

Less Restrictive Alternatives and the Ancillary Restraints Doctrine

*Thomas B. Nachbar**

ABSTRACT

In *Ohio v. American Express*, both the majority and dissent introduced into Supreme Court antitrust jurisprudence a new test for evaluating restraints under the rule of reason: a less restrictive alternatives test. Occasionally appearing in circuit court cases, less restrictive alternatives tests have not been part of Supreme Court's approach to the rule of reason, which generally evaluates restraints of trade by balancing their anticompetitive and procompetitive effects.

American Express was the first Supreme Court case to mention a less restrictive alternatives test, potentially representing a major shift in antitrust law, but it was not the last. In 2021's *Alston v. NCAA*, the Supreme Court applied the test to strike several NCAA compensation restrictions, but it did so without explaining how the test might fit into the rule of reason or providing any single statement of the rule of reason. Rather than explicitly adopting the less restrictive alternatives test as a necessary part of the rule of reason, the Court merely noted that it has "sometimes spoken of" a three-step framework that includes the less restrictive alternatives test, suggesting that the test might or might not apply in any particular rule of reason case.

The Supreme Court has discussed alternatives in antitrust cases, though, and many find in those cases a distinct less restrictive alternatives test. Careful analysis of the cases shows that prior to *Alston*, the Court has not used anything like a less restrictive alternatives test. Nor should it. A less restrictive alternatives test injects tremendous uncertainty into the rule of reason while doing little to reduce the problems inherent in the kind of balancing the rule of reason requires. The Court's willingness to accept the less restrictive alternatives test in *Alston* without accounting for the

* Professor of Law, University of Virginia School of Law. I would like to thank Tom Arthur, Josh Bowers, Peter Carstensen, John Duffy, Frank Easterbrook, Josh Fischman, Nik Guggenberger, Scott Hemphill, Alan Meese, Ruth Mason, Glen Robinson, Danny Sokol, Gregg Strauss, and Rory Van Loo for helpful comments and suggestions.

ramifications of the test is likely to increase confusion in antitrust cases as litigants struggle not only with the inherent indeterminacy of the less restrictive alternatives test itself but also with the question of whether the less restrictive alternatives test is even relevant to their particular case.

This Article traces the development of the less restrictive alternatives test in antitrust scholarship and commentary and evaluates how consideration of alternatives actually does, and should, inform antitrust analysis. The scholarly impulse to include a less restrictive alternatives test in the rule of reason actually highlights the need for a reinvigorated approach to another aspect of antitrust law: the ancillary restraints doctrine. Properly applied, the ancillary restraints doctrine responds to the concerns that motivate the less restrictive alternatives test, but less restrictive alternatives are of limited use even in that inquiry.

CONTENTS

INTRODUCTION.....	589
I. THE DOCTRINE AND COMMENTARY ON LESS RESTRICTIVE ALTERNATIVES	594
<i>A. Less Restrictive Alternatives in American Express</i>	594
<i>B. Less Restrictive Alternatives in NCAA v. Alston</i>	596
<i>C. The Scholarship and Commentary on Less Restrictive Alternatives</i>	597
<i>D. The Supreme Court and the Absence of a Less Restrictive Alternatives Test</i>	599
1. <i>Addyston Pipe</i>	599
2. Mining the Cases for a Test.....	602
a. <i>NCAA</i>	603
b. <i>Maricopa County Medical Society</i>	606
c. <i>Broadcast Music</i>	608
d. A Notable Absence	610
3. Supreme Court Rejections of the Less Restrictive Alternatives Test.....	610
4. Informal Consideration of Less Restrictive Alternatives in the Supreme Court	612
<i>E. Alternatives, Balancing, and Ancillary Restraints</i>	614
II. LESS RESTRICTIVE ALTERNATIVES ON THEIR OWN TERMS	616
<i>A. Practical Arguments Over Less Restrictive Alternatives</i>	616
<i>B. Leaving Less Restrictive Alternatives at the Altar</i>	627

III. MAKING THE MOST OF LESS RESTRICTIVE ALTERNATIVES:
 CONSIDERATION OF ALTERNATIVES AND ANCILLARY RESTRAINTS ... 630
 A. Consideration of Alternatives in Antitrust Cases 630
 *B. Alternatives and the Ancillary Restraints Doctrine:
 Categorizing Cases and Restraints*..... 632
 IV. ALTERNATIVES AS A WINDOW TO THE ANCILLARY RESTRAINTS
 DOCTRINE..... 636
 A. Alternatives and Purpose 636
 *B. Less Restrictive Alternatives and “Reasonably
 Necessary” Restraints* 638
 C. The Ancillary Restraints Doctrine as Narrative 640
 1. The False Determinacy of Less Restrictive Alternatives in
 Ancillary Restraints Analysis..... 640
 2. The Ancillary Restraints Doctrine as a Sorting Device 641
 CONCLUSION 644

INTRODUCTION

*Ohio v. American Express Co.*¹ can only be described as a highly contentious antitrust case. With Justice Thomas writing the majority and Justice Breyer writing for the dissent, the Court split 5–4 on the question of how antitrust should treat “two-sided markets”²: a question of considerable importance as large tech platforms are receiving increasing attention in antitrust.³ Given the level of disagreement in the case, it is worth identifying one point of agreement between the majority and

1. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

2. *Compare id.* at 2287 (“[W]e will analyze the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex’s antisteering provisions have anticompetitive effects.”), *with id.* at 2297 (Breyer, J., dissenting) (“The majority’s discussion of market definition is [] wrong.”).

3. Both Google and Facebook have recently been sued by antitrust enforcers. *See* Complaint, *United States v. Google*, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020); Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-3590 (D.D.C. Dec. 9, 2020); Complaint, *New York v. Facebook, Inc.*, No. 1:20-cv-03589 (D.D.C. Dec. 9, 2020). The FTC has initiated investigations against Amazon, Apple, Facebook, and Microsoft. *See* Press Release, Fed. Trade Comm’n, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> [<https://perma.cc/8KGG-ZCTP>]. In addition to congressional hearings, numerous pieces of legislation have been introduced to cabin the power of large online platforms. *See, e.g.*, Press Release, Sen. Amy Klobuchar, *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement* (Feb. 4, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement> [<https://perma.cc/9ZPN-P7WH>]. On the antitrust review of platforms, see Thomas B. Nachbar, *Platform Effects*, 62 *JURIMETRICS J.* 1 (2021).

dissent: under the rule of reason's burden-shifting framework,⁴ after a plaintiff demonstrates an anticompetitive effect and a defendant responds with a procompetitive justification, the plaintiff may then show that the defendant could have achieved their objective through a less restrictive alternative.⁵ With such strong disagreement in that case, it is almost refreshing to find a point on which all sides can agree.

What makes Justice Thomas and Justice Breyer's unanimous agreement on a less restrictive alternatives test all the more noteworthy is that it was the first time such a test has been suggested, much less explicitly articulated, by the Supreme Court.⁶

For Justice Breyer, in particular, the move to include a less restrictive alternatives test within the rule of reason was a surprising one. Antitrust's "rule of reason," which is applied in the vast majority of antitrust cases, is generally attributed to Justice Brandeis in 1918's *Chicago Board of Trade v. United States*⁷ and asks whether a restraint, on balance, enhances or reduces competition. Over eighty years later, in *California Dental Ass'n v. FTC*,⁸ Justice Breyer himself provided what the Court has come to accept⁹ as the canonical modern statement of the rule of reason: "(1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?"¹⁰ Justice Breyer's authoritative statement in *CDA* conspicuously lacks any mention of less restrictive alternatives.¹¹

The majority and dissent's mention of less restrictive alternatives in *American Express* were even more remarkable because the question of less

4. There are two primary forms of analysis under Section 1 of the Sherman Act. Some restraints (such as price fixing) are "per se" illegal, but most are decided under the "rule of reason," which balances the anticompetitive effects of a restraint with its procompetitive justifications. See *Am. Express*, 138 S. Ct. at 2283–84; Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 122, 132 (2018).

5. *Am. Express*, 138 S. Ct. at 2284; *id.* at 2291 (Breyer, J., dissenting).

6. Renee Grewe, *Antitrust Law and the Less Restrictive Alternatives Doctrine: A Case Study in Its Application in the Sports Context*, 9 SPORTS L.J. 227, 227 (2002) ("[T]he United States Supreme Court has never officially recognized the less restrictive alternatives doctrine[.]"); C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 940 (2016) ("The Supreme Court has given no sustained attention to the LRA test, despite its extensive use by lower courts. Most strikingly, the Court has never endorsed (or rejected) the test.")

7. *Bd. of Trade of Chi. v. United States (Chicago Bd. of Trade)*, 246 U.S. 231 (1918). On balancing, see generally Hemphill, *supra* note 6, at 934–35; Hovenkamp, *supra* note 4, at 131–33.

8. *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756 (1999).

9. See *Fed. Trade Comm'n v. Actavis, Inc.*, 570 U.S. 136, 156 (2013) (citing *Cal. Dental Ass'n*, 526 U.S. at 786–87 (Breyer, J., concurring in part and dissenting in part)).

10. *Cal. Dental Ass'n*, 526 U.S. at 782 (Breyer, J., concurring in part and dissenting in part). On the place of Justice Breyer's formulation of the rule of reason, see Hovenkamp, *supra* note 4, at 124.

11. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 342 n.374 (5th ed. 2016) [hereinafter HOVENKAMP, ANTITRUST POLICY].

restrictive alternatives was irrelevant to either opinion's approach to the case. The entire disagreement between the majority and dissent was over the application of the first step¹² of the rule of reason analysis: whether the plaintiff had shown an anticompetitive effect.¹³ Because the Court agreed that the question of less restrictive alternatives happens in the third step in the analysis, a step which neither the majority nor dissent thought was necessary to reach, the case's embrace of the less restrictive alternatives test was pure dicta.¹⁴ Nevertheless, *American Express* became Supreme Court authority for the less restrictive alternatives test.

It did not take long for that authority to get used. In 2021's *NCAA v. Alston*,¹⁵ the Court recognized its identification of the less restrictive alternatives test in *American Express* without explicitly adopting the less restrictive alternatives test as part of the rule of reason. Citing the *American Express* dicta, the Court only noted that it has "sometimes spoken of" a three-part test that includes the less restrictive alternatives test.¹⁶ The Court affirmed the lower court's use of less restrictive alternatives in its analysis,¹⁷ but the Court in *Alston* did not expressly make the less restrictive alternatives test part of the rule of reason nor, indeed, provide any single articulation of the rule of reason in that case.¹⁸

As shown below, the Court's treatment of less restrictive alternatives in *American Express* and *Alston* was actually fairly typical of how the issue has been treated in the courts: confusion over the relevance of less restrictive alternatives accompanied by an almost complete failure to apply the less restrictive alternatives test in any kind of rigorous or systematic way.¹⁹ Although never previously applied by the Supreme Court, less restrictive alternatives tests are occasionally used by lower courts. In a high-profile example, the Ninth Circuit debated the role of less restrictive

12. The Court's use of the three-step approach seems to simply be following the Second Circuit's approach in the case. See *Ohio v. Am. Express Co.*, 883 F.3d 179, 194 (2d Cir. 2016) (citing Second Circuit cases for the three-step framework). The Supreme Court has not itself used the three-step framework in a case other than *American Express* itself.

13. Compare *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018), with *id.* at 2295–96 (Breyer, J., dissenting).

14. See *id.* at 2284; *id.* at 2291 (Breyer, J., dissenting).

15. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

16. *Id.* at 2160.

17. *Id.* at 2162–63.

18. Indeed, the Court injected considerable doubt into the content of the rule of reason, suggesting it is a wide-ranging inquiry into the circumstances of every case with very few constraints or limiting features. See *id.* at 2160.

19. See Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1337–38 (finding in his survey of rule of reason cases only seven cases that had applied the less restrictive alternatives test and only three that had applied it correctly).

alternatives in *O'Bannon v. NCAA*²⁰ and applied it in the follow-on NCAA compensation case that led to *Alston*.²¹ The Ninth Circuit in both cases inserted less restrictive alternatives as a formal step in rule of reason analysis and made the less restrictive alternatives determination categorical: if a plaintiff can show that there is a less restrictive alternative, the defendant loses. Among courts more broadly, the use of less restrictive alternatives is uneven, both among and within circuits.²² Less restrictive alternatives have found far more acceptance among commentators.²³

This article takes a more critical approach to less restrictive alternatives, examining their use in antitrust. Although generally advanced by commentators as part of the rule of reason, review of the cases shows that the Supreme Court has not considered less restrictive alternatives in rule of reason cases and, even after *Alston*, does not give them the kind of determinative, categorical status that the Ninth Circuit gave them in *O'Bannon* and *Alston*. Rather, the less restrictive alternatives analysis more closely fits the inquiry undertaken by the ancillary restraints doctrine, which asks whether a restraint is “reasonably necessary” to further some legitimate productive activity.²⁴ Both the recent scholarly emphasis on less restrictive alternatives and acceptance of the less restrictive alternatives test by the Court in *Alston* highlights the importance of the ancillary restraints doctrine, an aspect of antitrust analysis that receives comparably little scholarly attention.

The invocation of less restrictive alternatives in rule of reason cases seeks to frame the central question in ancillary restraints analysis (necessity) in the cost–benefit terms of the Court’s modern rule of reason analysis. Doing so, however, undermines the limited nature of the ancillary restraints doctrine, resulting in the collapse of the ancillary restraints doctrine into the kind of indiscriminate rule of reason balancing that many proponents of the less restrictive alternatives test seek to avoid.

20. *O'Bannon v. NCAA*, 802 F.3d 1049, 1074–79 (9th Cir. 2015); *id.* at 1081–83 (Thomas, C.J., dissenting).

21. *NCAA v. Alston*, Nos. 20-512, 20-520, 2020 WL 7366281 (U.S. Dec., 16, 2020).

22. Gabriel A. Feldman, *Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 583 (2009); Grewe, *supra* note 6, at 231; Hemphill, *supra* note 6, at 941–42.

23. *See, e.g.*, 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1505 (1985) [hereinafter ANTITRUST LAW (1st ed.)]; LAWRENCE A. SULLIVAN, WARREN S. GRIMES & CHRISTOPHER L. SAGERS, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 224–25 (2016); Alan Devlin, *Antitrust as Regulation*, 49 SAN DIEGO L. REV. 823, 824 (2012); Hemphill, *supra* note 6, at 940–41; Hovenkamp, *supra* note 4, at 104, 114; Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 110 (2003); *see also* Feldman, *supra* note 22, at 581–82 n.101.

24. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

Less restrictive alternatives tests are problematic on their own terms. They are almost impossible to constrain—to prevent a “less restrictive alternatives” test from devolving into a “least restrictive alternatives” test. Their boundlessness is demonstrated not only by how vigorously their limits are debated among academics and courts but also by the inability of their proponents to describe what those limits are or even how they could be measured. Less restrictive alternatives tests are likely to have outsized effects in technologically dynamic industries, especially those involving information technology and two-sided platforms, adding additional uncertainty to how antitrust will be applied to those industries. If the Court were to accept the less restrictive alternatives test as a formal step in the rule of reason, it would work a fundamental change to antitrust law.

Consideration of alternatives more generally is a valuable analytical tool, though, and is frequently used by courts in deciding antitrust cases, just not in the way proponents of less restrictive alternatives tests would have them. The impulse to look for less restrictive alternatives highlights previously ignored aspects of ancillary restraints analysis and offers an opportunity to reconstruct the ancillary restraints doctrine to make it a more effective tool for analyzing restraints of all kinds.

This article proceeds in four Parts. Part I is a comprehensive review of the authority that has been offered for the less restrictive alternatives test. While the less restrictive alternatives test has (prior to *American Express* and *Alston*) either gone unmentioned or been affirmatively rejected in Supreme Court cases, commentators have found several instances in which the Court has mentioned alternatives, and in those cases, commentators see a less restrictive alternatives test. Examination of those cases, though, shows that even when the Court has considered alternatives, it has not used a less restrictive alternatives test; indeed, the Court has frequently considered *more* restrictive alternatives. With no solid precedent for less restrictive alternatives, Part II considers whether a less restrictive alternatives test nevertheless belongs in the rule of reason and highlights the practical problems of applying such a test. The incremental nature of the less restrictive alternatives inquiry makes it almost impossible to limit, driving courts to look for ever-less restrictive alternatives. That presents a particular danger to markets for intangible products, such as Internet platforms, since the boundaries of those products are difficult to define. Next, Part III describes how the Court actually has used alternatives, which is within the ancillary restraints doctrine. The ancillary restraints doctrine precedes application of the rule of reason and requires not a comparative “less restrictive” analysis but rather a binary determination of whether a restraint is related to a procompetitive justification. Finally, Part IV flips the inquiry and explores

how considering alternatives highlights important yet frequently overlooked aspects of the ancillary restraints doctrine.

I. THE DOCTRINE AND COMMENTARY ON LESS RESTRICTIVE ALTERNATIVES

Perhaps the best that can be said about authority for the less restrictive alternatives test in the courts is that it is confused. The Court's discussions of the test in both *Ohio v. American Express* and *NCAA v. Alston* are instructive.

A. Less Restrictive Alternatives in American Express

When Justice Thomas declared “the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means,” he cited two sources: Julian von Kalinowski's antitrust loose-leaf, *Antitrust Laws and Trade Regulation*, and a Second Circuit case, *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*²⁵ When Justice Breyer agreed that “the antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways,” he cited only one source: Phillip Areeda and Herbert Hovenkamp's multi-volume *Antitrust Law* treatise.²⁶ That was the sum total of the Court's authority. Neither opinion cited any Supreme Court case on less restrictive alternatives, leaving the question ostensibly to the Second Circuit and two secondary sources.

