies and courts have been too reluctant to declare restraints inherently suspect. If, instead, courts and agencies expand the category of restraints deemed inherently suspect, perhaps the modified quick look described above will capture more restraints that—although potential sources of redeeming virtues—nonetheless pose so much competitive risk that truncated analysis is appropriate. If so, then a modified quick look could, in fact, produce benefits that offset the additional costs imposed on section 1 analysis by the application of step one.<sup>209</sup>

There is, of course, no reason that the category of restraints deemed inherently suspect should remain frozen in its current, miniscule incarnation. The rule of reason's strength lies in the license it provides courts and agencies to refashion antitrust doctrine, including the scope of per se rules and the methodology of rule of reason analysis, without legislative intervention whenever (exogenous) changes in economic theory or the experience derived from antitrust litigation warrants such change.<sup>210</sup> Similar considerations suggest that courts should adjust the nature of quick look analysis, including the definition of inherently suspect, if economic theory evolves in a manner that suggests such an adjustment is necessary or when such adjustment can increase the net

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208. See *supra* notes 191–92 and accompanying text.

209. See *supra* notes 117–24, 171–73 and accompanying text (explaining how current articulations of the quick look contemplate the existence of such restraints).

210. See *State Oil Co. v. Khan*, 522 U.S. 3, 20–22 (1997) (defining the rule of reason as empowering courts to reject previously adopted per se rules when economic theory undermines their premises); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (same); Meese, *supra* note 22, at 89–92 (explaining how *Standard Oil's* rule of reason empowers courts to adjust antitrust doctrine so as to reflect evolving economic theory); see also HOVENKAMP, *supra* note 24, at 536 (contending that rule of reason treatment of challenged restraints allows courts to gather information about actual operation of restraints to inform subsequent rules).



benefits of rule of reason analysis.<sup>211</sup>

At the same time, courts and agencies should not expand the inherently suspect category for the mere sake of expansion, even if such expansion reduces enforcement and adjudication costs and enhances deterrence of some conduct in the newly expanded category. Although deterring harmful conduct and reducing enforcement and adjudication costs are important objectives, these benefits must be weighed against the social cost of deterring beneficial conduct.<sup>212</sup> Any expansion of the category of inherently suspect restraints and the resulting presumption against such agreements could sweep within its ambit practices that often produce significant benefits, while leaving conduct with analogous economic effects subject only to full-blown rule of reason analysis. Plaintiffs, of course, could establish a prima facie case against conduct deemed inherently suspect at little cost.

Defendants would be free to rebut the prima facie case that would arise because of the mere existence of such inherently suspect restraints. However, such rebuttal would be costly and also subject to the plaintiff's assertion that, for instance, the defendant could have achieved the same benefits by means of a less restrictive alternative.<sup>213</sup> Even if defendants anticipated ultimate victory in each such case, they would still hope to avoid the costs of such adjudication under the quick look framework in the first place. As explained earlier, potential defendants who fear that courts or agencies will deem a beneficial practice inherently suspect may adopt different and less beneficial practices, to the detriment of consumers and the rest of society, in order to avoid the significantly higher—and asymmetrical—costs of defending those restraints that are deemed suspect.<sup>214</sup> Proponents of any new and more expansive definition of inherently suspect bear the burden of explaining why the resulting benefits

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211. See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (suggesting that experience derived from full-blown rule of reason analysis “over time” can lead courts to adjust the category of restraints deemed inherently suspect).

212. Cf. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894–95 (2007) (rejecting the argument that administrative convenience could justify per se condemnation of conduct that is often reasonable).

213. See *supra* notes 125–26 and accompanying text.

214. See *supra* notes 191–93 and accompanying text (explaining that firms may adopt inefficient practices if they believe tribunals may declare efficient conduct inherently suspect). The defendant's reaction to the Supreme Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), is instructive. There, the Court condemned as unlawful per se vertically imposed exclusive territories and other restrictions on resale whenever title passed to dealers but analyzed otherwise identical consignment agreements under a forgiving rule of reason. Schwinn responded to the decision by retaining title to all its products before sale to the ultimate consumer as a transitional step toward complete vertical integration into distribution. See Robert C. Keck, *The Schwinn Case*, 23 *BUS. LAW.* 669, 685–86 (1968). Presumably such complete integration, accomplished solely to avoid Sherman Act liability, produced fewer economic benefits than the firm's original system of distribution. See *Bus. Elecs.*, 485 U.S. at 728 (refusing to impose per se ban on conduct indistinguishable from that which produced significant benefits because “[m]anufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties”).

