

Less Restrictive Alternatives in Antitrust and Constitutional Law

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Introduction

At its core, antitrust law is constitutional law, but with money. The Sherman Act, inclusive and terse, is a “Bill of Rights” for economic freedom.¹ Its glittering generalities leave courts with a lot of work to do. Judicial elaboration is necessary for a statute that otherwise appears to prohibit *every* contract.² In response, courts have interpreted the statute in an evolving fashion. Today no one doubts that there is a living Sherman Act, even those who resist evolution in constitutional norms.³

Antitrust and constitutional law share a judicial anxiety about balancing. The anxiety arises whenever a court confronts conduct that has two contrasting effects, one harmful and the other beneficial. In constitutional law, this anxiety is rooted in deep-seated concerns about insulting the legislature, violating the separation of powers, and making a choice between incommensurable values. The basis for anxiety in antitrust is different and weaker, a question of courts’ practical ability to evaluate the net economic effect of corporate conduct. The doctrinal solution, in both contexts, has been to avoid an open tradeoff between the harm and the justification.

This avoidance conflicts with the identification of net competitive effects at the heart of the antitrust project. The resulting tension is acute, because the problem of mixed conduct arises frequently in antitrust. The NCAA adopts a rule prohibiting college football teams from competing for players by paying them (*harmful*), a decision that also increases the popularity of

¹ “Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

² 15 U.S.C. § 1 (prohibiting “every contract, combination, . . . or conspiracy, in restraint of trade”); *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978) (§ 1 “cannot mean what it says”); *see also* 15 U.S.C. § 2 (prohibiting without defining “monopoliz[ation]”).

³ *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 732 (1988) (Scalia, J.) (“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.”).

college football (*beneficial*). ASCAP, a performing rights organization, restricts price competition among songwriters (*harmful*) in the course of assembling the authors' rights into a blanket license that is valued by radio stations (*beneficial*). Two groups of doctors merge, allowing them to raise prices (*harmful*) while also improving the quality of patient care (*beneficial*).

Courts have fashioned a particular response to mixed conduct, which is to compare the action to a hypothesized alternative, and ask whether the alternative action is less harmful in the particular sense that it is "less restrictive." If so, then the defendant loses. Antitrust courts and agencies apply this less restrictive alternative (LRA) test to the full range of mixed conduct.⁴

The LRA test is shared with, and borrows from, constitutional law. Constitutional law applies the LRA test to government decisions that burden an important value while assertedly serving an important state purpose. An LRA test is an important component of strict scrutiny of government decisionmaking, and plays an important role beyond strict scrutiny too.⁵ The sharing extends to a particular version of the test employed in both fields, that the LRA must be not only less restrictive but also *equally effective*. In other words, could the good have been achieved equally well with less bad?

This article reexamines the LRA test by appraising its use in both antitrust and constitutional law. In bridging the divide between the two fields, I offer a new account of the three functions served by the LRA test: as a *shortcut* that avoids trading off the two values at stake, as a tool to *smoke out* the defendant's knowing benefit from a harmful effect, and as a locus of *balancing* that takes into account both the pros and cons of the alternative.

⁴ See Part I.B *infra* (discussing the test's use, once a mixed restraint has been established, in rule of reason, horizontal merger, monopolization, and tying cases).

⁵ See Part I.C *infra*. Outside the United States, the necessity test is if anything even more important, as an integral step in the proportionality review used by many constitutional democracies.

The first two functions—shortcut and smoking out—are drawn from constitutional law and commentary. The shortcut permits a determination of net effect without making any tradeoff, because the alternative is equal or superior along both dimensions of interest.⁶ Smoking out enables a Bayesian inference about the intent or effect of the conduct.⁷ Such an inference is particularly useful when the court is choosing between two accounts of the conduct, rather than calculating a net effect.

These stories are incomplete, however. In order to make sense, they both require an equally effective alternative. In practice, many LRAs are less effective. Courts often condemn conduct on the strength of a less effective LRA.⁸ Such cases cannot be explained by reference to the shortcut or smoking out accounts, and indeed, such courts' claim to rely upon an equally effective alternative tends to obscure what is really going on. A limitation to equally effective LRAs also excuses some conduct whose net effect is negative.

The LRA test, far from offering a way to avoid balancing, is actually a form of balancing.⁹ When less effective alternatives are credited as a basis for condemning conduct, these outcomes may be explained and defended as balancing. Balancing within the LRA test complements and strengthens the search for net effects at the core of antitrust law. Although balancing in antitrust is regarded as rare in practice—even a “myth”—that view leaves out balancing that takes place within the LRA test. Recognizing LRA as balancing also reveals important errors in some courts' approach to the test, in insisting that an LRA is necessary for

⁶ See *infra* Part II.B.

⁷ See *infra* Part III.

⁸ See *infra* Part II.C.

⁹ See *infra* Part IV. For an analogous suggestion that the LRA test is a locus of balancing in WTO trade cases, see Alan Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 208 (2003).

liability (rather than sufficient), and that defendants (rather than plaintiffs) bear the burden of persuasion.¹⁰

I argue antitrust courts should overcome their anxiety, and recognize balancing as an appropriate and usually inescapable part of LRA analysis. The constraint to equally effective alternatives is a poor fit for antitrust law. A similar conclusion fits uneasily with constitutional law, where the anxiety about balancing has a more powerful pull. In this respect, the constitutional analogy obscures and inhibits the recognition of LRA-as-balancing in antitrust law. As the article demonstrates, however, balancing within the LRA test plays a significant and perhaps inevitable role in constitutional scrutiny as well.

I. Mixed Conduct in Private and Public Law

A. Mixed Restraints of Trade

In 2009, Ed O’Bannon, a former UCLA basketball player, filed an antitrust suit against the NCAA.¹¹ The suit challenged an NCAA rule that limits compensation to student-athletes. The rule caps scholarships at a level several thousand dollars below the full cost of attendance.¹² Additional cash compensation is prohibited. In practice, this constraint binds only as to basketball and football, the two most profitable college sports. O’Bannon sought payment for the use of his likeness, the rights to which are valuable to videogame makers and other licensees. Additional suits seek compensation for playing the sport.¹³

After a bench trial, the district court concluded that the rule restrained trade. The court found that the rule eliminates price competition among the schools, reducing compensation to the

¹⁰ See Part IV.D.

¹¹ O’Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

¹² *Id.* at 971–72. The cap includes tuition and fees, room and board, and books, but not transportation and other expenses.

¹³ See Complaint, Jenkins v. NCAA, No. 14-1678 (D.N.J. Mar. 17, 2014) (men’s basketball and football); Complaint, Hartman v. NCAA, No. 3:15-cv-00178 (N.D. Cal. Jan. 13, 2015) (women’s basketball).

players. At the same time, the court credited two justifications for the rule offered by the NCAA, that limiting payment preserves amateurism and thereby increases interest in college sports, and facilitates a scholar-athlete's successful integration within the academic community.¹⁴ The court was therefore faced with mixed conduct that has both positive and negative effects, and the challenge of reconciling the two.

Sports leagues are an obvious place to expect mixed conduct. A certain degree of restraint is necessary to make league play possible. Limitations that preserve competitive balance can improve the product, which in turn fosters competition with other sports leagues. Mixed conduct is also common where the intellectual property of competing creators is pooled and repackaged. A famous example is the blanket music licenses offered by ASCAP.¹⁵

The phenomenon is general. Competitors frequently join forces through “horizontal” agreement or merger for a purportedly beneficial end. When they do so, they simultaneously reduce competition among themselves. Some antitrust cases acknowledge mixed conduct by stating that the restraint is “ancillary” to a desirable purpose.¹⁶ The harm can take a variety of forms, including higher prices to buyers, lower prices to sellers (as in *O'Bannon*), reduced output, higher production costs, and reduced quality and innovation. Antitrust evaluations of horizontal conduct must therefore pay close attention to mixed conduct.

Nor is the issue limited to horizontal conduct. The problem arises in the other major areas of antitrust scrutiny as well. For example, restrictive “vertical” contracts between manufacturers

¹⁴ *O'Bannon*, 7 F. Supp. 3d at 978 (“consumer preferences might justify certain limited restraints”); *id.* at 999 (“this evidence could justify some limited restrictions on student-athlete compensation”); *id.* at 1001 (concluding that the restraints “play a limited role in driving consumer demand”); *id.* at 980–81 (integration). The court rejected the NCAA’s arguments that the rule also promoted competitive balance and increased output. *Id.* at 978–79, 981–82.

¹⁵ *See, e.g.*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 21 (1979).

¹⁶ *E.g.*, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (identifying “ancillary” restraints as protected from antitrust liability under certain circumstances). For a further discussion of ancillarity, see *infra* note 168 and accompanying text.

and retailers can have a similar variety of bad effects.¹⁷ Yet they may also serve a desirable end, such as assuring quality or providing optimal incentives to retailers.¹⁸ Exclusionary conduct can also have a mixed effect—for example, harming consumers by impeding a rival’s competitive opportunities, while simultaneously improving the product. In short, mixed restraints are everywhere in antitrust. Table 1 presents a large set of illustrative examples, drawn from antitrust litigation.

B. LRAs in Antitrust Law

Courts use the LRA test to handle mixed conduct.¹⁹ *O’Bannon* recites one version of the burden-shifting framework developed by lower courts.²⁰ The first two steps establish whether there is mixed conduct in the first place. At the outset, the plaintiff offers evidence establishing the presence of an anticompetitive effect—for example, higher prices to purchasers.²¹ In response,²² the defendant offers evidence of a cognizable justification, often characterized as an improvement in some aspect of competition.²³ The court next evaluates this mix, asking whether an LRA exists that serves the same goal with less anticompetitive effect.²⁴

¹⁷ See, e.g., *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877, 892–94 (2007).

¹⁸ *Id.* at 889–92.

¹⁹ The LRA test also appears outside the context of mixed conduct. For example, federal regulation impliedly repeals antitrust law only if repeal is “necessary” to make the regulatory scheme work, “and even then only to the minimum extent necessary.” *Silver v. NYSE*, 373 U.S. 341, 357 (1963).

²⁰ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 984–85 (N.D. Cal. 2014).

²¹ The plaintiff might show that prices actually increased on account of the restraint, or that a price rise is likely to occur given the usual tendency of such conduct, combined with a showing that the plaintiff has market power. The presence of market power tends to confirm that the conduct has the complained-of effect.

²² Rather than offer a justification, the defendant could challenge the premise of the plaintiff’s claim of anticompetitive effect, a point omitted from the standard burden-shifting framework. A defendant’s claim that prices won’t rise because of a countervailing downward pricing pressure—for example, due to a reduction of marginal cost—might be understood either as an assertion of mixed conduct or as a negation of the plaintiff’s initial case.

²³ *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978) (“[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.”). The boundaries of increased “competition” are elastic, and courts recognize justifications that are hard to square with the “competition” rubric. There is an ongoing debate about the scope of permissible justifications. On the narrowest view, the same consumers must receive the benefit. A broader view recognizes benefits to other consumers or

LRAs take various forms. Instead of merging, competitors might enter a joint venture. A contract that indirectly supplies good incentives to a dealer, but also excludes rivals, could be replaced by a different contract that directly specifies the desirable behavior. A task assigned to a party with anticompetitive incentives might be reassigned to one with better incentives. In *O'Bannon*, the court condemned the NCAA rule in light of an unusual LRA: permitting a school to award a small stipend, plus additional compensation, held in trust, once the player leaves college.²⁵ Table 1 contains illustrative LRAs offered in response to challenged mixed conduct.

The general form of the LRA test is familiar in legal analysis—that the restraint goes too far, compared to its justification. The fundamental problem is sometimes described as overinclusion. More informally, we speak of swinging a sledgehammer to crack a nut, firing a cannon to shoot a sparrow,²⁶ or “burn[ing] the house to roast the pig.”²⁷ The alternative might be superior because it harms fewer consumers, or because it harms them all to a lesser degree.²⁸

The LRA test is employed in a wide range of antitrust cases. *O'Bannon* is an example of the rule of reason, antitrust’s most important “implementing” doctrine,²⁹ applied to a widening array of horizontal and vertical agreements.³⁰ Courts applying the rule of reason to mixed

(broader still) to producers or other economic actors. The analysis in this article generally applies without regard to the scope of permissible justifications.

²⁴ In most statements of the test, there is a further step to determine the net effect of the conduct. See *infra* II.A.

²⁵ *O'Bannon*, 7 F. Supp. 3d at 1007–08. The stipend was calculated to cover the shortfall between existing scholarships and the full cost of attendance. *Id.*

²⁶ AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 334 (2012).

²⁷ *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

²⁸ The term “overinclusion” is a less natural fit for the latter situation but is often stretched to cover it.

²⁹ *Cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37–42 (2001) (describing the Supreme Court’s role in fashioning doctrines and tests that “implement” constitutional principles).

³⁰ *See, e.g.,* *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007) (holding that resale price maintenance is governed by the rule of reason, rather than per se illegality); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (holding that reverse payment settlements of patent litigation are governed by the rule of reason, rather than a “scope of the patent” test that was tantamount to per se legality).

conduct routinely invoke the LRA test.³¹ Jury instructions and special verdict forms impart this test to jurors.³² The Department of Justice and Federal Trade Commission (FTC) rely on the test in making enforcement determinations.³³

Horizontal mergers and monopolization claims alleging exclusionary conduct are evaluated in a similar manner to rule of reason claims. Courts and agencies apply an LRA test to mergers by insisting that a claimed justification (a so-called “efficiency”) must be “merger-specific.”³⁴ Courts considering monopolization claims have recognized a close kinship to the rule of reason.³⁵ Monopolization cases include the LRA test,³⁶ consistent with economically analogous rule-of-reason cases alleging exclusion.³⁷

³¹ *E.g.*, *Arkansas Carpenters Health and Welfare Fund v. Bayer AG*, 604 F.3d 98, 104 (2d Cir. 2010); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991); *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984); *Wilk v. American Medical Association*, 719 F.2d 207, 227 (7th Cir. 1983).

³² *See, e.g.*, AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES A-10 (2005) (Instruction 3C) (“If you find that the challenged restraint does result in competitive benefits, then you must also consider whether the restraint was reasonably necessary to achieve the effects. If the plaintiff proves that the same benefits could have been readily achieved by other, reasonably available alternative means that create substantially less harm to competition, then they cannot be used to justify the restraint.”) [hereinafter MODEL JURY INSTRUCTIONS]; Jury Instruction #15, *Deutscher Tennis Bund v. ATP Tour Inc.*, No. 07-CV-00178 (D. Del. Aug. 5, 2008) (nearly identical instruction); Verdict Form at 2, *Deutscher Tennis Bund v. ATP Tour Inc.*, No. 07-CV-00178 (D. Del. Aug. 5, 2008) (Question #5 for Sherman Act § 1 claim) (“Do you find by a preponderance of the evidence that any contract, combination or conspiracy for which you answered ‘Yes’ [to a previous question about the existence of procompetitive benefits] was reasonably necessary to achieve the procompetitive benefits you found?”).

³³ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.36(b) (2000) [hereinafter COLLABORATION GUIDELINES] (“[I]f the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement. In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.”).

³⁴ *E.g.*, *Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke’s Health System, Ltd.*, No. 12-CV-00560, 2014 WL 407446, at *17 (D. Idaho Jan. 24, 2014), *aff’d*, 2015 WL 525540 (9th Cir. Feb. 10, 2015) (rejecting efficiency defense “[b]ecause a committed team can be assembled without employing physicians, [and therefore] a committed team is not a merger-specific efficiency of the Acquisition.”); U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 10, at 30 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES] (“The Agencies credit only those efficiencies . . . unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects.”) (internal footnote omitted).

³⁵ *See United States v. Microsoft*, 253 F.3d 34, 59 (2001) (en banc) (per curiam) (citing *United States v. Standard Oil*, 221 U.S. 1, 61–62 (1911)).

³⁶ *See, e.g.*, *LePage’s v. 3M*, 324 F.3d 141, 167 (3d Cir. 2003) (quoting, as part of jury charge, whether defendant “has impaired competition, in an unnecessarily restrictive way”); *id.* (defining “exclusionary conduct and predatory conduct” as, in relevant part, conduct that “either does not further competition on the merits, or does so in an unnecessarily restrictive way”); *id.* at 178 (dissenting opinion) (concluding that justification should be rejected if

Finally, LRAs play a major role in cases alleging tying, in which a firm conditions the purchase of one product on the purchase of a second product. Tying claims are governed by a “quasi-per se” rule³⁸ that reflects the premise that usually there are LRAs to a tie.³⁹ For example, an early tying case tested IBM’s claim that a tie between its tabulating machines and punch cards was necessary to avoid machine damage from inferior non-IBM punch cards.⁴⁰ The Court rejected this justification in favor of the LRAs of customer outreach and detailed contractual specification.⁴¹

One implication of the Court’s skepticism about the need for ties is that defendants have the burden of establishing the lack of an LRA.⁴² By contrast, in the rule of reason, the plaintiff

“if a valid asserted purpose would be served fully by less restrictive means”); *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188–89 (2d Cir. 1992) (prohibiting conduct that does “not further competition on the merits or does so in an unnecessarily restrictive way”); *Addamax Corp. v. Open Software Foundation, Inc.*, 888 F. Supp. 274, 283 (D. Mass. 1995) (applying rule of reason test, including LRA requirement); *New York v. Actavis, PLC*, No. 14-CV-7473, 2014 WL 7015198, at *40–*41 (S.D.N.Y. Dec. 11, 2014) (applying *Trans Sport* test).

Microsoft articulates a test that lacks an explicit LRA step, but identities “pretext” as a way to reject an asserted justification. *See Microsoft*, 253 F.3d at 58–59. As discussed *infra* Part III, the LRA test helps to smoke out pretext.

Cf. Southern Pacific Comm. Co. v. AT&T, 556 F. Supp. 825, 977 & n.184 (D.D.C. 1983) (resisting insistence on LRA analysis where regulator had identified an alternative); *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1227–28 (S.D.N.Y. 1981) (design need merely be reasonable to avoid initial finding of anticompetitive effect, not the least restrictive of competition).

³⁷ *See, e.g., United States v. Visa*, 344 F.3d 229 (2d Cir. 2003); *U.S. Healthcare v. Healthsource, Inc.*, 986 F.2d 589, 596–97 (1st Cir. 1993).

³⁸ *See U.S. Healthcare*, 986 at 593 n.2 (“Tying is sometimes also described as a per se offense but, since some element of power must be shown and defenses are effectively available, ‘quasi’ per se might be a better label.”). Some tying cases are considered under the rule of reason, and include an LRA test. *E.g., County of Tuolumne v. Sonora Community Hospital*, 236 F.3d 1148 (9th Cir. 2001).

³⁹ *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (concluding that tying arrangements “generally serve[] no legitimate business purpose that cannot be achieved in some less restrictive way.”). *See also Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949) (concluding that tying defenses fail because the LRA of contractual specification usually suffices, except perhaps where the specification is too detailed to be practical). The skeptical view of ties has been vigorously challenged. *See, e.g., ROBERT BORK, THE ANTITRUST PARADOX* 365–81 (1978).

⁴⁰ *IBM v. United States*, 298 U.S. 131 (1936).

⁴¹ *Id.* at 133–34, 140.

⁴² *See, e.g., Mozart v. Mercedes-Benz*, 833 F.2d 1342, 1349 (9th Cir. 1987) (“To exonerate a franchisor’s tie-in quality control technique from the antitrust law, there must be a finding that no [LRA] exists. Frequently [LRAs] do exist.”); *Metrix Warehouse v. Daimler-Benz*, 828 F.2d 1033, 1040 (4th Cir. 1987) (“An asserted business justification cannot salvage a tying arrangement that is otherwise per se unlawful without proof that means less restrictive than the tie-in were not feasible to achieve the desired protection.”); *Image Technical Service v. Eastman Kodak*, 903 F.2d 612, 618–19 (9th Cir. 1990), *aff’d*, 504 U.S. 451 (1992).

ordinarily has the burden of proving the existence of an LRA.⁴³ In merger cases, meanwhile, some courts insist that defendants establish the absence of an LRA.⁴⁴

Most of the development of the LRA test has occurred in the lower courts and agencies.⁴⁵ The Supreme Court has given little attention to the subject outside of tying cases. Most strikingly, in rule of reason cases, the Court has never offered an endorsement or rejection of the test, much less attempted to shape it. This is part of the Court's larger inattention to antitrust's implementing rules. Unlike, say, the frequent recitation of the components of strict scrutiny, the Court has offered no well-developed implementing doctrine for the rule of reason. Lower courts have filled the vacuum, taking conflicting and inconsistent views about the proper implementation of the test.⁴⁶

The Court's most intense engagement with the LRA test came in two opinions authored by Justice Brennan in 1963. In *White Motor Co. v. United States*,⁴⁷ the Justice Department challenged vertical restraints that limited the territory within which a dealer could resell trucks and parts.⁴⁸ The Court held that per se condemnation was inappropriate and remanded for trial. In a concurrence, Justice Brennan urged an examination of "less restrictive alternatives" as part of "a full inquiry into the pros and cons" of the restrictions,⁴⁹ asking:

whether, assuming that some justification for these limitations can be shown, their operation is reasonably related to the needs which brought them into being. To put the question another way, the problem is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in light of the extenuating interests.⁵⁰

⁴³ 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1914c (3d ed. 2011) (collecting cases, and concluding that most though not all rule of reason cases assign the burden to plaintiffs).