The treatment in the Second Circuit was not much better. Perhaps because, as in the Supreme Court, the less restrictive alternatives question was not relevant to the Second Circuit's resolution of the case.²⁷ The court nevertheless described the less restrictive alternatives test, citing *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*,²⁸ which was Second Circuit precedent. *Geneva Pharmaceuticals*, in turn, had relied on another Second Circuit case, *Capital Imaging Associates, P.C. v.*

25. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (first citing 1 JULIAN VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 12.02[1] (2d ed. 2007); and then citing *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)).

26. See *id.* at 2291 (Breyer, J., dissenting) (citing 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1507a at 442 (4th ed. 2013) [hereinafter 7 *ANTITRUST LAW* (4th ed.)]).

27. The plaintiff failed to establish anticompetitive effects or market power, so the court did not reach the less restrictive alternatives question. See *United States v. Am. Express Co.*, 838 F.3d 179, 202 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

28. *Am. Express*, 838 F.3d. at 193 (citing *Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc.*, 386 F.3d 485, 506 (2d Cir. 2004)).

*Mohawk Valley Medical Associates, Inc.*²⁹ for the less restrictive alternatives test.³⁰ If *Capital Imaging* sounds familiar, that is because it is the same Second Circuit case Justice Thomas cited for the less restrictive alternatives test in *American Express*.³¹

Justice Breyer did not cite any case for the less restrictive alternatives test, relying exclusively on the fourth edition of *Antitrust Law*.³² *Antitrust Law*, though, also cites *Capital Imaging*,³³ making that case central to the appearance of the less restrictive alternatives test in the Supreme Court *American Express* case.³⁴

Like the Supreme Court and Second Circuit *American Express* cases, *Capital Imaging* articulated the less restrictive alternatives test in dicta; the case was decided on the plaintiff's failure to show either an anticompetitive effect or that the defendant had market power.³⁵ Thus, at least as far as the Supreme Court goes, the adoption of the less restrictive alternatives test in *American Express* appears to be the adoption, without any analysis or even acknowledgment, of Second Circuit precedent (announced as dicta) on the less restrictive alternatives test, taking sides among divided circuits over the application of the test without the issue even being raised.³⁶ Many lower courts do apply a less restrictive alternatives test,³⁷ but the test is subject to general confusion over exactly what the origin or justification for the less restrictive alternatives test is or what it requires.³⁸ It is hard to imagine that either Justice Thomas or Justice Breyer intended to displace the Court's prior approach to the rule of reason, but that became a possibility after *American Express*.

29. *Geneva Pharms. Tech. Corp.*, 386 F.3d at 507 (citing *Cap. Imaging Assocs.*, 996 F.2d at 543).

30. *See Am. Express*, 838 F.3d at 195.

31. *See Am. Express*, 138 S. Ct. at 2284.

32. *Id.* at 2291 (Breyer, J., dissenting).

33. 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1913, at 396, n. 2 (4th ed. 2018) [hereinafter 11 ANTITRUST LAW (4th ed.)] (citing *Cap. Imaging Assocs.*, 996 F.2d at 543). The primary treatment of the less restrictive alternatives test is in paragraph 1913a, which has cited *Capital Imaging Associates* since that paragraph was added to the treatise in 1998. *See* 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1913a at 304, n. 2 (1998) [hereinafter 11 ANTITRUST LAW (1st ed.)].

34. *Antitrust Law* does cite other cases in addition to *Capital Imaging Associates*. *See* 11 ANTITRUST LAW (4th ed.), *supra* note 33, ¶ 1913.

35. *Cap. Imaging Assocs.*, 996 F.2d at 546.

36. The parties appear to have been operating under the reasonable assumption that Second Circuit precedent would apply, and the Supreme Court seems to have taken the issue as the parties framed it. *See Am. Express*, 138 S. Ct. at 2277; *id.* at 2291 (Breyer, J., dissenting).

37. *See* 11 ANTITRUST LAW (4th ed.), *supra* note 33, ¶ 1913; Devlin, *supra* note 23, at 824 (collecting cases in the various circuits); Grewe, *supra* note 6, at 236–45 (same); Hemphill, *supra* note 6, at 941 (same).

38. Devlin, *supra* note 23, at 838; Feldman, *supra* note 22, at 583; Grewe, *supra* note 6, at 231; Hemphill, *supra* note 6, at 941–42.

B. Less Restrictive Alternatives in NCAA v. Alston

That possibility was realized in *NCAA v. Alston*. In that case, the lower courts had, unlike in *American Express*, actually applied the less restrictive alternatives test in a way that controlled the outcome of the case,³⁹ so at least the issue was actually live. As in *American Express*, though, the litigants had largely accepted Ninth Circuit precedent on the less restrictive alternatives test, with the NCAA arguing not that the less restrictive alternatives test itself was bad law but rather that the lower court had misapplied the test as a “least restrictive alternatives” test.⁴⁰ As a result, the less restrictive alternatives question in *Alston* was argued by the parties on its margins (how much less restrictive?) but not on the question of whether the test was part of the rule of reason in the first place.

The Supreme Court affirmed the lower courts’ application of less restrictive alternatives,⁴¹ but the Court’s treatment of precedent for the test was even more cryptic than in *American Express*. The Court did not describe the test as a necessary part of the rule of reason (or even provide a statement of the rule of reason at all) but merely said that it had “sometimes spoken of” a three-step test that included less restrictive alternatives, citing only the dicta in *American Express*.⁴²

It is difficult to imagine a more tepid embrace of the less restrictive alternatives test than that offered by the Court in *Alston*. The phrasing “sometimes spoken of” is more reminiscent of some pleasant memory of a long-passed event than the establishment of binding precedent by the highest court in the land. Moreover, the failure of the Court or provide any definitive statement that the rule of reason requires lower courts to consider less restrictive alternatives, or even of the rule of reason itself, is likely to result in confusion among lower courts, as they decide whether they must, should, or may, include a test that the Supreme Court has “sometimes spoken of.” The Court notably failed to situate the less restrictive alternatives test within previous rule of reason precedent, such as *Chicago Board of Trade*, or the modern cases applying its balancing framework.⁴³ Wholly aside from the less restrictive alternatives test question, *Alston*’s articulation introduces uncertainty as to whether there is a single rule of reason or many, or how lower courts should decide which version to adopt in a particular case. Even for those like me who doubt the

39. *In re NCAA Grant-in-Aid Cap Antitrust Litig. (Alston)*, 375 F. Supp. 3d 1058, 1088 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020), *aff’d sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

40. *Alston*, 141 S. Ct. at 2162.

41. *Id.*

42. *Id.* at 2160.

43. *Bd. of Trade of Chi. v. United States (Chicago Bd. of Trade)*, 246 U.S. 231, 238 (1918). On the modern treatment of *Chicago Board of Trade*, see *supra* text accompanying notes 7–10.

value of the less restrictive alternatives test, *Alston* would have been better if it had adopted a clear articulation of the rule of reason. Even on its own terms, *Alston* is a jurisprudential flub.⁴⁴ The case is only the weakest form of precedent for any rule of antitrust law, much less the less restrictive alternatives test itself.

C. The Scholarship and Commentary on Less Restrictive Alternatives

Given the lack of treatment (or even acknowledgment⁴⁵ before *American Express*) in the Supreme Court and confusion in the lower courts, the most likely place to look for guidance on less restrictive alternatives tests is in scholarship and commentary. Proponents of the less restrictive alternatives test suggest its use in a variety of circumstances within the rule of reason and in some cases, beyond. Professor Herbert Hovenkamp offers the less restrictive alternatives test as a distinct, third step in a four-step rule of reason inquiry roughly mirroring the three-step test applied in *American Express* and *Alston*.⁴⁶

Even without conducting the rule of reason in stepwise fashion, though, one could use a less restrictive alternatives test for other purposes. Professor Scott Hemphill suggests three functions for a less restrictive alternatives test, a “shortcut, a locus of balancing, and a tool of smoking out.”⁴⁷ It is a shortcut to balancing by allowing courts to compare alternative restraints rather than having to compare procompetitive and anticompetitive effects of a restraint,⁴⁸ an innovation by courts to avoid the

44. It is tempting to attribute the Court’s equivocal language combined with its failure to articulate a clear statement of the rule of reason to the Court’s own doubts about the viability of the less restrictive alternatives test, especially given the Court’s concerns about the harmfulness of the NCAA’s restraints in this particular case. The case has garnered substantial media attention for the NCAA’s potential to exploit unpaid players, and the oral argument focused heavily on the NCAA’s market power and the practical effects of the restraints, with little attention to the Ninth Circuit’s approach to the law. Justice Kavanaugh wrote separately to highlight the NCAA’s highly anticompetitive nature, again with no attention to less restrictive alternatives. *See Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring). *Alston* and the Court’s willingness to apply, if not embrace, the less restrictive alternatives test may very well be part of an antitrust tradition of great cases making bad law. *See N. Sec. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting) (“Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”).

45. Grewe, *supra* note 6, at 227 (“[T]he United States Supreme Court has never officially recognized the less restrictive alternatives doctrine[.]”); Hemphill, *supra* note 6, at 940 (“The Supreme Court has given no sustained attention to the LRA test, despite its extensive use by lower courts. Most strikingly, the Court has never endorsed (or rejected) the test.”).

46. Hovenkamp, *supra* note 4, at 102–04; *see also* 11 ANTITRUST LAW (4th ed.), *supra* note 33, ¶ 1913a, at 395–96.

47. Hemphill, *supra* note 6, at 947.

48. *Id.* at 952.

“anxiety”⁴⁹ they feel over doing open-ended rule of reasoning balancing. By being equally effective while being less restrictive, less restrictive alternatives that are clearly better (or “dominant”) can serve as a locus of balancing between the effectiveness and cost of alternative restraints.⁵⁰ Finally, a less restrictive alternatives test can be used to “smoke out” anticompetitive intent, which Professor Hemphill acknowledges has limited value in antitrust law.⁵¹ These three functions can be divided into two distinct categories: the first two functions place less restrictive alternatives within rule of reason balancing, and the third goes to intent, which is distinct from balancing itself. Professor Hemphill finds that the less restrictive alternatives “test appears in a wide range of antitrust cases.”⁵²

Others have suggested other roles for less restrictive alternatives. Professor Lawrence Sullivan suggested the use of less restrictive alternatives as a prerequisite to performing a full market analysis under the rule of reason to the point that he, like Professor Hovenkamp, would not perform full rule of reason balancing without first evaluating the availability of less restrictive alternatives, although he did not argue it should be a separate step in the analysis.⁵³ Professor Areeda, prior to Hovenkamp’s addition to the *Antitrust Law* treatise, suggested that less restrictive alternatives could be used to determine either the defendant’s objective or the necessity of the restraint.⁵⁴ Like Areeda, others have identified the value of imposing a less restrictive alternatives requirement generally on the rule of reason analysis.⁵⁵

But not everyone is a fan of less restrictive alternatives. Most criticisms center on the impracticality of evaluating restraints. Professor Alan Meese puts it succinctly: “[M]any of the less restrictive alternatives posited by courts and scholars are either less effective, more expensive to administer, or both.”⁵⁶ Some just believe that the less restrictive alternatives test is not or should not be present in the case law.⁵⁷

49. *Id.* at 949 (“The resulting anxiety about balancing has led courts and commentators to shy away from an analysis of net effects.”).

50. *Id.* at 959.

51. *Id.* at 968.

52. *Id.* at 938.

53. Lawrence A. Sullivan, *Viability of the Current Law on Horizontal Restraints*, 75 CALIF. L. REV. 835, 851 (1987).

54. 7 ANTITRUST LAW (1st ed.), *supra* note 23, ¶ 1505 at 383.

55. *E.g.*, Thomas E. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CALIF. L. REV. 893, 909 (1987) (“On balance, therefore, evaluation of alternatives within the limits suggested above should be a part of antitrust’s methodology in cases involving integration.”)

56. Meese, *supra* note 23, at 168; *see also* Devlin, *supra* note 23, at 826; Feldman, *supra* note 22, at 563.

57. *See* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 266, 334 (1986) [hereinafter Arthur, *Sea of Doubt*].

What is clear from a review of the scholarship is that scholars have devoted considerably more attention to the question of less restrictive alternatives test than have the courts and in doing so have provided a compelling argument for at least some consideration of less restrictive alternatives. The question is *how* less restrictive alternatives should factor in antitrust cases. It is possible the Court in *American Express* was simply acknowledging explicitly what has been implicit in the rule of reason, a possibility considered by the next Section.

D. The Supreme Court and the Absence of a Less Restrictive Alternatives Test

Scholars and commentators have pointed to a number of Supreme Court cases in support of a less restrictive alternatives test. This Section considers the asserted Supreme Court sources for a less restrictive alternatives test and demonstrates that none of the proffered precedents actually stands for the use of less restrictive alternatives in the rule of reason. Instead, the cases show that the Court uses alternatives in a much less systematic way than advocated by proponents of a less restrictive alternatives test.

1. Addyston Pipe

Although not a Supreme Court opinion, later-Chief Justice Taft's opinion in the Sixth Circuit case *United States v. Addyston Pipe & Steel Co.*⁵⁸ has been hugely influential. Judge Robert Bork described it as "one of the greatest, if not the greatest, antitrust opinions in the history of the law,"⁵⁹ and it is generally acknowledged to be the source of the ancillary restraints doctrine—the requirement that restraints "ancillary" to a larger, productive transaction⁶⁰ be evaluated differently than "naked" restraints, whose sole purpose is to limit competition⁶¹—in American antitrust law.⁶² The doctrine has been particularly relevant to arguments in favor of a less restrictive alternatives test as part of the rule of reason.

58. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

59. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 26 (1978).

60. Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 353 (2000) (describing the connection the ancillary restraints doctrine draws between restraints and productive efficiency) [hereinafter Arthur, *Workable Rule of Reason*].

61. *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (Easterbrook, J.).

62. *Id.* at 188–89 (reciting the ancillary restraints doctrine and citing *Addyston Pipe*); BORK, *supra* note 59, at 27 (same); Hovenkamp, *supra* note 4, at 139–40 (same); Hemphill, *supra* note 6, at 938 (same).

Addyston Pipe dealt with a price fixing conspiracy among a group of six pipe manufacturers. The defendants “admitted the existence of an association between them” to avoid great losses⁶³ but argued that their low collective market share (below 30%) combined with their price structure (tied to market rates) made it impossible for them to have restrained trade, as “the public had all the benefit from competition which public policy demanded.”⁶⁴ They also argued that the prices they fixed were “reasonable” ones and therefore “did not exceed in degree of stringency or scope what was necessary to protect the parties.”⁶⁵

Judge Taft rejected all these claims. Although he found a “relaxing of the original strictness of the common law”⁶⁶ regarding contracts in restraint of trade, such “relaxing” was only in cases involving “contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract,” not those “having for their sole object the restraint of trade.”⁶⁷ The defendants’ purpose was to limit competition itself, which meant their restraints were not subject to this more tolerant rule. In describing the difference between what has come to be called a “naked”⁶⁸ restraint (such as the defendants’) and one “merely ancillary to the main purpose of a lawful contract,”⁶⁹ Judge Taft gave birth to the ancillary restraints doctrine, which provides a rule for distinguishing between the two principal categories of cases under Section 1: restraints that are per se unlawful and ones that require deeper inquiry under the rule of reason.⁷⁰

As described by both Lawrence Sullivan and Thomas Arthur, *Addyston Pipe* reconciled a tension between a near-literal view of the Sherman Act as applying to “every . . . restraint of trade” and the unbounded balancing of procompetitive effects and anticompetitive effects in *Chicago Board of Trade*.⁷¹ *Addyston Pipe* opened up the possibility of conducting an inquiry in every case as to the legitimacy of a restraint without engaging in a wide-ranging cost–benefit analysis.⁷² It did

63. *Addyston Pipe*, 85 F. at 272–74.

64. *Id.* at 279.

65. *Id.*

66. *Id.* at 283.

67. *Id.*

68. The word “naked” does not appear in *Addyston Pipe*. The concept of a “naked restraint” first appeared (in the Supreme Court) in *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963), without citation to *Addyston Pipe*.

69. *Addyston Pipe*, 85 F. at 282.

70. See *supra* text accompanying notes 61–62.

71. Sherman Antitrust Act of 1890, 15 U.S.C. § 1; see also Arthur, *Sea of Doubt*, *supra* note 57, at 374; Sullivan, *supra* note 53, at 838; Clarence E. Eldridge, *A New Interpretation of the Sherman Act*, 13 MICH. L. REV. 1, 14 (1914) (explaining *Addyston Pipe*’s role in the reconciling the differences among two sets of cases).

72. Hovenkamp, *supra* note 4, at 132–33.

so by limiting the inquiry to the specific restraint and its effect on the larger transaction.⁷³ Sullivan went on to find that not only should the relationship exist, but it must also include—”most importantly”—consideration of less restrictive alternatives.⁷⁴ Sullivan connected his conclusion about less restrictive alternatives to what he called the “proportionality” between the restraint and the productive purpose of the larger transaction.⁷⁵ A less restrictive alternatives test ensures that a restraint out of proportion with the gains from the larger transaction could not be justified.

Another way to think about the problem is from the perspective of necessity, which featured even more prominently in *Addyston Pipe*. Judge Taft’s understanding required not only that the restraint was ancillary in that it was subordinate⁷⁶ to the primary purpose of the contract, but it was also “necessary” to that purpose.⁷⁷ By limiting the available justifications to those that are the least restrictive available, one can avoid permitting restraints that do not actually serve the productive purpose of the larger transaction. Professor Scott Hemphill finds support in *Addyston Pipe* for a less restrictive alternatives test from Judge Taft’s dual requirement of ancillarity⁷⁸ and necessity.⁷⁹ Taft also relied on reasonableness to sort among valid and invalid restraints, but “reasonable” itself was a determination to be made based on the relationship between the restraint and the purpose of the larger transaction: “Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable.”⁸⁰

Not everyone sees a less restrictive alternatives test in *Addyston Pipe* though. Professor Thomas Arthur argues that Judge Taft’s emphasis on the purpose of the larger transaction did not suggest an inquiry into less

73. Sullivan, *supra* note 53, at 838.

74. *Id.* (emphasis added).