would exceed the social costs of deterring such beneficial restraints.<sup>215</sup>

A canvas of scholarly, judicial, and official commentary suggests that the prospects for developing a more expansive but defensible definition of inherently suspect are dim. For one thing, as explained earlier, the current definition of inherently suspect is far from clear.<sup>216</sup> It is difficult to evaluate the impact of proposals to expand a category that no court or agency can define with precision even before such expansion. Moreover, there is no consensus among proponents of the quick look about the appropriate treatment of some restraints that scholars have studied for decades. For instance, some proponents would expand the category to include certain vertical restraints, particularly minimum resale price maintenance.<sup>217</sup> Indeed, several plaintiffs have attempted to convince courts that various vertical restraints are inherently suspect and thus subject to quick look scrutiny.<sup>218</sup> Other scholars, however, have just as vehemently rejected such an approach.<sup>219</sup> Some other scholars have recommended attaching the inherently suspect label to at least some horizontal restraints that are plainly ancillary to otherwise legitimate joint ventures, such as the restraints challenged in *United States v. Topco*.<sup>220</sup> Here again, other proponents of the quick look

215. See *Bus. Elecs.*, 485 U.S. at 724 (explaining that departure from the full-blown rule of reason must turn on “demonstrable economic effect” of condemned restraints (quoting *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977))).

216. See *supra* notes 130–38 and accompanying text.

217. See Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 196–98* (Robert Pitofsky ed., 2008) (contending that courts should apply quick look to minimum resale price maintenance); Warren S. Grimes, *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 *ANTITRUST L.J.* 467, 492–94 (2008) (same); Robert Pitofsky, *Are Retailers Who Offer Discounts Really “Knaves”?: The Coming Challenge to the Dr. Miles Rule*, 21 *ANTITRUST* 61, 65 (2007) (endorsing quick look for minimum resale price maintenance as a “compromise” between per se condemnation and full-blown rule of reason).

218. See *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (declining to subject exclusive dealing arrangement to quick look); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 n.9 (3d Cir. 1996) (rejecting plaintiff’s argument that exclusive agreement between film distributor and plaintiff’s rival merited quick look analysis); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) (declining to subject exclusive dealing arrangement to quick look analysis); *Holmes Prods. Corp. v. Dana Lighting, Inc.*, 958 F. Supp. 27, 33–34 (D. Mass. 1997) (declining to subject exclusive distribution agreement to quick look analysis).

219. See HOVENKAMP, *supra* note 27, ¶ 1911a, at 327 n.7 (discussing with approval decisions holding that minimum resale price maintenance is not inherently suspect); see also Thomas A. Lambert, Dr. Miles Is Dead. Now What?: *Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 *WM. & MARY L. REV.* 1937, 1969–72 (2009) (rejecting quick look approach to minimum resale price maintenance); Joshua D. Wright, Comm’r, U.S. Fed. Trade Comm’n, Remarks Before the British Institute of International and Comparative Law: The Economics of Resale Price Maintenance & Implications for Competition Law and Policy 21–22 (April 9, 2014) (transcript available at [https://www.ftc.gov/system/files/documents/public\\_statements/302501/140409rpm.pdf](https://www.ftc.gov/system/files/documents/public_statements/302501/140409rpm.pdf)) (“In light of the existing economic evidence on [resale price maintenance] and other vertical restraints, it is hard to justify a *per se* or ‘inherently suspect’ approach to analyzing minimum [resale price maintenance] agreements . . . .” (alteration in original)).

220. See Klein, *supra* note 103, at 11 & n.8 (opining that the Department of Justice’s Antitrust Division would treat restraints such as those challenged in *United States v. Topco Associates*, 405 U.S. 596 (1972), as inherently suspect under a “stepwise” or quick look approach); Robert Pitofsky, A

have rejected the claim that such restraints are inherently suspect.<sup>221</sup>

The absence of a consensus among scholars, officials, and judges about the treatment of particular restraints does not itself preclude the possibility that there is some organizing principle that would offer an improvement over the current methodology for identifying restraints that are inherently suspect. A review of the literature and the case law suggests two possible organizing principles. Neither, however, appears promising.