⁴⁴ See, e.g., *E.g.*, *Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke's Health System, Ltd.*, 2015 WL 525540 (9th Cir. Feb. 10, 2015). For a discussion of the appropriate allocation of burdens, see Part IV.C.2.

⁴⁵ See *supra* notes 29–42 and accompanying text.

⁴⁶ See *infra* Part IV.C.

⁴⁷ 372 U.S. 253 (1963).

⁴⁸ *Id.* at 255–56. The restraint also restricted sales as to particular customers. *Id.*

⁴⁹ *Id.* at 271.

⁵⁰ *Id.* at 270.

Justice Brennan’s concurrence was the first appearance of the term “less restrictive alternative” in the United States Reports, and has been referred to in lower court analyses of LRAs.⁵¹

A few months later, Justice Brennan authored the Court’s opinion in *United States v. Philadelphia National Bank* (“PNB”).⁵² There the Court enjoined a bank merger, defended on the ground (among others) that “only through mergers can banks follow their customers to the suburbs and retain their business.”⁵³ The Court rejected this asserted benefit in favor of the LRA of internal growth.⁵⁴

Since Justice Brennan’s opinions, the Court has offered a few hints about LRAs. Several cases evaluate horizontal restraints by reference to LRAs, though without explication or development.⁵⁵ One monopolization opinion suggests in dicta, as a relevant question for liability, whether the conduct “impaired competition in an unnecessarily restrictive way.”⁵⁶ Finally, one opinion for the Court⁵⁷ (and a concurrence in a second case⁵⁸) might be read to offer skepticism about LRA tests.

⁵¹ See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979) (citing concurrence in support of an evaluation of LRAs); cf. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 n.61 (3d Cir. 1975) (citing concurrence but preferring a different formulation of the LRA analysis).

⁵² 374 U.S. 321 (1963).

⁵³ *Id.* at 370.

⁵⁴ *Id.* (“There is an alternative to the merger route: the opening of new branches in the areas to which the customers have moved—so-called de novo branching. Appellees do not contend that they are unable to expand thus, by opening new offices rather than acquiring existing ones . . .”). This idea was picked up in *United States v. Marine Bancorporation*, 418 U.S. 602, 629–30 (1974) (citing and distinguishing *PNB*, where “serious questions” existed as to the feasibility of internal growth).

⁵⁵ The cases are *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332 (1982); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); and *FTC v. Actavis, Inc.*, 133 S. Ct. 2233 (2013). For further discussion, see *infra* notes 158–161 (*Maricopa County*), 163–166 (*NCAA*), 175 (*Actavis*), and accompanying text. See also *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679, 699–700 (1978) (Blackmun, J., concurring) (even if product quality is a cognizable benefit, ban on competitive bidding was “grossly overbroad” to achieve it).

⁵⁶ *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 604 (1985).

⁵⁷ In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), a vertical restraints case, the Court stated: “The location restriction . . . was neither the least nor the most restrictive provision that it could have used. . . . We are unable to perceive significant social gain from channeling transactions into one form or another.” *Id.* at 58 n.29. As Phillip Areeda explained, this statement is not a critique of the LRA test, but merely means that if one form

The LRA test has received attention from antitrust scholars. A few papers focus on the LRA test in the context of a particular antitrust doctrine or issue, such as the rule of reason,⁵⁹ monopolization,⁶⁰ or sports joint ventures.⁶¹ A larger literature discusses the test in the course of analyzing various antitrust doctrines⁶² or issues.⁶³

C. LRAs in Constitutional Law

Antitrust shares the LRA test with constitutional law. There, the test is used to assess mixed state action that both burdens an important value and assertedly serves an important state purpose. Consider, as one example, *Riley v. National Federation of the Blind*.⁶⁴ In *Riley*, the

is permitted, per se liability for a different form is inapt. See PHILLIP AREEDA, THE “RULE OF REASON” IN ANTITRUST ANALYSIS: GENERAL ISSUES 9 (1981).

⁵⁸ In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), a tying case, Justice O’Connor’s concurrence dismissed the Court of Appeals’ imposition of liability premised on the presence of an LRA. *Id.* at 44 n.13 (O’Connor, J., concurring) (“In the absence of an adequate basis to expect any harm to competition from the tie-in, this objection is simply irrelevant.”). In context, Justice O’Connor declined to reach the LRA argument given the lack of anticompetitive effect, as opposed to rejecting the LRA test. *But see* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 591 (2009) (reading the opinion as a rejection of an LRA test).

⁵⁹ An insightful recent article is Feldman, *supra* note 58 (objecting to LRA test in rule of reason, except to smoke out intent).

⁶⁰ See Alan Devlin, *Antitrust as Regulation*, 49 SAN DIEGO L. REV. 823 (2012) (objecting to LRA test in monopolization cases as too demanding and lacking limiting principle).

⁶¹ 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 (2002).

⁶² In the context of the rule of reason, see, e.g., Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77; Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265 (accepting LRA test in principle but criticizing it in practice); Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859 (1988); 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1432b1 (3d ed. 2010) (repeatedly including the test in statements of the rule of reason); Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CAL. L. REV. 835 (1987); Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the “Rule of Reason” in Restraint of Trade Analysis*, in 15 RESEARCH IN LAW AND ECONOMICS 1, 62 (Richard O. Zerbe, Jr. & Victor P. Goldberg eds., 1992). On mergers, see, e.g., Dennis A. Yao & Thomas N. Dahdouh, *Information Problems in Merger Decision Making and Their Impact on the Development of an Efficiencies Defense*, 62 ANTITRUST L.J. 23 (1993).

⁶³ Notable recent examples include the Google Book Search settlement, see Elhauge, *Why the Google Books Settlement is Procompetitive*, 2 J.L. ANALYSIS 1, 7 (2010); Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement*, ANTITRUST CHRONICLE, Oct. 2009; Marina Lao, *The Perfect Is the Enemy of the Good: The Antitrust Objections to the Google Books Settlement*, 78 ANTITRUST L.J. 201 (2012) (accepting test but criticizing in practice); and professional sports, see Gabriel A. Feldman, *Antitrust Versus Labor Law in Professional Sports*, 45 U.C. DAVIS L. REV. 1221 (2012); Stephen S. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463 (1990).

⁶⁴ 487 U.S. 781 (1988).

Court considered a provision in a North Carolina statute obliging professional fundraisers to report—in the course of their solicitation of a donor—what fraction of the money actually reached the charity.⁶⁵ The provision burdened First Amendment rights by compelling speech, but the state defended the measure as a way to avoid “donor misperception.”⁶⁶ The Court (per Justice Brennan) rejected the justification in favor of two LRAs, to publish the information instead or enforce antifraud laws more aggressively, and struck down the statute.⁶⁷

Riley is an application of strict scrutiny, constitutional law’s most important implementing doctrine. Legislation survives strict scrutiny only if the government’s interest is sufficiently strong (“compelling”) and the state action is “narrowly tailored” to further the interest. Strict scrutiny in its various forms applies to a wide variety of state action, including the fundraising statute and other content-based regulations of speech,⁶⁸ discrimination on the basis of suspect classes such as race and alienage,⁶⁹ and infringements of fundamental rights.⁷⁰

The LRA test enters the strict scrutiny analysis as an element of narrow tailoring. Sometimes the LRA inquiry and narrow tailoring are simply equated.⁷¹ However, many applications of narrow tailoring include a further component, which is to test the state action for

⁶⁵ *Id.* at 784–87. Several other provisions were challenged as well.

⁶⁶ *Id.* at 798.

⁶⁷ *Id.* at 800.

⁶⁸ *Id.* at 784–87; *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality) (content-based ban on campaign speech within 100 feet of polling place); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813–14 (2000) (content-based requirement that cable operators scramble sexually explicit channels or limit to certain hours); *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (content-based ban on both indecent and obscene commercial telephone messages).

⁶⁹ *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (race); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (alienage).

⁷⁰ *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (due process); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626–27 (1969) (equal protection challenge to state apportionment statute); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (equal protection challenge to restriction on right to travel); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (equal protection challenge to restriction on redistricting).

⁷¹ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (“The term ‘narrowly tailored,’ so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used.”); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1327 (2007) (concluding that the search for an LRA is “essentially the same demand” as narrow tailoring, and citing cases). At the other extreme, some articulations of narrow tailoring omit the LRA test altogether.

underinclusion.⁷² The underinclusion test lacks an explicit counterpart in antitrust scrutiny. Defendants have the burden of establishing the lack of an LRA, the opposite of the usual antitrust rule.⁷³

LRAs take various forms. The alternative might be preferable because it harms fewer individuals, or because it harms them all less. For some LRAs, the “less restrictive” label seems inapt. Sometimes an alternative is deemed superior (less harmful) for LRA purposes even though the alternative burdens more conduct, rather than less. In such cases the alternative is less harmful not so much because it is less “restrictive,” but because it is less discriminatory.⁷⁴ I follow convention in applying the LRA label to such superior alternatives.

The LRA test, as a component of strict scrutiny, can be traced to 1963 and the pen of Justice Brennan. Stephen Siegel’s analysis focuses on the replacement of two Justices in 1962, which shifted the Court in favor of more extensive First Amendment protections for speech, exercise of religion, and association.⁷⁵ The immediate fruits of that shift included *Sherbert v. Verner*,⁷⁶ a free exercise case. There the Court (per Justice Brennan) required the defendant to demonstrate both a compelling interest and the absence of an LRA—in particular, “that no alternative forms of regulation would combat such abuses without infringing First Amendment

⁷² In some instances, an inquiry is styled as an LRA examination but is in substance an underinclusion analysis, because it identifies a *more effective* alternative, rather than a less restrictive one. *E.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 337–38 (1979) (concluding that discriminatory regulation of minnow exports poorly served the asserted goal of conservation, and less discriminatory measures would be more effective).

⁷³ *See, e.g.*, *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2414 (2013) (Equal Protection); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) (First Amendment); *Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992) (dormant commerce clause); *see also Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (RLUIPA). This contrast is considered *infra* Part IV.C.3.

⁷⁴ *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *R.A.V.* is discussed *infra* Part III.A.

⁷⁵ Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 362 (2006) (emphasizing the retirement of Justices Frankfurter and Whittaker and appointment of Justices Goldberg and White); Fallon, *supra* note 71, at 1291 (crediting Justice Goldberg’s appointment with advent of “empowered liberal majority”).

⁷⁶ 374 U.S. 398 (1963). Siegel also emphasizes two other cases addressing the freedoms of speech and association: *NAACP v. Button*, 371 U.S. 415 (1963), and *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539 (1963).

rights.”⁷⁷ Siegel thus singles out *Sherbert* as the “first clear, succinct, and complete statement” of strict scrutiny.⁷⁸

In constitutional cases beyond strict scrutiny, the LRA test again plays an important role. For example, state protectionism that discriminates against interstate commerce receives “the strictest scrutiny” under the dormant commerce clause.⁷⁹ The applicable test requires the state to demonstrate a legitimate local purpose and the lack of an LRA—that the “purpose could not be served as well by available nondiscriminatory means.”⁸⁰ For example, in *Maine v. Taylor*, the Court considered a ban on whitefish imports, justified as a means to protect local fisheries from “parasites [and] commingled species.”⁸¹ The Court accepted the conclusion that the proposed LRA, inspection rather than exclusion, was infeasible.⁸² Analyses of commercial speech similarly consider whether the restriction is “more extensive than necessary.”⁸³

The LRA test in U.S. constitutional law has received some attention from commentators. Functional assessments of the LRA test often identify a purpose of smoking out the true purpose of state action.⁸⁴ Frequently, analysis of the LRA test is bundled with the rest of narrow tailoring or strict scrutiny. For example, commentators sometimes identify a balancing or cost-benefit

⁷⁷ *Sherbert*, 374 U.S. at 407.

⁷⁸ Siegel, *supra* note 75, at 380. Some free exercise challenges today are conducted under a statutory implementation of strict scrutiny. See *infra* notes 139–147 and accompanying text.

⁷⁹ *Maine v. Taylor*, 477 U.S. 131, 144 (1986). Some lower courts call this “strict scrutiny.” See, e.g., *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001); *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 995 (9th Cir. 2002); see also *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 353 (2007) (Alito, J., dissenting) (“strict scrutiny”); *id.* at 360 (same).

⁸⁰ *Maine v. Taylor*, 477 U.S. at 138; see also *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354–56 (1951) (condemning statute with “practical effect” of discriminating against interstate commerce, despite permissible purpose of “health and safety,” given available LRAs); see also *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (for laws that burden interstate commerce only incidentally, invalidity requires that the burden be “clearly excessive”; the burden is evaluated by determining “whether [a legitimate purpose] could be promoted as well with a lesser impact on interstate activities”).

⁸¹ *Maine v. Taylor*, 477 U.S. at 140–41.

⁸² *Id.* at 146.

⁸³ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (reciting the *Central Hudson* test).

⁸⁴ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 144 (1980); Fallon, *supra* note 71, at 1308–11; Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 436–37 (1997); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 *MICH. L. REV.* 1091, 1143–60 (1986). See Part III *infra* for further discussion.

function for strict scrutiny as a whole,⁸⁵ without discussing whether or how the LRA test might play a role. Outside the United States, the LRA test, styled as a “necessity” test, has received academic attention as a component of the proportionality review used by many constitutional democracies.⁸⁶ There, the test is understood as a means to avoid difficult tradeoffs between the values at stake.

D. Making the Comparison

In both antitrust and constitutional law, the court is obliged to evaluate conduct that has an allegedly mixed effect. In response, courts have implemented the same solution, an LRA test. These features, however, are not unique to these two areas of law. Other areas of law use LRA tests too.⁸⁷ Why compare these two?

One reason is that courts look to constitutional law when they do antitrust analysis. For example, there is evidence that the LRA test as described by Justice Brennan is an adventitious transplant from constitutional law to antitrust. The two tests flowed at the same time from the pen of the same Justice. In the same Term that *Sherbert* and other cases introduced a modern conception of strict constitutional scrutiny, Justice Brennan made a similar move in antitrust in both *White Motor* and *PNB*. Indeed, *Sherbert* and *PNB* were handed down the same day. The

⁸⁵ *E.g.*, Fallon, *supra* note 71, at 1302; Rubinfeld, *supra* note 84, at 437–44 (1997). *See also* Ian Ayres, *Narrow Tailoring*, 43 U.C.L.A. L. REV. 1781, 1789 n.25 (1996).

⁸⁶ *See, e.g.*, BARAK, *supra* note 26, at 317–39.

⁸⁷ An LRA test is used in WTO trade cases, see Sykes, *supra* note 9; disparate impact claims under Title VII and the Fair Housing Act, see, e.g., 42 U.S.C. §§ 2000e–2(k)(1)(A)(ii), (C) (Title VII); 24 C.F.R. § 100.500(c) (Fair Housing Act); and quarantine and confinement cases, see, e.g., *Covington v. Harris*, 419 F.2d 617, 624–25 (D.C. Cir. 1969) (inquiring into availability of LRA in case of mental patient confinement). An LRA test has also received recent attention in connection with the determination whether to capture or kill an enemy combatants.

contemporaneous appearance of these opinions suggests that Brennan’s approach to the antitrust test may have been influenced by constitutional developments.⁸⁸

Moreover, Justice Brennan’s understanding of the antitrust test bears the clear imprint of constitutional thinking. In *White Motor*, his frankly expressed concern was to smoke out the defendant’s bad intent: “If the restraint is shown to be excessive for the manufacturer’s needs, then its presence invites suspicion . . . that the real purpose of its adoption was to restrict price competition.”⁸⁹ Justice Brennan was open about this inquiry into a firm’s motives, though more guarded about questioning the bad motives of the state in constitutional cases decided the same Term.⁹⁰

Some commentators have identified a borrowing in the opposite direction, crediting antitrust law as the source of the constitutional LRA and pointing particularly to *White Motor*.⁹¹ Antitrust may be the source of the term “less restrictive alternative” in constitutional law,⁹² as *White Motor* is the first mention of the term by a Justice. Also, as noted above, the label is a misfit: less burdensome alternatives to challenged state action are not always less “restrictive.”

⁸⁸ Interestingly, the clerks in Justice Brennan’s chambers that term were a future First Amendment scholar (Robert O’Neil) and a future antitrust scholar (Richard Posner).

⁸⁹ *White Motor Co. v. United States*, 372 U.S. 253, 270 n.9 (1963) (Brennan, J., concurring).

⁹⁰ Fallon notes, citing *Sherbert* and two other First Amendment cases from the same Term (*NAACP v. Button*, also written by Justice Brennan, and *Gibson v. Florida Legislative Investigative Committee*), that “[a]s applied to those cases, the narrowly-tailored-to-a-compelling-interest test and its doctrinal precursors may well have functioned to unmask forbidden motives.” Fallon, *supra* note 71, at 1309. But this was not explicit. The Brennan chambers’ end-of-term memo, written by law clerks, contains an interesting comment about *NAACP v. Button*. Apparently Justice Brennan chose an overbreadth-based attack on the statute, rather than striking down the statute based on evidence of the illicit motives of legislators as revealed in the legislative history, because he believed he lacked the votes for the latter approach. See Richard Posner & Robert M. O’Neil, *Opinions of William J. Brennan, Jr.*, October Term, 1962, at xi (1963), available in Box II.6, Folder 5, Papers of William J. Brennan, Jr., Library of Congress.

⁹¹ E.g., Feldman, *supra* note 58, at 562 n.9; Yao & Dahdouh, *supra* note 62, at 37 & nn.48–50. Feldman cites Yao and Dahdouh, which in turn relies on Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1464 n.1 (1967). Struve is referring to Justice Brennan’s concurrence in *White Motor Co.* See also Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1212–13 (1988) (citing Struve).

⁹² See Struve, *supra* note 91, at 1463 n.1 (concluding that “[t]he term ‘less restrictive alternative’ is derived from antitrust law,” citing Justice Brennan’s concurrence in *White Motor*).

The poor fit suggests that the term may be a transplant. Evidence of a conceptual borrowing, however, is lacking.⁹³

The analogy from constitutional law has been pursued by agencies as well as courts. Consider the Federal Communications Commission’s ongoing effort to implement “network neutrality” regulation.⁹⁴ In 2008, the Commission considered allegations that Comcast had anticompetitively interfered with its Internet customers’ efforts to use BitTorrent and other filesharing applications. In its order, the Commission concluded that Comcast had discriminated against and thereby impeded certain applications.⁹⁵ Comcast countered that these actions were merely “reasonable network management.”⁹⁶ To evaluate these claims, the Commission fashioned a test based on strict scrutiny, requiring that the conduct “further a critically important interest and be narrowly or carefully tailored to serve that interest,”⁹⁷ with an LRA test constituting part of the tailoring analysis.⁹⁸

The analogy has been used both affirmatively and negatively. For example, in *NFL v. North American Soccer League*, the Second Circuit struck down, on LRA grounds, a National Football League rule prohibiting team owners from owning other sports teams.⁹⁹ Dissenting from a denial of certiorari, Justice Rehnquist made an explicit and unfavorable connection between the

⁹³ Struve concluded that the term came from *White Motor*, but that the *principle* had earlier origins. Yao and Dahdouh misread Struve as having “pointed to the antitrust laws as the prime source for use of the concept.” Yao & Dahdouh, *supra* note 62, at 37.

⁹⁴ In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13,028 (2008) [hereinafter Comcast Order]. The FCC was not applying antitrust law, but antitrust principles are similar in this context. This order was subsequently vacated by the D.C. Circuit. *Comcast Corp. v. FCC*, 600 F.3d 642 (2010).

⁹⁵ Comcast Order, *supra* note 94, at 13,052–53.

⁹⁶ *Id.* at 13,054.