75. *Id.* at 854; *see also Addyston Pipe*, 85 F. at 282 (“The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined.”).

76. *See* WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 51 (1880) (defining “ancillary” as “[s]ubservient or subordinate, like a handmaid”); BORK, *supra* note 59, at 27 (defining “ancillary” as “subordinate and collateral”).

77. *Addyston Pipe*, 85 F. at 282 (“[I]t would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract” (emphasis added)).

78. I’m ashamed to admit that “ancillarity” is a word used in antitrust circles and one I myself use, occasionally without irony.

79. Hemphill, *supra* note 6, at 938–39 (arguing that *Addyston Pipe* means that “horizontal restraints must be both ‘ancillary’ to a desirable purpose and no more restrictive than necessary to achieve the purpose”).

80. *Addyston Pipe*, 85 F. at 282 (quoting *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] App. Cas. 535, 567); *see* Kauper, *supra* note 55, at 908–09 n.73.

restrictive alternatives; rather, Judge Taft's concern, as informed by the common law background on restraints of trade,⁸¹ was over purpose—or even intent—more generally,⁸² and not whether the restraint was tailored in any particular way to that purpose. As a result, under his reading of *Addyston Pipe*, almost any connection will do, not just a least restrictive one.⁸³ This reading of *Addyston Pipe* resembles the interpretation of Judge Bork, perhaps *Addyston Pipe*'s greatest modern booster, who emphasized the need for an ancillary restraint to contribute to the larger transaction, but not to any particular degree.⁸⁴ It is also possible for one to take a middle road interpretation: Professor Thomas Kaufer sees the “necessity” in *Addyston Pipe* as indeterminate, potentially, but not necessarily, supporting the evaluation of less restrictive alternatives.⁸⁵

While one can argue over the relationship between concepts like necessity or reasonableness and less restrictive alternatives without end, the real question for modern arguments for less restrictive alternatives is not whether *Addyston Pipe* got the law of restraints correct; rather, it is whether a case dealing with price fixing has much to say about the use of less restrictive alternatives in other contexts. In addition, virtually all of Judge Taft's exegesis on the common law of trade restraints was dicta. The defendants in *Addyston Pipe* were not arguing around the margins of the ancillary restraints doctrine; the object of their conspiracy was to control the price of pipe directly—it had no other purpose. Although encyclopedic in its collection of both contracts and antitrust cases, *Addyston Pipe* offers little guidance on how any of the dozens of cases it cites would apply to a restraint that actually *was* ancillary to some other productive activity, as the defendants' was not.⁸⁶

2. Mining the Cases for a Test

In the end, Judge Taft is a poor source for the less restrictive alternatives test and the law in the circuits is confused. But various commentators perceive support in a variety of places in the *U.S. Reports*.

81. Arthur, *Sea of Doubt*, *supra* note 57, at 281; *id.* at 296–97.

82. *Id.* at 297 (“The requirement that nonnaked restraints be ‘reasonably ancillary, to a valid business purpose provided a tool to ferret out cartel restraints disguised as ancillary to legitimate ventures.’”).

83. *Id.* at 334; *see also* Arthur, *Workable Rule of Reason*, *supra* note 60, at 380 (modifying his reading of *Addyston Pipe* to a two-step inquiry that includes some consideration of less restrictive alternatives).

84. BORK, *supra* note 59, at 27 (describing an ancillary restraint as one that “makes the main transaction more effective in accomplishing legitimate business purposes”).

85. Kaufer, *supra* note 55, at 908–09 n.73.

86. *Addyston Pipe*, 85 F. at 283; *cf.* Arthur, *Workable Rule of Reason*, *supra* note 60, at 342 (describing the “non-exhaustive list of five transactions to which a restraint could be ancillary”) (footnotes omitted).

Justice Brennan, for example, endorsed consideration of less restrictive alternatives as “[a]nother pertinent inquiry” in his concurrence in *White Motor Co. v. United States*,⁸⁷ but the Court never took up his invitation, and Justice Rehnquist wrote even more forcefully against them.⁸⁸ Other than occasional dissents and concurrences, the Supreme Court had not, prior to *American Express*, discussed, much less applied, the less restrictive alternatives test. The cases typically cited for relying on less restrictive alternatives analysis do not engage in any real comparison of alternatives, which is the essence of considering less restrictive alternatives, thus making them poor precedents for a less restrictive alternatives test. Deeper examination of some of the cases shows they actually reflect the rejection of the less restrictive alternatives test rather than its acceptance.

a. *NCAA*

In *NCAA v. Board of Regents of University of Oklahoma*,⁸⁹ the Court considered limitations on the number of football games that member schools could televise.⁹⁰ The NCAA argued that the restrictions made the product “high-quality college football” more attractive to fans.⁹¹ The Court rejected that argument finding the plan reduced rather than increased the number of televised football games, undermining the NCAA’s justification.⁹²

While deciding the case, the Court considered the efficacy of the specific restraints, and in that consideration, the Ninth Circuit,⁹³ along with several commentators, saw a less restrictive alternatives test. According to Professor Hemphill, “[t]he Supreme Court rejected [the NCAA’s] argument because competitive balance was already promoted equally well by other existing NCAA rules that had no restrictive effect.”⁹⁴ Professor Kauper, too, thought the Court “clearly rested its decision in part on the finding that any efficiencies created by the defendant’s restraint need not be weighed because they could have been achieved in less restrictive

87. *White Motor Co. v. United States*, 372 U.S. 253, 271 (1963) (Brennan, J., concurring). Regarding the particular restraints at issue in *White Motor*—vertical exclusive territories—the Court affirmatively disclaimed consideration of a less restrictive alternative in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.29 (1977) (“The location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used.”).

88. *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of cert.).

89. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

90. *Id.* at 89–94.

91. *Id.* at 131 (White, J., dissenting).

92. *Id.* at 119–20.

93. *See O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

94. Hemphill, *supra* note 6, at 955.

ways.”⁹⁵ Professor Lawrence Sullivan saw in *NCAA* a balancing test that includes less restrictive alternatives.⁹⁶ According to Professor Hovenkamp, the Supreme Court “agreed with the lower court’s conclusion that even if such a defense were legitimate, it could be achieved by a less restrictive alternative.”⁹⁷

The Court did note that the Tenth Circuit had relied on less restrictive alternatives as the basis of its decision, but the Court did not adopt the Tenth Circuit’s reasoning—it applied its own analysis, ignoring the Tenth Circuit’s use of less restrictive alternatives in deciding the case. It is true that the Tenth Circuit cited less restrictive alternatives, but it did so as a second alternative holding after concluding that, in two separate ways, the restraints had *no* competitive justification.⁹⁸

The other claims that the *NCAA* case engaged in less restrictive alternatives analysis fail to acknowledge that the only alternative the Court considered was no restraint at all. The Court did not hold that the NCAA’s restraints served its productive objective less effectively than they might if structured differently; it rejected the NCAA’s restraints on their own terms and not in comparison to some alternative form because the restraints did not produce any procompetitive effects.⁹⁹ Because the television restrictions reduced output rather than increased it,¹⁰⁰ the restrictions did not contribute to the productive activity, and so there was no procompetitive justification for them in the first place.¹⁰¹ That conclusion does not reflect the application of a less restrictive alternatives test. If the restraints did not make any contribution to productive activity, then there would be nothing against which to measure other less restrictive alternatives.

That, of course, is no more than application of the ancillary restraints doctrine itself. If the NCAA’s restraints did not in fact contribute to productive activity, they were not ancillary to it and therefore were not subject to the ancillary restraints doctrine.¹⁰² That is the only way to understand the Court’s holding in *NCAA*, which refused to find any procompetitive benefit from the restraints.

95. Kauper, *supra* note 55, at 909.

96. Sullivan, *supra* note 53, at 850.

97. Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J. L. & BUS. 369, 372 (2016).

98. *See* Bd. of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147, 1154 (10th Cir. 1983), *aff’d*, *NCAA*, 468 U.S. 85, 120 (1984).

99. *NCAA*, 468 U.S. at 114. Unlike the Court’s notation of the Tenth Circuit’s less restrictive alternatives analysis, the Court actually relied on the District Court’s findings that the restraints did not produce any procompetitive effect. *See id.* (citing the District Court’s findings).

100. *Id.* at 119.

101. *Id.* at 116.

102. *See* HOVENKAMP, ANTITRUST POLICY, *supra* note 11, at 346; *see also* Hemphill, *supra* note 6, at 953.

Although the holding of the case was based on the wholesale rejection of the restraints rather than their comparison to less restrictive alternatives, the opinion contains language discussing alternative restraints that one could read as including a less restrictive alternatives analysis. One justification the NCAA offered was that the restraints maintained competitive balance among the teams.¹⁰³ The Court rejected that justification entirely because it reduced rather than increased output,¹⁰⁴ a determination that did not involve comparison with less restrictive alternatives. In the course of its discussion, though, it did cite alternatives, largely following the District Court:

[T]he District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are “clearly sufficient” to preserve competitive balance to the extent it is within the NCAA’s power to do so.¹⁰⁵

One might read “much better tailored” to mean “less restrictive,” but those of us who have had our pants let out know that sometimes tailoring does not result in making things smaller. Here, the alternatives the Court considered looked *more* restrictive than the television restraints. The Court described the various ways in which the restraint was *too limited* to achieve the end of competitive balancing:

The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity.¹⁰⁶

The district court, too, had cited the “far-reaching NCAA regulations governing college football, other than those relating to television.” In its opinion, it listed seven different restraints that go to the core of competition over the coaches, players, and number of games, which it described as “only a small part of the vast NCAA regulatory scheme.”¹⁰⁷

103. *NCAA*, 468 U.S. 85 at 117.

104. *Id.* at 119.

105. *Id.* For the proposition that this language suggests a less restrictive alternatives test, see Hemphill, *supra* note 6, at 955 & n.133.

106. *NCAA*, 468 U.S. at 119.

107. *Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1309 (D. Okla. 1982), *rev'd*, 707 F.2d 1174 (10th Cir. 1983).

That was the alternative that was “clearly sufficient”¹⁰⁸ for the NCAA’s purpose. Those restrictions covered all aspects of the games the NCAA produced, not just the television portion, which was only part of the NCAA’s football market. Some restraints, such as restraints on tuition, would go to the school’s broader enterprise outside athletics entirely. It is hard to describe these alternatives as “less”¹⁰⁹ restrictive than a limit on the number of games that appear on television, which is only one part of one market in which the NCAA’s games competed.¹¹⁰

Looking at the alternatives considered by the Court, it appears that there is no meaningful way to even measure whether an alternative is less or more restrictive. Is a restriction that prevents paying players (amateurism) more restrictive or less restrictive than a limitation on the number of television games? How about a restriction on the amount of donations that schools can receive or put toward their football programs? It is hard to say. The restraints operate in completely different markets¹¹¹ (television versus sports versus alumni donations versus tuition) even if they are all designed to produce a single product.

The Court did not rely on less restrictive alternatives when it found that the NCAA’s restrictions did not further a productive end. Instead, it applied a standard ancillary restraint analysis to determine whether they actually contributed to the stated justification. More significantly, there is absolutely nothing in *NCAA* to suggest that consideration of less restrictive alternatives is a distinct, much less necessary, step in rule of reason analysis.

b. *Maricopa County Medical Society*

Professors Hemphill,¹¹² Hovenkamp (in Justice Powell’s dissent),¹¹³ Ross,¹¹⁴ and Sullivan¹¹⁵ find a less restrictive alternative analysis in

108. *NCAA*, 468 U.S. at 119.

109. Cf. PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 15.03 (2013 supp.) [hereinafter FUNDAMENTALS OF ANTITRUST LAW] (“We doubt that the Court meant by the first quoted sentence above that colleges should adopt the less restrictive alternative of equalizing tuition or alumni donations as a preferable way to achieve competitive balance. Rather, the Court suggested that television revenues or exposure would not determine football strength in view of all the other factors affecting a school’s resources and recruitment.”).

110. *NCAA*, 468 U.S. at 116–17 (discussing the relationship between the TV plan restraint and the sales of tickets for live attendance).

111. FUNDAMENTALS OF ANTITRUST LAW, *supra* note 109, § 15.03 (“In the *NCAA* situation, the alternatives are very different qualitatively.”).

112. Hemphill, *supra* note 6, at 940; *id.* at 957.

113. Hovenkamp, *supra* note 4, at 114–15.

114. *But see* Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 489 (1990).

115. Sullivan, *supra* note 53, at 845, 851.

Arizona v. Maricopa County Medical Society.¹¹⁶ That case involved a maximum fee schedule set by doctors. The Society offered a plan under which doctors would agree to accept a maximum fee from insurers who signed up for the plan. The insurers, conversely, would agree to pay the maximum fee.¹¹⁷ The case revolved largely around how the Court should treat a maximum fee schedule offered by a professional association as opposed to some other form of price restraint, like a minimum fee schedule.¹¹⁸ The Court decided that such a restraint was a *per se* violation of Section 1,¹¹⁹ but in doing so, it considered an argument by the doctors that their fee schedule system had procompetitive effects by providing choice, complete coverage, and lower premiums.¹²⁰ In rejecting the second and third justifications, the Court pointed out that, while complete coverage (and reliable prices) were benefits, they did not require the doctors to horizontally set the price; the insurers could just as easily do so as part of their plans' agreement with individual doctors, and offered examples to prove the point.¹²¹

Because the Court applied the *per se* rule in *Maricopa County Medical Society*, it is, like *Addyston Pipe*, an unlikely source of wisdom regarding the use of less restrictive alternatives in rule of reason cases.¹²² That is all the more so because the Court's rejection of the doctors' rationale was not based on the effects of the fee arrangement or its alternatives but rather because the justification was precluded—as in *Addyston Pipe*—by the *per se* rule.¹²³

Even in considering alternatives, though, the Court's analysis did not emphasize anything like a “degree” of restrictiveness. Rather, it suggested an alternative source for the restraint: the insurers.¹²⁴ Shifting the price setting to the insurers from the doctors would change the restraint from a horizontal one to a vertical one and therefore subject it to an entirely different rule (for one thing, it would not be price fixing). It is possible to

116. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332 (1982). Professor Hovenkamp cites Justice Powell's emphasis on nonexclusivity in his dissent in *Maricopa County* as a less restrictive alternative. Hovenkamp, *supra* note 4, at 114–15. Justice Powell himself did not mention less restrictive alternatives, *see Maricopa Cnty. Med. Soc'y*, 457 U.S. at 360 (Powell, J., dissenting), and I will address the role of nonexclusive licenses below.

117. *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 341.

118. *Id.* at 342–57.

119. *Id.* at 354. For a discussion of the *per se* rule of reason distinction, see *supra* text accompanying notes 66–70.

120. *Id.* at 351.

121. *Id.* at 352–53; *see also* Sullivan, *supra* note 53, at 845 (citing less restrictive alternatives in *Maricopa County Medical Society*); *id.* at 851 (same).

122. *Cf.* Hemphill, *supra* note 6, at 957 (“The case is styled as a *per se* condemnation of the conduct, but the Court considered the defendants' proffered justification at length.”).

123. *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 351.

124. *See id.* at 341.

describe a vertical restraint as “less restrictive” than a horizontal one, but what the Court was saying (as in *NCAA*) was not that the doctors’ horizontal agreement was overbroad but rather that the doctors should not have agreed at all.¹²⁵ Thus, like the comparison in *NCAA*, the Court compared the doctors’ agreement not with some a less restrictive agreement, but with no agreement. The agreement was unnecessary to achieve the benefits of complete coverage and lower premiums, which is, again, the standard ancillary restraint analysis without any separate consideration of less restrictive alternatives.¹²⁶ Nowhere did the Court suggest that the doctors’ horizontal agreements are either more or less “restrictive” than the vertical examples they offer.

c. Broadcast Music

Professors Hovenkamp (in the majority),¹²⁷ and Hemphill,¹²⁸ and Sullivan¹²⁹ (in Justice Stevens’ dissent) also find less restrictive alternatives analysis in *Broadcast Music, Inc., v. CBS*.¹³⁰ *Broadcast Music* addressed the use of so-called “blanket licenses” used by performing rights associations such as BMI and American Society of Composers, Authors and Publishers (ASCAP), which effectively bundled together the performance rights for all the composers who were members of the association.¹³¹ Because the blanket licenses bundled all those composers’ rights together in a single purchase, it was conceivably price fixing among the competing composers, a per se violation.¹³² The Court rejected that characterization of the arrangement, ruling instead that the blanket licenses created a product different from anything the individual composers sold and so should be subject to the rule of reason.¹³³ One basis of the Court’s decision was that, because the blanket licenses were non-exclusive,¹³⁴ composers and licensees were free to negotiate licenses for individual songs outside the blanket license.¹³⁵ Professor Hovenkamp argues that the

125. *Id.* at 357.

126. *Id.* at 351–52.

127. Hovenkamp, *supra* note 4, at 114–15.

128. Hemphill, *supra* note 6, at 986.

129. Sullivan, *supra* note 53, at 842, 850.

130. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

131. *Id.* at 4–5.

132. *Id.* at 6, 9–10.

133. *Id.* at 23–24.

134. *Id.* at 11.