First, courts and agencies could treat all horizontal restraints as inherently suspect, reserving full-blown rule of reason analysis for vertical restraints. However, such an approach would be unjustified. To be sure, courts have often said that horizontal restraints pose a greater risk of competitive harm than vertical restraints and that this greater risk justifies more intrusive scrutiny of such restraints.<sup>222</sup> However, neither these statements nor any other discernible principle would justify treating all horizontal restraints that survive per se condemnation as inherently suspect. After all, the category of horizontal restraints includes mergers, the formation of partnerships, and various forms of less complete contractual integration such as franchising and amateur sports leagues.<sup>223</sup> The category also includes agreements that the common law treated as ancillary and thus presumptively lawful, such as restraints ancillary to formation of a partnership.<sup>224</sup> According to William Howard Taft, for instance, such partnership-enhancing restraints were not only presumptively reasonable but were “to be encouraged.”<sup>225</sup> Recent developments in economic theory—the same developments that caused courts to contract the scope of the per se rule—have buttressed the common law’s implicit conclusion that such restraints can often produce redeeming virtues.<sup>226</sup> Declaring all horizontal restraints inherently suspect would presumptively condemn all manner of cooperation necessary to allocate resources to their highest valued use, relegating economic

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*Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1621 (1986) (contending that *Topco* restraints should have been presumed unlawful and condemned because defendants could have achieved objectives through a less restrictive alternative).

221. See HOVENKAMP, *supra* note 24, at 281 (concluding that courts should analyze restraints such as those challenged in *Topco* under full-blown rule of reason).

222. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734–35 (1988) (distinguishing, twice, a restraint before the Court from analogous horizontal price fixing that was purportedly more harmful (citing *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–58 & nn.27–28 (1977))).

223. See Meese, *supra* note 193, at 69 & nn.312–14 (collecting authorities demonstrating that franchising contracts are horizontal).

224. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281–82 (6th Cir. 1898).

225. *Id.* at 280; see also *Matthews v. Associated Press of N.Y.*, 136 N.Y. 333, 342 (1893) (subjecting similar restraints to lenient analysis); Bork, *supra* note 63, at 380–84 (explaining why such restraints can produce benefits despite reducing horizontal rivalry); Bork, *supra* note 63, at 389–90 (contending that such restraints should survive antitrust scrutiny absent proof that proponents of the restraint possess market power).

226. See Meese, *supra* note 22, at 134–41 (explaining how the advent of transaction cost economics undermined the economic premises of expansive per se rules announced during antitrust’s inhospitality era); *id.* at 141–44 (explaining how these developments induced the Supreme Court to contract the scope of per se rules, beginning in 1977).

actors to cooperation achieved through atomistic interaction in the spot market or complete integration.<sup>227</sup> As the Supreme Court explained over a century ago, such a literalistic ban on all contractual cooperation would “render difficult, if not impossible, any movement of trade in the channels of interstate commerce.”<sup>228</sup>

Second, courts could identify the subset of horizontal restraints that expressly set minimum prices or maximum output, declaring such restraints inherently suspect even if they otherwise survived per se condemnation because they may produce redeeming virtues.<sup>229</sup> This category would be significantly smaller than, say, the category of “horizontal” restraints. Here again, however, the case for treating this group of restraints as inherently suspect is not particularly strong. Recall that the category would not include so-called naked restraints, which would be deemed unlawful per se because of the lack of any prospect that such agreements could produce redeeming virtues.<sup>230</sup> Thus, the category would only include those restraints on price or output with respect to which defendants were able to adduce a plausible claim that the restrictions produced redeeming virtues.<sup>231</sup> Examples might include agreements among members of an amateur sports conference on the number of games each member can play per season (output), whether members can engage in post-season play (output),

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227. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) (“Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production. . . . Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.”); Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 489–93 (2000) (contending that courts should analyze nonancillary horizontal restraints that avoid per se condemnation under the full-blown rule of reason analysis).

228. *See United States v. Am. Tobacco Co.*, 221 U.S. 106, 180 (1911); *see also* Muris & Cummins, *supra* note 106, at 47–49 (endorsing *Polygram*’s quick look framework but contending that the FTC has improperly expanded the definition of inherently suspect).

229. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36–37 (D.C. Cir. 2005) (treating restrictions on pricing and advertising as inherently suspect); *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992) (finding that explicit restriction on output of games, while not unlawful per se, shifted burden to the defendant), *modified*, 95 F.3d 593, 600 (7th Cir. 1996) (holding that, given the extent of integration between the parties, the plaintiff bore the burden of establishing that the defendants possessed power in a properly defined relevant market). Indeed, some scholars have gone so far as to contend that minimum resale price maintenance, although vertical, should be inherently suspect. *See supra* note 219 (collecting scholarly authorities contending that courts and agencies should treat minimum retail price maintenance as inherently suspect, despite the fact that such restraints can produce redeeming virtues).