⁹⁷ *Id.* at 13,055; *see also id.* at 13,055–56 (“[T]here must be a tight fit between its chosen practices and a significant goal.”); *id.* at 13,091 (dissenting statement of Commissioner Robert M. McDowell) (“Perhaps most puzzling of all is the Commission’s use of a ‘strict scrutiny’ type standard to strike down the actions of a private party engaged in management of its network.”) In support of its test, the Commission cited, among other cases, *Maine v. Taylor*. *See id.* at 13,056 n.221.

⁹⁸ *Id.* at 13,057–58.

⁹⁹ *North American Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir. 1982).

decision below and use of the LRA test in probing state action. Rehnquist protested the importation of a “least restrictive alternatives” analysis from constitutional law as a step “too far.”¹⁰⁰

Such borrowing is not surprising. As noted in the introduction, courts perceive an open-ended, “constitutional” mandate to shape antitrust law. Antitrust law is rightly seen as the paradigmatic case of a “super-statute.”¹⁰¹ The perceived open-endedness of the analysis invites connections between the two, such as Justice Breyer’s analogy between “reasonable” limitations on competition and limitations on speech.¹⁰²

Moreover, judges are generalists, and work with the materials that are ready at hand. For most federal judges, constitutional cases are a lot more familiar than antitrust cases, and so the constitutional analogy is a natural one. In some cases, the borrowing shades into a blurring of constitutional and antitrust analysis. For example, in its earliest attempts to determine which agreements violate the Sherman Act, the Court relied heavily on a distinction between “direct” and “indirect” effects drawn from Commerce Clause jurisprudence.¹⁰³ The elision of

¹⁰⁰ *National Football League v. North American Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting) (“The Court of Appeals has taken this statement too far by adopting the least restrictive alternative analysis that is sometimes used in constitutional law.”). Justice Rehnquist’s disagreement was a matter of degree, not kind. Rehnquist would have substituted “reasonable necess[ity]” in place of “absolute necessity.” *Id.* at 1079–80.

¹⁰¹ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231 (2001) (offering the Sherman Act as the first and “classic” example of a super-statute).

¹⁰² See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 48 (2005) (“[J]ust as a restraint of trade is sometimes lawful because it furthers, rather than restricts, competition, so a restriction on speech, even when political speech is at issue, will sometimes prove reasonable, hence lawful.”). *Cf.* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 459 (2010) (analyzing “surprisingly unnoticed” borrowings among constitutional doctrines).

¹⁰³ See *United States v. Joint-Traffic Ass’n*, 171 U.S. 505, 568 (1898) (Sherman Act applies only to “contracts whose direct and immediate effect is a restraint upon interstate commerce”); *Hopkins v. United States*, 171 U.S. 578 (1898) (similar). The Sherman Act has had a reciprocal effect in shaping the interpretation of the Commerce Clause. See Eskridge & Ferejohn, *supra* note 101, at 1236 (concluding that “the Sherman Act has exercised a gravitational pull on constitutional law,” as expansive readings of the Commerce Clause were used to support expansions of antitrust law).

constitutional and antitrust analysis has produced one of the great mistakes in antitrust doctrine, the baseball exemption.¹⁰⁴

A further reason for comparison is that antitrust and constitutional law use the LRA test in a similar fashion, in response to similar pressures. As explored in Part II, both areas of law reflect a deep-seated anxiety about balancing. Judges in both areas resist making a tradeoff between the harm of the challenged conduct and the benefit claimed by the defendant. That anxiety has encouraged the use of the LRA test as a shortcut that avoids the need to balance effects. Moreover, as discussed in Part III, both areas of law, to varying degrees, have considered the test as a tool for smoking out.

One reason to resist the comparison is that the rights and values at stake are different, a point heavily emphasized by a dissenting commissioner in the Comcast proceeding.¹⁰⁵ Indeed, the differences are real, and inform the subsequent analysis. The contrast, however, should not be overstated. Corporate interference with economic liberty has something important in common with government interference with individual liberty. John Hart Ely's influential account of constitutional scrutiny acknowledges the kinship between political market failures and the market failures of concern to antitrust:

The approach to constitutional adjudication recommended here is akin to what might be called an “antitrust” as opposed to a “regulatory” orientation to economic affairs—rather than dictate substantive results it intervenes only when the “market,” in our case the political market, is systemically malfunctioning.¹⁰⁶

¹⁰⁴ *Toolson v. New York Yankees*, 346 U.S. 356 (1956) (per curiam) (holding that “the business of baseball” is beyond the reach of antitrust law); *id.* at 360–62 (Burton, J., dissenting) (noting that the Court’s new holding interpreted the statute, whereas previous rulings relied on a narrow and by then discredited reading of the Commerce Clause).

¹⁰⁵ In the Comcast order, one of two dissenting commissioners (discussing strict scrutiny as a whole, not just an LRA test) thought it “inappropriate . . . to judge the actions of a private actor by a standard that has generally been reserved for determining whether the *government* has trampled on the fundamental constitutional rights of *individuals*.” Comcast Order, *supra* note 94 (dissenting statement of Commissioner Robert M. McDowell) (emphasis in original).

¹⁰⁶ ELY, *supra* note 84, at 102–03.

The analogy is even closer for scrutiny under the dormant commerce clause, which is ultimately concerned with a free and fair playing field for business transactions. The norm being enforced judicially is the preservation of the freedom to trade. Preservation of a sphere of economic liberty is at the heart of antitrust analysis as well. To understand the application and performance of the LRA test in these two contexts—both their similarities and differences—therefore requires a closer look at the work of the test.

II. LRAs as a Shortcut

This Part considers the use of LRA tests as a shortcut that avoids a more difficult, demanding, and error-prone balancing of incremental benefits against incremental costs. Part II.A describes the components of a cost-benefit analysis of mixed conduct and locates the demand for a shortcut, in both constitutional and antitrust law, in an anxiety about balancing. Part II.B describes the LRA test, in its limited, equally-effective-alternatives form, as a shortcut that relieves the anxiety. Part II.C considers the restricted scope of application of the test, so conceived.

A. Anxiety About Balancing

To see the effect of a shortcut, we must first consider what the longer path looks like. Consider how a mixed restraint of trade or mixed state action would be evaluated through the lens of cost-benefit analysis. A cost-benefit approach to mixed conduct has two key features of relevance for understanding the LRA test.¹⁰⁷ First, it generally entails *balancing*. By balancing, I mean an explicit trading off of the incremental harms and incremental benefits of one option, compared to another. For example, the NCAA rule in *O'Bannon* harms athletes but also yields

¹⁰⁷ The literature on cost-benefit analysis is vast; the discussion here is necessarily selective.

the benefit of a more popular form of entertainment. A cost-benefit approach would assess which effect is more important, or equivalently, whether the net effect is negative. Similarly, the fundraising statute in *Riley* burdened speech interests, but also served a state goal of improved information about charities. Again, the cost-benefit approach would ask which effect is larger, or the sign of the net effect.

Although in general, cost-benefit comparisons require balancing, that is not always the case. If one action has greater or equal benefit and also lesser burden on speech or competition, compared to another, it is decisively better. Such alternatives offer a free lunch. We may choose it without regret. These are the easy cases, in which cost-benefit analysis can be performed without needing to explore any tradeoff.

The cost-benefit analysis must be performed by reference to some baseline. The most common baseline is the status quo in which the conduct is absent—the current state of affairs, if the action is challenged before it takes effect, or else the pre-action status quo. However, the analysis is not limited to a comparison of the action and the status quo. It also draws in additional *alternatives* beyond these two possibilities. This is a second feature of the cost-benefit approach. An examination of unchosen alternatives—both their pros and cons—is a natural and indeed standard part of cost-benefit analysis, implemented (among other places) in the development and review of agency regulations.¹⁰⁸

Constitutional law cases and commentary, in the areas I have described, resist a cost-benefit comparison of this kind.¹⁰⁹ In particular, they resist performing an open tradeoff between

¹⁰⁸ Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2006) (III.A.2, evaluation of alternatives); Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4, Regulatory Analysis (2003), available at http://www.whitehouse.gov/omb/circulars_a004_a-4.

¹⁰⁹ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 984 (1987) (noting and criticizing “recent opinions that have openly explored the ‘costs’ and ‘benefits’ of constitutional rules and appealed to empirical evidence of the effect of constitutional doctrine on societal interests”).

the harm to a protected interest and the benefit of a challenged state action. This resistance has various sources and is the subject of a large literature. A major theme of that literature is that making this tradeoff is not the proper role of the judiciary. Courts fear second-guessing or, worse, insulting the legislature.¹¹⁰ After all, the legislature is the branch charged with making and weighing policy tradeoffs in the first instance, not the courts.¹¹¹ Redoing the legislature’s work also raises serious separation of powers concerns.¹¹²

A second theme is that the tradeoff is impossible to perform in a coherent or responsible manner. Performing the tradeoff requires a confrontation of incommensurable values.¹¹³ On this view, the burden on a fundraiser’s right to be free from compelled speech simply cannot be coherently placed on the same scale as the state’s interest in disseminating information about charitable giving. This problem has been memorably described as the futile attempt to “judg[e] whether a particular line is longer than a particular rock is heavy.”¹¹⁴ That was in a dormant

¹¹⁰ See, e.g., Siegel, *supra* note 75, at 397 (2006) (noting Justices’ reluctance to “overrul[e] the legislative determination that the benefit to society brought about by burdening a protected right is worth it in the particular instance.”); *id.* (describing illicit motive review as an attempt to avoid “[c]ost-benefit analysis, which inevitably involves judicial second-guessing of a legislature’s or executive branches balance among competing policy interests”); Regan, *supra* note 84, at 1131 (“The court has no warrant for second-guessing the legislature”); Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164–65 (1978) (criticizing balancing because of a belief that judges, as a practical matter, will be reticent to second-guess legislatures).

¹¹¹ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (“Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, and ‘ill suited to the judicial function.’”) (citations omitted).

¹¹² See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21-22 (1972) (discussing the evaluation of means rather than ends in order to avoid “ultimate value judgments about the legitimacy and importance of legislative purposes”).

¹¹³ There is a vast literature on incommensurability. For a sampling, see Matthew Adler, *Symposium: Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1169–84 (1998) (surveying various contributions to incommensurability scholarship in symposium on the topic); Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Rule of the World?*, 1995 UTAH L. REV. 683, 690 (1995) (proposing “utilitarian approach to incommensurability”); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 795–801 (1994) (defining incommensurability and discussing problem of valuation). Scholarship distinguishes between incommensurability—the problem of defining disparate values along a common metric—and incomparability, the need to choose among incommensurate options. Even if values are incommensurable, they may nevertheless be sufficiently comparable to enable a choice. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 193–94 (2000). See also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 322 (1986); Ruth Chang, *Introduction*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 2, 4 (Ruth Chang ed., 1997); Sunstein, *supra*, at 798 (“Incommensurability need not entail incomparability.”).

¹¹⁴ *Bendix Autolite*, 386 U.S. at 897.

commerce clause case; one might expect the problem to be even more severe where the interests at stake are less commercial in nature. Constitutional analysis thus contains two powerful reasons to avoid balancing if possible.

In antitrust, by contrast, one would expect balancing to be a common element of antitrust analysis. The sources of fundamental anxiety about balancing are missing. Unlike constitutional law, there is no fear of insulting the action's author. Firms have no privileged status; there is no countermajoritarian difficulty. Moreover, in antitrust, courts are regarded to have a clear mandate to engage in common lawmaking.

Nor is there incommensurability to be avoided in antitrust. The values traded off, the anticompetitive effect versus procompetitive or efficiency justification, are widely viewed to be commensurable—it's just money on either side of the balance.¹¹⁵ In principle, we can measure the welfare loss to college players and compare it to the welfare gain from the accompanying increased popularity of college sports.

Consistent with this expectation, balancing is frequently and explicitly stated to be at the heart of antitrust analysis. Canonical statements of the rule of reason,¹¹⁶ horizontal mergers,¹¹⁷

¹¹⁵ See, e.g., Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 64 (2013) (in an efficiency-focused conception of antitrust, pros and cons are easy to compare).

¹¹⁶ Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999) (assessing "net procompetitive effect" as part of rule of reason); *id.* at 774 (inquiring into "net anticompetitive effect" of restraint); *id.* at 782 (Breyer, J., dissenting) (evaluating "offsetting" procompetitive justifications notwithstanding a restraint's anticompetitive effects); Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (emphasizing "offsetting efficiency gains"); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) ("countervailing procompetitive virtue"); *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011 (7th Cir. 2012) (Posner, J.) ("The rule of reason directs an assessment of the total economic effects of a restrictive practice that is plausibly argued to increase competition or other economic values on balance."); *Interface Group v. Mass. Port Auth.*, 816 F.2d 9, 10 (1st Cir. 1987) (Breyer, then-J.) (agreement is unreasonable when the "anticompetitive consequences . . . outweigh its legitimate business purposes"); COLLABORATION GUIDELINES, *supra* note 33, at § 3.3 (considering procompetitive benefits that "offset the anticompetitive harm").

¹¹⁷ FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) (considering whether "anticompetitive effects . . . will be offset by efficiencies"); HORIZONTAL MERGER GUIDELINES, *supra* note 34.

and monopolization cases¹¹⁸ all culminate in a determination of net effects. There appears to a judicial consensus that the search for net effects is appropriate.¹¹⁹

However, judicial analysis of mixed restraints is nevertheless afflicted with a reluctance to balance. The problems are practical, rather than fundamental. The concerns are about accurate quantification and judicial capacity to perform that task.¹²⁰ The balance is not simple to calculate. It is challenging to measure and compare a price rise to a countervailing improvement in, say, product quality or production costs. The quantification problem is perhaps most difficult when effects on innovation are at stake. In exclusion cases, lost innovation is an important or even the paramount harm that must be weighed against a claimed justification.¹²¹ Moreover, innovation sometimes appears on the other side of the balance, as defendants offer increased innovation as a justification.¹²² A predicted or realized change in innovation is comparable in principle, but the practicalities are daunting, and precise measurements are usually unavailable.

The anxiety about balancing has led courts and commentators to shy away from an analysis of net effects. Judge Bork dismissed the possibility of “weigh[ing] procompetitive effects against anticompetitive effects” thusly: “we do not think that a usable formula if it implies an ability to quantify the effects and compare the values found.”¹²³ The leading treatise, while flatly declaring that the rule of reason includes a balancing step at the end, regards the

¹¹⁸ *United States v. Microsoft*, 253 F.3d 34, 59 (2001) (en banc) (per curiam) (“[P]laintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.”); *see also id.* (asking “whether the monopolist’s conduct on balance harms competition”).

¹¹⁹ One classic account of net effects is Oliver Williamson, *Economics as an Anti-Trust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

¹²⁰ *Cf.* Cass Sunstein, *Nonquantifiable* (2013).

¹²¹ *See* C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1210–13 (2013).

¹²² *E.g.*, Timothy J. Muris, Chairman, FTC, Statement in the Matter of Genzyme Corporation/Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004), *available at* <http://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf>.

¹²³ *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986).

prospect with trepidation: if the Court reaches that step, it “must *somehow* weigh and balance the harm against the benefit.”¹²⁴

Beyond all this, even if the analysis could be performed in an error-free fashion, it would be costly to perform. If we can find a less costly way to resolve the case, we should be eager to do so.

As a consequence, courts appear to avoid balancing in practice. For example, consider the rule of reason. Although it is commonplace to understand the rule of reason as a fact-intensive search for net effects, cases are seldom decided on that explicit basis. An extensive survey of rule of reason cases concludes that very few cases reach the final step in which a net effect is determined.¹²⁵ One observer has gone so far as to declare that explicit balancing is a “myth.”¹²⁶

B. The Shortcut: Equally Effective Alternatives

The LRA test relieves the anxiety created by balancing by offering a way out. The key is to focus on a particular version of the LRA test, one that insists on an equally effective alternative. That is, the alternative must not only be less restrictive (harmful) along the dimension of concern, but also (at least) equally beneficial along the dimension of the defendant’s claimed justification.

¹²⁴ 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1507b (3d ed. 2010) (emphasis added).

¹²⁵ See Carrier, *supra* note 62, at 1272–73 (concluding that balancing took place in less than 5 percent of surveyed rule of reason cases); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (updating previous study, and finding that 2 percent of cases in the more recent sample resulted in balancing). Most cases fail for lack of anticompetitive effect, and thus do not present mixed conduct.

¹²⁶ Andrew I. Gavil, *Burdens of Proof in U.S. Antitrust Law* 125, 147, in 1 ISSUES IN COMPETITION LAW AND POLICY 125 (American Bar Association 2008).

Such LRAs offer the free lunch discussed in the previous section.¹²⁷ To be clear, this test credits only some no-regret moves, not all. An alternative that is *more* effective and equally restrictive does not count as an LRA. Moreover, the analysis considers the action and the alternative only along the dimensions of the restriction and the justification. It therefore omits the many other axes along which conduct might be desirable or harmful.

The operation of the test is depicted in Figure 1. The figure depicts the conduct (point A) and an alternative (point Z) along the dimensions of justification and restriction. Here, A has equal or lesser benefit compared to Z, and greater restriction, and thus the existence of Z provides a basis for condemning A. The same is true for any conduct to the southwest of Z. By contrast, suppose the LRA is less effective in achieving the defendant's aim, a scenario depicted by point Z' in Figure 1. A is to the *northwest* of Z'. Hence Z' would not furnish a basis for condemning A.

The LRA, limited in this fashion, offers a potentially valuable shortcut. Such an LRA avoids the difficult conflict of values at the heart of mixed conduct. There is no need to trade off the justification against the restriction.¹²⁸ The temperature is lowered; the conflict of values is converted to a technical exercise.

The limitation to equally effective alternatives is often embraced by both constitutional and antitrust law. In U.S. constitutional law, some opinions make this explicit.¹²⁹ Outside of the

¹²⁷ In the proportionality literature, these are sometimes described as Pareto improvements. *E.g.*, BARAK, *supra* note 26, at 320 & n.12; Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 198 (2006). That label presents some risk of confusion. The Pareto label treats the various entities as fundamentally similar or comparable, which may be inapt depending on the setting, and overlooks the lost benefit to a defendant—albeit an illicit benefit—from shifting to an LRA.

¹²⁸ Although there is no “balancing” in the sense I have defined it, there may be balancing in other senses of the term. For example, finding a free lunch might be regarded as identifying a different balance, compared to that selected by the legislature. This may be what Mathews and Stone Sweet mean when they say that the LRA test entails balancing.

¹²⁹ *E.g.*, *Playboy Entertainment Group*, 529 U.S. 803, 813 (2000) (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997), for the proposition that any “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective”); *Ashcroft v. ACLU*, 542 U.S. 656, 669 (government must establish that proposed LRA is less effective); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (asking “whether alternative means could promote this [legitimate] local purpose as well without discriminating against interstate commerce”); *Burwell v. Hobby Lobby*,

United States, the limitation is even clearer. Many constitutional democracies evaluate constitutional claims under so-called proportionality analysis. The “heart”¹³⁰ of this review is an LRA test, and commentators caution that only an equally effective alternative counts.¹³¹

In antitrust, the limitation to equally effective alternatives is a common refrain.¹³² Where the equal effectiveness requirement is not explicit, it is often implied. After all, this limitation is needed if balancing is to be avoided. That said, many cases simply call for a “less restrictive alternative,” without specifying whether a narrow or broader use of the test is being employed.¹³³

The shortcut relieves the anxiety to different degrees in antitrust and constitutional analysis. In antitrust, the shortcut resolves the anxiety completely. The messy practicalities of balancing are avoided. In constitutional law, the problems of incommensurability are avoided. The conflict with the legislature is lessened,¹³⁴ though not removed entirely. The legislature’s decision about effects, after all, is still being second guessed. In essence, the court is telling the

134 S. Ct. 2751, 2783 (2014) (“as effectively”); *id.* at 2801 (dissent of Ginsburg, J.) (“equally effectively”); *see also* District of Columbia v. Heller, 554 U.S. 570, 712 (2008) (Breyer, J., dissenting) (proposing rule that includes search for LRAs that are “equally effective”).

¹³⁰ BARAK, *supra* note 26, at 337 (quoting United Mizrahi Bank Ltd. v. Migdal Cooperative Village ¶ 95 (1995) (Barak, J.): “the most important [test]”; “the heart of the requirement of proportionality”); *see also* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 38-36, 38-37 (5th ed. 2007) (in Canada, the requirement “has turned out to be the heart and soul” of the test; “for the great majority of cases, the arena of debate” is this step); Grainne de Burca, The Principle of Proportionality and its Application in EC Law, 13 Y.B. EUR. L. 105, 146 (1993) (necessity is the “most prominent” step in ECJ reasoning).