135. *Id.* at 24.

nonexclusive nature of the license as a less restrictive alternative was important to the outcome in *Broadcast Music*.¹³⁶

The Court's use of the non-exclusive licenses in *Broadcast Music* was quite different from its consideration of alternatives in *NCAA* and *Maricopa County Medical Society*. In those cases, the existence of an alternative regime, whether less or more restrictive, demonstrated the lack of a necessary connection between the restraint and the procompetitive justification as required by the ancillary restraints doctrine. In *Broadcast Music*, the existence of a real versus a hypothetical alternative did not demonstrate the lack of a connection between the blanket license and the justification; the Court found the blanket license was in fact related to the justification.¹³⁷ Rather, the existence of the alternative demonstrated that there could be no harm from the blanket license at all. If the blanket license raised prices or artificially restricted output, composers and licensees would just switch to the available alternative of direct licenses.¹³⁸ The existence of alternatives was in service of a completely different question: whether there was anticompetitive harm in the first place.¹³⁹ For its part, the Court thought that the success of the blanket license in the face of available alternatives demonstrated the productive benefits of the blanket license,¹⁴⁰ also a question unrelated to whether the license was more or less restrictive than an alternative restraint.

Justice Stevens' dissent at least compares the blanket license with a less restrictive alternative,¹⁴¹ but his analysis is focused not on the defendants' procompetitive justifications but rather on the possibility that an alternative market could exist at all. The defendants justified the blanket license on its ability to reduce transaction costs in licensing the performance rights by obviating the need for individual negotiations with the composers.¹⁴² Justice Stevens' argument is not that transaction costs could have been reduced (similarly or at all) without the blanket license but rather that the blanket was not necessary to having some *different* market for performance rights (direct negotiation),¹⁴³ placing his analysis well outside the rule of reason.¹⁴⁴ Demonstrating that a restraint is

136. Hovenkamp, *supra* note 4, at 115; *see also* Hemphill, *supra* note 6, at 952 (citing nonexclusive licenses, including the specific licenses at issue in *Broadcast Music*, as less restrictive alternatives but not citing *Broadcast Music* itself).

137. *Broad. Music*, 441 U.S. at 21–22.

138. *Id.* at 24.

139. 11 ANTITRUST LAW (4th ed.), *supra* note 33, ¶ 1913c.

140. *Broad. Music*, 441 U.S. at 24.

141. *Id.* at 33 (Stevens, J., dissenting).

142. *Id.* at 20.

143. *Id.* at 33 (Stevens, J., dissenting).

144. On the balancing inherent in the rule of reason, *see* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 782 (1999) (Breyer, J., concurring); Hovenkamp, *supra* note 4, at 124.

necessary for the existence of a market is an impossible burden for virtually any restraint.

d. A Notable Absence

Although references to alternatives are present in the Supreme Court's antitrust jurisprudence, their appearance is spotty at best. Prior to the *American Express* dicta, the Court had never included a less restrictive alternatives test in its articulation of the rule of reason, and most rule of reason cases do not mention alternatives at all. Based on that record alone, inferring that the rule of reason requires consideration of less restrictive alternatives is at the very least strained. Moreover, when alternatives do appear, their use is varied and largely informal. Occasionally the Court recognizes problems with a restraint because it is not *more* restrictive, and even when the alternatives considered are less restrictive, they are used in the cases in a variety of ways, from implementing the ancillary restraints doctrine to demonstrating that a restraint cannot be harmful. There is zero affirmative support in the Supreme Court case law for consideration of less restrictive alternatives as a distinct step in the rule of reason as suggested by the *American Express* dicta and several commentators. To the contrary, there are several instances in which the Court has refused to consider less restrictive alternatives and has even suggested that they should not be considered; I now turn to those instances.

3. Supreme Court Rejections of the Less Restrictive Alternatives Test

If Justice Brennan endorsed less restrictive alternatives in his dissent in *White Motor* as "another pertinent inquiry"¹⁴⁵ and Justice Stevens implicitly approved of less restrictive alternatives in his *NCAA* majority and his *Broadcast Music* dissent,¹⁴⁶ Chief Justice Rehnquist was explicitly hostile to them. In his dissent from denial of certiorari in *NFL v. North American Soccer League*,¹⁴⁷ then-Justice Rehnquist condemned a less restrictive alternatives test on its terms.¹⁴⁸ Although it might be tempting to count Justices' views (two to one), Rehnquist's condemnation is at least consistent with the rest of the Supreme Court antitrust jurisprudence,

145. *White Motor Co. v. United States*, 372 U.S. 253, 271 (1963) (Brennan, J., concurring).

146. See Sullivan, *supra* note 53, at 850.

147. *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of cert.).

148. *Id.*

unlike either Justice Brennan's¹⁴⁹ or Justice Stevens's¹⁵⁰ views on the matter.

Most rule of reason cases do not mention less restrictive alternatives, even when they would have been clearly relevant. Some of those omissions are striking. In *NCAA*, the Tenth Circuit explicitly relied on the existence of a less restrictive alternative, albeit as an alternative holding. The Supreme Court noted that fact but passed up the obvious opportunity to decide the case on that basis.¹⁵¹ In *California Dental Ass'n v. FTC*,¹⁵² the opportunity to rule based on less restrictive alternatives presented itself even more clearly, sparking a disagreement in the Court, but the implications for antitrust law nevertheless went unnoticed by both the majority and dissent, including by Justice Breyer himself. In *CDA*, the Court considered a partial ban on advertising by dentists.¹⁵³ Although the Court did distinguish the partial ban from a total one, it did not cite a rule of antitrust law indicating the partial ban was more likely to be permissible because it was less restrictive than a total one would have been.¹⁵⁴ Justice Breyer keyed on this aspect of the majority and criticized it for other reasons, but he nevertheless failed to comment on how the less restrictive alternative might alter the *CDA*'s liability.¹⁵⁵

In addition to the many cases in which less restrictive alternatives are simply not mentioned, the Court affirmatively rejected such cases in *Continental T.V., Inc. v. GTE Sylvania Inc.*¹⁵⁶ In that case, which dealt with a vertical restraint (an exclusive dealership) instead of the horizontal restraints at issue in *NCAA*, *Maricopa County Medical Society*, *Broadcast Music*, and *CDA*, the Court affirmatively recognized that there might be a less restrictive alternative to the restraint and refused to consider it for the purpose of invalidating the restraint as a per se violation.¹⁵⁷ But *Sylvania*, like *Addyston Pipe*, is of limited use as precedent for the content of the rule of reason. Although *Sylvania* established that the rule of reason was applicable to vertical restraints like the exclusive dealership at issue in that

149. Compare *supra* note 87 (discussing Justice Brennan's argument to include analysis of less restrictive alternatives in *White Motor*, a vertical restraint case), and *infra* text accompanying notes 156–59 (discussing rejection of less restrictive alternatives in *Sylvania*, another vertical restraint case).

150. See *supra* text accompanying notes 141–144 (describing Justice Stevens' incongruous use of less restrictive alternatives in his dissent in *Broadcast Music*).

151. See *supra* text accompanying note 98.

152. See generally *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

153. *Id.* at 761.

154. *Id.* at 773–74.

155. *Id.* at 790 (Breyer, J., concurring in part and dissenting in part).

156. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

157. *Id.* at 58 n.29.

case, it did not apply the rule of reason,¹⁵⁸ so its views on less restrictive alternatives do not necessarily read on the rule of reason itself.¹⁵⁹

4. Informal Consideration of Less Restrictive Alternatives in the Supreme Court

Some cases clearly do consider alternatives, albeit not as a distinct step or a stated requirement, in the rule of reason analysis. In *FTC v. Actavis, Inc.*,¹⁶⁰ the Court held that reverse-payment settlement agreements—settlements in which a plaintiff makes a payment to the defendant, often as part of an agreement under which the defendant agrees not to compete with the plaintiff, which raises antitrust concerns¹⁶¹—are subject to the rule of reason.¹⁶² One concern with the rule was that the threat of antitrust liability and the prospect of antitrust litigation would prevent parties from settling lawsuits.¹⁶³ The Court disclaimed the risk to settlement by highlighting that the availability of alternatives to the “large, unjustified reverse payment[s]”¹⁶⁴ meant that parties could still settle without worrying about running afoul of the antitrust laws. In so doing, the Court suggested that “the generic manufacturer [could] enter the patentee’s market prior to the patent’s expiration, without the patentee paying the challenger to stay out prior to that point.”¹⁶⁵ If the Court meant that litigants using another form of settlement would avoid liability under the rule of reason, then it was at least suggesting that it will, when confronted with such a case, ask whether the parties used something less restrictive than a reverse payment. Doing so would require that courts permit antitrust defendants to offer less restrictive alternatives in defense of their settlements.¹⁶⁶

But the Court in *Actavis* did not mention a less restrictive alternatives test, instead emphasizing the possibility that the existence of alternatives might be principally useful for determining the parties’ intent:

Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are

158. *Id.* at 59.

159. *See also* 7 ANTITRUST LAW (1st ed.), *supra* note 23, ¶ 1505 at 386 (arguing that *Sylvania*’s comments relate to the problem of applying the per se rule to one of two similar restraints); Hemphill, *supra* note 6, at 940 n.63 (same).

160. *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

161. *See id.* at 140–41.

162. *Id.* at 159–60.

163. *See id.* at 170 (Roberts, C.J., dissenting).

164. *Id.* at 158.

165. *Id.*

166. *Cf.* Hemphill, *supra* note 6, at 940 (noting *Actavis*’s identification of less restrictive alternatives but not describing how they would operate in the rule of reason).

those reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement.¹⁶⁷

By highlighting the parties' "reasons" for the payment, one could argue all the Court did was invoke the ancillary restraints doctrine, identifying that the settlement payment was not ancillary to productive activity but rather was a "naked" agreement to "to maintain and to share patent-generated monopoly profits."¹⁶⁸ That would not be a use of alternatives in the rule of reason but rather in the ancillary restraint inquiry, which as I describe below,¹⁶⁹ is probably the correct way to think about them.¹⁷⁰

Another case in which the Court actually discussed less restrictive alternatives was *Fortner Enterprises, Inc. v. United States Steel Corp.*¹⁷¹ In *Fortner*, the Court specifically called out the availability of less restrictive alternatives as one component of the law of tying:

The[] decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally served no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie.¹⁷²

Both Professor Hemphill and Professor Meese noted *Fortner's* recognition of less restrictive alternatives.¹⁷³

Fortner's use of less restrictive alternatives seems quite unproblematic, but it has little to do with the rule of reason for two key reasons: First, the case was decided under the modified per se rule for tying, not the rule of reason.¹⁷⁴ Second, the Court's consideration of alternatives was categorical; it was a rejection of tying generally, which is why it could be subjected to modified per se treatment. It was not a consideration of any particular form of tying with regard to any particular

167. *Actavis*, 570 U.S. at 158.

168. *Id.*

169. *See infra* Part III.

170. The Court's recitation of less restrictive alternatives does also raise a second possibility: that courts should look to the amount of a settlement to determine its validity. *See Actavis*, 570 U.S. at 158. Such a use is disclaimed even by proponents of a less restrictive alternatives test. Hovenkamp, *supra* note 97, at 376–77; *see infra* Section II.A.

171. *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969).

172. *Id.* at 503.

173. Hemphill, *supra* note 6, at 939 n.58; Meese, *supra* note 22, at 127 n.264.

174. *Fortner*, 394 U.S. at 500–01 (citing the per se rule for tying); *see also* Stanley D. Robinson, *Recent Antitrust Developments: 1975*, 76 COLUM. L. REV. 191, 231–32 (1976) (arguing the less restrictive alternatives concept in the Supreme Court had its origins in tying cases).

defendant or in service of any particular productive justification or, for that matter, with regard to any particular alternative.¹⁷⁵ *Fortner* did rely on the existence of alternatives to justify the modified per se rule, but it did not actually compare any alternatives to the tie at issue.¹⁷⁶

It is hard to develop a comprehensive understanding about less restrictive alternatives in the rule of reason from the Supreme Court cases because less restrictive alternatives are often not mentioned at all, including in both opinions in *CDA*, still the leading case on how to perform the rule of reason. There is simply no support in Supreme Court antitrust jurisprudence for the use of less restrictive alternatives as a formal step in the rule of reason, much less in the way commentators would have them used: as a categorical rejection of the defendant's proffered justification because it could be accomplished by a less restrictive alternative. The Court mentions alternatives (less, equally, or even more restrictive, as in *NCAA*) as an analytical tool when they are helpful, and the facts of the particular case lend themselves to it and ignores them when they are not. The question remains whether there is a broader place within antitrust analysis for less restrictive alternatives even if they are not a distinct step in the rule of reason.

E. Alternatives, Balancing, and Ancillary Restraints

Answering what role less restrictive alternatives might have in antitrust starts with determining what their purpose might be. According to Professor Hemphill, courts have turned to less restrictive alternatives partly out of discomfort at the rise of the formless balancing test created in *Chicago Board of Trade*¹⁷⁷ combined with Chicago School doubts over balancing.¹⁷⁸ Recognition of the difficulties inherent in balancing procompetitive and anticompetitive effects have only grown over time, with scholars, commentators, and judges¹⁷⁹ becoming increasingly skeptical that any real balance could take place.¹⁸⁰ In light of this balancing

175. Indeed, under the applicable standard, a different restraint would only be meaningfully "less restrictive" if it were not a tie—its form would be more important than its overall restrictiveness, since its form would determine whether it received the rule of reason or per se treatment. A comparatively less restrictive *tie* would have been equally unlawful.

176. As it happens, the Court eventually upheld the tie at issue in *Fortner* without considering less restrictive alternatives. See *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 622 (1977).

177. On the role of balancing in *Chicago Board of Trade* and in antitrust since then, see Hovenkamp, *supra* note 4, at 122, 132.

178. Hemphill, *supra* note 6, at 947–49.

179. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986); FUNDAMENTALS OF ANTITRUST LAW, *supra* note 109, § 15.04[A]; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14 (1984); Hovenkamp, *supra* note 4, at 133.

180. Hovenkamp, *supra* note 97, at 373.

issue, less restrictive alternatives might be an alternative to balancing¹⁸¹ or maybe even a shorthand way to perform it.¹⁸²

But if less restrictive alternatives are a shortcut to balancing as Professor Hemphill suggests, they are a futile alternative because they raise exactly the same problems of less-structured balancing approaches.¹⁸³ Rather, the analysis that courts seem to be undertaking through less restrictive alternatives—as suggested by the many citations of *Addyston Pipe* as the source of less restrictive alternatives in antitrust law¹⁸⁴—seems to be more closely tied to the ancillary restraints doctrine than to the net competitive effect balancing of *Chicago Board of Trade*. As a method for implementing the ancillary restraints doctrine, less restrictive alternatives can indeed help to alleviate anxiety over balancing the same way the ancillary restraints doctrine itself does: by denying the connection between a restraint and a productive justification, either rendering the restraint per se illegal or, at the very least, breaking the causal chain between the restraint and a putative procompetitive “benefit” that has to be weighed in any ultimate balancing.

When one observes how the Supreme Court applies less restrictive alternatives, the connection to the ancillary restraints doctrine becomes clear: Ancillary restraint analysis looks more like what the Court was doing in cases that are frequently cited as examples of less restrictive alternatives analysis, such as *NCAA* and *Maricopa County Medical Society*, in both of which the Court held that the restraints did not contribute to the productive justification at all.¹⁸⁵ The same is true of *Actavis*.¹⁸⁶

Whether the ancillary restraints doctrine should relieve one’s anxiety over balancing is questionable. Like net effects balancing itself, the ancillary restraints doctrine is indeterminate at its margins.¹⁸⁷ *Addyston Pipe* is full of uses of “reasonable” and “necessary” and “reasonably necessary,” none of which are particularly determinate terms; the ultimate question under the ancillary restraints doctrine is what to make of those terms. The present question, however, is what less restrictive alternatives can contribute to that inquiry.

181. Hovenkamp, *supra* note 4, at 134.

182. Hemphill, *supra* note 6, at 952–53.

183. *Id.* at 961.

184. *See supra* text accompanying notes 74–85.

185. *See supra* text accompanying notes 98–111 (*NCAA*), 122–123 (*Maricopa County Medical Society*).

186. *See supra* text accompanying note 168.

187. *See* Horner v. Graves, 131 Eng. Rep. 284, 287 (C.P. 1831) (“[N]o certain precise boundary can be laid down, within which the restraint would be reasonable and beyond which, excessive.”); Arthur, *Sea of Doubt*, *supra* note 57, at 343.

Lacking formal recognition by the court, consideration of less restrictive alternatives is a practice, not a doctrine. With a picture of how the Court *does* use less restrictive alternatives in antitrust, the next question is whether and how the Court *should* use less restrictive alternatives in antitrust. Answering that question requires assessing less restrictive alternatives on their own terms.

II. LESS RESTRICTIVE ALTERNATIVES ON THEIR OWN TERMS

While the less restrictive alternatives test may lack a doctrinal basis in the Supreme Court's antitrust jurisprudence, there remains the question of whether it nevertheless has merit in antitrust analysis. Because the test has never been consistently applied and has largely escaped the Supreme Court's notice until recently, the merits of the less restrictive alternatives test have not been the subject of protracted debate. That lack of attention has allowed the less restrictive alternatives test to flourish in an environment in which its boundaries have not been adequately tested through application. Examination of those boundaries reveals two observations about them: (1) that they are acknowledged by the test's proponents to be undefined, and (2) that the few courts that have applied the less restrictive alternatives test have described those boundaries inconsistently. These observations present especially large problems for a method of analysis that emphasizes a continuing comparison: a search for alternatives that are comparatively "less" restrictive than some alternative. Without clearly defined boundaries, there is nothing to prevent a comparative test like the less restrictive alternatives test from collapsing into an ever-more-exacting inquiry into alternatives, if not during a particular case then over time with regard to a set of restraints. The few cases that have actually applied the test demonstrate exactly that problem. The inability to describe the test's boundaries is an integral feature of the test, meaning that the only sound conclusion is to reject the less restrictive alternatives test as a step in the rule of reason.