230. *See HOVENKAMP, supra* note 24, at 279 (properly defining as “naked” those restraints “formed with the objectively intended purpose or likely effect of increasing price or decreasing output in the short run”).

231. *See Chi. Prof’l Sports Ltd. P’ship v. NBA*, 95 F.3d 593, 596–600 (7th Cir. 1996) (finding that explicit horizontal agreements setting the output of broadcast games could plausibly create redeeming virtues thereby justifying full-blown rule of reason scrutiny); *see also* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–03 (1984) (explaining that an agreement between NCAA members to limit compensation of student athletes could overcome market failure and enhance interbrand rivalry with other forms of entertainment).

and the number and size of scholarships that each member can award (price).<sup>232</sup> Recall also that the formation and subsequent operation of mergers and partnerships both result in price fixing far more certain and all-encompassing than explicit horizontal restraints. When challenging the initial formation of such ventures, plaintiffs must establish the boundaries of the relevant market and the level of concentration within the market.<sup>233</sup> The plaintiff must also demonstrate that the level of concentration resulting from the transaction exceeds some threshold and thus indicates that the transaction may create anticompetitive harm. Moreover, if such transactions pass muster, any subsequent price setting by participants in the venture is “perfectly proper;” that is, lawful per se.<sup>234</sup>

The Supreme Court has repeatedly said that departure from the full-blown rule of reason must turn on “demonstrable economic effect” instead of “formalistic line drawing.”<sup>235</sup> Thus, classification of explicit price or output restraints that survive per se condemnation as inherently suspect must depend upon some theoretical argument or empirical evidence that such restraints pose a risk of net economic harm significantly greater than that posed by mergers, partnerships, or other horizontal restraints between independent firms that merit full-blown rule of reason scrutiny.<sup>236</sup> The theoretical basis for such a conclusion is by no means apparent. To be sure, received antitrust wisdom holds that, say, horizontal mergers that necessarily extinguish price competition can nonetheless generate technological efficiencies such as economies of scale.<sup>237</sup> One could argue that the prospect that such transactions might generate these efficiencies justifies less intrusive scrutiny compared to horizontal restraints between independent firms on price or output that may generate nontechnological, and thus more fleeting, efficiencies.<sup>238</sup>

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232. The Ivy League, for instance, prohibits members from awarding athletic scholarships and from participating in the post-season Football Championship Subdivision tournament. See Jacob D. H. Feldman & Scott A. Sherman, *Ivy League Remains Absent from Expanding FCS Playoff*, HARV. CRIMSON (May 29, 2013), <http://www.thecrimson.com/article/2013/5/29/harvard-football-ivy-league-fcs/>; *Prospective Student-Athletes Information*, IVY LEAGUE, <http://www.ivyleaguesports.com/information/psa/index> (last visited Jan. 27, 2016). These agreements constitute explicit horizontal restrictions on price and output.

233. See *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715–17 & n.10 (D.C. Cir. 2001); HOVENKAMP, *supra* note 24, at 564–75.

234. See *Texaco Inc. v. Dagher*, 547 U.S. 1, 6–7 (2006) (“As a single entity, a joint venture, like any other firm, must have the discretion . . . to sell a product under two different brands at a single, unified price.”); *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 356–57 (1982) (explaining that price fixing between partners is “perfectly proper”).

235. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (quoting *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977)); see also *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992) (stating that presumptions employed in antitrust litigation should rest on market realities and not formalistic distinctions).

236. Cf. *Muris & Cummins*, *supra* note 106, at 47–49 (contending that empirical evidence and economic logic are the only appropriate bases for declaring a restraint inherently suspect).

237. See HOVENKAMP, *supra* note 24, at 545; Givens, *supra* note 55, at 52–53 (concluding that mergers are “far more competition-destroying” than other restraints but nonetheless avoid per se condemnation because they may produce redeeming virtues, such as economies of scale).

238. Cf. HOVENKAMP, *supra* note 24, at 545 (“Most mergers are legal . . . because they can increase . . . efficiency . . .”).