¹³¹ *See, e.g.*, BARAK, *supra* note 26, at 321 (“[T]he necessity test does not require the use of means whose limitation is the smallest, or even of a lesser extent, if the means cannot achieve the proper purpose to the same extent as the means chosen by the law.”).

¹³² *E.g.*, MODEL JURY INSTRUCTIONS, *supra* note 32, at A-10 (providing that LRA must confer “same benefits”); County of Tuolumne v. Sonora Community Hospital, 236 F.3d 1148 (9th Cir. 2001) (concluding that proposed LRAs are less effective, and ruling in favor of defendants at subsequent balancing stage); LePage’s Inc. v. 3M, 324 F.3d 141, 178 (3d Cir. 2003) (Greenberg, J., dissenting) (LRA must serve the purpose “fully”); Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke’s Health System, Ltd., No. 12-CV-00560, 2014 WL 407446, at *1 (D. Idaho Jan. 24, 2014) (LRA must have the “same” effect); COLLABORATION GUIDELINES, *supra* note 33, at § 3.36(b) (LRA must achieve “similar” efficiencies). *See also* Comcast Order, *supra* note 94 (limiting analysis to equally effective LRAs).

¹³³ *See also* Feldman, *supra*, at 599 (reading the case law to accept less effective alternatives). To the extent the cases permit less effective alternatives, that is a good thing, as discussed *infra* Part IV.

¹³⁴ BARAK, *supra* note 26, at 338 (“Courts usually prefer to announce the lack of proportionality without resorting to any balancing tests. In that way, the courts avoid unnecessary conflict with the legislator, as their decision is perceived as a ‘factual’ matter, without the need for balancing”); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011) (similar).

legislature that it failed to identify a no-regret move. An alternative response to the concern about intrusion is to analyze motive rather than effect. That alternative is taken up in Part III.

C. Scope of Application

The shortcut conception of the LRA test, though sound in theory, has limited application in practice for two reasons. First, the equal effectiveness limitation is hard to satisfy, and in fact is not satisfied in important instances in which it is applied. Second, the information requirements of the test are demanding, undercutting its effectiveness as a shortcut.

1. Rarely Satisfied

A fundamental limitation of the LRA test, conceived as a shortcut, is that it is seldom satisfied. Often, the available alternatives are in fact less effective in serving the goal. This is the case even in instances where the court credits the existence of an LRA. Consider, for example, the fundraising statute in *Riley*. The asserted LRA—publishing the financial disclosure forms, instead of compelling speech by the fundraisers—was surely less effective in informing donors about the fundraiser’s efficacy.¹³⁵

Occasionally, the Court acknowledges that the LRA is less effective. In *Hunt v. Washington Apple Advertising Commission*,¹³⁶ the Court considered a North Carolina statute that banned the use of Washington state’s system for grading apples, which had the effect of benefitting North Carolina apples at the expense of out-of-state apples. The Court invalidated the statute as a violation of the dormant commerce clause. The state’s asserted justification was that the existing federal grading standard served customers well, and that using a state system in

¹³⁵ See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2441–42 (1996) (making this point).

¹³⁶ 432 U.S. 333 (1977).

addition would confuse consumers.¹³⁷ The Court recognized an LRA, to allow both federal and state systems side-by-side, while acknowledging that the LRA was less effective, as consumers might be more confused under the dual scheme.¹³⁸

A heavily contested example is *Burwell v. Hobby Lobby*,¹³⁹ where the Court considered a provision of the Affordable Care Act requiring corporations to provide employees with insurance coverage for certain forms of contraception. This mandate was challenged as a violation of the Religious Freedom Restoration Act (RFRA), which invalidates federal legislation that burdens the free exercise of religion.¹⁴⁰ RFRA applies the LRA test as part of its imposition of strict scrutiny, and the Court emphasized the LRA test as a powerful tool otherwise missing from the constitutional test.¹⁴¹ The mandate was invalidated in light of two LRAs that, the Court said, would serve the government's purposes equally effectively.¹⁴²

The first LRA was for the government to provide the service directly. This LRA, however, is clearly less effective. As the principal dissent pointed out, public provision would impose extra costs on the government and impose logistical hurdles that the ACA was designed to avoid.¹⁴³ The Court offered a partial response to the first point¹⁴⁴ and none to the second, ultimately declining to rest judgment on this LRA. Instead, the Court relied on a second LRA

¹³⁷ *Id.* at 334 (“The North Carolina statute, appellants claim, was enacted to eliminate this source of deception and confusion by replacing the numerous state grades with a single uniform standard.”)

¹³⁸ *Id.* at 354. *See also* Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1237 (1986).

¹³⁹ 134 S. Ct. 2751 (2014).

¹⁴⁰ 42 U.S.C. §§ 2000bb et seq.

¹⁴¹ The Court asserted that this tool was missing from Free Exercise jurisprudence before *Employment Division v. Smith*. 134 S. Ct. at 2761 n.3, 2767 n.18; *see also* *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) (making this point). However, this conclusion is debatable given the inclusion of an LRA test in *Sherbert*. *See* notes 77–78 *supra* and accompanying text.

¹⁴² *Hobby Lobby*, 134 S. Ct. at 2783 (“as effectively”); *see also id.* at 2801 (Ginsburg, J., dissenting) (“equally effectively”).

¹⁴³ *Id.* at 2802 (quoting stated governmental goal of “minimal logistical and administrative obstacles”).

¹⁴⁴ The Court pointed out that RLUIPA, a “sister statute” to RFRA, provides that “[t]his chapter may require a government to incur expenses in its operations to avoid imposing a substantial burden on religious exercise.” 42 U.S.C. § 2000cc-3(c). An analogous does not appear in RFRA, and arguably does not extend to the creation of new government programs.

that had been “barely addressed” by the parties, an opt-out mechanism that the Department of Health and Human Services had already implemented for non-profit organizations.¹⁴⁵ Although the Court asserted this LRA was equally effective,¹⁴⁶ a closer examination demonstrates that it too would be more costly to the Government, handing the bill in an important set of cases to taxpayers rather than the employer.¹⁴⁷

Antitrust law condemns conduct based on less effective alternatives as well. For example, the *O’Bannon* court accepted an LRA that creates a trust fund for players. However, this LRA imperfectly serves the NCAA’s credited justifications. The players are still being paid—potentially a large amount, just delayed. That hardly preserves college athletics as a money-free zone. Moreover, players will likely be able to borrow against future earnings and thereby spend during school, in derogation of the integration goal. The court’s proposed LRA therefore fails as an equally effective alternative.

As a second example, consider the *St. Luke’s* case, a recent merger of physician practices that was challenged by the FTC.¹⁴⁸ The transaction brought 80 percent of primary care physicians in Nampa, Idaho, under the same roof. After a bench trial, the district court concluded that the merger was likely to raise the price of health care.¹⁴⁹ At the same time, the judge

¹⁴⁵ *Hobby Lobby*, 134 S. Ct. at 2802 & 2803 n.27 (Ginsburg, J., dissenting).

¹⁴⁶ *Id.* at 2782.

¹⁴⁷ For self-insured organizations, a third-party administrator “provide[s] or arrange[s] payments,” and is then reimbursed by the Government in the form of a reduced fee. 78 Fed. Reg. 39,893 (2013). The Government would thus be forced to pay if this opt-out were extended to self-insured for-profit corporations. The Court minimized this expense in a footnote, noting that HHS had determined that the resulting outlay would “represent only a small portion” of the fee in question. *Id.* at 39,882. Even if this determination would also apply to for-profit corporations, still the Government is being forced to pay, rather than obliging the corporation to do so.

¹⁴⁸ *Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke’s Health System, Ltd.*, No. 12-CV-00560, 2014 WL 407446 (D. Idaho Jan. 24, 2014).

¹⁴⁹ *Id.* at *7–*8 (noting likely price rise and other bad effects). The court noted considered that some patients might go to neighboring Boise in response to a price rise, but considered this source of competitive discipline to be limited. *Id.* Prior to the transaction, only 15 percent of Nampa residents went to Boise for care. *Id.* at *7. For a more general analysis, see Laurence C. Baker, M. Kate Bundorf & Daniel P. Kessler, *Vertical Integration: Hospital Ownership Of Physician Practices Is Associated With Higher Prices And Spending*, 33 HEALTH AFF. 756 (2014).

recognized an important efficiency resulting from the deal, increased integration of doctors with other medical providers. Integrated providers can better coordinate care, and by negotiating payment based on outcomes rather than procedures performed, they have an incentive to economize on utilization over time.¹⁵⁰ The court “complimented” the acquirer on its “foresight and vision” in acquiring practices to advance its integration goal.¹⁵¹

Nevertheless, the court condemned the merger on the ground that the “same effect” could be accomplished instead through the LRA, a contract-based network of providers.¹⁵² The court offered a specific rebuttal as to just one component of defendant’s efficiency claim, that shared electronic records required a merger.¹⁵³ Otherwise, the court simply asserted the general proposition that a network was sufficient to achieve the benefits of integration,¹⁵⁴ and stated that defendants had failed to meet their burden in establishing the absence of an LRA.¹⁵⁵ The court’s unsupported confidence that a contractual network would be equally effective is doubtful, given previous, failed efforts to accomplish integration without merger in Nampa¹⁵⁶ and the view of some health care experts that integrated care is best served by a high degree of formal integration.¹⁵⁷ To be clear, my point is not that the transaction should necessarily have been

¹⁵⁰ *Id.* at *1 (shift to integrated care “require[s] a major shift away from our fragmented delivery system”).

¹⁵¹ *Id.*; *see also id.* at *2 (“The Acquisition was intended . . . primarily to improve patient outcomes. The Court is convinced that it would have that effect if left intact, and St. Luke’s is to be applauded for its efforts to improve the delivery of health care . . .”).

¹⁵² *Id.* at *2 (“[T]here are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs.”).

¹⁵³ *Id.* at *19.

¹⁵⁴ *Id.* at *17 (“Because a committed team can be assembled without employing physicians, a committed team is not a merger-specific efficiency of the Acquisition.”);

¹⁵⁵ *Id.* at *24. For a critique of this allocation of burdens, *see infra* Part IV.C.2.

¹⁵⁶ *Id.* at *4 (noting the failure of earlier collaborations); *see also* Defendant’s Excerpts of Record at 517–18 (quoting response of plaintiffs’ expert, asked whether loose affiliation would be equally effective: “The jury is still out”).

¹⁵⁷ *See, e.g.,* BERKELEY FORUM, A NEW VISION 6 (2013) (endorsing increase in care via “fully- or highly-integrated care systems”); KAISER COMM’N ON MEDICAID & THE UNINSURED, INTEGRATING PHYSICAL AND BEHAVIORAL HEALTH CARE: PROMISING MEDICAID MODELS 1 (2014); Alain C. Enthoven & Laura A. Tollen, *Competition in Health Care: It Takes Systems to Pursue Quality and Efficiency*, HEALTH AFF. W5–420 (2005).

permitted, but that the court never engaged with a tradeoff between higher prices and improved integration, due to its hasty conclusion about an LRA.

Or consider *Arizona v. Maricopa County Medical Society*,¹⁵⁸ where the Supreme Court reviewed an antitrust challenge to a maximum fee schedule set by an association of doctors. The doctors offered the justification that a fee schedule lowers the cost of providing insurance.¹⁵⁹ The Court entertained this justification,¹⁶⁰ but perceived an LRA, that insurers could set the fee schedule instead of doctors. There, the Court conceded quietly that this LRA would be less effective.¹⁶¹

The point is general. Many, perhaps most, LRAs are less effective in fact.¹⁶² *O'Bannon*, *St. Luke's*, *Maricopa County*, and *PNB* illustrate the point for horizontal agreement and merger. Likewise, in vertical restraints, contractual specification often fails to fully supply dealers with an incentive to provide good service. Likewise in tying cases: if IBM really wants to make sure that subpar punch cards are kept out of its machines, a ban is better than a public relations campaign.

To be sure, not all LRAs are less effective. One set of cases that meets the equal effectiveness limitation arises when the action (private or public) makes *no* incremental contribution to the claimed justification. The LRA is simply to cease (or never take) the action. Without the conduct, the level of benefit would be unchanged. The conduct is unnecessary, not merely in the usual sense that *switching* to an alternative achieves the same benefit with less

¹⁵⁸ 457 U.S. 332 (1982).

¹⁵⁹ *Id.* (noting the resulting “potential for lower insurance premiums”); *see also id.* at n.25 (noting that fee schedule could make it “easier” and “less expensive” to calculate risks).

¹⁶⁰ The Court condemned the conduct on a per se basis, but only after considering and rejecting the defendants’ proffered justification.

¹⁶¹ *Id.* at 353–54 (acknowledging that “doctors may be able to do it [i.e. set maximum prices] more efficiently than insurers.”).

¹⁶² *See, e.g.*, Meese, *supra* note 62, at 168 (“[M]any of the [LRAs] posited by courts and scholars are either less effective, more expensive to administer, or both.”); Feldman, *supra* note 58, at 602 (describing “typical[l]” LRAs as “a half-way house,” with both less restriction and less justification).

harm, but in the stronger sense that *halting* the conduct—without replacing it with anything else—would do so. This scenario, a special case of Figure 1, is depicted in Figure 2. The alternative of cessation is located at the origin. That LRA suffices to condemn actions (such as point A) to the west of the alternative (point Z).

For example, consider a second antitrust case against the NCAA, decided more than 30 years before *O’Bannon*.¹⁶³ Plaintiffs challenged an NCAA rule that limited the number of games broadcast on television, thereby increasing the price for advertising paid by networks.¹⁶⁴ The NCAA contended that its rule helped maintain competitive balance among the teams, ultimately redounding to consumer benefit.¹⁶⁵ The Supreme Court rejected this justification on the ground that competitive balance was already promoted equally well by other existing NCAA rules that had no restrictive effect.¹⁶⁶ In other words, where, as there, the conduct made no incremental contribution to the benefit, the LRA of cessation served the goal equally well.

In constitutional law, this idea is captured by statements that the state action fails narrow tailoring because the action makes no contribution to the advancement of the state’s claimed interest.¹⁶⁷ In antitrust, we sometimes say that the restraint is not “ancillary” to a desirable business transaction.¹⁶⁸ Restraints that fail ancillarity are condemned; ancillary restraints are subjected to an LRA analysis. A restraint might fail ancillarity either because it simply has no causal relationship to the claimed benefit, or—as in the NCAA television case—because the

¹⁶³ NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

¹⁶⁴ *Id.* at 105–06.

¹⁶⁵ *Id.* at 117–20. The Court rejected other justifications offered by the NCAA. *Id.* at 104–17.

¹⁶⁶ *Id.* at 119 (“[T]he 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.”) (internal quotation omitted).

¹⁶⁷ *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 226, 228–29 (1989); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *Buckley v. Valeo*, 424 U.S. 1, 45–47, 53 (1976); *Volokh*, *supra* note 135 (discussing these and other cases).

¹⁶⁸ *See, e.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.).

benefit is already being achieved to some degree, and the restraint provides no incremental benefit.

2. Information Demands

In many areas of law, courts employ shortcuts to reduce the dimensionality of a difficult problem, to economize on resources, and to avoid hard questions when they can answer easy ones instead. Many shortcuts offer the familiar benefit of a rule over a standard, namely simplicity at the expense of accuracy. For example, in antitrust, courts have adopted an explicitly underinclusive rule for predatory pricing.¹⁶⁹ Price fixing is per se illegal, despite the acknowledgement that in some instances it could be welfare enhancing.¹⁷⁰ Many claims require a finding of horizontal agreement, which may serve as an imperfect proxy for socially harmful activity that can occur even without agreement.¹⁷¹

As shortcuts go, the LRA test is unusual. LRA-as-shortcut does not supply simplicity at the expense of accuracy. It is accurate, provided that its stringent conditions are met. And it is not simple. Its information demands are extensive. Most important, a court needs enough information about the beneficial effect of both the conduct and the alternative to determine that the alternative is at least equal. The court also needs enough information about restrictiveness to confirm that the LRA is in fact less restrictive. This latter requirement is generally easier to meet, as the proposed LRA is usually not restrictive at all.

¹⁶⁹ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (declining to ban above-cost predation, even if it might have an anticompetitive effect, for fear of “courting intolerable risks of chilling legitimate price-cutting”).

¹⁷⁰ MICHAEL D. WHINSTON, LECTURES ON ANTITRUST ECONOMICS (2006) (presenting model of efficient price fixing).

¹⁷¹ See Hemphill & Wu, *supra* note 121, at 1226 (contrasting oligopolistic price elevation, which may be difficult to accomplish without activities, such as communication, that support a finding of agreement, with oligopolistic exclusion, which is easier to accomplish without communication).

The informational requirements are quite daunting in practice. In the examples above (*Riley*, *O'Bannon*, *St. Luke's*), I argued that the credited LRAs are all less effective. Suppose instead that the alternatives embraced by the court were not clearly less effective. At a minimum, it is difficult and costly to establish with confidence that the alternative is equally effective. These informational requirements impose costs similar in nature and size to the avoided costs of calculating net effects.

In some instances, this informational challenge is lessened or even sidestepped thanks to the particular nature of the justification and the LRA. As an example, consider the antitrust treatment of so-called “reverse payment” or “pay-for-delay” settlements of patent litigation in the pharmaceutical industry. Here is the basic issue. A branded drug maker sells a patented drug. A competing generic drug maker wishes to enter the market, before a patent expires. The generic argues that the patent is invalid or not infringed; if it wins, consumers see the benefit of low prices at an early date. The brand sues the generic for patent infringement. The parties settle, and the agreement has two key terms: the brand makes a large payment to the generic, and in turn the generic agrees to delay entry. The Supreme Court recently concluded that these settlements must be evaluated under the rule of reason.¹⁷² There is now ongoing pay-for-delay litigation on at least 19 drugs.¹⁷³

The most obvious harm (though not the only one) in these cases is higher prices for drug purchasers due to the delay in generic entry. In response, defendants have offered the justification that settlement is beneficial because it avoids the risk-bearing costs of a risk averse

¹⁷² *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). This ruling reversed the holding of the court below that such settlements were essentially immune to antitrust scrutiny.

¹⁷³ C. Scott Hemphill, *Unjustified Delays in Generic Drug Competition: Expert Submission to Organization for Economic Cooperation and Development Competition Summit*, June 7, 2014 (listing 18 drugs); *Class Action Complaint, Fraternal Order of Police v. Endo Health Solutions Inc.*, No. 14-cv-3190 (E.D. Pa. June 4, 2014) (Opana ER).

branded firm. However, in many of these cases, the logic of defendants' argument implies that there exists an LRA. In particular, there exists a better settlement with an earlier entry date and a smaller (or zero) payment from the branded drug maker to the generic firm. This settlement would be chosen instead if the anticompetitive settlement were prohibited.¹⁷⁴ The parties' reverse payment settlement can be condemned in light of the LRA, a better settlement.¹⁷⁵ In such cases, the LRA approach offers a simple resolution of the case. It is easy to demonstrate that the benefit is identical—the asserted risk-bearing costs are equally avoided in the alternative settlement. Moreover, the restrictiveness is less. Here, the LRA approach offers a shortcut that, as promised, avoids the need to compare the net effect of the conduct compared to the status quo (i.e., litigation rather than settlement).

* * *

In summary, the LRA conceived as a shortcut is a clean response to the anxiety about balancing. Sometimes it works in practice—for example, in cases where the restraint makes no incremental contribution to the justification, or where the nature of the justification and the LRA makes a clean comparison feasible.

Usually, however, it doesn't apply. The result is a mix of false positives, true but "obscured" positives, and false negatives. At worst, the false embrace of an equally effective alternative results in false positives, the erroneous condemnation of desirable conduct. Even if the conduct is properly condemned, albeit on other grounds, the courts' claim to rely upon an equally effective alternative obscures what is really going on. The tradeoff is not being avoided,

¹⁷⁴ See Aaron Edlin, C. Scott Hemphill, Herbert Hovenkamp, and Carl Shapiro, *The Actavis Inference: Theory and Practice*, RUTGERS L.J. (forthcoming 2015), available at <http://ssrn.com/abstract=2560107>.