After considering practical arguments over less restrictive alternatives, I explain why the Supreme Court should end its recent flirtation with the less restrictive alternatives test.

A. Practical Arguments Over Less Restrictive Alternatives

Opponents of less restrictive alternatives have leveled a number of practical critiques against them, arguing that even if a less restrictive alternative test could be successfully codified in doctrine, society would not want to do so. Proponents have responded in kind. Most of these arguments are about how to credit the defendant's productive justification. For instance, Professor Devlin cautions that using less restrictive

alternatives could result in a situation in which a defendant actually improves consumer welfare but, because it does so in a less than optimally restrictive way, violates antitrust law.¹⁸⁸ That concern rings true to antitrust law, which generally privileges defendants' goals, especially in Section 2 cases.¹⁸⁹ It might seem at first blush unlikely that a court would completely ignore the defendant's goal in adopting a restraint when considering less restrictive alternatives, but that appears to be what Justice Stevens did in his *Broadcast Music* dissent.¹⁹⁰ Excessive focus on alternative restraints may very well turn courts' attention away from focusing on productive justifications. Concern over how they might do so is generally broken down into two categories: (1) concern that courts might second-guess defendants' *ex ante* judgments with *ex post* hindsight, and (2) concern that courts might conduct too fine-grained analyses of alternatives.

The *ex ante/ex post* criticisms of a less restrictive alternatives test¹⁹¹ is that courts will second-guess defendants, subjecting them to treble damages for failing to anticipate what eventually turned out not to be a less restrictive alternative. That second-guessing might charge firms with failing to adopt an alternative that might not have been obvious or even available at the time the defendant adopted the challenged practice.¹⁹²

A separate set of criticisms focus on either the potential that courts will use the existence of a *slightly* less restrictive alternative to invalidate a restraint entirely or will allow less restrictive restraints even if they do not serve the productive justification *as well*. Whether as to restrictiveness¹⁹³ or efficacy¹⁹⁴ (or both)¹⁹⁵, these criticisms are about incrementalism—the magnitude of the difference between a challenged restraint and a proposed less restrictive alternative.¹⁹⁶ Proponents of less

188. Devlin, *supra* note 23, at 824.

189. Hovenkamp, *supra* note 97, at 371–72.

190. *See supra* text accompanying notes 141–144.

191. Carrier, *supra* note 19, at 1337; Feldman, *supra* note 22, at 587–88.

192. Feldman, *supra* note 22, at 603.

193. *See id.* at 597 (“It is always conceivable that there is a more efficient method for achieving the procompetitive impact of a restraint—there is always a sharper needle in the haystack.”).

194. *See* Arthur, *Sea of Doubt*, *supra* note 57, at 343 (“[E]ven where an alternative is clearly less restrictive, there may be serious doubt whether it is sufficient for its appointed task, or is the least costly choice.”).

195. FUNDAMENTALS OF ANTITRUST LAW, *supra* note 109, § 15.03 (“Occasionally, these questions can be answered yes or no with assurance, but often there will be perplexing differences of degree. The restraint may promote the legitimate objective clearly or only indirectly or modestly or somewhere in between. An alternative may be only slightly less restrictive, slightly more costly, or slightly less effective, or greatly so.”).

196. *See id.* (“The key difficulty in examining less restrictive alternatives lies in deciding how refined a distinction to make among the possible alternatives available to the defendants.”); Arthur, *Sea of Doubt*, *supra* note 57, at 343 (describing the potential that less restrictive alternatives might leave “no margin for error” by antitrust defendants).

restrictive alternatives are quick to disclaim exactly such fine-grained analysis as unworkable.¹⁹⁷

The problem posed by incrementalism is hardly hypothetical; it was a major feature of the *O'Bannon*¹⁹⁸ litigation and has been resurrected in the Ninth Circuit's application of *O'Bannon*'s less restrictive alternatives approach in another case addressing NCAA player compensation rules: *Alston v. NCAA*.¹⁹⁹ *O'Bannon* dealt with the use of college football players' names, images, and likenesses (NILs) in the marketing of video games based on college football and men's basketball.²⁰⁰ The practice has generated substantial revenue, but NCAA amateurism rules prohibit compensating players for the use of their likenesses.²⁰¹ In *O'Bannon*, the court considered two less restrictive alternatives to not paying athletes at all for the use of their likeness: (1) increasing the maximum athletic scholarship from tuition and fees, room and board, and other school-required costs, such as books to the "full cost of attendance," which, in addition, includes "[nonrequired] books and supplies, transportation, and other expenses related to attendance at the institution,"²⁰² and (2) deferred cash compensation set at \$5,000.²⁰³ The NCAA (with help from amici) argued that consideration of either less restrictive alternative would "open the floodgates to new lawsuits demanding all manner of incremental changes,"²⁰⁴ an argument that literally reads in incrementalism. The specific less restrictive alternative of \$5,000 of deferred compensation raises the incremental question of whether \$5,001 would not have been even less restrictive than that, and Professor Hovenkamp has criticized the district court's remedy of a \$5,000 floor on compensation restrictions as "really nothing more than disguised price administration."²⁰⁵

The Ninth Circuit upheld the increase scholarship limits to full cost of attendance but rejected the cash payments because they defeated the NCAA's procompetitive justification of protecting amateurism, which is at the core of the product they sell. The court's rejection is in the language

197. See Hovenkamp, *supra* note 97, at 376–77 ("For example, if members of a joint venture are found to be unlawfully fixing prices at ten dollars, lowering the price to eight dollars is not the type of less restrictive alternative contemplated by antitrust law.").

198. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

199. *In re NCAA Grant-in-Aid Cap Litig. (Alston)*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

200. *O'Bannon*, 802 F.3d at 1055.

201. *Id.*

202. *Id.* at 1054 & n.3.

203. *Id.* at 1074.

204. *Id.* at 1075.

205. Hovenkamp, *supra* note 97, at 376.

of less restrictive alternatives,²⁰⁶ but its logic sounds in ancillary restraints, since the problem with the alternative was not that it was marginally less effective or more expensive but rather that it would defeat the *entire* productive justification for the NCAA's arrangement (and indeed, for the NCAA itself).²⁰⁷

If one takes the NCAA's justification seriously, though, then it is not clear what separates the \$5,000 from the "full cost of attendance" remedy, at least from the standpoint of incrementalism. If amateurism is the justification for excluding the \$5,000 payments, then any payment *up to the level of defeating amateurism* would be a less restrictive alternative. The court took that line to be "full cost of attendance," but it is not clear why it did so. The existence of the Amateur Sports Act, which prohibits the use of "eligibility criteria related to amateur status or to participation . . . that are more restrictive than those of the appropriate international sports federation"²⁰⁸ demonstrates that there are multiple definitions of amateurism. In the follow-on *Alston* case, the Ninth Circuit truly threaded the needle by distinguishing, for instance, between the *form* of the compensation (cash or non-cash) prohibiting any limit on non-cash compensation like post-eligibility, post-graduate scholarships, even for study at other schools.²⁰⁹

If the NCAA's justification for amateurism is consumer demand, then its level of justification should fluctuate with consumer perception, fluctuations that played a major role in *Alston*. The district court, after pointing out that the NCAA actually allowed some cash compensation for students without a demonstrated change in consumer perception, permitted only those NCAA cash compensation limits that were *no lower than the current ones*, essentially locking in the current dollar amount, at \$5,600 to be precise.²¹⁰ The approach underling this ruling opened the door to experiments in consumer perception at the level of dollars, not type of compensation. One wonders when the *Alston* plaintiffs will return with a new economic study showing that a hypothetical \$1,000 (or \$1) increase

206. *O'Bannon*, 802 F.3d at 1076 ("The question is whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses, is 'virtually as effective' in preserving amateurism as *not* allowing compensation.").

207. *Id.* ("Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits. But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs.*"); *id.* at 1078 (calling any cash payment unconnected to academic expenses a "quantum leap").

208. 36 U.S.C. § 220522(15).

209. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (Alston)*, 375 F. Supp. 3d 1058, 1088 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

210. *Id.* On the \$5,600 amount, see *id.* at 1072, 1099.

to the current limits would not change consumer perception.²¹¹ *Alston* itself represents just such a case: a follow-up to *O'Bannon* brought by plaintiffs seeking to further limit the NCAA's compensation rules from limits on NIL compensation to "dismantl[ing] the NCAA's entire compensation framework."²¹² From the perspective of incrementalism, compensation up to full cost of attendance has the same potential for judicial price regulation as cash (and non-cash) payments. In both *O'Bannon* and *Alston*, nothing about the degree of change (in restrictiveness, efficacy, or cost) distinguishes the two; the only difference is in the connection to the NCAA's productive justification, which is exactly the question addressed by the ancillary restraints doctrine.²¹³

The incrementalism problem is everywhere in less restrictive alternatives; even if a court avoids the incrementalism problem as a matter of liability, it is impossible to ignore as a matter of remedy. As the Ninth Circuit explained in *O'Bannon*, once a restraint is invalidated because there is a less restrictive alternative, "an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative."²¹⁴ When choosing a remedy, courts will have to order a new restraint. The Ninth Circuit rule, which is typical, seeks to cabin the incrementalism problem by requiring less restrictive alternatives to be "substantially less restrictive" than the challenged restraint,²¹⁵ a limitation the Supreme Court keyed on in its affirmance in *Alston*.²¹⁶ But when the district court applies a remedy, the defendant's restraint will be off the table, so there will be nothing to measure substantiality against. Without an established restraint to compare to, the *less* restrictive alternative approach will necessarily drive the court to look for the *least* restrictive way to fulfill the defendant's

211. Such marginal changes to consumer perception might be outside the NCAA's control. The Ninth Circuit noted in *Alston* that California had, since the lower court *Alston* decision, adopted the Fair Pay to Play Act, CAL. EDUC. CODE § 67456 (2023), requiring the NCAA to permit colleges to pay students for the use of their names, images, and likenesses, one of the restrictions upheld in *O'Bannon* for its contribution to the NCAA's amateurism justification. See *Alston*, 958 F.3d at 1252. The court refused to discount the NCAA's justifications by virtue of its efforts to comply with the California law, which does not take effect until 2023. *Id.* If California succeeds in changing consumer perception of college athletics (which was the touchstone relied on in both the *O'Bannon* and *Alston* cases) as encompassing player compensation for NILs, will the Ninth Circuit in 2024 hold the NCAA liable for the same restriction it upheld in *O'Bannon*?

212. *Alston*, 958 F.3d at 1247.

213. As for the ancillary restraints question itself, it is not clear *O'Bannon* got that right either because the court failed to explain why full cost of attendance had anything to do with compensation for the use of students' likenesses. The court did not even attempt to connect the increase in compensation (the difference between the old cost of attendance cap to the new, full cost of attendance cap) to the use of student likenesses.

214. *O'Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015).

215. *Id.* at 1064.

216. See *NCAA v. Alston*, 141 S. Ct. 2141, 2162 (2021).

procompetitive justification. If the restraint is in the form of a price, then the district court will have to set that amount, as it did in *Alston* itself.²¹⁷

If the court retains jurisdiction, the quest for a less restrictive alternative will effectively convert the court into a price regulator, a function that the Court has specifically prohibited in antitrust cases.²¹⁸ *Alston* again provides the example. The district court's \$5,600 floor on NCAA limits on cash compensation did not even last the course of the *Alston* litigation. While the case was still pending on appeal, the parties returned to the district court to explain that the NCAA had indeed been allowing a higher compensation of \$5,980.²¹⁹ The district court accordingly revised its previous order, naming the new, higher floor and retaining jurisdiction to do so again in the future.²²⁰

The argument from incrementalism is really an argument about stability: introducing less restrictive alternatives destabilizes both planning and markets themselves because all restraints will be open to challenge by virtue of the existence of a less restrictive alternative. That instability operates not just across restraints but over time. Professors Carrier and Feldman make this point explicitly in their emphasis on *ex post* examination that results in hindsight bias.²²¹ One need not look further than *Broadcast Music* and Justice Stevens' dissent to demonstrate just how much time combined with less restrictive alternatives analysis can invalidate a restraint. As Professor Hemphill points out, the less restrictive alternatives that Justice Stevens pointed to—individualized licenses—were impractical at the time the case was decided but would not be now.²²² Including less restrictive alternatives in the analysis will require courts to confront what to do with such temporal changes.²²³ Will a restraint that was legal in the 1970s become the subject of treble damages today? Will

217. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (Alston)*, 375 F. Supp. 3d 1058, 1107–08 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

218. *See Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

219. *See Order Granting Motion for Clarification of Injunction, In re NCAA Athletic Grant-in-Aid Cap Litig. (Alston)*, No. 14-md-02541 (N.D. Cal. Dec. 30, 2020), ECF No. 1329. The district court offered a confusing “clarification” that the NCAA could lower the cap without returning to the court for permission so long as it *also* lowers athletic participation award levels. *Id.* at 6. But that clarification is at odds with the district court's own reasoning, which is that the \$5,600 (now \$5,980) compensation limit is consistent with the NCAA's amateurism justification. *Alston*, 375 F. Supp. 3d at 1088. If the NCAA can preserve amateurism with a \$5,980 floor, then anything lower would be more restrictive than necessary to do so.

220. *Order Granting Motion for Clarification of Injunction, In re Alston*, No. 14-md-02541 (N.D. Cal. Dec. 30, 2020), ECF No. 1329.

221. *See Carrier, supra* note 19, at 1337; Feldman, *supra* note 22, at 608.

222. Hemphill, *supra* note 6, at 986.

223. *Id.*

firms be required to proactively monitor changes in technology and update their policies and contracts over time in order to avoid antitrust liability?

Proponents of less restrictive alternatives acknowledge these concerns and counter with limitations on the use of less restrictive alternatives to limit overreach. Professor Hovenkamp has argued for a number of limits on less restrictive alternatives analysis to prevent it from completely undermining defendants' ability to offer procompetitive justifications:

[P]laintiffs cannot be permitted to offer possible less restrictive alternatives whose efficacy is mainly a matter of speculation. A skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements. Proffered less restrictive alternatives should either be based on actual experience in analogous situations elsewhere or else be fairly obvious. Tending to defeat such an offering would be the defendant's evidence that the proffered alternative has been tried but failed, that it is equally or more restrictive, or otherwise unlawful.²²⁴

Whether a court is capable of applying any of these limitations is unclear. The only citation Professor Hovenkamp offers for what all agree is a critical limitation on less restrictive alternatives analysis is a dissent arguing that less restrictive alternatives are inherently incapable of verification beyond a "tinkerer's assurance that . . . competitive balance will be achieved in the years to come,"²²⁵ which is a criticism that goes to the core of less restrictive alternatives, not their margins.

Professor Hemphill argues that courts can protect defendants from harmful less restrictive alternatives by insisting that less restrictive alternatives be "dominant," which is to say that they serve the business interest equally as well as the challenged restraint.²²⁶ He cites the *O'Bannon* court as an example,²²⁷ and the Ninth Circuit did hold that its preferred less restrictive alternatives, capping student compensation at full cost of attendance, was just as effective at preserving amateurism as the NCAA's restraint of paying just the cost of attendance.²²⁸ But that

224. 11 ANTITRUST LAW (4th ed.), *supra* note 33, ¶ 1913b; *see also* NCAA v. Alston, 141 S. Ct. 2141, 2161 (2021) (citing this Hovenkamp passage); Easterbrook, *supra* note 179, at 9 ("If it is hard to find what a given practice does, it is impossible to determine the difference in efficiency between a known practice and some hypothetical alternative."); Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859, 863 (1988) (arguing for a less restrictive alternatives test but that the "alternative must be *clearly* preferable").

225. ANTITRUST LAW (4th ed.), *supra* note 33, ¶ 1913b n.11 (quoting *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1205 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part)).

226. Hemphill, *supra* note 6, at 928–29.

227. *Id.* at 944.

228. *See supra* text accompanying note 207.

formulation only goes to one side of the comparison for efficacy versus incremental restrictiveness and, more importantly, was not the Ninth Circuit's formulation of the rule, which was "virtually as effective"²²⁹ and leaves room open for subdominant alternatives.

In the end, for every objection predicting that less restrictive alternatives will lead to the demise of antitrust and markets, there is an equally plausible and equally non-falsifiable claim that less restrictive alternatives can be practically cabined to keep that from happening. Given how inconsistently less restrictive alternatives have been applied, their widespread and systematic use remains hypothetical, leaving both opponents and proponents with little evidence on which to base either predictions or prescriptions. Professor Hovenkamp gives up on trying to formulate a precise rule, acknowledging the indeterminacy of less restrictive alternatives, claiming "[o]ften, we can only speculate"²³⁰ before leaving the topic with an admonishment to moderation:

The situations are too various to permit hard and fast rules. But we must try to avoid each extreme: refusing to consider the legitimate objective whenever the plaintiff questions its connection to the restraint or names an apparently less restrictive alternative; or tolerating every restraint whenever the defendant states a plausible connection with a legitimate objective and claims that the alternatives are unsatisfactory. Both are inconsistent with the purpose of the rule of reason.²³¹

Proponents readily acknowledge that there must be some leeway, or buffer, between the challenged restraint and a proposed alternative before the existence of the alternative leads to prohibition of the challenged restraint.²³² The inability of either courts or commentators to describe not only the size of that buffer but also how one might even measure it casts doubt on the ability of courts to apply it reliably.