However, any distinction between “technological efficiencies” achieved through complete integration and nontechnological efficiencies achieved via partial integration is illusory as a matter of economic theory and thus does not justify more hostile treatment of partial contractual integration that, like a merger, also reduces rivalry on price or output. After all, both technological and nontechnological efficiencies have the same (beneficial) impact on economic welfare. That is, both steer resources to their highest valued use and thus maximize the value of society’s output.<sup>239</sup> To paraphrase *Standard Oil*, both sorts of efficiencies “fructify” commerce and thereby counsel against condemning a restraint under the rule of reason.<sup>240</sup> If complete and long-term price fixing accomplished by merger does not presumptively offend the antitrust laws because of possible technological benefits, there is no reason to presumptively condemn less complete and less durable price fixing or output reduction that may produce redeeming virtues simply because those virtues are nontechnological.

None of this is to say that most horizontal price fixing or output reduction agreements between two or more firms may plausibly create cognizable benefits. Perhaps the opposite is true. That is, perhaps most horizontal price fixing between separate firms cannot plausibly create such benefits and is thus naked. If so, then horizontal mergers, for instance, will produce benefits more often than such horizontal price fixing. However, such a differential probability of producing benefits does not justify treating non-naked horizontal restraints more harshly than mergers. After all, if a restraint is naked, then application of the *per se* rule will condemn it for that reason alone, thereby obviating the need for any rule of reason analysis—full-blown, quick look, or in-between. By contrast, non-naked horizontal restraints will survive such condemnation precisely because they may produce redeeming virtues. Absent proof—and I know of none—that non-naked horizontal price or output restraints are significantly more likely to produce harm than mergers or agreements that do not mention price or output, there is no justification for treating such price or output restraints as inherently suspect.

#### CONCLUSION

The indisputable costs of full-blown rule of reason analysis understandably encourage courts, scholars, and enforcement officials to explore alternative methods for evaluating the numerous restraints that avoid *per se* condemnation. This Article has examined one such reform, the so-called quick look. Propo-

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239. See, e.g., Meese, *supra* note 75, at 510–13; see also F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 22 (3d ed. 1990) (equating increased productive efficiency with improvement in the allocation of resources); Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 22 & n.4 (1968) (equating productive efficiencies with allocative efficiency).

240. See *Standard Oil Co. v. United States*, 221 U.S. 1, 55–56 (1911) (explaining that the tendency of a restraint to “fructify” commerce renders it reasonable).



nents of the quick look claim that this mode of analysis improves upon the traditional dichotomous approach by reducing enforcement and adjudication costs, enhancing the accuracy of administrative and judicial determinations, and improving deterrence of harmful restraints.

As shown above, however, the case for the quick look does not withstand scrutiny. The quick look adds an additional layer to the analysis of restraints that avoid *per se* condemnation, namely, an inquiry into whether the challenged agreement is inherently suspect. The result of this inquiry is generally outcome determinative, and both plaintiffs and defendants will predictably invest significant resources in attempting to convince the tribunal that the challenged restraint is or is not inherently suspect. Tribunals, in turn, will expend significant resources assessing these contending arguments.

The significant costs of this threshold inherently suspect inquiry will produce no offsetting benefits. In most cases, tribunals reject claims that a challenged restraint is inherently suspect, thereby confirming the traditional result: full-blown rule of reason analysis. Even though tribunals declare some restraints inherently suspect, they always reject defendants' assertions that such restraints may produce cognizable economic benefits and thus invariably condemn such agreements. To be sure, such condemnation is less costly than condemnation after full-blown rule of reason analysis, suggesting that application of the quick look reduces the cost of condemning such restraints and enhances deterrence and accuracy as well. However, any such cost savings are illusory, given that a straightforward application of the traditional *per se* test—which consumes fewer resources than the quick look—would condemn the same restraints.

Engrafting the quick look onto the traditional dichotomous approach thus increases the costs of enforcement and adjudication without producing any offsetting benefits. These costs are themselves a deadweight social loss, consuming resources that could produce social value elsewhere. Because defendants will bear some of these costs, the quick look also functions as a tax on numerous forms of concerted action that survive *per se* condemnation. This tax will induce some firms at the margin to abandon agreements that tribunals might conceivably deem inherently suspect, even if such agreements produce benefits for the parties and consumers compared to alternatives. In other words, the quick look is currently a lose-lose that imposes deadweight social losses and distorts underlying economic activity.

The mere fact that the quick look, as currently structured, consumes agency, private, and judicial resources with no offsetting benefits does not establish that the traditional dichotomous approach is the best we can construct. This Article has explored two possible reforms of the quick look: (1) better integration of *per se* analysis with the quick look and (2) a more expansive definition of the inherently suspect category. Neither approach, it is shown, promises any improvement over the traditional dichotomous approach.