¹⁷⁵ *Actavis*, 133 S. Ct. at 2237 (noting that instead of a settlement with "a large, unjustified reverse payment," parties may settle instead by setting an entry date without making a payment); *King Drug v. Cephalon, Inc.*, No. 06-cv-1797, 2015 U.S. Dist. LEXIS 9545, at *44, *53–*54, *62 (E.D. Pa. Jan. 28, 2015) (identifying and applying the rule, drawn from standard rule of reason principles, that plaintiff has opportunity to demonstrate that defendants' conduct was not necessary to achieve the asserted procompetitive objective).

merely being made quietly. In still other cases, no equally effective alternative is available, and none is asserted. Here, limiting the LRA test to equally effective alternatives results in false negatives, harmful conduct that is correctly identified under a broader conception of the LRA test. I return to this issue, and the associated question of quiet balancing, in Part IV. LRA-as-shortcut thus offers only a partial account. We must look elsewhere to understand the test's function.

III. LRAs as Smoking Out

A second conception of the LRA test draws directly upon from constitutional law, that the LRA test reveals or “smokes out” the true state of affairs. Part III.A discusses the test as used in constitutional law to smoke out the state’s true intent. Part III.B considers whether and how this idea might be transplanted to antitrust. Part III.C evaluates its scope of application.

A. Constitutional Law

A large literature in constitutional law presents the court’s proper role as smoking out the true, prohibited intent of state action. This account is associated most closely with Ely and Paul Brest, and has received extensive development by others.¹⁷⁶ The court evaluates the legislature’s motives, rather than the effects of its actions. Focusing on intent avoids a judicial judgment about the desirability of effects and associated infringement of the legislature’s prerogative in selecting appropriate ends and the best means of achieving them. It thereby sidesteps one source of anxiety

¹⁷⁶ ELY, *supra* note 84, at 146–47; Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1443 (1978) (advocating motive inquiry as a “less intrusive” alternative to balancing); Rubinfeld, *supra* note 85, at 436–37; Mathews & Stone Sweet, *supra*, at 805 (in context of necessity); Regan, *supra* note 84, at 1209–33 (reading *Dean Milk* and other dormant commerce clause cases to smoke out motive). For a critique, see Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1138 (1997) (arguing that purpose review, as applied in equal protection cases, “functions to protect the prerogatives of coordinate branches”).

about the proper judicial role discussed in Part II—that courts should not second-guess the legislature in these respects.¹⁷⁷

Examination of the “sincerity” of the government’s claimed justification is an acknowledged function of strict scrutiny.¹⁷⁸ This function is a judicially recognized basis for strict scrutiny of race-based classifications¹⁷⁹ and infringements of freedom of speech.¹⁸⁰ Commentators have perceived a similar role in evaluating claims of state protectionism under the dormant commerce clause.¹⁸¹

Strict scrutiny evaluates intent indirectly. Courts infer intent by evaluating the quality of the fit between the state’s asserted ends and its chosen means. As the Court explained in an equal protection case, scrutiny “ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”¹⁸² This evaluation is undertaken within the narrow tailoring step of strict scrutiny. The LRA component of narrow tailoring does some of the work of smoking out.¹⁸³

For example, in *R.A.V. v. City of St. Paul*,¹⁸⁴ the Court considered a First Amendment challenge to a city ordinance prohibiting “fighting words that insult, or provoke violence, on the

¹⁷⁷ The solution is arguably incomplete, because even a motive review is intrusive.

¹⁷⁸ *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker”).

¹⁷⁹ *E.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) (“The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose.”); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (similar).

¹⁸⁰ *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (strict scrutiny prevents regulation “based on hostility—or favoritism—towards the underlying message expressed”). *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414, 451 (1996); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 96 (1997).

¹⁸¹ *Cf.* *Regan*, *supra* note 84 (arguing that motive inquiry is the proper reading of the dormant commerce clause cases).

¹⁸² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

¹⁸³ ELY, *supra*; Rubinfeld, *supra* note 85, at 436–37.

¹⁸⁴ 505 U.S. 377 (1992).

basis of race, color, creed, religion, or gender.”¹⁸⁵ The city defended the ordinance as necessary “to ensure the basic human rights of members that have historically been subjected to discrimination.”¹⁸⁶ The Court rejected this argument in light of an LRA, a prohibition not limited to the enumerated topics, with “precisely the same beneficial effect.”¹⁸⁷ The Court was open about its search for impermissible motive.¹⁸⁸ Comparing the city’s conduct to the LRA revealed the legislators’ “special hostility towards the particular biases singled out,” a hostility impermissible under the First Amendment.¹⁸⁹

The mechanism by which the LRA test smokes out motive is generally not spelled out. Here I offer one account, picking up on the *R.A.V.* Court’s recognition of an equally effective alternative, and the Court’s stated interest in assessing the probability that the state action reflects an impermissible motive, and how that probability varies depending on the facts.¹⁹⁰ The existence of an LRA is a basis for making a Bayesian inference about the probability that the state had an ill motive. The idea is to begin with a “prior” probability about the issue in question—here, the probability that the state actor has an illicit motive—and adjust that probability in light of a new fact, by comparing the likelihood that the new fact would arise with or without the bad motive.¹⁹¹

The Bayesian analysis provides a way to assess the state’s contrary argument that, despite the burden, it lacks a bad motive. In response to our concern that the state actor knowingly

¹⁸⁵ *Id.* at 391 (internal quotation marks omitted).

¹⁸⁶ *Id.* at 395.

¹⁸⁷ *Id.* This is an example of a “less restrictive alternative” that, in the course of reducing a constitutional burden, actually restricts more speech. See note 74 *supra* and accompanying text.

¹⁸⁸ See, e.g., *id.* at 390 (relevant inquiry is to determine “realistic possibility that official suppression of ideas [was] afoot”); *id.* at 394 (concern is that government “seek[s] to handicap the expression of particular ideas”). See also Kagan, *supra* note 180, at 420–23 (discussing focus on motives in *R.A.V.* without reference to LRA analysis).

¹⁸⁹ *Id.* at 396.

¹⁹⁰ *Id.* at 394 (noting how certain evidence “elevate[s]” the “possibility” of illicit motive to a “certainty”).

¹⁹¹ See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1350–54 (1971).

benefitted from the harm, the defendant might respond that it was merely indifferent to the harm or unaware of it. The starting point is to recognize that the existence of an LRA establishes a gratuitous harm caused by the state’s action, compared to the alternative. It is possible that such a gratuitous harm is just unfortunate happenstance, rather than resulting from the state actor’s preference for it. However, a state decision maker with a bad motive would be likely to choose the action over the alternative. A decision maker without that motive, who was indifferent to the harm, would be less likely to do so. In this manner, the LRA test helps smoke out the hidden “type” of the decisionmaker.

For example, suppose that without considering the gratuitous harm revealed by an LRA, the *R.A.V.* Court believes that St. Paul is 25 percent likely to harbor a bad motive. Suppose further that a gratuitous harm is 80 percent likely to result from a state actor motivated by “special hostility,” and 20 percent likely otherwise. If the court observes a gratuitous harm, it updates its assessment of a likely bad motive. Applying Bayes’ Rule, instead of 20 percent, the court’s new (“posterior”) probability that the state has a bad motive is 57 percent.¹⁹²

Courts have tools at their disposal that would strengthen the inferential force of the LRA test. A court could publicly announce the inferential consequences of a gratuitous harm to constitutional interests. The announcement would state that if the court identifies a gratuitous harm, it will deem the state to have intended to cause that harm. If state actors fully absorb that rule—an important if—they will steer clear of gratuitous harms, except in instances in which the harm really is intended. Such a rule would have the effect of reinforcing a separating equilibrium, and enhancing the court’s ability to screen for bad intent by means of the LRA test.

¹⁹² Here is the calculation. $p(\text{bad motive}|\text{gratuitous harm}) = \frac{p(\text{gratuitous harm}|\text{bad motive}) \cdot p(\text{bad motive})}{p(\text{gratuitous harm}|\text{bad motive}) \cdot p(\text{bad motive}) + p(\text{gratuitous harm}|\text{good motive}) \cdot p(\text{good motive})} = \frac{(0.80 \cdot 0.25)}{(0.80 \cdot 0.25) + (0.20 \cdot 0.75)} \approx 0.57$.

The absence of any such announcement (so far as I am aware) is either a missed opportunity, or a sign that courts do not take the LRA test as a smoking out tool all that seriously.

B. Antitrust Law

1. Smoking Out Intent

Smoking out intent has a less firm foothold in antitrust law. As noted in Part I, Justice Brennan perceived a smoking out function for the LRA test, perhaps influenced by the constitutional law opinions issuing from chambers at the same time. In *White Motor*, his expressed concern was to smoke out the defendant's bad intent: "If the restraint is shown to be excessive for the manufacturer's needs, then its presence invites suspicion . . . that the real purpose of its adoption was to restrict price competition."¹⁹³

The facts of *White Motor* illustrate how this might work in practice. There, the claimed justification for exclusive territories was to encourage distributors to invest in high-quality service. That incentive would be undercut if dealers from other areas could sweep in and cherry-pick customers. The upshot, according to *White Motor*, was to encourage interbrand competition with other manufacturers. The government's proposed LRA was a detailed contract that directly specified the services sought.¹⁹⁴ If the detailed contract also elicited services but without restricting dealer competition, Brennan was suggesting, this would show that the true purpose was to restrict intrabrand competition among its dealers. In line with Brennan's approach, Gabriel Feldman has suggested that the LRA test serves to smoke out intent in antitrust cases.¹⁹⁵

¹⁹³ *White Motor Co. v. United States*, 372 U.S. 253, 270 n.9 (1963) (Brennan, J., concurring).

¹⁹⁴ Brief of Government of United States, 1962 WL 115588. The government suggested, as a further alternative, a contractual promise to employ "best efforts" on the manufacturer's behalf.

¹⁹⁵ Feldman, *supra* note 58, at 563 (advocating use of LRA "solely as proof of intent"); *id.* at 624 (similar). My account, like Feldman's, draws inspiration from the constitutional analogy. As developed below, my argument diverges from Feldman's in important respects, including the limited value of smoking out intent, the limited role of

One barrier to using the LRA test in this way is that, with narrow exceptions,¹⁹⁶ intent is commonly said to play no direct role in modern antitrust analysis.¹⁹⁷ With the ascendance of more sophisticated economic approaches, intent has been steadily downgraded in favor of effect. One reason is that fact-finders can be misled by vivid language that merely reflects hard competition.¹⁹⁸ Another is that even where firms lack a clear or provable intent to behave anticompetitively, there remains an interest in halting and deterring that conduct if it has adverse effects. Given the ascendance of an effects-centered approach, it is unsurprising that Justice Brennan’s intent-based account has not been emphasized by subsequent case law.

However, the conclusion that intent is irrelevant—and thus, perhaps, that Justice Brennan’s account is a failed transplant from constitutional to antitrust law—may be too hasty. Some cases suggest that intent continues to play a role. For example, the Supreme Court’s tying cases and the leading lower-court monopolization case provide that justifications should be tested for pretext.¹⁹⁹ Supreme Court cases indicate the relevance of an “inference . . . that [conduct was] intended to restrain trade and enhance prices”;²⁰⁰ or, more colorfully, a defendant’s “dreams of monopoly.”²⁰¹ One reconciliation is that intent evidence is relevant, but only to the extent it provides evidence of effect.²⁰² If that is the only use of intent, the LRA test is

an LRA test for discerning intent, the alternative role for an LRA test in discerning effect, the limitation to equally effective alternatives, and the use of a Bayesian approach.

¹⁹⁶ Intent is required for certain per se claims that are prosecuted criminally. Attempted monopolization requires a specific intent to monopolize. *See* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

¹⁹⁷ *United States v. Microsoft*, 253 F.3d 34, 59 (2001) (en banc) (per curiam) (“Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist’s conduct.”); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (“knowledge of intent may help the court to interpret facts and to predict consequences”); *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (discussing “anticompetitive animus” that “thereby raise[s] a probability of anticompetitive effect”).

¹⁹⁸ 7 AREEDA & HOVENKAMP, ANTITRUST LAW § 1506.

¹⁹⁹ *Microsoft*, 253 F.3d at 59 (justification must be “nonpretextual”).

²⁰⁰ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 691 (1978) (“surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices”).

²⁰¹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

²⁰² *See* note 197 *supra*.

of little help, even circular: a comparison of effects is used to infer intent, which in turn indirectly sheds light on effect.

A bigger issue, from the standpoint of using the LRA test, is that the relationship between bad effect and bad intent is fundamentally different in the typical antitrust case, compared to a constitutional case like *R.A.V.* When we observe an anticompetitive effect, usually the effect is a consumer harm yields a direct benefit to the firm, in the form of a transfer from victims to the firm.²⁰³ For example, not paying players is money in the bank for NCAA teams. Higher post-merger prices for medical procedures mean higher revenues for doctors.

Unlike in *R.A.V.*, we do not ordinarily wonder about the hidden type of the decision-maker. We do not normally ask, is this the sort of firm that prefers (as opposed to being indifferent to) the additional profits resulting from a price rise? If we observe an anticompetitive effect, normally we may readily conclude that the firm knowingly benefitted from that effect. This idea is captured by Learned Hand's encomium that "no monopolist monopolizes unconscious of what he is doing."²⁰⁴ In other words, it is a rare antitrust case in which the connection between the anticompetitive harm and the firm's benefit is unclear, and hence little to be gained from use of an LRA to smoke out a hidden type.

2. Smoking Out Effect

In antitrust, smoking out might be more useful to answer a different question: is there an anticompetitive effect in the first place? Often there are significant problems of proof in assessing the anticompetitive effect. For example, in a challenge to a proposed merger, plaintiff's

²⁰³ That illicit benefit is separate from the claimed benefit asserted by the firm. If there is a gain from the conduct because the defendant's asserted end is better served, the alternative is not equally effective.

²⁰⁴ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) (Hand, J.). *See also* *American Tobacco Co. v. United States*, 328 U.S. 781, 814 (1946) (endorsing Hand's view).

evidence is limited to a prediction, which is usually controverted, of higher prices in the future. Even after the fact, the evidence of a price rise is often ambiguous. In the face of such ambiguity, we might wish for greater confidence of anticompetitive effect before condemning the conduct. In such cases, the LRA test may help to smoke out the anticompetitive effect. This role for the test is absent from a case like *R.A.V.*, where there is no factual dispute about the existence of a burden.

At first blush, such an analysis of effects might seem needless. If we are able to identify an LRA with less anticompetitive effect and at least equal efficacy, then this is the rare case in which the LRA properly functions as a shortcut. We can simply condemn the conduct without regret. That might seem true, even if the evidence of anticompetitive effect is fairly weak in the first place—better safe than sorry. Why bother with a smoking out analysis? The answer is that there are costs to wrongly condemning conduct that is not in fact anticompetitive.²⁰⁵ Aside from the policy considerations, as a legal matter, low-confidence evidence of anticompetitive effect may fail to meet the requisite burden of proof.

Here, a smoking out approach furnishes additional confidence. The existence of an LRA raises the question, why did the defendant choose this action rather than the LRA? The existence of an illicit gain resulting from the consumer harm furnishes a reason. The defendant's choice of the conduct, in preference to the LRA, is thus a reason to think that there was in fact an effect that would produce the illicit gain.

The LRA test, used as a tool of smoking out effect, provides a possible explanation for an otherwise puzzling doctrinal discrepancy. Most courts treat the LRA test as a step unto itself, an

²⁰⁵ E.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (“[I]n many cases the costs of monopoly wrongly permitted are small, while the costs of competition wrongly condemned are large.”); see generally Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010) (perceiving, and criticizing, a pervasive caution in antitrust on account of possible false positives).

independent basis for a plaintiff's victory. However, a few courts position the test as an input into a balancing test.²⁰⁶ The latter approach makes sense under a smoking out approach. The existence alters the quality of evidence of anticompetitive effect, but is not determinative of the bottom line.

C. Scope of Application

1. Limitation to Equally Effective Alternatives

The LRA test, deployed as a tool for smoking out, has a narrow application. As with the shortcut conception, the LRA must be equally effective to serve its purpose. If the LRA is less effective, the defendant can point to the good effect as the reason for its choice. If requiring fundraisers to declare their efficacy to donors is more effective than publishing the information, then the state can say that superior efficacy motivated its choice to require declarations. Similarly, if a merger improves clinical integration more effectively than a physician network, that that furnishes a full reason for choosing a merger over the network. The existence of a less effective LRA does nothing to cast doubt on the claim.

In Bayesian terms, we are back where we started—there is no basis for altering our beliefs about the likelihood of bad intent. To take another example, suppose we are interested in and uncertain about the NCAA's intent in banning payments to players. If the NCAA has an anticompetitive motivation, it will choose the ban over the LRA. If it does not, it still chooses the ban—the LRA does not accomplish its goal as well. We expect the NCAA to make the same

²⁰⁶ *See, e.g.,* *Berkey Photo v. Eastman Kodak*, 603 F.2d 263, 303 (2d Cir. 1979) (affirming jury instruction in which LRA was “one among many possibilities to be considered”).

choice either way. Likewise, if the goal is to smoke out effect, we make no headway by identifying a less effective LRA.²⁰⁷

The limitation to equal effectiveness has a different basis, compared to the shortcut conception discussed in Part II. Here, the point of the LRA test is to establish that the defendant made this choice because it derived a benefit from the harm, not from some other effect of the choice. The point is to isolate the “bad” effect as a motivation for the conduct, by ruling out all the other effects and reasons. The focus is the benefit to the defendant (whether state or firm), not the effects on social welfare or consumer welfare.

As a consequence, equal effectiveness is more demanding when an LRA is used to smoke out. In addition to the “good” reasons considered in an effects analysis, we must also rule out motivations that are not cognizable in an effects approach to the LRA. For example, in antitrust, it is argued that a benefit to the firm that is retained rather than passed along to consumers does not count in the welfare analysis. Whether or not these effects count in an effects approach, they do count for purposes of isolating a bad intent.²⁰⁸ Their existence rules out the presence of an equally effective LRA, for purposes of smoking out.

In constitutional scrutiny, without an equally effective alternative, we can no longer isolate a bare desire to harm. One way around this is to change the terms of what intent we are trying to smoke out. We might seek to infer (as a type) not the bare desire to harm, but rather the willingness to engage in an inappropriate tradeoff. For example, suppose the state accepts a large amount of incremental harm, in order to achieve a small increase in efficacy compared to the

²⁰⁷ Here is the calculation: $p(\text{bad motive}|\text{less effective LRA}) = \frac{p(\text{less effective LRA}|\text{bad motive}) * p(\text{bad motive})}{p(\text{less effective LRA}|\text{bad motive}) * p(\text{bad motive}) + p(\text{less effective LRA}|\text{good motive}) * p(\text{good motive})} = \frac{(1.00 * 0.25)}{[(1.00 * 0.25) + (1.00 * 0.75)]} = 0.25$. Thus the posterior probability remains at 25 percent.

²⁰⁸ In theory, this could cut the other way. The point is that anything counts, provided only that it is experienced by the defendant and is different from the bad/forbidden source of defendant benefit. So a cognizable, procompetitive effect that did not redound to the firm’s benefit would also be ignored.

alternative. A court might point to the somewhat less effective (and much less restrictive) alternative and conclude that the willingness to choose an unacceptably high burden, for a small benefit, shows a bad intent—an intent to give away First Amendment freedoms too cheaply.

But this shift undermines the reason for pursuing a smoking out approach in the first place. Now the inference is relative to a judicially determined benchmark about what constitutes an unacceptable *tradeoff*. The second-guessing of the state has returned, front and center. Smoking out no longer provides a way to relieve the anxiety about second-guessing the legislature. Instead it is premised on second-guessing the legislature.²⁰⁹

The limitation to equal effectiveness has the same basic consequences as in Part II. Establishing equal effectiveness is demanding. The conditions are hard to identify confidently and are rarely met, and do not match the observed outcomes of cases in which courts embrace less effective alternatives. Moreover, antitrust courts in practice do not appear to use the test to shore up doubts about intent or effect. Instead, courts appear comfortable and confident that there is both an anticompetitive effect and a genuine justification to consider. For example, in *O'Bannon*, the court was not troubled by doubt about the intent or anticompetitive effect of the NCAA rule. Similarly, in *St. Luke's*, the anticipated anticompetitive effect was similarly clear. These results are not well explained by a smoking out version of the test.

2. Choosing Instead of Summing

Although the test's application as a smoking out device is narrow, there is a category of cases where it seems useful. In the cases we have considered so far, there are two contrary

²⁰⁹ In antitrust that shift in perspective is even less useful. There is not a “good” type of firm that prefers the alternative of much less restrictive, somewhat less effective conduct. At most, we have demonstrated the firm's intent to act in a way that reduces social welfare. But that is uninformative. We are simply performing an effects analysis, and then saying the firm has an intent to accomplish that effect.

effects that arise simultaneously. For example, competition for players' services is reduced, while the value of the product increases. In such a case, we should sum them up to determine the net effect.