Whether as an added step or just a feature of rule of reason analysis, less restrictive alternatives systematically favor plaintiffs and disfavor defendants, so the real question is whether the virtual impossibility of a least restrictive alternatives test is avoidable through as-yet-unspecified limitations on the application of the concept. As an added step, less restrictive alternatives essentially give plaintiffs a mulligan. Under the rule of reason as described in *CDA*, if defendants demonstrate their restraints

229. *O'Bannon v. NCAA*, 802 F.3d 1049, 1074 (9th Cir. 2015).

230. *FUNDAMENTALS OF ANTITRUST LAW*, *supra* note 109, § 15.03, at 15–20.

231. *Id.* § 15.03[B], at 15-23 to 15-24.

232. 11 *ANTITRUST LAW* (4th ed.), *supra* note 33, ¶ 1913b; Hemphill, *supra* note 6, at 962.

have procompetitive justifications, then the court goes on to balancing.²³³ Adding a less restrictive alternatives test would allow plaintiffs to preempt that balancing step by showing a less restrictive alternative,²³⁴ a major but unspoken shift away from *CDA*'s approach to the rule of reason. If plaintiffs show a less restrictive alternative, they win.²³⁵ If they do not, the court then moves on to balancing.²³⁶ Defendants, on the other hand, would never be able to avoid liability simply by showing there is no less restrictive alternative,²³⁷ because the balancing step would still require them to show their restraint is, on the whole, procompetitive. The arguments for and against adding a less restrictive alternatives test to the rule of reason are steeped in concerns over antitrust policy²³⁸ and should be considered accordingly. A full examination of the wisdom of expanding antitrust liability generally, or relying on the particular device of less restrictive alternatives to do so, is beyond the scope of this Article, but it is possible to draw three specific lessons for both law and policy.

The first is the point above about the role of a less restrictive alternatives test. Adding such a test necessarily makes antitrust law more restrictive of defendants' conduct. Proponents of less restrictive alternatives, opponents of less restrictive alternatives, and courts should keep that in mind when considering whether and how to consider less restrictive alternatives in antitrust law. It is a shift from the balancing as currently applied by the Supreme Court since *Chicago Board of Trade*.²³⁹

Second, although proponents of less restrictive alternatives disclaim a "least" restrictive alternatives test, there is no reliable way to prevent a "less" restrictive alternatives test from sliding toward a "least" restrictive alternatives test.²⁴⁰ A least restrictive alternatives test is clearly

233. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 782 (1999) (Breyer, J., concurring). On the place of Justice Breyer's formulation of the rule of reason, see Hovenkamp, *supra* note 4, at 124.

234. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (Alston)*, 375 F. Supp. 3d 1058, 1108 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020).

235. 11 ANTITRUST LAW (4th ed.), *supra* note 33, ¶ 1913b ("Once a suitable less restrictive alternative is found, the ordinary remedy is a declaration that the challenged restriction is unreasonable . . .").

236. 7 ANTITRUST LAW (4th ed.), *supra* note 26, ¶ 1507a.

237. Of course, doing so would likely be impossible, since showing there is no less restrictive alternatives would require the defendant to prove a negative. See 11 ANTITRUST LAW (4th ed.), *supra* note 33, ¶ 1914c. *But see id.* at 409 ("But the difference in assignment of this proof burden is more apparent than real.").

238. See, e.g., Kauper, *supra* note 55, at 909.

239. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918); see *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 791 (1999) (Breyer, J., concurring in part and dissenting in part) (citing *Chicago Bd. of Trade*, 246 U.S. at 238); Hovenkamp, *supra* note 4, at 131–33.

240. Some have cited examples from constitutional law. See Hemphill, *supra* note 6, at 946 & n.89; *id.* at 962. But many of those cases apply a form of heightened scrutiny. Even in the most deferential forms of review, though, the Court has found it difficult to prevent comparisons like less restrictive alternatives from rising to the level of "least" restrictive alternatives. If one were going to

inconsistent with antitrust law, as recognized by virtually every court to consider the matter.²⁴¹ Indeed, the Ninth Circuit itself disclaimed applying the standard in *O'Bannon*.²⁴² But proponents of the less restrictive alternatives test have no principled or reliable way to prevent “less” from devolving into “least.”²⁴³

Third, a less restrictive alternatives test will not have an equal effect on all industries. Less restrictive alternatives will have an outsized impact on restraints related to intangible products, such as the licenses at issue in *Broadcast Music*, or the broadcast rights in *NCAA*, since there is no necessary minimal unit subject to sale.

The challenges for intangible products have particular implications for high technology businesses, including those recently subjected to increased antitrust scrutiny, such as Amazon, Apple, Facebook, and Google.²⁴⁴ Many of those businesses operate as “platforms.”²⁴⁵ One characteristic of two-sided platforms is that the structure of their pricing might look very different to the two sides of the platform.²⁴⁶ A newspaper or web portal, for instance, might charge advertisers for access to consumers while giving away their product to consumers for free.²⁴⁷ At

replace arguably problematic rule of reason balancing with some other form of inquiry into the reasonableness of a restraint, it would not be with a less restrictive alternatives test, which is the strictest form of “reasonableness” there is. In the constitutional context, the Supreme Court has used a similar method to invalidate legislation even under its most deferential “rational basis” tests by highlighting the relative, vs. the absolute, efficacy of a provision. See Thomas B. Nachbar, *Rational Basis “Plus”*, 32 CONST. COMMENT. 449, 473–74 (2017). As demonstrated by the Supreme Court’s use of increasingly impossible rationality tests in the constitutional context, the identification of some (hypothetical) alternative is an easy way to demonstrate the irrationality of any proposed restraint (or regulation) because every restraint (or regulation) is somewhat overly restrictive at the margin.

241. See, e.g., *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.29 (1977) (upholding restraint while concluding that it is “neither the least nor the most restrictive provision”); *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1982); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975).

242. *O’Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015).

243. See *supra* text accompanying notes 224–232.

244. See David McCabe, Cecilia Kang & Daisuke Wakabayashi, *Google’s Legal Peril Grows in Face of Third Antitrust Suit*, N.Y. TIMES (Dec. 30, 2020), <https://www.nytimes.com/2020/12/17/technology/google-antitrust-monopoly.html> [<https://perma.cc/3H9S-9R9N>] (recounting recent antitrust suits and investigations against these firms).

245. See MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 6 (Comm. Print. 2020) (specifically naming Amazon, Apple, Facebook, and Google and describing them as “platforms”). On the problems of applying antitrust to platforms, see Thomas B. Nachbar, *Platform Effects*, *supra* note 3.

246. Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS’N 990, 1017 (2003).

247. *Id.* at 1013–18; Geoffrey G. Parker and Marshall W. Van Alstyne, *Two-Sided Network Effects: A Theory of Information Product Design*, 51 MGMT. SCI. 1494, 1496 (2005).

the same time, the network effects that give platforms their value are likely to result in high market concentrations.²⁴⁸

As a result, tech markets are likely to include firms that have both a high degree of concentration and pricing structures that do not accurately reflect their costs, at least as the pricing structures relate to each side of their platform. That is roughly the situation that was presented in *Ohio v. American Express*,²⁴⁹ a case that resulted in sharp division on the Court and much scholarly criticism.²⁵⁰

The economics of platforms are such that they have to charge supracompetitive prices on one side of the platform, which will provide anticompetitive effects in the form of higher prices on that side of the platform. Platform defendants will have to defend the precise combination of prices they have chosen relative to cost, a problem of incrementalism. The relative difficulty of defending any particular allocation of costs will present considerable risk of destabilizing platform markets which, whether or not one thinks are adequately competitive, are undeniably large and important to the economy and are likely to only become more so.²⁵¹

The more general risk to tech markets comes from the intangible nature of the products and services they produce. Although many of the cases cited for less restrictive alternatives are horizontal cases, it is in the vertical context that normally receives more permissive antitrust review, in which less restrictive alternatives present the greatest risk to established antitrust law because of the difficulty of specifying what is and is not less restrictive with regard to the intangible products produced by today's "big tech" economy. Justice Stevens' less-restrictive-alternative-inspired thought experiment on music licensing²⁵² is the only example of that anyone needs. To the extent that less restrictive alternatives present problems of incrementalism, those problems will be exacerbated in the "big tech" markets.

Moreover, as technology changes, the ability to tailor restraints similarly changes. Consequently, a doctrine that looks to less restrictive alternatives will have a greater impact on industries in which technology is changing more rapidly.

248. See Kate Collyer, Hugh Mullan & Natalie Timan, *Measuring Market Power in Multi-Sided Markets*, ANTITRUST CHRON., Sept. 2017 at 1, 3; Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1078 (2019).

249. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

250. See Nachbar, *supra* note 3, at 21 (collecting sources).

251. *Id.* at 1–4.

252. See *supra* text accompanying notes 142–144.

B. Leaving Less Restrictive Alternatives at the Altar

As should be clear from the foregoing, the Supreme Court's ongoing flirtation with less restrictive alternatives is both unconsidered and ill-advised. Although less restrictive alternatives have certainly been brought into the Supreme Court's rule of reason lexicon through both Justices' *American Express* dicta, that invocation was only possible because of the lack of argumentation on the question in the case,²⁵³ and the Court's application of less restrictive alternatives in *Alston* was supported only by that *American Express* dicta.²⁵⁴ Further examination reveals that the use of less restrictive alternatives as a distinct step in a rule of reason analysis has no support in Supreme Court antitrust precedent, and evaluation of how less restrictive alternatives would work demonstrates why they are missing from the Supreme Court case law.

At their worst, less restrictive alternatives invite exactly the kind of judicial second-guessing objected to by opponents and disclaimed by proponents. Without a principled way to prevent "less" restrictive from becoming "least" restrictive, there is little assurance that courts will know when to stop comparing alternatives. If one could show that less restrictive alternatives tests actually produce better balancing than the rule of reason currently does, the less restrictive alternatives test might be worth the risk. As shown below, though, less restrictive alternatives actually contribute little to the rule of reason. There simply is no good reason to invite courts to engage in antitrust analysis influenced more by hindsight bias than anything else, with potential antitrust defendants required to make business decisions knowing that if a less restrictive alternative to that decision is later identified, their mistakes will result in treble damages. Even at their best, though, the less restrictive alternatives test replicates the problems inherent in rule of reason balancing.

One purported advantage to a less restrictive alternatives test is that it seemingly avoids the incommensurability problems²⁵⁵ of comparing anticompetitive effects to procompetitive justifications, since the comparison remains among restraints.²⁵⁶ But adding a less restrictive alternatives test does not resolve the incommensurability problem.²⁵⁷ Like rule of reason balancing, less restrictive alternatives require a comparison. That comparison is *ostensibly* simpler because it is limited to comparing

253. See *supra* text accompanying notes 12–14.

254. See *supra* text accompanying note 16.

255. Easterbrook, *supra* note 179, at 2; Feldman, *supra* note 22, at 575; Hovenkamp, *supra* note 4, at 131–33.

256. Hemphill, *supra* note 6, at 952; Hovenkamp, *supra* note 4, at 134.

257. Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 45–48 (2016) (noting how burden-shifting, including less restrictive alternatives analysis, simply moves the commensurability problem earlier in the rule of reason inquiry).

two anticompetitive effects rather than comparing anticompetitive effects with procompetitive effects. But the less restrictive alternatives test does not just compare the anticompetitive effects of two restraints; it compares the *relative* anticompetitive effects between two restraints.²⁵⁸ Most formulations of the rule include some measure of efficacy.²⁵⁹ Because two different restraints can also produce different procompetitive effects, the comparison between alternative restraints reintroduces procompetitive justifications into the analysis, obviating any advantage by avoiding comparing incommensurable anticompetitive harms and procompetitive benefits. The less restrictive alternatives test both reintroduces the incommensurability problem and resurrects the uncertainty of balancing more generally.²⁶⁰

Another reason why the comparison among alternatives cannot escape the indeterminacy inherent in rule of reason balancing is because “no restraint” is always a less restrictive alternative to a challenged restraint. Consequently, courts will necessarily evaluate the productive value of the restraint in the first place. That much is demonstrated by many of the mistaken citations to cases like *NCAA*,²⁶¹ *Maricopa County Medical Society*,²⁶² and Justice Stevens’ dissent in *Broadcast Music*²⁶³ as involving less restrictive alternatives tests when the comparison was in fact between the restraint as presented and no restraint at all.

But, even if limited solely to anticompetitive effects, comparison among restraints is similarly incommensurable because, unless one restraint is identical to another in kind and simply more restrictive in magnitude—such as a comparison between a cartel of two firms versus a cartel of three—there is no single criterion for evaluating the restrictiveness of a restraint.

Take the Court’s analysis in *NCAA*. Proponents of less restrictive alternatives cite that case for consideration of less restrictive alternatives,²⁶⁴ but the alternatives the Court considered were extremely

258. See Feldman, *supra* note 22, at 587.

259. See, e.g., *O’Bannon v. NCAA*, 802 F.3d 1049, 1074 (9th Cir. 2015) (requiring less restrictive alternatives to be “virtually as effective” as the challenged restraint).

260. Professor Hemphill seeks to avoid this problem by insisting that only “dominant” less restrictive alternatives be considered, but determining whether an alternative is indeed dominant is not itself a form of analysis but rather is a conclusion resulting from comparison of the likely procompetitive effects of the restraints, which reintroduces the incommensurability problem of comparing restrictions and benefits. Professor Hemphill acknowledges as much in his description of how courts actually use less restrictive alternatives, as “engaged in balancing in disguise.” Hemphill, *supra* note 6, at 930.

261. See *supra* text accompanying notes 89–111.

262. See *supra* text accompanying notes 112–123.

263. See *supra* text accompanying notes 141–144.

264. See *supra* text accompanying note 105.

restrictive. The restraint in question limited the supply of televised games and likely raised their prices.²⁶⁵ The alternatives the Court discussed²⁶⁶ would have touched upon practically every aspect of college football and beyond. It is simply wrong to call those restrictions “less” restrictive than the television program at issue in *NCAA*.

The reason why it is frequently impossible to evaluate which of two restraints is the more or less restrictive one is because they will frequently operate in different markets. The alternative restraints suggested in *NCAA* were likely less restrictive in *television* markets because they did not operate in television markets at all. They would have operated in the markets that constitute and feed football programs, from salaries for coaches to amenities in training facilities and stadiums. They even would have operated in markets for higher education generally by affecting the way tuition revenue might be used. Because comparing between two restraints almost always means measuring and comparing “restrictiveness” in completely different markets, it not only replicates but exacerbates the incommensurability problem presented by rule of reason balancing.²⁶⁷

Even if the comparison of less restrictive alternatives could be limited to a single market, the doctrine itself is no more determinative than other comparative rules like the rule of reason balancing. To the extent balancing is crude, comparison of alternatives will be similarly crude²⁶⁸ because there is no mathematical certainty added by restricting the inquiry to alternatives.

The use of less restrictive alternatives introduces additional room for error and does little to reduce the inherent indeterminacy of the rule of reason. Consequently, there is good reason why a less restrictive alternatives test has not previously appeared in the Supreme Court’s rule of reason jurisprudence. But just as there is good reason why a less restrictive alternatives test has never been included as a step in the Supreme Court’s rule of reason inquiry, there is equally good reason why so many have suggested the value of considering less restrictive alternatives in antitrust analysis. Thus, I do not suggest that courts should never consider alternatives when analyzing restraints; it would be wrongheaded to deny them access to so useful a tool. My claim is that less restrictive alternatives do not, and should not, operate as a formal step in the rule of reason as the Ninth Circuit used them in *O’Bannon* and the

265. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 119 (1984).

266. *Id.*; see *supra* text accompanying notes 106–110.

267. See Easterbrook, *supra* note 179, at 13.

268. See Hemphill, *supra* note 6, at 961 (“Identifying a balanced LRA has many of the same pitfalls that afflict net-effects balancing between the conduct and inaction.”).

Ninth Circuit used, and the Supreme Court permitted, in *Alston*. Consideration of alternatives does have strong intuitive appeal, though, and the existence (or absence) of alternative ways of doing something conveys a great deal of information about the choice that a defendant has made when it adopts a particular restraint. The question is what that information is and how it should feature in antitrust analysis.

III. MAKING THE MOST OF LESS RESTRICTIVE ALTERNATIVES: CONSIDERATION OF ALTERNATIVES AND ANCILLARY RESTRAINTS

Given the Court's haphazard road to applying the less restrictive alternatives test in *Alston*, it is not clear how a less restrictive alternatives test would or does work. Professor Hemphill sees less restrictive alternatives tests in a lot of places,²⁶⁹ and the short answer is they *are* in a lot of places. As is clear from the discussion above, though, they are not and should not be a formal part of the rule of reason inquiry. The question remains, then, how are they used and how should they be used in antitrust cases. The cases show that alternatives can be useful in a variety of ways, but they are most significant to the inquiry undertaken by the ancillary restraints doctrine, and their recent popularity suggests a renewed role for the ancillary restraints doctrine.

A. Consideration of Alternatives in Antitrust Cases

Consideration of alternatives can be useful in a variety of ways. For instance, in *Broadcast Music*, the Court relied on the defendants' use of a comparatively less restrictive alternative—a *nonexclusive* license as opposed to an exclusive license—to negate the possibility of any harm resulting from the restraint.²⁷⁰ In that case, consideration of an alternative (arguably a more restrictive one) was not used to indicate the value of the restraint or its legality but rather to deny the possibility that it would harm competition, which is a matter of causation not specific to antitrust law.

Conversely, the existence of less restrictive alternatives can tell a different kind of causation story. In Clayton Act Section 7²⁷¹ horizontal merger cases, which are less permissive than Section 1 rule of reason cases, the burden is clearly on defendants to show that any efficiency justifications for the merger are specific to the merger.²⁷² The examination

269. *See id.* at 938-39 (describing attention to less restrictive alternatives in analyzing the rule of reason, ancillary restraints, merger efficiencies, tying, and causation).

270. *Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 24 (1979).

271. 15 U.S.C. § 18.

272. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001).

of less restrictive alternatives can be helpful to show that there are other ways to achieve the same efficiencies without the merger.²⁷³

On this view, there is nothing particular about consideration of alternatives to antitrust and no way it should operate differently in antitrust than in other areas of the law. The problem arises when less restrictive alternatives are included in steps specific to antitrust analysis in ways that seek to alter the analysis. The difficulty that defendants face in establishing less restrictive alternatives in Section 1 cases, for instance, might be warranted by a different legal standard as applied to Section 7 cases because of a skepticism, causally or doctrinally, of efficiency justifications in merger cases.²⁷⁴ Indeed, much of the doctrinal difficulty introduced by arguments for less restrictive alternatives is not the result of their problems; it is the result of their usefulness. They can be used to undermine virtually any justification, especially on the margin, and the question is whether antitrust doctrine requires that. The answer to that question will vary based on the type of review being applied. It is certainly possible that less restrictive alternatives are more appropriate for some forms of antitrust scrutiny, such as review of efficiency justifications in mergers, than others, such as review of a vertical restraint under Sections 1 or 2.

Several commentators have argued that consideration of less restrictive alternatives can be useful for demonstrating the intent of antitrust defendants.²⁷⁵ That makes a lot of sense. After all, if a defendant passes up one method of doing business that does not restrict competition in favor of another that does, that decision can be an indication of their intent to harm competition rather than to bring about the productive activity. That idea is not limited to antitrust. For instance, in *R.A.V. v. City of St. Paul*, the Supreme Court used St. Paul's decision to forgo one form of speech restriction in favor of another one as an indication of its intent to unconstitutionally limit free speech rights.²⁷⁶ Of course, such alternatives need not be *less* restrictive. In *R.A.V.*, the City's rejection of a *broader* ordinance was used to indicate its intent to limit the speech rights of a subset of speakers, which was the constitutionally more problematic of the two alternatives.²⁷⁷

Including determinations of intent, however, opens the aperture on antitrust analysis beyond the rule of reason. The role of intent in rule of

273. Kauper, *supra* note 55, at 909.

274. *See e.g.*, *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1090 (1997).

275. *See* 7 ANTITRUST LAW (4th ed.), *supra* note 26, ¶ 1505a; Arthur, *Sea of Doubt*, *supra* note 57, at 297; Feldman, *supra* note 22, at 563; Hemphill, *supra* note 6, at 963–68.

276. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

277. *Id.*

reason cases is fairly limited: it is used as an indication of the likely effects of a restraint.²⁷⁸ In a per se case, intent itself can be enough.²⁷⁹ If consideration of alternatives is a useful tool in antitrust because of its ability to establish intent, it is likely as (if not more) useful in per se cases than in rule of reason ones.

In *Fortner*, for instance, the Court used the possibility that productive gains could be had without use of a tie to reject the restraint categorically.²⁸⁰ Similarly, although the Court settled on the rule of reason in *Actavis*, it used the existence of alternatives to signal circumstances under which settlements would almost certainly be illegal whether or not they failed the rule of reason balancing.²⁸¹

Indeed, in many of the Supreme Court cases in which consideration of alternatives has played a part—*NCAA*, *Maricopa County Medical Society*, *Fortner*, and *Actavis*—they have been used not in applying the rule of reason but rather in deciding what category of analysis to apply: per se or rule of reason. Answering that question is obviously not the object of the rule of reason, which is applied only after that decision has been made; rather, it is the object of a different aspect of antitrust analysis: the ancillary restraints doctrine.

B. Alternatives and the Ancillary Restraints Doctrine: Categorizing Cases and Restraints

Although advanced by scholars and some lower courts as part of the rule of reason itself, the Court's consideration of alternatives actually fits more comfortably with the ancillary restraints inquiry than within application of the rule of reason. The ancillary restraints doctrine and the less restrictive alternatives test ask fundamentally the same question: whether the restraint is necessary to the productive justification.²⁸² The availability of a less restrictive alternative indicates that the suspected restraint is not truly necessary since there is some other restraint that would serve the same productive end. Thus, when *Addyston Pipe* asked whether a restraint was "reasonably necessary"²⁸³ to the underlying productive transaction, it was not asking whether the transaction on the whole

278. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918); Hemphill, *supra* note 6, at 966.

279. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, 224 n.59 (1940).

280. See *supra* text accompanying notes 171–176.

281. *FTC v. Actavis, Inc.*, 570 U.S. 136, 158 (2013) (using the example of the alternative of when the purpose of the reverse-payment settlement is "a desire to maintain and to share patent-generated monopoly profits").

282. See Robinson, *supra* note 174, at 232.

283. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

increased or reduced competition; it asked what contribution the restraint made to the productive transaction.²⁸⁴

The several Supreme Court cases cited as examples of less restrictive alternatives tests fit the causation story of ancillary restraints, not the balancing of the rule of reason. In *NCAA*, when the Court concluded that the alternative of no collective television plan would be as effective to the NCAA's purpose,²⁸⁵ it was denying any connection between the restraint and the justification. That could be described as "balancing" only if the categorical exclusion of a justification is equated to zero weight. While mathematically true, that vision of balancing is not a particularly helpful one. Professor Hemphill describes the circumstance when a restraint "fails ancillarity" because "the action makes no incremental contribution to the claimed justification."²⁸⁶ That is exactly what the Court concluded in *NCAA* with regard to the television plan, and that is a determination made under the ancillary restraints doctrine, not rule of reason balancing.

Unlike the rule of reason, which portends to balancing, the ancillary restraints doctrine is necessarily categorical in its determinations. Although consideration of alternatives can be helpful for determining whether a restraint truly is ancillary to a productive transaction, analyzing *less restrictive* alternatives in the rule of reason threatens to confuse the weighing of procompetitive and anticompetitive effects of the rule of reason (which itself has the potential to become all-inclusive) with the causation analysis represented by the ancillary restraints doctrine.²⁸⁷

The danger comes not from considering alternatives but from the comparative nature of searching for "less" restrictive alternatives. Considering alternatives within the ancillary restraints doctrine can help to pare down the number of restraints under consideration to simplify rule of reason balancing, i.e., to exclude from balancing restraints that do not actually contribute to productive activity. But the result of the ancillary restraints analysis is binary: per se condemnation of restraints that do not contribute to productive transactions (those that "fail ancillarity") and rule of reason balancing for those that do.²⁸⁸ The ancillary restraints doctrine

284. See *supra* text accompanying notes 71–77.

285. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 114–15 (1984).

286. Hemphill, *supra* note 6, at 953; see also Muris, *supra* note 224, at 863.

287. Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, in 15 RESEARCH IN LAW AND ECONOMICS 1, 65–68 (Richard Zerbo, Jr. & Victor P. Goldberg eds., 1992); Jesse W. Markham, *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 635 (2012) (distinguishing the ancillary restraints and balancing questions).

288. *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (Easterbrook, J.); Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SECTION ANTITRUST L. 211, 212 (1959); see Arthur, *Workable Rule of Reason*, *supra* note 60, at 344 ("Taft's analysis is relatively

does not involve any kind of comparative analysis between the restrictiveness of restraints that do in fact contribute to productive efforts, which is what a less restrictive alternatives approach would do. Importing a less restrictive alternatives test into the rule of reason threatens performing the wrong analysis in the wrong step of the process.

In order to do any real work, the ancillary restraints doctrine has to precede the rule of reason, an ordering that fits both the doctrine and the commentary. In *NCAA*, the Court described the finding that the television program did not contribute to the NCAA's product as a "predicate" finding to consideration of the NCAA's efficiency justification.²⁸⁹ Most understandings of the ancillary restraints doctrine reflect this threshold, channeling function of ancillary restraints analysis,²⁹⁰ but uses are confused. Professor Hovenkamp concludes the ancillary restraints doctrine "was never applied in the *NCAA* case because the defendants never made a convincing argument that the limitation . . . was reasonably necessary to the functioning of the venture,"²⁹¹ but that usage confuses *application* of the ancillary restraints test with the restraint *satisfying* the test. The ancillary restraints doctrine was applied in *NCAA*, as it was in *Addyston Pipe*, but the defendants were not able to satisfy the test. The challenged restraints "failed ancillarity," so they were not subject to rule of reason balancing. And if the ancillary restraints inquiry is going to do any work, it must precede rule of reason balancing.

Connecting less restrictive alternatives test to rule of reason balancing threatens to resurrect the previously performed, binary, ancillarity analysis in the context of the incremental nature of balancing. Once the court concludes that the restraint actually contributes to the productive transaction, its consideration of alternatives should end lest they cloud the very different comparison inherent in rule of reason balancing.

Some see less restrictive alternatives as a way to avoid the indeterminacy of balancing by setting the less restrictive alternatives as a step prior to balancing.²⁹² But the incremental and comprehensive nature of less restrictive alternatives analysis invites even unintended balancing.

unambitious. It seeks only to make rough either/or judgments."); *id.* at 381 (describing the "polar models of cartel and firm"); *see also* Arthur, *Sea of Doubt*, *supra* note 57, at 301-02 (rejecting the notion that the ancillary restraints inquiry is one "of degree").

289. *NCAA*, 468 U.S. at 114.

290. Hovenkamp, *supra* note 4, at 140 ("The ancillary restraints doctrine is not a comprehensive method for applying the rule of reason, but rather an early stage decision about which mode of analysis should be applied.").

291. *Id.*

292. 7 ANTITRUST LAW (4th ed.), *supra* note 26, ¶ 1507d (describing the final step in his rule of reason approach, balancing, as a "last resort"); Hemphill, *supra* note 6, at 949 (describing the role of less restrictive alternatives in resolving judicial "anxiety about balancing").

Alston, with its application of the less restrictive alternatives test, again, provides the example. In *Alston*, the court held that, while the NCAA could not impose these restraints, the individual conferences (which themselves are collections of schools) could because the conferences doing so would be less restrictive than the larger NCAA doing so.²⁹³ But there was no difference in the justification offered between the conferences and the NCAA; the procompetitive justification was the same, and the district court had previously rejected that justification as not being served by those restraints.²⁹⁴ The only difference between the two restraints was the reach of the anticompetitive effect of having the limits at the national level versus the conference level. The court effectively engaged in balancing (seeing a reduced harm at the conference level and weighing it against a procompetitive justification) in choosing the conference-level restraint over the national one.²⁹⁵ In so doing, it ratified the conferences' imposition of a restraint for which it had previously found *no* procompetitive justification, a nonsensical outcome.²⁹⁶ By asking courts to engage in incremental analysis, the less restrictive alternatives approach encourages courts not to eschew balancing but to make it paramount, even at the cost of the ancillary restraints analysis, and in so doing to perpetuate under the rubric of less restrictive alternatives the problems of balancing that commentators and courts seek to avoid.

Having correctly situated consideration of alternatives in the ancillary restraints doctrine and outside of the rule of reason itself, the question remains about what role less restrictive alternatives should have in ancillary restraints analysis, which is not coterminous with

293. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (Alston)*, 958 F.3d 1239, 1258 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

294. *Id.* at 1259–60.

295. The court apparently did not recognize that if the restraint lacked a procompetitive justification at the national level, there was also no procompetitive justification at the conference level, a far more fundamental problem than the possibility of a less restrictive alternative. The court's failure to see the fundamental deficiency in the alternative it considered is emblematic of the kinds of errors invited by the incremental approach of less restrictive alternatives, in which the comparison of restrictiveness is likely to mask the much more important question of whether the procompetitive justification is actually served by *either* of the alternatives. For its part, the Supreme Court further muddied the relationship by using the less restrictive alternative of conference-level restraints as evidence of the "modesty" of the district court decree, *Alston*, 141 S. Ct. at 2165, suggesting for the first time that judicial modesty is a feature of the rule of reason.

296. It should be noted here that the relative market power of the NCAA and the various conferences is hardly fixed. Even very recent shifts in conference alignment have changed the potential for competition among the conferences to serve as a check on their market power. See Tom Goldman, *A Seismic Shakeup in College Sports as UCLA and USC Join Big Ten*, NPR (July 1, 2022), <https://www.npr.org/2022/07/01/1109470751/a-seismic-shakeup-in-college-sports-as-ucla-and-usc-join-big-ten> [<https://perma.cc/ECY4-LU4Q>] (describing the concentration of college football into two "superconferences").

consideration of alternatives. The answer to that question helps to illuminate the meaning of the ancillary restraints doctrine.

IV. ALTERNATIVES AS A WINDOW TO THE ANCILLARY RESTRAINTS DOCTRINE

Confronting how consideration of alternatives can and cannot work in antitrust provides a window into the oft-misunderstood and underappreciated ancillary restraints doctrine. Comparative approaches, such as consideration of less restrictive alternatives, emphasize quantitative forms of analysis because comparison requires some form of quantification. The inability of less restrictive alternatives to answer the ancillary restraints question, which is asked in terms of necessity rather than balance, highlights the limits of not only less restrictive alternatives but also other quantitative approaches to ancillary restraints analysis and emphasizes the *qualitative* aspects and limitations of the ancillary restraints doctrine.

A. Alternatives and Purpose

If consideration of alternatives is helpful for conducting ancillary restraints analysis, the question is why. At its base, the ancillary restraints doctrine reflects that the treatment of individual restraints under antitrust law depends on whether they are related to some productive transaction. The problem, though, is that there is no authoritative statement of the nature of that relationship. According to Bork:

To be ancillary, and hence lawful, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it makes the main transaction more effective in accomplishing legitimate purposes.²⁹⁷

Bork describes the nature of the relationship as making the “transaction more effective in accomplishing legitimate purposes” but does not say how *much* more effective the restraint has to make the main transaction. Five percent more? Ten percent more? Must it make the productive transaction less expensive, yield more product, or occur more quickly? Although limiting the relationship to contribution to the effectiveness of the restraint is helpful in that it excludes other justifications, such as mere preference or ones paradoxical to antitrust like the ones advanced by the defendants in *Addyston Pipe*,²⁹⁸ it specifies

297. BORK, *supra* note 59, at 27.

298. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), *aff'd*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

neither the quantum of contribution necessary nor even the units, such as cost, yield, or time, one would measure.

Some approach the problem from purpose: to use the ancillary restraints doctrine to evaluate the purpose of the challenged restraint to contribute to a productive transaction or to reduce competition.²⁹⁹ *Addyston Pipe* repeatedly evaluates the restraint in terms of the purpose of the contract,³⁰⁰ to the point of claiming that the “very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary.”³⁰¹ Even using purpose as the touchstone for evaluating the degree of restrictiveness the law will tolerate “whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given.”³⁰² “The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined.”³⁰³ Focusing on purpose opens up the door to two different, potentially related possibilities for applying the ancillary restraints doctrine.

The first possibility is to equate “purpose” with “intent.” This is where Professor Hemphill seems to be going with his third function of less restrictive alternatives: “smoking out” bad intent.³⁰⁴ That might make some sense, because although rule of reason analysis is ambivalent to intent, per se analysis is not. Under the rule of reason, intent is used to determine the likely effects of a restraint but can neither condemn nor save it,³⁰⁵ while under the per se rule, a restraint intended to restrain competition is a per se Section 1 violation.³⁰⁶ But if we take that premise seriously—if the existence of less restrictive alternatives demonstrate the presence of intent to restrain competition—then it raises some questions, like whether the defendant can rebut a lack of ancillarity with evidence of good intent, which is to say intent that it is trying to compete. “Purpose” seems to be broader than merely the defendants’ intent. At least as to rule of reason cases, for which good intent is no defense, “purpose” means the purpose of the transaction not as intended by the parties but as demonstrated by

299. See Arthur, *Sea of Doubt*, *supra* note 57, at 296–97.

300. See, e.g., *Addyston Pipe*, 85 F. at 282 (“merely ancillary to the main purpose of a lawful contract”); *id.* at 283 (“[A]ncillary to the main and lawful purpose of the contract.”).

301. *Id.* at 282.

302. *Id.* (quoting *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] App. Cas. 535, 567).

303. *Id.*

304. See Hemphill, *supra* note 6, at 947; see also Arthur, *Workable Rule of Reason*, *supra* note 60, at 380–83 (distinguishing between objective and intent-based components in ancillary restraints analysis and using less restrictive alternatives for the purpose of determining intent).

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

306. See *supra* text accompanying notes 278–79.

objective criteria such as theory or practice. Intent itself remains a secondary consideration.

The second possibility is to reconsider the role that less restrictive alternatives might have in determining whether the restraint is in furtherance of some productive purpose. It is possible to use the existence of a less restrictive alternative to conclude that a restraint was not in furtherance of a productive purpose,³⁰⁷ but the existence of a less restrictive alternative is neither necessary nor sufficient for doing so. In *NCAA*, the Court cited the lack of *any* real connection between the restraint and the productive purpose, not a less restrictive one. Indeed, the restraints the Court pointed to as alternatives were more restrictive.³⁰⁸ Of course, just because a defendant happens to pick a relatively restrictive restraint does not mean that it is in furtherance of an anticompetitive purpose; it could simply be an overly restrictive way of furthering a productive purpose.

Although a favorite argument of less restrictive alternatives analysis, general appeals to “purpose” are not particularly helpful for analysis of Section 1 cases, at least those that fall within the rule of reason. That is because of the limited role that purpose plays in rule of reason cases and the limited role that the consideration of alternatives can have in determining the purpose of any particular restraint.