In some cases, however, courts seem to approach mixed conduct in a different fashion—not by adding up the two effects, but by choosing between the two parties' stories. Essentially, the court sees the stories as mutually exclusive.²¹⁰ For example, in an exclusive dealing case, there are often conflicting narratives about the contract. One anticompetitive story is that the contract denies a rival an outlet for its goods, restricting its opportunities with resulting harm to consumer welfare. One procompetitive story is that the contract protects the producer's investments in a retailer from interbrand free riding—that is, from rival producers who would otherwise take advantage of the producer's investments, reducing the incentive to make them unless the producer is protected.

As a very rough cut, we might partition the set of antitrust claims into horizontal and vertical conduct. In horizontal cases such as *O'Bannon* or *St. Luke's*, the idea that there is both a bad effect and an offsetting good effect is familiar. These are usually “add them up” claims. With vertical claims, there seems to be more frequent recourse to choosing rather than summing. Exclusive dealing is one example.²¹¹ Resale price maintenance is another. Commentators tend to think of RPM in either/or terms,²¹² and the Court's leading RPM case seems to take an either/or approach.²¹³ In principle, both effects could arise simultaneously. But in practice they are often

²¹⁰ A weaker version of this claim is that the evidence of anticompetitive effect is negatively correlated with the evidence of procompetitive effect.

²¹¹ ROBERT PITOFSKY, HARVEY J. GOLDSCHMID, & DIANE WOOD, *CASE AND MATERIALS ON TRADE REGULATION* (6th ed. 2010).

²¹² See, e.g., Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 8 (1981) (criticizing efforts to add up net effects in vertical intrabrand restraint cases as “infeasible and unsound”).

²¹³ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 892 (2007) (concluding that RPM has “procompetitive justifications” in some cases, and “anticompetitive effects” in others).

viewed as either/or. Determining the validity of the either/or approach in vertical antitrust claims is beyond the scope of the article. But an LRA test to smoke out might take on heightened importance in either/or analyses of mixed conduct.

IV. LRAs as Balancing

The shortcut and smoking out conceptions offer partial explanations of the LRA test's role in evaluating mixed conduct. However, the requirement of equally effective alternatives is highly restrictive and doesn't match the observed outcome of cases. This Part considers a third explanation—that the LRA test is a locus of balancing. Far from avoiding balancing, courts are engaged in balancing when they apply the test, evaluating in a rough way the tradeoffs entailed by a particular alternative. The balancing account appears to capture what is really going on, though it raises challenges of its own.

Part IV.A describes this inquiry and the concomitant embrace of less effective alternatives. Part IV.B situates the LRA test in a larger balancing project, in which LRAs provide one of two benchmarks for evaluating conduct. Part IV.C considers the crude cost-benefit analysis performed by the LRA test and ways to improve it. Part IV.D offers several implementing rules or best practices for using the LRA test in antitrust cases.

A. Less Effective Alternatives

The balancing conception of LRAs offers a sharp contrast to the shortcut approach. It concedes that an assessment of the tradeoff is often necessary. In particular, the tradeoff is made in the context of a comparison between the conduct and an alternative. The LRA test thus

functions as a rough cost-benefit analysis between the two. Such a role has been suggested in trade cases, where Alan Sykes reports the LRA test serves a similar role.²¹⁴

This scenario is depicted in Figure 3, which revisits the scenario considered in Figure 1. Although the alternative *Z'* is somewhat less effective than *A*, it is much less restrictive. There is a net loss from choosing *A* instead of *Z'*, and hence *Z'* is a basis for condemning *A*. The set of conduct condemned on the basis of *Z'* includes any conduct to the west of *Z'* that is below the 45-degree line where incremental effectiveness and incremental restrictiveness exactly balance.

LRA-as-balancing fits the result of the cases discussed in Part II that embrace less effective alternatives.²¹⁵ In all of these cases, the court's result is consistent with an analysis in which the conduct is harmful, in the sense that it yields lower welfare compared to an alternative that is somewhat less effective and much less restrictive. Whether these cases are in fact true but obscured positives, rather than false positives, is unclear, however, given the absence of any analysis of the balance.

In fact, as noted in Part II, *most* proposed LRAs are less effective. Observing that the LRA is less effective is often taken as a sign that the courts are doing it wrong.²¹⁶ But it may be more accurate to say that they are doing an analysis different from what we expect, and perhaps even different from what they say they are doing.

None of these cases say that balancing is occurring, though a few admit that the LRA is less effective. LRA-as-balancing is seldom articulated, either in antitrust or constitutional law. Cost-benefit analysis within the LRA test is typically a quiet affair. But there are exceptions. For

²¹⁴ Sykes, *supra* note 9, at 404 (“[L]east restrictive means analysis in the WTO to date is simply a crude cost-benefit analysis, constrained by an awareness of error costs and uncertainty.”).

²¹⁵ See *supra* Part II.C.1 (discussing *Riley*, *Hunt*, *Hobby Lobby*, *O’Bannon*, *St. Luke’s*, and *Maricopa County*).

²¹⁶ Meese, *supra* note 62, at 168 (“The [LRA] test is plainly flawed . . . [since] many of the [LRAs] posited by courts and scholars are either less effective, more expensive to administer, or both.”).

example, in *Baskin v. Bogan*, the Seventh Circuit invalidated several state bans on same-sex marriage.²¹⁷ Judge Posner set up the analysis as an LRA test. If a discriminatory law has an “offsetting benefit,” he explained, the relevant question is whether “the benefit it confers on society could be achieved in a way less harmful to the discriminated-against group.”²¹⁸ The operation of the LRA test was illustrated with a hypothetical:

Imagine a statute that imposes a \$2 tax on women but not men. The proceeds from that tax are, let’s assume, essential to the efficient operation of government. The tax is therefore socially efficient, and the benefits clearly outweigh the costs. But that’s not the end of the inquiry. Still to be determined is whether the benefits from imposing the tax only on women outweigh the costs.

This cost-benefit analysis compares the women-only tax to the LRA, a general tax on both men and women. One way to flunk the test would be if the LRA were less costly and equally beneficial. But the women-only tax could still fail the test even if the general tax were less beneficial. That is, even if the women-only tax brought some incremental benefit, compared to a general tax, it would flunk the LRA test if the costs of discrimination were still higher. A less effective LRA still counts, provided the net benefit is higher.²¹⁹

One upshot for antitrust is that, contrary to the conventional wisdom, balancing turns out not to be a myth after all.²²⁰ It is just that balancing is happening where we haven’t been looking, quietly in the LRA step. A further feature of LRA-as-balancing is that the test plays a larger potential role as the size of the anticompetitive effect grows. The larger the anticompetitive

²¹⁷ 766 F.3d 648 (7th Cir. 2014).

²¹⁸ *Id.* at 655; *id.* (calling this “overinclusive”); *id.* (asking “whether unequal treatment is *essential*” to achieving the benefit); *see also id.* at 656 (addressing whether “the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy”).

²¹⁹ A similar idea is also captured, somewhat more distantly, by the scholarly suggestion that sometimes state action is condemned for being overinclusive, even though no LRA was found. Fallon, *supra* note 71, at 1328 (“[T]he prohibition against overinclusiveness suggests that a statute might be condemned for lack of narrow tailoring even if no [LRA] existed.”); Volokh, *supra*.

²²⁰ *See supra* notes 125–126 and accompanying text.

effect of the conduct, the more leeway there is for a less effective alternative to furnish a basis for condemnation.

Recognizing LRA as a balancing test runs headlong into the anxiety about balancing discussed in Part II. Like a balloon squeezed on one end, balancing has merely been shifted to a different part of the doctrine. LRA-as-balancing has coexisted with an anxiety about balancing in part because the LRA test does not announce itself as a balancing test.

One undesirable consequence of quiet balancing is that it is opaque. Opacity encourages inadequate analysis. The court may never engage with the hard question at the heart of the case. There is no full and open resolution about how the interest in player compensation should be traded off against the popularity of the sport, or how low prices are integrated with clinical improvement. Moreover, when courts don't show their work, review by the appellate court is much less effective.²²¹

LRA-as-balancing has a more comfortable home in antitrust, compared to constitutional law. In *Baskin*, Judge Posner is a confident, open balancer of contending values, but many judges are not—they are reluctant, or furtive, or both. The anxiety about balancing, rooted in concerns about incommensurability and overreaching, has a powerful foundation, giving the shortcut and smoking out conceptions a disproportionate appeal. In antitrust, LRA-as-balancing—done openly and carefully—is more attractive, to the extent that the objections are less fundamental. There is no separation of powers concern, no risk of insulting the legislature. There is an important practical concern about getting the tradeoff right, to which I return below, but this concern is not foundational.

²²¹ Cf. Bert I. Huang, *Concurrent Damages*, 100 VA. L. REV. 711 (2014) (arguing that a particular approach to damages would encourage transparency on virtues for transparency and appellate review).

Here, drawing upon the experience with constitutional scrutiny leads the antitrust analysis astray. Intuitions about intrusion and second-guessing, developed in constitutional law, are weaker or do not apply in antitrust law. The constitutional analogy thus obscures and even inhibits the proper full scrutiny. From the standpoint of the constitutional analogy, Justice Rehnquist had it backwards. Rehnquist thought that the constitutional analogy tended to show that antitrust was unjustifiably searching.²²² To the contrary, the analogy shows that antitrust is unjustifiably timid, because in adopting an equal effectiveness limitation, it has taken on board a limitation that is not justified by its distinctive setting.

The upshot is that an LRA test that undertakes a cost-benefit analysis is doing valuable work in antitrust. Even if balancing ought to be resisted in constitutional law, it is appropriate and necessary in antitrust. Ultimately, balancing is inevitable, lest a large amount of anticompetitive conduct escape scrutiny. Clearly identifying this role is important, in order to avoid the problem of opacity. Bringing the test out into the open permits, as a next step, improvements to its operation in practice.

B. The Dual Benchmark

Balancing is not confined to the LRA test. If we overcome the anxiety about balancing and acknowledge a net effects approach to assessing conduct, then a further implication of the LRA test comes into view. The LRA test complements balancing that occurs elsewhere in the analysis.

To see how, a suitable starting point is to notice that many courts divide their evaluation into two comparisons: a comparison of the conduct versus alternative (i.e., the LRA test), and a comparison of the conduct versus the status quo. For example, many statements of the rule of

²²² See note 100 *supra* and accompanying text.

reason compare the restraint to an LRA, then compare the restraint to the status quo. Judge Posner’s tax example has the same two components: compare the women-only tax to a general tax; compare the women-only tax to no tax.²²³

Similarly, the proportionality approach to constitutional law features an LRA test followed by “balancing in the strict sense” between the conduct and the status quo.²²⁴ This approach, common outside the United States, also finds expression in Justice Breyer’s proposed “interest-balancing inquiry” for constitutional scrutiny of Second Amendment infringements.²²⁵ What Breyer envisioned is a “proportionality”²²⁶ approach that separately assesses the existence of an LRA and the state action’s “effects upon the competing interests.”²²⁷ This approach highlights the close connection that Justice Breyer perceives between antitrust and constitutional inquiry.²²⁸

The result of this bifurcated analysis is a dual benchmark. The conduct may be condemned because worse than the LRA, or because worse than the status quo. The resulting analysis is depicted in Figure 4. As before, *A* depicts an action under consideration, and *Z*

²²³ Here, I have reversed the order of the quotation.

²²⁴ See BARAK, *supra* note 26, at 317–398; see also Feldman 2013. In European competition law, which uses a procedure that is in some ways similar to the rule of reason, a few scholars have emphasized the effective adoption of proportionality. See Wolf Sauter, Proportionality in EU Law: A Balancing Act? (working paper 2013) (“not been widely examined yet in the literature”); Jacques Steenberg, *Proportionality in Competition Law and Policy*, 35 LEGAL ISSUES OF ECONOMIC INTEGRATION 259 (2008) (“Literature on the proportionality principle usually does not refer to competition law.”).

²²⁵ See *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting). It is unclear whether Breyer had in mind a version of strict scrutiny or something a bit less potent. See *id.* (Breyer, J., dissenting) (“[A]ny attempt in theory to apply strict scrutiny to gun regulations will in practice turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.”).

²²⁶ *Id.* at 690.

²²⁷ *Id.* (proposing a procedure that “take[s] account both of the statute’s effects upon the competing interests and the existence of any clearly superior less restrictive alternative”). “Clearly superior” is a reference to the net effects of the LRA, not its effectiveness in achieving the government’s end. *Id.* Elsewhere Justice Breyer makes clear that the LRA must be equally effective, or nearly so. *Id.* at 710 (LRA must “similarly promote” statute’s purpose), 712 (LRA must be “equally effective” in advancing statute’s purpose). Justice Scalia’s opinion for the Court did not acknowledge the LRA component of the dissent’s analysis. He simply treated the dissent as a straight balancing proposal. *Id.* at 634–35.

²²⁸ Cf. BREYER, *supra* note 102, at 48 (analogizing reasonable restrictions on speech and competition).

represents an LRA. In addition, point *O* represents the pre-conduct status quo. *O* is neither restrictive nor effective. *A* is condemned based on the existence of *Z*; it is more restrictive and less effective than *Z*. *A* is also condemned by comparison to *O*; it is beneath the 45-degree line from *O*, and hence more restrictive than effective.

Use of the dual benchmark is perfectionist, compared to an analysis that merely compared the conduct to the status quo. To illustrate, consider point *D*. *D* would not be condemned by a comparison to the status quo. It is above the 45-degree line from *O*, which means that it is more effective than restrictive. However, it is still condemned by the comparison to *Z*, as it is more restrictive and less effective than *Z*.

This outcome recalls the pay-for-delay settlements of patent litigation discussed in Part II. The central analytic step in these cases is the inference that can be made from the observation of a large payment. To see this, consider the “expected” entry date under litigation, which is a blended average of the binary outcomes of the litigation, weighted by the probability of each outcome. If the settlement has a later entry date than the expected entry date, then consumers lose out compared to the no-restraint baseline (i.e., litigation), and the settlement is anticompetitive. A large payment is a basis for inferring that entry under settlement has been delayed, relative to the expected entry date; otherwise the branded firm would not have agreed to make the payment.²²⁹ Such settlements would be condemned for yielding lower welfare compared to the pre-conduct status quo.

Other settlements, however, might bring higher consumer welfare compared to litigation. Economists have developed models concluding that a risk-averse branded firm might reach a settlement that combines a payment with an entry date that is *earlier* than the expected entry

²²⁹ See Aaron Edlin, C. Scott Hemphill, Herbert Hovenkamp, and Carl Shapiro, *Activating Actavis*, ANTITRUST, Fall 2013, at 16. This abbreviated description suppresses a number of complications discussed in the article.

date.²³⁰ Such a settlement would survive a cost-benefit comparison with the status quo.

Nevertheless, the settlement is condemned because there is an even better settlement, from a consumer welfare standpoint, that the parties could have reached instead. The LRA test provides a basis for insisting on a better settlement, not merely a settlement in which consumers break even compared to litigation.

For a constitutional example, consider the women-only tax. Even if the tax is efficient, in the sense that society is better off with the tax than without it—better than the status quo, in other words—that’s not enough. The tax must also beat the LRA of a general tax. This is just as we would expect from a cost-benefit approach to the evaluation of conduct, once alternatives are taken into account.

A cost-benefit approach to the comparison between conduct and status quo allows us to see the dual benchmark, and the corollary perfectionist effect of the LRA test. Some conduct (the women-only tax, the reverse payment settlement) is an improvement, compared to the status quo, in the sense that the net benefits are positive. Nevertheless, the conduct is properly condemned in light of a still better alternative (the general tax, the better settlement). Without a net effects approach, there is no status quo benchmark, and hence no vantage from which to recognize this implication of the LRA analysis. In terms of Figure 4, there is no basis for drawing a 45-degree line from *O* and making welfare comparisons based on that line.

This dual benchmark is not widely recognized in constitutional analysis. That is perhaps no surprise, given that an open assessment of net effects à la Posner is rarely employed in U.S. constitutional scrutiny. References to “balancing” in strict scrutiny, for example, are often meant in a general sense; there is no distinct final net effects step that would provide the necessary

²³⁰ See Aaron Edlin, C. Scott Hemphill, Herbert Hovenkamp, and Carl Shapiro, *Actavis and Error Costs: A Reply to Critics*, ANTITRUST SOURCE, Oct. 2014, at 1 (describing and criticizing such models). The discussion in text assumes that the posited settlement is chosen in equilibrium, rather than merely being feasible.

baseline. In proportionality analysis, there is a final, explicit balancing step, so it is surprising to see the LRA test sometimes characterized as less stringent or nested within the final balancing analysis.²³¹ That view is incorrect, unless the final balancing step is understood not only as a comparison between the action and status quo, but also a comparison to unchosen alternatives.²³²

This discussion of the dual benchmark, thus far, has not relied on an LRA test that reaches less effective alternatives. The reverse payment example, and the condemnation of *D* in Figure 4, are easily handled by a limited version of the test. A full LRA analysis intersects with the dual benchmark in two respects. First, an LRA that considers less effective alternatives expands the reach of the dual benchmark—that is, it makes the test more perfectionist. It catches some additional conduct that would otherwise be missed. In terms of Figure 4, we are expanding the analysis to condemn conduct, such as point *C*, that is somewhat more effective and much more restrictive than *Z*. Point *C* would be permitted without a net effects approach to the LRA. Similarly, when Judge Posner considers whether the “benefits from imposing the tax only on women outweigh the costs,” compared to a general tax, this is a net effects comparison to alternatives.

Second, recognizing the dual benchmark strengthens the case for a broad understanding of the LRA test. The LRA test and the status quo-focused net effects test are doing parallel work, just as in a cost-benefit analysis that considers multiple alternatives. Indeed, the status quo is itself an LRA. This is an extension of the point made in Part II, that cessation is an LRA. There, the status quo was recognized to be an LRA that is equally effective, compared to conduct that makes no incremental contribution to the justification. If the conduct does make a contribution,

²³¹ Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 805 (2011) (concluding that proportionality’s component “tests are sequenced in order of increasing stringency”).

²³² *E.g.*, BARAK, *supra* note 26, at 350–51 (noting that the usual comparison in the last step is to the status quo, but that other alternatives should be compared as well).

then the status quo is once again an LRA, but a less effective one. In short, fully implementing the cost-benefit vision means considering less effective alternatives. Provided the perfectionist implication is conceded, it makes sense to do a net effects analysis, rather than a limitation to no-regret improvements.

In antitrust, where the dual benchmark has received more attention,²³³ critics do not concede that the perfectionist effect is desirable. Critics argue that antitrust merely requires that welfare must not fall overall by virtue of the conduct. Beyond that, firms are free to organize their activities as they see fit. They bristle at the proposition that a court might also consider the superiority of an unchosen alternative. Considering less effective alternatives, for these critics, would just make the problem worse.

The objection to perfectionism in antitrust is in one sense surprising, given the otherwise fairly thorough integration of economic thinking into antitrust decisionmaking. If antitrust decision making is ultimately bottomed on a cost-benefit analysis of the restraint, then it is natural to examine an alternative in addition to the pre-restraint status quo and the chosen means. A thorough examination of alternatives, after all, is a logical and standard part of cost-benefit analysis, implemented (among other places) in the development and review of agency regulations.²³⁴

Part of the objection is a concern that the LRA test opens up firms to open-ended reorganizations of private decision-making. The idea is captured by a refusal to deal case, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.²³⁵ There the Court concluded that

²³³ Compare Devlin, *supra* note 60, at 826–27; Feldman, *supra* note 58; Meese; with Edlin et al., *supra* note 174, at 17–18; Picker, *supra*; Elhauge, *supra*.

²³⁴ See *supra* note 108 and accompanying text.

²³⁵ 540 U.S. 398 (2004).

The Sherman Act is indeed the “Magna Carta of free enterprise,” but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.²³⁶

This and similar language in the opinion²³⁷ has been read to imply a watered-down scrutiny of alternatives.

It is no such thing, at least as applied to mixed conduct. Although the case is a useful caution against adventurism, the *Trinko* context is very different from an LRA inquiry. There the Court concluded that the defendant had not engaged in any cognizable anticompetitive conduct. In the language of the rule of reason, the initial prerequisite of anticompetitive effect had not been satisfied. By contrast, scrutiny of alternatives is triggered only after an initial showing that there is an actual or likely anticompetitive effect.