B. Less Restrictive Alternatives and “Reasonably Necessary” Restraints

The consideration of alternatives in the ancillary restraints doctrine presents substantial risk of promoting what at first appears to be a determinate test (whether there are alternatives) over what is in reality an admittedly indeterminate doctrine. Rather than explicitly asking whether there are less restrictive alternatives, the ancillary restraints inquiry asks whether the restraint is “reasonably necessary”³⁰⁹ to the productive transaction. That hardly resolves the matter, as either term is open to considerable interpretation. Professor Hovenkamp invokes Learned Hand’s *Carroll Towing* formulation of optimal precautions,³¹⁰ but that is just another way of asking whether the restraint is worth the productive gains³¹¹ and thereby invokes the same type of balancing as rule of reason analysis generally. “Necessary” is not much better. It is possible to get to

307. Arthur, *Workable Rule of Reason*, *supra* note 60, at 381; Eldridge, *supra* note 71, at 10.

308. *See supra* text accompanying notes 109–10.

309. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (1898).

310. *FUNDAMENTALS OF ANTITRUST LAW*, *supra* note 109, § 15.01 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947)).

311. Under *Carroll Towing*, it would be the gain as discounted by the likelihood of them being realized. *See Carroll Towing*, 159 F.2d at 173.

insistence on less, or least, restrictive alternatives from “necessary.”³¹² But as demonstrated in the famous constitutional case *M’Culloch v. Maryland*, “necessary” can mean varying degrees of necessity. The discretion the Court afforded Congress in that case³¹³ was far broader than any kind of less restrictive alternatives test.

Of course, as Professor Hovenkamp points out, “a restraint can be ‘reasonably necessary’ even though some less restrictive alternative exists.”³¹⁴ Justice Rehnquist explicitly connected *Addyston Pipe*’s use of “necessary” with a reasonableness standard in arguing against a less restrictive alternatives test.³¹⁵ It is not clear that there is any necessary relationship between less restrictive alternatives and determining whether a restraint is “reasonably necessary” to a particular productive transaction.

Rather, as Professor Hovenkamp continues, the “‘reasonably necessary’ formula thus highlights the need for a discriminating judgment about the allegedly less restrictive alternative.”³¹⁶ He believes that “discriminating judgment” can be applied quantitatively by measuring “how much worse for the parties or how much better for society?”³¹⁷ But if the problems of the rule of reason demonstrate anything, it should be the perils of an overly quantitative approach to applying the doctrine. As Professor Hovenkamp points out elsewhere in the same treatise, the test should be driven by the purpose of the inquiry.³¹⁸ When one considers the purpose of the ancillary restraints inquiry, it becomes clear that quantitative comparisons, like rigorous less restrictive alternatives requirements, raise the same problems in ancillarity analysis that they raise in rule of reason balancing. Fortunately, because the ancillary restraints doctrine does not call for balancing, quantification is not necessary, and those problems are avoidable.

312. See, e.g., Kauper, *supra* note 55, at 909 n.73 (“This description may mean only that the restraint must bear a reasonable relationship to the legitimate purpose of the integration. But ‘necessity’ may also be read to encompass an examination of less restrictive alternatives.”); Richard S. Wirtz, *Purpose and Effect in Sherman Act Conspiracies*, 57 WASH. L. REV. 1, 34 (1981) (“[T]he criteria for ‘reasonable necessity’ and ‘least restrictive alternative’ must be the same.”).

313. *M’Culloch v. Maryland*, 17 U.S. 316, 421 (1819) (“All means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

314. FUNDAMENTALS OF ANTITRUST LAW, *supra* note 109, § 15.03(b).

315. *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1079–80 (1982) (Rehnquist, J., dissenting).

316. FUNDAMENTALS OF ANTITRUST LAW, *supra* note 109, § 15.03; see also FTC & U.S. DEP’T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 9 (2000).

317. FUNDAMENTALS OF ANTITRUST LAW, *supra* note 109, § 15.03(b).

318. *Id.* § 15.01 (“Like all such general standards, reasonableness varies not only with the circumstances but also with the purpose of the inquiry.”).

C. The Ancillary Restraints Doctrine as Narrative

Whether stated in terms of “purpose,” “intent,” or “necessity,” the ancillary restraints doctrine is not so much a test as it is a narrative device. It is about the defendant telling and the court believing a story: that there is a connection between the challenged restraint and a legitimate business activity. The ancillary restraints doctrine is about causation and, to the extent it evaluates intent, credibility.

In that sense, as mentioned above, it is a binary determination.³¹⁹ It is meaningless to describe restraints as “80% ancillary” or “mostly ancillary.” Restraints are ancillary or they are not. It is also a determination specific to antitrust law: some forms of ancillarity are permitted and some are prohibited. Thus, the ancillary restraints inquiry should be undertaken with antitrust law in mind.

For instance, the doctrine might operate differently in vertical and horizontal cases. Horizontal restraints generally present a greater risk to competition than vertical ones.³²⁰ Consequently, the ancillary restraints doctrine should be sensitive to that risk in the nature of the ancillarity it insists upon. For the pipe companies in *Addyston Pipe*, for whom any agreement is suspicious, we might require a much stronger showing of the connection between the restraint and productive activity than we would require of a vertical distribution agreement for a company with relatively low market share, as in *Sylvania*.³²¹ In neither case, though, would the existence or absence of less restrictive alternatives tell us much about whether the challenged restraints were “sufficiently” ancillary to the productive transaction. We would need a more general theory about how antitrust should operate with regard to that particular transaction in order to make that determination.

1. The False Determinacy of Less Restrictive Alternatives in Ancillary Restraints Analysis

Like rule of reason balancing, a quantitative approach to ancillary restraints offers an attractive certainty from quantitative comparison, but as in the rule of reason itself, it is a false certainty and for the same reason: comparisons between restraints run into problems of both measurability and incommensurability. As stated canonically by *Horner v. Graves*, a rigorous account of necessity would ask whether “the restraint is such only

319. See *supra* text accompanying notes 286–88.

320. See Hovenkamp, *supra* note 4, at 159–60.

321. The same holds true for mergers, which are challenged under a different standard than Section 1 cases. Insisting on a closer fit between the restraint (the merger itself) and efficiency gains might be sensible as a matter of antitrust law, see *supra* text accompanying note 272, quite apart from the presence or absence of less restrictive alternatives.

as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public.”³²² The problem with that statement is that, even putting aside how to quantify “fair,” the “protection to the interests of the party” cannot be compared in any meaningful way with harm to “the interests of the public.” It might be that there is no other way to answer that question, and that is why the Court has eventually wound up with rule of reason balancing as a last resort, but there is no reason to bring a similarly indeterminate quantitative inquiry into earlier stages of the case, such as in determining whether a restraint is ancillary to a particular productive transaction.

2. The Ancillary Restraints Doctrine as a Sorting Device

Rather than determining whether the challenged restraint is in fact *justified* by its contribution to the productive transaction, which is the question asked by rule of reason balancing, the ancillary restraints doctrine seeks only to describe *whether and how* the restraint contributes to productive activity. Defendants cannot simply assert the connection, they have to explain it. Although not determinative to the case, that explanation provides a lot of value to antitrust scrutiny.

First, of course, it necessarily disqualifies restraints adopted in order to further anticompetitive ends, such as the restraint in *Addyston Pipe*. That might not seem like much of a contribution, but there is considerable incentive for cartel members to adopt exactly such restraints since those will be the most profitable to cartel members. The requirement that they have to explain themselves has a substantial deterrent effect.

Second, even for restraints that are not superficially naked, the ancillary restraints doctrine can clarify the analysis.³²³ Take *Polk Bros. v. Forest City Enterprises*, a leading modern ancillary restraints case.³²⁴ *Polk Bros.* involved a covenant not to compete in certain lines of business in a lease, which eventually became a sale, of a shared building between an appliance and home furnishing store (Polk Brothers, the lessor/seller) and a home improvement store (Forest City, the lessee/buyer).³²⁵ As part of the lease, Forest City had promised not to sell “major appliances and furniture”³²⁶ in deference to Polk Brothers. Such a restraint is a horizontal market allocation, which is generally per se unlawful.³²⁷

322. *Horner v. Graves*, 131 Eng. Rep. 284, 287 (C.P. 1831).

323. See *supra* text accompanying notes 72–73 (discussing how ancillary restraints doctrine analysis cabins rule of reason balancing to specific restraints).

324. *Polk Bros. v. Forest City Enters.*, 776 F.2d 185 (1985).

325. *Id.* at 187.

326. *Id.*

327. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972).

The district court struck the restraint, but the Seventh Circuit held that the covenant to not compete had to be considered not just in light of the lease but in light of its effect on the lease.³²⁸ It was not just the existence of the connection but the nature of the connection that mattered.³²⁹ Even as a part of the larger lease, the arrangement would be illegal if for the sole purpose of reducing the price Forest City paid for the lease. A cash payment, or reduction in rent, is not a “productive transaction” for the purposes of the ancillary restraints doctrine, otherwise every horizontal restraint could be purchased. But this covenant had a different purpose. As the court explained, if appliances were offered at both Polk Brothers and Forest City, Forest City could free ride off of Polk Brothers’ advertising of appliances at that particular store.³³⁰ One can accept or reject that explanation,³³¹ but the need for it is prompted by the ancillary restraints doctrine, which requires the defendant to describe the relationship between the restraint and the productive transaction, not merely quantify the impact of both the restraint and the activity.

The danger of including comparative methods, and especially less restrictive alternatives, in ancillary restraints analysis is in inviting their inherent incrementalism into what is binary determination. Less restrictive alternatives present two distinct opportunities for confusion: First, as demonstrated by *Alston* and discussed above, allowing plaintiffs to offer less restrictive alternatives essentially gives plaintiffs a second, incremental, and therefore comparatively easy, bite at the ancillary restraints apple.³³² Second, the less restrictive alternatives analysis, by emphasizing the marginal differences between two restraints, emphasizes the point of highest indeterminacy. At the margin is the point where data about the restraint’s overall effects is cloudiest, but the margin is exactly the point that less restrictive alternatives analysis emphasizes. Doing so increases the risk that a court will extrapolate from a failure at the margin

328. *Polk Bros.*, 776 F.2d at 190.

329. Cf. Gregory J. Werden, *The Ancillary Restraints Doctrine After Dagher*, 8 SEDONA CONF. J. 17, 22 (2007) (insisting that, for a joint venture, there should be an “organic connection” between the restraint and the conduct of the venture).

330. *Polk Bros.*, 776 F.2d at 190.

331. Antitrust is generally sympathetic to the free riding argument, at least in vertical cases. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890–92 (2007).

332. See *supra* text accompanying notes 233–38. The NCAA actually presented this argument at the Supreme Court in *Alston*, but the Court misread the argument as being one about whether the district court was insisting on the “least” restrictive alternative. See *NCAA v. Alston*, 141 S. Ct. 2141, 2161 (2021). While it is true that an incrementalistic approach to individual restraints would lead to a least restrictive alternative standard, it is not the only consequence of doing so; the problem of incrementally smaller ancillary restraints analysis also goes to whether the court sees the connection to the defendant’s procompetitive justification at all, since no single aspect of any particular restraint is likely to be necessary to the defendant’s justification. The Supreme Court did not mention the ancillary restraints doctrine in *Alston* at all.

to a complete failure of the restraint. It might be worth the added risk if the less restrictive alternatives test added much to the ancillary restraint inquiry, but it does not. That is not to argue that less restrictive alternatives have no place in ancillary restraints analysis, just that the less restrictive alternatives test should not subsume the larger ancillary restraint inquiry by becoming the sole, or dominant, test for whether a restraint is “necessary” to a particular productive transaction.

O’Bannon demonstrates the problem of using quantitative comparisons like less restrictive alternatives in ancillary restraints analysis. The court drew the compensation line at “full cost of attendance,” specifically rejecting cash payments as a less restrictive alternative because it was at full cost of attendance that the line between producing amateur and non-amateur sports was crossed.³³³ That determination was categorical, not quantitative.³³⁴ But “full cost of attendance” is itself a constructed figure. Suppose the *O’Bannon* plaintiffs could produce evidence to show that consumers do not distinguish between players who receive the full cost of attendance and those who are provided on-campus summer jobs paying above-market rates?³³⁵ That actually appears to have happened for payment of up to \$10,000 according to surveys conducted as part of *Alston*.³³⁶ If so, then the consideration of less restrictive alternatives would immediately become quantitative again (How much higher than market rates? How much above \$10,000?), opening the door to the self-same incrementalism the Ninth Circuit avoided by rejecting the \$5,000 cash payment. The existence of less restrictive alternatives can inform the ancillary restraints analysis, but if it subsumes it, the problem of incrementalism is likely to become unavoidable.

Judge Taft’s formulation of ancillary restraints as those “reasonably necessary” to productive activity could hardly be more resistant to quantitative, superficially formulaic approaches like the existence of less restrictive alternatives. Rather, the ancillary restraints doctrine reflects a value judgment about the relationship between restraints and productive activity, and like most value judgments, it does not lend itself to a formula. Bork—dean of Chicago School economic reductivism in antitrust—acknowledged Judge Taft’s distinction between naked and ancillary restraints as “juridical rather than economic.”³³⁷ Judge Taft rejected such

333. *O’Bannon v. NCAA*, 802 F.3d 1049, 1075–76 (9th Cir. 2015).

334. See *supra* text accompanying notes 204–09.

335. See NCAA, NCAA DIVISION I MANUAL 2019–20, § 12.4.1(b) (requiring student employment to be at “a rate commensurate with the going rate in that locality for similar services”).

336. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (Alston)*, 958 F.3d 1239, 1258 (9th Cir. 2020), *aff’d sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

337. BORK, *supra* note 59, at 27.

comparisons—his “sea of doubt”³³⁸—for selecting among naked restrictions on competition.³³⁹ We should be hesitant to appeal to quantitative comparisons in deciding between what is in fact naked and what is ancillary.

More than it asks *whether* the restraints contribute to productive activity, the ancillary restraints doctrine asks *how*. The defendants in *Addyston Pipe* could demonstrate a connection between their restraint and their productive activity. The restraint reduced price uncertainty and volatility, assuring a continued supply of pipe to the public at “fair” prices.³⁴⁰ It may very well have done so as a matter of fact. But the Sherman Act outlaws exactly those justifications.³⁴¹ The ancillary restraints doctrine’s channeling function implements the Sherman Act’s policy choice to favor some forms of restrictions, like those avoiding free riding, over others, like those providing market or price stability. Requiring defendants to explain how the challenged restraint contributes to productive behavior is critical to implementing that policy choice. Still, the “how” question cannot be answered through purportedly quantitative comparative techniques such as evaluating less restrictive alternatives.

CONCLUSION

Although favored by some commentators and inconsistently applied by some lower courts, and despite its mention as dicta in *American Express* and its unthinking acceptance in *Alston*, the less restrictive alternatives test is problematic on its own terms and, more importantly, simply does not fit in rule of reason balancing. It is understandable that some have latched onto consideration of alternatives as a way to derive meaning in antitrust cases—it can be a valuable and intuitive tool for thinking about restraints. But its value is generic, not specific to antitrust, and it is completely unconnected to rule of reason balancing.

Instead, the consideration of alternatives better fits within the ancillary restraints doctrine and helps to highlight why it is important to keep the ancillary restraints and balancing steps distinct in antitrust analysis.³⁴² That is not to say that less restrictive alternatives can simply be applied in the ancillary restraints doctrine instead of in rule of reason balancing. Even within the ancillary restraints doctrine, the stringent

338. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283–84 (6th Cir. 1898), *aff’d*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

339. Arthur, *Workable Rule of Reason*, *supra* note 60, at 343 n.28, 345.

340. *Addyston Pipe*, 85 F. at 279.

341. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220–21 (1940).

342. The analysis in this Article has focused on Section 1 cases, but the same arguments could be made with regard to legitimacy of business justifications offered in Section 2 cases. *See* Devlin, *supra* note 23, at 825; Hemphill, *supra* note 6, at 939 & n.56.

requirements of the less restrictive alternatives inquiry are far too restrictive for a doctrine as flexible as the ancillary restraints doctrine needs to be in order to allow any degree of business discretion.

The introduction of less restrictive alternatives analysis into the rule of reason reflects the need for more robust application of the ancillary restraints doctrine, a doctrine that does not feature as prominently in modern antitrust law as balancing. As the Court moves toward an expansive application of the rule of reason, the ancillary restraints doctrine has taken on less importance as a way to channel restraints between per se and rule of reason analysis. Although not litigated as frequently, the ancillary restraints doctrine serves an important channeling function, and reinvigoration of ancillary restraints analysis might be one way to get courts to halt the decline of the per se rule in antitrust by providing a meaningful way to separate per se and rule of reason cases.

But to ask for greater emphasis on the ancillary restraints doctrine does not mean that easy answers can be calculated in hard antitrust cases, a mistake suggested by the kinds of comparative inquiries represented by the less restrictive alternatives test. In the end, the ancillary restraints standard of “reasonably necessary” calls for at least two value judgments: one about how business owners should choose restraints to further productive activity, and one about how antitrust enforcers should be policing those choices. Antitrust cannot avoid those value judgments through falsely mechanical forms of analysis such as less restrictive alternatives, and attempts by commentators and lower courts to do so within the rule of reason have only confused matters.³⁴³ Perhaps one reason why the ancillary restraints doctrine has received comparatively little attention is because its “reasonably necessary” standard is inadequately concrete for judges who wish to avoid accepting, or accepting responsibility for, the delegation arguably contained in the language of the Sherman Act.³⁴⁴ Commentators are likely to offer up any number of tools, rules, and tests that allow judges to claim they are practicing objective analysis imbued with quantitative certainty rather than making the hard judgments required by antitrust law. Judges should decline those proposals.

343. See Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57 (2013); Allensworth, *supra* note 257, at 55.

344. On the anxiety of judges and their turn to more deterministic methods in antitrust, see TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 90–91 (2018). On the delegation of antitrust lawmaking to federal judges, see *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”). See generally Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013 (2017).