Moreover, public evaluation of private restraints is different from review of state action in a way that strengthens the case for evaluating alternatives. There is no reason to expect a firm to choose the means that maximizes net welfare. Far from it: the firm will choose the privately optimal course, subject to whatever constraint is imposed by antitrust law. If antitrust law only insists upon equipoise, compared to the status quo, then there is a powerful incentive to game that system.

Private parties have substantial leeway to design their restraints in anticipation of antitrust scrutiny. If they merely need to ensure that consumers break even, they will take a minimal approach if it is profitable to do so, draining consumer welfare down to the level that just meets the pre-restraint status quo.²³⁸ For example, in a reverse payment settlement, a branded firm

²³⁶ *Id.* at 415 (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)).

²³⁷ *See id.* at 407–08 (expressing concern about courts acting as “central planners [in private business] . . . a role for which they are ill-suited”).

²³⁸ For a further discussion, see Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement*, *ANTITRUST CHRONICLE*, Oct. 2009, 1, 5–6 (discussing a bundle of procompetitive and anticompetitive effects). *See also* Elhauge.

would have a strong incentive to pay the generic firm more in exchange for a later entry date. It would choose the largest payment and latest entry date it thought it could get away with. A dual benchmark approach avoids this problem, and a net effects approach to the LRA benchmark is necessary to fully protect consumers against gaming.

C. Crude Cost-Benefit Analysis

I have argued that the LRA test in actual operation implements balancing. But it does not follow that courts are conducting the tradeoff correctly. The balancing being done by courts in the LRA test is necessarily crude. The comparison of benefits and costs is unlikely to take full account of the many complications that arise in a full cost-benefit analysis, such as risk aversion, uncertainty, and irreversibility.²³⁹ The crudeness of the analysis is probably inevitable, whether the court undertakes balancing or attempts to implement LRA-as-shortcut.

Even a very crude analysis is likely sufficient for many of the cases that arise. Some cases are easy. The alternative is somewhat less effective but much less restrictive. Or the anticompetitive effect is large and clear, such that even a substantially less effective alternative is still clearly superior to the course taken by the firm. Indeed, LRA-as-balancing reveals an additional set of “easy” cases, beyond the cases that satisfy the shortcut conception: cases where the alternative is much less restrictive and almost as effective. It is unnecessary to determine whether the LRA is equally effective; a less effective alternative will do.

In some cases, the LRA benchmark is easier to use than the status quo benchmark. The LRA test provides additional leverage in assessing the net effect of conduct. In some instances, the additional “height” gained makes it easier to perform a confident condemnation. In terms of

²³⁹ See note 108 *supra* and accompanying text.

Figure 4, it is easier to show that *A* is worse than *Z* than it is to show that *A* is worse than *O* because the difference is more dramatic.

In other cases, the status quo benchmark is easier to use. The pre-restraint status quo can be conceptualized as just one choice, conceptually equivalent to unimplemented alternatives. But in practice it is an alternative about which we have extra information. Where the effects of the restraint have already manifested, we are in a position to make reliable comparisons between the two based on how the world changed after the restraint was imposed. This additional effect is important where the effects of the restraint have already taken hold. Where we are instead predicting a future effect, the advantage is lessened.

The analysis is simplified, compared to a full cost-benefit analysis, by the structure of the test. The alternative must feature a lower restrictiveness. Alternatives that improve welfare but not by reducing restrictiveness—for example, allowing the conduct but insisting that the firm pay consumers cash to help make up the difference—don't count. Nor may the superiority of the alternative be established by showing greater effectiveness.

The residual difficulty is similar to the comparison of incremental benefit and incremental cost present in a balancing comparison between the conduct and the status quo. This topic has been extensively analyzed, often critically, by others. The court must evaluate the effectiveness of the alternative in achieving the defendant's claimed aim. Usually, the alternative is not restrictive at all; if it is somewhat restrictive, this must be taken into account as well. It must then make a comparison of the alternative's incremental benefit (no restrictiveness) and incremental harm (reduced effectiveness).

In antitrust, the most important concern with implementation is the court's institutional capacity to administer the test. Implementation is a potentially acute problem for courts. Judges

are generalists, see antitrust cases only rarely, are generally unfamiliar with the practice at and industry at issue, and are therefore not well equipped to evaluate the plausibility of alternatives. The limited fact-finding capacity of courts is a familiar refrain,²⁴⁰ as is courts' limited capacity in antitrust cases.²⁴¹ Courts are well aware of their limited capacity. As the Supreme Court noted in *Maricopa County*, the physician maximum price-fixing case, “[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice’s effect on competition.”²⁴² Despite this concern, the Court proceeded to discuss just that, including the availability of an LRA.

The problem in antitrust is likely more acute, compared to constitutional scrutiny of alternatives. Courts think about legislatures and other state actors on a regular basis. Judges frequently have previous experience as government officials. Interpreting statutes and the motivations of state actors is a common activity. Courts have less experience evaluating the competitive activities of firms. That makes it challenging to compare the effects of the action and a no-action baseline. This work is comparably difficult—or even harder²⁴³—when the evaluation is made by reference to a hypothetical alternative. The practicality restriction discussed below reduces but does not eliminate this problem.

There is a second difference from constitutional scrutiny that heightens the implementation concern. In constitutional scrutiny, evaluating the alternative is a question of law

²⁴⁰ See, e.g., Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1251–57 (2006) (reviewing argument that courts are weak fact-finders, limited by lack of expertise, investigative capacity, and access to facts beyond those of single case before them); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 671 & n.171 (2009); and sources cited therein.

²⁴¹ See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 47 (2006) (“[T]here is relatively little disagreement about the basic proposition that often our general judicial system is not competent to apply the economic theory necessary for identifying strategic behavior as anticompetitive.”); Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 264 (2010) (arguing that “courts are generally not effective arbiters of whether alleged business conduct is implausible”).

²⁴² *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 343 (1982) (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 209–10 (1972)).

²⁴³ See Easterbrook, *supra* note 205, at 9 (comparison to an LRA is “impossible”).

performed by a judge. In antitrust, by contrast, this evaluation is a question of fact, which means this question often goes to the jury. Whether juries are up to this task is subject to doubt.

The search for net effects in antitrust is the subject of a large literature, and a full treatment is beyond the scope of this article. Here, I offer two suggestions that are distinctive to the operation of the LRA test. The first is to make greater use of neutral economists in cases of mixed conduct. Federal courts have substantial authority to appoint economists to support the court's work.²⁴⁴ In cases of mixed conduct, the value of neutral expertise is particularly strong. In practice, party economists frequently reach the conclusion that there is no mixed conduct to begin with. The plaintiff's expert concludes that there is an anticompetitive effect and that the justification is unsupported. The defendant's expert concludes to the contrary that there is no anticompetitive effect and strong evidence of a justification.

If a court were fundamentally engaged in "choosing" in the sense discussed in Part III, rather than identifying net effects, the fact-finder may nevertheless be able to decide (despite the complexity) which account better fits the weight of the evidence. But in a case of mixed conduct, the conduct brings both benefits and costs. Neither economist is likely to offer much insight about the integration of the contrasting effects. Doing so requires the party expert to embrace hypotheticals—"if defendant's evidence of justification is correct, how does that compare to your proposed LRA?"—that are poorly suited to the conduct of adversarial litigation. A neutral economist is better positioned to undertake that integration.

Second, expert agencies have an important role to play in buttressing the work of courts. Agencies offer a familiar set of advantages (and some disadvantages) in addressing difficult and

²⁴⁴ See FED. R. EVID. 706(a) ("The court may appoint any expert . . . of its own choosing."); Fed. R. Civ. Proc. 53 (authorizing court appointment of special master); *Reilly v. United States*, 863 F.2d 149, 158 (1st Cir. 1988) (appointing technical advisor under the court's inherent authority). See also Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Consensus in the Battle of Experts*, 106 NW. U. L. REV. 1261 (2012); J. Gregory Sidak, *Court-Appointed Neutral Economic Experts*, 9 J. COMPETITION L. & ECONOMICS 359 (2013).

technical questions.²⁴⁵ The FTC has the capacity to collect information about a particular practice—a contractual alternative to resale price maintenance, let’s say—from throughout the economy. It has the ability to collect and consider confidential information through compulsory process. And it can synthesize this information without narrow regard to the context of a particular litigated case. These tools are much more powerful than the limited information the parties can supply the court.

These advantages are particularly important, as to a fact—the effectiveness of an unimplemented alternative—the evidence for which is, by its very nature, often drawn from the conduct of third parties. The question of alternatives, moreover, is one the agency often considers when investigating anticompetitive conduct and reviewing mergers.

These institutional advantages tip the scales in favor of agencies over courts. One option would be to allocate cases of mixed conduct to the FTC for adjudication. That route would require legislation, unless ordinary antitrust doctrine were narrowed to eliminate liability under an LRA theory, thereby leaving the FTC alone to bring LRA-based cases under its more expansive statutory authority.

A more modest though still ambitious solution is comparative effectiveness studies for assertedly procompetitive conduct. In particular, the Federal Trade Commission could supply courts with information and advice about the existence of practical alternatives. Part of its mandate as an enforcement agency is to collect, study, and publish information about particular business practices and industries. It has authority to require firms to divulge confidential information relevant to antitrust policymaking, as an input into such studies.²⁴⁶

²⁴⁵ For a discussion, see Hemphill, *supra* note 240.

²⁴⁶ FTC Act, 15 U.S.C. §§ 46(b), 49, 57b-1(c) (2006).

The proposed benchmarking exercise would compare alternatives to conduct subject to antitrust scrutiny, drawing upon the real-world experience of firms. For example, when is a resale price maintenance provision necessary to incentivize a retailer, and to what extent does contractual specification serve this goal? What is the state of the art in the centralized pooling of individual copyrights for efficient utilization by downstream users? The FTC could announce best practices in particular a context—in essence, a standard of care that would immunize firms from attack if they were followed. The result is akin to the agency reference model that has been proposed for federal preemption of state tort claims.²⁴⁷

D. Implementing Rules for Antitrust

LRA-as-balancing is consistent with Supreme Court precedent. As noted in Part I, the Court, while steadily expanding the rule of reason’s scope of application, has not taken much interest in its actual operation. The Court, meanwhile, has invited courts to develop more effective implementing rules.²⁴⁸ This part suggests four implementing principles to assist courts in filling in the blanks. First, an LRA is sufficient for liability, not necessary. Second, plaintiffs have the burden of persuasion in establishing an LRA, not defendants. Third, LRAs are subject to a rigorous test of practicality. Fourth, an LRA analysis applies to all forms of mixed conduct.

²⁴⁷ See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008) (advocating “agency reference model” wherein agency offers expert input into the desirability of uniform federal policy); Hemphill, *supra* note 240 (proposing agency-developed standard of care in reverse payment cases).

²⁴⁸ See, e.g., *Actavis*, 133 S. Ct. at 2238 (“As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.”) (citation omitted); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 898–99 (2007) (“As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.”).

1. Is an LRA Necessary?

I have argued that the LRA test provides a second benchmark or baseline against which to evaluate a firm's conduct. Moreover, the comparison between the conduct and the LRA should evaluate net effects, just as occurs in the comparison between the conduct and the status quo. From this perspective, an LRA is sufficient for establishing liability, but it is not necessary. Even if there is no feasible LRA, the conduct should still be condemned if the net effect is negative.

Most courts recognize that identifying an LRA is sufficient, not necessary. Antitrust scrutiny of mixed conduct normally entails an LRA step followed by a balancing step. However, some courts omit the final balancing step. These courts treat an LRA as a necessary condition for liability. Under this bobtailed test, if the defendant presents evidence of a justification, the plaintiff "must" establish an LRA.²⁴⁹ A variant is that the proved absence of an LRA results in a defendant win. This implementing doctrine reflects Bork's suggestion, endorsed by others, that an LRA should be a precondition for liability.²⁵⁰ Bork emphasizes an early, influential appellate case considering mixed conduct, *Addyston Pipe & Steel Co. v. United States*,²⁵¹ which can be

²⁴⁹ *E.g.*, *Virgin Atlantic Airways, Ltd. v. British Airways PLC*, 257 F.3d 256, 265 (2d Cir. 2001) (plaintiff "must show [procompetitive] purpose could be achieved without restricting competition"; plaintiff offered no alternative "that would achieve the same procompetitive effect as the [challenged] incentive agreements . . . leav[ing] intact the evidence that [the] incentive agreements are good for competition. . . . Accordingly, [the] cause of action . . . was properly dismissed."); *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (affirming summary judgment for defendants upon failure to show LRA); *Addamax Corp. v. Open Software Foundation, Inc.*, 888 F. Supp. 274, 282 (D. Mass. 1995) ("must" show LRA).

O'Bannon might be read to take the *Hairston* view. The court cites *Hairston* and describes the LRA inquiry as something the plaintiff "must" show. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014). It is unclear whether the court would have proceeded to a final balancing step if plaintiffs had failed to establish an LRA. The court does note in general terms the obligation to "weigh" effects, but describes the burden shifting procedure as its mechanism for doing so.

Some courts omit the balancing step, but their procedure is sufficiently non-specific that it might accommodate one. *E.g.*, *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 507 (2d Cir. 2004); *United States v. Visa*, 344 F.3d 229 (2d Cir. 2003). In *Visa*, for example, the court affirmed a judgment for plaintiffs without crediting an LRA.

²⁵⁰ BORK, *supra* note 39, at 279.

²⁵¹ 175 U.S. 211 (1898) (Taft, J.).

read to implement such a defense. On this view, the alternatives inquiry is a shield, rather than a sword, and plaintiffs have no opportunity to win on the ground that the net effect is negative, compared to the status quo.

For example, in *Virgin Atlantic Airways, Ltd. v. British Airways PLC*, Virgin challenged BA's use of incentive agreements to maintain the loyalty of travel agents. Upon the identification of a procompetitive effect, the Second Circuit insisted that the plaintiff must show an LRA. Virgin's failure to do so required dismissal.²⁵² These courts' approach reflects the anxiety about balancing discussed in Part II. It mirrors U.S. constitutional law, in which strict scrutiny lacks an explicit balancing step. The resulting contrast between U.S. doctrine and proportionality is often remarked in comparisons of the regimes.²⁵³

This approach opens up a significant gap, in cases where there is no LRA.²⁵⁴ Frequently, there is no alternative that also substantially advances the justification. Without a status quo benchmark, anticompetitive conduct escapes scrutiny. In Figure 4, *A* and *B* will be erroneously permitted, even though they are net anticompetitive compared to the status quo. In cases where there exists an LRA, moreover, some anticompetitive conduct will escape scrutiny if the LRA is limited to equally effective alternatives. *B* will be erroneously permitted, as well as *C*. The truncated test thus erroneously leaves some conduct incompletely analyzed and some conduct improperly permitted, even though it is anticompetitive.

²⁵² It is unclear how widespread this view is, given conflicting doctrine in circuits that have utilized the "must" approach. *See, e.g.*, *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (final balancing step); *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485 (2d Cir. 2004) (same); *Sonoma County* (9th Cir.).

²⁵³ *See, e.g.*, *BARAK*, *supra* note 26, at [518]; *Mathews & Stone Sweet*, *supra* note 134, at 836 (describing strict scrutiny's "retreat from open balancing").

²⁵⁴ This gap assumes that the court has not fully absorbed the final step into the LRA analysis by treating the status quo as itself a (less effective) LRA.

2. The Plaintiff's Burden of Persuasion

On a balancing conception of the LRA test, plaintiffs properly have the burden of persuasion in establishing an LRA. The plaintiff is arguing that the net effect of the LRA is positive compared to the conduct, as a means of establish the anticompetitive effect of the conduct. This claim is functionally identical to the comparison between the conduct and the status quo. Ultimately, establishing an unreasonable restraint of trade is the plaintiff's burden, whether premised on one benchmark or the other.²⁵⁵

Many courts assign the burden to plaintiffs.²⁵⁶ Some cases, however, place the burden on defendants, particularly in tying and merger cases, and even some rule of reason cases.²⁵⁷ For example, the *St. Luke's* court insisted that the merging medical providers prove the absence of an LRA.²⁵⁸ The allocation of burden here was likely decisive to the result. Given the limited state of current knowledge about what is needed for successful integration, it was very difficult for defendants to show that their merger was a superior vehicle for delivering the beneficial effects.

²⁵⁵ This conclusion does not, strictly speaking, require a full embrace of LRA as balancing. If the LRA is conceived as a second benchmark, to which is applied a truncated net effects test—a shortcut, in other words—the point in text still holds.

²⁵⁶ *E.g.*, *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993) (“[T]he burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.”); *Ark. Carpenters Health and Welfare Fund v. Bayer AG*, 604 F.3d 98, 104 (2d Cir. 2010) (“[Plaintiff] must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives.”); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (“[P]laintiff must then show that “any legitimate objectives can be achieved in a substantially less restrictive manner.”) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)); *United States v. Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993) (“Once a defendant demonstrates that its conduct promotes a legitimate goal, the plaintiff, in order to prevail, bears the burden of proving that there exists a viable less restrictive alternative.”).

²⁵⁷ *E.g.*, *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984); *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 227 (7th Cir. 1983). In contrast to other Second Circuit cases such as *Capital Imaging, NASL v. NFL* places the burden on defendants. *NASL v. NFL*, 670 F.2d 1249, 1261 (2d Cir. 1982) (“[T]he NFL was required to come forward with proof that any legitimate purposes could not be achieved through less restrictive means. This it has failed to do”).

²⁵⁸ *See, e.g.*, *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.*, No. 14-35173, 2015 WL 525540, at *11 n.15 (9th Cir. Feb. 10, 2015) (treating LRA as part of defendant's “burden to rebut a prima facie case of illegality”); *see also Philadelphia National Bank* at 370 (criticizing defendants' failure to contend that LRA is infeasible).

Here, the court applied the wrong rule. Plaintiffs ought to have borne the burden of establishing the comparison between the conduct and the LRA benchmark.

That said, defendants ought to be assigned the burden of production. Defendants have better access to information about their reasons for adopting a particular practice.²⁵⁹ Such an allocation is a common feature of regimes in which a defendant is required to justify its conduct. Giving defendants a burden of production is not unduly onerous. The burden is lightened, first, by an insistence that the plaintiff propose the set of alternatives to which the defendant responds. Second, this set of alternatives is highly constrained in practice, as discussed below.

Giving defendants a justificatory burden brings additional benefits. A firm that may later be required to explain its actions is more likely to create a suitable record at the time that it implements the conduct. A burden of production is therefore likely to induce more careful deliberation by the firm before taking its action.²⁶⁰ At least some anticompetitive conduct is the product of inattention by the firm.²⁶¹ Deliberation is frequently in short supply, and often firms seem to have no considered reason for having taken an action with anticompetitive consequences. Encouraging a culture of justification and reason-giving, a familiar part of constitutional discussion, is valuable in antitrust as a source of deterrence.²⁶²

This approach contrasts with U.S. constitutional doctrine, where the defendant fully bears the burden of proving the absence of an LRA.²⁶³ This difference might reflect the influence of

²⁵⁹ Carrier, *supra* note 61, at 1341–43 (providing reasons why defendant is best positioned to bear burden of production).

²⁶⁰ See, e.g., *Hennessy v. NCAA*, 564 F.2d 1136, 1154 (5th Cir. 1977) (in considering the existence of an LRA, “[t]he NCAA, acting through its member institutions after much study, concluded in the negative”).

²⁶¹ Cf. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.) (suggesting need for more precise legal standard in predation context in order to influence managerial decisions affecting competition).

²⁶² Cf. 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1505b (3d ed. 2010) (“Forcing defendants to explain how their restraint promotes their asserted objective not only illuminates the legitimacy of that objective; it may also suggest that alternative, less injurious means are available.”).

²⁶³ See *supra* note 73 and accompanying text.

the smoking out conception of the LRA test, where the LRA is just one input, rather than a standalone basis for liability. If the LRA test is not a sufficient basis for liability, the grounds for assigning the burden to plaintiff are weaker. Moreover, the focus of information elicitation might suggest placing the burden more fully on the defendant, the party with better information.²⁶⁴

3. Practicality

The analysis is limited in the important respect that the alternative must be one that the firm would likely pursue if the conduct in question were prohibited. The LRA is subject to a rigorous test of practicality. Some courts require that the posited alternative must be “based on actual experience” or else “fairly obvious.”²⁶⁵ One useful measure of practicality is that this conduct has been implemented by other firms (or this firm) in analogous circumstances. This limitation improves the reliability of the comparison. The requirement of practical availability means that defendants are not being forced to prove a negative relative to an indefinitely large set of alternatives, and reduces the risk of “armchair surmising” in the development of LRAs.²⁶⁶

Where the conduct at issue is a contractual restraint, the analysis is easier. For example, consider a retailer’s asserted concern about intrabrand free-riding, presented as a justification for resale price maintenance. The free-riding argument is straightforward to understand, and the proposed LRA to serve this concern (likely less effectively), a more detailed contract, is ready at hand. The same is true with exclusive dealing contracts, justified by a manufacturer’s asserted

²⁶⁴ *But see* BARAK, *supra* note 26, at 448–49 (proposing, in the context of proportionality, that defendant bear the burden of production and plaintiff the burden of persuasion).

²⁶⁵ *E.g.*, *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014) (citing 11 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1913b (3d ed. 2006)); HORIZONTAL MERGER GUIDELINES, *supra* (restricting analysis to “alternatives that are practical in the business situation faced by the merging firms”; “The Agencies do not insist upon a less restrictive alternative that is merely theoretical.”).

²⁶⁶ 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1822d (3d ed. 2010) (“[M]ost business practices are tested by trial and error, and armchair surmising about alternatives is seldom sufficient to establish their practicability.”).

concern about interbrand free-riding. The value of the LRA analysis weakens as the conduct itself is more unusual and less standardized. Where the alternative has never been implemented in a related context, there is less basis for confidence in its effectiveness.

Judged from this perspective, the *O'Bannon* court erred in embracing a highly non-standard alternative to the NCAA's rule. Paying players a small amount (subject to a cap), with more held in trust, is an ingenious response to the justifications credited by the court. However, it lacks the indicia of reliability that previous experience would confer. Beyond recognizing that the alternative is less effective, it is highly unclear how well the alternative would perform.

Insisting on practical alternatives is consistent with various verbal formulations of the LRA test that have been offered by Courts of Appeals.²⁶⁷ For example, some courts style the LRA test as determining whether the conduct is not "reasonably necessary."²⁶⁸ The absence of reasonable necessity is best understood to be equivalent to the presence of an LRA.²⁶⁹ The underlying concern motivating the reasonable necessity formulation is that it is insufficient to simply point to the existence of an LRA, without any assessment of the LRA's effectiveness in serving the claimed goal. An assessment of effectiveness is properly a part of any analysis of LRAs, whatever the verbal formulation.

²⁶⁷ The Second, Sixth, and Ninth Circuit formulations rely on "less restrictive" (2d) or "substantially less restrictive" (6th, 9th). The Eighth Circuit is similar for this purpose, as it seeks to identify a "means less likely to harm overall competition." For a useful survey of circuit precedent, see Nicholas Colombo, *A Balancing Test Without Balancing: Rule of Reason Analysis, Less Restrictive Alternatives, and the Three Prong Burden Shifting Approach* (unpublished) (n.d.).

²⁶⁸ *See* *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49 (3d Cir. 1975); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996); *Graphic Prods. Dist., Inc. v. Itek Corp.*, 717 F.2d 1560, 1577 (11th Cir. 1983) (placing burden on defendants, in vertical restraint case, to rebut plaintiff's showing of anticompetitive effects by demonstrating that restraints were "reasonably necessary to achieve legitimate, procompetitive purposes").

²⁶⁹ *See, e.g.*, 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶1502 (3d ed. 2010) (equating "reasonably necessary" with the absence of a "less restrictive alternative"); *cf.* *United States v. Visa*, 344 F.3d 229, 238 (2d Cir. 2003) (presenting "not reasonably necessary" and "less restrictive alternatives" as alternative and presumably distinct ways for the plaintiff to meet its burden); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (similar).

A closer interpretive question is presented by jurisdictions that require the defendant to employ the “*least* restrictive alternative.”²⁷⁰ Logically, this is a distinction without a difference; the failure to employ the least restrictive alternative is equivalent to the presence of an unchosen less restrictive alternative.²⁷¹ However, “least” is sometimes read to entail a particularly aggressive search for alternatives,²⁷² consistent with the similar apparent—though inconsistently applied—distinction in First Amendment jurisprudence.²⁷³ If this distinction bears any interpretive weight, courts should nevertheless insist upon effectiveness with the same care as in jurisdictions with a different verbal formulation.

4. Application to Exclusionary Conduct

As noted in Part I, LRAs have been applied in every branch of antitrust doctrine, albeit not always consistently. LRAs properly have a role to play whenever mixed conduct is at issue. The dual benchmark is appropriate, in order to capture the full range of anticompetitive conduct and to offer alternative routes when one or the other is simpler to establish. Moreover, within the LRA benchmark, the consideration of less effective alternatives is valuable in rule of reason, merger, and monopolization cases alike.

Commentators have proposed the selective exemption of exclusionary conduct from the LRA analysis. In favor of exemption, the argument has been made that conduct by a dominant

²⁷⁰ *E.g.*, *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1495 (D.C. Cir. 1984).

²⁷¹ This point has been made by Carrier, *supra* note 61, at 1337, and Feldman, *supra* note 58, at 606, among others.

²⁷² *See* *Am. Motor Inns v. Holiday Inn*, 521 F.2d 1230 (3d Cir. 1975) (insisting upon “reasonably necessary” and rejecting “least restrictive alternative”).

²⁷³ *Compare* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556, 582 (2001) (requiring defendant to choose available “less restrictive” alternative but not to employ a “least restrictive” alternative), *with* *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813 (2000) (strict scrutiny; interchangeably quoting from cases discussing “less restrictive” and “least restrictive” alternatives).

firm is less suspicious, and therefore a less searching inquiry into alternatives is appropriate.²⁷⁴ But that reaction neglects the structure of the test. By the time we reach the LRA inquiry, we have already satisfied ourselves that there is an actual or likely anticompetitive effect. Even if it is true in general that most conduct by a dominant firm is not suspicious, here we are considering conduct that is problematic. Establishing that first step is a difficult and indeed often insuperable hurdle. But once that threshold is crossed, we are beyond the point where the defendant enjoys the benefit of the doubt. A thorough evaluation of the justification is therefore justified.

Moreover, incomplete scrutiny of exclusionary conduct comes at a disproportionately high cost. Exclusion of new entrants restricts the introduction of new products and services. Such innovation, and the accompanying creative destruction, are key to economic growth.²⁷⁵ Conduct that slows or blocks innovation is ultimately more worrying than high prices from reduced competition among insiders, and more resistant to self-correction by the market.²⁷⁶ Thus exclusion, particularly in innovative industries, raises a particularly high cost of false negatives.

Doctrinal consistency supports this conclusion. The same logic that underpins the rule of reason also applies to exclusionary conduct by a dominant firm. Application to monopolization is also supported by the modern recognition that the economically-informed inquiry under section 2 of the Sherman Act closely tracks the inquiry under section 1.²⁷⁷ Thus, the same test should be applied to all mixed restraints, including exclusionary conduct by a dominant firm.²⁷⁸

²⁷⁴ *E.g.*, 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1822d (3d ed. 2011) (inquiry “is least important when unilateral conduct is challenged under Sec. 2 of the Sherman Act, because such conduct enjoys the strongest presumption of legality.”). The treatise adds that exclusive dealing is akin to unilateral conduct in this context.

²⁷⁵ *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 63–120 (3d ed. 1942).

²⁷⁶ Hemphill & Wu, *supra* note 121, at 1210–13.

²⁷⁷ *United States v. Microsoft*, 253 F.3d 34 (2001) (en banc) (per curiam).

²⁷⁸ An exception might be made if LRAs are harder to identify or more error prone in a particular area of exclusionary conduct. *See infra* Part IV.D.1.

The previous section argued that selective exemption is justified if practical alternatives are too difficult to identify. Such an exception is presented when the exclusion is accomplished not by contract, but by internal and unilateral business decisions.²⁷⁹ Decisions about product design and refusals to deal are two prominent examples. Here, a proposed alternative is likely to be highly idiosyncratic, a one-off. There is little evidence on which to rely in arguing, say, that Google could serve users equally well with a different, plaintiff-proposed organization of its search results. Such LRAs likely fail the practicality condition discussed above.

Conclusion

Balancing is usually inescapable, and the identification of a superior alternative seldom offers an escape. Courts employing the LRA test are often engaged in balancing, sometimes without saying so. Many credited alternatives are actually less effective. If the net effect of an LRA is positive, compared to the conduct, condemnation is appropriate. The LRA furnishes a second benchmark for cost-benefit analysis, in addition to the status quo. We should embrace such balancing openly, as a first step to improving its operation.

The shortcut approach to net effects works well in specific circumstances—for example, when the relationship between the justification and the LRA enables a clean comparison, or the conduct does not make an incremental contribution to the justification. The smoking out approach has value where the court's project is to choose one story over another, rather than calculating net effects. Here, the LRA test aids analysis by enabling a Bayesian update of the probability of bad intent or effect.

²⁷⁹ See Alan J. Meese, *Monopolization, Exclusion, and the Theory of the Firm*, 89 MINN. L. REV. 743 (2005) (contrasting contractual and unilateral practices).

A balancing approach has the usual pitfalls of open-ended standards. Today, balancing is happening quietly and without evaluation. If it is commonly recognized that when we consider LRAs, very often they are less effective, our ability to work with them in an open balancing process is likely to improve. Courts can work out how to do the balance in particular settings. Private parties will have an incentive to develop information about best practices, as a guide for counseling or litigation. And appellate courts will be able to weigh in, as district courts' rulings render visible the balancing that is currently going on behind the scenes. In other words, bringing the analysis out in the open is likely to lead to better results over time.

In antitrust, recognizing the LRA test as a form of balancing helps resolve several doctrinal issues that have divided the lower courts. But the inescapability of balancing applies to constitutional law as well. Courts appear to be engaged in quiet balancing when they perform the LRA analysis, making the LRA test one place—though hardly the only one²⁸⁰—in which balancing can be accommodated. This balancing heightens the perfectionist effect of the LRA test, a perfectionism that is commonly noted (and unduly criticized) in antitrust, but generally neglected in constitutional law.

²⁸⁰ Balancing might take place in the selection of the mode of analysis (e.g. strict scrutiny), in the judgment whether a justification is “compelling,” or in a determination that narrow tailoring has failed despite the lack of an identified LRA.

Table 1. Examples of Antitrust Mixed Conduct and Less Restrictive Alternatives

Industry	Conduct Justification <i>Less restrictive alternative</i>
Airlines	Incentive agreements with travel agents and customers ¹ Improve customer loyalty <i>None suggested</i>
Baby food	Merger ² Access to acquired firm's recipes <i>Greater investment in product development</i>
Cars	Territorial restrictions in distribution of cars ³ Improve incentive to work the territory <i>More detailed contract</i>
College sports	Rule prohibiting payments to college athletes ⁴ Maintain amateurism and improve athletes' integration with academic life <i>Pay a small amount now, with additional payment held in trust</i>
	Rule restricting quantity of televised football games ⁵ Improve competitive balance <i>Cessation</i>
Dentistry	Rule that dental association members must practice only periodontics, not restorative dentistry ⁶ Increase quality of patient care and inform the public <i>Minimum hour requirement for periodontics</i>
Health care	Merger of hospitals ⁷ Clinical integration of doctors <i>Integration through contract</i>
	Medical association boycott of chiropractors ⁸ Concern for patient care through rigorous adherence to scientific method <i>Patient education</i>
	Maximum price-setting by doctors ⁹ Lower cost of providing insurance <i>Insurers set price instead of doctors</i>

¹ Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256 (2d Cir. 2001).

² FTC v. H.J. Heinz Co., 246 F.3d 708, 722 (D.C. Cir. 2001).

³ White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (Brennan, J., concurring).

⁴ O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

⁵ NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

⁶ Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1494–95 (D.C. Cir. 1984).

⁷ Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke's Health System, Ltd., No. 12-CV-00560, 2014 WL 407446, at *2, *17 (D. Idaho Jan. 24, 2014).

⁸ Wilk v. Am. Med. Ass'n, 719 F.2d 207, 225 (7th Cir. 1983); on remand, 671 F. Supp. 1465, 1483 (N.D. Ill. 1987).

⁹ Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982).

Medical services	Rule requiring that doctors performing cesarean procedure must be board certified or complete 36-month residency ¹⁰ Ensuring patient health by requiring minimum training <i>Individualized evaluation (such as letters of recommendation)</i>
Music	Blanket license to public performance of full repertory for a period ¹¹ Creation of a new good <i>Per-use license</i>
	Blanket license to public performance of full repertory for a period ¹² Creation of a new good <i>Per-use license or narrower license to subset of repertory (e.g., country music)</i>
Pharmaceuticals	Settlement of patent litigation between branded and generic drug makers ¹³ Reducing risk and uncertainty <i>Settlement with earlier date and smaller payment</i>
Professional sports	Rule prohibiting NFL owners from owning other professional teams ¹⁴ Divided loyalty in negotiating for broadcast rights <i>Removing cross-owners from negotiations</i>
	Rule restricting out-of-market television licenses by individual hockey and baseball teams ¹⁵ Promoting competitive balance by sharing revenue from league-offered out-of-market licenses <i>Other forms of direct revenue sharing</i>
	Rule deferring player entry until three years after high school graduation ¹⁶ Protect athletes and league from immature players <i>Individualized evaluation to measure maturity</i>
	Rule requiring supermajority approval to move team to another owner's territory ¹⁷ Ensure that local governments can recover stadium expenditures <i>Leases negotiated by the local governments</i>
Salt machines	Tying machines and salt tablets Quality assurance <i>Directly specify the quality standard</i>

¹⁰ County of Tuolumne v. Sonora Community Hospital, 236 F.3d 1148 (9th Cir. 2001).

¹¹ Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (Stevens, J., dissenting).

¹² Broadcast Music, Inc. v. Moor-Law, Inc., 527 F. Supp. 758, 767–72 (D. Del. 1981).

¹³ FTC v. Actavis, Inc., 133 S. Ct. 2233 (2013).

¹⁴ NASL v. NFL, 670 F.2d 1249, 1261 (2d Cir. 1982).

¹⁵ Laumann v. National Hockey League, 2014-2 Trade Cas. ¶ 78,868, 2014 WL 3900566, at *8-*11 (S.D.N.Y. 2014).

¹⁶ Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), reversed on other grounds, 369 F.3d 124 (2d Cir. 2004).

¹⁷ Los Angeles Memorial Coliseum Commission v. NFL, 726 F.2d 1381 (9th Cir. 1984).

Software	Interference with peer-to-peer applications ¹⁸ Management of network congestion <i>Cessation, as to usage that has no effect on congestion</i>
	Merger ¹⁹ Lower labor costs in acquired firm's area <i>Relocation of production</i>
Tabulating machines	Typing machine leases and punch cards ²⁰ Protect machine from inferior punch cards <i>Customer education or direct specification</i>

¹⁸ In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13,028 (2008).

¹⁹ United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011).

²⁰ IBM v. United States, 298 U.S. 131 (1936).

Figure 1

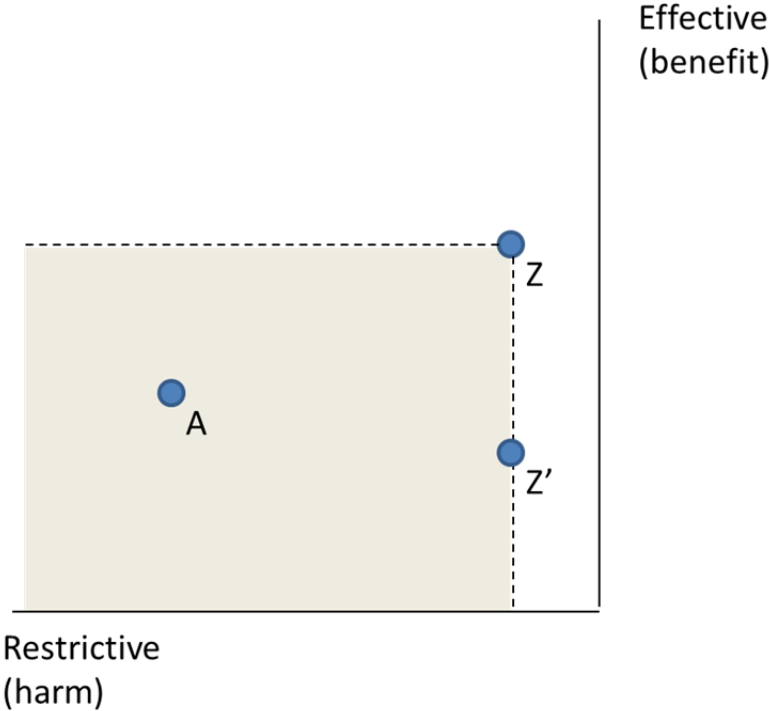


Figure 2

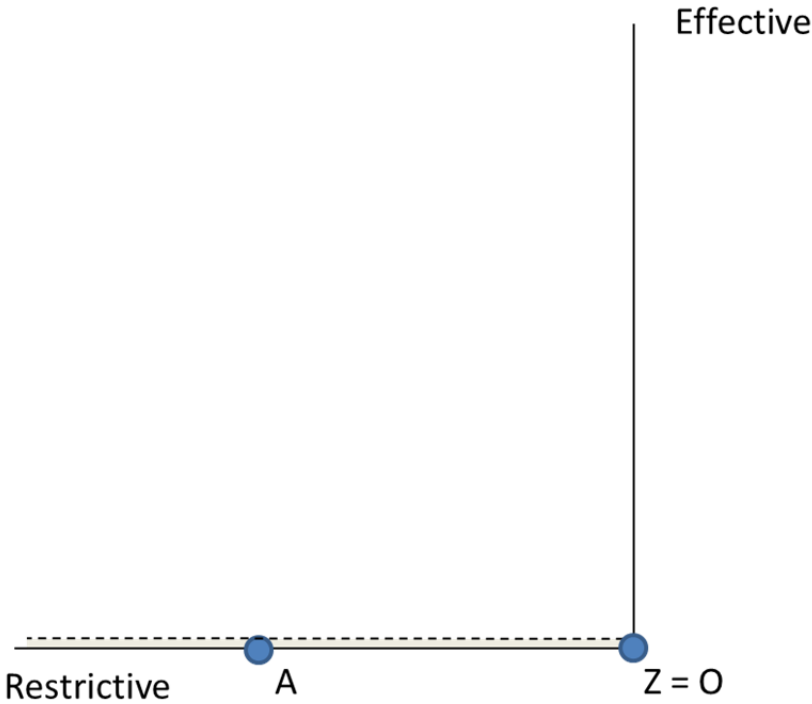


Figure 3

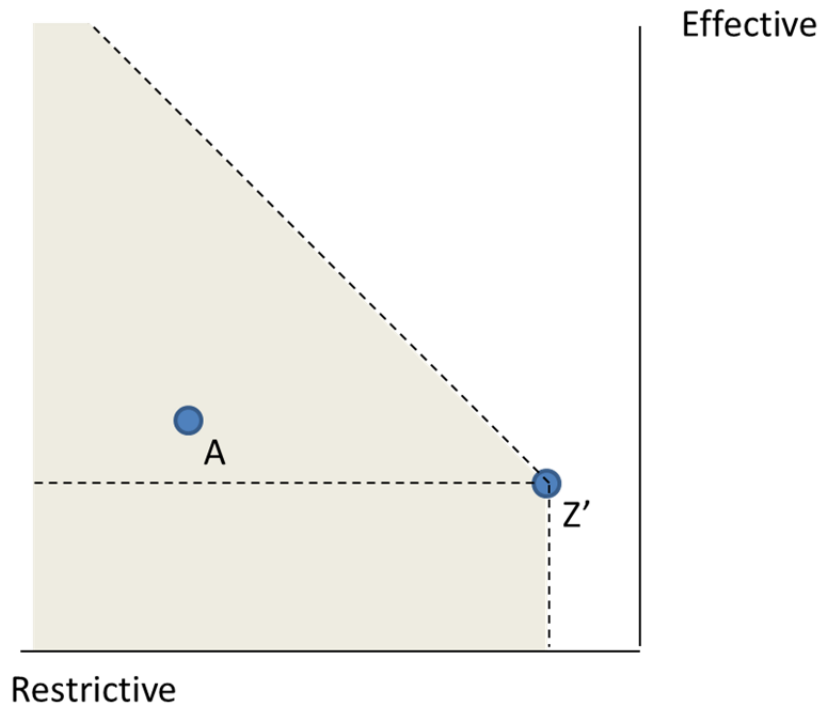


Figure 4

